

**PROVOCATION AND THE HOMOSEXUAL ADVANCE
DEFENSE IN AUSTRALIA AND THE UNITED STATES:
LAW OUT OF STEP WITH COMMUNITY VALUES**

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INTRODUCTION

In this article, I critically consider legal issues that arise when a straight person kills a homosexual person after the homosexual persona has made a sexual “advance” toward the straight person. Specifically, this scenario gives rise to the legal question of whether such conduct may ever attract the legal defense of provocation. The defense of provocation applies the “reasonable person” standard to assess whether the violent response to the homosexual advance was reasonable. In answering this difficult question, inevitably broader questions about society and culture become wrapped up in the analysis. Does our society and our law remain heterocentric and homophobic? If so, should these values be reflected in legal principle? And how can change occur to reflect different values?

THE LAW AND SEXUALITY

Historic and longstanding links between law and religion made it inevitable that the law would frown on homosexual behavior. As one example from the Christian tradition, a passage in the Bible’s book of Leviticus states that “if a man lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.”¹ Acceptance of such principles of natural law, and the use of ecclesiastical courts, help explain why the law criminalised homosexual behavior for hundreds of years, refused to recognize same-sex relationships, and allowed discrimination against someone due to their sexuality.² Legal discrimination against homosexuals continues even today,³ though there have been improvements.⁴

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¹ *Leviticus* 20:13 (King James).

² Legislative attempts were even made to overturn laws outlawing discrimination on the basis of sexuality. See *Romer v. Evans*, 517 U.S. 620 (1996).

³ For example, the Defense of Marriage Act (DOMA), 28 U.S.C.A. § 1738C (2009) (effective September 21, 1996), states that the courts of one state need not recognize a same-sex marriage solemnized in another state. Section 88EA of the Marriage Act, 1961 (Austl.), also specifically provides that a marriage between two persons of the same sex, when entered into elsewhere, will not be recognized in Australia (though Australia generally recognizes marriages that took place in other

Historically, the ambivalence towards homosexuality was not confined to the legal discipline. As late as the 1950s, homosexuality was seen as a mental aberration, as reflected in the American Psychiatric Association's (the APA's) *Diagnostic and Statistical Manual*.⁵ It was only in 1973 that the APA formally removed homosexuality from its list of "sociopathic personality disturbances."⁶ Regardless, the classification of homosexuality as a mental disease fed into the development of doctrines such as the Homosexual Panic Defense (HPD) and Homosexual Advance Defense (HAD).

HOMOSEXUAL PANIC DEFENSE AND HOMOSEXUAL ADVANCE DEFENSE

As has been documented elsewhere, the Homosexual Advance Defense evolved from the related Homosexual Panic Defense. The HPD was first identified by psychiatrist Edward Kempf in 1920.⁷ While working in a mental institution with prisoners following World War I, he studied the possible side

countries, provided the legal requirements were observed at the place of solemnization, regardless of whether it would have been a valid marriage in Australia). "Contemporary condemnation of gay and lesbian people is not simply a matter of individual attitude or idiosyncrasy, but rather is deeply embedded in the structures of our culture and law." Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 195 (1988).

⁴ Compare the United States Supreme Court's attitude in *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (suggesting that extending the right to privacy to "homosexual sodomy" was "at best, facetious"), with the case that overruled it, *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning a Texan law criminalising adult homosexual behaviour), and *Croome v. Tasmania* (1997) 191 C.L.R. 119 (the High Court of Australia's decision ending State statutes outlawing homosexual practices).

⁵ AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38 (American Psychiatric Association 1952). In the first edition, homosexuality "and other sexual deviations" were classified as sociopathic personality disturbances. Such disturbances were defined as having the absence of subjectively experienced distress or anxiety despite the presence of profound pathology. In 1968, the classification of homosexuality as a mental illness continued, but the revised version did not list it as a sociopathic personality disturbance. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS (American Psychiatric Association, 2nd ed. (DSM-II) 1968).

⁶ AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS (American Psychiatric Association, 2nd ed. 6th prtg. (DSM-II) 1973).

⁷ PSYCHOPATHOLOGY (1920) 477-515; Christina Pei-Lin Chen *Provocation's Privileged Desire: The Provocation Doctrine, 'Homosexual Panic', and the Non-Violent Unwanted Sexual Advance Defense* (2001) 10 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 195, 198-202; Cornstock, G *Dismantling the Homosexual Panic Defence* (1992) 2 LAW AND SEXUALITY 81; Adrian Howe *More Folk Provoke Their Own Demise* (1997) 19 SYDNEY LAW REVIEW 336, 339-344.

effects of grouping soldiers together in same-sex environments for prolonged periods. He believed that some soldiers were “latently homosexual” and would find a homosexual advance by another soldier to be extremely confrontational, because it would force the former to acknowledge their homosexuality. However, according to Kempf, the advance would cause the latent homosexual to feel disgust and self-loathing which in turn might lead to self-harm and/or suicide. It would not, according to that psychiatrist, lead to violent behavior. This reaction was termed the Homosexual Panic Defense. Because Kempf asserted that only self-inflicted violence was likely, the HPD was of limited practical use to someone seeking a defense for their violent reaction to a homosexual advance. Further, the practical utility of HPD as a defense to charges of violence likewise waned as the perception that homosexuality was a mental illness faded.

From this backdrop the related HAD developed.⁸ Although not recognized per se in criminal statutes, HAD could be used with existing defenses of provocation or self-defense to defend or partly defend acts of violence perpetrated against a homosexual victim who might have made an advance upon the accused. However, HAD was quite different in nature from HPD, since HPD presumed only a non-violent response would result from an unwanted homosexual advance. In contrast, HAD sought to excuse or explain responsive violence. Thus, while HPD shared links with the insanity defense (since a latent homosexual had a diagnosable mental illness: homosexuality), HAD was more relevant to defenses founded in provocation or self-defense.

PROVOCATION AND GENDER

Others have commented that the provocation defense was conceived of in male gender terms. The typical scenario it was designed to deal with was a barroom brawl, with two male aggressors. It may be argued that the provocation defense partly legitimized violent behavior; it is an ongoing debate whether—and to what extent—the law should do so. The defense presumes that sometimes men (in particular) act violently, and that this violence may be justifiable.⁹ Of course,

⁸ Christina Pei-Lin Chen *Provocation's Privileged Desire: The Provocation Doctrine, 'Homosexual Panic' and the Non-Violent Unwanted Sexual Advance Defense* (2001) 10 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 195, 201-203.

⁹ Christina Pei-Lin Chen, *Provocation's Privileged Desire: The Provocation Doctrine, Homosexual Panic, and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 195, 220 (2000).

the expression of the defense in criminal legislation is flavoured by the context in which it was created—legislation codifying the provocation defense typically draws upon the image of a person acting in the heat of the moment before their passions have cooled, and typically assesses the proportionality of the violent response to the provocative act itself.¹⁰

Given that the provocation defense was framed in this context, it is not surprising that it has struggled to accommodate other scenarios. For example, the law continues to struggle with the complexities of the “battered spouse syndrome,” where a long-term victim of domestic violence (typically a woman) violently strikes back against her abuser after an extended period of abuse. Australian courts typically do not recognize this scenario as deserving of the leniency granted by the defense of provocation.¹¹ The long-term victim of domestic violence is unable to show she acted in the heat of the moment. Likewise, because her violent response may not occur in immediate proximity to an attack by her abuser, self defense may not be open to her either. Thus, the “slow burn” effect of domestic violence on many female victims is not acknowledged by the law, while the quick, aggressive response by a man in a barroom brawl carries legal weight as far as the provocation defense is perceived. Similarly, a man’s aggressive response to his wife’s confessions of infidelity is accorded recognition by the provocation defense.¹² It seems not to matter that the cumulative psychological effect of long-term domestic violence perpetrated against a woman may be far more profound than the single punch or insult at the bar that triggers the violent male response.

This gender bias, which the law struggles to recognize let alone address, can also be seen in the context of unwanted sexual advances and the provocation defense. As Justice Kirby noted in *Green v. The Queen*, women are subject to unwanted, non-aggressive sexual advances on a much more regular basis than men.¹³ If every woman subject to such an advance could respond with brutal violence rising to the level of intent to kill or inflict serious injury, the law of provocation would be both sorely tested and undesirably extended. Yet the same standard

¹⁰ For a summary of various provisions, see Robert Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 140-141 (1992).

¹¹ See *Osland v. The Queen* (1998) 197 C.L.R. 316, 73 A.L.J.R. 173 (Austl.).

¹² See *Moffa v. The Queen* (1977) 138 C.L.R. 601, 51 A.L.J.R. 403 (Austl.).

¹³ *Green v. The Queen* (1997) 191 C.L.R. 334, 72 A.L.J.R. 19, at 415 (Austl.) (Kirby, J., dissenting).

should be applied across genders, whether the advance is by a man to a woman or a man to a man. Although most jurisdictions have enacted discrimination legislation prohibiting discrimination on the basis of gender, the law continues to treat situations differently according to whether the person upon whom an advance is made is male or female in the very application of these legal principles.

SOME AUSTRALIAN CASES ON HAD

Perhaps the most famous Australian case in which the homosexual advance defense was raised was *Green v. The Queen*,¹⁴ a case eventually decided by the High Court of Australia, Australia's most senior court. In that case the accused and the victim had been friends for some years. The victim was 15 years older than the accused, had helped him find work, and had loaned him small amounts of money. In some ways, he had become a father figure to the accused. On the night of the killing, the victim invited the accused to dinner. They each consumed a number of alcoholic drinks over the course of the evening. The victim explained that he lived with his mother and could sleep in his mother's bedroom, and asked the accused if he wanted to stay for the night and sleep in the victim's bed. The accused eventually agreed.¹⁵

The accused testified that when he was in bed with his underpants and tracksuit pants on, the victim entered the bedroom and lay on the bed next to him, telling him what a good person he was. The victim started touching the accused. The accused said he pushed the victim away. The victim asked why, and the accused told him he "was not like this." The accused claimed that the victim nonetheless continued to grab him near his lower back, while the accused pushed him away. He claimed the victim continued to grab him, this time near his genital area; the accused acknowledged that this touching was gentle rather than aggressive.

Next, the accused said he struck the victim approximately thirty-five times. He picked up a pair of scissors lying nearby and struck the victim with the scissors until "he didn't look like [the victim] anymore." Ten stab wounds were found. Blood spatter was consistent with the victim's head being rammed against the wall on numerous occasions. The victim rolled off the bed and onto the floor. He was left there,

¹⁴ See Generally *Id.*

¹⁵ This footnote is referencing the entire previous paragraph which lays out the facts of *Green v. The Queen. Id.*

face down in a pool of his own blood. A post mortem examination revealed the victim's skull had been fractured, and bones in his neck had been broken.¹⁶

During police interviews, the accused claimed he had "lost control," and that he could not remember some of the events on the night in question. He had been raised in a troubled home, and had witnessed his father's physical abuse toward his mother, his sisters, and himself. Based on conversations with his sisters and mother, the accused believed that his father had also sexually abused his sisters, although he had never witnessed any such assault. He argued that these experiences explained his reaction to the victim's unwanted advances; when the victim began to make sexual advances, the accused suffered flashbacks of the abuse he had witnessed and known of as a child, causing him to lose control. While admitting that he had killed the victim, he commented that the victim had done worse to him.¹⁷

The relevant provision of the New South Wales Crimes Act¹⁸ provided for the provocation defense where the deceased's conduct provoked the accused to lose self-control and act out violently—so long as an ordinary man in the accused's position would likewise have lost self-control and formed an intent to kill or inflict serious harm.¹⁹ The defense was a partial one, in that it would reduce what would otherwise be a murder charge to a manslaughter charge. In *Green*, the trial judge ruled evidence of the accused's abusive family history inadmissible as to the question of provocation. Then the New South Wales Court of Appeal found that the accused's response did not fit within the partial defense of provocation, because it fell below the hypothetical ordinary man standard of self-control. On appeal to the High Court of Australia, the Court of Appeal's decision was overturned by a 3-2 majority vote, which held that the provocation defense was open on the evidence and should have been left for the jury to consider.

¹⁶ This footnote is referencing the entire previous paragraph which lays out the facts of *Green v. The Queen. Id.*

¹⁷ This footnote is referencing the entire previous paragraph which lays out the facts of *Green v. The Queen. Id.*

¹⁸ Crimes Act, 1900, § 23 (Austl.) (NSW), available at <http://www.austlii.edu.au>.

¹⁹ *Id.* at § 23(2)(a) to (b).

A. *Majority Views*

Chief Justice Brennan of the High Court of Australia found that the question of past family abuse was relevant because it made it more likely that the accused was more severely provoked by the deceased's unwanted homosexual advances than he otherwise would have been, and thus more likely to lose self-control and inflict the fatal blows.²⁰ The victim had attempted to "violate the sexual integrity of a man who had trusted him."²¹ Chief Justice Brennan referred with apparent approval to the comments of dissenting Court of Appeal Judge Smart, who described the provocation as "of a very grave kind. It must have been a terrifying experience for the accused when the victim persisted. The grabbing and the persistence are critical."²² Judge Smart went on to claim that "[s]ome ordinary men would feel great revulsion" at the persistence of the homosexual advances and could lose self-control such that they might inflict serious injury on another.²³ He claimed that these ordinary men might consider the advance to be a "serious and gross violation" of their bodily integrity and their person.²⁴ Chief Justice Brennan agreed that under these circumstances, a jury might have found that a reasonable person, provoked as was the accused, might form an intent to kill or do serious harm.²⁵

Similarly, Justice McHugh claimed that "the fact that the advance was of a homosexual nature was only one factor in the case." He argued that the most important factor was that the accused had trusted and looked up to the victim, who had made the sexual advance with some force.²⁶ This, taken with the accused's belief that his father had sexually abused his sisters, provoked the accused's violent response. Justice McHugh said the victim's conduct was directly related to the accused's sensitivity and ensuing violent response, and that "any unwanted sexual advance is a basis for 'justifiable indignation,'" especially when coupled with aggression.²⁷ He found that any unwanted advance may lay the foundation for a successful defense of provocation.²⁸

²⁰ *Green v. The Queen*, (1997) 191 C.L.R. 341-342.

²¹ *Id.* at 345.

²² *Id.* at 345-346.

²³ *Id.* at 346.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 370.

²⁷ *Id.*

²⁸ Judge Toohey took a similar position. *Id.* at 347.

B. *Minority Views*

Interestingly, Justice Kirby was the only judge to consider in any detail the extent of the victim's injuries.²⁹ He quoted at length from the post mortem medical report, referring to the very extensive injuries the victim suffered. This included wounds from thirty-five punches, ten stab wounds, skull fractures, broken bones in the neck consistent with strangling, and a large amount of blood loss. Justice Kirby noted that the defense of provocation was based on an objective standard—the ordinary person test—and discussed just what that standard, in terms of contemporary Australian society, entailed:

For the law to accept that a non-violent sexual advance, without more, by a man to a man could induce in an ordinary person such a reduction in self-control as to occasion the formation of an intent to kill or to inflict grievous bodily harm, would sit ill with contemporary legal, educative and policing efforts designed to remove such violent responses from society, grounded as they are in irrational hatred and fear.

In my view, the “ordinary person” in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or to inflict grievous bodily harm. He or she might, depending on the circumstances, be embarrassed; treat it at first as a bad joke; be hurt; insulted. He or she might react with the strong language of protest; might use as much physical force as was necessary to effect an escape; and where absolutely necessary assault the persistent perpetrator to secure escape. But the notion that the ordinary twenty-two year old male . . . in Australia today would so lose self-control as to form an intent to kill or grievously injure the deceased because of a non-violent sexual advance by a homosexual person is unconvincing. It should not be accepted by this Court as an

²⁹ It may be relevant to note here that Justice Kirby is openly homosexual.

objective standard applicable in contemporary Australia.³⁰

OTHER AUSTRALIAN CASES

Several other cases have considered this kind of factual scenario, with mixed results. In *R. v. Murley*, for example, the victim was nearly decapitated after he was stabbed seventeen times in the head, neck and chest. He allegedly made a homosexual advance to the accused. The sixty-five year old victim apparently put his arms around the accused, which made the accused extremely anxious and uncomfortable. The accused then responded violently. The accused struck the unarmed victim several times before he lost consciousness, and then wrapped a tea towel around the victim's head before he slashed the victim's throat. At trial, the accused raised both self-defense and provocation defenses. He was acquitted of all charges.³¹ The accused claimed that he had been subject to other unwanted homosexual advances during his life, and that by the time of the victim's ill-fated advance, he had become so disgusted by the homosexual advances that he lost all control. A psychologist testified that the accused had an "intense or excessive detestation of homosexual advances" made towards him. This evidence was contentious, in that after the victim had placed his hand on the accused's backside while they were drinking at a bar, the accused agreed to go to the victim's house to continue drinking.

In arguing his client's case, the defense lawyer claimed that "this was not the usual case of an attack where he's going to be killed; it's an attack where he's going to be sodomised, which is almost as grave."³² During questioning, the defense lawyer referred to his client as a "normal man" in a "normal relationship" (with a female) who didn't appreciate being thought a homosexual. During direct examination, he asked the accused whether he had known the victim might be a homosexual. His client responded "No, not at all. He seemed like a genuine person . . . he seemed like a very nice man."³³

³⁰ *Id.* at 408-409. Justice Gummow agreed that the defense of provocation was not open on the facts of the case. *Id.* at 378.

³¹ Unreported, Supreme Court of Victoria, Teague, J., May 28, 1992: Transcript, Victorian Government Reporting Service, No 60-37119. The case is discussed at length, including references to the transcript, in Peter Johnston *More than Ordinary Men Gone Wrong: Can the Law Know the Gay Subject?* (1996) 20 MELBOURNE UNIVERSITY LAW REVIEW 1152, 1165-1175.

³² Transcript, at 332.

³³ Transcript, at 239.

In another well known case, *R. v. McKinnon*,³⁴ the accused was charged with murdering a homosexual man. He pleaded not guilty on the basis that the victim had made homosexual advances to him. There was evidence at trial that the accused had boasted to friends that he had “rolled a fag.” Despite this he was acquitted, apparently on the basis of self-defense.

SOME AMERICAN CASES ON HAD

Not surprisingly, American courts have also dealt with very similar issues, and have often accepted the homosexual advance defense and lessened the punishment imposed for unlawful killings of homosexuals. In *Mills v. Shepherd*, the accused told two roommates that he “had rolled a queer.”³⁵ He apparently met the victim in a gay bar and went with him in his vehicle. When the victim made a homosexual advance, the accused responded by pushing the victim out of the car, chasing him, knocking him down, kicking him, and ultimately leaving him to die near a creek where the victim’s body was later found.³⁶ In the face of strong evidence that the killing had been premeditated, the jury nonetheless found the accused guilty of manslaughter, the lesser offense.³⁷

Similarly, the homosexual advance defense was successfully applied in *People v. Saldivar*. After the court admitted evidence of “homosexual paraphernalia” in the victim’s possession,³⁸ the accused was convicted of the lesser offense of voluntary manslaughter for the death of a victim who allegedly made a homosexual advance to him.³⁹ Likewise, in the high profile case *People v. Schmitz*, the accused was approached on national television by the victim, who confessed to have a crush on him. The accused, claiming he was “embarrassed,” later purchased a shotgun and shot the victim twice through the heart, killing him.⁴⁰ The jury convicted the accused of second degree murder, rather than first degree murder.⁴¹

³⁴ Unreported, New South Wales Supreme Court, November 24, 1993. The facts of the case are described in detail in *Homosexual Advance Defence: Final Report of the Working Party (1998) para 3.10*.

³⁵ 445 F. Supp. 1231, 1234 (D.C.N.C 1978).

³⁶ *Id.*

³⁷ *Id.* at 1237.

³⁸ *People v. Saldivar*, 497 N.E.2d 1138, 1139 (Ill. 1986). *Id.* at 1139.

³⁹ *Id.*

⁴⁰ *People v. Schmitz*, 586 N.W.2d 766, 768 (Mich. Ct. App. 1998).

⁴¹ *Id.*

Shockingly, it appears the homosexual advance defense may be applicable even where the advance is made to someone other than the accused. In *Vujesovic v. Rafferty*, a homosexual advance was made to a friend of the accused. The accused claimed that “something snapped in his head,”⁴² and he killed the homosexual victim. The court held the defense applied.⁴³

Thus, apparent juror sympathy for violent responses to homosexual advances has been played out in the courts on multiple occasions.⁴⁴ Some judges have also, by their comments in cases involving violence against homosexual people, expressed these biases. Examples include:

- 1) A Florida judge in an anti-gay murder case joked “that’s a crime now, to beat up a homosexual? . . . Times really have changed.”⁴⁵
- 2) A California judge presiding without a jury found the defendant, who had killed the man made a homosexual advance to him, was guilty only of the lesser offense of manslaughter, reasoning that the victim had “contributed in large part to his own death” by his “reprehensible conduct” in allegedly soliciting his killer.⁴⁶
- 3) A New York judge stated “that he did not ‘much care for queers cruising the streets’ . . . ‘these guys wouldn’t have been killed if they hadn’t been cruising the streets picking up teen-age boys,’ and that ‘he put prostitutes and gays at about the same level . . . [and would] be hard put to give somebody life for killing a prostitute.” Although the defendant was accused of killing two gay

⁴² *Vujesovic v. Rafferty*, 844 F.2d 1023 (3d Cir. 1988).

⁴³ *Id.* at 1026; *see also* *Wills v. State*, 636 P.2d 372 (Okla. Crim. App. 1981).

⁴⁴ A manslaughter verdict was also returned in *People v. Rodriguez*, where the accused 17-year-old was grabbed by an elderly man in an alley. The accused picked up a four-foot long stick and killed the elderly man. *People v. Rodriguez*, 64 Cal. Rptr. 253 (1967). Likewise, in *State v. Thornton*, the accused responded to the victim putting his hands around his waist by stabbing the victim to death. He admitted the victim had not threatened him, but claimed that “queers and freaks upset him a lot” and that he tried to avoid them as much as possible. *State v. Thornton*, 532 S.W.2d 37, 40-41 (Mo. Ct. App. 1975).

⁴⁵ Altschiller, Donald (2005), *Hate Crimes: a reference handbook*, ABC-CLIO, pp. 26–28.

⁴⁶ *Robert Lindsey, After Trial, Homosexuals Say Justice is Not Blind, N.Y. Times, Mar. 21, 1988, at A17.*

men, and the prosecution pressed for a life sentence, the judge imposed a mere thirty year sentence.⁴⁷

CRITIQUE OF THE CASES

A. *Use of Stereotyping*

Ben Golder notes a pattern in the types of facts judges and jurors give substantial weight in cases involving the homosexual advance defense.⁴⁸ For example, the victim of the homicide is often de-personified, and the extent of his injuries remains largely unaddressed (e.g., *Green*, where only one of the judges actually described the extent of the victim's injuries). This makes little sense, as according to the provocation defense, the violent response to a provocation is only justifiable to the extent that it is reasonable and proportional to the provoking conduct. The extent of a victim's injuries would thus be highly relevant.

In contrast, the published opinions dealing with the homosexual advance defense reveal much about the accused. As Golder notes, "the 'real' crime inheres not in the homicidal retaliation but in the purported act of penetration which it seeks to pre-empt."⁴⁹ Golder further notes that the victim is typically portrayed as a sexual predator: "the forensic verges on the cinematic, as the defense projects figures of the homosexual villain as phantom, zombie and vampire, in appeal to cultural understandings of homosexuality as a (literally) monstrous aberration."⁵⁰

Meanwhile the accused is consistently portrayed as a "normal" individual who responded with understandable fury in the face of the victim's morally reprehensible conduct. The heterosexual is "normal" and the homosexual "abnormal." Ironically, in suggesting reforms in this area, the New South Wales Attorney General's Working Party on the Review of the

⁴⁷ This footnote references the entire preceding paragraph. These comments are collected in Kara Suffredini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 305-306 (2001).

⁴⁸ See generally Ben Golder, *The Homosexual Advance Defense and the Law/Body Nexus: Towards a Poetics of Law Reform*, 11 MURDOCH U. ELECTRONIC J.L. 1 (Mar. 2004).

⁴⁹ *Id.* at para. 35.

⁵⁰ *Id.* at para. 38; see also Kara Suffredini, *supra* note 43, at 284 (homosexuals "'are stereotyped as sex-crazed predators' who may plausibly be accused of making sexual advances to strangers").

Homosexual Advance Defense⁵¹ perpetuates this stereotyping by suggesting that specific instructions be given to the jury in cases where “the unusual sexuality of the victim” has been placed before the jury. The presumption is clearly that heterosexuality is the “norm” while homosexuality is “unusual,” with no shades of grey in between.

B. *The Bounded Male Heterosexual Body*

Naffine and others have developed the notion that law reflects a particular construct of the human body as male and impermeable.⁵² As Naffine says:

What I think we can discover at the heart of the law of human contact is a quite particular idea of a bounded, embodied subject, which bears a strong kinship to Kantian man. The person presupposed by the law of assault is a discrete, distinct, volitional subject for whom the skin of his body is considered to represent a boundary from other distinct subjects. . . . People are essentially bounded and separate, they come in closed body bags, and it is vital that one person not interfere with the body bag of another unless there is positive agreement to make contact . . .

. . . The implication . . . is that women in such circumstances somehow have a reduced status as persons because their body bag, their skin, has been punctured and permeated.⁵³

Others have made similar points, e.g., that our culture and society are heterocentric. We understand sex, gender, and sexuality through this lens, and this lens defines what is “appropriate” social interaction.⁵⁴ In terms of legal regulation, this lens may explain the law’s historic and continuing subjugation of women’s rights. For example: (1) there was a time when it was legally impossible for a man to rape his wife, as she was considered his chattel and thus wholly subject to his

⁵¹ See HOMOSEXUAL ADVANCE DEFENSE: FINAL REPORT OF THE WORKING PARTY (Criminal Law Review Division) (1998) [hereinafter *Final Report*], available at http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_had.

⁵² Ngaire Naffine, *the body bag*, in *SEXING THE SUBJECT OF THE LAW* 79 (Ngaire Naffine & Rosemary Owens eds., 1997).

⁵³ *Id.* at 85-86.

⁵⁴ Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation To Its Origins*, 8 *YALE J.L. & HUMAN.* 161, 169-170 (1996); See also Suffredini, *supra* note 43, at 279.

whims, (2) the denial of a woman's right to vote, and (3) the law's imposition upon women's reproductive choice (e.g., abortion and surrogacy laws), etc.

When the governing perception of the human body is one of the impermeable male, homosexual men are also excluded and disadvantaged. We see this idea in the comments courts have made that a given crime is effectively less serious because the victim is homosexual. Further, it explains the context in which the homosexual advance defense is played out. While any unwelcome sexual advance may be unpleasant, and any assault of another is unacceptable, in some of the cases described above, the victim's presumed intention—sexual interaction with another man—was analogized to murder. The basis on which a sexual assault may be compared with the taking of a life is unclear, but may be explained by the underlying theory of the inviolability of the male body. Thus, Judge Smart's description of the homosexual advance in *Green* as “terrifying,” “revolting,” and a “gross violation of [Green's] body” makes more sense within such context—although the reasoning by no means becomes more defensible.

C. Is the Reasonable Person Homophobic?

At the heart of the difficulty of the *Green* judgment is the majority's finding that the accused's extreme response to the victim's homosexual advance was reasonable. The proportionality defense requires the accused to act as would a reasonable person, and that his responsive conduct be proportional to the provocative act. In *Green*, however, the accused was not required to explain why he did not make any effort to leave the room where the advance occurred.⁵⁵ He was not confined to the room, and the victim did not prevent him from leaving it. Surely, these would have been options considered and taken by the reasonable person in such cases. Surely, further, the typical reaction when a person is confronted by an unpleasant situation is, if at all possible, to remove oneself from the situation. While the self-defense analysis typically takes into consideration the available means of escape, availability of escape is also relevant to whether one's conduct is reasonable and thus deserving of mitigated punishment. In *Green*, then, how did the accused's very violent response ever come to be considered a reasonable and proportional response to the victim's actions? The law's acceptance of such extreme violence is most troubling.

⁵⁵ *Green v. The Queen*, (1997) 191 CLR 334, 409.

Given that the accused's response to the homosexual advance in *Green* could only be described as irrational, the case should be understood as evidence that other factors are at play. The notion that the accused was homophobic is primary among them, and many commentators have read the decision (and others like it), as a re-affirmation that the law condones and embraces homophobia.⁵⁶ Legal recognition and legitimization of a phobia might explain a court's willingness to grant leniency in light of an accused's irrational reaction. In the *Green* case, Judge McHugh was prepared to concede that the fact that the advance was of a homosexual nature was a relevant factor in the case.⁵⁷ If the law does not condone homophobia, it causes one to wonder, respectfully, why the fact that the advance was made by a homosexual is at all relevant.

Dworkin concedes that some in society do find homosexuality and homosexual behavior abhorrent. However, this does not mean the law should embrace behavior which is likely sourced in such feelings:

Even if it is true that most men think homosexuality an abominable vice and cannot tolerate its presence, it remains possible that this common opinion is a compound of prejudice (resting on the assumption that homosexuals are morally inferior creatures because they are [stereotypically] effeminate), rationalization (based on assumptions of fact so unsupported that they challenge the community's own standards of rationality), and personal aversion (representing no conviction but merely blind hate rising from unacknowledged self-suspicion). It remains possible that the ordinary man could produce no reason for his view, but he would simply parrot his neighbor who in turn parrots him, or that he would produce a reason which presupposes a general moral position he could not sincerely or

⁵⁶ Adrian Howe, *More Folk Provoke Their Own Demise*, 19 SYDNEY L. REV. 336, 364 (1997) (Howe refers to the comments of Smart J discussed above, before concluding "thus is the ordinary man judicially inscribed as a violent homophobe."); See also Rebecca Bradfield, *Provocation and Non-Violent Homosexual Advances: Lessons from Australia*, 65 J.CRIM. L.76 (2001); See also Santo De Pasquale, *Provocation and the Homosexual Advance Defense: The Deployment of Culture as a Defense Strategy*, 26 MELB. U.L. REV. 110 (2002); See also Robert Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 136 (1992) (Mison stated that the cases reinforce "both the notions that gay men are to be afforded less respect than heterosexual men, and that revulsion and hostility are natural reactions to homosexual behavior").

⁵⁷ *Green v. The Queen*, (1997) 191 CLR 334, 370.

consistently claim to hold. If so, the principles of democracy we follow do not call for the enforcement of the consensus, for the belief that prejudices, personal aversions and rationalization do not justify restricting another's freedom itself occupies a critical and fundamental position in our popular morality. Nor would the bulk of community then be entitled to follow its own lights, for the community does not extend that privilege to one who acts on the basis of prejudice, rationalization or personal aversion. Indeed, the distinction between these and moral convictions, in the discriminatory sense, exists largely to mark off the former as the sort of positions one is not entitled to pursue.⁵⁸

Another angle is taken by Mison:

The reasonable man is an ideal, reflecting the standard to which society wants its citizens and system of justice to aspire. It is an "entity whose life is said to be the public embodiment of rational behavior." If the reasonable man is the embodiment of both rational behavior and the idealized citizen, a killing based simply on a homosexual advance reflects neither rational nor exemplary behavior. The argument is . . . that a reasonable person *should not* be provoked to kill by such an advance.⁵⁹

In this context, it seems wise to suggest that it be made explicit in jury instructions intended to assist the jury in assessing what response would be attributable to a reasonable man that a reasonable man is neither homophobic nor prejudiced. This suggestion is made by Dressler⁶⁰ and the Final Report of the Working Party of the New South Wales Law Regarding Homosexual Advance Defense.⁶¹

D. Are Incest and Paedophilic Behavior Equated with Homosexual Behavior?

Another difficulty with the court's decision in *Green* is that it might equate incest and paedophilia with homosexuality.

⁵⁸ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 254 (1977).

⁵⁹ Mison, *supra* note 50, at 160-161.

⁶⁰ Joshua Dressler, *When Heterosexual Men Kill Homosexual Men: Reflections on Provocation Law, Sexual Advances, and the Reasonable Man Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 760 (1995).

⁶¹ See also Final Report, *supra* note 46.

If this observation is accurate, it is clearly unacceptable. There has never been any proven link between homosexuality and paedophilia or incest, and indeed the sexual orientation of a paedophile is disproportionately more likely to be heterosexual than homosexual.

This link is suggested by the *Green* court because of the High Court majority's decision on the relevance and admissibility of evidence of the accused's childhood exposure to physical and possibly incestuous sexual abuse. The Court held such evidence was relevant in assessing the accused's response to an unwanted homosexual advance. The majority judges did not state explicitly that they were making the link in this way, instead asserting that the link arose from the fact that in both cases there was a gross breach of trust. However, it is arguable that the court equated the two types of behavior. Though we will never know for certain, a slight shifting of the facts from *Green* provides for an interesting juxtaposition: would the case have been decided differently if the sexual advance in *Green* had been made by a female friend who was also a mother figure? In other words, had the accused responded by savagely killing a maternal sexual aggressor, would the majority still believe the accused's history of abuse and experiences of gross breach of trust warranted submission to the jury?

E. The Homosexual Advance Defense as Provocation Should Not be Available to the Jury

Given that juries are not required to provide justification for their decisions, there remains the possibility that juror biases regarding homosexuality might taint their view of a crime involving the homosexual advance defense. These biases may or may not operate at a conscious level in the mind of the juror, and may or may not be explicitly stated. Given this reality and the fact that some jurors hold very strong views about homosexuality, one wonders whether a simple jury instruction proscribing a vision of the reasonable person as one who is prejudiced or homophobic is sufficient to cure the failings of the jury system.

There are, of course, suspicions that a jury's response in particular cases is not a defensible application of the law of provocation. Given that provocation tends to be expressed in terms of someone reacting to a highly provocative act in the

heat of passion and before there is time for those passions to cool, it is hard to justify some of the actual outcomes.

For example, it is submitted that provocation through the homosexual advance defense should not be available where an unreasonable length of time has elapsed between the acts said to be provocative (e.g., announcement during a television program of a homosexual crush) and the violent response (e.g., unlawful killing days later), because such a lapse of time suggests premeditation. Yet as we have seen, the accused's conduct in such cases may nonetheless be partially excused. So too has the accused's conduct been partially excused when the acts said to be provocative were not even directed towards the accused, but rather toward a friend. Legally, such circumstances *should not* amount to provocation. Yet, juries have repeatedly reduced murder charges to manslaughter convictions. It may be that juries, without warrant under the law, are taking into account the homosexual nature of the advance and determining that it lessens the gravity of the accused's conduct. In other words, it seems the law is being applied through a lens of prejudice and bias.

Curiously, Dressler agrees that a jury should be instructed to not ascribe homophobia or prejudice to the reasonable person, yet suggests that the provocation defense should be taken into consideration by the jury if each of the following questions is answered in the affirmative:⁶²

- 1) Did the decedent commit the acts alleged by the defendant?
- 2) Were the acts uninvited by the defendant?
- 3) Would a reasonable person in the defendant's situation have interpreted the acts as sexual in nature?

The basic difficulty with this suggested formulation is that it continues to suggest that a deadly response to an uninvited sexual advance might be at least partially justifiable in the eyes of the law. While Dressler is, in my view, right in suggesting that "it is impossible to fairly condemn those heterosexual or homosexual males or females who find some sexual acts—including some sexual activities with persons of their own orientation—extremely distasteful and, therefore, emotionally upsetting,"⁶³ it is an unacceptable and substantial

⁶² Dressler, *supra* note 54, at 760-761.

⁶³ *Id.* at 755.

leap to suggest that because the conduct might be distasteful or distressing, the law should partially excuse deadly violence committed in response.

CONCLUSION

While in recent years the law has taken many steps to accommodate homosexuality, more needs to be done. Remnants of heterosexism are perpetuated by the law's acceptance of the homosexual advance defense as a partial excuse for extreme violence against a homosexual victim. While unwanted sexual attention is unpleasant and may be offensive, the law should not condone violent reactions to homosexual advances. To the extent that the provocation defense enables the law to condone such violent conduct, reform is both urgent and necessary. A mere jury instruction to avoid decisions founded in prejudice and homophobia may be insufficient to remedy the problem, given that some judges have shown their own biases in this regard, and given that jurors may have deep-seeded personal prejudices against homosexual persons. In such cases, the defense of provocation should, as a matter of law rather than fact, be unavailable. The law must acknowledge extreme violence is never a reasonable response to an unwanted sexual advance, homosexual or otherwise. Community values and attitudes towards homosexuality and homosexuals have evolved to the point today that society demands it.