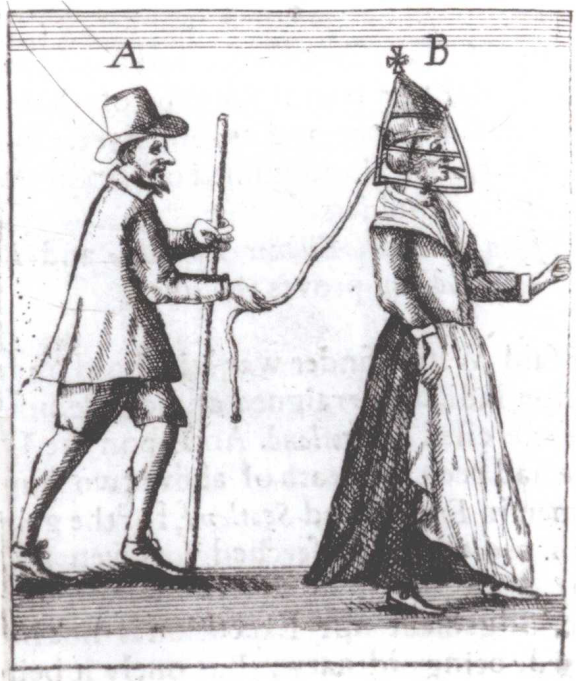
Sex, Culpability and the Defence of Provocation



Danielle Tyson

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Contents

Introduction: Murder and culpable subjects: the standard tale of a woman 'asking for it'

> Affectively speaking, I think that words can be much more harmful than actions. There's a sting in words, which no action can replicate.[1]

When undertaking court observation for my doctoral research, I witnessed the above exchange. The statement was delivered by Cummins J during legal argument in the absence of the jury in *Leonboyer*. Counsel for the defence had asked the judge to make a ruling that the partial defence of provocation be left for the jury on the ground that words allegedly spoken by the deceased *caused* the defendant, her fiancé, to feel insulted and *lose all self-control*. While under the influence of that loss of self-control, he inflicted at least 24 stab wounds to her head, back, groin and shoulder, thereby causing her death. The words allegedly spoken by the deceased were that she had been 'fucking' another man, which she followed with a taunt, in Spanish, about the defendant's lack of sexual prowess ('he did it better than you did').[2]

Cummins J was of the view that there were no authoritative cases that established mere words as a sufficient ground to raise the partial defence of provocation and therefore he did not intend to leave it as a matter for the jury (*Leonboyer* 1999: 1142). To register his disagreement, counsel for the defendant cited an Australian case from 1975 in which the presiding judge left the determination of whether provocation had occurred to the jury on

the ground of mere words. In that case the defendant claimed to have been wounded by the words spoken by his former spouse 'at a time when he was under a lot of stress', and those words caused him to lose all self-control and kill her. The alleged words were described as a 'final rejection' by the defendant's 'angry spouse' that took the form of 'a statement that he wasn't going to see the children' (*Leonboyer* 1999: 1146). As such, counsel for the defence sought to convince Cummins J that a confession by a woman of adultery accompanied by a taunt about a man's sexual prowess was sufficient to raise the partial defence of provocation.

A short while later, the prosecuting counsel also sought to clarify the question of whether there were any authoritative cases that established words alone as a sufficient ground to raise the defence of provocation (*Leonboyer* 1999: 1163). He then cited the leading case on the doctrine of provocation in Australia, that of *Moffa*,[3] which he understood to have affirmed the House of Lords decision in *Holmes v Director of Public Prosecutions* ([1946] AC 588) that 'a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter'.[4] He then submitted that 'the proposition that mere words cannot amount to provocation as a "be all and end all" proposition is no longer correct' (*Leonboyer* 1999: 1166). He added: 'it's a question of looking at the words in the context in which they are uttered' (*Leonboyer* 1999: 1166). It was at this point that the judge replied: 'Affectively speaking, I think that words can be much more harmful than actions. There's a sting in words, which no action can replicate' (*Leonboyer* 1999: 1168). On hearing this a number of those seated in the courtroom – the prosecuting counsel, counsel for the defendant, their respective solicitors, the judge's associate and even the tipstaff – leaned back in their chairs and nodded their heads as if in agreement.

This exchange highlights some of the themes that are explored in this book: the problem of law's masculinist bias related to the constitution of subjectivity, sexual difference and assessments of culpability in provocation cases. Specifically, this scene illustrates my understanding of legal reasoning and language as a social practice and discursive formation. Law, observes Goodrich, is a linguistic register or literary genre that can be described in terms of its privileging of legally recognised meanings (modes of inclusion) and simultaneous rejection of competing meanings (modes of exclusion) (1987: 1–3). From this, it follows that if murder 'is to exist for us', it must first 'be articulated' and like any and all events will already 'have been articulated in numerous contexts and in a variety of ways' (Young 1997: 129).[5] Attaching this (and not that) explanation for the event of the deceased's death and invoking the idiom 'there's a sting in words which no

action can replicate', demonstrates the ways in which a judge uses the linguistic device of metaphor. Literary tropes, such as metaphor, are employed in the process of judging because of their all-inclusive universal properties to explain social values and behaviours to various audience groups, ranging from the parties to a particular case, legal counsel, the jury, the appellate courts and the wider community.[6] I maintain that this process is not simply reducible to questions of style or adornment. Such treatments of language presume that: 'like law, [we can put our] faith in language as the instrument through which polyvalent signs can be reduced to a single truth and deliver both justice and narrative closure' (Aristodemou 2000: 106). On this view, the meaning of an event such as the killing of a woman by her intimate partner or ex-partner is assumed to be self-evident or to speak for itself, thus requiring no further justification; it is 'as if the statement of the case is a correct reflection and reproduction of the state of affairs in the world' (Philadelphoff-Puren and Rush 2003: 201).

Cummins J's resort to metaphor in the case observed – the idiom[7] that words have a sting – assists in the conveying of an idea, observation or opinion to the audience (legal counsel in the absence of the jury). When framed in this way, the idiom invoked by the judge appears as a relatively straightforward, commonsense observation about people's behaviour; that is, there is a limit to everyone's endurance and that everyone has a breaking point. When posed as commonsense knowledge, the phrase 'there is a sting in words which no action can replicate', simply appears to refer to a natural state of affairs in the world. Moreover, the person using the phrase does not need to claim responsibility for creating meaning because he or she is simply calling on pre-existing knowledge, which is assumed to be self-evidently true. Metaphor, writes Mills, 'conventionally works at the level of the phrase rather than at the level of words in isolation'. The use of metaphor enables a person to draw on a body of thought or background knowledge that might in fact skew the analysis or thinking of that particular object (Mills 1995: 136). Young has argued that '[r]easoning by analogy is unsurprising – it is, after all, the favoured mode of legal reasoning – but what has to be noted is the productive force that inheres in metaphor' (1996: 55).[8] In stating a similarity between two disparate things or domains (one context and another), 'analogies displace the invisible with the visible' (Young 1996: 55). Metaphor inscribes the event of murder with new meanings. Every deployment of the 'stinging speech' analogy repositions the victim as an illegitimate (active) subject rather than a legitimate victim and recasts the accused as the unwitting object of the speech act's insulting trajectory, compelled to restore his subjectivity by killing the verbal antagonist. As Dijkstra succinctly states: 'metaphors do the dirty work of

ideology. They telescope complex ideas into simple imagery and encourage us to see others not as person but as patterns' (1996: 311).[9]

On this analysis, the metaphor that words have a sting carries with it a whole host of associated meanings, a sedimented narrative history,[10] that 'begin in myth, legend and religion and continue in representations in film, art, pornography, poetry and popular and domestic fiction and through to traditional common-law legal categories' such as the defence of self-defence and partial defence of provocation (Threadgold 1997a: 229). Interrogation of these scripts provides some insights as to the fears and fantasies that dominate the cultural and legal imagination. Foremost of these is the long held assumption about the capacity of the female body to incite male violence, which is illustrated by the qualifier: *she asked for it.*

The idea that words can wound is well established (eg compare Matsuda et al 1993 with Butler 1997). In the context of the criminal law of provocation, the allegedly provocative behaviour, whether through words or conduct, is understood 'by the defendant and the judiciary as saying something about *who* the defendant is (a cuckold in adultery cases, for example)' (Rush 1997: 342). As Rush observes, both self-control and its loss, however, 'are mental states that, like *mens rea*, cannot be observed and thus only appear in law as legal fictions' (1997: 341). As Chief Justice Gleeson remarked in the Australian case of *Chhay*, the judiciary's resort to metaphor to describe the loss of self-control is not only 'necessary', but 'disconcerting' and seems 'calculated to confound, rather than assist analytical reasoning'.[11] What is often meant when an accused claims to have 'lost it' or that his mind suddenly 'snapped', 'went blank' or he 'blew a fuse', 'saw red' etc is in effect that he lost his mind. Other examples found in provocation cases include the metaphor 'the straw that broke the camel's back',[12] feeling 'wound up like a clock spring'[13] or that my 'eyes' went 'black'[14] or that my mind 'exploded'.[15]

This brings me to a key reason for this book: to challenge and subvert the all too familiar cultural commonplace:[16] the convention that when a woman responds to the performance of men, she is not so much speaking back but asking for it and hence deserving of what she gets. For too long this narrative, what I term throughout this book a narrative of insult and its gendered trope of 'she asked for it', has come to inform the repertoire of 'commonsense' understandings that judges use to interpret 'facts', justify their decisions, arrive at their conclusions and reproduce their 'hegemonic tales' (Ewick and Silbey 1995: 211–217). A detailed discussion regarding the debates leading up to the decision, in some jurisdictions, to abolish the controversial partial defence of provocation will follow in the next chapter. For present purposes, I provide some preliminary remarks to

give an indication as to the book's aims and concerns and where the discussion is headed.

The demise of provocation: a 'classic masculinist apology' for violent men[17]

The rule of law that provocation reduces the crime of murder to manslaughter has now been repealed in a number of jurisdictions: in the Australian states of Tasmania, Victoria and Western Australia (*Criminal Code Amendment (Abolition of Defence of Provocation) Act* 2003 (Tas), *Crimes (Homicide) Act* 2005 (Vic), *Criminal Law Amendment (Homicide) Act* 2008 (WA)), and also in New Zealand (*Crimes (Provocation Repeal) Amendment Bill* 2009 (NZ) (passed 26 November 2009). In these jurisdictions, provocation is to be considered along with other multiple aggravating or mitigating factors that a court must take into account when deciding an appropriate and proportionate sentence (Stewart and Freiberg 2008: 284). Its demise has also been contemplated in the Australian state of Queensland (Department of Justice and Attorney-General (DJAG) *Discussion Paper: Audit on Defences to Homicide: Accident and Provocation* 2007) and in England and Wales (Wells 2000: 85). The debates about whether to abolish the provocation defence in Queensland and England and Wales were constrained by their respective governments' intention to make no change to the existing penalty of mandatory life imprisonment for murder. Consequently, the *Criminal Code and Other Legislation Amendment Act* 2011 (Qld) was passed by the Queensland Government in 2011 and significantly revised the partial defence of provocation. In 2009 the *Coroners and Justice Act* 2009 (UK) replaced the provocation defence and implemented a new partial defence of loss of control. The partial defence of provocation still operates in one of the common law and four of the code jurisdictions in Australia. In South Australia, the qualified defence of provocation is governed by the common law.[18] In the Australian Capital Territory and New South Wales, there are statutory provisions governing the defence (*Crimes Act* 1900 (ACT) s 13; *Crimes Act* 1900 (NSW) s 23), and in the Northern Territory and Queensland (*Criminal Code Act* (NT), *Criminal Code* 1899 (Qld)), both of which carry a mandatory sentence of life imprisonment for murder.

In those jurisdictions in which it can still be raised it applies to situations where the accused 'understandably' loses self-control owing to the behaviour of the deceased. Broadly speaking, for the provocation defence to succeed, there are several elements that must be satisfied. The deceased must have said something and/or acted in a way that was provocative. The accused

must have lost self-control as a result of the provocation and killed the deceased while experiencing that loss of self-control. Overriding both of these legal requirements is the further demand that the accused must have acted as a hypothetical 'ordinary' person would have acted.[19] What runs through each of the requirements of the formal legal definition is a construction and representation of what the deceased said and/or did and the effect of those words and/or behaviour on the accused. For some decades now, feminist scholars in almost all jurisdictions have expressed a sense of injustice with the way the partial defence of provocation has been too restrictive for women defendants who kill their violent abusers, but in cases involving men who kill their current or former female partners, they have been able to use it with relative ease. Some of the most scathing criticisms of the provocation defence have been in regard to how such cases operate to construct the female victim as partially to blame for, and hence deserving of, her own death. This was outlined by the National Association of Women and the Law (Côté et al) in a report submitted to the Federal Department of Justice Canada, entitled *Stop Excusing Violence Against Women*:

> By placing the focus on the victim's behaviour, the law capitalizes on historic judeo-christian (sic) ideologies that blame women for the evils of mankind, and that immunize men from responsibility for their behaviour. The plausibility of the provocation hypothesis in spousal femicide cases rests on sexist assumptions about female maliciousness and male vulnerability. It excludes the real context and dynamic of male domination and patriarchal violence.
>
> (2000: 21–22)

A key aim of these criticisms of provocation has been to find ways of challenging and subverting what this book argues is the most vexing exculpatory 'narrative of excuse' for men's murderous anger and rage against women. Numerous problematic cultural assumptions about masculinity and femininity underscore this narrative: one is an understanding that male violence is an expected and therefore 'normal' characteristic of masculinity and the other is the degree of blameworthiness that attaches to the woman victim depends on her performance of appropriate femininity (Edwards 1987: 158–61; Bandalli 1995: 401–402; Morgan 1997: 238; Howe 1999: 131, 2002: 41). In an effort to expose and unsettle the truth-claiming function of this exculpatory narrative, many feminist scholars have turned to legal storytelling, which is now a well established strategy of critique (Graycar and Morgan 2002: 66, 56–81).