Sex, Ethnicity, Power of Self-Control and Provocation Revisited

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1. *Introduction*

In a previous article published in the *Sydney Law Review*,[1] I analysed the High Court's decision in *Stingel v R*[2] on the issue of characteristics affecting the power of self-control in the law of provocation. I had agreed with the High Court that age (that is, youthful immaturity) should be permitted to affect the capacity for self-control expected of an ordinary person but that sex[3] should be denied this function. However, I challenged the Court's ruling that age alone was relevant to the power of self-control, submitting that ethnicity might be another characteristic having this effect.

Since then, the High Court has revisited this subject in *Masciantonio v R*.[4] The whole court reaffirmed its decision in *Stingel* recognising age but not sex as relevant to the issue of capacity for self-control.[5] With regard to ethnicity, McHugh J alone was persuaded by my arguments to revise the stance he took as a party to the joint judgment in *Stingel*.[6] Ian Leader-Elliott has written an article strongly defending the majority view's rejection of ethnicity as a characteristic affecting an ordinary person's capacity for self-control.[7] He contends that expert evidence which would invariably be required on alleged racial differences in the capacity for self-control would be dubious. Furthermore, he warns of the danger that judicial acceptance of negative stereotypes such as the emotionally volatile Latin or the particularly aggressive Vietnamese will promote racism.[8]

Leader-Elliott's arguments have confirmed my own misgivings over the wisdom of my earlier hypothesis.[9] While I feel honoured by Justice McHugh's

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1 Yeo, S, "Power of Self-Control in Provocation and Automatism" (1992) 14 *SLR* 3.

2 (1990) 171 CLR 312.

3 This term is used here in keeping with its usage by the courts. It would have been preferable to speak of "gender" instead. Whereas sex refers to our distinctive physiologies, gender is our learned identity developed through a process of socialisation.

4 [1995] 69 ALJR 598.

5 Id at 602 per Brennan, Deane, Dawson and Gaudron JJ; at 606 per McHugh J.

6 Id at 606–7.

7 Leader-Elliott, I, "Sex, Race and Provocation: In Defence of Stingel" (1996) 20 *CLJ* 72.

8 When these stereotypes are based on male versions of ethnic characteristics, women of non-Anglo-Saxon-Celtic heritage are doubly disadvantaged: see Bird, G, *Multiculturalism and the Law*, Issues Paper, Australian Institute of Criminology (1995) at 5.

9 I have expressed my concern over the possibly racist undertones of my hypothesis when

endorsement of my hypothesis, I must now resile from it. However, this is far from saying that ethnicity no longer has a role to play on the issue of power of self-control. In revisiting the meaning of "power of self-control", I have discovered a way of incorporating not only ethnicity but sex as well into the concept. It is a way which sits comfortably with the dominant views of the High Court, avoids the concerns expressed by Leader-Elliott, and yet enables the courts to acknowledge the social realities of ethnic minorities and of women, groups which have for far too long been silenced by the law.

Shortly stated, my revised hypothesis stipulates that the concept of power of self-control in the law of provocation has two features. The first is well known and concerns an ordinary person's capacity for self-control. The law rightly insists on a common level of self-control for everyone in the community irrespective of their sex or ethnic derivation. There is, however, a second feature of the concept of power of self-control which has hitherto not been judicially recognised as such but which has nevertheless presented itself in some judgments on the law of provocation. This aspect of power of self-control concerns the form of behaviour or response pattern of an ordinary person while deprived of self-control. According to this hypothesis, the relevance of sex to the power of self-control concept is not one of asserting, for example, that an average woman's capacity for self-control is higher than an average man's. This assertion would run counter to the notion of a common level of self-control imposed by the first feature. Rather, sex informs the triers of fact on the type of reaction to the provocation which might be expected from an ordinary person of that gender. Likewise, the relevance of ethnicity is not to assert that a particular race has a lower capacity for self-control than other races. Rather, ethnicity instructs the jury on the type of reaction which may be expected of an ordinary person belonging to the particular ethnic community.

Before proceeding any further, it will be necessary to identify certain legal principles which have a bearing on the concept of power of self-control. Only by working through these legal principles will the nature and significance of my hypothesis become clear. It is also critical that the hypothesis sits well with those principles.

2. *Relevant Prescriptions of the Present Law*

To be viable, my hypothesis must subscribe to the High Court ruling that all adult defendants are measured against the same minimum standard of self-control possessed by an ordinary adult. As the majority in *Masciantonio* put it:

> The test involving the hypothetical ordinary person is an objective test which lays down the minimum standard of self-control required by the law. Since it is an objective test, the characteristics of the ordinary person are merely those of a person with ordinary powers of self-control. They are not the characteristics of the accused, although when it is appropriate to do so

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applied to Australian Aborigines in an article entitled "The Recognition of Aboriginality by Australian Criminal Law" in Bird, G, Martin, G and Nielsen, G (eds), *Majah: Indigenous Peoples and the Legal System* (1996) at 229. I express my revised views below at pp316–7.

> because of the accused's immaturity, the ordinary person may be taken to be of the accused's age.[10]

By "standard of self-control" the Court clearly meant the capacity for self-control involving levels or degrees of self-control. This was simply a reiteration of the Court's earlier ruling in *Stingel*. There, the Court had accepted that "there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average".[11] However, the Court eventually decided that the principle of equality before the law demanded that everyone should be measured against a common standard of self-control. Accordingly, all members of the community have to comply with "the lowest level of self-control which falls within those limits".[12] In the ensuing discussion I shall call this the "capacity for self-control" feature of power of self-control.

It follows from the above ruling that, except for immaturity through age, all characteristics of a defendant are irrelevant to the capacity for self-control to be expected of an ordinary person. This is so even if it could be proven scientifically that, say, on average, women have a greater capacity for self-control than men. Similarly, it would not matter that there was scientific evidence showing members of a particular ethnic group as having on average a lower capacity for self-control than other ethnic groups residing in the same community.

Another prescription of the law which my hypothesis has to comply with concerns the reaction of an ordinary person who has lost self-control as a result of provocation. The following statement by Viscount Simon in *Holmes v DPP* states the law:

> [A jury must] form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death.[13]

The statement has been endorsed by the High Court on numerous occasions including *Stingel*.[14] This legal prescription requires the defendant's response upon losing self-control to be compared with an ordinary person's response to the same provocation. It serves to ensure that the defendant's response stemmed from the loss of self-control as a result of the provocation as opposed to some other source or motivation.[15]

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10 Above n4 at 602.

11 Above n2 at 329.

12 Ibid.

13 [1946] AC 588 at 597.

14 Above n2 at 325 citing *Sreckovic v R* [1973] WAR 85 at 91 which had held that this statement in *Holmes* was part of the law of Western Australia even though it was governed by a Code. In *Moffa v R* (1977) 138 CLR 601 at 613, Gibbs J quoted the passage in which the statement appears and said that it "has been cited with approval again and again, in England and in Australia, and is supported by the views expressed recently in this Court in *Johnson v The Queen*".

15 Thus the Privy Council in *Parker v R* (1964) 111 CLR 665 at 681 was led to say that "the homicidal act [must have been] the result of the passionate impetus caused by the provocation ... and that it was not done pursuant to an [intention to kill or do grievous bodily harm] ... which was either formed previously to or was formed independently of the provocation".

The *Holmes* rule also renders morally relevant the form and manner of retaliation to provocation in the same way as the extent of lost self-control is morally relevant. Consider the case of D, a man who is gravely provoked by a woman and retaliates by raping her. She dies from psychological shock, an event which is intended by him as a consequence of his conduct.[16] There is a strong sense that the judge should instruct the jury that the manner of D's reaction works against him in respect of mitigation no matter how grave the provocation or how high the degree of lost self-control is manifested in his intention to kill or do grievous bodily harm. In contrast, a jury can be expected to be more lenient on D if he had hit, strangled or stabbed the woman. Why is this so? Leader-Elliott finds the explanation in the denial of compassion to the rape-killer because his conduct was alien to any conception of normality; the rape evinced "brutal ferocity" rather than "natural anger excited by serious cause".[17] Jeremy Horder would agree and suggest further that the jury's judgment of the defendant's response is heavily influenced by cultural, moral and gender-specific norms.[18] Hence, only "normal" response patterns as morally defined by the jury are deserving of mitigation.

In *Johnson v R*, Barwick CJ was alive to the above functions of the *Holmes* rule when he said:

> If the extremity of the resentment [that is, the accused's reaction] is due rather to the idiosyncrasy of the accused than to the reactions of an ordinary man in the circumstances, then the provocation cannot be relevantly effective: or that extremity may indicate because of its disproportion, that the reaction generated by the provocation was not the basis of the accused's acts.[19]

The confining of the provocation defence to "normal" response patterns is covered by his reference to idiosyncrasy, and the need to ensure that the defendant's response stemmed from loss of self-control is covered by saying that the provocation might not explain the defendant's conduct.

Mention should be made that in New South Wales, legislation has removed entirely the moral relevance of the manner of the defendant's reaction to the provocation. All that matters is whether the provocation was sufficient to induce an ordinary person to have so far lost self-control as to have formed a murderous intent.[20] Hence, in that jurisdiction, the rapist-killer would be

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16 This example has been borrowed from Horder, J, *Provocation and Responsibility* (1992) at 150–1.

17 Above n7 at 84 citing Stephen, J, *History of the Criminal Law of England*, Vol III (1883) (Franklin, B, ed) at 171: "The moral character of homicide must be judged of principally by the extent to which the circumstances of the case show, on the one hand, brutal ferocity, whether called into action suddenly or otherwise, or on the other, inability to control natural anger excited by serious cause".

18 Above n16 at 152. For a more thorough examination of this issue, see Horder at 145–55.

19 (1976) 136 CLR 619 at 639. Barwick CJ was discussing another passage by Viscount Simon in *Mancini v DPP* [1942] AC 1 at 9 but the subject matter was basically the same as in *Holmes*, namely, the relevance of the accused's reaction to the ordinary person test in the law of provocation. For a further discussion of Barwick CJ's judgment in *Johnson*, see below at pp309–10.

20 *Crimes Act* 1900 (NSW), s23(2)(b) of which requires the jury to consider whether the conduct of the deceased "could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous

treated in exactly the same way as someone who had stabbed in response to the same provocation. It is submitted that the moral evaluation of the defendant's response forms a natural and inevitable backdrop to a jury's determination of whether an ordinary person might likewise have reacted when deprived of self-control and the legislative abrogation of this evaluation unduly diminishes the moral underpinnings of the provocation defence.

In our discussion, I shall describe the *Holmes* rule as the "response pattern" feature of the concept of power of self-control. What this feature does is to "round off" as it were the enquiry into the power of self-control expected of an ordinary person when confronted with the same provocation as the defendant. This enquiry has two stages. It begins with considering whether people with an ordinary capacity for self-control could have found themselves bereft of their self-control in the face of the provocation. This is the "capacity for self-control" feature of power of self-control. Should this be established, the enquiry proceeds to the second stage to consider whether an ordinary person could have behaved in the way the defendant did. This enquiry does not merely determine whether an ordinary person might have formed an intention to kill and to have carried out that intention. It examines in detail the particular reaction of the defendant such as the method used to kill, the number and type of wounds inflicted, and the duration of the episode of violence. The enquiry then considers whether an ordinary person who was deprived of her or his self-control could have acted in the same or similar way as the defendant in fact did.[21] Only by examining the defendant's reaction in detail and deciding that an ordinary person might have behaved in the same or similar fashion can it be properly concluded that an ordinary person's reaction stemmed from loss of self-control rather than from some other source or explanation.[22] This second stage of the enquiry comprises the "response pattern" feature of power of self-control.

Unfortunately, the majority of the High Court in *Masciantonio* has thrown confusion over the *Holmes* ruling. It had this to say:

> [T]he question is whether the provocation, measured in gravity by reference to the personal situation of the accused, could have caused an ordinary person to form an intention to kill or do grievous bodily harm and to act upon that intention, as the accused did, so as to give effect to it. ... It is the nature and extent — the kind and degree — of the reaction which could be caused in an ordinary person by the provocation which is significant, rather than the duration of the reaction or the precise physical form which that reaction might take. And in considering that matter, the question whether an ordinary person could form an intention to kill or do grievous bodily harm is of greater significance

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bodily harm upon, the deceased". The provision makes no reference whatsoever to the response pattern of the defendant nor of the ordinary person.

21 The Criminal Code 1983 (NT), s34(2)(d) has paraphrased the *Holmes* ruling concisely in requiring that "an ordinary person similarly circumstanced would have acted in the same or a similar way". The weakness of this provision is its use of the word "would". "Could" or "might" better covers the possibility of the hypothetical ordinary person reacting in different ways. However, the phrase "or a similar way" appears sufficient to cover this eventuality.

22 See Horder, above n16 at 87–92 for an historical account of this enquiry.

> than the question whether an ordinary person could adopt the means by the accused to carry out the intention.[23]

With respect, the distinction sought to be drawn by the majority between the nature and extent (or kind and degree) of the reaction and the precise physical form which the reaction might take is too subtle to make any real sense of it. If the judges had meant to stress the need for the loss of self-control to have been of such a degree as to create an intention to kill or to do grievous bodily harm in an ordinary person, this could have been done without downplaying the legal principle in *Holmes*. As we have observed, the second stage of the enquiry over power of self-control does not stop at the determination that an ordinary person could have formed a murderous intention; it certainly regards this as crucial but continues on to examine the precise mode of retaliation for the purpose of ensuring that an ordinary person could indeed have reacted in the way the defendant did as a result of a loss of self-control. As such, the formation of a murderous intent and the form or manner of carrying out that intention are closely related but distinct outcomes flowing from lost self-control. The majority seems to have correctly expressed this aspect of the law earlier on in its judgment when it said:

> Since the provocation must be such as could cause an ordinary person to lose self-control and act in a manner which would encompass the accused's actions, it must be such as could cause an ordinary person to form an intention to inflict grievous bodily harm or even death.[24]

The majority had relied on a statement by Barwick CJ in *Johnson v R* for placing a premium on the murderous intent aspect of loss of self-control.[25] The Chief Justice had said that "it is the induced intent to kill rather than the induced fatal act which is the critical consideration".[26] However, examination of the part of his judgment leading up to this statement reveals that he did not intend the mode of retaliation to be irrelevant. While Barwick CJ objected to there being a rule of law requiring the retaliatory conduct to be proportionate to the provocation, he did accept that it was necessary "[t]o take into account the mode and extent of retaliation when determining whether an ordinary man, subjected to the like acts of provocation in all the circumstances in which the accused then stood, would have lost self-control to the point of doing something akin to what the accused has done".[27] The point to note here is

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23 Above n4 at 604. McHugh J alone (at 611) gave unqualified support to the *Holmes* rule. It appears that the judges, without saying it, drew inspiration from the following comment by Taylor and Owen JJ in *Parker v R*, above n15 at 641: "[T]he question is not whether there was some loss of the power of self-control, but whether the loss of self-control was of such extent and degree as to provide an explanation for or, to constitute, in some measure, an excuse for the acts causing death. And, of course, the provocation must have been of such a character as was calculated to deprive an ordinary person of the power of self-control to that extent."

24 *Masciantonio*, id at 602. The majority likewise acknowledged the need to take account of the precise response of the defendant when it said (at 603): "[H]aving assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control *and act in a manner which would encompass the accused's actions*"(author's emphasis).

25 Id at 603.

26 Above n19 at 639.

27 Ibid.

that the majority in *Masciantonio* did not abrogate the *Holmes* rule on the relevance of the defendant's response to the provocation. That response may, in the majority's view, be of lesser significance than the need for an ordinary person to have formed a murderous intent, but the majority still gave it significance.[28] As we shall see, the maintenance of this legal prescription is pivotal to my hypothesis.

Finally, my hypothesis should account for various instances when the courts have recognised the response patterns of defendants, particularly those manifested by some women and some members of ethnic minority groups who have killed under provocation. Examples include a "slow burning" reaction to provocation which, by virtue of their circumstances, battered women tend to experience, and the longer time to cool down experienced by some members of certain ethnic groups.[29] It would appear that the courts have until now not identified which requirement of the provocation defence these response patterns come under. In these cases, the courts were comparing the particular defendant's behaviour with that typically experienced by members of the group to which the defendant belonged. Accordingly, they were dealing with the objective rather than the subjective requirement of the defence. The objective condition of the defence has two parts, namely, the gravity of the provocation and the power of self-control. Since it was the reaction to the provocation rather than the provocation itself which was the issue, the cases were not concerned with the gravity of the provocation. This left the power of self-control concept which would have nothing to say about response patterns if it did not extend beyond the capacity for self-control. It is here that my hypothesis comes into play — the concept of power of self-control has another feature to it which has hitherto not been judicially acknowledged.[30] This is the "response pattern" feature which, if judicially recognised, will situate these cases in their proper place under the law of provocation.

3. *Distinguishing Capacity from Response*

The reader should by now have a good idea of the revised role I am proposing the law should give to sex and ethnicity in respect of the power of self-control concept in the defence of provocation. To reiterate, my hypothesis contends that the concept comprises two features. The first is the capacity for self-control expected of an ordinary person and the second is the response pattern of an ordinary person who is deprived of self-control. On the question of capacity for self-control, everyone, irrespective of their sex and ethnic origin, is measured against the minimum level of self-control expected of ordinary people in the community. The only exception is immaturity of age. Within this framework of ordinary capacity for self-control, the law recognises that ordinary

28 This clearly appears in the last sentence of the passage of the majority's judgment reproduced in the main text accompanying n23.

29 The relevant cases will be discussed below.

30 What seems to be happening is that the response patterns are subsumed under the feature of capacity for self-control thereby stifling detailed enquiry into those matters. For example, in *R v Georgatsoulis* (1994) 62 SASR 351 at 359, King CJ said that it was necessary to consider "whether the accused's reaction to the insult or affront ... conformed to the minimum standard of self-control expected of ordinary persons in the community".

people who lose their self-control might behave in different ways. These differences may be occasioned by the particular sex or ethnic group to which the defendant belongs. This suggested way of viewing the law is consistent with the High Court's proposition in *Stingel* that "the differences between these classes or groups be reflected only in the limits within which a particular level of self-control can be characterized as ordinary".[31]

Thus far, the courts have regarded the concept of power of self-control solely in terms of the capacity for self-control. This is understandable since *DPP v Camplin,* the case which first highlighted the concept in its model direction on provocation, had related it to immaturity of age.[32] The House of Lords in *Camplin* was prepared to accept a lower level of self-control from young people because "to require old heads on young shoulders is inconsistent with the law's compassion of human infirmity".[33] The House had also mentioned sex along with age as the only characteristics affecting the power of self-control to be expected of an ordinary person. This has led courts from other jurisdictions including Australia and Canada which have adopted the *Camplin* direction to assume that the House meant to recognise that women possess different levels of self-control compared to men.[34] These courts have proceeded to argue that the law should ignore these different levels of capacity for self-control between the sexes because to recognise them infringes the principle of equality before the law. Consequently, they have modified the *Camplin* direction to permit age alone to affect the power of self-control of an ordinary person.

There is no objection to this modification of *Camplin* provided its critics are right in assuming that the House of Lords meant for sex to affect the capacity for self-control. However, it is entirely possible that the House intended for sex to perform a different function, namely, to influence the response pattern of an ordinary person deprived of her or his self-control.[35] This function gives substance to the part of the *Camplin* direction which states that:

> the question is not merely whether [the reasonable] person would in like circumstances be provoked to lose his self-control *but also would react to the provocation as the accused did.*[36]

We have also observed that this focus on response patterns forms the crux of the legal prescription in *Holmes.*[37] What this examination of response patterns

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31 Above n2 at 329.

32 [1978] 2 All ER 168 at 175.

33 Id at 174.

34 See *Stingel,* above n2 at 329–32; *R v Hill* (1986) 25 CCC (3d) 322 at 351–2. Commentators including myself have made the same assumption. For example, see Williams, G, *Textbook of Criminal Law* (2nd edn, 1983) at 538–9; Allen, H, "One Law for All Reasonable Persons?" (1988) 16 *Int'l J Sociology L* 419 at 427; Yeo, S, above n1 at 9–10; Leader-Elliott, above n7 at 91.

35 Recently, the House of Lords in *R v Morhall* [1994] 3 WLR 330 at 336 reaffirmed that sex was relevant to the power of self-control concept despite being aware of the High Court decision in *Stingel.* This can be interpreted in either of two ways. The House may not have been persuaded by *Stingel* and thought that sex did affect the capacity for self-control. Alternatively, it regarded sex as serving a different function to that given to it by *Stingel.* The latter interpretation, it is submitted, is to be preferred.

36 Above n32 at 175 (author's emphasis).

37 See above at pp306–9.

does is to ensure that the defendant's reaction is consistent with the reaction of an ordinary person acting whilst deprived of self-control as opposed to one whose self-control was intact. There may be cases where the jury will need to take into account the defendant's sex because that characteristic influences the response pattern which might be expected of an ordinary person of that sex. Otherwise, the jury may conclude that an ordinary person reacting in the same or similar way as the particular defendant did would have been in possession of self-control. Furthermore, the *Holmes* rule makes response patterns morally relevant by confining the scope of the defence to cases where those patterns conform to community conceptions of normality. It is submitted that the characteristic of ethnicity could likewise have a significant bearing on the response pattern normally expected of an ordinary person belonging to a particular ethnic group. This and the characteristic of sex will now be considered in greater detail.

4. *Response Patterns influenced by Sex and Ethnicity*

Before discussing the influence of a defendant's sex and ethnic origin on the response pattern feature of power of self-control, consideration should also be given to the characteristic of age. This is because the courts have singled out age (and sex) as a characteristic affecting the power of self-control expected of an ordinary person. The response patterns of young people when deprived of their self-control have hardly come to the attention of the courts. This is probably because the law has focused on their capacity for self-control with the result that the question of response patterns has been sidelined. On another view, it may be that the response patterns of youth are reflected in the law's allowance for a lower level of self-control compared to adults. Hence, a jury is permitted to assume that an ordinary teenager could have reacted more quickly with violence than an adult confronted with the same provocation. Nevertheless, it is submitted that more judicial attention can and should be given to the response patterns of youth to provocation. For example, we do not know whether young people tend to regain their self-control just as quickly as when they lose it or whether they may take a longer time to cool off than adults. Furthermore, the method of retaliation such as the choice of weapons available to them and the type and number of wounds inflicted might well differ between teenagers and adults who kill under provocation. Also worthy of study are the response patterns of male and female adolescents — in the light of the discussion which follows, it is likely that significant differences will be found between them.[38] All these are matters which would be relevant to a jury's decision whether an ordinary teenager might have reacted in the same or similar way as the particular defendant did when deprived of self-control. That said, the remainder of our discussion will focus primarily on the influence of sex and ethnicity on the response patterns of the ordinary person.

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38 In the South Australian case of *R v Romano* [1984] 36 SASR 283 at 289, King CJ had suggested that account be taken of possible differences in the degree of maturity to be found in adolescent males and adolescent females. However, this suggestion does not enhance our discussion as it pertains to the capacity for self-control rather than to response patterns to provocation.

A. Sex

The law has quite rightly rejected recognising any possible differences in the capacity for self-control between men and women. To recognise these differences would breach the principle of equality before the law. This principle requires that justice is served only if men and women are measured by the same standard or capacity for self-control. Furthermore, differentiating the capacity for self-control according to sex promotes the contentious stereotypes which depict women as the gentler sex who are normally passive and submissive in the face of provocation while men are normally active and aggressive.[39]

However, recognising that different response patterns may ensue depending on the circumstances in which men and women who kill may be found is an entirely different matter. The principle of equality before the law is sustained rather than eroded by such recognition. Real equality before the law cannot exist when defendants are acquitted or convicted of murder on the basis of response patterns often experienced by one sex but not by the other. The law of provocation has developed, for far too long now, according to projected male reactions to loss of self-control. Gender equality is achieved only when the law recognises that gender may have a strong influence on the attitudes and behaviour of people who are gravely provoked.

Due to their gender influenced circumstances, men tend to react instantaneously with violence when provoked.[40] This traditional male reaction is embodied in the common law requirement of a sudden loss of self-control.[41] In contrast, the particular circumstances in which women who kill often find themselves renders them more likely to experience a slow burn reaction culminating in an eruption of loss of self-control at a point in time much later after the provocative incident.[42] This has led a feminist scholar to propose that "[a] model of provocation which would accurately reflect a woman's experience would contemplate (as a central case) the killing being at a time *other than* during a violent incident".[43] Fortunately, there exists a trend amongst Australian courts to acknowledge this common response pattern of women who kill, especially in the context of domestic violence settings. Thus, in *R v R*[44] the South Australian Court of Criminal Appeal held that the defence of provocation was open to the female defendant even though the victim had been asleep for over twenty minutes before he was killed. And in *R v Kontinnen and Runjanjic*[45] the same court permitted the defence to go to the jury

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39 For an excellent application of these stereotypes to English cases involving battered women who killed their husbands, see Nicolson, D, "Telling Tales: Gender Discrimination, Gender Construction and Battered Women Who Kill" (1995) 3 *Fem Leg Studies* 185.

40 But it should be stressed that this is not always the case. For example, in *Parker*, above n15 the defendant had killed his provoker a considerable time after the last provocative incident. The law acounts for the possible variations in responses when it says that the ordinary person might or could have reacted in the way the defendant did: see *Masciantonio*, above n4 at 604; *Stingel*, above n2 at 329.

41 See Tarrant, S, "Something is pushing them to the side of their own lives: A feminist critique of law and laws" (1990) 20 *UWALR* 573 at 592–4; Horder, above n16, ch9.

42 Again, there may be other cases where women may have reacted instantaneously to provocation.

43 Tarrant, above n41 at 594 (original emphasis).

44 (1981) 4 A Crim R 127.

45 (1991) 53 A Crim R 362.

even though there had been a considerable time-lag between the victim's last provocative act and when he was killed. The New South Wales Court of Criminal Appeal in *R v Chhay*[46] made a similar ruling in a case where a battered wife had killed her sleeping husband several hours after the last provocative incident. Gleeson CJ who delivered the main judgment in *Chhay* accepted that the law of provocation had developed in its practical application as a concession to male frailty.[47] He felt that justice required that the law recognise the research which showed that battered women tend to respond to provocation "by suffering a 'slow burn' of fear, despair and anger which eventually erupts into the killing of their batterer, usually when he is asleep, drunk or otherwise indisposed".[48] He thought that women who reacted in this way were at least as worthy of compassion as men who reacted instantaneously to the provocation.[49]

It would appear from some of the above decisions that the courts do not require expert witnesses to testify on these different response patterns of battered women.[50] This is as it should be for if the law does not insist on the scientific objectification of men's experiences, why should the law insist on it for women's experiences?[51] It should be sufficient for the trial judges when exercising their generous powers in instructing juries to inform them of these experiences. Perhaps, trial judges still presently lack the knowledge and confidence to perform this task, in which case, education of the judiciary is urgently required. Pending this, expert evidence on women's experiences should still be permissible.[52]

The mode of killing may also be influenced by gender-specific norms. For instance, their superior physical strength and training make men more likely than women, when angered, to use their fists. In contrast, women provoked by men tend to use weapons and to commit violence by stealth because of their smaller size, lesser physical strength and lack of training in fighting with their hands.[53] Related to this is the emotion underlying the loss of self-control. Anger will usually be the dominant emotion where male defendants are involved. This may help explain why men often respond with instantaneous bursts of

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46 (1994) 72 A Crim R 1.

47 Id at 11.

48 Ibid, citing from an article by Nicolson, D and Sanghvi, R, "Battered Women and Provocation" [1993] *Crim LR* 728. The article discusses the English case of *R v Ahluwalia* [1992] 4 All ER 889.

49 *Chhay*, ibid.

50 Only in *Kontinnen and Runjanjic* was expert evidence introduced but only then because the defendant had suffered from battered woman syndrome. The defendants in *R and Chhay* were likewise women who had killed their male batterers but they had not experienced the syndrome. Consequently, the courts in these cases did not require expert evidence to be heard.

51 See O'Donovan, K, "Law's Knowledge: The Judge, The Expert, The Battered Woman, and Her Syndrome" (1993) 20 *J Law and Soc* 427 at 434.

52 There should be no problem in obtaining such evidence. Besides the New South Wales Court of Criminal Appeal's reference to research on the subject in *Chhay*, there are the findings of an American scientific study by Dobash, R E and Dobash, R P, *Women, Violence and Social Change* (1992).

53 See Greene, J, "A provocation defence for battered women who kill?" (1989) 12 *Adel LR* 145 at 159. See Horder, above n16 at 152 for an interesting comment as to why men might strangle women who they believe have injured their self-worth.

violence and attack their provoker with their hands or with any weapon that so happens to be available at the time. Women, on the other hand, are usually the targets rather than instigators of violence. Battered women tend to react to physical provocation from a combination of fear and anger.[54] The underlying emotion of fear may explain the choice of weapons used by women, the timing of the homicidal act, the stealth in carrying it out and the apparent appearance of calmness and deliberation displayed by these women during and after the killing.[55]

A useful parallel may be drawn between the above discussion and certain recent developments in the law of duress.[56] Expert evidence on the battered woman syndrome has been admitted for the first time in Australia to assist the jury to more fully understand the behaviour of battered women acting under duress. In *R v Kontinnen and Runjanjic*, the South Australian Court of Criminal Appeal explained the role of the syndrome in these cases as follows:

> [T]he primary thrust of the evidence is to establish a pattern of responses commonly exhibited by battered women. The proferred evidence is concerned ... with what would be expected of women generally, that is to say women of reasonable firmness, who should find themselves in a domestic situation such as that in which the appellants were. It is designed to assist the court in assessing whether women of reasonable firmness would succumb to the pressure to participate in the offences. It also serves to explain why even a woman of reasonable firmness would not escape the situation rather than participate in criminal activity.[57]

Importantly, the Court did not treat women with the syndrome as having a lower level of human fortitude than women without the syndrome. Instead, they were regarded as possessing "reasonable firmness" and behaving as women generally might have done in the same or similar circumstances. Given the Court's finding of normalcy, it is rather disappointing that the Court felt the need for expert witnesses to describe these women's experiences to the jury. In this respect, we have noted instances involving the defence of provocation where judges have been prepared to instruct the jury on these experiences rather than relying on expert evidence.

Apart from this matter, the Court's approach in *Kontinnen and Runjanjic* is closely similar to my hypothesis concerning the power of self-control concept and its features of capacity for self-control and response patterns.[58] Battered women who kill under provocation may be regarded by the courts as possessing ordinary

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54 *Van den Hoek v R* (1986) 161 CLR 158 was the first High Court case to recognise that fear as much as anger could give rise to provocation. It is no coincidence that the defendant in that case was a woman who had been physically provoked by the male deceased.

55 The cases of *R, Kontinnen and Runjanjic* and *Chhay* provide good illustrations of these response patterns.

56 In *R v Abusafiah* (1991) 24 NSWLR 531 at 540–1 Hunt J opined that duress and provocation should not be compared with each other because they were quite different defences. With respect, their similarities outweigh their differences: see Yeo, S, *Compulsion in the Criminal Law* (1990) at 57–60, 98–9. Also, if provocation can be compared with a plea of automatism, as the High Court did in *R v Falconer* [1990] 65 ALJR 20 at 30, *a fortiori* might a comparison be made between provocation and duress.

57 Above n45 at 368.

58 In *Kontinnen and Runjanjic*, id at 372, Bollen J opined that the Court's views on the application of the syndrome was equally pertinent to the pleas of provocation and self-defence.

capacities for self-control.[59] This may be so even though they may have been experiencing the effects of battered woman syndrome at the time of killing.[60] Thus, information on battered women is not concerned with their capacity for self-control but rather with their response patterns when gravely provoked by their batterers. Without such information, there is a danger of jurors concluding that ordinary women behaving in the way the defendant did were in possession of their self-control. This would be the result of adhering solely to a male model of response patterns which views a time-lag from the provocative incident as constituting a regaining of self-control, having the opportunity to select a weapon and to attack the deceased in stealth as clear signs of being in possession of self-control, and so also with appearing calm during and after the act of killing. Yet, these are all typical response patterns of ordinary women when deprived of their self-control.[61] Additionally, they are responses which fall within the realm of normality and therefore deserving of societal compassion.

B. Ethnicity

At the beginning of this article, I raised several objections to the legal recognition of different levels of self-control according to ethnic derivation. One of these objections was the promotion of racist stereotypes. Prior to the decision in *Stingel*, there existed a long line of Northern Territory cases involving Aboriginal defendants who resided in isolated communities.[62] The Northern Territory Supreme Court ruled in these cases that Aboriginality was significant for the purpose of assessing the gravity of the provocation as well as the level of self-control expected of an ordinary Aboriginal person. This ruling seems to have continued with the decision in *R v Mungatopi*,[63] a case which came after *Stingel*. With respect, these rulings are objectionable because they regard Aboriginal people as possessing lesser capacity for self-control than other ethnic groups. Doubtless, the judges who delivered these decisions had fairness and justice as their paramount aims. However, their decisions had the effect of promoting a great evil, namely, a negative stereotype of Aborigines being at a lower order of the evolutionary scale than other ethnic groups. Besides the absence of scientific verification of this assumption, the more plausible explanation as to why Aborigines may more frequently lose their self-control than non-

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59 Should the syndrome have caused their capacity for self-control to be lowered below the norm that is usual for ordinary battered women, the proper defence should then be diminished responsibility in those jurisdictions which have such a plea, not provocation.

60 This is to be contrasted with the approach taken by the English Court of Appeal in *R v Ahluwalia* (above n48 at 898) which seems to have regarded the syndrome as inevitably lowering the capacity for self-control expected of an ordinary person.

61 Certainly, these response patterns could also be those of a person whose self-control was intact. The appropriate plea would then be self-defence. Indeed, this should be the preferred plea for battered women who kill given that they are acquitted altogether of any offence: see Tolmie, J, "Provocation or Self-Defence for Battered Women who Kill?" in Yeo, S (ed), *Partial Excuses to Murder* (1991) at 61; McColgan, A, "In defence of battered women who kill" (1993) 13 *Oxf J Leg Studies* 508.

62 For example, see *R v Patipatu* (1951–1976) NTJ 18; *R v MacDonald* (1951–1976) NTJ 186; *R v Muddarubba* (1951–1976) NTJ 317; *R v Jimmy BalirBalir* (1951–1976) NTJ 633; *R v Nelson* (1951–1976) NTJ 327; *Jabarula v Poore* (1989) 42 A Crim R 479.

63 (1991) 57 A Crim R 341.

Aborigines is their greater exposure to highly provocative encounters. Thus, it is submitted that the High Court in *Stingel* and *Masciantonio* was right in limiting ethnicity to the gravity of the provocation. However, should the trend set by the Northern Territory cases continue, the courts are duty bound to explicitly declare that the purportedly lower capacity for self-control possessed by ordinary Aborigines is not the result of heredity but due to the abusive, frustrating, racist and violent environment that many Aborigines grow up and live in.

Besides its relevance to the gravity of the provocation, the characteristic of ethnicity has another significant role to play in the law of provocation. This is the influence which ethnicity might have on the response pattern of an ordinary person while deprived of self-control. Unfortunately, the High Court in *Stingel* and *Masciantonio* overlooked this function.[64] Unlike the feature of capacity for self-control, a claim that members of a particular ethnic group tend to respond in a certain way to grave provocation does not have any racist undertones. There is no question of any higher or lower level of capacity for self-control, the only assertion being one of differences in responses, in the form and manner of acting out one's loss of self-control.[65]

Regrettably, the courts have only rarely recognised the response patterns of people belonging to particular ethnic groups when deprived of their self-control. As may be expected, the few occasions in Australia where this has occurred have involved Aboriginal defendants. In *R v Nelson*, the Northern Territory Supreme Court said that while the law of provocation was the same for everyone, the jury could take the view that an ordinary Aborigine might take longer to cool down after being provoked than would a non-Aborigine, and might react in a different way.[66] While the regaining of one's equilibrium involves the concept of power of self-control, it has to do with the response pattern feature rather than the capacity for self-control feature of that concept. This is because a person may have the same capacity for self-control as everyone else but, upon losing self-control, reacts differently by taking a longer time to cool down. This response may be regarded as the converse of slow-burning passion which, as we have already observed in relation to some battered women, describes a response pattern rather than the capacity for self-control. Another case which recognised the particular response patterns of Aborigines while deprived of self-control was *R v Muddarubba*.[67] The Northern Territory Supreme Court directed the jury to consider whether "the average member of the Pitjinjara tribe ... would have retaliated to the words

64 This includes McHugh J in *Masciantonio* as he was only concerned with the effect of ethnicity on the capacity for self-control.

65 Leader-Elliott, above n7 at 90 used the case of *R v Watson* [1987] 1 Qd R 440 to illustrate how taking ethnicity into consideration when assessing the capacity for self-control might promote racism. Provocation was not in issue in that case but the facts lend themselves well to our discussion. In *Watson*, the defence sought to admit expert evidence showing that male Palm Islanders did not regard disciplining their wives by stabbing and cutting them as "serious" violence. The court rightly condemned this submission as a racist slur. Applying my hypothesis to *Watson*, the expert evidence might be useful in informing the court about the practices of these male Islanders. The evidence would not be used to suggest that these men regarded the wounds as not serious.

66 Above n62 at 335 and noted in *Jabarula v Poore*, above n62 at 487.

67 Above n62.

and actions of the woman by spearing her".[68] Seen in the context and circumstances of people belonging to that tribe, spearing as a mode of retaliation would not be alien to the behaviour of an ordinary person. Without any account being taken of the defendant's ethnicity, a jury might construe that an ordinary person who chooses spearing as a method of killing would be in possession of self-control. Moreover, the jury might regard the spearing as a response pattern which is alien to any conception of normality and consequently undeserving of mitigation.

Looking further afield, the courts of New Zealand[69] and Western Samoa[70] have been prepared to assume that, unlike the case of Europeans, there is a tendency among Samoans "towards a slow build-up of passion".[71] It is also worthwhile mentioning the Privy Council case of *Kwaku Mensah v R*[72] because it was cited by the South Australian Full Court in *R v Webb* as authority for the proposition that "the ordinary man is apparently an ordinary man of the accused's 'ethnic derivation'".[73] That case concerned the interpretation of the particular section on provocation in the Gold Coast Criminal Code. The following passage appears in Lord Goddard's judgment:

> Then again, it can be said that as there had been a chase, and the dead man had fled to a house and was killed while he was escaping from the house, and was shot from behind, there must have been time for an ordinary person to have regained control of his passion. In their Lordships' opinion, however, the question whether in the circumstances the provocation was such as to deprive an ordinary person of self-control, and whether sufficient time had elapsed to enable control to be regained, are questions for the jury ... The tests have to be applied to the ordinary West African villager ...[74]

This passage clearly indicates that the Privy Council was prepared, as far as the law of provocation in the Gold Coast was concerned, to endow the ordinary person with the defendant's ethnicity for two purposes. The first was to assess the gravity of the provocation towards such a person and the second was to account for the particular response pattern displayed by the defendant.

The factual circumstances surrounding the killing in *Kwaku Mensah* bring to mind those circumstances in *Masciantonio*. In that case, the defendant was an Italian migrant who had been provoked by his son-in-law into attacking him with a knife. On one view of the evidence, the attack was conducted in two stages, separated by the intervention of bystanders who sought to prevent

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68 Id at 322.

69 *R v Tai* [1976] 1 NZLR 102. This case involved a Samoan who had killed another while residing in New Zealand. The Court attributed the defendant's ethnic derivation to the ordinary person after noting (at 106) that the population of New Zealand was "of markedly mixed racial origins with, especially a substantial Polynesian minority".

70 See Marsack, C, "Provocation in Trials of Murder" [1959] *Crim LR* 697.

71 Above n69 at 106.

72 [1946] AC 83. This same decision has been frequently relied on by the courts of Papua and New Guinea to justify a liberal interpretation of the objective test: see O'Regan, R, "Ordinary Men and Provocation in Papua and New Guinea" (1972) *Int'l and Comparative LQ* 551 at 552.

73 (1977) 16 SASR 309 at 314.

74 Above n72 at 93. The page of the case report in which this passage appears was expressly referred to by the South Australian court in *Webb*.

the defendant from effecting further violence on the deceased as he lay wounded on the ground.[75] While there are factual differences between the cases such as the type of weapon used and the capabilities of the victim to flee, there is a significant similarity. This was the longer time taken by the defendants in both cases to cool down after being provoked. The Privy Council in *Kwaku Mensah* was prepared to attribute this response pattern to the ethnic origin of the defendant but the High Court in *Masciantonio* failed altogether to consider the matter. This is not to assert in any conclusive way that Italians ordinarily take a longer time to regain their self-control compared to, say, people of Anglo-Saxon-Celtic heritage. Whether this is the case will require expert opinion evidence.[76] Such evidence should be more forthcoming than evidence on the capacity for self-control of a particular ethnic group since it pertains to the response patterns of people which are readily observable and demonstrable facts conducive to scientific study.[77] Reverting to the main point of discussion, what is contended here is that in *Masciantonio*, the possible influence of the defendant's ethnicity on the ordinary person's reaction to the provocation was not put forward by defence counsel nor was it considered by the courts through all the stages of the proceedings.[78]

Perhaps, it may turn out that there are very few ethnic groups residing in Australia whose response patterns to provocation differ so markedly from the mainstream population as to be deserving of legal attention in the way suggested. If this is the case, so be it. But so long as there is the possibility that these differences exist, it is incumbent upon the courts to take them into account when applying the objective test in the law of provocation. The reasons for this are well expressed in McHugh J's dissenting judgment in *Masciantonio*. Although he had given those reasons to explain his recognition of ethnicity in relation to the capacity for self-control, they are equally apposite to explain the need to recognise the possible influence of ethnicity on the response patterns of an ordinary person deprived of self-control. The relevant passage is worth setting down in full:

> [I]f it is objected that this will result in one law of provocation for one class of persons and another law for a different class, I would answer that that must be the natural consequence of true equality before the law in a multicultural society when the criterion of criminal liability is made to depend upon objective standards of personhood. Moreover, to a large extent a regime of different laws already exists because the personal characteristics of the accused including attributes of race and culture are already taken into account in determining the effect of the provocative conduct of the deceased on the

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75 This was the way the trial judge, the Victorian Court of Criminal Appeal and McHugh J (dissenting) in the High Court viewed the evidence. The majority of the High Court preferred to regard the attack as one continuous episode.

76 Unlike women's experiences which should arguably not require scientific objectification, the response patterns of particular ethnic groups may not be within the common knowledge and experience of most jurors. Hence, the need for expert evidence.

77 See Leader-Elliott's concerns that expert evidence on the capacity for self-control of a particular ethnic group is likely to be dubious. Above n7 at 89–90.

78 While McHugh J was prepared to recognise ethnicity as affecting the capacity for self-control, he did not consider whether it might also be relevant when assessing the response patterns expected of an ordinary person of the defendant's ethnic derivation.

ordinary person.[79] In any event, it would be much better to abolish the objective test of self-control in the law of provocation than to perpetuate the injustice of an "ordinary person" test that did not take into account the ethnic or cultural background of the accused.[80]

C. *Other Characteristics?*

It may be argued that other characteristics besides age, sex and ethnic origin should equally be permitted to influence the response patterns of the ordinary person. For example, it is conceivable that a normal person suffering from some physical disability such as blindness, being one-armed or hunchbacked might react in quite different ways compared to other normal persons when provoked.[81] It is certainly conceivable that the High Court might recognise these other characteristics since the Court has yet to pronounce on the response pattern feature of the concept of power of self-control. However, I would venture to suggest that policy grounds, dictated by the principle of equality before the law and the notion of universality of application, will rule against this happening. Unlike these other characteristics, those of age, sex and ethnicity are experienced by everyone. All of us undergo a stage of immaturity along the ageing process, we all undergo training and conditioning according to our sex and we are all influenced by our ethnic or cultural heritage. Accordingly, these characteristics but not others are universal to us all in the sense of "affecting us all", albeit in different ways.[82]

5. *Conclusion*

This article highlights the relevance of sex and ethnicity (and perhaps, age) to a feature of power of self-control hitherto overlooked by the High Court. While the court has paid careful attention to the feature of capacity for self-control, it has ignored the closely related but distinct feature of the response pattern of an ordinary person who is deprived of self-control. Presently, there are a few occasions when the lower courts have been prepared to recognise that response patterns may be greatly influenced by gender-specific circumstances and by ethnic and cultural influences. The number of these occasions would be increased considerably if the High Court were to formally identify the aspect of the law which governed these occasions, namely, the response pattern feature of power of self-control.

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79 By this, he was probably referring to the effect of ethnicity on the gravity of the provocation rather than on the response patterns of an ordinary person while deprived of self-control.

80 Above n4 at 607.

81 Again, the supposition here is that people with physical disabilities are expected to exercise the same capacity for self-control as the rest of the population. The query concerns the possibly different response patterns of such people when deprived of their self-control.

82 The *Macquarie Dictionary* (2nd edn, 1991) at 1859 defines "universal" in part as "applicable to many individuals or single cases; affecting, concerning, or involving all". The notion of universality was applied to this area of the law by Lord Simon in *Camplin*, above n32 at 180. It is preferable to the notion of being "common to us all" adopted by the High Court in *Stingel* (1990) 171 CLR 312 at 330 since age alone would strictly meet this description.

To adequately reflect the two features of the concept the High Court could consider reformulating the ordinary person test in the following terms:

> An ordinary person (with the exception of youths) is a person who possesses the capacity for self-control of an ordinary adult. The jury should consider whether such a person might have lost self-control as a result of the provocation in question and responded to the provocation in the same or similar way as the defendant did. When considering the response of the ordinary person, the jury should take into account the defendant's age, sex and ethnic origin.

Of course, the courts should not need to refer to these characteristics in each and every case. It is only when the particular characteristic may have influenced the response pattern of the ordinary person that the jury should be directed to take it into account. In such cases, a failure to direct and inform the jury on the possible influence of the characteristic may result in injustice to the defendant. The injustice is perpetrated should the jury decide that an ordinary person who had reacted in the same or similar way as the defendant did, would have retained rather than lost self-control, with the result that the defendant would be denied the defence.

The defence of provocation has been the subject of recent law reform proposals. The Victorian Law Reform Commission rightly criticised the present ordinary person test for "divert[ing] attention from the personal situation of the defendant".[83] This was borne out by our discussion showing that the present law pays insufficient attention to the characteristics of the defendant which have a bearing on the response patterns of an ordinary person experiencing lost self-control. The legal recognition of the defendant's sex and ethnicity when evaluating the response pattern feature of power of self-control should go a considerable way towards acknowledging the personal situation of the defendant. After all, it is only when these personalised response patterns are considered that context and coherence is given to the act of killing under provocation. Unfortunately, the Commission's proposed method of personalising the objective test is unsatisfactory on account of its vagueness. It recommended that a person suffering a loss of self-control as a result of provocation who intentionally kills another is not guilty of murder but guilty of manslaughter "if, in all the circumstances, including any of the defendant's personal characteristics, there is a sufficient reason to reduce the offence from murder to manslaughter".[84] It is immediately apparent that this formula provides very few clues to the jury which will guide their determination of whether to convict of murder or manslaughter.[85]

The English Criminal Law Revision Committee has proposed another method of reworking the objective test to take greater account of the defendant's personal characteristics. It recommended that the question for the jury to consider should be whether, on the facts as they appeared to the defendant, the provocation can reasonably be regarded as a sufficient ground for the loss of self-control leading the defendant to react against the victim with murderous intent.[86] The problem with this proposal is that it regards the murderous intent

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83 Victorian law Reform Commission, Report No 40, *Homicide* (1991) par189.

84 Id, par191.

85 See Leader-Elliott, above n7 at 96.

86 Criminal Law Revision Committee, Report No 14, *Offences Against the Person* (1980) pars81–2.

alone as determinative of whether or not a murder conviction should lie. The proposal rejects the form or manner which that intent took as being morally relevant. As we have seen, this is already the law in New South Wales. It is also akin to the majority's ruling in *Masciantonio* except that the judges in that case did not entirely disregard the manner of the defendant's reaction to the provocation.[87] It is submitted that response patterns to provocation should continue to form an integral part of the objective test in whatever form it might take. As Jeremy Horder has said in his seminal work *Provocation and Responsibility*,

> our actions ... are most certainly our responsibility, and are shaped by cultural and moral norms that bear on the manner as well as the degree of our (re)action. These norms form a natural and inevitable backdrop to the jury's decision as to whether a reasonable person might likewise have acted in anger, and reform which seeks to weaken their influence unacceptably debases the moral currency of the provocation defence.[88]

A better test would be to ask whether the provocation can reasonably be regarded as a sufficient ground for the loss of self-control leading the defendant to react against the victim with murderous intent *and to act in the way the defendant did.*

The following comment by McHugh J in *Masciantonio* sounds an appropriate concluding note to our discussion:

> To what extent, if any, and for how long would the ordinary person have lost self-control if he or she had been provoked in the circumstances that confronted the accused are key questions if society is "to maintain objective standards of behaviour for the protection of human life".[89]

The defence of provocation requires an objective appraisal of the response patterns of the defendant to provocative circumstances. This is necessary to ensure that those response patterns are the result of lost self-control and do not fall outside the bounds of behaviour which warrants societal compassion. The contention is that in conducting this appraisal, justice requires the sex and ethnic derivation of the defendant to be taken into consideration.

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87 See above pp308–10.
88 Horder, above n16 at 155.
89 Above n4 at 611 citing Gibbs J in *Johnson*, above n19 at 656.