

The Death of a Defence: Reflections on provocation's afterlife

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Abstract

*This paper offers a critical legal method of reading the forms of argument used in provocation cases to address the question of what is at stake in the quest for context to resolve doctrinal problems in law. In research conducted for my PhD research, I argued that the formulaic structure in legal narrations of gendered subjectivity in provocation cases resembles much of the current elaboration of the relationship between 'masculinity/ies' and 'crime'. This means that the two discourses of law and criminology share a common structure. By way of extending these insights, in this paper I make the claim that similar tropes of subjectivity underscored a recent book by Karen Kissane who was assigned by editors of *The Age* to do a follow up article about the controversial decision reached in the Ramage case. What is noteworthy about this text is its claim to have 'discovered' an alternative to law's 'truth', one that lies beyond the (legal) frame of the event. Yet, as Culler reminds us, framing is something we all do it hints of the 'frame up' (1988, p. ix). This insight has implications for a feminist legal strategy modelled on a treatment of context as reflecting, rather than producing, a given state of affairs. Better viewed as an act of framing, a context is not given, but produced, and is just as much in need of elucidation as are events. I conclude by asking whether a critical legal strategy of rereading might be one capable of saving the text – and the contemporary juridical narrative of insult – from repetition across discursive sites. This involves imagining an audience that although inscribed and acted upon, starts reading (and seeing) otherwise. As Barthes reminds us, 'those who fail to reread are obliged to read the same story everywhere' (cited in Felman 1981, p. 19).*

Rereading, an operation contrary to the commercial and ideological habits of our society, which would have us "throw away" the story once it has been consumed ... so that we can then move on to another story, buy another book ..., rereading is here suggested at the outset, for it alone saves the text from repetition (those who fail to reread are obliged to read the same story everywhere (Barthes cited in Felman 1981, p. 19).

Introduction

In November 2005 the Victorian Government reformed the criminal law through the *Crimes (Homicide) Act 2005* (Office of the Attorney-General, Media Release, 04/10/05). This Act gave force to the Victorian Government's decision to adopt two key legislative recommendations of the Victorian Law Reform Commission's *Defences to Homicide: Final Report* (VLRC 2004, p. xlv). Firstly, the use of the

controversial defence of provocation in cases of homicide was abolished (s. 3B *Crimes Act 1958*). Secondly, a new offence of ‘defensive homicide’ was introduced (s. 9AG *Crimes Act 1958*).ⁱ This major reform to homicide law forms part of a broader package of changes to the *Crimes Act 1958*ⁱⁱ that promises to ‘tackle entrenched gender-bias’ within the law. As a result of the changes to the criminal law, evidence of a loss of self-control and of the alleged provocative behaviour of the deceased may be taken into account by a judge in pleas of mitigation of sentence.

Both of these major reforms to the law of homicide have been driven by a feminist legal discourse focused almost exclusively on ensuring that the narratives of ‘the battered woman’ are seen and aired in court. Such narrative efforts have been crucial to a feminist legal strategy of making the courts more responsive to, and reflective of, women’s lives. But this desire to privilege different forms of knowledge in legal (and also feminist) reasoning rests on an assumption that the law (and law reformers) can control the contexts in which their texts take on meaning. As emphasised by Philadelphoff-Puren and Rush in a reference to Derrida, ‘there is no sign or writing without context and as soon as there is context, the sign is recontextualised’ (2003, p. 195). It is writing that constitutes the passage from the dead body to the verdict, from verdict to sentence; the predicament of judgment is that it writes (Philadelphoff-Puren and Rush 2003, pp. 195-197, 202).

The moment of homicide law reform calls these issues again into question. With this in mind, my focus in this paper is on a recent text written by Melbourne journalist, Karen Kissane. *Silent Death: The Killing of Julie Ramage*, published by Hodder in May 2006, is an important work because it is an attempt to rewrite the dead body of a woman; in this instance, the dead body of Julie Ramage. Her book flows from similar concerns articulated in media reports following the decision taken in the case that went far beyond the merely personal, taking on a more overtly critical form. For example, the words in one headline read, ‘Women are angry’ (Stewart 2004, p. 10), the words in another demanded, ‘Call it what it was: domestic homicide’ (Alexander 2004, p. 10), while another declared, ‘It’s time women had a better deal from the law’ (Crooks 2004, p. 17).

It is noteworthy that the editors of *The Herald Sun* made a decision to publish an image of Justitia holding the scales of justice at a skewed angle with words in the accompanying headline that read: ‘Jammed scales and a blunt sword’ (2004, p. 32). In another section of the same paper was written the words in the headline, ‘Sister Slams Verdict: Provocation Laws Reviewed’ (Packham & Ross 2004, p. 16). Pictured is Jane Ashton, Julie’s twin sister, approaching the camera as she emerged from the courtroom following the jury’s announcement of a verdict of not guilty of murder, but guilty of the lesser crime of manslaughter. Below this photo of Jane Ashton are the words, ‘Angry: Jane Ashton defends her dead sister’. What is conveyed to the viewer by this simple text is achieved not only through the use of the words. Jane is shot looking directly at the camera. Her eyes lock ours and those of the viewer in a look Aristodemou describes as having a disruptive quality that signifies a moment of control and power (2000, p. 78). This text, needs to be read, I suggest, as a ‘theatrical performance’, not one in which we can imagine a passive, stolidly indifferent audience as Aristodemou explains, but one that has the capacity to act as an agent and producer of new readings and meanings (2000, p. 80). A stark illustration Aristodemou gives of the power of the audience’s ability to start seeing

otherwise is ‘a performance of the *Oresteia* which did not end when the director thought it would, but when the women members of the audience got up from their seats and untied the ropes that had been used to restrain the Furies’ (2000, p. 80; see also Adams 2004, p. 1; Kissane & Gregory 2004, p. 1; Sweres, 2004 p. 16).

As a book about law’s socially harmful effects, that also claims to (re)present the ‘truth’ of this homicide situation, I would argue it ultimately fails. This is due to the unintended effects of ‘truth’ produced by key tropes of subjectivity that are mobilised by the author and that ironically also underscore the contemporary juridical ‘narrative of insult’ used by an accused and their lawyer to argue for a reduction in culpability for murder. The aim of my discussion of this text aims to address the question, what is at stake in the quest for context as a strategy of law reform?ⁱⁱⁱ When content is read as a text, the simplistic opposition between an act and its cause, its context, breaks down as such treatments presume context is given and determines the meaning of the act. Better viewed as an act of framing, a context is not so fundamentally different from what it contextualises; it is not given, but produced and is in need of just as much elucidation as are events (Culler, 1988, p. ix).

A Critical Legal Method of Reading ‘Context’ as a Text: The Discursive Effects of the Use of a ‘Narrative of Insult’ in Provocation Cases

The doctrine of the defence of provocation has a long history of criticism and my aim is not to repeat this literature here. Rather, my point is to emphasise a standard story that is mobilised in such cases, based on a construction of what the deceased said and did; conduct that is mobilised as a ‘narrative of insult’ against the defendant. In summary terms, the narrative is: ‘woman addresses man, man feels insulted, man kills woman, man feels justified, law says man excused’. What drives the narrative to its inevitable conclusion is due to a very limited set of plots in which feminine excess drives wounded males to restore their masculinity by killing their verbal antagonist. These various and specific plots, the ‘romance-gone-wrong’, the ‘love-hate relationship’ and the ‘love-triangle’, provide the organising frame through which relationship evidence, evidence of an accused’s past history or culture of origin acquires legal significance. Plot, a key element of narrative, is a device that problematically permits a cultural habit of reading and of writing murder as falling within the frame of lesser intents (which is manslaughter rather than murder).

What gives form and force to one version of events rather than another depends on the mobilisation of metaphor, which as Young emphasises, can dictate the whole organisation of a discourse; ‘the material and psychic organisation of its symbolic order’ (1992, p. 44). Provocation cases are replete with various and specific tropes of subjectivity that are used to indicate that a killing occurred as a result of a sudden loss of control or build up of anger or frustration on the part of an accused (as most defendants claim). Think of the claim ‘I lost it’, ‘I snapped’, ‘I blew a fuse’, ‘my mind went blank’ or ‘black’, ‘I saw red’ etcetera. But the truth effects of tropes of masculine loss are not produced in a vacuum. When mobilised in conjunction with a strategy of questioning witnesses about their perception of the deceased’s speech and behaviour, the general attribute of talkativeness enables an inference to be made about the hypersexuality of the deceased, or the deceased’s capacity for violence. There are thus two figures that form the structure of the narrative, that correspond to two speaking positions that organise the relation between the subject and object of the

narrative. The discursive effect of this binary logic is that (feminine) excess (a certain style or manner of speaking, expressing desire or display of aggression) is understood to *cause* (masculine) loss (of autonomy, proprietary and manliness). The ‘narrative of insult’ is thus marked by an ideology and imperative of sexual difference. In order to counter a range of dominant and socially harmful effects of this narrative, we need a model of law reform capable of accounting for criminal law as a system of writing, that literature forms part of law’s genre, which traditional legal analyses repress or deny (Douzinas and Nead 1999, p. 10; Goodrich 1987, p. 6).^{iv} As Frow offers, texts are performances that take place in a field or economy of genres (Frow 2005, p. 2). What is missing from much of the reform-oriented feminist and legal commentary about homicide law reform, which has been driven by a quest for context, is an account of the precarious nature of textuality, that like texts, contexts travel with predetermined meaning, forms of character, genre and discourse already attached (Philadelphoff-Puren and Rush 2003, p. 196).

The Quest for Context: Looking Beyond Legal Categories to Women’s Lives

Addressing the issue of how women defendants are treated by the legal system in certain homicide situations has led to a range of suggested reforms in Australia and overseas informed by a legal feminist discourse. These reforms focus almost exclusively on ‘battered women’s’ experiences of and reactions to abuse. There is little doubt that such narrative efforts, based on ensuring that the experiences of violence suffered by ‘battered women’ who kill their abusive partners are seen and aired in court, have fast become part of the vocabulary with which domestic violence and the women who kill as a result of it are talked about. Celia Wells laments that it has increasingly become more common to note a number of unintended ‘essentializing and syndromizing’ effects of this discourse (2000, p. 91). The limited success of relying on the visualising force of narrative description to alter and posit alternatives to law’s claims to ‘truth’, testifies to the difficulty that law reformers face when seeking to untangle the conundrum such narratives pose.

Clearly, there are implications then for an approach to law reform oriented toward ‘social context’, rather than the taken-for-granted legal categories traditionally used to respond to those subject to the law of homicide (2002, p. 1).^v Much of the recent debate that preceded the recently implemented legislative changes to Victorian homicide law focussed on the need for the use of expert evidence of context as a strategy to make the law more responsive to, and reflective of, women’s lives (eg. Graycar 2005, p. 67). The introduction of ‘evidence of context’ or ‘social framework evidence’, into a trial is a strategy to better inform judges’ and juries’ understandings of how on-going violence by an intimate partner affects women’s lives in distinctly patterned ways (Stubbs & Tolmie 1999; Schuller, Wells, & Rzepa 2004). That it has been regularly used in North America to improve prosecutions of sexual offences (eg. Monahan & Walker 1988; Murphy 1992), but has had less success in the U.K. (Raitt 2004, p. 234) means that it has been in dispute for some years.

Despite this, in the texts that claim to represent this homicide situation, the context that is cited appeals to those ‘statements of fact’ in sociological studies of gendered violence. The narrative of (domestic) violence against women in Australia and elsewhere is a story of men beating, raping and emotionally abusing their wives, de-facto, current and former partners. Where the violence is homicide, the victim is a

women who kills as a response to a history of abuse perpetrated against her by her male partner, the methods used are often a knife or a gun, the location is most often the victim's or accused's premises, and a large percentage of these women are from lower socio-economic groups (eg. Naylor 1993). It is the story of a woman who often uses force to defend herself from a threat that is imminent but not immediate. It is a story that speaks of a reality that is gendered. Such treatments of context 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, p. 106). What is at stake has to do with the presumption that the meaning of events speak for themselves, thus require no further justification, as Philadelphoff-Puren and Rush have warned, 'as if the statement of the case is a correct reflection and reproduction of the state of affairs in the world – as if it was possible to find facts and not write them' (2003, p. 201).

The promise that through 'a return to those contexts' feminist theorists can better 'inform the way we think about how law operates, and ... law reform' (Morgan 2002, p. 45) is, I believe, destined to be limited given that such treatments assume (like law) that we can control the contexts in which our texts take on meaning. As Philadelphoff-Puren and Rush have specified, 'the narrative and performative qualities do not pertain only to those statements of fact invoked by legal judgements. They also operate in all disciplines which fetishise facts as their proper and sole object' (2003, pp. 201-2). With this in mind I want to now focus on a recent text by Karen Kissane, called *Silent Death: The Killing of Julie Ramage*.

'Silent Death: The Killing of Julie Ramage': The Quest for an Alternative 'Truth' that Lies Beyond the 'Snapshot' of the Legal Evidentiary Frame

To set the scene, on 28th October, 2004 a Victorian Supreme Court jury found James Ramage not guilty of the murder of his wife, Julie, from whom he had separated five weeks earlier, but guilty of the lesser crime of manslaughter. The jury accepted Ramage's version of events that he killed Julie after she allegedly made a number of comments about their marriage which included an alleged expression of disgust about how sex with him repulsed her. The body of Julie Ramage was retrieved from a shallow grave on a property in Kinglake on 21st July, 2003 some hours after James Ramage turned himself in to police. Ramage was sentenced on 9th December, 2004 to 11 years imprisonment for the manslaughter of Julie with a non-parole period of 8 years.^{vi}

The reaction to the *Ramage* case, by friends and family of the accused and deceased, institutions such as the media and state governments, legal and academic commentators, and the public more generally, is noteworthy. Not since the news reached the legal and academic community that Heather Osland's application for leave to appeal against her conviction and sentence for the murder of her abusive husband, Frank, was rejected by the Australian High Court in 1998, has a criminal trial attracted such nation-wide interest.^{vii} Even the more recent decision by a Victorian Supreme Court jury in March, 2006 in what came to be known as the 'sniper woman' (or 'sniper's nest') case, to acquit Claire Margaret MacDonald of the murder of her abusive husband, Warren, at the couple's Acheron property on September 30, 2004, received moderate as opposed to high interest by the press.^{viii} Although it is the second book on the topic of the Ramage case, it differs from Phil

Cleary's book, *Getting Away With Murder: The True Story of Julie Ramage* (published in 2005) in a number of significant respects.

In *Silent Death*, Kissane turns her attention to issues of crime, men and women, guilt, justice and the criminal justice system. The blurb on the back cover describes how:

[j]ulie and Jamie Ramage were the classic middle-class Australian couple. They appeared to have it all: good looks, a nice home and children in private schools. But Julie walked out of their seemingly perfect marriage. And then Jamie killed her.

Kissane's book promises to reveal the story 'behind the controversial trial' by walking 'us through the front door of the Ramage home and into a relationship marked by affairs, obsession and a history of violence'. It is offered as a probing and frank account of the 'actual' history of the relationship between these two people in the sense that it is a response to, and critique of, the role of 'evidence of context' in legal reasoning.

As indicated by a published extract of the book that appeared in *The Age* upon its release with the words in the headline, 'Relationship Abuse: What the jurors didn't know' (2006, p. 6), Kissane's book, *Silent Death*, is a metaphor for how women like jury are 'silenced' a second time by the criminal trial. In Part Three of the book, under the title '*Justice?*', are numerous sub-headings which read, 'Trial Without Jury', 'The Edited Marriage', 'Final Words', 'The Judge's Cut' and so on (Kissane 2006, p. 85). The play on words is significant. Here Kissane is drawing an analogy with the directorial talents of the trial judge. This is achieved through the use of a metaphor of visibility as literal transparency *as if* legal reasoning is analogous to decisions made by the editors of a reel of film to privilege only those shots that achieve the desired aesthetic affect and to manipulate the mise-en-scene. Throughout the book, Kissane invites the reader to agree that had more 'pieces' of evidence been admitted into the trial, the 'truth' about what happened to Julie would have been revealed to the jury. The device that underscores the assumption that knowledge is gained through vision – that seeing and hearing more (evidence) in court would have given the jury a direct, unmediated apprehension of the world in which James and Julie lived – abounds not only in media discourse, but also in much of the feminist legal commentary about homicide law reform.

In the opening pages to the book we are told that what is written is 'Julie's story'. Kissane submits that this is the story of a middle-class woman, killed in a leafy Balwyn suburb one Monday morning, one that exposes 'the brittleness of the middle-class veneer and the subtle viciousness of another kind of silent death: the abusive marriage' (2006, p. 7). In an extract in Part Two (called '*Julie and Jamie*') is a sub-heading which reads 'Young Love'. Reflecting on some childhood photos taken of Julie and her sister Jane that were displayed at the family home, Kissane muses how:

[t]here is a wistfulness to childhood happy snaps in a family that has suffered a tragedy. They are reminders of a lost innocence, of a time when this family trusted in life's beneficence in a way they no longer can after a savage twist of fate (2006, p. 11).

The literary concept of fate is again mobilised in a comment about Julie and Jane's relationship.^{ix} She concedes that although, 'there were differences between them':

the truly fateful differences ... were not so visible to outsiders ... when ... [Julie] ... fell in love, she fell hard, and she was attracted to strong men. Many teenage girls naturally outgrow Mills and Boon syndrome, the romantic fantasy of the strong laconic lantern jawed hero who will protect and cherish them. That was not to happen for Julie Garrett. She would soon foreclose on her future (Kissane 2006 p. 12).

Embroided in this comment on the history of the relationship between James and Julie Ramage is the use of the literary concept of fate that comes from the genre of romance, with its chivalrous code. Again, the theme of fatalism emerges in a comment about a photograph of Julie and James taken early on in the marriage in which Julie is looking up at James, in which Kissane laments, Julie's 'affection [for Jamie] was to cost her dearly ... at eighteen, Julie Ramage had made her bed' (2006, p. 14). Later, in a section called, 'The Edited Marriage', Kissane describes an exchange between defence counsel, Phillip Dunn, and the trial judge, Osborne J, in the absence of the jury during which Dunn sought permission from him to lead evidence of Julie's sexual history, what is described as 'the topic of her [Julie's] "two lovers"' (2006, p. 76). On this occasion Osborn J refuses. Kissane then describes how this prompted prosecuting counsel, Julian Leckie, to 'interject' and it went 'no further'. She then explains for the benefit of the reader that the damage had been done, for:

Dunn has managed to let the judge know that Julie might have had affairs other than those mentioned in evidence, and that Jamie has claimed she hurled news of them at him in that *last fatal exchange* (my emphasis, Kissane 2006, p. 76; see also Gregory 2004, p. 8).

A more specific example can be found under another heading 'Sex v Death' in the same part of the book. Here, Kissane writes about the decision by the trial judge to rule evidence of Julie's sexual history as admissible.^x Kissane recounts how the prosecuting counsel, Julian Leckie, 'ask[ed] Osborn, in the juror's absence, whether the judge could tell the jury not to make a moral judgement about the sexual evidence' (2006, p. 156). Osborn J refuses to do so on the grounds that he is 'charged with the duty to ensure that the accused man gets a fair trial' (2006, p. 156). Kissane describes how:

Leckie is tenacious. He is like a knight at a joust, charging with a lady's colours tied to his lance. He argues that there is a huge prejudice in the way the evidence is being used and that it will distract the jury from the true issues. Osborn refuses him. The jurors are entitled to see this part of the relationship evidence and make their own call. The lady's champion has been unseated (2006, p. 157).

This strategic use of a genre; in this instance, the genre of romance, with its chivalrous code, is no doubt intended as a form of rewriting the dead body of a woman. Here, Leckie is imagined as defending Julie's honour and reputation. Kissane's book is noteworthy because it was inspired by a collective of 'savvy' and 'articulate' women, friends of the late Julie Ramage, women Kissane describes as '[p]eople like us' (2006, p. 57). Kissane recalls how Julie's twin sister, Jane Ashton, and '30 or so' of Julie's friends who 'knew how to work the system and who had no intention of allowing the courts or the media to be in ignorance of how they saw the

justice of the case' (2006, p. 56) and made a decision prior to the committal to maintain a presence at the trial. Yet, the position from which Kissane imagines these women (and also Leckie) to speak is the one usually occupied by an affronted (wounded) man, and lends their words legitimacy. Ironically, it is due to the truth effects of a genre that the legal discourse of provocation ends up reproduced.

In an interview with Richard Aedy for Radio National's LifeMatters program broadcast upon the book's release, Kissane was asked to explain for the listeners, 'What happened to this women, What happened to Julie Ramage?' Kissane offered the following version of events:

She left her husband after 23 yrs of marriage. Set herself up in a little townhouse. He had enormous difficulty coping with this. He was quite an obsessive, controlling man. He pursued her quite fiercely in the subsequent weeks, he wrote her letters, he sent her flowers, he wanted to have dinner with her frequently, he contacted all of her friends and most members of her family and asked them to intervene with him, he could not let her go. And then she went around and she saw him in the family home, alone with him one Monday morning, where he'd invited her to lunch to look at the renovations of the kitchen and they had a terrible row and he lost his temper, he knocked her to the ground and then he strangled her. *And this is quite frequent in domestic killings that just a red haze descends and they lose all control* but the unusual thing in this case was he then didn't call the police, he didn't call an ambulance to see if she could be revived. He put her in the boot of his lovely jaguar and drove her an hour up into the country and then he buried her in a bush grave (my emphasis).

Here, Kissane uncritically recycles a key trope of the contemporary juridical narrative of insult mobilised by an accused and their lawyer to argue for a reduction in culpability. The trope of a mind clouded by 'a red haze' permits yet another reading of Ramage's act of force against his former female partner as falling within the frame of lesser intents.

Kissane's book lays claim to significance on the basis that it offers another reading of the *Ramage* case. We are told that this was no ordinary 'domestic homicide'. This was an honour killing committed *in our backyard!*^{xi} This was *the* case that inspired legal change. As a work that seeks to reposition women as legitimate subjects of the legal system, by telling the story of how the acts of ordinary, privileged, Anglo men like Jamie are synonymous with those of men who lack the normal avenues through which to achieve their masculinity, and that drive such men to commit an act violence against the perceived perpetrator of the insult (be it society or a woman who has rejected them), Kissane's text, I argue, ultimately fails. Having reinscribed Julie's dead body through the shadow of the legal speaking subject, Kissane's book promotes rather than subverts the cultural habit of reading and writing the event of homicide between intimate partners as the inevitable culmination of a 'romance-gone-wrong'.

Conclusion: Reflections on Provocation's Afterlife

In a recent editorial of the *Criminal Law Journal*, the author describes Karen Kissane's feature article with the words in the headline, 'Honour killing in the Suburbs' (Coss 2004, pp. 4-5) as one that deserves to be read. He submits, it is 'a most moving account of the Ramage saga ... [one] clearly penned with passion (Coss

2005, p. 136). Like that of Kissane, the author's objection to the case has to do with the effects and privileging of certain forms of knowledge in legal reasoning that can all too often disproportionately effect the outcome of the case. He too muses, whether the failure to include different forms of knowledge prevented the jury from seeing '[t]he whole picture'. His response perplexingly echoes that of Kissane when he recites that '[t]he jury [wa]s only given some of the jigsaw pieces. And they [did] not even know what proportion of the pieces they ha[d]' (Kissane cited in Coss 2005, p. 136). Herein lies the promise: there is another 'reality' to be known, a reality that is accessible to the one who knows where to look, whose unique vantage point is outside the discourse in question, and whose practice of knowledge production, whose *writing*, is presumably free from bias or manipulation. One only has to *look* for more pieces of the puzzle and the jury would have heard the whole story and responded accordingly.

A similar device can be found to underscore another recent article on provocation law reform in which the author remains critical of the way the criminal law deals with assigning criminal responsibility where an accused wishes to raise evidence of a particular mental state, be it anger, 'dissociation' causing involuntary behaviour or mental impairment (McSherry 2005, p. 15-16). Here, the problem is articulated as due to the way the criminal law requires mental health professionals to adopt a 'snapshot' approach when identifying the accused's mental state at the time a person was killed. Recycling a metaphor of visibility used by another author (Kelman, cited in McSherry 2005, p. 15), the author issues a comment about how the timeframe used by criminal law to assign criminal responsibility is a very short one: 'it is that of a photo rather than a video' (2005, p. 15). I strongly agree that there is merit in a feminist legal strategy that questions whether the context of a 'breakdown of relationship' should ever be a sufficient ground to raise one or other of the criminal defences to homicide and permit an accused to be acquitted of murder or found guilty of manslaughter. My question is will such a strategy ultimately save the text (and the contemporary juridical narrative of insult) from repetition across discursive sites? Until such time as law reformers are prepared to come to terms with the predicament of judgement, which is that it writes, provocation's afterlife will not be confined to the sentencing stage. Rather, similar narratives of the facts – s/he asked for it – will continue to raise different questions of legal doctrine while at the same time as articulate difference according to the values of law.

As Culler has warned, there is the 'danger of an incipient positivism in such treatments that presume context to *reflect* (rather than *produce*) a given state of affairs' (1988, p. ix, my emphasis). His expression *framing the sign* has several advantages over *context*; it points to the act of framing (which hints of the 'frame-up') as something that we all do. The question remains, what might a strategy of law reform that saves the legal text – and the contemporary juridical narrative of insult – from repetition across discursive sites look like? For Golder, it involves reimagining our metaphors of the body, a poetics of law reform modelled on reading the narratives of the what has come to be known as the 'homosexual advance' defence to address the particular inscriptions of the male heterosexual body in legal discourse (2004b, p. 68; 2004a). Writing in relation to sexual offences, for Philadelphoff-Puren a pragmatic and critical legal strategy could involve legislation to ensure that evidence about the hymen is accompanied by a judicial direction about its complex nature and its unreliability as evidence (2004, p. 50). My own position can be placed in this

contemporary revision of legal discourse. What I have offered here is a model of reading the legal text to stress what is at stake in the quest for 'social context' as a strategy to alter law's claims to 'truth' by way of a critique of a popular but nevertheless noteworthy illustration of this claim. In making an assumption that it is possible to access an unmediated 'reality' by looking outside / beyond the legal frame is to presume we can find 'facts' and not write them. At the very least, such a feminist legal strategy ought to involve an account of the aesthetics of the legal text and its reception, and imagining an audience that although inscribed and acted upon, starts reading (seeing and writing) otherwise. For as Barthes reminds us, 'those who fail to reread are obliged to read the same story everywhere' (cited in Felman 1981, p. 19).

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¹ This new offence arises from the VLRC's recommendation to reintroduce excessive self-defence (2004, p. xlvi-xlvii) and is an alternative verdict for a person on charge for murder, which carries a maximum penalty of 20 years. The Government's decision to create a new offence of 'defensive homicide' is the result of a long history of feminist's engagements with law and legal reform processes with a view to making the law more responsive to the situations in which women experience family violence (for an detailed overview of this literature, see: Graycar & Morgan 1990; 2005). As an alternative to the defence of self-defence, which in the past has been used rarely and when it has, has been rarely successful, the offence of defensive homicide aims to take account of the situation in which a person, usually a woman, kills her intimate partner and who claims she did so as a result of a past

history of abuse perpetrated against her by the deceased. This means that evidence of a past history of abuse, sometimes referred to as ‘evidence of context’ or ‘social framework evidence’, may be introduced into a criminal trial to better explain to judges and juries how such a person reacts in ‘non-confrontational’ situations (where the threat was not immediate) in distinctly patterned ways (VLRC 2004, pp. 172-87).

ⁱⁱ These changes include the codification of the defence of self-defence (s. 9AC *Crimes Act 1958*) and manslaughter (s. 9AE); the codification of the defence of duress (s. 9AG); the defence of sudden or extraordinary emergency was created (s. 9AI); statutory recognition was given to the relevance of family violence (s. 9AH); and provisions were introduced partially to codify the law with respect to intoxication (see Phillip Priest Q.C. ‘Defences to Homicide’ which can be found at <http://www.vicbar.com.au/webdata/-CLEFiles/Defences%20to%20Homicide.pdf> last accessed 5 May, 2006).

ⁱⁱⁱ In a recent article, Davies and Mack make the point that while feminist theorists like Carol Smart are skeptical of how all too often the ‘resort to law’ reinforces its power, this is not to advocate ignoring or rejecting law altogether. Rather, as Smart suggests, it is about finding ways to co-opt ‘its power to define ... and tell the ‘truth’. Given that law is not the only discourse that makes claims to ‘truth’, searching for other discourses to tell counter ‘truths’ can be effective in altering, challenging and ultimately subverting legal discourse (2004, p. 3).

^{iv} That the formulaic structure in legal narrations of gendered subjectivity in provocation cases resembles current elaborations of the link between ‘masculinity’ and ‘crime’, means that the two discourses of law and criminology share a common structure. I am referring to the idea that key tropes of masculine loss underscore much of the current literature on men’s predisposition for violence that makes a link between the masculinity of men and crime. Here, the narrative operates to position wounded men as defending themselves against the threat of feeling feminised (that is, being named as like a woman). Violence is accepted as restorative of masculinity – his voice, autonomy, proprietary, for example. Think of the popular return of the fist fight as a contemporary response to masculine ‘crisis’, a theme featured in a number of recent films (such as *Fight Club*).

A brief example drawn from the criminological literature can be found in Jefferson’s psycho-social approach to the study of the relationship between ‘masculinity/ies’ and ‘crime’, in which he makes use of the ‘narrative interview method’ to make explicit the ‘psychic’ (read ‘unconscious’, ‘emotional’) dimension of men’s lives without losing sight of the ‘social’ (2000; 2002). Of concern is Jefferson’s reading of Tyson’s unconscious desire to rape a young female acquaintance, a crime for which Tyson was convicted and imprisoned for 10 years in 1992 (1997), which he sees are causally linked to Tyson’s early ‘feelings of vulnerability and powerlessness’, and which had, according to Jefferson, become insurmountable (1996, p. 158). That key tropes of masculine loss can be found to underscore the author’s own narrative raises the question, whether and to what extent, it is the narrative that ‘discovers’ the cause of a man’s use of force (against men in the boxing ring and later a woman) as the result of a past history of masculine ‘crisis’.

I suggest that what evokes such (wounded) men into narrative possibility is enabled by the situation of address that comes from (and governs) the genre of romance, and its chivalrous code. The context that is cited can be traced to the historiography of the duel, which has problematically become the privileged locus and exemplar of masculinity ‘culture’. I am drawing on Frow’s description of genre as more than simply a stylistic device; genre is a core process of textuality that generates effects of truth and authority (Frow 2005, p. 2). Genres are how textual relations between senders and receivers of messages (and I would add readers and writers of texts) are organised in a structured situation of address, listening and viewing positions that are already always saturated with power relations (Frow 2005, p. 74-5). What is missing from the texts that claim to represent the motivations of men in these situations is an account of the play between a structured text and a process of reading that is a response to the text’s strategic intentions (Frow 2005, p. 4).

^v In her Occasional Paper Who Kills Whom and Why: Looking Beyond Legal Categories, published by the VLRC, Professor Jenny Morgan reasoned that:

any reconsideration of the defences to homicide [ought to be] fully informed by the contexts in which people are killed. The emphasis has been placed on describing and analysing those contexts, in the hope that readers are encouraged to return to those contexts when considering more directly “legal” questions of when a homicide should be justifiable or excusable (2002, p. 45).

^{vi} *R v Ramage* [2004] VSC 508 (9 December 2004).

^{vii} *Osland v R* [1998] 159 ALR 170.

^{viii} MacDonald’s defence was that she was suffering from ‘battered woman’s syndrome’ at the time she killed her husband in self-defence in response to 17 years of physical, psychological and sexual abuse.

MacDonald's victory coincides with the release from prison five months earlier (in August, 2005) of Heather Osland who served a 9 and a half year minimum sentence for the murder of her husband, Frank. Osland's claim that she was suffering from 'battered woman syndrome' when she killed her husband, failed to convince the jury that she killed as a result of either self-defence (and should therefore be acquitted of murdering her husband) or provocation by the deceased (and should therefore be found guilty of the lesser crime of manslaughter) despite having being subjected to 13 and half years of physical and sexual abuse. Yet, the same jury who convicted Osland was unable to reach a verdict on her co-accused, her son David Albion, who allegedly inflicted the fatal blow, using a lead pipe to kill Frank. At David's retrial, a new jury found him not guilty of either murder or manslaughter after he said he acted in self-defence of himself and his mother.

^{ix} During the trial and following news of the jury's verdict, comments on the progress of the case by relatives and friends of the deceased, Julie Ramage, were regularly reported. In one media report bearing the headline, 'I knew my sister had been killed, twin says', Jane Ashton, Julie's sister, claimed to have experienced a 'dreadful feeling', a 'flash', on the 'fatal day' that Julie was reported missing (Kissane 2004, p. 5). The policeman who later informed Jane that her sister's body had been discovered reassured her that 'it's not unusual for there to be a prophetic vision in cases like this, especially if the relationship was between twins, or a mother and child', thus confirming her 'intuition' that Julie was already dead.

^x *R v Ramage* [2004] VSC 391 (8 October 2004).

^{xi} Think back to Kissane's feature article with the words in the headline 'Honour Killing in the Suburbs' (2004, p. 4-5). For a recent discussion on this point: see Maher et. al, 2005.