

‘Red Mist’ Homicide—Sexual Infidelity and the English Law of Murder (glossing *Titus Andronicus*)

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Abstract—For over 300 years, criminal courts have regarded sexual infidelity as sufficiently grave *provocation as to provide* a warrant, indeed a ‘moral warrant’, for reducing murder to manslaughter. While the warrant has spilled over into diminished responsibility defences, wounding, grievous bodily harm and attempted murder cases, it is provocation cases that have provided the precedents enshrining a defendant’s impassioned homicidal sexual infidelity tale as excusatory. Periodically, judges and law reformers attempt to reign in provocation defences, most recently in England and Wales where provocation has been replaced by a loss of control defence that, most controversially, specifically excludes sexual infidelity as a trigger for loss of control. This paper reflects on this reform and its reception glossing Shakespeare’s scathing critique of warrants for murder in *Titus Andronicus*.

TITUS

My lord the emperor, resolve me this:
Was it well done of rash Virginius
To slay his daughter with his own right hand,
Because she was enforced, stained and deflowered?

SATURNINUS

It was, Andronicus.

TITUS

Your reason, mighty lord?

SATURNINUS

Because the girl should not survive her shame,
And by her presence still renew his sorrows.

TITUS

A reason mighty, strong and effectual;
A pattern, precedent and lively warrant
For me, most wretched, to perform the like.
Die, die, Lavinia and thy shame with thee
And with thy shame thy father’s sorrow die.

He kills her.

Titus Andronicus 5.3.35-46

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What could possibly warrant another encounter with provocation, the partial defence to murder that has troubled judges, law reformers and criminal law scholars for so long and that has, seemingly, finally met its demise in England and Wales? As Jeremy Horder observes, the provocation defence has been the subject of more decisions of the House of Lords, the Privy Council and the Court of Appeal since the 1940s ‘than perhaps any other area of the substantive criminal law’.¹ It has also been the subject of tens of thousands of scholarly articles and numerous law commission inquiries, the question of what should be regarded as sufficiently grave provocation to reduce murder to manslaughter especially vexing for commentators and reformers alike. Whether it be suggesting changes to the objective or the subjective test, querying whether the defence is gender-biased in its operation, or indeed, challenging its entire normative basis, provocation is guaranteed to incite debate.²

¹ J Horder ‘Reshaping the Subjective Element in the Provocation Defence’ 25 (2005) *OJLS* 123, at 131-2. Gough’s observation in 1999 that provocation has ‘long been a puzzle’ which scholarly debates have ‘often seemed to deepen’ remains relevant: S Gough ‘Taking the Heat out of Provocation’, 19 (1999) *OJLS* 481 at 492.

² A search of law-based e-resources reveals over 16,000 law journal articles and commentaries on the law of provocation. See O Quick and C Wells ‘Getting Tough with Defences’ 514 (2006) *Crim LR* 514 at 524-5 on the importance of the ‘gender context’ and the ‘general denial of gender as relevant factor’ in domestic provocation cases. For a discussion of some of the extensive feminist law scholarship on provocation’s gender bias see A Howe ‘Provoking Polemic: Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition’ 10 (2002) *Feminist Legal Studies* 39 and A Howe ‘Provocation in Crisis—Law’s Passion at the Crossroads? New Directions for Feminist Strategists’ 21 (2004) *Australian Feminist Law Journal* 55. Key foundational feminist critiques include L Taylor ‘Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defence’ 33 (1986) *UCLA Law Review* 1679; H Allen ‘One Law for All Reasonable Persons?’ 16 (1988) *International Journal of the Sociology of Law* 419; DK Coker ‘Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill’ 2 (1992) *Southern California Review of Law and Women’s Studies* 71; S Lees ‘Lawyer’s Work as Constitutive of Gender Relations’ in ME Cain and CB Harrington (eds) *Lawyers in a Postmodern World: Translation and Transgression* (NY: New York University Press, 1994) and S Bandalli ‘Provocation—A Cautionary Note’ 22 (1995) *Journal of Law and Society* 398.

Recent reforms to the law of murder in England and Wales have ensured that the disagreement about how the criminal law should respond to provoked killings will continue. In 2009, the Labour Government abolished the provocation defence, replacing it with a 'new' defence of loss of control which, if successful, will have the same effect as successful provocation pleas, reducing murder to manslaughter. The new defence, set out in sections 54-56 of the Coroners and Justice Act 2009 (the 2009 Act), consists of three elements. First there must be a loss of self control. Second, the loss of control has a qualifying trigger. Third, a person of the defendant's sex and age, with a normal degree of tolerance and self restraint and in the circumstances of the defendant might have reacted in the same or in a similar way to the defendant. The triggers for loss of control are first, if it was attributable to the defendant's fear of serious violence or second, to a thing done or said which constitutes circumstances of an extremely grave character and caused a defendant to have a justifiable sense of being seriously wronged. Most controversially, s.55(6)(c) expressly excludes sexual infidelity as a trigger for loss of self control, omitted from the list of things done or said that constitute 'extremely grave circumstances or that caused a defendant to have a justifiable sense of being seriously wronged'.³

The culmination of a campaign led by the then Minister for Women and Equalities Harriet Harman, s.55(6)(c) addresses long-standing concerns raised by women's rights groups about the operation of partial defences to murder in femicide cases. She explained that for centuries

the law has allowed men to escape a murder charge in domestic homicide cases by blaming the victim. Ending the provocation defence in cases of 'infidelity' is an important law change and will end the culture of excuses.⁴

Whether the reforms will have the desired effect remains to be seen.⁵ Certainly, many criticised the sub-clause as 'uncompromising' and poorly drafted. Speaking in his

³ This exclusion has attracted surprisingly little attention in criminal law scholarship but see S Edwards 'Anger and Fear as Justifiable Preludes for Loss of Self-control' 74 (2010) *J Crim Law* 223 at 230-2 and J Miles 'The Coroners and Justice Act 2009: A "Dog's Breakfast" of Homicide Reform' 6 (2009) *Archibald News* 6.

⁴ Quoted in R Verkaik 'Judge Backs Infidelity Defence for Killers' *The Independent* November 7, 2008.

capacity as a law commissioner, Horder thought it ‘fraught with difficulty’ and worried about ‘being “absolutist” in this area’. Describing the wording as ‘bizarre’, he questioned in what circumstances ‘a thing “said” in itself’ could be said to constitute sexual infidelity—‘is that really what is being aimed at’ or ‘is what is really being got at here sexual jealousy and envy, not “infidelity”?’ If so, why not say so?’ He suggested ‘binning’ the clause or, at the very least, ‘rewording’ it to say that in so far as a defendant was ‘motivated by sexual jealousy or envy, these motivations are to be disregarded’.⁶ Horder’s concerns related to ‘tweaking or reshaping the law a little’, especially with a reform of ‘as much fundamental importance as this one’ that had been so ‘controversial within the legal community and beyond’.⁷ Controversial it certainly was, many vigorously condemning the whole idea of challenging the time-honoured cultural script that killing on the ground of known or suspected sexual infidelity merits law’s compassion. Some were apoplectic about a proposal they felt had the potential for ‘grave injustice’. Inasmuch as ‘unfaithfulness by a supposedly committed sexual partner is liable to cause deep shock and hurt, and for some of them, quite likely to provoke explosive anger’, it was ‘outrageous’ that a ‘person’ who loses self control and kills must now be convicted of manslaughter.⁸

The enduring sympathy expressed in the courts, criminal law scholarship and society at large for impassioned killers, indicatively men who kill their current or former wives and women partners while in a jealous rage-inspired ‘red mist’ has preoccupied me for some time.⁹ Challenging the continuing disavowal of the sexed asymmetry of the ancient right to passion embodied in provocation by infidelity; addressing the normative questions raised by the conceit that a woman’s infidelity is sufficiently grave provocation to provide a ‘moral warrant’ to reduce murder to manslaughter, these remain focal concerns.¹⁰ How best to query the justice dispensed

⁵ I have suggested elsewhere that piecemeal approaches to reform are unlikely to succeed: see eg A Howe ‘Reforming Provocation (More or Less)’ *Australian Feminist Law Journal* 12 (1999) 127.

⁶ Horder, Memorandum to Public Bill Committee, January 2009.

⁷ Testimony to Public Bill Committee, February 4, 2009, Hansard, col 28.

⁸ JR Spencer ‘Response to Ministry of Justice Consultation Paper *Murder, Manslaughter and Infanticide: Proposals for Reform*’ www.docstoc.com/docs.

⁹ Eg A Howe ‘Provoking Comment: The Question of Gender Bias in the Provocation Defence—A Victorian Case Study’ in N Grieve and A Burns (eds) *Australian Women: New Feminist Perspectives* (Oxford University Press: Oxford, 1994) and ‘More Folk Provoke Their Own Demise (Revisiting the Provocation Defence Debate Courtesy of the Homosexual Advance Defence)’ 19 (1997) *Sydney Law Review* 366.

¹⁰ Most recently in A Howe ‘A Right to Passions? Compassion’s Sexed Asymmetry and a Minor *Comedy of Errors*’ 23(2) (2012) *Law and Critique* 83-102..

in ‘red mist’ cases? The following analysis, offered as a contribution to the burgeoning Law and Shakespeare movement,¹¹ explores sexual infidelity’s legal status as a moral warrant for murder in English law through the lens of Shakespeare’s first Roman play, *Titus Andronicus*. This might seem an unlikely choice. Why not *The Merry Wives of Windsor*, *Cymbeline*, *The Winter’s Tale* or *Much Ado About Nothing* where masculine fantasies of cuckoldry are parodied mercilessly? Better still, *Othello*, that damning parody of ‘sexual infidelity’ as excuse for femicide that reduces the ‘tragedy’ of homicidal male jealousy to farce. In *Titus Andronicus*, Shakespeare offers something just as valuable—a parody of justification-via-precedent for retaliatory violence. The play’s scathing gloss on the notion of moral warrants for murder, I suggest, opens up an illuminating space for questioning the ethical basis and hence the justice of manslaughter verdicts in sexual infidelity homicides.

1. The Furore over the Exclusion of Sexual Infidelity as Trigger for Loss of control

If the exclusion of sexual infidelity as a trigger for loss of control is yet to receive any sustained consideration in criminal law scholarship, it did cause a great deal of consternation at the time, several eminent lawmen expressing their continuing support for this culturally and legally-inscribed excuse for homicidal violence against women. In November 2008, the media reported the response of Lord Phillips, then the Lord Chief Justice to Harman’s call for abolishing provocation defences in infidelity cases. He felt ‘uneasy’ about a reform that he felt ‘so diminishes the significance of sexual infidelity as expressly to exclude it from even the possibility of amounting to provocation’. No ministerial statement had persuaded him it was necessary for reforms to ‘go that far’. Indeed, no change was needed because the current law did not let men ‘off lightly’—it required provocation to be conduct that would cause a reasonable man to act as the defendant acted. Furthermore, if juries were declining to

¹¹ See eg E Heinze ‘Power Politics and the Rule of Law: Shakespeare’s First Historical Tetralogy and Law’s “Foundations”’ 29 (2009) *OJLS* 139; E Heinze “‘Were it not Against our Laws’: Oppression and Resistance in Shakespeare’s *Comedy of Errors*’ 29 (2009) *Legal Studies* 230; E Heinze ‘Heir, Celebrity, Martyr, Monster: Legal and Political Legitimacy in Shakespeare and Beyond’ 20 (2009) *Law and Critique* 79; E Heinze ‘Imperialism and Nationalism in Early Modernity: The “Cosmopolitan” and the “Provincial” in Shakespeare’s *Cymbeline* 18 (2009) *Social & Legal Studies* 373; C Jordan and K Cunningham (eds) *The Law in Shakespeare* (New York: Palgrave Macmillan, 2007); P Raffield and G Watt (eds) *Shakespeare and the Law* (Oxford: Hart, 2008); P Raffield *Shakespeare’s Imaginary Constitution: Late Elizabethan Politics and the Theatre of Law* (Oxford: Hart Publishing, 2010).

hold that infidelity meets that test, he could not understand why it should be suggested that they are 'stretching the law to its limits'.¹² Harman persisted:

This defence is our version of honour killings and we are going to outlaw it. We have had the discussion, we have had the debate and we have decided and are not going to bow to judicial protests...I am determined that women should understand that we won't brook any excuses for domestic violence...It is a terrible thing to lose a sister or a daughter, but to then have her killer blame her and say he is the victim of her infidelity is totally unacceptable. The relatives say 'he got away with murder' and they're right.¹³

The dispute continued in the parliamentary deliberations on the reform bill, shrillest objections to the sexual infidelity exemption being raised in the House of Lords where emotions ran very high over the idea of depriving men of the ancient right to plead provocation after killing an unfaithful wife. Objections were couched in scrupulously gender-neutral terms. According to Lord Neill of Bladen, a retired judge:

The most common thing one reads in the press in murder cases is that the wife or husband finds the other spouse in the sexual act, loses control, picks up a bread knife or whatever comes to hand and stabs and sometimes kills the other spouse. That is French-style *crime passionel*. Are we now turning this into something that the English, with their stiff upper lip, will take as an ordinary incident of marital life? That is ridiculous and out of line with the way in which people think about human passions. It is one great terrible event that can happen in a married life and to say that it is to be disregarded makes nonsense of...the whole of the reform.¹⁴

Lord Lloyd of Berwick agreed:

¹² Quoted in Verkaik 'Judges Back Infidelity Defence', above n 4.

¹³ Quoted in G Hinsliff 'Harman and Law Lord Clash Over Wife Killers', *The Guardian* November 9, 2008.

¹⁴ July 7, 2009, House of Lords Debates, Hansard, col 576.

Why should we exclude infidelity from a jury's consideration? Is Parliament really to say that sexual infidelity can never give rise to a justifiable sense of being seriously wronged? Surely not.¹⁵

In response, Attorney-General Baroness Scotland reiterated the government's position that an 'important policy shift' was required—'in this day and age' it was no longer 'adequate to treat violence as a justified response to anger and we wish to raise the bar in relation to the partial defence in order to reflect this'. The provocation defence was 'too generous to those who kill in anger' and this, she said, was a 'deliberate and carefully considered shift in policy'—it was unacceptable today for 'a defendant who has killed an unfaithful partner to seek to blame the victim for what occurred'.¹⁶ Lord Thomas of Gresford, a deputy high court judge was unconvinced. What, he asked, was meant by 'sexual infidelity'? Did it mean 'only between married partners', or did it mean 'between a man and a woman, or a man and a man'? Looking 'back in history', he recalled that adultery was described as one of the four categories of adequate provocation in the law's foundational case. Lord Thomas did not 'want to go back to those days'; he did not want to 'go back to provocation'. But if the law was to be based on loss of self-control, 'how can we exclude the deepest feeling and passions, the breach of trust and breach of faithfulness, from our considerations?'¹⁷ As for Harman's view that the provocation defence 'institutionalises the culture of excuses'—that was 'just nonsensical rhetoric in an area of law of great sensitivity'.¹⁸

In Oct 2009, the House of Lords voted against the motion to exclude sexual infidelity as a trigger for loss of control by 99 votes to 84, Lord Henley condemning the proposed reform as 'gesture politics'. Lord Lloyd of Berwick, called it 'truly objectionable' and 'little short of astonishing that Parliament should be asked to tell a jury whether sexual infidelity is enough to cause a man or woman to lose their self-control'. While admitting that 'it is mainly men killing women'—Antigone, he recalled, was an exception proving the rule that 'on the whole, it is the men'—Lord Neill of Bladen said:

¹⁵ Ibid, col 578.

¹⁶ Ibid, col 581.

¹⁷ Ibid, col 589-90 referring to the case of *R v Mawgridge* (1706) Kel 119 at 135.

¹⁸ November 11, 2009, Ibid, col 839.

We would make ourselves look extraordinarily foolish if we say a jury cannot take account of what most people recognise as being the most dominant cause of violence by one individual against another. Every opera you go to, every novel you read has sexual infidelity at some point or another. Otherwise it is not worth reading or listening to.¹⁹

Nothing could convince them of the government's view that as Lord Bach put it: 'passions may run very high' over sexual infidelity, but it was no longer acceptable to resort to retaliatory violence.²⁰

The following month, the lower house decided 299 votes to 145 to overturn the peers' vote, but not before further objections were raised against the troublesome clause. Junior Justice Minister Claire Ward tried to reassure them: while it was unacceptable 'in this day and age for a man to be able to say that he killed his wife as a result of sexual infidelity...if other factors come into play, the court will of course have an opportunity to consider them'. It was only sexual infidelity 'in itself' that was excluded. But some still thought the proposal unjust, a product of Harman's 'desire to be politically correct'. As Tory justice spokesperson and now Attorney General Dominic Grieve saw it, the government had decided that 'thousands of years of human history and experience should be jettisoned for a piece of political correctness and proclamation: a declaratory statement that sexual infidelity can never justify violent behaviour'. For her part, Conservative MP Ann Widdecombe was completely flummoxed by the proposed reform: What, she asked, is 'unique about sexual infidelity that it must be removed from the almost endless list of circumstances in which somebody might be provoked?'²¹ It made no sense to her at all.

2. *The Law Commission: sexual infidelity as 'warranted excuse'*

Querying sexual infidelity as a legally recognisable trigger for homicidal fury had made more sense to the Law Commission charged with reviewing the operation of partial defences to murder in 2003. Not that it recommended either the exclusion of

¹⁹ October 26, 2009 Ibid, col 1061. Thanks to the reviewer who pointed out that Lord Neill appears to be confused about his classical precedent. In Sophocles' play, Antigone does not kill anyone except herself.

²⁰ Ibid, col 1061-2.

²¹ November 9, 2009, House of Commons Debates, Hansard, cols 85-95.

sexual infidelity as a trigger for loss of self control or the introduction of a loss of self control defence. Instead, the commissioners recommended that the defence of provocation be retained, proclaiming it to have a ‘moral basis’ that turns out to be the traditional notion of having a ‘legitimate ground to feel seriously wronged’ by the deceased. If defendants kill in response to grossly provocative words or conduct that gave them a justified sense of being severely wronged, the moral blameworthiness of the homicide would be significantly lessened.

Would this apply to killings of unfaithful wives? The initial impression given in the Commission’s Report is that it would not inasmuch as the commissioners agreed with Lord Hoffmann in *Smith (Morgan)* that

Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide, whether inflicted upon the woman herself or her new lover.²²

It followed that they believed that provocation should not be left to the jury in such a case. After all: ‘More than fifty years ago in *Holmes* Lord Simon said that Othello would be guilty of murder, even if Iago’s insinuations had been true, and we think this should be so’.²³ However, if a husband discovered his wife was having an affair, confronts her, she taunts him about his sexual inadequacy and he kills her, that lessened the gravity of the crime, the wife’s taunts constituting ‘some provocation’, provocation sufficiently grave to provide a defendant with a ‘warranted excuse’ for retaliatory violence.²⁴

The concept of a ‘warranted excuse’ is borrowed from Victoria Nourse’s analysis of the impact of liberalising reforms on the operation of provocation defences in the United States. Nourse addressed the ‘lurking normative questions’ left unaddressed by those defending passion as a mitigating factor. Why do some losses of self-control, say ‘infidelity-inspired rage’, count as provocation, while others, notably

²² *Partial Defences to Murder* Law Com No. 290 (2004) para 3.143 citing *Smith (Morgan)* [2001] 1 AC 146 at 169.

²³ *Ibid*, para 3.145 citing *Holmes* [1946] AC 588 at 598.

²⁴ *Ibid*, paras 3.52-54 citing V Nourse ‘Passion’s Progress: Modern Law Reform and the Provocation Defence’ 106 (1997) *Yale L J* 1331 at 1338.

‘till-inspired greed’ do not?²⁵ Despite finding that men are the beneficiaries of expanding provocation defences, that ‘infidelity’ might encompass a fiancée dancing with another, a girlfriend dating someone else or a woman pursuing a new relationship after divorce, and that 65% of men’s provocation claims are not based on infidelity but on a woman’s attempt to exit the relationship, Nourse rejects the abolitionist option advocated by provocation’s most ardent critics. Refusing to give up on ‘law’s compassion for sincere emotion’, she believes abolition is unnecessary inasmuch as her proposal for a ‘warranted excuse’ would bar most provocation claims in intimate exit and infidelity homicides because such behaviours, ‘though upsetting to men, are protected by law’.²⁶ Interestingly, one of the abolitionists Nourse refers to is Jeremy Horder, a commissioner on the law of murder reference that in 2006 endorsed the Commission’s earlier recommendation to retain the provocation defence even for some forms of sexual infidelity femicides.²⁷ In his 1992 book, *Provocation and Responsibility*, Horder had debunked the whole notion of a ‘moral warrant’ for murder, arguing for the abolition of the provocation defence on the ground that there is ‘no moral justification’ for individuals taking retributive action.²⁸ Significantly, it was the statistics demonstrating the sexed asymmetry of killers and killed in domestic homicides—103 men compared to only 26 women were convicted of killing a partner or former partner in 1989—and what he perceived to be the disturbing operation of provocation defences in femicide cases that led Horder to conclude that angry retaliation had ‘insufficient ethical status to warrant reducing murder to manslaughter’. Refusing the ‘excusatory distinction’ between revenge killing and killing in anger, he argued that there was ‘no moral justification for acting on a desire to take retribution personally’ and ‘nothing morally understandable’ in an angry exaction of vengeance ‘to warrant the exceptional mitigation of provoked killings from murder to manslaughter’.²⁹

²⁵ Ibid, at 1370.

²⁶ Nourse ‘Passion’s Progress’, above n 24 at 1332-6 and 1345.

²⁷ Law Commission, *Murder, Manslaughter and Infanticide*, No 304 (2006) paras 5.61-5.77.

²⁸ *Punishment and Responsibility* (Oxford: Clarendon Press, 1992) p 112.

²⁹ Ibid, at 186 and 197. See also JE Stannard ‘Towards a Normative Defence of Provocation in England and Ireland’ 66 (2002) *J Crim Law* 528. On the intrinsically normative evaluations made in determinations of criminal responsibility see J Watkins ‘Responsibility in Context’ 26 (2006) *OJLS* 593.

The Law Commission on which Horder sat 13 years later came to endorse the notion of a ‘moral warrant’ in the form of a ‘warranted excuse’ for murder, reinstating it in precisely in the same kind of femicide cases that had once so troubled him.³⁰ In recommending the retention of provocation on the basis of a consideration of a selection of hypothetical cases, the Commission, perhaps distracted by a reference asking it to pay particular attention to homicides committed in the context of domestic violence, rather than in a broader domestic context, paid insufficient, indeed no discernible attention to the cases that had led to the establishment of the reference on partial defences to murder. The precipitating events leading to the review, the triggers, if you will, for the establishment of the inquiry into the operation of partial defences to murder were not the infrequent domestic violence cases, the so-called ‘slow burn’ cases usually associated with battered women killers, but rather ‘red mist’ femicides.

In December 2002, the Attorney General appealed against sentences considered unduly lenient in 3 femicide cases.³¹ The sentences, all for manslaughter, ranged between three and half and seven years. In two of the cases defences of provocation and diminished responsibility were raised. Both were exit cases. In one, a man killed a woman who had left him, the court noting he had found this difficult to accept. He said he ‘just boiled over’ in a ‘red haze’ and choked her to death, saying ‘Do me a favour and die’. She had, he said, provoked him by saying she had the children, he only had their photos. The jury acquitted him of murder. In the other case, that of the ‘overworked’ solicitor Les Humes, a plea of guilty to manslaughter on the basis of provocation was entered on condition that this plea was accepted by the prosecution. Humes, who knifed his wife to death in front of their 4 children, the eldest a 12-year old covered in blood as she rang 999, said he was ‘in a red mist’ at the time and had ‘lost it totally’—‘It’s like they say, you can see a red mist, I was bellowing like a bull’. Maddie Humes was not only going to leave him for another

³⁰ Horder’s shift from an abolitionist to a reformist position is discernible in ‘Between Provocation and Diminished Responsibility’ 10 (1999) *King’s College Law Journal* 143 where he criticises *Holmes* for ‘wrongly’ turning the strong excuse theory into ‘a theory that disregards *all* individual characteristics’ (at 145; his emphasis) and in *Excusing Crime* (Oxford: Oxford University Press, 2004) pp 97-98 although he remains sympathetic to abolitionism at p 178.

³¹ *R v Suratan, R v Humes and R v Wilkinson* (Attorney General’s Reference No 74 of 2002, No. 95 of 2002 and No 118 of 2002) [2002] EWCA Crim 2982.

man for whom she had ‘big style’ feelings, she insisted on telling Humes so. He received a 7-year sentence.³²

The Court of Appeal declined to interfere in any of the sentences. It was unmoved even by argument that sentences were much longer in attempted murder cases, even domestic cases, than in cases of manslaughter by reason of provocation. As the court explained this anomaly, ‘certain assumptions’ had to be made in the offender’s favour in provocation cases, including the assumption that the loss of control was reasonable and that the circumstances were such as to make the loss of self control sufficiently excusable to reduce the gravity of the defendants offence from murder to manslaughter.³³ This decision returns us to the question that troubled the Commission: what should count as sufficiently excusable control-losing circumstances for murder? For the Court of Appeal, they include being distressed by a woman who discloses, as Maddie Humes allegedly did, that she had been unfaithful and that she wanted to leave the marriage. The Commission concurred: such behavior constituted ‘legitimate grounds’ for feeling seriously wronged, an unfaithful woman’s verbose departure providing a ‘warranted excuse’ for murder. With Horder’s arguments in *Provocation and Responsibility* against precisely this viewpoint overlooked by the very same Commission on which he sat, we need to look elsewhere for the necessary *gravitas* to contest this age-old warrant, a ‘moral warrant’ no less, for murder. Where better than Shakespeare?

3. *From the Theatre to the Theatre of Law, Glossing Titus Andronicus*

Titus Andronicus, Shakespeare’s early Roman revenge drama, has much to offer anyone challenging the notion of sexual infidelity as an excuse for murder. First, there’s the sheer excess of the violence, the dramatic overkill—half the cast are dead by the end. On one critic’s count, the play features

³² Ibid, at 285.

³³ Ibid, at 274. See M Burton ‘Case Note: Sentencing Domestic Homicide Upon Provocation: Still ‘Getting Away with Murder’” 11 (2003) *Feminist Legal Studies* 279. Burton suggests that the Court of Appeal has ‘implicitly approved the mitigation afforded to jealous men who kill’, p 287.

14 killings, 9 of them on stage, 6 severed members, 1 rape (or 2 or 3 depending how you count), 1 live burial, 1 case of insanity and 1 of cannibalism (the serving up of 2 butchered sons to a mother in a pie)—an average of 5.2 atrocities per act, or one for every 97 lines.³⁴

Such an exuberance of violence, I suggest, finds a parallel in the scale of men's homicidal violence against wives and women partners, the 2 killed in England per week by current or former male partners, the thousands killed over the 400 years since Shakespeare.³⁵ Second, and crucially, *Titus Andronicus* queries justification-via-precedent for retaliatory violence, so germane to a critical reading of historical and contemporary femicide cases. No matter that there is no intimate partner homicide in the play—read as a profound questioning of how homicide is justified or excused, *Titus Andronicus* invites a re-examination of the legitimating of retaliatory interpersonal violence whatever form it takes.

Over the last 30 years, *Titus Andronicus* has been reclaimed by Shakespeare scholars interested in tracing the intricate structuring and patterning in the play derived from classical allusions. Virgil's *Aeneid* is featured but it is Ovid's tale in *Metamorphoses* of Procne's revenge on her husband for raping her sister that provides the play's 'main structural model'.³⁶ In all there are over 50 classical allusions, the key ones providing textual 'precedents' for the current situations of the characters that 'authorise (quite literally) their subsequent actions', the sacrifices and slaughters that

³⁴ S Clark Hulse 'Wresting the Alphabet: Oratory and Action in *Titus Andronicus*' 21 (1979) *Criticism* 106.

³⁵ Horder cites this widely-published statistic in 'Reshaping the Subjective Element in the Provocation Defence', above n 1 at 124, n 2. This number has remained fairly constant. In 2009-2010, 54% (94 offences) of female victims aged 16 or over had been killed by their partner or ex-partner, a slightly lower proportion than in 2008/9 (58%, 100 offences). By contrast, only 5% (21 offences) of male victims aged 16 or over were killed by a partner or ex-partner: K Smith et al (eds) 'Homicides, Firearm Offences and Intimate Violence 2009/10: Supplementary Volume 2 to Crime in England and Wales 2009/10' *Home Office Statistical Bulletin*, January 2011. Statistics on the sex distribution of intimate partner homicide in different jurisdictions indicates that in 'Anglo-Saxon countries generally, men are far more likely to kill their married female partners than the reverse', with a ratio of 4-1 in England: Nourse 'Passion's Progress' above n 24 at 1344, note 82. Across all jurisdictions, 'gender differences are especially stark in the context of murder': DA Bergman 'Digging Deeper into, and Thinking About, the Interplay of Families and Criminal Justice' 13 (2010) *New Criminal Law Review* 119 at 120.

³⁶ J. Bate *Shakespeare and Ovid* (Oxford: Oxford University Press, 1994) p 102. For the 'explosion of scholarly interest' in the play in North American literary studies: K Solga 'Rape's Metaphorical Return: Rehearsing Sexual Violence Among the Early Moderns' 58 (2006) *Theatre Journal* 53 at 63.

deplete the cast.³⁷ Only one of these classical ‘precedents’ concerns us here—Livy’s tale of Virginius, the centurion who killed his daughter to *prevent* her rape. In *Titus Andronicus*, Shakespeare has Titus twisting the original tale, ‘wresting’ it to suit his purpose, misremembering ‘rash’ Virginius slaying his daughter *after* she had been raped—‘enforced, stained and deflowered’(5.3.38).³⁸ Shakespeare scholars note how Titus ‘makes do’ with this his chosen ‘textual exemplar’ in order to give himself ‘A reason mighty strong and effectual/ A pattern, precedent and lively warrant’(5.3.42-3)—to kill his raped daughter Lavinia.³⁹ ‘Lively warrant’ is glossed in the Arden edition by Jonathon Bate as ‘striking’, calling it ‘the OED’s first usage for this sense’ and suggesting that the ‘lively’ in ‘lively warrant’ perhaps plays on the more usual Elizabethan sense of ‘living’, as in Titus’s earlier reference to Lavinia’s ‘lively body’ (3.1.106). Bates notes the irony: Titus’s ‘lively warrant’ becomes Lavinia’s death-warrant.⁴⁰ Indeed, considerable critical commentary has converged on this point: distorted though Livy’s tale is in Titus’ re-telling, it provides him with a textual precedent to authorise and sanction Lavinia’s murder. A ‘great Roman precedent’ becomes his ‘deadly logical proof’ that she must die, no matter that he does not place ‘any real value on his stated textual authority’.⁴¹ As the bearer of ‘the language of the fathers, especially the texts of the fathers, Titus kills his daughter ‘because Livy told the story of Virginius killing *his* daughter’ thus confirming the pre-eminence of a past text that ‘originates and sanctions actions’.⁴²

³⁷ DA St Hilaire ‘Allusion and Sacrifice in *Titus Andronicus*’ 2 (2009) *Studies in English Literature* 311 at 316. See also G. Starry West ‘Going by the Book: Classical Allusions in Shakespeare’s *Titus Andronicus*’ 79 (1982) *Studies in Philology* 62 and RS Miola ‘*Titus Andronicus* Rome and the Family’ in PC Kolin (ed) *Titus Andronicus: Critical Essays* (New York: Garland, 1995). For an earlier account of the play’s classical origins see RA Law ‘The Roman Background of *Titus Andronicus*’ 40 (1943) *Studies in Philology* 145. For its Roman history sources see MC Liebler ‘Getting it All Right: *Titus Andronicus* and Roman History’ 45 (1994) *Shakespeare Quarterly* 263.

³⁸ P Aebischer *Shakespeare’s Violated Bodies* (Cambridge: Cambridge University Press, 2004) pp 56-7; C Asp ‘“Upon her Wit Doth Earthly Honour Wait”—Female Agency in *Titus Andronicus*’ in Kolin *Titus Andronicus: Critical Essays*, above n 37, p 341.

³⁹ GM Kendall ‘“Lend Me Thy Hand”: Metaphor and Mayhem in *Titus Andronicus*’ 40 (1989) *Shakespeare Quarterly* 299, p 313.

⁴⁰ *Titus Andronicus* (ed) J Bate (London: Arden Shakespeare, 1995) p 267, n 43. Titus’ depiction of his ‘warrant’ to kill Lavinia as ‘lively’ has alerted more than one critic to ‘the corporeal effects that come from the bind of those past tales’: TP Anderson ‘What is Written Shall be Executed: Nude Contracts and Lively Warrants in *Titus Andronicus*’ 45 (2003) *Criticism* 301, p 312.

⁴¹ H James ‘Cultural Disintegration in *Titus Andronicus*: Mutilating Titus, Vergil and Rome’ in Kolin, *Titus Andronicus: Critical Essays*, above n 37, p 297.

⁴² ML Fawcett ‘Arms/Words/Tears: Language and the Body in *Titus Andronicus*’ 50 (1983) *English Literary History* 261, p 269 (her emphasis).

Shakespeare scholars have noted too how the performance history of *Titus Andronicus* has overwhelmingly endorsed Lavinia's death, most directors content to accept Titus's 'lively warrant' to 'perform the like'. Critics have also tended to support the murder, refiguring it as euthanasia or assisted suicide and, at any rate, warranted by classical precedents. But not all: what 'never ceases to amaze' one theatre performance critic about Lavinia's death is 'the sheer endorsement Titus received from critics and performers alike for his wresting of her into another myth which prescribes her destruction', an endorsement oblivious to 'the obvious unsoundness of Titus' pre-text'.⁴³ As another critic puts it, in her death Lavinia is 'refigured by textual "precedent" into an explanation of her own slaughter...Both the knowledge and resolution of her violation are enabled by classical allusions that allow Titus to contextualise murder as "justice"'.⁴⁴ Nor, crucially, has it escaped scholars that in challenging the Emperor, Saturninus, to endorse his choice of literary precedent, asking him whether it was 'well done of rash Virginius' to slay his daughter, Titus uses the language of law—'precedent' and 'warrant'—to justify his killing of his own daughter.⁴⁵

Switching from the theatre to the theatre of law, is a similar pattern discernible in provocation by infidelity murder trials? Has legal precedent proved as 'lively' there as the warrant Titus seized on for killing Lavinia? Have defence lawyers transformed victims into explanations of their slaughter, prescribing their destruction while enabling defendants to say, supported by authority, that a murder conviction would be unjust? Of course, 'infidelity' pleas are not confined to provocation cases: cuckoldry, real or imagined, is too potent a transgression, too 'mighty, strong and effectual' to be so confined. 'Infidelity' tales also make their way into insanity, diminished responsibility, wounding and attempted murder cases. Nor are red mist cases all sexual infidelity cases. The last wife killer hanged in England lost his self control in a dispute with her over a bus fare.⁴⁶ But overwhelmingly, the thousands of femicides

⁴³ Aebischer *Shakespeare's Violated Bodies*, above n 38, p 57.

⁴⁴ K. Cunningham "'Scars Can Witness'": Trials by Ordeal and Lavinia's Body in *Titus Andronicus*' in KA Ackley (ed) *Women and Violence in Literature* (New York: Garland, 1990) 153.

⁴⁵ Bate above n 40, p 107. One can only agree with the reviewer who notes the further irony of Titus deferring to Saturninus on such a grave ethical question, given the emperor's brutality and despotism throughout the play.

⁴⁶ Corbett Roberts, a Jamaican immigrant, was hanged in Birmingham prison in 1955 for killing his wife with two hammers: 'New in Brief', *The Times* August 3, 1955 and 'Corbett Roberts' www.murder.uk. Jack Cull was the last Englishman hanged for killing wife. The prosecution alleged he

recorded in the English case law involve some version of her alleged ‘infidelity’—her passing glance at another man, her desire to leave an unhappy or violent relationship, perhaps, indeed, *his* total fabrication—provoking him into a jealous homicidal rage. Not that wifely infidelity guaranteed a successful defence. Over a third of the men hanged in England and Wales between 1900 and 1950 were convicted of murdering wives or current and former women partners, their tales of unfaithful women failing to sway judges to direct manslaughter convictions.⁴⁷ As for the inevitable question about the sexed distribution of defendants and victims in provocation by infidelity cases, suffice it to say that cases involving women who kill men over sexual infidelity are extremely rare, Ruth Ellis being a classic case of the exception proving the rule.⁴⁸ Certainly, appellate court judges have been well aware of the sexed asymmetry of sexuality infidelity pleas in murder cases, framing their rulings on provocation exclusively in terms of a male defendant distraught by proof or suspicion of a wife’s infidelity. Not until the mid-20th century did a court consider that in an age of marital equality, a woman might consider killing an unfaithful husband.⁴⁹

Even when reading the history of the English law of murder idiosyncratically, through the prism of the evolving sexual infidelity script, one starts conventionally with two of provocation law’s foundational authorities. In *Manning’s Case*, decided in 1670, the court held that killing a man found in the very act of committing adultery with one’s wife was ‘but manslaughter’ and directed the executioner to burn Manning gently in the hand, for there ‘could not be greater provocation than this’.⁵⁰ This case was approved in the famous 1706 case of *Mawgridge* which set down four rules,

stabbed her with a bayonet after receiving a letter saying she wished to leave him: ‘Murder of 17-year Old Wife’ *The Times*, September 13, 1952.

⁴⁷ In some years over half the men hanged had killed wives, rising as high as 8 of the 12 executed in 1900, 7 of the 8 in 1906, 8 of the 10 in 1912 and 7 of the 9 in 1915:

www.capitalpunishment.org/hanged.

⁴⁸ Of the four other women executed for murdering their husbands in 20th century Britain, his infidelity was raised as a motive in just one case. Ethel Major, hanged in 1934 for poisoning her husband, was said to be jealous of a woman neighbour: ‘Wife Charged with Murder’, *The Times* October 30, 1934. The court noted that Mr Major was ‘addicted to drink, had a violent temper and uttered many threats’: *The Times* December 4, 1934. Ellis is well-known as the last woman hanged in England, but who can name the man hanged the same year for murdering a woman partner? Answer: Winston Shaw, hanged at Leeds prison in 1955 for murdering a former girlfriend.

⁴⁹ See the discussion of the *Holmes* case below.

⁵⁰ Anonymous (1670) T Raym 212; also cited as *Maddy’s Case* (1671) 1 Vent 158.

‘supported by authority and general consent’ regarding ‘what are always allowed to be sufficient provocations’.⁵¹ The fourth, and most well-known, was this:

...when a man is taken in adultery with another man’s wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of a man, and adultery is the highest invasion of property.⁵²

Property she may have been, but in an oft-overlooked footnote, the court stated that at law ‘a man is not justifiable (sic)’ in killing a man he ‘taketh in adultery with his wife’ for this ‘savours more of sudden revenge, than of self-preservation’, adding however, that this law ‘hath been executed with great benignity’. Even so, a doubt had been registered about a vengeful motive in such cases right from the start.

Skipping ahead to the early 19th century, by which time the target of most red mist homicidal rages had shifted imperceptibly from interlopers to wives suspected of adultery, English courts continued to confirm the notion that the killing of an adulterer by a husband was the very lowest degree of manslaughter. Mere suspicion was not enough; ‘strong misgivings’ as to a wife’s fidelity without proof to ‘warrant the inference that he was justified in any such feeling’ would not do—a man had to have ‘ocular inspection of the act, and only then’.⁵³ After all, as Coleridge J said in the 1837 case of *Kirkham*, though the law ‘condescends to human frailty, it will not indulge human ferocity’—a man could only be excused if the provocation was recent and he acted ‘on its sting’, with ‘the blood remaining hot’.⁵⁴ *Kirkham* had killed his son when his wife left him because the son ‘took his mother’s part’ when his father beat her, a witness testifying that *Kirkham* said he would be his son’s ‘butcher’ and that he had picked the ‘day of execution’. The judge clearly had doubts about *Kirkham* but the jury brought in a manslaughter verdict.⁵⁵

⁵¹ *R v Mawgridge* above n 17 at 135.

⁵² *Ibid*, at 137.

⁵³ *Pearson’s Case* (1832) 2 Lewin 216.

⁵⁴ *R v Kirkham* (1837) 173 ER 422 at 425.

⁵⁵ *Ibid*, at 423.

By the mid-19th century, judges were directing juries that ocular inspection of the act of infidelity was essential for a successful provocation plea:

...to take away the life of a woman, even your own wife because you suspect that she has been engaged in some illicit intrigue, would be murder; however strongly you may suspect it, it would most unquestionably be murder.

The judge stated this ‘without the least shadow of doubt. We must not shut our eyes to the truth’—conceiving ‘a jealousy of the woman’ would not reduce the crime to manslaughter.⁵⁶ As for the man who cut his fiancée’s throat when she broke off their engagement, viewing her as if she were an adulterous wife and stating he had as ‘perfect a right to deal with her life as he had with any other property, the court saw this as a simple case of insanity.’⁵⁷ As the judge told the jury, if his ‘real motive’ was jealousy or a desire for revenge, that would be murder. After all, these were ‘the very passions which the law required men to control’. He added: ‘what would be the consequences to society if men were to say to every woman who treated them in that way’ that she should die, and carried out such view by cutting her throat?’ The defendant’s claim that he exercise ‘the same power over a wife as he could lawfully exercise over a chattel’ was ‘the conclusion of a man who had arrived at results different from those generally arrived at and contrary to the laws of God and man’.⁵⁸

By the late 19th century, wife killers were convicted of murder if all that they had to rely on was an ‘innocent suspicion’—‘perfectly sane men often have a suspicion of their wives having committed adultery’—killing such a wife was ‘a very common form of innocent suspicion’, but a suspicion was no warrant for murder, especially when men admitted that they did so because their wives had threatened to leave them.⁵⁹ Juries, however, were often reluctant to bring in murder convictions in femicide cases, many making recommendations to mercy in cases where women wanted to leave a man. That, they thought, was ‘great provocation’.⁶⁰ Men with jealous dispositions who had made previous threats to kill were strongly

⁵⁶ *R v Matthias Kelly* (1848) 175 ER 342 at 342-3.

⁵⁷ *R v Townley* (1863) 176 ER 384.

⁵⁸ *Ibid*, at 386.

⁵⁹ Trial of Charles Taylor, November 1882, *Old Bailey Proceedings Online* (www.oldbaileyonline.org).

⁶⁰ *Eg* Trial of Alfred Palmer, September 1901, *Ibid*.

recommended to mercy, including one who shot his wife, believing she ‘compelled’ him to do it.⁶¹ In one early 20th century case, a man who suspected his wife of involvement with a sailor killed his five-year-old daughter saying ‘I am glad she is dead; she can’t be brought up a prostitute now...I did it to save my old woman from putting her in bed with other men’. The jury recommended him to mercy ‘on account of the somewhat honourable motive he had of saving the little girl from a life of prostitution’.⁶² A man who murdered his daughter because she refused to disclose his wife’s whereabouts after their separation was also strongly recommended to mercy on account of the provocation ‘laterally from his family’, namely their refusal to help him find her.⁶³

Then followed a spate of well-known provocation cases where appeal courts were invited to follow *Rothwell*,⁶⁴ an 1871 femicide case, one of many departure cases to come—she left because of his violence, he killed her for leaving him. Blackburn J told the jury that ‘there may be such heat of blood and provocation as to reduce the crime to manslaughter’ but where there are ‘no blows’, there must be ‘a provocation equal to blows; it must be at least as great as blows’:

For instance, a man who discovers his wife in adultery and thereupon kills the adulterer, is only guilty of manslaughter. As a general rule, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she has committed adultery were thereupon to kill his wife, it might be manslaughter.⁶⁵

The door was now open for a wife’s allegedly sexually allusive words to count as sufficiently grave provocation to reduce murder to manslaughter, but early 20th-century courts were reluctant to extend the doctrine, refusing to extend it to cover cases of murdered fiancées and unmarried partners. As the court said in the 1913 case

⁶¹ Trial of John Price, October 1901, Ibid.

⁶² Trial of Henry Williams, October 1902, Ibid.

⁶³ Trial of Edward Harrison, 1905, Ibid.

⁶⁴ *R v Rothwell* (1871) 12 Cox CC 145.

⁶⁵ Ibid, at 147.

of *Palmer*,⁶⁶ it was ‘well established by law’ that a husband killing a wife found in adultery was guilty of manslaughter, not murder and that had been extended in *Rothwell* to a wife’s sudden confession of adultery, a sudden confession being ‘treated as equivalent to a discovery of the act itself’. But while it was a grave offence against the husband for the wife to commit adultery, there was no such offence when the woman was his fiancée or was co-habiting with him.⁶⁷ Moreover, as the Chief Justice said in a 1920 femicide case, ‘no authority can be cited to support’ the proposition that if a wife told her husband that she was going to commit adultery a manslaughter conviction was possible. That was ‘not the law of England’—a wife’s statement that she was ‘going to live with another man, or that she was about to commit adultery’ would not amount to provocation so as to reduce the crime of killing from murder to manslaughter. Indeed, the authorities supported the ‘contrary view’.⁶⁸

As for the soldier convicted of murder in 1944 after loading a Bren gun and emptying it to into a woman who had dumped him for a sergeant, the court was scathing about his appeal: There was not a ‘scintilla of evidence’ that could or should have been left to the jury. Just because he was jealous?—‘A man may conjure up a motive or reasons sufficient for himself to cause him to kill, but it does not follow that that provides evidence of provocation’. Furthermore, ‘the mode of resentment must bear some relation to the alleged provocation. A Bren gun which fires bullets in quick succession is one thing, but a woman showing preference for a particular lover is another’.⁶⁹ In mid-20th century England, jealous men who killed such women could find no authority that such ‘infidelity’ was sufficiently grave to provide them with a moral warrant for murder.

4. *Sexual Infidelity as motive for murder in ‘Modern Times’*

The reluctance of trial and appellate court judges to indulge suspicious husbands on trial for murdering their wives reached its apogee in the 1946 case of *Holmes*,⁷⁰ high point of judicial resistance to expanding the sexual infidelity murder defence script

⁶⁶ *R v Palmer* [1913] 2 KB 29.

⁶⁷ *Ibid*, at 31 and *R v Greening* (1914) 9 Cr. App. R. 105.

⁶⁸ *R v Ellor* (1921) 15 Cr. App. R. 41 at 43-44 citing *Palmer*, *Greening* and *R v Birchill* (1914) 9 Cr App R 91.

⁶⁹ *R v Gauthier* (1944) 29 Cr App R 113.

⁷⁰ *Holmes* above note 23.

beyond ocular proof of adultery. The court was unanimous: a confession of adultery ‘without more’ was not sufficient provocation to reduce murder to manslaughter. The judgment warrants a lengthy citation, recognising as it does the inherently sexed operation of the defence and the need to balance respect for human frailty (his) with a consideration of the sanctity of human life (hers). The Crown’s argument that it would be most ‘unfortunate’ if returned soldiers were to believe that on a wife’s confession of adultery ‘there is something like a licence to kill’ was persuasive. No ‘special quality’ attached to confessions of adultery—words, ‘whether an insult or an admission of adultery, never constituted provocation’.⁷¹ The defence countered with the prediction, accurate as it turned out, that in the future ‘there will certainly be ordinary reasonable men in this country who will hear confessions of adultery from their wives and some of them will be so deprived of their self-control that they will kill them’. If the Crown’s argument was accepted, these men will be ‘bound to be convicted of murder’.⁷² The court was unmoved. Delivering the unanimous judgment dismissing the appeal, Viscount Simon said ‘confession of adultery, grievous as it is, cannot in itself justify the view that a reasonable man (or woman) would be so provoked as to do what this man did’. While ‘the actual finding’ of a spouse in the act of adultery had always been treated as a ‘very special exception’ to the general rule about sufficient provocation because, as Blackstone put it, ‘there could not be a greater provocation’, it has been ‘rightly laid down that the exception cannot be extended’. Ocular observation was essential: ‘Even if Iago’s insinuations against Desdemona had been true, Othello’s crime was murder and nothing else’.⁷³

Furthermore

The rule, whatever it is, must apply to either spouse alike, for we have left behind us the age when the wife’s subjection to her husband was regarded by the law as the basis of the marital relation...when the remedies of the Divorce Court did not exist. Parliament has now conferred on the aggrieved wife the same right to divorce her husband for unfaithfulness alone as he hold against

⁷¹ Ibid, at 593-4.

⁷² Ibid, at 596.

⁷³ Ibid, at 598.

her, and neither, on hearing an admission of adultery from the other, can kill the other and then claim provocation.⁷⁴

In Viscount Simon's view the application of common law principles in such matters 'must to some extent be controlled by the evolution of society' and 'as society advances, it ought to call for a higher measure of self-control in all cases'.⁷⁵

It ought to, but has it?⁷⁶ In 1979 *Othello* reappeared in another femicide case, an appeal against a life sentence imposed after a plea of guilty to manslaughter on the grounds of diminished responsibility providing another opportunity to rethink sexual infidelity homicide. The appellant was said to suffer from an 'Othello Syndrome'—'morbid jealousy for which there was no cause'. He was 'undoubtedly guilty of homicide of some kind', but what?

It was a story of conduct of a common kind. Jealous husbands do kill their wives. Sometimes there might be good reasons why they should be jealous. In other cases they may not have any reasons at all for being jealous. On some occasions the reasons are flimsy. It is a kind of conduct against which wives should be protected by the law. Before 1957...this man would have been found guilty of murder. He could not have had any defence.⁷⁷

In the court's view, there was 'clear evidence of a killing by a jealous husband which, until modern times, no one would have thought was anything but murder'.⁷⁸ But now that the Homicide Act 1957 had reversed *Holmes*, leaving it to juries to determine whether a 'reasonable man' would do as the defendant did in a murder case, such killers had a viable defence. Juries could take into account 'everything done and said', thereby opening the floodgates to passion provocation pleas. Now 'any infidelity' could amount to provocation, leading to 'perverse manslaughter verdicts' based on

⁷⁴ *Ibid*, at 600.

⁷⁵ *Ibid*, at 600-1.

⁷⁶ Surveying the state of the English case law at the turn of the 21st century, one commentator, recalling Viscount Simon's observation, observed that it 'seems that we are going backwards by going forwards!': MJ Allen 'Provocation's Reasonable Man: A Plea for Provocation's Self Control' 64 (2000) *J Crim Law* 216 at 240. Bandalli puts it more bluntly: the Homicide Act 1957 'facilitated the regression of men's matrimonial evolution': 'Provocation—a Cautionary Tale', above note 2, p 399.

⁷⁷ *R v Vinagre* (1979) 69 Cr.App.R. 104 at 105.

⁷⁸ *Ibid*, at 106.

‘equivocal evidence’.⁷⁹ Now ‘passion’—the passion of men aroused by taunting, departing women in scenarios far removed from discovering her *flagrante delicto*—could follow an unabashedly subjectivising path, becoming embedded in what is colloquially referred to today as ‘the nagging and shagging defence’. Henceforth mere suspicion of a wife’s ‘infidelity’—say, her departure from an unhappy and often violent relationship—would not bar a successful provocation plea or appeal. All her killer need allege was that her taunting of his sexual inadequacy or her preference for another drove him into a ‘red mist’ rage. To take just one amongst dozens of examples, a man released in 1985 after serving a prison sentence for a dishonesty offence strangled his wife, claiming she had disparaged his sexual ability and boasted about her encounters with other men. His five-year sentence for manslaughter by reason of provocation was reduced to four, the court taking the view that ‘to taunt a man about his lack of sexual inclination or prowess does involve striking at his character and personality at its most vulnerable’.⁸⁰

In ‘modern times’ then, a woman’s slurs on a man’s virility constitutes grave provocation, although occasionally limits are placed on what her taunting permits him to do in response. It did not, for example, warrant—in a 2010 case—a man setting alight a departing wife and the house to conceal her body. He was convicted of murder.⁸¹ Nevertheless, buying an infidelity kit over the internet in order to detect from her underwear whether she was having an affair when she told him the marriage was over signals just how far we have come since *Mawgridge*, that foundational precedent case requiring ocular proof of a wife’s adultery for legally adequate provocation. By the late 20th century, it was established that the ‘normal range’ of sentences in cases of manslaughter where ‘one party to a relationship’ had a defence of provocation arising from ‘the faithless conduct or disenchantment of the other’ was between five and seven years. It could however, rise to seven or eight years in a case

⁷⁹ C Elliot ‘What Future for Voluntary Manslaughter?’ 68 (2004) *J Crim Law* 253 at 255 (my emphasis) and M.C. Davies, ‘Leaving Provocation to the Jury: A Homicidal Muddle?’ 62 (1998) *J Crim Law* 374.

⁸⁰ *R v Melletin* (1985) 7 Cr App R (S) 9 at 10. Compare W Gorman ‘Provocation: The Jealous Husband Defence’ 42 *Criminal Law Quarterly* 478 discussing at 489-90 the Australian case of *Arrowsmith v R* (1994) 55 FCR 130 where the court stated that in Australia in the 1990s, ‘the mere telling of a partner that a relationship is over, whether accompanied or not by an admission of adultery’ should not be regarded as sufficient to ‘induce an ordinary person to so lose control as to deliberately or recklessly inflict fatal violence on the other’, at 138.

⁸¹ *R v Birks* [2011] 1 Cr App R (S) 48.

where a man killed his wife because she wished to end the marriage, telling him she was having an affair but had not tried to ‘boast about it’ or ‘disparage’ him.⁸² That the ‘disenchantment’ arising from ‘faithless conduct’ is almost exclusively one way, that the ‘existing authorities’ providing the Court of Appeal with ‘sufficient guidance’ in matters of sentencing were all cases in which men had been convicted of manslaughter after killing departing women, was simply taken as read.⁸³ Anyone who still believes that sexual infidelity killings feature ‘a wife *or* husband’ finding the other spouse *in flagrante delicto*, losing control and stabbing them, or that a reform expressly excluding sexual infidelity as a trigger for loss of control is illogical, ‘truly objectionable’ and ‘outstandingly obnoxious’ needs to read the case law.

5. Law’s Logic in ‘Domestic’ Cases—Querying the Weight of Authority

A spate of late 20th century attempted murder cases, referred to by the Court of Appeal as ‘domestic attempted murder’ cases, shed interesting light on judicial views of the weight of authority in domestic cases. In all but one of these cases the court reduced sentence, but only because they felt obligated by precedent to do so. Only in one, the 1983 case of *Haines*,⁸⁴ did the court refuse to reduce a 12-year prison sentence. Mystified as to how the victim had survived being shot in the face with a shotgun from a range of 12 inches, it upheld that sentence as ‘condign’.⁸⁵ In all the others the court felt obliged by the authorities to reduce sentence, even where a young woman’s life was ‘totally ruined’ after suffering brain damage during strangulation.⁸⁶ But for those authorities—the foundational case constraining subsequent decisions was the 1979 cases of *Townsend* in which a man fired at his departed wife with a shotgun causing severe injuries from which it was thought she might not recover—

⁸² Attorney General’s Reference No. 74 of 2002 above note 31 at 277-280 (citing *Taylor* (1987) 9 Cr App R (S) 175, *Gilbey* (1990) 12 Cr App R (S) 49 and *Light* (1995) 16 Cr App R (S) 824).

⁸³ *Ibid*, at 282.

⁸⁴ *R v Haines* (1983) 5 Cr App R (S) 58.

⁸⁵ *R v Green* (1986) 8 Cr App R (S) 284 at 287. The court thought the defendant in *Donnelly* (1983) 5 Cr App R (S) 70 who had behaved in an extremely jealous manner over a long period, accusing his wife of infidelity, threatened her and hitting her with a hammer, was ‘lucky’ to get his sentence reduced from nine to seven years: *Ibid*.

⁸⁶ *R v Dearn* (1990-1) 12 Cr App R (S) 527 at 528. The trial judge found it ‘very hard to think of a worse case of attempted murder than this...Its consequences have been utterly disastrous, some would say as bad if not worse’ than if he had killed her: *Ibid*.

they would have been content to leave the sentences as they were.⁸⁷ A sense of being overburdened, even oppressed by authority, is palpable. Consider *Casseram*, a 1992 case in which a husband tried to murder a wife who had initiated divorce proceedings by setting her alight. His 14-year sentence was reduced to 12 years' imprisonment by a reluctant Court of Appeal that felt 'constrained to follow authority' that a lesser sentence was appropriate.⁸⁸ So too did the court in *Bedford*, another case of a man attempting to murder his wife by setting her alight. While 'each member' of the court thought there was nothing wrong with the 12-year sentence, they felt bound 'in the light of the authorities' to reduce it to ten years' imprisonment.⁸⁹

Reviewing these cases in a 1995 *non-domestic* rape and attempted murder case, the Court of Appeal relived its sense of obligation, stating that 'the weight of authority' in domestic attempted murder cases had 'compelled' it to reduce sentence. The court gave this explanation:

In our judgment, a distinction has to be drawn between cases in which there is a pre-existing relationship between the victim and the perpetrator of the offence and those in which there is no such relationship. Whether that is a logical distinction is not for us to say, but the authorities clearly show that in cases where such a relationship exists *or has existed* a somewhat lesser tariff is imposed.⁹⁰

Coming face to face with the received notion that killing a partner or former partner was a lesser form of homicide, the court demurred—whether a relationship, even a pre-existing one, should lessen the tariff imposed was not for it to say. Not for it a bold statement such as that made by the Court of Appeal in 1980:

An assault by a man on his wife should not be brushed aside as due to emotional upsets or jealousy; wives are vulnerable people at the hands of violent husbands, and there is no reason why a man should not be punished in

⁸⁷ *R v Townsend* (1979) 1 Cr App R (S) 333. Instead, they reduced his sentence of 15 years imprisonment to ten.

⁸⁸ *R v Casseram* (1992) 13 Cr App R (S) 384 at 387-8.

⁸⁹ *R v Bedford* (1993) 14 Cr App R (S) 336 at 338.

⁹⁰ *R v Jason Clement* [1995] 16 Cr App R (S) 811 at 815 (my emphasis).

the same way for assaulting his wife as he would be for assaulting any other person.⁹¹

It went without saying that the authorities that late 20th century courts felt so compelled to follow in domestic attempted murder cases were all cases of attempted femicide committed by jealous men, their ‘infidelity’ allegations code for a woman’s desire to depart.

Finally, four recent appeals against sentences considered unduly lenient in cases where men attacked women, sometimes fatally, reveal divergent judicial views on infidelity’s mitigating prowess today. In the first, a successful appeal against a lenient sentence for grievous bodily harm for a man who, suspecting his wife of infidelity, branded her with an iron, Hallett LJ observed that:

...if there is anyone in or outside the criminal justice system who still believes that infidelity can justify or mitigate violence of this kind, they are mistaken. Whatever the hurt or anger that a betrayed partner feels, they must understand that they should not resort to violence. If they do, they do so not only at the peril of their victim but at their own peril.⁹²

His sentence was increased from two and a half to five years. Compare that to the unsuccessful appeal in 2010 against a six-year sentence for a man convicted of grievous bodily harm against a woman who had left him, started another relationship and, he said, sexually taunted him. Hallett LJ’s observation about infidelity not mitigating violence, the court said, had to be ‘closely examined’:

There is no justification for violence arising from infidelity. Unlawful violence is unlawful violence, but the observation in relation to mitigation was clearly confined to the kind of systematic torture deliberately inflicted on the victim [in that case]. In the context of such cold-blooded violence we have no

⁹¹ *R v Giboin* (1980) 2 Cr App R.(S) 99. Nevertheless, the court reduced his sentence from 6 to 5 years. See the comments comparing sentencing in attempted murder and manslaughter cases in J Horder ‘Sex, Violence and Sentencing in Domestic Provocation Cases’ (1989) *Crim LR* 546 at 547-8 and Burton ‘Case Note’ above n 33 pp 282-6.

⁹² Attorney General’s Reference (No.80 of 2009) [2010] EWCA Crim. 470 at para 19.

difficulty with the observation that in such a case, even if there were infidelity, it would not provide mitigation. But the observations of Hallett LJ in that decision does not sustain an argument that infidelity can never mitigate violence.⁹³

Such an argument would contradict not only ‘the reality of human behaviour’ but also the approach taken by the courts ‘for generations’ to ‘the possible impact that infidelity may have on men and women who are normally peaceful and calm. Hallett LJ would not have departed from such well-established principles without doing so expressly and unequivocally’.⁹⁴ These historically mandated principles ensure that infidelity still has mitigating force, at least where there is no systematic torture.

In the third case, a June 2011 appeal against the five-year sentence given to a 66-year-old man convicted of the manslaughter of his partner by reason of provocation, the court took the opportunity to comment on the changes to the law of provocation made by the 2009 Act. These changes, it said, ‘appeared to create a higher and certainly different threshold than the common law’ and ‘a greater focus on the death of the victim equally fell to be considered’.⁹⁵ A greater focus on her violent death and less on his emotional state?—now that’s a startling development. The fourth and final case, *Williams*,⁹⁶ was an appeal, in June 2011, on the ground of undue leniency against a man’s sentence for murder of life imprisonment with a minimum specified term of 15 years. Entering the home of his former partner in the middle of the night, he had killed her in a prolonged beating in front of their three-year-old daughter while shouting: ‘Have you slept with him?’ His sentence was increased to 20 years. Its attention drawn to s.55(6)(c) of the 2009—the sexual infidelity exclusion clause—the court stated that s.55 was concerned with the substantive criminal offence of murder, not with the determination of the minimum term for murder. Provocation, even if not amounting to a defence, may provide ‘relevant mitigation to murder’. That not only accords ‘with common sense’; it reflects the sentencing principle which allows for mitigation when the same material’—stories of unfaithful women who

⁹³ *R v Thompson* Attorney General’s Reference No. 1 of 2010 [2010] EWCA Crim 748 at para 21.

⁹⁴ *Ibid* at para 22.

⁹⁵ *R v Edwards* Attorney General’s Reference No. 008 of 2011 [2011] EWCA Crim 1461 at para 15.

⁹⁶ *R v Williams (Sanchez)* Attorney General’s Reference No 23 of 2011 [2011] EWCA Crim 1496.

leave overbearing men—arises in attempted murder or grievous bodily harm cases.⁹⁷ While the court found ‘no provocation of any kind’ to mitigate the offence in *Williams*,⁹⁸ the case law provides clues as to what forms of ‘sexual infidelity’ will survive reformers’ efforts to reign in the excesses of provocation defences in domestic cases. In a 2007 case in which a man killed his former partner after seeing a photo of her new boyfriend, the court found that the ‘actual trigger’ to his ‘readiness to kill’ was his discovery of his former partner’s ‘latest relationship’. In its view, this could be said to amount to ‘an element of provocation’ that will mitigate sentence.⁹⁹ A man learning of his former partner’s latest relationship—that’s the kind of ‘sexual infidelity’ that will continue to mitigate murder in the post-reform era. Furthermore, infidelity will still be relevant to a defence to murder notwithstanding the reforms designed to exclude it. As the Court of Appeal has made clear in the most recent spate of wife-killing cases—all three of which were exit cases—‘infidelity’ taking the form of a wife’s departure from a marriage may properly be taken into consideration for the purposes of the partial defence of loss of control when such behaviour is integral to the facts as a whole.¹⁰⁰

6. *Reading Titus Andronicus*

Once dismissed as a simple revenge drama, a gore-fest of retaliatory violence—*Titus Andronicus* is now finding a place in the law and literature genre, critics recognising its use of excess and overkill to ‘define the ethical’ and, ultimately, justice.¹⁰¹ Justice and injustice are dominant themes throughout: ‘This prince in justice seizeth but his own’ (1.1.281); ‘my lord, you are unjust’ (1.1.292). Titus goes mad in search for justice. Searching by land and sea, he finds justice has been ‘shipp’ed’ from Rome by a tyrannical emperor. The goddess of justice having left the earth, he shoots arrows attached with petitions to the gods and even to the underworld, but he finds ‘no justice

⁹⁷ *Ibid*, at para 32.

⁹⁸ *Ibid*, at para 33.

⁹⁹ *R v Rush* [2008] Cr App R(S) 45 at para 26.

¹⁰⁰ *R v Clinton, R v Parker, R v Evans* [2012] EWCA Crim 2. So much for the view, expressed in 1973, that the notion that ‘a husband can treat his wife with any kind of force seems now to be obsolete, whether she is living with him or apart’: ‘Kidnapping One’s Wife: *R v Reid*’ 37 (1973) *J Crim Law* 33.

¹⁰¹ C Crosbie ‘Fixing Moderation: *Titus Andronicus* and the Aristotelian Determination of Value’ 58 (2007) 147. See also D Callaghan and CR Kyle ‘The Wilde Side of Justice in Early Modern England and *Titus Andronicus*’ in *The Law in Shakespeare* above n 11 and P Raffield *Shakespeare’s Imaginary Constitution* above n 11, pp18ff.

in earth nor hell' (4.3.50). The Andronici 'go pipe for justice' (4.3.24), leaving Titus no recourse, at least in his mind, but to take matters into his own hands. Crucially, however, his revenge is patterned on precedent, commentators noting that when Titus speaks of 'precedent' and 'warrant', he sounds like he is creating 'a new system of case-law' following the breakdown of established law. His appeal to 'precedent'— 'the bedrock of the common law, in a play set in Rome, the home of civil law'— suggests to them 'an intervention in the late Elizabethan argument about the relative weight' of civil law, by then associated with arbitrary government, and common law.¹⁰² In this reading, the play is a gloss on juridical developments in the 1590s, the last decade of Elizabeth's rule, when 'the jurisdiction of the common law was being encroached upon' by the Tudor prerogative courts.¹⁰³ Here Titus' argument from the common law principle of precedent 'makes him into the very voice of the English common law, a dramatic antecedent to Sir Edward Coke'.¹⁰⁴ In one reading, he is even presented as a moderate, an Aristotilean hero in search of the ethical mean. When situated within the Aristotelian ethical theory of the late 1590s, it is argued, *Titus Andronicus* reveals a 'deeply moderate protagonist', a man provoked beyond endurance but whose 'deep sense of proportion' and 'Aristotelian temperance of anger' is 'easy to overlook'.¹⁰⁵

For these scholars, Lavinia's killing is 'no savage murder'. As an embodiment of the common law principle of precedent or as a seeker after the Aristotelian ethical mean, Titus, in their eyes, plausibly defends her slaughter on the basis of his 'lively warrant'. Some go so far as to suggest that in symbolic terms the killing of Lavinia, 'Rome's 'rich ornament', is 'a necessary act', her mangled body symbolising the 'desecrated body of Rome' which 'had to perish that a new' benevolent order might arise from the ruins of the old'. Shakespeare 'distinguishes clearly between barbarous acts of violence and the sacrificial rites which are enacted by Titus' and Lavinia's

¹⁰² Bate *Titus Andronicus* (ed), above n 40 p 28.

¹⁰³ Raffield *Shakespeare's Imaginary Constitution*, above n 11 at 21.

¹⁰⁴ Bate *Titus Andronicus* (ed), above n 40 p 28. Extending the argument, Raffield claims that Titus' search for justice 'marks him out also as the dramatic descendant' of the 'apologist for the constitutional supremacy of the common law, Sir John Fortescue': *Shakespeare's Imaginary Constitution*, above n 11, pp 28-9.

¹⁰⁵ Crosbie 'Fixing Moderation' above n 101, pp 148 and 163-164. Indeed it is, easy to overlook. This was a man who slaughtered one son for filial disobedience, killed his daughter for dishonouring the family by getting herself raped and served up two sons to their mother in a pie as revenge for plotting the rape!

death is a 'legitimate form of sacrifice'.¹⁰⁶ Other Shakespeare scholars have challenged the depiction of Titus as epic hero, highlighting the play's use of Ovid against Virgil to parody the epic idiom.¹⁰⁷ To them, his killing of Lavinia is clearly murder. He claims to act on a classical precedent to remove her shame and 'stain' on the family honour—'die, die Lavinia, and thy shame with thee'. But he also has a selfish motive, that of ending *his* 'sorrow'—'and with thy shame thy father's sorrow die' (5.3.6), lines often omitted in performance.¹⁰⁸ Moreover, he knows his act is outrageous. In adapting the Virginius story as a model for action, he describes that father as 'rash', and his own deed as an 'outrage', but still attempts to justify it: 'I have a thousand times more cause than he' (5.3.50-1). Here Titus is a pathetic figure who mistakes 'false shadows for true substances' (3.2.79), a man 'so confined by an education that substitutes erudition for wisdom that he cannot even invent the form of his own revenge'.¹⁰⁹

Paralleling the debunking of Titus is a move in Shakespearean criticism to transform Lavinia from an object to a subject. Once just a mangled body symbolising the fallen world of Rome; a 'mute presence' serving as 'a constant symbol of the appalling injustices that are inflicted on the body politic by an unaccountable and tyrannical lawmaker',¹¹⁰ she is now a survivor. Transformed from a mere stage prop in Titus' revenge drama to 'co-author' of the retaliation against her rapists, Lavinia rejects Titus' repetitive narrative strategy, his commitment to literary precedents to authorise his actions. She insists on other 'narrative possibilities beyond her father's proscriptions', imagining a future outside his 'preset stories'.¹¹¹

¹⁰⁶ Raffield *Shakespeare's Imaginary Constitution*, above n 11, p 48. According to Crosbie, Titus' piety, 'however imperfect, nonetheless nobly privileges the ethos of gratitude over unrestrained self-interest', even when he kills Lavinia, above n 101 pp 158-9. Compare M Hunt 'Compelling Art in *Titus Andronicus*' 28 (1099) *Studies in English Literature* 197, arguing at 211 that Titus adapts the Virginius story to 'satisfy his perverted sense of honour. Clearly, Lavinia's death in Titus' staging is gratuitous'.

¹⁰⁷ H James 'Cultural Disintegration in *Titus Andronicus*' above n 42. Bate describes James' argument as 'ingenious', noting its coherence with his 'sense' that Shakespeare uses Ovid to 'destabilise a Virgilian, imperial idiom': Bate *Shakespeare and Ovid*, above n 36 p 103, n 33.

¹⁰⁸ Aebischer *Shakespeare's Violated Bodies*, above n 38 pp 58-63. See also D McCandless 'A Tale of Two Tituses: Julie Taymor's Vision in Stage and Screen' 53 (2002) *Shakespeare Quarterly* 487.

¹⁰⁹ West 'Going by the Book', above n 37 p 74. See also JP Cutts 'Shadow and Substance: Structural Unity in *Titus Andronicus*' 2 (1968) *Comparative Drama* 161.

¹¹⁰ Raffield *Shakespeare's Imaginary Constitution*, above n 11, p 39.

¹¹¹ B Packard 'Lavinia as Co-author of Shakespeare's *Titus Andronicus*' 2 (2010) 281 at 282.

In this reading, one that follows Heather James' influential interpretation of Shakespeare as performing an Ovidian critique of Rome, *Titus Andronicus* condemns Titus' slavish adherence to precedent texts to authorise revenge.¹¹² Far from supporting Titus' hegemonic view of his killing of Lavinia as culturally warranted, the play is a parodic indictment of self-legitimizing precedents for retaliatory violence, a damning critique of cultural texts that distinguish between 'good and bad killing' and, more generally, the use of 'elevating' discourses, legal or poetic, that legitimate violence and grant it meaning.¹¹³ Read this way, it creates an interpretative space for re-examining the process by which violence, whatever form it takes, is legitimated. Take infidelity homicide cases for instance. Following Shakespeare in *Titus Andronicus*, what demands re-examination in these cases is not only the twisting and perverting of the foundational precedent case requiring ocular proof of a woman's infidelity. It is also the extraordinary expansion of that still 'lively' warrant for murder to departure cases, thus overriding the best efforts of many 19th and 20th century judges to contain its liveliness. More than that, it is the foundational precedent, or pretext, itself which must be interrogated. Isn't it past time, Shakespeare might ask, 300 years after *Mawgridge*, to query the notion that a manslaughter conviction for a man who kills a woman he deems unfaithful is warranted by legal precedent? Isn't it well past time to imagine a future outside this preset story, this pre-text, of male possessory right?

Conclusion: Murder, Manslaughter, Justice?

For one theatre reviewer, 'the nightmarish spectacles' of retaliatory violence in *Titus Andronicus* are 'cathartic channels through which the spectator is at once horrified and compelled to think about justice'.¹¹⁴ Does this brief history of the sexual infidelity case law compel us to do the same? The question of justice is raised only very

¹¹² For James, Ovid provides Shakespeare with a precedent for parodying Vergil's *Aeneid*, the epic tale of empire-building, order and pietas which the Andronici 'virtually claim as family history', 'Cultural Disintegration in *Titus Andronicus*' above n 41 at p 287. Bate agrees, above n 36 p 109.

¹¹³ L Dickson "'High and "Low" Blows: *Titus Andronicus* and the Critical Language of Pain', 26 (2008) *Shakespeare Bulletin* 1, pp 6 and 15. See also KA Rowe 'Dismembering and Forgetting in *Titus Andronicus*' 45 (1994) *Shakespeare Quarterly* 279; D Willis "'The Gnawing Vulture": Revenge, Trauma Theory and *Titus Andronicus*' 53 (2002) *Shakespeare Quarterly* 21 and HYF Choy 'Toward a Poetic Minimalism of Violence: On Tang Shu-wing's *Titus Andronicus*' 1 (2011) *Asian Theatre Journal* 44.

¹¹⁴ I Cetin '*Titus Andronicus* A Comedy of Blood' 28 (2010) *Shakespeare Bulletin* 356 at 357.

occasionally in the judgments.¹¹⁵ In *Vinagre*, for example, the Court of Appeal wondered whether, following the logic of medical evidence about ‘Othello Syndrome’, it was necessary, ‘if justice was to be done’, to determine whether there was evidence that the victim, the appellant’s wife, had been unfaithful. If so, it was a ‘straightforward case of a jealous husband’. If not, the ‘Othello Syndrome’ could be ‘called in aid’. The concept did not appeal to the court, but as the trial judge had accepted the plea, the court felt obliged to consider its sentencing implications. It decided that whatever the appellant ‘may have been suffering from at the time when he killed his wife’, he was not likely to have a reoccurrence—(his wife being, specifically, dead now, no need for a relapse)—and as he was no longer suffering from ‘the kind of mental imbalance’ that would justify a life sentence, ‘justice’ demanded that his sentence be reduced to seven years’ imprisonment.¹¹⁶ In *Townsend*, one of the domestic attempted murder cases that so troubled the Court of Appeal, the ‘real question’ was whether, ‘bearing in mind the domestic nature of this offence, as contrasted with, for example, an armed robbery leading to the same result, it is possible to take a rather more merciful view than that taken by the trial judge?’ The court decided, without any further explanation, that ‘justice would be done in this case’—the one where it was thought the woman might never recover from her shotgun wounds—if they reduced his fifteen year sentence by five years.¹¹⁷ That’s about as far as courts have taken the question of justice in ‘infidelity’ cases, a reminder, if any is needed, that there is ‘no necessary connection between law and justice’.¹¹⁸

Suggesting, as abolitionists do, that provocation’s ‘red mist’ script be scrapped *tout court*, whether offered as defence *or* as mitigation to murder in sentencing might sound far-fetched. But precedents, if not the weight of authority, can be found for questioning excusatory transports of ‘passion’ countenanced for so long in English law in provocation by infidelity cases. In a dissenting judgment in *Buckner’s* case, a 1655 non-domestic manslaughter by reason of provocation case, Judge Aske queried the whole idea of distinguishing murder from manslaughter in intentional homicides.

¹¹⁵ This would not surprise Marianne Constable who argues that ‘modern law often seems silent as to justice’: M Constable *Just Silences: The Limits and Possibilities of Modern Law* (Princeton: Princeton University Press) p 7.

¹¹⁶ *Vinagre* above note 77 at 106-7.

¹¹⁷ *Townsend* above n 87 at 334.

¹¹⁸ Constable *Just Silences*, above n 115 p 177.

By ‘the law of God’, he said, ‘I find no difference between murther (*sic*) and manslaughter, for it makes no difference between hot blood and cold blood, as we do now distinguish’.¹¹⁹ Echoing these misgivings in the 1727 case of *Oneby*, the Lord Chief Justice, Lord Raymond, observing how ‘the Law of England is so far peculiarly favourable...as to permit the excess of anger and passion’ in some instances, said he deployed the word ‘peculiarly’ because he knew ‘no other law that makes such a distinction between murder and manslaughter’.¹²⁰ Perhaps the English Court of Appeal, perplexed as it says it is about the logic of distinguishing hot-blooded domestic cases from cold blooded non-domestic armed robberies, might consider revisiting Judge Aske and Lord Raymond’s judgments, joining them in questioning the ‘pretext of passion’ exempting an angry man from the punishment ‘which from the greatness of the injury and the heinousness of the crime he justly deserves’ in, say, red mist homicides.¹²¹

¹¹⁹ *Buckner’s Case* (1655) Style 467 at 469.

¹²⁰ *Oneby* (1727) 2 Ld Raym 1485 at 1494-5.

¹²¹ *Ibid.*