Provocation to Murder: Sovereignty and Multiculture

M J DETMOLD*

1. *Introduction*

In this article I argue that provocation as a partial defence to murder is misconceived when it is thought to involve an issue of subjective self-control. Such an idea is based upon a conception of law as the imposition of a single sovereign standard upon erring subjectivities. The conception of law as a sovereign standard is false. And it is incapable of obtaining in a multicultural society where subjectivities differ as much as err. Rather, the issue in provocation is one of objective self-control. All subjectivities differ; and a multicultural society is bound to respect this. But all subjectivities make relations with others. These relations provide the lawful objectivity against which the self-control following a provocation is measured. Law is always found in the structure of relations; neither in the subjective self-control of humans (as Kant thought), nor in the imposition of an external sovereign standard.

2. *Subjectivities*

Let ABCD be a full statement of the accused's social and personal characteristics. I mean this to be complete. Later we shall make some discriminations — ethnicity, gender, particular psychological history, and so forth. And we shall allow for the fact (unlikely as it might be) that some of these characteristics are irrelevant to the accused's propensity to respond to a provocation. But for the moment ABCD is simply defined as complete; from which fact it follows, since with such a specification there can be no duplicated humans[1], that ABCD makes a unique description of the particular person known to us simply as the accused. We now have one complete subjectivity; and the question is how it fares when it encounters the objectivity of law.

In *Masciantonio v The Queen*[2] ("*Masciantonio*") there was a disagreement between the majority of the High Court and McHugh J as to how ABCD was to feature in the assessment of Masciantonio's defence of provocation to the charge of killing his son-in-law. It is well-known that in *R v Stingel*[3] ("*Stingel*") the High Court ruled that ABCD could be taken into account in assessing the nature of the provocation experienced by the accused, but that in

* Professor of Law, University of Adelaide. I have had helpful comments from Mathew Goode and Ian Leader-Elliot, for which I thank them.

1 This is a contingent not a necessary fact. It follows simply from the enormous complexity of ABCD.

2 (1995) 69 ALJR 598.

3 (1990) 65 ALJR 141.

assessing the proportionality of the accused's response to it it could not.[4] The definition of what characteristics of the accused relevant to the provocation can be taken into account in assessing its character relative to the accused (the first question) is very wide. There may be some limits here in the minds of the majority judges; but this possibility I ignore for the purposes of the argument; I will take it that all of ABCD is relevant to the first question. McHugh J differs from the majority in that he thinks that much of ABCD can be taken into account on the second question as well.

But it cannot be all of it, McHugh J thinks, because that would be meaningless. Let us suppose it is all of it. The question would then be: could an ordinary person of characteristics ABCD be provoked to the point of killing? And the answer must be: of course they could! The accused is the only case of ABCD and was provoked. How could that not be ordinary for ABCD? It is apparent at this point that 'ordinary' is trying to escape the argument in the form of some limitation of ABCD. The thought here is that some part of ABCD must be ordinary and some part not. Let us say this latter part is C and D. The question is then: could an ordinary person of characteristics A and B have been provoked? And the possibility is left open of our saying no and convicting the accused of murder (from these definitions it would follow that C and D constituted the criminality of the accused, whatever that means). The problem that McHugh J sees is that if we take all of ABCD into account we allow the defence to succeed in every case; allow it to succeed simply by our definition of the person or the question or both (which he rightly thinks is absurd). For the majority the issue does not press since ABCD is not imported into the second question and therefore it, the second question, appears to give full scope to the question of criminality. In fact it doesn't, as we shall see. The second question is a sub-category of the first question: it is intended to be the issue of criminality but it has been entirely misconceived.

Such a thing as McHugh J envisages certainly would be absurd. But his analysis, as well as that of the majority has miscarried. Before developing this claim I wish to place it in the constitutional context that caused McHugh J in the first place to defect from the majority position that he had originally supported in *Stingel*.

McHugh J states that context in this way:

> The ordinary person standard would not become meaningless, however, if it incorporated the general characteristics of an ordinary person of the same age, race, culture and background as the accused on the self-control issue. Without incorporating those characteristics, the law of provocation is likely to result in discrimination and injustice. In a multicultural society such as Australia, the notion of an ordinary person is pure fiction.[5]

Well, pure fiction it is in a factual sense. And the multicultural society in all its senses is the fundamental constitutional issue for these times in Australia. But there is more to the question than the fact: there is an enormous amount of work for lawyers in the reconceiving of intricate legal doctrines so that the normative

4 There is one exception to this, youth. I ignore youth for the moment.

5 Above n2 at 606.

(legal) accurately follows the factual. The subject of this article, provocation to murder, is one of these doctrines. A little further on McHugh J summarises his view by saying that:

> ... I would hold that relevant matters arising from the ethnic or cultural background of the accused can be taken into account in determining whether an ordinary person would have lost his or her self-control as the result of the deceased's provocation.[6]

The contrast is clearly between ethnic and cultural matters on the one hand and the "personal" (non-general) characteristics of the accused on the other. So that in the way we put the matter earlier, A and B are ethnic or cultural qualities while C and D are personal. The recognition of A and B is designed to satisfy constitutional propriety in the multicultural society; the non-recognition of C and D to maintain the distinction between criminality and legality. Let us now consider some examples.

What of street-kids[7] living violent lives? Perhaps this is a culture, perhaps not. Then what of the street-kids in families — those who live violent domestic lives within four walls? What of a person with a psychiatric injury and consequent propensity to anger? What of dissenters in cultures — say, a member of a certain religion who goes much further than the orthodox in attributing to God an authorisation of violence? What of patriarchy? Is this a culture? What when it offers an authorisation to men to reclaim their women by any means? What of the leavening or extenuation of violence by virtue of a belief in the judgment of a forgiving God? What of existentialism — nothing matters?[8] And what of persons who are individually (not culturally) hot-blooded?

The expanded, constitutional recognition of difference is welcome. But what could possibly be the ground on which we deny the constitutional right of street-kids, or persons with psychiatric injuries, or existentialists, or patriarchs, or religious and cultural dissenters, or hot-blooded people to full membership of the Australian community?

3. *Sovereignty and Multiculture*

The constitutional problem of multiculture is much more complex than it first seems. The old law of provocation (represented, say, by *Bedder v DPP*[9] ("*Bedder*")) postulated a single objective standard to which all in the community had to conform. The standard was sovereign. Bedder was with a prostitute who taunted him for his impotence. He then killed her. But the sovereign was not impotent; so Bedder's plea of provocation fell on deaf ears in the House of Lords.

This sovereign's law was always presented as a just equality before the law. But legal thought has progressed against this idea in various ways (including

---

6 Id at 607

7 Of course, youth is recognised by all judges. But I am thinking of a propensity to violence beyond "ordinary" youth. And what of aging bikies?

8 The killing, say, in Camus's *L' Etranger*. For a true existentialist like Camus it is because everything matters that the claims of the state in its criminal law do not.

9 (1954) 38 Cr App R 133.

the rejection of *Bedder*), and it is now obvious that all equality before the law did was institute the inequality (the sovereignty) of those with the power to define the law and its standard.[10] In confronting this problem we have to deal with the whole problem of sovereignty. The measurement of subjectivities against the objective and equal sovereign's law is only part of the constitutional issue.

Up to the achievement in 1986 of full and recognised independence of Australia from the United Kingdom[11] it was necessary to classify Australian jurisprudence as fundamentally a jurisprudence of sovereignty. This was a complex sovereignty: an amalgam of formal institutional elements, the sovereignty of the United Kingdom (and its empire) and the sovereignty of a personal monarch; and less formal, more philosophical (or cultural) elements, the sovereignty implicit in the (Austinian) theory of law that these formal sovereignties spawned, and the sovereignty of the dominant British culture.[12]

What is it that contrasts with sovereignty? It had often been remarked that the absence of a systematic concern for the rights of citizens in our constitutional jurisprudence[13] made a sharp distinction between our Constitution and that, say, of France or the United States. In those cases the formally instituted sovereign was deposed in a violent revolution. And it is sometimes thought that this fact makes a difference; that the "convulsion" of the people in some way establishes them as the constitutional foundation.[14] In our case, by contrast, the removal of the sovereign was evolutionary. We evolved to the Australia Acts; and we are evolving to the final rejection of the personal monarch.[15]

But the distinction between revolution and evolution is over-rated. First, it was the people who made the Australian evolution, as surely, perhaps more surely[16], than they might have made a revolution. Second and, more importantly, the question is not what is inserted (the people inserting themselves by convulsion), but what is left in place when the ultimate institutional sovereignty in a constitutional system drops, violently or peacefully, out of that system. The people were there all along; and when the sovereignty goes they are naturally present to take its place. So the answer that Australian constitutional law is in the process of giving to the question of what replaces the sovereign is the very answer

---

10 See, for example, the more sophisticated idea of discrimination, and therefore of equality, expounded by Gaudron and McHugh J J in *Castlemaine Tooheys v South Australia* (1990) 64 ALJR 145 at 155.

11 The *Australia Acts* 1986 (Cth).

12 The culture, of course, was never just British. It was importantly Irish and Chinese; and more recently, German and Italian; and more recently still, Lebanese and Vietnamese. Nevertheless, the simplification is justified by the fact that there is a very clear movement from a dominant British culture of 1788 to our present multiculture.

13 Constitution and attached common law (including interpretation). By constitutional jurisprudence I mean the common law that attaches to the written Constitution.

14 This was Dixon's view (and "convulsion" was his word). See "The Statute of Westminster 1931" (1936) 10 *ALJ Supp* 106.

15 With a great deal of fuss, it must be said; particularly as in all important (non-sentimental) respects that (formal) evolution is actually complete. See Detmold, M J, *The Australian Commonwealth* (1986) at ch 12. Of course the formal recognition of the constitutional fact is not complete.

16 Most revolutions of the people get hijacked. It is much harder to hijack an evolution.

that America gave in 1776 and France gave in 1789: it is the people, or more particularly the citizens, who provide the ultimate constitutional foundation.[17]

The extraction of the people from the less formal sovereignties, the Austinian philosophy and the British culture, is more complex. Because of the Austinian influence, the constitutional jurisprudence of wholly Australian institutions by its philosophy still, to this day, in large measure mimics the sovereignty of their antecedents, and it will take many years of constitutional argument to overcome the intricacy of all the doctrines in this jurisprudence.[18] And the second less formal sovereignty, British culture, raises precisely the question of the Australian multiculture that McHugh J's position in *Masciantonio* is designed to deal with.

It is a multicultural Australia that is emerging from the historical sovereignty. And this means a people's Australia. A multicultural sovereign is a nonsense (the nearest that we have to such a thing is the United Nations, but that, thankfully, is not a sovereign). The people, on the other hand, are a multicultural thing. McHugh J is concerned to define a citizenship of a multicultural society in which the notion of the ordinary person is a pure fiction.[19] But it is a pure fiction for all subjectivities, not just multi-culture. The ordinary person is a pure fiction through all of ABCD. All persons are unique not ordinary, and entitled to a full place in the community.

But then if all subjectivities justify themselves[20] it seems to follow that there is no objectivity and no law.

The issue is correctly put as an issue of objectivity. There must be some objective standards of behaviour if there is to be law; and it is of the first importance that our commitment to law be preserved. But the (sovereign) manner of connection to objective standards is false; and is causing logical mayhem in the provocation issue. In fact it is possible to recognise all the subjectivities and still have the question of legality (criminality) and objectivity. More than that, it is essential. If a subjectivity, any subjectivity at all, is given no constitutional

---

17 The movement of thought involved in this transition has a fundamental ambivalence. Is it to the rights of citizens (as it is often put) that the constitution moves? Or is it to the democratic (people's) process? On the one hand, *McGinty v Western Australia (1996)* 70 ALJR 200, is a profound reflection on the complexities of the various Australian democratic processes; and a welcome assertion of them against the rather spurious rights talk of 'one vote, one value'. But on the other hand, the relation of democracy and rights remains a complex one. Often the protection of rights is best left to the democratic process. But not always, for it is sometimes the democratic process (the will of the majority) that infringes minority and individual rights, as is shown by the references in the judgments in *McGinty* to the issue of the constitutional validity of a (democratically voted) return to male suffrage. There is little doubt that the rights of women would here prevail. I speak in this footnote of rights because that is a conventional and useful terminology. In the next section I reject the idea of fundamental rights in favour of lawful relations (so the point about female suffrage in this footnote should ultimately be made in terms of women's lawful relations to men).

18 And many false paths; for example, expansive interpretations of the freedom of speech cases, corrected in *McGinty*.

19 Above n2 at 606.

20 As we saw in the previous section, McHugh J seems constrained by what he takes to be the logic of ABCD: if all of ABCD is taken into account provocation appears to succeed as a defence in every case by definition.

place those who deny it impose themselves by power not law — the very thing[21] with which they charge the accused.

When the idea of sovereignty drops out of constitutional thought it becomes necessary to reconceive equality. Instead of the equality of subjectivities before the sovereign's law it will become the constitutional equality[22] of the subjectivities. Obvious things (ethnic and cultural diversity) recommend themselves. But the sovereign is collapsed for all subjectivities (all of ABCD) not just these ones.

4. *Rights*

This whole constitutional equality of subjectivities miscarries when it is expressed in terms of rights. Individual rights falsely abstract humans from the communities and relations in which culture derives its meaning (and from their duties). Further, if every subjectivity justifies itself in terms of constitutional equality then every subjectivity seems to be supported by right[23], and we appear again to have no objectivity and no law.

The answer to this problem is to think only of relations. Fundamentally, there are no individual or human rights. I accept what I think is now in many fields of thought understood,[24] that the individual person does not exist as an isolated entity: humans only exist in relation.[25]

Pierre Ryckmans, in his recent Boyer lectures, extends this conception of the human individual to culture:

> Without you I cannot be. It is only after an individual becomes aware of the existence of others... distinct from himself ... that he discovers his own identity ... What is true for individuals ... applies to societies. For instance, when people praise multiculturalism ... their intention is generally unimpeachable, but their thinking may be somewhat muddled. The very concept of multiculture is a pleonasm and a tautology. It is akin to demanding that water be wet ... From the beginning there never was any monocultural society. All societies were multicultural in their formative stage. They achieved original syntheses through the centuries, elaborating systems of values that defined their specific character and ensured their cohesion. For a society to thrive, its system of values should be able to attract a constant inflow of outsiders... A civilisation is strong in proportion to its capacity to tolerate within itself what is foreign to itself.[26]

---

21 It is not death that is the point. It is the *unlawful* taking of life; that is, the taking by a power unauthorised by law. A lawful taking of life is possible; for example, an authorised death penalty. The death penalty has an equivalent structure to a successful defence of provocation — apart from the fact that it is a complete excuse.

22 I do not mean simple equality, which would deny difference; but rather, equality of respect, which maintains difference. The distinction is developed in Detmold, M J, "Australian Constitutional Equality: The Common Law Foundation" (1996) 7 *Pub LR* 33.

23 Typically, rights are not accepted in this absolute but inconvenient way: though rights claim to be absolute they typically have a biased content (Western, say) and thereby reassert Western monoculture.

24 By seminal thinkers as diverse as Hegel, Freud, and Wittgenstein.

25 Above n22 at 45-48.

26 Published as *The View from the Bridge* (1996). The quote is from Lecture 5. His argument applies not just to culture but to law itself; see Detmold, M J, "Law and Difference" (1993) 15 *Syd LR* 159.

Well, if monoculture is not a culture what is it? The answer should be clear. It is a sovereignty. We could make Ryckmans's point in the terms of the previous sections: sovereignty and multiculture are incompatible. But my purpose at this point is not to pursue the sovereignty issue. It is to emphasize that self requires other, both on the individual and cultural level. It is only in relations with others that we have both the freedom that rights theories seek and the identity of a certain place in the world.[27] Where can a free human live except in the place constituted by their relation with others? There are no other *human* places. The multicultures and the rest seek their rights in Australia; but more profoundly they seek to make Australia their place.

This change in philosophical thought is an extremely important one for Australian lawyers at this time. On the broad philosophical scale it marks the movement of human thought away from the certainties not just of a sovereign law but of a sovereign truth — no culture now has a monopoly of truth. On a more precise constitutional scale it shows the way of the movement from a sovereign's monoculture to a people's multiculture. The difference is this: a sovereign's law is imposed from above, a people's law is in the structure of their relations.

5. *Objectivity as Relational*

So the key event in the demise of the sovereign in our legal history, beyond *Magna Carta*, even beyond the regicide, the key *republican* decision, is *Donoghue v Stevenson*[28], which instituted the law of neighbourhood relations.

Law is a relation of (usually two, but any number of) subjectivities, not the imposition of a standard on either. We see this clearly in contract (less clearly in tort, for *Donoghue v Stevenson* is not yet fully understood, but I shall come to that shortly). Suppose I sell you a book. One subjectivity (yours) desires the book, the other (mine) the price. And that is the end of it if the contract is lawfully constructed. There is no imposition of a standard, say the proper value of books, on the contract — a judge who said, "no, this book is worth more than this", and gave judgment accordingly, would wholly misunderstand the law of contract. And the issue is not different in tort. It is actually the comparison with tort that shows the confusion in the current conceptions of provocation. In *Stingel* the High Court said:

> To make what the reasonable man of the law of negligence would have done in the circumstances the controlling standard of what might constitute a defence to a charge of murder would in effect be to abolish the defence since it is all but impossible to envisage circumstances when a wrongful act or insult would so provoke the circumspect and careful reasonable man of the law of negligence that, not acting in self-defence, he would kill his neighbour...[29]

Clearly the idea is of a standard which, with leeway, describes the course of conduct required or proscribed. In the conception of torts presented in this passage the standard is conceived to be that of the circumspect and careful — so that of course there is a problem with a violent response to provocation.

---

27 See Detmold, M J, "Australian Law: Freedom and Identity" (1990) 12 *Syd LR* 482.

28 [1932] AC 562.

29 Above n3 at 147.

But this standard, and the very idea of a standard, is as false an idea in the law of torts as it is in the criminal law. There is no standard imposed in either case beyond the lawful relation of the subjectivities.

The usual formulation of the law of negligence in its reference to the standard of care of the reasonable person is misleading in this regard. It looks as though there is, in this standard of care, an evaluation — what a reasonable person would do in the circumstances — that is required over and above the parties' choices, indeed is to be imposed upon them. This appearance is false. It is obviously false to contract. Contracts and other transactions and relations speak for themselves. An impartial (and just) judge is one who lets the contract speak: a partial judge is one who imposes something on it, some standard on it. It is obvious in a contract case that (assuming the contract is lawful[30]) if the judge were to impose a new version of the contract upon the parties that would be a failure on the judge's part to understand the law of contract. The parties speak their own contract. And beyond contract the matter is the same, though more complex. Perhaps the contract has been induced by duress or fraud. What is duress? Simply, the degree to which power has broken the lawful balance. What is fraud? The degree to which trickery has done the same. In these cases the judge merely reasserts the conditions under which the parties can speak their own parts of the contract. There is no imposition of a third standard; merely the rectification of the structures in which the standards or desires of the parties might operate.

We could easily think of duress or fraud (or unconscionability, if this is thought to add something[31]) as torts, and the establishment of the lawful conditions of contract as not different from the establishment of the lawful conditions for driving on the road. In torts the reasonable or objective person is simply the one showing lawful respect to the other. We often talk here of the objective person, but simply mean the one free from selfishness beyond the lawful balance. And what is the lawful balance? It is Lord Atkin's law[32] — in the enterprise in question self and other have equal status. This is the law of impartiality.[33] Sometimes the reasonable person is pictured as the impartial bystander. This is an accurate metaphor. But it is just a metaphor for the impartiality required in the relation of the two subjectivities. There is not actually a third person or standard. Impartiality is a structural thing between subjec-

---

30 Self and other given equal respect in the formation of the contract.

31 I do not think it does. See above n22 at 41.

32 His founding statement of the law of negligence in *Donoghue v Stevenson* above n28 at 580. This is actually the whole of the law of torts (indeed, the fundamental principle of the whole of the law, as I am attempting to show in this and other writings). If it is not now true to say that negligence is the whole of the law of torts, it soon will be, with all the remaining torts going the way of *Rylands v Fletcher* (1868) LR 3 HL 330; see *Burnie Port Authority v General Jones Pty Lt,* (1994) 68 ALJR 331. And the way of *Beaudesert Shire Council v Smith* (1966) 120 CLR 145; see *Northern Territory v Mengel* (1995) 69 ALJR 527. I speak broadly. There will still be intricate problems and doctrines. But fundamentally, as it was several times put in *Mengel's* case for example (at 538) when compared with negligence the special torts are either otiose or anomalous.

33 Very often called care. This is not a problem, for care is simply other-regard. The word does create a problem when it leads to the standard of the careful, in the sense of circumspect, person; and thence to the sovereignty (tyranny) of those who ride quietly to work on the Clapham omnibus over other cultural proclivities.

tivities just like contract is; and, no more than contract, is it an imposition of a third subjectivity or standard on the first two? If one party is inclined, say because they are late for an appointment, to drive at great speed careless of the other's presence, or perform a careless audit, impartiality in the form of the reasonable person is simply freedom from these and all the other backsliding (self-favouring) inclinations that we all have.[34] Impartiality is the structure of relation: it is only when self and other are treated impartially (equally) that the relation is maintained. This denial of the selfish subjective is not a denial of the subjective — in our road case each party's desires and choices to travel on the road in the first place are subjective things, and they are absolutely entitled to these (as they are in contract). And it is not a denial of the selfish — it is pure selfishness that determines those desires and choices. Rather, it is a denial of an attitude in the *relations* of subjectivities, the denial of the putting of self over other in the relation; that is to say, it is simply the assertion of the principle of equal respect. The parties are each personally free to maintain their selfish subjectivities (and attempt to drive through each other). But they cannot do it in relation. *And the law protects the relation.* Here the identification with contract is quite explicit: the requirement of the objectivity of relation (the two sides) in the law of torts is the equivalent of the requirement of mutual consideration in the law of contract. In both cases the selfish subjectivities can reassert themselves, and break the relation. But it is the function of human law to stand against this (to constitute and mantain relations). *In this relational way, law is an objective thing beyond all subjectivities.*

The requirement of the maintenence of relation is the only meaning that the objective or reasonable can have. The objective person test is nothing more or less than this. When a relation is maintained by reasonable mutual respect it is objective on the entirely sufficient and meaningful ground that it is a binding of the subjectivities. This is in just the way that a contract is the binding of subjectivities into an objective relation. If the relation is one we call a contract the issue now goes by the objectivity of the contract not by the subjectivities within it. When the contract or wider relation is broken by a failure of respect it collapses into those subjectivities. Tort and contract are exactly alike in this matter.

Our thinking here is confused by two other possibilities for the meaning of the reasonable person test. The first is quite implausible, though it is certainly in the background of legal thought. It is the idea that there is floating in the air, as though part of the furniture of the world, an objective or reasonable standard for human activities. This idea has only to be stated to be rejected. Nevertheless, unstated it generates massive confusion in our legal conceptions. The second possibility accepts that humans make their standards — so that in one community it will be one thing and in another another —and conceives of the objective or reasonable as a sort of an average of whatever the standard is that is established in a given community. This is

34 There is, of course, no such person: we are all selfish in these ways. But we know what it is to be free of such selfishness; that is, we know what it is to be fully respectful (and therefore fully objective) in our relations. The reasonable person test means nothing more than this.

clearly a much more plausible view than the first. When it is analysed, however, it reduces to the objectivity of equal respect.

Consider some more torts cases. Suppose a racing driver is injured in a collision with another driver in a race and sues. It is absurd to think that the average (circumspect) standard of speed is imposed on the race (neither the community average, nor the race average — these would deny the very idea of the race). Or suppose a passenger in an ambulance is injured as a result of the speed of the ambulance. Or that a share broker suffers damage because of the financial advice of another share broker. Though the average standard is rejected there is, in these cases, still an issue of negligence. Each responds to the particular circumstances of the relation whatever they might be. But then every situation is its own case and its own average; which, of course, denies the very idea of average. The idea of average in our conceptions here is the lack of specialness in the case. But this is simply the lack of special information. If in any of these relations I know nothing more of the other than that they are driving on the road or have sought my financial advice I can do nothing more than treat them as average. As special information emerges from a relation so the appropriate care changes. And the case becomes more like contract. The difference between tort and contract is a continuum with average at one end and special information at the other.[35] In all cases lawfulness depends upon the terms (the nature) of the relation. In the racing drivers' relation there are many issues of lawfulness (even in certain situations going *too* fast[36]); and whether we call them terms (contract) or description of the relation (tort) makes no difference.

There is no limit to these special cases. We are, at this point of the argument, simply seeing the infinite variety and complexity of humans, their desires and situations. We are in fact returning to ABCD, the complexity of human characteristics which has given rise to the problem of provocation. The lawful quality of a response to provocation is a lawfulness wholly dependent, as it is in contract and tort, on the relation between the parties. It is a matter of the relation between their subjectivities, not an imposition of a (third) standard or subjectivity on either or both.

Two parties are in relation, the father and the son-in-law in *Masciantonio*, two drivers on the road. The relation is maintained, and no wrong committed, when an equality of respect is maintained between the two. This is reasonably simple in the road case where all that is involved is two cars safely passing each other. In an Italian immigrant family it is very complex. Suppose Masciantonio (Giovanni) and his son-in-law (Maurizio) are in conversation at the dinner table. They are not two abstract (reasonable or ordinary) persons in conversation. They are two persons with certain attributes and characteristics (ABCD). One pair of these attributes is that one is an Italian father and the other son in law; so Maurizio will up to a point defer to Giovanni. It is crucial at this point to see that lawful *and equal* respect requires this deference. To think deference by the one a breach of that respect is to think of the parties abstractly — to take them without their characteritics (ABCD). Now, I have

35 This I have argued, see above n22.

36 *Prost v Senna, Schumacher v Hill* claiming and counter-claiming in post-race recrimination.

said Giovanni is an Italian father. Is Maurizio an Italian son (in law)? I speculate here, and the possibilities are infinite. Yes, to some extent, but he is also the next generation trying to be Australian as well as Italian. The relation is very complex. Of course, each can break the relation; fathers can require too much deference, can humiliate sons; sons can refuse deference. Or they can break it the other way; the father can expect too little, the son give too much. What will maintain a lawful balance of respect here is partly cultural, partly individual; and constantly in movement at both levels.

Now, suppose Giovanni insults Maurizio in a humiliating way. The eating stops; there is a hush at the table. What will Maurizio do? Lord Atkin's law 'love the other as your self' is also 'love your self as the other'. On the road each driver must give equal status to the other. But that does not mean total deference — as though each driver had to stop their car and get off the road to let the other pass! All that the word "reasonable" does in tort is present the two sides, present the reason, the impartiality, the lawful balance between them. That is all it does - when it is not confounded with the imposition of a standard. Maurizio will follow this. His dignity is threatened and so the lawful balance is threatened. He will reassert his dignity — that dignity which Giovanni has put in jeopardy. Will he go too far? Perhaps, but if he gets it right the relation is restored. *And if he does not it cannot survive* — it is necessary to see that the reassertion of dignity is as much a lawful requirement of the relation as the proscription of its destruction. Self gets full lawful status as well as other. Does Maurizio go too far? If he does his offence might nevertheless be excusable (provocation succeeds as a defence[37]) and there is some chance that the relation may be restored. If he goes very much too far his offence is not excusable (the defence fails) and the relation is broken, perhaps for ever.

The actual events in the case of *Masciantonio* were played out on a larger scale than those I have imagined at the dinner table, and it was the father who felt the need to reassert his dignity (his responsibility for his daughter's plight). He killed Maurizio for dishonouring his daughter. But the issue was essentially the same. There are several things obscuring this.

First, it is not normal to think of an insult as a tort; either the one I invented at the Masciantonio dinner table, or the more egregious failure of Maurizio to respect his wife and her father. But the lawfulness of such relations are of far greater moment in any community than, say, the relations of drivers on the road. Insults are torts of very great personal and social seriousness. Of course, we may not want to *litigate* them. That is a different question, and as long as we don't confuse the question of lawfulness itself with the definition of the circumstances in which we think it appropriate to make the courts available for remedy[38] the legal analysis will be in order; and, undistorted, available to be of service when a special circumstance (such as death) causes a remedial

37 Not literally, of course — I'm only talking of the insult. But the idea that the lawful structures at the dinner table are different from those played out in the street (the actual place of killing) is something I'm seeking to do away with.

38 There are many reasons to limit this availability; not least, limited court budgets.

intervention requiring reconsideration of the whole of the relevant cicumstances down to the smallest insult.

Masciantonio was a complex case. The matter is not different in a simple case. Suppose I insult a stranger in the street. A wrong has been committed and a reassertion of the stranger's dignity might be expected. The structure of relation (and the defence of provocation) is not different because the case is simple. Here, too, the facts can vary infinitely. The stranger might be Asian and the reassertion of their dignity complicated by the fact that their whole place in the community has been put in issue.[39]

The emphasis on the infinite variety of the relations in this analysis extends to the whole social context of the relation. Normally where a provocation crosses cultures it falls to be assessed impartially between them. Think of *Masciantonio* as crossing between a traditional Italian and a modern Australian culture. The law between them is Lord Atkin's law under which each, Giovanni and Maurizio, must give the other, and the other's culture, a status equal to their own. The provocation falls to be assessed on the basis of that equal status (Giovanni must see what is worrying Maurizio, and vice versa). But sometimes the constitutional context is such that it is necessary to say that a culture has no status. This, too, turns on the issue of relation.

Leader-Elliot, who is an adherent of the application of the standard of an ordinary person to the issue of self-control[40], writes:

> The law of provocation does not ... require symmetry between Jews and Nazis in the application of the defence ... However sincerely held the beliefs of the Nazi, provocation does not become grave because it is deeply offensive to Nazis. It may be grave, however, because it is deeply offensive to Jews.[41]

Well, why not? What is the difference? Leader-Elliot appears to be taking the view that an ordinary person might be a Jew, but will never be a Nazi. But why not? He never has to state the point quite so brazenly because it is submerged in the application of the ordinary person test. In the provocation issue ordinary and reasonable tend to be elided.[42] Put aside the ordinary person, the reasonable person is never a Nazi; and, as ever with that test, the issue of the defensibility of the beliefs in question tends to be lost in the idea of average that floats uncertainly around the test. It is much easier to say that the average person is not a Nazi (and then pass very quickly over the fact that the average person is not a Jew, either). I will consider the question front on. Is it more reasonable to be a Jew than a Nazi?

Suppose we wish to assert that it is. Will we undertake the refutation of the works of Hegel and Nietzsche in the course of the demonstration of the

---

39 Here we see how fatuous it is to think of hate speech as though it were an issue of freedom of speech.

40 "Sex, Race and Provocation: In Defence of Stingel" (1996) 20 *Crim L J* 72.

41 Id at 79. Leader-Elliot discusses various examples of this problem: Hells Angels, Mafia bosses, the violent Palm Island community at issue in *R v Watson*, [1987] 1 Qd R 440.

42 Presumably because the issue is one of thought and judgment (passionate thought and judgment, if you like) as to how one reacts to a provocation. And in matters of thought reasonableness is pervasive: to be an ordinary thinker is the same thing as to be a reasonable thinker.

proposition? Of course not. But why not? If we take those very great philosophers as constituting an arguable base for Nazism surely we would need to. And even if they do not offer a base but are merely laterally connected we would need, if we really are in the business of being reasonable, to work this issue through.

We don't work it through because the issue is not in these cases, or in any cases, the reasonableness or ordinariness of beliefs. It is here, too, that the relations are what counts. A Nazi reaction is excluded from law, not because it is unreasonable, but because it is not a reaction that occurs within a lawfully constituted community of relations.

Suppose a Jew shows a placard "Auschwitz Killers!" at a Nazi rally and is killed. There is no issue of relation in this killing for the simple reason that the relation is denied by the Nazis themselves, who hold that the place of Jews is in the death-camps not the constitutional community.[43] It is always necessary to look at the whole constitutional relation before a legal decision can be made about a particular relation.[44] The killing is therefore an unqualified murder.

6. *Narratives*

Frank Parker killed Dan Kelly for stealing his wife. When the Chief Justice of the High Court saved him from conviction for murder[45] it was a fine moment in Australian legal history. The great judge, who in a brief paragraph at the end of the judgment was to announce the demise of the House of Lords in the Australian legal system[46], devoted nearly ten pages to a simple narrative of the events, beginning, "the facts material to the homicide may be stated very shortly."[47] It is, quite simply, fine writing. It is not, as fine writing sometimes is in legal judgments, mere pleasant decoration, an amelioration of the grimness of it all; but rather, in this case, it is the essence of the matter. There are six or seven pages on the law, and as usual they are learned, succinct and humane; but anyone who reads Dixon J's judgment in Parker for its legal analysis has missed the point. In judging the excessiveness of the accused's response it is only simple and sympathetic narrative that can inform.

In the previous section we showed that the provocation is a defence when it is in relation, and pursuant to the relation, between the deceased and the accused. The question is simply its excessiveness. Is it too excessive? How is the judgement to be made? Ian Leader-Elliot refers here to "tragic narrative"[48], and

---

43 In lesser versions it might be that a Jew or Asian has no place within these shores. The point of exclusion is the same. And it is the same for Stingel (see part 7). Where is the place of his girlfriend? Why, it is in his mind, which is not a constitutional community (because it is not a relation)!

44 See Detmold, above n22.

45 *Parker v The Queen* (1963) 111 CLR 610 (*"Parker"*). Some will think the Privy Council did. But, not for the first time, it was the power of Dixon J's dissent in the High Court that did it.

46 Another aspect of sovereignty despatched!

47 Above n44 at 616.

48 "Passion and Insurrection in the Law of Sexual Provocation" in Naffine, N and Owens, R J, (eds) *Sexing the Subject of Law* (1997) at 149. I owe a great debt to that article

there is no other answer to the question. It is tragedy which makes the form by which our sympathies are engaged in the understanding of the frailty, horror and uncertainty of human lives. But, more than this, in tragedy the quality of humanness survives. In the end the lawful relations survive. Lear dies, but Lear's life, and its relations, Lear's humanity[49], lives in our tragic understanding. Frank Parker's did, too.

Mathew Goode, reflecting upon *Dincer's* case[50] (where a conservative Turkish Muslim father killed his daughter for maintaining a relationship with a boyfriend) asks:

> How on earth could [the jury] possibly come to any conclusion beyond reasonable doubt what an ordinary conservative Turkish Muslim father could do if no-one was allowed to tell them?[51]

The point is that such evidence (say, calling a conservative Turkish Muslim father to give evidence and asking him what he might have done) is inadmissible, and thus the jury are left to decide such questions (of which there are infinitely many) of their own knowledge. Goode thinks the whole process a farce, for they cannot know such things, and if they do (or a particular juror does) it is a mere accident; and this, amongst other things, leads him to recommend the abolition of the defence of provocation. But I think he under-rates the power of the trial process, and particularly its narratives, to move a jury to a sympathetic understanding of any aspect of the human condition at all. The point is not to know what a conservative Turkish Muslim father would or could do, it is to be brought to a sympathetic understanding of what this one did – in fact one could go so far as to say that the trial in *Dincer* would have miscarried had the jury consisted of twelve conservative Turkish Muslim fathers, for the requisite distance of sympathy would have been lacking.[52]

There may, of course, have been more to the story of Frank Parker and Dan Kelly than is revealed in the Commonwealth Law Reports. The trial occurred in the 1960's and Joan Parker's story may not have been well-told.

7. *Sexual Relations: the Tyranny of the Private (Non-Relational)*

Masciantonio's crime was to assert his dignity too far (and his daughter's; of course, both indistinguishably). It is interesting to compare the case with *Stingel*. Stingel's girlfriend had dropped him. He had resisted this obsessively, had stalked her, had threatened to kill subsequent lovers and finally did kill one of them. This is not in any sense the reassertion of Stingel's dignity. Dignity is

---

which called my attention to Dixon J's narrative (I having first, as most do, skipped the facts to get to the law).

49 A thing only found in relations: Ryckmans, above n26.

50 *R v Dincer* [1983] I VR 460 (*"Dincer"*).

51 "The Abolition of Provocation" in Yeo, S, (ed), *Partial Excuses to Murder* (1990) 37 at 44.

52 It would be rather like the unsuitability of a man attending a performance of King Lear when he has just been thrown out of his house by his daughters. And, pursuing the analogy, as for calling evidence from a conservative Turkish Muslim father, that would be like simply reading an account of the plot in King Lear rather than attending or reading the play itself.

a relational thing — self and other, other and self. A private dignity has no meaning because it has no measure[53] (was six million deaths enough for Hitler's dignity, or would another six have been needed?) In relation there is perfect measure; the dignity of self and other are absolutely equal[54] in a way defined by the relation. There is room for some merciful appreciation of Stingel's loss of relation (a sort of winding-down period). But as with most male sexual killers the obsession went far beyond that. The relation was terminated. There was no issue of Stingel's dignity; merely his working out his private murderous obsession.[55]

The termination of the relation may be thought problematic. In Stingel's mind it is not terminated. Of course! But a relation of subjectivities is not itself subjective; that Stingel has a subjective opinion that there is a relation is irrelevant to the question: the existence or non-existence of the relation is a real and objective question, a thing in the world, a *relation* of subjectivities, not a thing in the mind of one subjectivity. It is not even a thing in the mind of two subjectivities. Contract is a paradigm here. Suppose you and I pass in the street. I desire your tie, in fact desire to exchange it for the one I am wearing. It happens that the reverse occurs to you. Now, we are both shy people and pass on. There is, of course, no contract by virtue of the correspondence of subjectivities. A relation is an external reality, and this character carries through to its termination as well as its creation.

The sexual relation between Stingel and his girlfriend had concluded. But another arose. He was stalking her, harassing her in fact. This is a relation and it is a tort, and as all torts do it depends upon relations of proximity and causation. But it is irrelevant to the issue of provocation. It is the other's tort not my own that provokes me! Stingel's wrong is a provocation to his girlfriend not to him! With the matter all in Stingel's own mind it would be no wonder if that distinction, too, eluded him — such is the subjective confusion of patriarchal killings.

With female killers of a male sexual partner, on the other hand, the killings (apart from self-defence, which is always exceptional) are usually slower and calmer. Partly they are relational in virtue of children.[56] Of course such a thing will be slower and calmer. The very idea that the private explosion of anger and grief in a single violent moment is evidence of provocation and the latter is evidence of no provocation is the opposite of the truth. Gleeson CJ referred in *Chay* to women "whose blood simmered per-

---

53 I take Wittgenstein's position here (Wittgenstein, L, *Philosophical Investigations* (1953)): the private as an object of knowledge does not exist. See Detmold, M J "The Common Law as Embodiment" in Nafine, N and Owens, R J (eds), *Sexing the Subject of Law* (1997) at 95.

54 Absolute equality is available in theory so long as the whole constitutional context of a relation is followed through (see Detmold, above n22); and available in practice only when the world task of lawyers is completed.

55 A metaphysical position, as I view it. See Detmold, above n53.

56 Relational to the children in the simple sense; but also relational to the father by virtue of his relation to the children — how could she kill *their* father? The patriarchal response to the equivalent conundrum is often to kill them all.

haps over a longer period, [than mens'], and in circumstances at least as worthy of compassion"[57].

The point is so important that it is worth setting out with care. Suppose a husband has been beating and sexually assaulting his wife and children for ten years. And suppose two scenarios. First, she kills him while he is asleep. Second, he kills her while she is escaping the house. It is almost beyond belief that our ideas of law could be so distorted that only a few years ago the defence of provocation was only available in the second case. But it is necessary to accept this with fortitude and try to see why such a thing could obtain. It is this: the legal relation was not thought to be an issue. The almost unbearable wrong of the husband was irrelevant. The issue was simply the subjective self-control of the moment. The answer to this is to see that law is not a standard of subjective self-control. It is an entirely relational thing. When it was a sovereign's law a standard of self-control may have been an issue (the sovereign directing his subjects to behave themselves — keep the peace, as it used to be put — to one degree or another). But it is that no longer. Law is now a matter of the relations of citizens.

Certainly, as Gleeson CJ says, there is compassion in our responses to such marital events as we have been considering (a thing we address by narrative), but there is also law. It is the law that I wish to emphasize.

8. *The Two Questions*

Of the two questions in the provocation issue McHugh J wrote:

> Thus a curious dichotomy exists. The personal characteristics ... of the accused are relevant in determining the effect of the provocative conduct but they are not relevant in determining the issue of the self-control. The distinction has been strongly criticised on the ground that it "runs counter to human reality"[58]

The quote is from Stanley Yeo's article[59] in which he showed that the bifurcation of the accused's personality implied by the two questions was psychological nonsense. Notwithstanding his doubts in the matter, McHugh J felt constrained to preserve the structure of the two questions (in the way we have seen in part 1) out of respect for authority. Normally, in the entirely respectful way of common law development nonsense works its way out of the system because judges *as well as theorising* have to decide actual cases — and the thing about nonsense is that you can't actually use it. With jury directions it is possible for judges merely to theorise. Nonsense can thus be preserved without detection; can be delivered to the jury with all appearing well — for there will be a verdict.

There are simply not two questions of the sort that the courts are asking. There is one question of that sort, and then there is a second question of lawfulness. And once that question of lawfulness is clarified and preserved in the provocation

---

57 (1994) 72 A Crim R 1 at 11.

58 Above n2 at 606.

59 "Power of Self-Control in Provocation and Automatism" (1992) 14 *Syd LR* 3 at 6.

issue (as this article seeks to do) that which has driven the courts to a second question (and a nonsensical psychological bifurcation) disappears.

The first question, what counts as provocation, is correctly conceived as a relational question: the provocation to be understood must be seen as issuing from this person in a certain relational context. It is not on the first question that the issue loses itself in the meaningless, immeasureable private. Why have the courts thought there is a second question at all of the psychological measurement of the accused in a social context?

Well, there has to be a second question. A provocation is issued and a response is made, and there must always be a second question of the lawfulness of the response (more precisely in a provocation case a question of its degree of unlawfulness). But this is an entirely relational question: it turns on the relation in question and raises no further issue of the psychological categorisation of the accused either personally or by type. And because there is no further issue there is only one standard of lawfulness. There could be no law without this (as the High Court in *Stingel*[60] saw when it agreed on this point with Wilson J's rejection of a "fluctuating standard" in *Hill*[61]). I can illustrate the point by reference to ordinary contracts.

Contracts come with infinite variety, but this does not mean there is more than one standard of lawfulness. A contract, say, to cater for the Masciantonio wedding is a different contract from that for a non-immigrant wedding or a Vietnamese wedding. Many of the terms will be stated in writing, but many will not and will depend on the context of the contract. But beyond that social, cultural and ethnic complexity, however, there is just one standard of lawfulness. To put it simply, there are many ways of contract, but only one way of breaking a contract. We are misled here because what counts as a breach of one contract is quite different from what counts in another (serving pork, say, at a Muslim wedding — a breach — compared with serving it at the Masciantinio wedding — not a breach). The breach is different only because the relation (contract) is different. There are as many breaches as there are contracts; but only one way of breach (only one type of unlawfulness).

That way is: self is put before other in the issue of performance. Take any contract requiring my performance of something for the other party. Will I perform this thing? If I do not it will be for self-interested reasons beyond the contract: I will have elevated myself over the self-other relation that constitutes the contract. Provocation is only different in that a degree of unlawfulness is judged (it is, at least usually, the case that what constitutes a breach of contract is not a thing of degree). As we saw in the earlier discussion of the Masciantonio family a re-assertion of self is always required against a provocation.[62] But the re-assertion constitutes a breach of the relation only insofar as it is taken too far. In parity with the contractual analysis, it is the case that there are as many overreactions to provocations as there are

60 Above n3 at 145.

61 *R v Hill* [1986] 1 SCR 313 *("Hill")* at 342.

62 The most exquisite response may well be a turning of the other cheek. We misunderstand this possibility if we think it not an assertion of self.

relations giving rise to provocation. But only one way of overreacting – the excessive reassertion of self in the relation. And the lawfulness which tests this is the same lawfulness which tests contract.

In fact it is easy to think of circumstances where the two issues, contract and provocation, are identical. For a caterer to serve pork at a Muslim wedding would be both a breach of contract and a provocation. For Stingel's former girlfriend to engage in sexual activity with another is both not a provocation and not a breach of their (former) relation. The taunt of the prostitute in *Bedder's* case[63] is both a breach of contract and a provocation.

9. *Self-Control*

If I break a contract it is for self-interested reasons beyond the contract that I do it: I have elevated myself over the self-other relation that constitutes the contract. This is clearly enough an issue of self-control. But it is nothing like the self-control envisaged by the traditional analysis of provocation. As though we only broke contracts in the heat of passion! It is necessary, therefore, to distinguish two concepts of self-control. I shall call them the objective and the subjective.

The failure to control the self in a breach of contract is objective. There is an objective relational question of what the contract requires, and an equally objective relational question of whether there has been a performance or a failure in performance. And it is the same in tort. Two drivers on the road (say) have an objective relation, and there is an objective issue of the breach or not of the impartial requirement of care (as we showed in part 4).

The law of provocation has, however, concerned itself almost entirely with an issue of subjective self-control (of which *Stingel* is a paradigm). Loss of self-control is regarded as a universal subjective frailty of humans; and any particular case is conceived as a measurement of the (frail) subjectivity in question against some (purportedly objective) standard — with all the problems that attend both to the defining of that standard and the measurement of illusory private subjectivity. This subjectivity comes historically from Kant, in whose moral philosophy the law of love (Lord Atkin's law) was transcendental, obtaining only in the private world of conscience. It is of the first importance to see that Kant was wrong here, that the law of love obtains *in the world.* It is the law of the structure of objective relations, which occur nowhere but in the world. Relations are only objective and public when self and other are absolutely equal (any backsliding against this law in favour of the self reverts from the public relational self to the subjective private self). The law of love is a law for lawyers not moral philosophers.

As law is relational so provocation is relational. The traditional conception misses this except in a trivial sense. There is another around the place who offers the provocation. That is a relation of a sort. From that point the relational

63 Various factors, including a somewhat hypocritical squeamishness, mean that courts don't often get to adjudicate on contracts for prostitution. If they did regularly, the terms would present enormous social and cultural questions in their construction, against which poor Bedder's plight would pale into insignificance: see Pateman, C, *The Sexual Contract* (1988).

question disappears and the issue becomes one of self-control *by the individual subjectivity in question*; from which conception all the problems of the standard of self-control emerge. But the true issue of self-control is the objective (relational) one. We showed this in our discussion of the Masciantonio family. Three types of response were distinguished: the lawful proportionate response to insult; the excessive but partly excusable[64] response; and the very excessive, entirely disproportionate or otherwise inexcusable response. These are all objective and relational: in all of them the issue of proportion makes no sense except as measured against (or in) the relation at issue. We now see a fourth reaction: the private (subjective) nurturing of a murderous anger which does not raise the issue of the defence of provocation because it is not a response *to the other* (not in relation with the other) at all. The question of law in such an issue is lost entirely.[65]

The desire for fairness between men and women, quickened by a sense that the respective powers of self-control might be different, has infused much of the recent discussions of provocation in sexual killings. Referring to *Stingel*, Leader-Elliot writes:

> The High Court agreed with Wilson J in Hill, that it is "clearly unacceptable" to measure the liability of men and women by different standards. Central to the High Court judgment is the postulate of equality before the law ... In the usual case, a man kills a woman as a consequence of the breakdown of an intimate relationship. The fatal attack is often preceded by a confrontation or quarrel which is arguably provocative ... In some of these cases juries will conclude that an ordinary man might have been driven to the same pitch of violence as the accused. Compare the exceedingly rare cases of women who kill men in these circumstances. The risk of unfair discrimination is obvious. If a woman kills her partner as a consequence of jealous possessiveness following breakdown of their relationship, a comparison of her reactions to separation with those of an ordinary woman might result in denial of the defence of provocation simply because it is rare for women to kill in these circumstances. When men kill from jealousy their actions are far less likely to fall outside the range of behaviour which we recognise as the conduct of ordinary men driven to extremes. It cannot be right, however, to allow men an advantage on the ground that they are less controlled and more likely to resort to criminal violence than women.[66]

There are so many subjective things going on in sexual killings that I do not think that we have much idea of the part that subjective self-control might play. Wittgenstein's rejection of the private as an object of knowledge[67] is salutary here. In any case it is a very confused notion. Compare an angry man and a calm man. To a common provocative incident we might suppose that the angry man reacts with violence and the calm man with a smile. But the

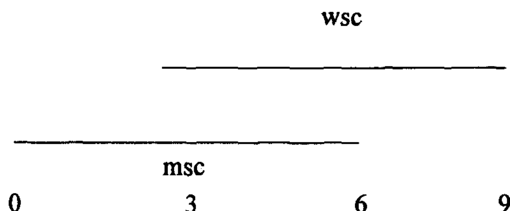
64 I mean here excusable (and partly excusable and inexcusable) by reference to the particular relation involved, not excusable by reference to the community as a whole. A blow in a boxing match is excusable in its particular relation. We make nonsense of such an issue if we try to assess it by some objective standard for the whole community.

65 The narrative also is lost. Literature is public not private, as post-modernists have been telling us for a very long time now.

66 Above n40 at 91. Leader-Elliot is here drawing on Professor Yeo's argument; see above n59 at 10.

67 Above n53.

angry man might have shown *more* subjective self-control than the calm man: he might have struggled heroically and failed whereas the calm man succeeded naturally. So there is a real question here as to what we mean by subjective self-control. But let us for the moment assume that men are less self-controlled[68] in such circumstances than women. Picture it like this on a self-control scale of 0 – 9:



0 3 6 9

It will be clear enough that 3 is the average degree of self-control for men (men self control: msc) and 6 the average for women (wsc). Leader-Elliot supports the objective test in the matter of self-control here: Could a normal person have lost their self-control in the circumstances? But what does that mean? I suppose we would have to say (for gender: presumably an equivalent for other differentiations) something like: the ordinary person is a range somewhere in the middle of the whole range. Let us then say that the ordinary person in the differentiation of gender is the range between 3 and 6. It is obvious on any counting, given our assumptions, that such a middle range will correspond wholly or partially to the overlap between msc and wsc. This has the odd consequence of including, or tending to include in the average range for the whole, both extreme women and extreme men (respectively at the low and high ends of their ranges). I think this in itself shows that we are talking nonsense, but let us press on to the more important question, how is it fair between men and women to think like this?

Perhaps it is fair between male and female killers. But how is it fair to women victims? For whilst moving the average from average man to average person (3 to 4.5) diminishes the number of women killed[69] it is still the case that more women are killed than men, by virtue of the fundamental difference between msc and wsc. The average may be fair between male and female killers but it is still not fair to their victims. Recognising this, Hilary Allen argues that juries "might be instructed ... to exclude as unreasonable any response

---

68 I am very simplistically asking the reader to assume that the universal male subjectivity is less self-controlled than the female. Notwithstanding the universality this is an assumption of subjective self-control. The subject is the self. The issue is the control from within the self whether or not it is universally postulated. Objective self-control is measured by the relation of subjectivities (selves).

69 Of course, there is no direct or clear correlation between the number of people killed and the attitude taken by the criminal law to provocation as a partial defence. But I am prepared to assume that there is some correlation. To some degree, therefore, victims have a stake in this issue.

that would not be considered reasonable in both [sexes]".[70] This would mean that we would find the average range in wsc (say, 5-7) and hold both men and women to it. But this is unfair to men. To discuss this we have to recall our assumptions. One of them is that we are assuming that there really is a difference between men and women in the matter of self-control. So Allen's suggestion is a case of requiring men to behave as women. Women do it naturally (just as the biologically calm man did it naturally compared with the biologically angry man in our earlier comparison). It privileges biological women, and thereby tends to exclude biological men from the constitutional community. It fails to show equal constitutional respect to the two biological persons.

Biological men are entitled to their constitutional place. This is not the same thing as saying that patriarchy is entitled to a constitutional place.

10. Patriarchy

I do not believe that the question of justice in subjective self-control can be taken any further than this. I am sceptical of a biological base for male violence, but I do not want my position misunderstood here. I am not sceptical of male violence. The countless wars in human history, and, more pressingly, all the horrors of this murderous century, are almost wholly attributable to male violence. And of all the persons who have the power in the world at the moment to choose to make a war or not (or a holocaust), 99 per cent of them are men. I take the view that it is essential if the human species is to survive without immense (nuclear, biological, chemical) catastrophe that we find ways to remove male violence from our practices. Of course we don't know that a matriarchal course of human history would not have been as violent as the patriarchal one — as I said I am sceptical of the biological base. But in my view we have no choice but to bet on feminism and hope. As I go on to show, the way to do this is not to force biological men to be biological women, but to dismantle patriarchy, which is a function of (unlawful) power not biology. When patriarchy is dismantled men may turn out to be less violent than women (drones, say). We simply do not know; but *must* do something.

In patriarchy, as our earlier analysis of *Stingel* suggested, there is an illusory (private) metaphysics at work giving men the authority to deal with their women without regard to the relational question of whether they really are their women any longer. If a man loves a woman in his mind, that is, as it were, where the action is. So, in his mind she is still his woman no matter what is going on in the real world; that is, no matter what the *relation* is between him and the woman in the real world. *In fact the killing might be the only way of preserving the integrity of the relation in the mind.* There is no issue of subjective self-control here. If self-control means anything, there is not the slightest reason to think it has anything to do with the question whether the person with the private patriarchal obsession kills — in fact, reason to think the opposite of what the conventional idea of provocation takes to be the

---

70 Allen, H, "One Law for All Reasonable Persons?" (1988) 16 *Int'l J Sociology of Law* 419 at 430.

case. A patriarch well in control of himself may be more likely to kill than one who dissipates his obsession in anger.

The relation being in the mind, and not the real world, yet justifying action in the real world, it is an illusory metaphysics.[71] The illusory metaphysics may be pornographic; the right of men (in their minds) to control, in the sense of establishing the conditions of, women's desire (thus Stingel knows that she still really loves him, or at least ought to); or it may be religious, some special revelation or, more generally, the God-given right of male reason by which the matters in issue may be exclusively (non-relationally) judged. The latter, even so great (and so recent) a philosopher as Hegel adhered to. He expressed it in this way:

> Women are capable of education, but they are not made for activities which demand a universal faculty such as the more advanced sciences, philosophy, and certain forms of artistic production. Women may have happy ideas, taste, and elegance, but they cannot attain to the ideal. The difference between men and women is like that between animals and plants. Men correspond to animals, while women correspond to plants because their development is more placid and the principle that underlies it is the rather vague unity of feeling. When women hold the helm of government, the state is at once in jeopardy, because women regulate their actions not by the demands of universality but by arbitrary inclinations and opinions. Women are educated – who knows how? — as it were by breathing in ideas, by living rather than by acquiring knowledge. The status of manhood, on the other hand, is attained only by the stress of thought and much technical exertion.[72]

And often the two forms of patriarchy go together: pornography is a function of mind, and mind is the instantiation of the God-given function of reason.[73]

Legally speaking, patriarchy is an unlawful power. It is unlawful because it is unrelational. We see the point with perfect clarity in contract. If you have something that I want I may contract with you or steal it from you. The former is relational, and lawful. The latter is private, that is, I impose my private purpose upon you.[74] The difference between contract and a constitutional relation such as that between men and women is simply size: patriarchy is the equivalent of stealing on the constitutional level[75], it is the private[76] imposition of an ordering of desire by one gender upon both.

I have merely sketched these latter points: I will not here pursue the philosophical and social analysis of patriarchy any further. The main texts are: Simone

---

71 Metaphysics being large organising mental pictures (for example, God) beyond (meta) the real world.

72 *Philosophy of Right* (1821) at 107.

73 See Detmold, above n53. The theological reference confirms the metaphysical nature of both forms.

74 Stealing is private in this, the fundamental, relational sense. Of course, it is a tort (a wrong, a crime), and is public and relational in that sense (the sense in which we earlier saw that the manifestation of Stingel's private obsession in harassment was public and relational).

75 See Detmold above n22, which shows the identity of the constitutional and contractual legal questions. And for the refutation of the idea that patriarchy is relational (and public) between men see Detmold, above n53.

76 Private in the sense that it is (on the constitutional level) unrelational in the fundamental sense.

de Beauvoir, *The Second Sex*; Luce Irigaray, *Speculum of the Other Woman*; and Catharine MacKinnon, *Towards a Feminist Theory of the State*.[77] But one question may be pressing in the present context: how can so poor a creature as Stingel think he has this philosophically sophisticated patriarch's right? There is a simple answer. Of course he can, what else does he have going for him? Precisely this is why any power survives. Patriarchy like any large system of power first destroys the lives of its practitioners and then holds them in service.

11. *Mental Conditions*

Suppose the accused has a mental condition which makes them irascible; or like Bedder[78] is self-conscious about a personal condition (in Bedder's case, impotency). Can these mental conditions be taken into account? The current answer is that they can on the first question, the nature and context of the provocation, but not on the second, the lawfulness of the accused's response. Professor Yeo has remarked upon the psychological strangeness and artificiality of such a distinction.[79] But the objection to it is deeper than this. Are such persons not to be citizens? There is a point beyond which they are not; the meaning of insanity (and the insanity defence) is that a person is so mentally incapacitated that they are not capable of functioning in human relations.[80] But short of that what ground is there for the legal construction of the relationship in question being such as to exclude the mental condition in question. To exclude it is to exclude the person themself: they are what they are and not some other person.

The reason that has driven the courts to this exclusion is quite clearly the logic of the complete recognition of subjectivities. We discussed this at the beginning. If all subjectivities are recognised all defences succeed: that the accused was provoked is incontrovertible evidence that such would be provoked. And the very idea of lawfulness seems to be in jeopardy. So the courts are driven to draw a line.

However, to show (as we have done) that the complete recognition of subjectivities does not put lawfulness into question (in fact, does the opposite) cancels the line. Then the idiosyncratic mental condition of the accused is the

---

77 Beauvoir, S de, *The Second Sex* (1949); Irigaray, L, *Speculum of the Other Woman* (1985); MacKinnon, C, *Towards a Feminist Theory of the State* (1989)

78 Above n9.

79 Above n59 at 7.

80 Was Stingel insane? Patriarchy is insanity; an incapacity to constitute a *relation* with a woman. But perhaps he is capable, perhaps we men are capable, of being redeemed. Redemption is an inappropriate thought in the case of the really insane, where only an operation, or some chemical intervention, can offer hope. We are not very good at judging these matters, for we tend to identify insanity and unreasonableness, and in that confusion simply impose our own standards of reasonableness on others. Think of the patriarch, Hegel (above n72). In Luce Irigaray's work (above n77) the other to the patriarchal self is always hysterical (just as Hegel thought). That is actually guaranteed by the fact that reason is exclusive to the private mind of the patriarch: the other is excluded (unreasonable, hysterical) by the private (self-referential) mind. So Stingel knows that when his girlfriend rejects him she doesn't mean it; and if she says she does, well, he knows better. The more he nurtures this thought the more hysterical she becomes. The hysteria of the other is a sort of blank wall on the perimeter of the private.

equivalent of the egg-shell skull in the law of torts. If I unlawfully assault someone and they suffer grievous injury by virtue of an unusual physical condition I have no excuse — the lawful relation in question was between me and *that* person. If I unlawfully provoke someone with an unusual mental condition the legal issue is the same — my relation is with that person and no other. My relation is with that person and the relation that concerns the courts is my relation with that person. If it is not, the person is excluded from the citizenship right to participate in the relation in question. They are what they are; and if what they are is excluded they are excluded.

Often it is not possible to analyse a mental condition and its connection to provocation without reference to a third person. *R v Green*[81] *("Green")* is such a case. The accused alleged a childhood of abuse by his father. His sisters had been sexually assaulted by the father when they were children, and the accused and his mother had been regularly beaten. The accused was offered lodgings for the night by an older man who had become something of a father-figure to him. During the night the older man arrived naked in the defendant's bed and attempted to seduce him. Thereupon the defendant, who claimed that all the horror and outrage of his father's crimes suddenly came back to him, visited this horror upon his host and attacked and killed him. Was this provocation? Indeed, what was it that might have been provocation? The offer of sexual activity, even persistent offer, is not a wrong, and therefore not in itself a provocation. It was perhaps an issue in *Green* whether the deceased's sexual overtures went too far. But assume that they did not reach the point of serious provocation. The interesting question is: what part did the father play?

It would be common to say that Green had a psychological problem concerning his father; what mixture it was of guilt, fear, loathing, a sense of wrong, and love, I should not want to say. Something of this sort was repressed by his psyche, the common analysis would continue, and it came out in the moment of crisis. Now, I do not find the metaphor of repression at all illuminating. Green had a relation to his father which was unfinished — a grievous wrong to his sisters (and therefore to him) as yet unpunished and unforgiven. No doubt it was very complex, but let us simplify it: there was an unforgiven wrong between him and his father. And when he killed the deceased he was acting in that relation with his father as much as he was acting towards the deceased. Relations are (by definition) public — a subjectivity comes out of itself to the (necessarily public[82]) other. But repression is private. I have the same problem in measuring Green's repression as I do in measuring Stingel's private self-control. In each case the answer is to follow Wittgenstein, do away with the private, and deal with the legal (public) relations.[83]

---

81 A New South Wales trial at present under appeal to the High Court (with judgment expected early 1997).

82 That is *out* of the subjectivity.

83 In Stingel's case, patriarchy (a tall order!); in Green's case, apart from the provocation issue, a *legal* reconciliation with his father (which might take the form of acknowledgement of wrong and forgiveness). The place of lawyers in psychiatric clinics is grievously overlooked. Had that legal (legal: concerned with law, not legal: concerned with litigation) reconciliation taken place, the chances are that Green's killing would not have occurred. We still pay an enormous price for the sovereign conception of law — the objective stand-

Sometimes the metaphor of private repression gains attractiveness when it relates to a deceased person: if there is to be a relation of someone with a deceased person where can it be but within the someone? But the attractiveness turns on the primitive (pre-Einstein) thought that persons lose reality when they die (as though the only real tense is the present). Whether the father in *Green* was alive or dead the relation was a real one and the provocation issue a tripartite one; to be analysed accordingly.

It is relatively common for contract cases to require a tripartite analysis. Generally speaking, there is a distinction between the case where the contract with the third party is known (in *Green* the case where the deceased knew the family history) and where it is not (which may have been the case in *Green*). In the latter case I do not see the difference between coming across a man with a certain unknown contractual burden (or other relational burden, such as Green) and coming across one with an (unknown) egg-shell skull.

12. *A Direction*

By way of summary of the argument I shall offer a draft direction to a jury.

Did the deceased commit a wrong against the accused? You must look at the whole circumstances of their relation to determine this.[84] You will know that in all our relations our dignity, and that of those for whom we care, such as our children, is what we value most.[85] So against the wrong that the deceased committed (if you so find) you must accept that the accused may have felt bound to reassert his (or her) dignity. You must decide whether in fact the accused felt this. This does not mean that anything goes. You must decide whether the accused's response to the wrong and the reassertion of dignity was so wholly disproportionate that he (or she) should still be convicted of murder.

Postscript 1: Law Reform Agencies

In some states the reasonable person test has been legislated. This is, however, open to be interpreted in the way I have suggested, the concept of reasonableness always gains its meaning in law — as the lawful balance between two

---

ard which says fatuously to Green's father not to molest his children and to Green not to kill because of it. Sometimes the conventional doctrines of provocation in the criminal law look like the apology of lawyers to the community for philosophical inadequacy. I refer here, as elsewhere, to Wittgenstein's argument against the private, see above n53.

84 This excludes *Stingel*. The judge would not put the matter to the jury. *Parker*, on the other hand, raises a jury issue on this question.

85 I am aware that putting the matter like this loses the point of many husband killings. The wife kills to save herself and her children from further harm. Safety, not dignity, is the issue. In such a character, self-defence and the defence of others is the relevant defence, not provocation. And on these defences in such cases much more work is needed. I am trying to catch the sense only of the provocation defence. If the wife says or thinks that he deserved it, provocation is the defence. In some, perhaps many, cases both defences will be appropriate. A difficulty here is that self-defence but not provocation is a complete defence. When provocation is understood in the way I am proposing there is no reason in a very extreme case why it should not be a complete defence. It is not that killing can never be fully excused or justified, as self-defence shows.

subjectivities. But in some cases the nonsense about cooling passions (subjective self-control) has also been legislated.[86] The difficulty of interpreting that away leads me to the following concluding reflection.

We are all lawyers. Some of us become barristers and in arguments in defence of accused persons or against them try to make sense of enormously complex social, psychological, legal and philosophical issues. Some of us become judges with basically the same task. And some of us become academics. But some of us become law reform commissioners.

A proper humility is able to attach to the first three functions: all of us will be aware there that we are offering something imperfect, something that is open to qualification by subsequent thought; no doubt all of us hope, in our respective ways, to have made a lasting contribution but none of us, not even the judges (as McHugh J's dissent shows), think we have terminated the problem.

It is only the law reform commissioner who is allowed to think their solution perfect enough to terminate the problem.[87]

Postscript 2 Land Rights for Bankers[88]

> "... Now they reckon he's grabbed a gun
>
> and an old coin sieve and holed up in the vault, screaming
>
> about his years of work, his identity. Queer talk from a bank-johnny!"

But there are no land-rights for bankers. No writer better expresses than Les Murray the problem of dignity for all Australians, nor more powerfully challenges the monoculture of the official index of multiculture. There are ethnic cultures, religious cultures and the sexual cultures. And many of the cases discussed in this article have concerned these cultures. But the people who are emerging from the old sovereignties in our legal system are many other things as well, as Murray reminds us; in fact they are as many other things as there are ways for humans to relate. Provocation to murder, I have shown in this article, is an ordinary legal question as capable as ordinary contract law of ranging over all the possible subjectivities. But provocation is just one issue in which multiculture presses for recognition. There are many, many others.

In all cases it is necesary to recognise ethnic and cultural diversity if we are to have law rather than power (the law of relations rather than the law of sovereignty). Against this, there is abroad in Australia at this moment a large measure of hatred of the ethnic and cultural. This is certainly a constitutional issue. But beneath this hatred there is an appreciation of the fact that there are many more exclu-

---

86 For example, *Criminal Code Act* 1924 (Tas) s160.

87 I have not talked of Parliament. In many cases it is proper to think that the will of the people terminates an issue. But to attribute the will of the people to a technical legal issue which they are not interested in comprehending is a nonsense. It is not democratic work that goes on in the law reform commissions. I am, of course, not denying that good work goes on in the commissions, but simply making the point that this is generally not on the fundamental legal issues.

88 This and the quote is from"The Rollover" in Murray, L, *Subhuman Redneck Poems* (1996) at 20.

sions from the (sovereign) mainstream which are themselves entitled to constitutional protection. The banker in question is dispossessed of his bank by some regional branch rationalisation. He speaks in his own way for the bush, but he might be any worker at all rationalised out of a livelihood by what is called progress, or one of a multitude of young people looking for non-existent jobs. An old culture is replaced by the new culture of the international money market with consequent hardship to the old. Then do these old cultures have land rights? Does the banker have land rights in his bank?

So far as provocation to murder is concerned the banker already achieves recognition. Were he, holed up in his vault, to shoot the bailiff dead, a plausible jury issue of provocation is there. But there is more to the problem than this. Where is the bailiff's wrong? If there is no wrong there is no provocation. But if there is a wrong then it must have other ramifications. So where is the wrong? Well, some international money-mover has rationalised the bank (and its town). Is that a wrong? Of course it is. It is a tort of enormous seriousness.[89] How might this be answered? The money-mover owns the money? Perhaps they do, but the answer is irrelevant. Suppose I drive my car into a crowd of people. I cannot say in my defence that I own the car. There is not a jot of difference between driving my car into a community of people to their injury and driving my money to the same effect.

As yet our law has not recognised this. But were the money-mover to drive the money into an Aboriginal sacred site, there would be something we would consider recognising. I think what is happening is this: the extraordinary ethnicities and cultures and the ancient ones of the land (and that extraordinary gender, woman) are pressing for constitutional recognition, and truly so. They are a vanguard against the sovereignty of power. But behind them the more ordinary cultures are assembling. When there is no sovereignty, when power is defeated through and through, there will be just the relations of humans and their lawful structures.[90] The strategy of power in all this is obvious: it will seek to divide the vanguard from the mass in order to maintain its sovereign rule.[91]

---

89 So, judgment against the banks without more ado? Of course not! Lord Atkin's law is the law of impartiality. In "love the other as youself" the money-movers as well as the sacked workers are entitled to status. My complaint is that the legal issue now goes automatically against the workers.

90 And being relations through and through, there is no further question of social adhesion. This latter question has often led otherwise good people to support sovereign power.

91 I here speak simplistically of power. Actually, I take Foucault's view. Foucault denied that power was as lawyers have thought it, a spreading from an apex: "Power is everywhere; not because it embraces everything, but because it comes from everywhere". (Foucault, *The History of Sexuality* (1979) vol 2 at 93). Foucault denied that power was a simple sovereign. He was right, and that is what makes it necessary to do as we have done in this article and move beyond the formal sovereignties. Lawyers can see this point easily. We have removed the sovereignty of the United Kingdom from our legal system, but the sovereignty of Austinianism is still everywhere in it (just think what answer would be given to my suggestion in the text that the international movement of capital can be a tort). And when I speak of the strategy of power I do not mean to suggest there is some great conspiracy out there. Power does not need conspiracy. The more it is everywhere the more each item of it finds a congenial environment (*micro*-environment, we must say, following Foucault) in which to grow. There is a sort of a natural selection of power in operation here; and it defeats the argument of design by conspiracy as surely as biological natural selection defeats the argument of design by God. We can talk of the strategy of power just as we might talk of the strategy of genes.