Rewriting the event of murder: Provocation, automatism and the law's use of a narrative of insult

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Introduction: the dead body at the scene of writing

> Affectively speaking, I think that words can be much more harmful than actions. There's a sting in words which no action can replicate (Cummins J *Leonboyer* Nov 1999: 1168).

The opening quote to this article reflects a legal moment in which there is a movement or passage from the dead body to the legal text.[2] The above statement was made by Cummins J during legal argument in the absence of the jury in *Leonboyer*, a case I observed. Counsel for the defence had asked his Honour 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 sexual prowess ('he did it better than you did').

His Honour was of the view that there were no authoritative cases that established mere words as a sufficient ground to raise the defence

of provocation therefore he did not intend to leave it as a matter for the jury (*Leonboyer* Nov 1999: 1142). To register his disagreement, counsel for the defendant cited an Australian case from 1975 in which the presiding judge left provocation 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* Nov 1999: 1146).

A short while later, the prosecuting counsel also sought to clarify the question of whether there were any authoritative cases that established words as a sufficient ground to raise the defence of provocation (*Leonboyer* Nov 1999: 1163). Citing the Victorian decisions by the majority of the High Court in *Moffa* and the Court of Appeal in *Tuncay* as cases in point, counsel for the crown outlined that 'the proposition that mere words cannot amount to provocation as a be all and end all proposition is no longer correct' (*Leonboyer* Nov 1999: 1166). He added: 'it's a question of looking at the words in the context in which they are uttered' (*Leonboyer* Nov 1999: 1166). It was at this point that his Honour 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* Nov 1999: 1168).[3] Whereupon, everyone seated in the courtroom — the prosecuting counsel, counsel for the defendant, their respective solicitors, the judge's associate, including the tipstaff, and all of whom happened on that day to be male — leaned back in their chairs and nodded their heads as if in solemn agreement.

This exchange caused me some concern. What this scene illustrates is that for the event of murder to have meaning, 'if is to exist for us', as Young states, 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' (1997: 129). In making this (and not that) statement of the case and which is contained in the maxim — 'there's a sting in words which no action can replicate' — we can see how the process of

judgment involves drawing inferences from the 'facts' to delineate the state of mind to prove murder, but also operates to deliver a narrative which tells of the figurative wound from the speech of the deceased.

Specifically, this scene illustrates the scene of a disaster in murder trials which is that the dead body cannot speak until it has the voice or utterance of the other (Philadelphoff-Puren and Rush 2003: 210 fn 26). Or as Legendre has testified: how the dead body is only sayable in 'the grip of the image', a fiction, only then to be 'captured by language' (1997: 4). This article examines this scene within the larger context of the murder trial to point to the law's use and production of a narrative of insult to make evident some of its dominant and socially harmful effects. The article is concerned with the transcripts of trials in the cases of *Richardson*[4] and *Leonboyer*.[5] The purpose in re-reading the transcripts is to trace the deployment of metaphor and other literary devices and generic narrative conventions that are used to understand the situation to invoke an emotional response on the part of the audience (the judge, jury and so on), and that also work to promote rather than subvert a cultural habit of reading the event of murder in cases of domestic homicide as the inevitable culmination of a 'romance-gone-wrong'. This is done with an eye to making evident the values and assumptions that underpin the plot structure that organises the relation between the subject and object of the narrative and that enables law to conduct its reasoning.[6]

First, I discuss the trial transcript of *Richardson* (1997). On the night of 3 January 1996, Alan Richardson stabbed his fiancée, Joanne Campbell, 22 times to the front and back of her body thereby causing her death. He was charged with murder. At his trial, his defence counsel sought to convince the jury that the defendant lacked the requisite intent for murder therefore they should find he was not guilty of murder. In the alternative, the defence asked the jury to consider that he acted under provocation and should be convicted of the lesser crime of manslaughter. His claim that his culpability should be reduced was made on the grounds of an utterance and an action about their upcoming wedding, specifically, she is alleged to have said that the lack of a

honeymoon meant there would be no point in having a wedding, at which point she threw a box of wedding invitations at him.[7]

Second, I examine the trial of *Leonboyer* involving a defendant who stabbed his girlfriend, Sandra Morales, 25 times on her head, back, groin and shoulder. She died the next day and Leonboyer was charged with murder. At his first trial, the defendant and his lawyer raised both the defence of automatism and the partial defence of provocation. However, the jury was unable to reach a verdict and the trial was aborted (*Leonboyer* May 1999). At Leonboyer's second trial (the case observed), Cummins J ruled that the defence of provocation was *not* open for the jury but that the defendant was entitled to raise the defence of automatism (*Leonboyer* Nov 1999).[8]

In examining the trial transcripts from both these cases, I will elucidate how the process of judgment operates to discursively construct the character of the defendant and deceased, and to situate them within what I have termed a narrative of insult in which feminine excess (excessive speech and behaviour) is understood to drive wounded males to restore their masculinity by killing their verbal antagonist. I will further claim that the discursive process of emplotting events according to a familiar storyline operates not only to frame the situation in terms of coherence and plausibility but to drive the narrative forward towards a conclusion with an air of inevitability — murder. What my reading of these legal texts will demonstrate is that the law's use and production of this narrative is not only gendered, but is one that can be *stretched* across law's representation of the 'facts' to raise different questions of legal doctrine while at the same time reproduce difference according to the values of law.[9]

Law's use and production of a narrative of insult: The trial of *Richardson*

> You can't, as one of the barrister's said, open someone's mind and find out what their intent is. How do you prove the existence of a particular intent? The answer is by inference. ... You are entitled to infer an intent from all

> the circumstances, from what a person does, from what they say before, from what they say afterwards. In all the circumstances in which you accept you may draw the inferences that a person acted with a certain intent (*Richardson* May 1997: 493).

Richardson was charged with the murder of his fiancée, Joanne Campbell. In his record of interview with police he claimed that on the night in question, whilst seated at the kitchen table of their home, an argument developed between them. They shouted at each other over whether or not they could afford a honeymoon. During the course of the argument he further claimed that the deceased uttered words to the effect that if there was to be no honeymoon there would be no wedding. He said that she then picked up a box containing wedding invitations and threw it across the room, hitting him on the shoulder. He grabbed her, asking what she was doing. She screamed and he released her. The deceased again picked up the box and threw it. He became angry and moved towards her with the purpose of scaring her. He said that she grabbed a knife from the kitchen area and told him to 'back off', however he continued to advance. Although he stated he was uncertain how he sustained the injury, at some stage he sustained a cut to the little finger of his left hand. He stated that he had no recollection of what occurred after that time until he found himself on the floor covered in blood and the deceased lying naked nearby. There was blood everywhere and the knife was beside him. He was convicted of murder and sentenced to 15 years' imprisonment with a non-parole period of 10 years.[10]

When directing the jury in *Richardson*, and having just spelled out the elements of murder and manslaughter that they must apply to the case, the trial judge sought to clarify the issue of intention which he did by posing a rhetorical question: 'How may intent be proved in a court of law?' As the opening quote to this section illustrates, Hampel J told them that they were 'entitled to infer an intent from all the circumstances, from what a person does, from what they say before, from what they say afterwards' (*Richardson* May 1997: 493). However, as the above extract also illustrates, judges are prohibited from defining

intention when directing juries on the law at the same time that intention is set up as the presumptive standard of responsibility. What makes up for this paradox, for the 'invisibility of intention' is evidence: 'evidence provides the contents that are poured into the abstract container of intention' (Rush 1997: 283). This insight requires critical reflection on the implications and effects of the legal process of drawing inferences from the various and specific forms of evidence that are led at a criminal trial. The drawing of inferences to delineate the state of mind to prove murder is, as I will demonstrate, a practice deeply 'embedded within the rhetorical practices of legal discourse' (Young 1998: 445; see also Goodrich 1987). That is to say, literature is an indelible part of law's genre (Philadelphoff-Puren and Rush 2003: 193).[11]

Through a close reading of the forms of argument deployed in *Richardson*, it is possible to discern the extent to which it is the narrative of the situation that gives the evidence presented at the trial its plausibility and coherence, and enables the deceased's words on the night to become imputed with ideological significance. In *Richardson*, evidence was admitted into the trial of the history of the relationship. There was also evidence admitted of a prior incident that had taken place six months earlier. On this occasion the defendant had been drinking and had held the deceased in a headlock causing her to fall to the ground. A key component of the argument put forward by the defence was that the relationship between the defendant and deceased was fraught with problems about finances, particularly as it related to the wedding and the honeymoon. In addition, the defence sought to convince the jury that since 'the headlock incident', the defendant had become increasingly fearful that the deceased would leave him. In contrast, the Crown argued that the defendant was a somewhat 'immature' person who 'simply lost his temper' on the night he killed the deceased but that it was not an act done in sufficient provocation to avail himself of the partial defence. In *Richardson*, the following exchange took place during cross-examination between the defence counsel and a witness who was the mother of the deceased:

Q: [Witness' name] is the position this, that [the deceased] was a bright intelligent woman?

A: Yes.

Q: She was a determined young woman?

A: Not determined, no, if she was — I wouldn't say determined, she liked sort of achieving things.

Q: She had in mind things that she wanted to do and she set out to achieve them?

A: That's right.

Q: For instance, like buying a block of land and building a home, those were thoughts that she wanted to implement?

A: That's right (1997: 35).

In the above exchange, the witness is asked whether she thought the deceased was a 'bright' and 'intelligent' person, adjectives that travel with positive connotations of character. Next, she is asked whether she thought the deceased was a 'determined' person, a proposition the witness sought to clarify: 'Not determined, no ... she liked ... achieving things.' It isn't clear at this point whether the line of questioning demarcated above can be taken as insinuating that the deceased was of poor character. Nor is it clear that this is a point at which a gap opens up between the event of murder and the dead body of the deceased which can only be filled by language.

An important part of the defence argument was that since the defendant was regularly unemployed, he worked from time to time as a sub-contractor, the relationship between the defendant and the deceased was fraught by tensions and problems arising from financial difficulties. A few moments later in *Richardson*, another exchange took place during cross-examination between the defence counsel and the same witness:

Q: When he visited you, that is [the defendant], he would come there with your daughter and he really played a very small role in what was happening in household discussions; he just sat virtually in the background?

...

A: He never joined in much at all, he kept in the background, yes.

Q: So he was, if not shy, retiring at least, he didn't come forward with any sort of outward signs of involvement?

...

Q: So he would virtually sit there and say very little?

A: He would just talk, like normal talking, like a normal — we would include him in everything —

Q: I am not suggesting you didn't but you say he was in the background in the sense he played very little part in the active conversation that was going on at various times he was there?

A: That's right, yes.

D: [Deceased's name] was the assertive person, is that right? (1997: 37-8)

In this exchange, the witness is encouraged to represent the defendant through recourse to the relatively innocuous stereotype of the 'shy', 'retiring' male. At the same time, the questions asked by the defence juxtapose two types of character: one, the deceased, who is represented as the 'active' one in the relationship and the other, the defendant, who is represented as 'passive' and 'quietist' (the more she talked the more he just sat 'in the background'). In the above exchange, what is being presented for the jury is an image of the deceased as someone who sought to usurp the position of the male in the relationship ('she had in mind things she wanted to do'; 'she was determined'; she was 'active' in conversation and so on).

This strategy of inviting witnesses to affirm that the deceased had a 'stronger' personality than the defendant (was the more 'assertive', 'determined' and 'focused' person) persisted throughout the trial.[12] At one level, this line of questioning is a tactic deployed by the defence to enable the jury to better understand the situation between the parties involved in the case. At another level, however, it is an example of the kind of strategy Young has described as working through 'implication' and 'insinuation' (1998: 456-7); in this instance, one that enables a causal link between the deceased's words and behaviour on the night and the defendant's reaction to be established. I suggest that the witnesses may be quite unaware that their responses to trial questioning

are assisting the defence narrative to make an incriminating point about the deceased's character. The questions asked by the defence squarely position the deceased as a 'strong', 'determined' woman who exhibited all the signs of normal femininity ('she had a regular job', she was 'bright', 'hoped to get married' and so on). It is in this way that the narrative mobilised by the defence enables an accumulation of culpability to be attached to the deceased and is what gives the defendant 'relief' in the form of a defence (Hachamovitch 1997).

Consider how in *Richardson* Hampel J's charge to the jury offers a highly abridged version of the history of the relationship as narrated by the defence. This is done in the manner of simply cataloguing the 'facts'. A number of devices figure in his direction to the jury which reveal the genre to which the law's narration of the fatality of the deceased will ultimately become attached. In his opening remarks, Hampel J reminds the jury of their obligation to consider the evidence of the history of the relationship as 'part of the circumstances' between the defendant and deceased 'up to and on the night' (*Richardson* 1997: 485). This is followed by a rehearsal of the history of that relationship which included an assemblage of matters that were focused upon during the trial that sought, according to him, 'first of all' to emphasise 'the good quality of their relationship as a whole' (*Richardson* 1997: 495). In a series of paragraphs that are linked in logical succession, Hampel J delivers a narrative in which various incidents — one involving violence described as 'the headlock incident' and 'a general argument' between the pair six months earlier — are linked with later ones — the purchase of 'the block of land', that they 'built a house and moved in' and planned 'to get married' — and which render the psychological impact of what the murdered woman allegedly said and did on the night in question as significant. Indeed, this discursive device figures in Hampel J's subsequent representation of events leading up to the defendant's act of killing and the conclusion that he was prepared to accept the defendant's account of the event. Hampel J systematically distils the details and phases of the relationship between the defendant and deceased in a way that reveals his acceptance that they were brought

together by voluntary romantic choice. According to his account of the 'evidence of a number of witnesses' — which included some who observed how on the day before the defendant's act of killing they were 'lovey-dovey', 'getting on well' and 'being affectionate' (496) and others who saw them 'driving' together and 'walking the dog' (496-8) — Hampel J invites the jury to concur that these images confirmed the romantic context in which the killing ultimately took place (he told them the relationship was 'on the whole ... a good one, right up to the evening Joanne died': 504). By privileging and imputing significance to the defendant's version of events, an account which sought to establish that right up until he killed her 'they were close and affectionate' and were 'both excited' about his purchase of 'two rings' (504), despite the 'residual tensions' between them about the 'question of the money, the honeymoon and the wedding' (497), the jury is made complicit with one version of events more than the other.

The jury in *Richardson* returned a verdict of murder. However, the outcome of the trial is of less consequence than are the implications of the law's use and production of a narrative of insult with its key trope of a woman 'asking for it'. It is significant that the same sequencing of events that shaped the defence narrative and drove it forward with an air of inevitability throughout the trial was redeployed during the plea in mitigation of sentence. Here, counsel for the defence submitted that his Honour impose a sentence at the lower range for murder. In his representation of the details of the history of the relationship between the defendant and deceased, familiar phases and events are again subsumed within a chronological sequence in the defence counsel's plea. In *Richardson*, the plea begins:

> In … 1992 … they started to live together at premises … he wasn't working … they decided, nevertheless, to purchase the block of land and build a house. In a sense that decision indelibly impressed upon the relationship with a commitment which ultimately led to the tragic result in many ways (1997: 564).

There are a number of devices of narrative at work here. First, events that occurred in 'real' time are recounted in 'narrative' time with the effect that they are assumed to follow a neat formulaic structure:

beginning	>	middle	>	end
couple meet and commence living together	>	purchase of land and a house	>	the tragic yet unavoidable result: murder

Once events have been reorganised within a linear temporal sequence — a beginning, middle and an end — a sequence of events or actions take on familiarity and become time dependent as if they have a 'natural' or 'true' order (Martin 1986). As Culler points out, a tendency is to substitute (or confuse) chronology with causation ('this' is assumed to cause 'that' and so on) (1981: 183). To that extent, the end of the narrative is accepted as implicit in past events all along. Moreover, any variations in character or in the imagined motivations of the defendant do not affect the overall generic structure and movement of the narrative, which takes on additional significance in the plea:

> They were looking to a happy future ... the debts kept piling up ... They [were] seen by all and sundry as happy, caring young people ... one, [the deceased] with ambitions and hopes for the future set upon a home, a family; the other, [the prisoner], who [was] financially ... way behind the 8th ball (*Richardson* 1997: 566).

In the above extract, the audience (the sentencing judge) is encouraged to identify with both characters ('they were looking to a happy future') and to share their worldview ('they were seen by all and sundry as happy, caring young people'). A second narrative device which is also at work has to do with the genre of the narrative.[13] De Lauretis has explained how in the discourse of romance, the plot that drives the movement of the narrative towards its conclusion, which is marriage, is the developing romance between the hero and heroine despite the heroine's misgivings about her choice of love object. Thus, there are only two designated speaking positions for the characters in

the narrative to occupy. What marks the difference between these two positions is that there is only one gender assigned to each position: one for the mythical (male) hero who moves through the 'plot space' to establish differences and norms and the other is that of the immobile object, obstacle or boundary, which only the hero can cross (1984: 118-19; see also Cranny-Francis 1990). De Lauretis further finds that whatever its personification, the object (obstacle or boundary) is always 'morphologically female' (1984: 119).

In the above extract, note the reference to the deceased as someone who was 'set upon a home, a family'. This image of her as indifferent about their financial situation and its effect on the defendant lends a certain legitimacy to the defence narrative that the defendant's fear that he was losing control over their finances was increasing. A few moments later, his defence counsel submitted:

> In the last six months he worked on and off. The financial problems were increasing ... the bills were growing and the arguments grew, doors were slammed and voices raised, but never resort to violence ... They lived together. They had been as man and wife. ... The desire by my client to marry seems to grow ... The arguments became more frequent as the funds seemed to grow less (*Richardson* 1997: 567).

What is being put into effect here takes place through a discursive process of distortion. The transcript literalises the defendant's fear of rising debt in order to make an incriminating point about the effect of the deceased's words on the night in question. This is done through a process of analogy and the juxtaposition of images designed to give the impression that the situation between the two of them was building up into a crescendo (the 'bills were growing' as were the 'arguments' and the volume of their 'voices'). Once the various phases of the relationship and events have been reordered within a discrete chronological series, the causal logic gains momentum and the deceased's words on the night are understood as the calcifying moment in the narrative. In a final move that invests the defence narrative with a degree of legitimacy and, to paraphrase Philadelphoff-Puren and Rush, which reveals the genre of sentence to which the law's narration of the

fatality of the deceased is to become attached (2003: 197), Hampel J's sentencing remarks culminate in a succinct reconstruction of the romantic context in which the event of murder is understood to have taken place:

> It is not only a tragic case, but it is a bizarre case in many respects. It is one which is unusual in my experience. Most cases have a background of violence, hate, jealousy, and misplaced possessiveness. This does not appear to have any of those features. What occurred, therefore, is very difficult to understand. That does not excuse it, but it places it in an unusual category of cases. ... [this was] basically a good, loving relationship (*Richardson* 1997: 591).

The above passage illustrates the claim by Philadelphoff-Puren and Rush that the contexts that come before the courts are not as determinate as law's appeals to fact would suggest (2003: 202). Rather than assume that context reflects a given state of affairs, they are produced, thus the process of judgment 'is brought into relationship with the sign of literature in a range of ways' (Philadelphoff-Puren and Rush 2003: 202-3).[14] In shifting the literary frame to the genre of tragedy ('It is not only a tragic case, but it is a bizarre case in many respects ... [this was] basically a good, loving relationship'), Hampel J activates a range of positive attributes of character that include chivalry and honour and that become attached to the defendant and which constitute his act as a legitimate attempt to defend against loss (of his self-image and also his masculinity).[15] It is the discursive proximity between the literary frame that shapes the narrative of the situation, which comes from the genre of romance with its entwined themes of tragedy and fate, and the defence narrative, that the event of murder in *Richardson* ends up rewritten as the inevitable culmination of a 'romance-gone-wrong'.[16]

Similarly, at Leonboyer's first trial, the defendant and his counsel mobilised a narrative of insult. Yet, it is used here to negate culpability for murder and, in the alternative, to argue for a reduction in culpability for murder (*Leonboyer* May 1999). That is, the standard provocation narrative that is typically used by a man to tell the tale that he was 'provoked' by 'a nagging, unfaithful or departing wife' (Howe 2002:

61; see also Tyson 1999), is used here to achieve another albeit different outcome. In the discussion below, what will emerge is that the narrative of insult that is used by the defendant and his lawyer to argue for a reduction in culpability is one that is gendered or sexed, and can be *stretched* across law's representation of the 'facts' to satisfy the rules and requirements of a different question of legal doctrine which is automatism.

Wounded men or the wounds of judgment? Provocation, automatism and the two trials of *Leonboyer*

> The predicament of judgement is that it writes. Before anything is done, in law as in *Julius Caesar*, there is a text. ... The questions which circumscribe the limits of our reading can thus be stated. ... Into what kind of sign, what genre of sentence will the law make his death? (Philadelphoff-Puren and Rush 2003: 197).

In *Leonboyer*, the defendant and his lawyer claimed that her (the deceased) saying to him that she could fuck anyone she wanted to fuck, that she had been fucking someone else, which she followed with a taunt in Spanish to the effect that 'he did it better than you did' delivered 'a psychological blow' that caused his mind to dissociate ('split') (May 1999). In doctrinal terms, the mentality that is the concern of the defence of automatism is one that causes a defendant to commit an action that is both conscious and voluntary, but that he was not aware of committing at the time.[17] If successfully argued, the defendant is acquitted of the crime of murder. In the alternative, the defence raised the defence of provocation. In contrast, the Crown case against the defendant was to argue that the defendant knew what he was doing on the night he killed the deceased, he stabbed her 'in a fit of anger and jealousy ... [and] ... to inflict the ultimate punishment' (*Leonboyer* Opening Address to Jury by Crown May 1999: 104). Thus, the jury should find him guilty of murder rather than manslaughter. Some examples from the transcript of Leonboyer's first trial will serve to

illustrate the legal process of positioning the defendant and deceased within a narrative of insult. My aim is to show how the process of judgment operates not only to delineate the state of mind to prove murder, but also delivers a narrative which discovers the cause of male violence in a past history of masculine crisis.

In the representation by the defence counsel of the details of the defendant's narrative, the jury is offered a version of the history of the relationship between the defendant and the deceased. From the very beginning of the trial in *Leonboyer*, the jury were told things that are crucial to the subsequent formulaic structure of that narrative:

> [T]hese two were apparently a happy couple as far as [he] was concerned. ... they met, they went to sign a lease and put the bond down on a flat that they were going to occupy together and live as man and wife ... they intended to have a full relationship, as far as this man was concerned ... they went home, had a meal and watched television in each others arms ... what appeared to be a happy, joyous couple, ten minutes later there were over 20 stab wounds ... something happened to his mind that resulted in what can only be described as a frenzied act (Opening Address to Jury by Defence May 1999: 115).

In the above extract, the defence narrative locates the cause of the death of the deceased within the context or circumstances of the relationship. They were a 'happy, joyous couple' who had a history together and one that importantly had a future: 'they went to sign a lease ... live together as man and wife'. As in *Richardson* discussed above, it is significant that the accused and female deceased are depicted as having been brought together by voluntary romantic choice. Note also how the deceased's desire is consumed within and according to the defendant's point of view: 'these two were apparently a happy couple ... they intended to have a full relationship, as far as this man was concerned'. As in the case of *Richardson*, the defence narrative in *Leonboyer* maintains a discursive proximity to the discourse of romance, which as Puren reminds us, gives primacy to the male subject's progression through the narrative whereas the female subject's utterances and desire in this masculinist economy do not figure in quite the same way (1995: 21).

In his opening remarks to the jury, the defence submitted that although the 'confession of adultery' was 'stressful, traumatic and dramatic, by itself it did not cause the state of automatism' (*Leonboyer* May 1999: 114-15). Crucial to the strategy adopted by the defence was the claim that despite its 'happy' outward appearance, the relationship between the defendant and the deceased was fraught with tension and anxiety arising from the deceased's duplicitous behaviour. The narrative mobilised by the defence sought to present Leonboyer's response as culturally specific.[18] An example can be found during cross-examination between the defence counsel and a witness who was the mother of the deceased. The defence asked the witness to confirm whether she and her boyfriend regularly attended the same nightclubs as her daughter. The witness replied in the affirmative. Next he invited the witness to clarify her age, which she did (she was 39), and that of her daughter (who was 18 at the time). A few moments later, this exchange was followed with a proposition: '[The accused] said to you, did he not, that he didn't like [the deceased] dancing with those older Colombians?' to which the witness responded 'Yes' (*Leonboyer* May 1999: 341). At this point in the defence narrative, the witness may have been quite unaware that the suggestion by the defence that she somehow failed to cite the norms of motherhood because she regularly socialised with her daughter and 'those older Columbians', would later underwrite the manner in which her daughter's words on the night would become imputed with ideological significance. Some further examples from the transcript of *Leonboyer* serve to highlight how the defence narrative sought to render the psychological impact of the wound from the deceased's words on the night as culturally significant.

Throughout the trial, it had been repeatedly emphasised for the jury by both counsel that in the months leading up to the night in question the defendant was under a lot of stress due to being in the final stages of a law degree. In a further move designed to lend plausibility and coherence and, more importantly, the weight of authority and objectivity to the sequencing of events as represented by the defence narrative, counsel led evidence from a number of expert witnesses. In one

exchange during cross-examination between the defence and a medical practitioner who was also a psychiatrist, the witness was asked whether he accepted 'the proposition that a mind can be made more vulnerable by pre-existing stresses, psychological stresses, so that one final blow will break the camel's back' (*Leonboyer* May 1999: 528). At one level, the deployment of metaphor; in this instance, 'the straw that broke the camel's back', enables legal practitioners to convey everyday meaning. But as a number of writers have commented, it is a linguistic technique that has the capacity 'to influence the apparent logic of a situation' (Facchini and Grossman 1999: 216). To that extent, certain associative metaphors have the capacity to dictate the organisation of entire discourses (Young 1997: 66-7).

A few moments later, this same witness was invited to reflect whether he could 'conceive of situations where, if someone was sufficiently vulnerable and had been under sufficient stress ... the revelation of sexual infidelity ... may cause that person to dissociate' (*Leonboyer* May 1999: 532)? The witness conceded: 'In an automatic manner, yes'. In another exchange between the defendant and his lawyer during the making of his unsworn statement, the defendant was asked whether he spoke Spanish at home to which he replied, 'always ... with his mother' (*Leonboyer* May 1999: 612). The defendant was then asked whether as a child he had played a Spanish flamenco instrument, whereupon the defendant replied that he did, and explained that it was 'played by beating a drum' (*Leonboyer* May 1999: 612). In a manner similar to that in *Richardson*, we can see the deployment of key tropes of masculine loss that enable the event to be rewritten in a way that sets up the defendant's reaction as caused by a build up of stresses and anxieties over a period of time and that are construed as culturally specific. An example to illustrate can be found during examination between the prosecuting counsel and an expert witness, who was a practising psychiatrist, medical practitioner and professor of psychiatry at the University of Melbourne:

> Q: But the going and getting and the using of the knife in the context of this case has but one purpose, doesn't it?

A: Well, the knife was used for one purpose, yes.

Q: In circumstances where there existed a very powerful motive to want to hurt?

A: Yes.

...

Q: That his reaction to that, I'm putting to you, isn't particularly unusual or out of the ordinary; we don't know how people respond in those situations.

A: We weren't there that is why it is a high probability, but I was interested in the stab movements because he actually plays a percussion drum and that involves a rapid movement (indicating), and I mean this is just theoretical because I wasn't there...

...

Q: You see, at the very least, it is well directed violence, isn't it?

A: Well, we don't know what else it was directed at, but yes, it would appear to be well directed violence, isn't it (*Leonboyer* May 1999: 689-90).

In the above exchange, the witness concedes that the defendant's reaction to what the deceased is alleged to have said on the night may well be 'directed' and 'purposeful' but he submits it was a 'high probability' that the 'stab movements' were analogous to those involved when a person (in this instance, the defendant) 'plays a percussion drum' (which also 'involves a rapid movement'). Earlier, counsel for the defence had introduced evidence for the jury informing them of the kinds of 'matters' likely to be important to men whose masculinity is linked to images of Chilean culture despite the fact that they have lived in Australia from a very young age (including 'the roles of male, female relationships' and 'religious aspects' of that culture) (*Leonboyer* May 1999: 535).[19] What is also at stake, however, is that this narrative of the background context in which the defendant's act of killing the deceased is assumed to take place is replete with cultural and relativistic assumptions about the masculinities of men associated with 'hot-blooded' cultures that are seen as clinging to an outdated form of hegemonic masculinity.[20] At one level, this line of questioning adopted

by the defence is intended to establish for the jury that the defendant's vulnerable psychological state was a permanent rather than transient or fleeting characteristic to be attached to the hypothetical ordinary man when dealing with the overriding legal requirement that must be satisfied before the defence of provocation can be made out. However, it is this narrative of the background context that must be stretched to fit the legal chronology of automatism. To that extent, the defence narrative must put into effect a putative chain of causation between the defendant's reaction on the night and the words allegedly spoken by the murdered woman.

In his charge to the jury, Hampel J's rehearsal of the evidence summed up the case for the defence in a manner that lends the defence narrative an air of legitimacy. On the issue of provocation, he told them that although the prosecuting counsel had argued that the law in this area was 'contradictory or inconsistent', he did not find this to be the case (783). He said that when the evidence was looked at as a whole, 'there is not very much in dispute about the background and the circumstances of the relationship. There may be a slight difference in emphasis but generally the issues are fairly clear' (785). When considering the 'ultimate question' they were to decide in the case, 'What was the state of mind of the accused?', he told them they were to have regard for the:

> longitudinal picture ... [including] ... the background manifestations, incidents, relationship, comings and goings, tensions, stressors, all those matters ... starting from the childhood events to the other incident I've already mentioned' (*Leonboyer* Charge to Jury: 785).

In a final move Hampel J offers the jury a succinct version of the defence narrative. Recounting the narrative for the defence, which 'talked about their relationship in the context of their culture', he next invited the jury to consider:

> the operation of factors such as the change in their relationship, the intensity of his studies, the final confrontation with the father, the 'new vision' as he called it with Sandra, and it is in that context, he argued, that you should

> look at the degree of the psychological blow produced before he stabbed her. He asked you to consider it was much more than just a mere admission of infidelity, it was a breakdown of his whole structure (*Leonboyer* May 1999: 787).

Moving to Leonboyer's second trial (the case observed), although Cummins J conceded that 'the door [was] not fully closed to words alone being sufficient in appropriate circumstances to constitute provocation ... [in this case] ... To allow provocation to be left with the jury ... would be to significantly extend the law of provocation'. It is also significant that when sentencing Leonboyer, Cummins J chose to remark that he believed the defendant's account of events on the night to be 'false' (*R v Leonboyer* [1999] VSC 422: [6]). He further stated :

> After I had ruled as a matter of law that provocation did not arise in this case, your senior counsel spoke … of 'political correctness'. That wearying cliché has no place in the legal lexicon … The law does not excuse from liability the murderous conduct of a man who in anger cuts down a woman because he is told of her infidelity (*R v Leonboyer* [1999] VSC 422: [7]).

In a recent article that explores the differential treatment given by Victorian trial judges to 'evidence of provocation' and in a comment about this decision by Cummins J to withdraw the defence of provocation from the jury,[21] McSherry submits how this 'demonstrates an attempt to delineate the boundaries of the defence of provocation in circumstances of intimate homicides' (2006: 13). In this acknowledgement of the potential for trial judges to perform an important 'gatekeeping role' when assessing men's claims of provocation to argue for a reduction in culpability for killing their current or estranged female partners, McSherry is sceptical of such decisions that can all too often end up overturned by the Court of Appeal and result in a retrial. Further, McSherry raises the question, whether the context of a breakdown of the relationship should ever be a sufficient ground to negate or avoid culpability for murder (2005: 15). Taking a slightly different tact, what I have offered here is a rereading of the values and assumptions that underpin the plot structure that underscores the narrative of insult mobilised in such cases to provide an account

context as a text. This insight, borrowed from Culler, points to the act of framing (which hints of the 'frame-up') as something that we all do (1988: ix). What I hope to have achieved here is an account of how the law's use and production of a narrative of insult is not confined to the domain of provocation. I have further demonstrated the extent to which *it is the narrative that discovers* the claim to the significance of those events and which occurs as a result of those events having met certain discursive requirements. That is to say, once an unrelated series of events are listed within a linear temporal sequence, a putative chain of causation between what the deceased said on the night and the event of murder is established. It is in this sense that I understand the defendant's act of killing can end up understood as a final episode within a chronological series and as if his act of killing the deceased was imminent in those past events all along. What makes up for the invisibility of intention is evidence conveyed through its content but also, and more crucially, its narrative form (White 1987).

Conclusion: The death of a defence? Provocation's narratives and their afterlife ...

> 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: 19).

The moment of homicide law reform calls these issues again into question. At centre stage of another scene of judgment is the claim that legal practitioners in a criminal justice context have tended to unfairly privilege men's reasons for killing their intimate partners by allowing them to argue they were provoked to reduce culpability. Specifically, a key focus of reform efforts has been on the inability of legal rules that structure the doctrines of the defences to homicide to accommodate and adequately reflect the different circumstances in which men and

women tend to kill (for example Morgan 2002, Graycar and Morgan 2005). Such efforts have been crucial to a feminist legal strategy of ensuring that the criminal courts are more responsive to, and reflective of, the reality of women's lives. A perhaps unintended effect of the move to privilege different forms of knowledge in legal (and also feminist) reasoning[22] is the presumption that context reflects a given state of affairs, that it is possible to control the contexts in which legal texts take on meaning. This is not to ignore the importance and necessity of growing critical attention to the contexts in which women kill their abusive male partners. Rather, a key concern in this article has been with what Goodrich describes as the effect of truth in a given context, with what seems to be true for a given audience (1986: 179-80).

The controversial outcome in the Victorian case of *Ramage*[23] coincided with the release of the Victorian Law Reform Commission's *Defences to Homicide: Final Report* (VLRC 2004). The VLRC's report endorsed an approach to reforming the defences to homicide as outlined in an earlier Occasional Paper *Who Kills Whom and Why: Looking Beyond Legal Categories* by Professor Jenny Morgan (VLRC 2002). The VLRC acknowledged the law's role in failing to adequately respond to the gendered circumstances or contexts in which men and women kill their intimate partners. The VLRC recommended that 'these two circumstances ... should not be seen as comparable' and resolved that continued use of the provocation defence to homicide no longer reflected modern concerns and realities particularly in the domestic sphere (2004: xxv). In late 2005, the Victorian Government recognised this and announced its intention to implement key legislative changes to the criminal law, which resulted in the *Crimes (Homicide) Act* 2005 (Vic) (Media Release 4 October 2005). At the level of law's narrative retelling of this homicide situation, a dominant and socially harmful effect of these attitudes has been to promote and perpetuate a culture of 'blaming the victim' (VLRC 2004: 32). To this extent, the changes to Victorian homicide law are about recognition of the need for a *gendered response* on the part of the criminal law in cases of domestic homicide.[24]

Indeed, a perceived benefit of shifting the telling of provocation's narratives to the sentencing stage is that it gives greater flexibility to judges about which sentence to impose (VLRC 2004: 33; see also NZLC 2001: 41). As numerous critical studies have documented, however, the tendency for judicial attitudes to reveal sympathy for men's motivations for killing their current or former female sexual partners (for example out of jealousy, a need for control or due to a breakdown in the relationship) and impose a dramatically reduced sentence may well persist (Coss 2006: 149-50, see also Morgan 1997, Cote, Sheehy and Majury 2000, Tyson 2002, Burton 2003, Strange 2003, Howe 2004, McSherry 2005, Coss 2005, Maher et al 2005). This has led to a degree of scepticism as to the benefits of banning the use of the provocation defence among academic and policy audiences, which is of concern. What remains is to thoroughly examine provocation's narratives post abolition of the defence in cases of domestic homicide which, I have argued here, operate to reproduce a dominant ideology and aesthetic of sexual difference according to the values of law. However, a point well raised by one commentator is worth noting:

> [T]his is not to imply that judges, or indeed defence counsel, are consciously and actively biased against women. Rather it reminds us that our conceptual frameworks are limited by what we are familiar with, that we are governed by habit; these patterns are institutional habits reproduced over time (Morgan 2002: 42).

There is little doubt that these institutional habits that have been reproduced over time are going to be hard to break. A key issue that needs to be further explored therefore is whether banning the use of the provocation defence to homicide will be sufficient to prevent the repetition of a key victim-blaming narrative with its duality of feminine excess and masculine loss (a narrative of insult) across discursive sites.[25] If we follow Mohanty, then the question of law reform ought not merely to be one of 'acknowledging difference; rather, the more difficult question concerns the kind of difference that is acknowledged and engaged' (1989-1990: 181). To return to the opening quote of this article, the disaster of all murder trials is that the dead body cannot speak, as

Philadelphoff-Puren and Rush testify, the wounds of the dead body remain intransitive until attached to statements, a statement about *who did what to whom* (2003: 197). This then is the paradox of judgment. If it is writing, literature, that is part of law's genre, then at the very least a critical strategy of law reform[26] ought to entail re-reading for as Barthes reminds us 'it alone saves the text from repetition (those who fail to reread are obliged to read the same story everywhere)' (cited in Felman 1981: 19).

Notes

1 My sincere thanks to the editors of the Special Issue and the anonymous referees for their extremely helpful comments, to Alison Young who read earlier versions of this article, and to my dear friend and interlocutor, Rebecca Scott Bray, for her generous important conversations and invaluable suggestions that were crucial to the final version.

2 Philadelphoff-Puren and Rush (2003: 192) state that '[t]he conventional name for this passage from the corpse' to the legal decision is judgment.

3 Only a few moments earlier, his Honour had reasoned with counsel for the defence that 'what was capable of provoking an ordinary person many years ago is not necessarily that which in 1997 is capable of provoking an ordinary person' and had warned that '[c]oncepts of domestic violence, concept of male ownership of females, concepts of male control over females have changed' (*Leonboyer* Nov 1999: 1146).

4 *R v Richardson* Supreme Court of Victoria Trial Transcript Hampel J 15 May 1997 – 30 May 1997 (hereinafter *Richardson* 1997).

5 *R v Leonboyer* Supreme Court of Victoria Trial Transcript Hampel J 3 May 1999 – 18 May 1999 (hereinafter *Leonboyer* May 1999); *R v Leonboyer* Supreme Court of Victoria Trial Transcript per Cummins J 4 October 1999 – 6 November 1999 (hereinafter *Leonboyer* Nov 1999).

6 On the deployment of the literary concept of plot as enabling law to conduct its own reasoning see Philadelphoff-Puren 2005 and Philadelphoff-Puren and Rush 2003; on the relationship between rape and romance more generally, see Larcombe 2005.

7 This summary of the facts is drawn from *DPP v Richardson* [1998] 2 VR 188: 189-90.

8 See his Honour's ruling in *DPP v Leonboyer* [1999] VSC 450 (20 October 1999): 3-4 where he resolved that nearly all the authoritative cases involve not only words but actions. On the question of whether words alone could amount to provocation, he reasoned that although this was sufficient basis on which to go to a jury on the subjective criterion, there was insufficient material to go to a jury on the objective criterion.

9 My argument follows and is similar to that of Young: '[s]uch a reading will suggest how law operates to judge the abused woman who kills [and, as I will argue, the murdered woman], not merely in terms of the formal doctrines of the criminal law, but also through recourse to the laws of gender difference' 1997: 128.

10 The Director of Public Prosecutions appealed against the sentence on the ground that it was, in the public interest, manifestly inadequate. The Court of Appeal allowed the appeal and the sentence was increased to 17½ years with a non-parole period of 12½ years. See *DPP v Richardson* [1998] 2 VR 188: 189.

11 On the law and literature movement, see White 1973; on trial discourse as narrative, see Nash 1990, Papke 1991 and Kaspiew 1995; for literature on legal storytelling, see Scheppele 1989.

12 See, for example, *Richardson* 1997: 83, 123.

13 According to Frow's formulation, genre is more than simply a 'stylistic device'. It provides the audience with 'a framework for processing information and for allowing us to move between knowledge given directly in a text and other sets of knowledge that are relevant to understanding it' 2005: 80. On the theme of genre and gender in French literature, see Freadman 1997.

14 These include the techniques of literature including citation, plot, rhetoric, genre and concept.

15 On the theme of masculinity and the threat of its loss in criminal trials involving men who plead provocation, see Lunny 2003.

16 For a fuller discussion of how the discourse of romance maintains a complex connection with legal representations of rape, see Philadelphoff-Puren 2005.

17 For an altogether different reading of how the criminal law takes into account fleeting mental states such as dissociation in response to extraordinary stress (automatism) and loss of self-control in provocation, see Yannoulidis 2005.

18 For a similar discussion of how discourses of the prosecution, the defence and the judge represent such cases as an 'honour killing', see Maher et al 2005.

19 Counsel for the defence also sought to lead evidence of a Senior Lecturer in Sociology at the University of New South Wales whose area of expertise was with how second generation migrants 'invest and, indeed, over-invest in relationships that they have between, or with their family and with others'. However, his Honour ruled the evidence inadmissible, see *Leonboyer* May 1999: 639-44.

20 On the salience of using the professional discourse of law to indirectly authorise 'tradition', 'belief' and 'honour' in cases involving minority men who seek to rely on evidence of their cultural background to reduce or negate criminal liability for murder, see Volpp 1994, Koptiuch 1996, Phillips 2003. For a discussion of the ideological assumptions about masculinity underpinning men's claims to the provocation defence in Victoria, Australia, see Maher et al 2005.

21 The jury convicted him of murder and he was sentenced to 18 years' imprisonment with a non-parole period of 14 years. See *R v Leonboyer* [1999] VSC 422 (5 November 1999). The applicant later lodged an application to appeal against conviction (on the ground that the learned trial judge erred in failing to leave the issue of provocation for determination by the jury) and against sentence. The Court of Appeal rejected the appeal against conviction (by a two to three majority with Callaway JJA dissenting), but granted the appeal against sentence which was reduced to 15 years' imprisonment with a non-parole period of 11 years. See *R v Leonboyer* [2001] VSCA 149 (7 September 2001).

22 For a discussion of the use of social science research in law, see Monahan and Walker 1988; on the ambivalence that surrounds the use of expert evidence in cases involving 'battered women', see Sheehy, Stubbs and Tolmie 1992 and Schuller, Wells and Rzepa 2004.

23 At least two books have been published in response to the case, see Cleary 2000 and Kissane 2005.

24 The recently implemented changes to Victorian homicide law are intended to address the issue of gender bias in the criminal law in a range of ways. First, reforms to the substantive law of homicide, including reforms to the laws of evidence, clarification of the defence of self-defence, and the

introduction of a new offence of 'defensive homicide' aim to better account for the homicide situation in which a woman kills her partner, usually a male, in response to a past history of abuse perpetrated against her by the deceased. Secondly, removal of the defence of provocation is intended to address a perceived injustice in the way judicial attitudes have tended to reveal sympathy for men who kill women who are said to have used words to 'provoke' them.

25 On the law's use and production of a narrative of insult in provocation cases, see Tyson 1999, 2002. On the concept of 'social injury' and the idea that provocation's narratives can posthumously harm all women, see Howe 2004: 74-5.

26 On the theme and theory of a poetics of law reform, see Philadelphoff-Puren 2004 and Golder 2004.

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