

The 'Ordinary Person' In Provocation Law: Is The 'Objective' Standard Objective?*

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Introduction

A common element in cases involving an exculpatory defence raised by a defendant's counsel is that the accused thought his or her acts were 'reasonable' in the circumstances surrounding the conduct that gave rise to the charge. In spite of this feature, the availability of these defences has traditionally depended upon the satisfaction of a so-called 'objective' standard. This has been the position since the mid-nineteenth century in regard to provocation (*Welsh*:338-339, Keating J), a 'partial' defence that operates to reduce a killing that will otherwise be murder to manslaughter.

Today, the courts supposedly recognise the difficulties inherent in a monolithic 'ordinary' person (objective standard) in a heterogeneous society. One of the more vehement critics of the test, Murphy J, stated in his dissenting judgment in *Moffa*:

The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary ... Australian (626).

Along with similar views expressed by English (*Camplin*) and Canadian (*Hill*) courts at the relevant time, such reasoning resulted in the High Court's decision in *Stingel* to introduce a supposed subjective dimension into the objective test part of the definition of provocation. The Court distinguished between the power of self-control of the ordinary person and the gravity of the provocation towards him or her. This distinction was crucial because it determined when the personal characteristics of an accused became relevant. With respect to gravity, 'the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused' (*Stingel*:326). However, when considering whether the ordinary person could lose self-control when provoked, with the sole exception of the defendant's age, the Court did not allow for subjective considerations, toeing the

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strictly objective line (327). The court made an exception for 'age' because 'it would be unduly harsh to require of an immature accused the minimum standard of self-control possessed by the ordinary adult' (329). The development from childhood to maturity was said to be an 'aspect of ordinariness' (330).

Whilst such a distinction between gravity and self-control may appear clear and unambiguous from a judicial perspective, the likelihood of courts uniformly applying the distinction is low (Leader-Eliot 1996:74). It has also been speculated that the dichotomy is too subtle for the jury member to appreciate or fully understand (*Camplin*:718; *Romano*:291; *Voukelatos*:12) due to its complicated nature and a natural tendency to regard a defendant's personal characteristics as affecting the whole person in relation to *both* issues of gravity and self-control. Further, each jury member interprets the objective standard of gravity according to his or her own particular subjective values (Bronitt & Amirthalingam 1996:60).

Despite the fact that the test for provocation has gradually become more liberal over time and now contains a subjective element, it appears that the objective standard of the 'ordinary person' persists. This persistence has attracted great criticism with the suggestion that the test is restricted by Anglo-Saxon middle class male (dominocentric)¹ definitions of what is 'ordinary' and hence effectively ignores the experiences of many (ordinary) members of the community. The most impassioned critiques have submitted that in a modern heterogeneous society where behaviour is influenced by a multitude of factors, the objective standard is 'inappropriate' and 'has no place in a rational criminal jurisprudence' (*Moffa*:626, Murphy J).

The traditional liberal notion of formal equality is described by Brennan J in *Gerhardy v Brown* as:

an engine of oppression destructive of human dignity if the law entrenches inequalities 'in the political, economic, social, cultural or any other field of public life' (129, quoting in part from *Racial Discrimination Act 1975* (Cth) s 9(2)).

In the same sense, the 'ordinary person' standard is set within the dominant white middle class male culture and imposed through a distinctly male epistemological context which operates to conceal and perpetuate a gender bias in its operation against women. Provocation was developed from a male view of human conduct so as to suit typically male responses to situations when men went armed and the premium on honour was high (Manning 1996:6; Rathus 1996:91). These scenarios bear no resemblance to the dynamics operating in domestic violence, the context within which many women kill (Manning 1996:8; Rathus 1996:92; Eastaill & Currie 1998:57) and, accordingly, evidence about Battered Woman Syndrome or battered woman's reality is necessary to convey properly the social reality of the battered woman (*Lavallee*:871-872, 882-883, Wilson J; Manning 1996:21; *Malott*:521-522, Major J; *Osland*:216-218, Kirby J). Accordingly those battered women cases that have used expert evidence or submissions to the court (for example, *Kontinnen* acquitted on murder charge; *Raby* found guilty of manslaughter on murder charge; and *Taylor* who plead guilty to manslaughter) have been more successful in acquittal or reduced sentencing with provocation than those that either did not (*Kina*), or were not permitted to (*Secretary*) present such evidence in the first trial.

A similar argument may be mounted by minority ethnic groups since what is 'dominant' in our society is in fact 'doubly dominant': once for being masculine and twice for being

¹ We are using the term dominocentric (derived from dominion) since the term masculocentric does not explicitly include male, European, middle class and heterosexual.

Anglo-Saxon. As McHugh J expressed his dissatisfaction with the distinction and neatly summed up his own view of the 'ordinary person' in *Masciantonio*:

In a multicultural society such as Australia, the notion of an ordinary person is pure fiction ... Unless the ethnic or cultural background of the accused is attributed to the ordinary person, *the objective test of self-control results in inequality before the law*. Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the *dominant class* but does not reflect the values of those minorities (73-74, emphasis added).

The 'ordinary person' standard also excludes an understanding of the social reality encountered by homosexuals in our society. For instance, the High Court looked at this issue in *Green*, an appeal from the NSW Court of Criminal Appeal, involving a homosexual advance as the alleged provocation. Recent writings, both academic (Mison 1992; Tomsen 1994; Dressler 1995; Howe 1997; Woods 1997; Tomsen & George 1997, 1998; Hodge 1998) and official (Attorney-General's Department (NSW) 1996; Manning 1996:23-26) as well as substantial case law (e.g., *Pritchard*; *Preston*; *Whittaker*; *Turner*; *Cook*; *Bonner*; *Dunn*), suggest that provocation, and occasionally self-defence, are quite commonly raised in such circumstances. Although opinions to the contrary have emphasised that *Green* has nothing to do with homophobia (Molomby 1998), the overall implication that the Court is sensitive to the potentially triggering effect of homophobia sends that message to society and therefore cannot be ignored (Coss 1998). The concept of the 'man of honour' still prevails in the modern provocation doctrine; due to 'not being so inclined,' a heterosexual man's honour is insulted by a homosexual advance and he must retaliate accordingly to counter its effect (Coss 1996:306). What is 'dominant' in our society is, at the minimum, in fact 'triple dominant': once for being masculine, twice for being Anglo-Saxon, and *thrice* for being heterosexual.

So, how objective is objective? Whilst a plethora of theoretical evaluations have been made of provocation's 'ordinary person' standard, there is a paucity of social scientific research directly exploring this issue. We seek to redress this through the use of an empirical study that assesses how this mythical hypothetical being is constructed among potential jurors in provocation cases. The primary concern is whether people have significantly different interpretations on this supposedly objective concept. More precisely, is a dominocentric attitude adopted when interpreting the 'ordinary person' along the lines of Anglo-Saxon, male, heterosexual, and middle class realities? Does the objective test thereby exclude an understanding of non-Anglo, female, homosexual, and working class perceptions of the world?²

Thus, we focus upon the operation of the objective test in provocation; or, more specifically as discussed below, the ordinary person standard (i.e. the objective component of the objective test).

2 Accommodating multiple non-dominant perspectives including gender, ethnicity, class and sexual diversity can contribute to assumptions about particular defendants, particularly if presented as essentialist, eg. all Italian Australian women are the same, or as additive instead of intersectional, eg. the effect of being Italian and the effect of being a woman without seeing that the two may intersect to create a uniqueness that is greater than the sum of the parts. (See Stubbs & Tolmie 1995 for an overview of the intersection of race and gender.)

Methodology

A survey detailing twelve homicide scenarios³ was completed by 124 Canberra residents, including a substantial proportion of Australian National University students. Respondents were told that each defendant was charged with the victim's murder and were asked:

Given the conduct [of the victim], would you say that [the defendant's] actions at the time of the killing could have been expected of the hypothetical ordinary person with ordinary powers of self-control?

This question mirrors the objective component of provocation. Whilst true application of the two-step test requires an initial subjective assessment of the gravity of the provocation, the objective test is the *overriding* question that a jury must be satisfied with before the defence applies. Furthermore, as noted above, the distinction between the elements of gravity and self-control in this two-step test has been said to be too difficult for the jury member to understand. For this reason and the commentary above about the limitations of the current subjective component, the survey focused only on objective assessment. Nonetheless, it is acknowledged that omitting the subjective test (i.e. did the accused lose self-control?) and the subjective component of the objective test (i.e. the determination of the gravity of the provoking act) may have affected the results. Our findings about the objective component of the objective test cannot necessarily be extrapolated to the provocation test in its entirety.

Each scenario required answers on a 5-point Likert scale, with space provided for additional or qualifying comments. Seven background variable questions were also designed to elicit information about age, gender, ethnicity, sexuality, social class, and familiarity with either criminal law or domestic violence principles. The last two variables were analysed to test expert testimony effects. The scale was collapsed into three responses ('agree', 'disagree' and 'undecided') when analysed.

The strength of any variation between the sociodemographic variables and respondents' interpretations of the ordinary person's behaviour was measured by the chi-square test (χ^2). 'Undecided' responses were excluded from the analyses.

Caveats

The methodology did not directly assess the other contributing factors at play during the course of an actual trial or sentencing hearing—including the evidence of experts and other exculpatory defences raised concurrently with provocation—that may impact upon the portrayal given to the ordinary person. We acknowledge such variables, but contend there is nonetheless much to be gained from an understanding of people's opinions on what is 'ordinary' *without* the potential effect of such extraneous influences, particularly given the relative dearth of expert testimony in trials or such reports in sentencing with guilty pleas.

Given that the sample is heavily weighted with university students, one might speculate that the findings are located at or towards the more 'liberal' end of an ideological continuum. Thus, results are not necessarily representative either of the electoral roll from which jurors are selected (in trials by jury) nor of those judges who adjudicate and sentence (in trials without jury or in cases where the defendant pleads guilty to manslaughter).

3 Appendix contains the factual scenarios.

Findings

The Impact of Dominocentrism

Table 1 shows that without expert evidence, the majority of the community does not interpret non-dominocentric experiences into the construction of 'ordinariness' in all scenarios except in instances of domestic violence and child abuse.

Table 1: Total aggregate response rates for the homicide scenarios⁴

Scenario	Agree (%)	Disagree (%)	Undecided (%)
1(a) Homicide as a result of male jealousy following wife's confession of infidelity	3.2	96.0	0.8
1(b) As with 1(a), assault introduced	21.0	71.0	8.0
1(c) As with 1(a), 'ocular discovery' introduced	19.4	75.8	4.8
2(a) Heterosexual partner abuse	50.8	37.1	12.1
2(b) Homosexual partner abuse	34.7	55.6	9.7
2(c) As with 2(b), premeditation introduced	10.5	81.5	8.0
3(a) Homicide based on Muslim religious beliefs	9.7	77.4	12.9
3(b) Homicide based on Japanese customary beliefs	16.9	58.9	24.2
4(a) Homosexual advance as provocation	16.9	71.8	11.3
4(b) As with 4(a), 'sexual abuse factor' introduced	50.8	26.6	22.6
5(a) Working class homicide	37.9	46.0	16.1
5(b) Middle-upper class homicide	2.4	93.6	4.0

The higher rate of agreement for the working class scenario as compared to the more affluent background scenario may reflect that dominocentrism is grounded more on a working or middle class than upon upper class accoutrements, and that the specific details concerning the latter were more alienating and less familiar to the respondents. It was also possibly a by-product of the specific details of that particular vignette (see below).

Sources of Variation in Defining Ordinary

On the whole, a majority of the sample possessed some dominocentric attributes: these included males (49%), Anglo-Australians (74%), heterosexuals (96%), and people identifying themselves as from the middle-upper socioeconomic bracket (77%). In assessing whether, as McHugh J called it, this is 'the stereotype of the ordinary person with which the jurors are most familiar' (*Masciantonio v R*:73), Table 2 examines whether the heterogeneity illustrated in Table 1 can be attributed to minority status. For example, are people of non-Anglo descent more apt to construct particular non-Anglo groups (Muslim, Japanese) experiences as objectively provocative? Are homosexuals more or less likely

4 Facts were loosely based on the following cases: 1(b) *Moffa*; 2(b) and (c) *McEwen and Ahluwalia*; 3(a) *Dincer*; 3(b) *Kimura*; 4(a) and 4(b) *Green*.

than heterosexuals to agree with the homosexual advance as provocation? Therefore, responses have been compared between subjects who possess the relevant dominocentric characteristic for that particular homicide and those who do not.

Table 2: Construction of incident as provocation, by dominocentric/non-dominocentric trait⁵

Actions expected of the hypothetical ordinary person with ordinary powers of self-control and...	Dominocentric Subjects (%)	Non-Dominocentric Subjects (%)
1(a) Male jealousy	3.3	3.2
1(b) As with 1(a), assault introduced	27.9	14.3
1(c) As with 1(a), 'ocular discovery' introduced	21.3	17.5
2(a) Heterosexual partner abuse	60.7	41.3
2(b) Homosexual partner abuse	33.6	60.0
2(c) As with 2(b), premeditation introduced	9.2	40.0
3(a) Homicide based on Muslim religious beliefs	7.6	15.6
3(b) Homicide based on Japanese customary beliefs	12.0	31.3
4(a) Homosexual advance as provocation	17.6	0.0
4(b) As with 4(a), 'sexual abuse factor' introduced	50.4	60.0
5(a) Working class homicide	35.8	44.8
5(b) Middle-upper class homicide	3.2	0.0

A clear trend becomes apparent. Dominocentric respondents were more likely to exclude the non-dominocentric perception of the world when assessing the acts of the 'ordinary person' than were respondents who held the particular non-dominocentric attribute in the scenario. Even this interjection of individuals' identity or experiences is limited though: in only two of the scenarios did the majority of non-dominocentric respondents agree that the action had been provoked. Further, given that dominocentrism is apparent in the majority of respondents, the results indicate that, amongst this sample, male, Anglo-Australian, heterosexual, and middle class realities were usually adopted when interpreting the objective standard.

Thus, although the majority of scenarios did not reveal statistically significant differences by sociodemographic variables, all five scenario-types showed a difference between at least one personal characteristic and the answers given, with gender having the greatest impact upon the interpretations given towards the behaviour of the 'ordinary person'.

5 Scenarios 1 and 2 are compared between male dominants and female non-dominants; scenarios 3(a) and (b) are compared between Anglo dominants and non-Anglo non-dominants; scenarios 4(a) and (b) heterosexual dominants and homosexual non-dominants; and scenarios 5(a) and (b) upper middle class dominants and working class non-dominants.

Age group

Age produced two significant variations between the responses of 18-25 and over 25 year olds for the infidelity scenario (0 and 10% respectively in agreement) ($\chi^2(1, n = 123) = 8.27, p < 0.005$) and for the *Moffa*-type scenario combining infidelity with assault (16 and 32% agreeing) ($\chi^2(1, n = 114) = 5.29, p < 0.025$).

Gender

Not unexpectedly, men were twice as likely (28%) than women (14%) to agree that the defendant's loss of self-control could have been expected of the ordinary person in the female-infidelity plus assault-upon-male scenario ($\chi^2(1, n = 114) = 3.96, p < 0.05$). Some comments made by males included:

[The female victim] was not understanding of the couple's needs. [The male defendant] was overtaken by a sudden uncontrollable rage, a crime of passion, at the crucial point of argument.

[The female victim] was a cold bitch, the beneficiary of the situation yet chose her own selfish motives to crucify [the male defendant]. She got what she deserved ... slut!

In contrast, female respondents who disagreed displayed a deeper understanding of the true basis for a provocation argument in such circumstances:

It's more about patriarchal ideas of possession of women than anything else.

A suggestion that *wounded pride* provides an excuse for murder perpetuates nothing but a masculine view of what is 'ordinary'.

When the alleged provocation was a homosexual advance, men were also more likely (25%) to agree than women (10%) ($\chi^2(1, n = 110) = 4.37, p < 0.05$). Comments clearly illustrated this difference:

Dirty filthy faggot. (male)

In a gun culture of macho men this was provocation. (female)

A lot of men would be shot if heterosexual women reacted this way. (female)

A surprising difference by gender was that men were markedly more likely (61%) than women (41%) to agree with the actions of the abused woman in killing her husband ($\chi^2(1, n = 109) = 5.04, p < 0.05$). The reasoning behind this trend may be uncharted through men's comments such as:

No woman deserves that. What a prick.

Women shouldn't have to go through shit like that.

Alternative interpretations for this result include the idea of males reacting protectively towards a woman in a violent environment or perhaps a greater willingness by men generally to endorse a violent response to grievances. Further, it is possible that females who did not characterise the scenario as one where provocation operated believed it was self-defence. As one female respondent stated:

Issues here relate to *personal safety* rather than merely wounded pride.

Both these arguments are typically raised concurrently in cases involving battered women (for example, see *Osland*).

Ethnic or cultural background

Ethnicity was a significant factor for the scenario involving ethnicity as a part of the relevant background. It was found that those informants who were of non-Anglo-Australian

descent were more than twice as likely (31%) than Anglo-Australians (12%) to agree that the ordinary person could lose self-control in the circumstances ($\chi^2(1, n = 94) = 6.94, p < 0.01$). Of the eight Japanese respondents, one half agreed.

The difference in attitudes between Anglo-Australians and respondents who identified as non-Anglo were found across all the different ethnicities that constitute the non-Anglo sample. Thus, European-based respondents had a significantly higher 'agree' response rate (26%) for the Japanese customary killing than Anglo participants ($\chi^2(1, n = 86) = 3.90, p < 0.05$). This finding hints at the idea that being migrants themselves at one time and having had to endure the difficulties associated with assimilation into the majority culture, non-Anglo respondents were either more understanding and accepting of the customary practices of foreign cultures or considered the ethnicity of the defendant as part of their construction of the 'ordinary person'.

Social class

Aside from socioeconomic bracket, there was one important difference between the facts in the two class-related scenarios (where workplace harassment led to the killing) which may have impacted upon the results. Due to efforts made by the 'working class' defendant in exhausting numerous avenues to prevent the violence continuing, including approaching the police, many male respondents saw the defendant as helpless:

History of physical and mental abuse coupled with [the defendant's] perception of helplessness would cause the ordinary person to lose self-control.

[The victim] was a bastard, the boss and police were bastards, what choice did the little blouse have?

In contrast to the homosexual advance these respondents appear to have focused upon the *similarities* between the defendant and the battered partner; there was no difference between the social reality faced by the battered partner in a domestic setting and the battered man at work — neither could see any option to escape the abuse other than to kill.

Almost all of the respondents (94%) disagreed with the idea that the 'middle-upper class' defendant's loss of self-control could have been expected of the ordinary person. Comments indicate that this could be due to the simple disbelief with the facts as described because of the professional nature of the parties:

Higher accountability here given the assumption that professionals would be more highly educated and possess better communication skills, rather than resort to violence.

[The defendant] had been subjected to violence as in [the 'working class homicide']. However, for class and economic reasons he may have been able to move jobs more easily than [the 'working class defendant'] and could have avoided the situation.

Familiarity with criminal law principles

Those who had studied criminal law were half as likely (12%) to agree than those who had not studied it (21%) that the homicide linked to Japanese culture did constitute grounds for provocation. This result could be due to an awareness of legal pluralism associated with the recognition of cultural defences in the criminal law (Australian Law Reform Commission 1986, Sams 1986; Sheybani 1987). A study of this discipline raises one's consciousness of the potential dangers with such recognition, and hence the lower rate of agreement. Or, perhaps criminal law students, on the whole, have learned that the law does not normatively accommodate differences, irrespective of whether they believe at a theoretical level that there should or should not be such recognition.

Familiarity with the dynamics of domestic violence

Those who had not studied the dynamics of domestic violence were more likely to agree with the provocation argument in respect to the jealous male reaction following the wife's admission of infidelity than those who had familiarity with the dynamics of violence against women in the home (5% and 0% respectively); with 'ocular discovery' of the adultery (24% and 12%); and with the homosexual advance (24% and 6%) which was statistically significant ($\chi^2(1, n = 110) = 6.71, p < 0.01$).

The opposite was true in relation to the battered spouse homicides involving both heterosexual (45 and 59%) and homosexual couples (27% and 47%) ($\chi^2(1, n = 112) = 5.14, p < 0.05$) with respondents unfamiliar with domestic violence less apt to agree than those who had studied it.

The finding in the battered homosexual man case that those who had studied domestic violence were practically equally divided on the ordinary person issue (47% agreed, 45% disagreed) is intriguing. In *McEwen*, the first such Australian case, the jury failed to reach a unanimous verdict at first instance. These results may be explained by reference to the two perspectives by which such defendants may be viewed. First, as in *McEwen*, defence counsel may seize upon the opportunity to evoke the jury's compassion and highlight *similarities* between the defendant and a battered woman, thereby allowing the depiction of the former as the latter. This is done via expert evidence which deems irrelevant or 'hetero-rationalises' the defendant's sexuality and filters his responses to ongoing violence through the fulcrum of the battered woman (Simone 1997:234). Such a distortion of a gay man's reality is equivalent to that of Battered Woman Syndrome itself, which has been criticised as creating a white, middle class standard which warps the experiences of non-Anglo-Saxon women from working class backgrounds who fall outside its boundaries (Stubbs & Tolmie 1995:142; *Osland*:213, Kirby J).

If one fails to accept such testimony and instead dwells upon the *differences* between the defendant and the battered woman, a second very different view crystallises. Where a man rather than a woman is sexually assaulted or beaten by a known assailant, there is a social tendency to blame the victim or trivialise the violence as acceptable male-to-male aggression involving a 'conflict of equals' (O'Sullivan 1995; Christie 1996). Subsequently, it is less likely that a juror's empathy will be evoked into regarding the man's actions as 'ordinary'. Some of the domestic violence-literate informants obviously chose to dwell upon the *differences* between the defendant and a battered partner rather than the similarities, if any. And, more of those without knowledge of domestic violence actually agreed on the ultimate issue for the homosexual advance.

One male respondent, who was 'undecided' in his response, succinctly expressed the dilemma of similarities and differences when confronted by these images of the battered homosexual man:

As a man, [the defendant] may have had more options than [the battered woman]. However, [the defendant] has also been subjected to serious abuse and, as a gay man, he may also have felt that he didn't have anywhere to turn to.

Sexuality

Although the number of homosexual and bisexual respondents ($n = 3$ and 2 , respectively) were too small to generate meaningful statistical findings, the response differentiation for the homosexual partner homicide is nonetheless noteworthy. Whereas all homosexual respondents agreed that the ordinary person could lose self-control, bisexual respondents disagreed.

Discussion: Provocation in Modern-day Australian Criminal Law

The survey results arguably demonstrate three points. First, dominocentric attitudes appear to permeate people's construction of the 'ordinary person'. Secondly, each individual's view of what constitutes 'ordinary' is also coloured by the sociodemographic background trait that is linked with the specific context of the case. In other words, people are more likely to be in agreement with the ultimate issue *if* they have had similar experiences as, and can thereby identify with, the defendant. If the basis of their marginal status (e.g. homosexuality) is not the variable under the microscope in the case, then their response tends to adhere to their own dominocentric lack of identification on that issue (e.g. ethnicity). Thirdly, we have seen that expert evidence is invaluable in providing an interpretative social schema by which to view a defendant's actions. For instance, the importance of admitting expert evidence to familiarise jurors with the dynamics and effects of living with domestic violence was glaringly apparent from the substantial number of 'disagree' responses from 'uneducated' respondents (the equivalent of those without expertise) adopting the view of 'why didn't she just leave?'

Therefore, despite the law's attempts to revise provocation by allowing for subjective considerations in certain instances, the overriding standard of the objective 'ordinary person' still prevails, as demonstrated among the respondents surveyed. And, given that this sample is heavily weighted with university-educated and 'left-leaning' people, one might speculate that in the wider community, the 'objective' views are even more pronounced. The survey has demonstrated that 'ordinariness' is an elusive concept to attempt to accurately define; both dominocentrism and people's individual experiences or identity influence how this concept is constructed.

The 'ruling class' in modern capitalist systems has been described as a network of elites which benefits from the exploitation of the working class and controls economic production, social institutions and political processes (O'Lincoln 1996:19). This definition neglects one additional factor: the ruling class continues to regulate in contemporary societies *legal standards*, an example of which is still evident today via the maintenance of the so-called objective test in provocation. Shifts in the social dynamics in the twentieth century have meant massive sociological change through industrial and sexual revolutions, policies of multiculturalism and a greater acceptance in the community of diverse sexual mores. The 'ordinary Australian person', nevertheless, is still the overwhelming standard by which people's actions are assessed (*Green*:405, Kirby J).

The research has shown that among the potential jurors surveyed, individuals integrate, to some extent, their own distinctive identity and characteristics when constructing ordinariness. Yet that integration is somewhat limited. The findings tend to demonstrate that most of the sample — male, female, European, non-European, straight or gay — do not recognise the non-dominocentric individual's actions as an 'ordinary' response to provocation in the majority of scenarios. For the most part, we continue to set a standard of ordinariness contrary to the socio-political realities of homosexuality, non-Anglo-Saxon heritage, women, battered women, and the working classes. What naturally follows in these circumstances — inequality and injustice — is undoubtedly the opposite of what *Stingel* intended by maintaining the objective test. What is 'dominant' in our society is in fact according to a reasonable interpretation of the survey results '*quadruply* dominant': once for being masculine, twice for being Anglo-Saxon, thrice for being heterosexual, and *four times* for being middle class.

However, the majority of respondents did recognise the killing by a battered woman or by a homosexual with child abuse history as what could be expected of an ordinary person

in those circumstances. This finding, along with the fact that defendants such as Mr Masciantonio, Mr Green and very recently Ms Osland (in the first High Court case dealing with Battered Woman Syndrome, *Osland*), appear before superior courts, is unmistakable evidence of the rippling effects of the massive sociological shifts referred to above.

Where To From Here?

Some, such as the Model Criminal Code Officers Committee (MCCOC), who have advocated abolishing provocation (MCCOC 1998:87), believe that the 'ordinary person' is a legal dinosaur and the time for its demise has well and truly arrived. However, this will not adequately redress the deficiencies. It has been argued that women who kill a violent partner should not be found guilty of manslaughter but rather should be acquitted because of self-defence (Coss 1998:121). While this is what happens ultimately in a few cases (such as *R v R*, in which the Crown refused her plea of manslaughter and she was acquitted of murder) the probability of this actually occurring via the abrogation of provocation seems remote. The women who have successfully done so in their initial trial, thus far, are few (for example, *Kontinnen*; *Hickey*), with others only acquitted after successful appeals and a retrial (*Secretary*). Moreover, the majority of those who have been acquitted (*R v R*) or have ultimately been granted clemency (*Kina*) have fulfilled the traditional masculine constructions of self-defence (see Easteal and Currie 1998).

MCCOC's suggestion that women's battering experiences be considered at sentencing (1998:89) could merely serve to perpetuate the gender bias because the current considerations taken into account when sentence is passed will normally be by a man (Cooney 1993; Morgan 1997). Given that the prevailing composition of our courts views reality through masculocentric eyes, it is unlikely that the criminal justice system will be able to fully grasp what domestic violence is truly about (Easteal 1995).

We believe that for these reasons, provocation must be allowed to thrive so as to reflect, as much as possible, current social considerations and changing conditions and attitudes (*Moffa*:616-617, Gibbs J; *Voukelatos*:26, Hampel J). For example, during provocation's initial development period, adultery was a serious crime of immorality punishable by the ecclesiastical courts (Manning 1996:11). However, within the present morality and social discourse, it has been questioned whether spousal infidelity should, as a matter of law, be capable of grounding a provocation plea (Martinson et al 1991).

A New Test

The priority must be to reformulate the rotten core of provocation that is the test of the 'ordinary person' keeping in mind that the standard of normalcy has usually been a dominocentric one. The New South Wales Law Reform Commission (NSWLRC 1997) proposed replacing the 'ordinary person' with a subjective test taking into account a defendant's characteristics together with the application of community standards of blameworthiness (NSWLRC 1997:paras 2.78-2.83). Although this approach avoids the problems associated with the ordinary person standard, it has been criticised for being too vague and offering insufficient guidance for the jury who will be forced to determine 'community standards' on a case-by-case basis (Leader-Eliot 1996:96; Yeo 1996:321; Nourse 1997:1373).

We propose a test similar to the New South Wales proposal with the recognition that it comes with the flaws and limitations inherent in drafting and implementing a pluralistic model within a dominocentric culture, both inside and outside of the courts.

We ask one fundamental question:

Is it reasonable for a person, possessing all the defendant's characteristics and having had all the defendant's experiences, to have done what the defendant did in the circumstances?

As with the current law, this reformulated model contains both objective and subjective elements with the recognition that the purely objective standard is inadequate in today's society. In contrast to the prevailing law, these elements are seen to overlap rather than be clearly dichotomised into distinct questions relating to gravity and self-control. As a result, we hope that it is less likely to cause confusion amongst either jurors or the judiciary. We believe that the test is adaptable enough to be subjectively applied to any particular accused and set of circumstances, with the crucial proviso that jurors must learn during the course of the trial (through the admission of expert testimony) what is like to be that particular person.

In order to keep the person's conduct from being interpreted through the (minimally) quadruply dominant lens described for 'ordinary' in the current question, subjectivity will now come from attributing to the person all the accused's characteristics and experiences. The test should thereby allow for a greater understanding of the social reality faced by many of the defendants who are currently excluded from the dominocentric construct of provocation as it stands. We acknowledge potential problems associated with adopting an intersectional approach to the doctrine of provocation, and consequently stress that the application of the proposed definition be prefaced with the jurors' receipt of relevant information. Jurors (and judges) must be educated so as to be placed, as much as possible, in the multi-faceted shoes of the accused. We believe that this could best be achieved through the admission of intersectional expert testimony or via mandatory judicial directions.

The proposed test is designed with an internal safeguard to avoid potential abuse of a wholly subjective standard. The question posed to the judge or jury of, 'Is it reasonable?' provides a measure of objectivity. In this way, objective standards are not totally abandoned, unlike an altogether subjective approach. The question is not simply, for example, 'Did Mr Masciantonio lose self-control?' (although, as under the current definition of provocation, this would remain the threshold question) but also, 'Is it reasonable for a 55-year old Italian migrant who believed his daughter had been the victim of domestic violence to have done what Mr Masciantonio did when he was abused and assaulted by his son-in-law?' This formulation maintains a minimum standard of behaviour as demanded by society plus, when placed within the context of the entire test, the overriding standard by which a defendant's actions are assessed. Juries and/or judges would interpret the defendant's narrative through the 'Is it reasonable' filter – in other words, their own assumptions about human rights and behaviour that transcend cultural boundaries. Thus, the risk of conceivably excusing violence in certain situations – for instance, when a man justifies violence by characterising his conduct as being in accordance with his traditional cultural values (either accurately or due to misinterpretation, misrepresentation or essentialisation) – is minimised.

Further, appropriate limits on the ambit of subjective factors (e.g., alcoholism, short-temperedness) seen as relevant would be determined on a case-by-case basis: first, by defence counsel in presenting their 'reasonable' client; secondly, by the judge in deciding whether such a factor should be deemed as relevant; and thirdly, by the jury and or the judge in choosing whether to integrate the factor into their assessment and decision making through applying the reasonable behaviour question.

Conclusion

The notion of reasonable behaviour is not an immutable beast. When placed within a subjective context it allows for a person's behaviour to be judged against that which could be expected of the reasonable person possessing the defendant's characteristics. There are such beings as *unreasonable* defendants who would fall short of the standard. The key advantage with the proposed model is *flexibility*, an invaluable and particularly desirable quality in a legal standard for facilitating the attainment of substantive equality before the law in a modern heterogeneous society. The proposal would also be ideally conducive to the admission of expert testimony and reports in order for judges and juries to learn how reasonable behaviour can vary depending upon gender, ethnicity, social class, and sexuality. These differences, however, do not sit well in modern legal discourse, legal implementation or within the community and legal cultures. This position must change. Twenty-first century eyes must not continue to view the world through nineteenth, or indeed even twentieth, century spectacles.

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Appendix: Homicide scenarios used in survey

In each of these scenarios the defendant is charged with the murder of the victim.

Scenario 1

- (a) David and Vanessa were married very young and as a result had always struggled to make ends meet. In addition to his job as a carpenter, David was forced to take on a night shift working for a security company. Vanessa loved David a great deal but due to his long hours she felt rejected by him. Upon confronting him with this, they argued, and Vanessa confessed to having slept with David's best friend on numerous occasions. Vanessa cried the whole time she was telling David of her affair but, enraged as a result of this admission, David stabbed Vanessa to death with a large kitchen knife.
- (b) Same facts as (a) except now instead of Vanessa being gravely apologetic in confessing her infidelity to David, she insulted him and kicked him in the groin. 'Don't you understand,' she said, 'I don't love you any more you bastard. You are not a man, you're a mouse. I've been enjoying myself screwing with everybody on the street.'
- (c) Same facts as (a) except now instead of Vanessa merely confessing her infidelity to David, he returned home from work and actually discovered Vanessa in bed with his friend.

Scenario 2

- (a) Donna and Vaughan had been married for 15 years. Vaughan physically abused Donna on a regular basis. Their first child died several years ago when Donna miscarried, yet Vaughan blamed her for the death and referred to her as a 'murderer' when he abused her. On one occasion when she protested to this name-calling, Vaughan gave her two black eyes and tore out her hair. That night when Vaughan fell asleep, Donna bludgeoned him to death with an axe.

- (b) Damien and Virgil were in a homosexual marriage. Virgil was an alcoholic whose drinking frequently resulted in physical and sexual abuse of Damien. One night Virgil told Damien that the marriage was over, demanded money to pay an outstanding bill, and threatened violence if the money was not forthcoming by the next morning. At 3 am, Damien killed Virgil by dousing him with petrol while he slept and setting him alight.
- (c) Same facts as (b) except that now evidence is adduced saying that Damien had purchased the petrol a few days before the killing contemplating using this to kill Virgil.

Scenario 3

- (a) Dalmesh is a Turkish migrant to Australia with strong Muslim religious convictions. Upset after finding out that his daughter Vashti had engaged in premarital sex, Dalmesh beat Vashti to death with a household brick.
- (b) Demiko is a Japanese migrant to Australia. Upon discovering that her husband had been committing adultery, she attempted to drown herself and her husband's mistress Vuko in accordance with a Japanese custom that dictated these homicides to make up for the shame brought upon the wife by the husband's adultery. Demiko succeeded in killing Vuko, but she survived the attempt to kill herself due to the intervention of bystanders.

Scenario 4

- (a) Daniel and Victor were professional kangaroo shooters. They returned to their camp one evening with two bottles of rum and began to drink together. When both men were drunk, they fell asleep. Victor awoke soon afterwards, crawled into Daniel's sleeping bag and began fondling Daniel's arms and chest. Daniel quickly awoke and protested Victor's advances saying 'I'm not like this' and attempting to get out of the sleeping bag. Victor persisted and groped Daniel's buttocks and testicles. Daniel suddenly broke free of the bag, grabbed a nearby rifle, and shot Victor five times in the head.
- (b) In a police interview only hours after the killing, it is revealed that Daniel had been the victim of sexual abuse by his father during his childhood. Medical evidence suggests that Daniel is psychiatrically ill, a condition directly related to the sexual abuse he suffered as a child. Whether or not one accepts that diagnosis, it is clear that Daniel is acutely sensitive to sexual interference.

Scenario 5

- (a) Douglas and Vernon both work at a steel factory in Port Kembla. For months Douglas was tormented by Vernon who regularly verbally and physically abused him at work. Douglas approached his employer to see if he could take any action to reprimand Vernon. However, the boss merely laughed this off saying 'Vernon's just having his fun with you, stop being such a baby.' After several more beatings, Douglas went to the police, but they did nothing to follow up his complaint about Vernon's behaviour. Douglas soon began to live in fear of Vernon. After having been successfully avoided for several weeks, Vernon finally ran into Douglas as he was sitting in a pub quietly enjoying a beer with his friends after working a 12-hour shift. Vernon immediately began to verbally abuse Douglas. After several minutes of abuse, Douglas broke the end off his beer bottle by smashing it on the table and stabbed Vernon to death with the jagged edge of the bottle.

- (b) Darren and Vincent are wealthy executives who work for the same advertising firm in Sydney and live life to the fullest, spending excessive amounts of money on trivial items and occasions. They are also fierce competitive rivals and have had a long history of arguing and physical confrontations with one another, Vincent always seeming to get the upper hand over Darren. On one particularly ugly occasion Vincent even gave Darren a black eye. One morning during a board meeting, Vincent accused Darren of having stolen his ideas for the latest successful marketing campaign and began to verbally abuse Darren, calling him 'a fraud, low-life, scum of the earth' and demanding that Darren resign from his position. Darren reached over the desk in the meeting room, grabbed Vincent by his pure silk Italian tie, and cut his throat with his personalised solid gold letter-opener. Vincent later died from massive blood loss as a result of Darren's attack.