Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation

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As the law now stands, a nonviolent homosexual advance may constitute sufficient provocation to incite that legal fiction, the reasonable man, to lose his self-control and kill in the heat of passion, thus mitigating murder to manslaughter. The author argues that this homosexual-advance defense is a misguided application of provocation theory and a judicial institutionalization of homophobia. Provocation defenses have their origin and rationale in tangled theories of justification and excuse, both of which divert attention away from the killer and onto the behavior of the deceased victim. The homosexual-advance defense appeals to irrational fears, revulsion, and hatred prevalent in heterocentric society, focusing blame on the victim's real or imagined sexuality. In allowing the defense, the judiciary reinforces and institutionalizes violent prejudices at the expense of norms of self-control, tolerance, and compassion that ought to reign in society. The defense affirms homophobia and undermines the ability of courts to produce fair verdicts by creating a lower standard of protection against violence afforded to an identifiable class of victims. The author concludes that we ought to expect more from our courts: judges should hold as a matter of law that a homosexual advance is not sufficient provocation to incite a reasonable man to kill. Murderous homophobia should be considered an irrational and idiosyncratic characteristic of the killer rather than a normative social aspiration incorporated as the homosexual-advance defense into the standards that govern jury decisionmaking.

INTRODUCTION

The question is simple: Should a nonviolent sexual advance in and of itself constitute sufficient provocation to incite a reasonable man to

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lose his self-control and kill in the heat of passion?[1] If so, the defendant will be guilty of voluntary manslaughter, not murder.[2] This sexual-advance defense could be used by a male or a female who claims that he or she killed in reaction to the victim's sexual advance. As the law now stands, however, only a homosexual[3] advance can mitigate murder to manslaughter.[4]

Consider the following story[5] in which the defendant successfully raised the homosexual-advance defense[6] to mitigate his crime. A young

1. *See infra* notes 12-50 and accompanying text (provocation theory) and notes 51-74 and accompanying text (historical evolution of "reasonable man" standard).

2. *See infra* Part I.

3. The word "homosexual" as an adjective—homosexual advance, homosexual victim—is descriptive of the sexual component of persons and their behavior. *See* Wayne R. Dynes & Warren Johansson, *Homosexual (Term), in* 1 ENCYCLOPEDIA OF HOMOSEXUALITY 555, 556 (Wayne R. Dynes ed., 1990). "Homosexual" is also a word laden with prejudice and negative connotations. *See infra* Part II. As suggested by Douglas Warner, I use the term "chiefly where quoted sources use it, and in discussion of the historical and more abstract legal, moral, and social issues raised by homosexuality." Douglas Warner, *Homophobia, "Manifest Homosexuals" and Political Activity: A New Approach to Gay Rights and the "Issue" of Homosexuality,* 11 GOLDEN GATE U. L. REV. 635, 636 (1981). The term "gay," on the other hand, is used in the context of the "gay rights movement" and represents a "self-proclaimed and proudly-assumed identity as a 'homosexual person.'" *Id.* at 637; *see also* JOSEPH P. GOODWIN, MORE MAN THAN YOU'LL EVER BE: GAY FOLKLORE AND ACCULTURATION IN MIDDLE AMERICA xi-xii (1989) (examining the differences between the terms "gay" and "homosexual"); Wayne R. Dynes, *Gay, in* 1 ENCYCLOPEDIA OF HOMOSEXUALITY, *supra.* at 455 (preferring "gay" to "homosexual" because the former connotes political consciousness and the latter implies pathology).

4. *See, e.g.,* State v. Skaggs, 586 P.2d 1279, 1284 (Ariz. 1978) (en banc) (allowing instruction on provocation); Walden v. State, 307 S.E.2d 474, 475 (Ga. 1983) (jury instructed on voluntary manslaughter); People v. Saldivar, 497 N.E.2d 1138, 1139 (Ill. 1986) (defendant found guilty of voluntary manslaughter where parties stipulated that victim made a homosexual advance); People v. Lenser, 430 N.E.2d 495, 498 (Ill. App. Ct. 1982) (allowing instruction on voluntary manslaughter); Commonwealth v. Medeiros, 479 N.E.2d 1371, 1375-76 (Mass. 1985) (even assuming victim's homosexual advances constituted reasonable provocation, defendant was not entitled to an involuntary manslaughter instruction). For a discussion of the defense as raised and abused by homicide defendants, see *infra* notes 232-65 and accompanying text.

I have yet to discover a single case that uses a sexual-advance defense between heterosexuals. The battered-woman defense can be distinguished from a sexual advance in that the latter is nonviolent while the former includes "long term physical violence." Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense,* 33 UCLA L. REV. 1679, 1714 (1986) (arguing that provocation theory should be expanded to include the battered-woman defense).

5. This story is a retelling of Schick v. State, 570 N.E.2d 918, 921-22 (Ind. Ct. App. 1991).

6. The homosexual-advance defense should be distinguished from the homosexual-panic defense. The homosexual-panic defense is an insanity defense or, in jurisdictions that still have the rule, a diminished-capacity defense. Under this theory, the sexual advance or "non-violent verbal or gestural solicitation" by the gay victim triggers a psychotic reaction in the defendant, who is a latent homosexual. This psychotic reaction causes the defendant temporarily to lose the capacity to distinguish right from wrong, thereby absolving the defendant of criminal responsibility. Robert G. Baguall et al., Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties,* 19 HARV. C.R.-C.L. L. REV. 497, 499 (1984). Theoretical, evidentiary, and sociological problems plague this defense. *See, e.g.,* EDITORS OF THE HARV. L. REV., SEXUAL ORIENTATION AND THE LAW 33-34 (1990). Such problems are, however, beyond the scope of this Comment.

man is out drinking heavily with his friends. His car breaks down and he hitches a ride from another man, the victim. Together they drive around looking for women for sex. After a while, the young man asks, "Where can I get a blow job?" The victim-to-be responds, "I can handle that." They continue to drive around, stopping at a convenience store for some cigarettes before going to a baseball field at a local school. They wander into the shadows where the victim pulls down his pants and underwear and attempts to embrace the young man. But the young man kicks him, stomps on him, takes his money, and leaves the victim to die on the isolated field. Before leaving the scene, the young man returns to the victim's car and carefully wipes it clean of his fingerprints.

At his trial, the young man claims that the victim's homosexual overture provoked him to lose his self-control and kill. He took the money and wiped his fingerprints from the car only as an afterthought. Defense counsel argues that a reasonable jury could find the victim's homosexual advance sufficient provocation for the defendant's acts and requests the judge to instruct the jury on the lesser included offense of voluntary manslaughter. The prosecution does not object. The judge, satisfied that a reasonable jury could find the victim's sexual advance adequate provocation, permits defense counsel to argue provocation and agrees to instruct the jury on voluntary manslaughter. The jury finds the young man guilty—of voluntary manslaughter.

So unfolds a homosexual-advance case.[7] Regardless of the ultimate verdict, allowing the defense to argue provocation and instructing the jury on the reduced charge of voluntary manslaughter in cases such as the foregoing is both immoral and inconsistent with the goals of modern criminal jurisprudence. Although the sufficiency of provocation is normally a question for the fact finder,[8] judges may decide as a matter of law that no rational jury could find an alleged homosexual advance sufficient provocation to kill.[9] With few exceptions, however, trial courts have permitted juries to make that decision as a matter of fact.[10] The continued use and acceptance of this defense sends a message to juries and the pub-

7. Unless otherwise noted, this Comment explores only the use of the homosexual-advance defense between a male defendant and a male victim. I have not located a single reported case in which a female defendant invoked the homosexual-advance defense after being accused of killing an alleged lesbian victim. *See generally* 1989 FBI, U.S. DEP'T OF JUSTICE, ANN. UNIFORM CRIME REP. 10 (there are fewer female perpetrators of violent crimes than male).

8. *See infra* text accompanying notes 38-41.

9. *See, e.g.*, Commonwealth v. Halbert, 573 N.E.2d 975, 979 (Mass. 1991) (homosexual victim placing hand on defendant's knee "insufficient to support a finding of reasonable provocation").

10. *Compare Halbert*, 573 N.E.2d at 978-79 (trial court's refusal to instruct on voluntary manslaughter where evidence of homosexual advance did not support finding of reasonable provocation not error) *and* State v. Volk, 421 N.W.2d 360, 365 (Minn. Ct. App. 1988) (homosexual advance did not support instruction for "heat of passion manslaughter") *with* cases cited *supra* note 4 (instances where homosexual-advance defense mitigated murder charges to manslaughter).

lic that if someone makes a homosexual overture, such an advance may be sufficient provocation to kill that person. This reinforces 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.

This Comment argues that the homosexual-advance defense is a misguided application of provocation theory and a judicial institutionalization of homophobia.[11] Part I surveys the origins of, and rationale behind, the provocation defense, relying on common-law and statutory definitions of sufficient provocation. Part II examines the "ordinary man's" reaction to a homosexual overture and argues that homophobia permeates the fabric of modern society and is expressed through overt individual and institutional acts. Part III examines specific ways in which the homosexual-advance defense undermines the ability of courts to produce fair verdicts by creating a lower standard of protection to an identifiable class of victims. The Comment concludes that judges should hold, as a matter of law, that a homosexual advance is not sufficient provocation to incite a "reasonable man" to kill.

I
THE DOCTRINE OF PROVOCATION

According to provocation theory, if circumstances were sufficient to rob a reasonable man[12] of self-control, the individual's culpability is reduced.[13] "The basic moral question . . . is distinguishing between those impulses to kill as to which we as society demand self-control, and those as to which we relax our inhibitions."[14] Understanding the conflict between the need to punish voluntary killings on the one hand and the desire to pardon a provoked response on the other is vital in analyzing the validity of the homosexual-advance defense.

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11. *See infra* notes 103-05 and accompanying text (defining homophobia).

12. As it is used today, the term "reasonable person" does not reflect a gender-neutral, abstract, and universal individual. Instead the term still embodies the legacy and character of the common-law gender-specific "reasonable man." *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort Law*, 38 J. LEGAL EDUC. 3, 20-25 (1988) (both the reasonable-man and the reasonable-person standards are examples of implicit male norms). This Comment, therefore, intentionally uses the term "reasonable man" because that is the standard implicitly used in a homosexual-advance defense.

13. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 245-46 (1978) (strong moral prohibition against killing innocent persons relaxed where victim engaged in provocative conduct).

14. *Id.* at 247.

A. The Origins of the Provocation Defense

The early common law presumed all killings to be the consequence of malice aforethought[15] and uniformly applied the penalty of death.[16] The lack of discretion thus given English courts in sentencing defendants in different types of homicides contributed to the development of provocation theory.[17] For example, courts were unwilling to convict defendants when the killing occurred in the confusion of a brawl, which they saw as a less morally objectionable form of homicide.[18] In the absence of evidence of malice aforethought, courts began to carve out exceptions to the rule and "excused" the defendant for his crime.[19] In the seventeenth century, however, England's draconian law began to change after Parliament passed a series of statutes differentiating between types of homicide.[20] A killing that occurred "upon a sudden brawle or contention by chance" was no longer believed to involve malice aforethought.[21] The moral culpability of the defendant, therefore, provided the basis for drawing the distinction between murder and manslaughter.[22]

The law, under the rubric of provocation, now recognized "the

15. The law implied malice even if there was no express malice. 3 EDWARDO COKE, INSTITUTES OF THE LAWS OF ENGLAND 47 (London, W. Clarke & Sons 1817) ("[m]urder is when a man of sound memory [kills another] . . . with malice fore-thought, either expressed by the party, or implied by law"); 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 455 (Dublin, E. Lynch 1778) ("[w]hen one voluntarily kills another without any provocation, it is murder, for the law presumes it to be malicious").

16. Hugo A. Bedau, *Capital Punishment, in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 133, 134 (Sanford Kadish ed., 1983); *see also* Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation,* 14 LOY. L.A. L. REV. 435, 442 (1981) ("Absolute liability was necessary in early society because of the need to control social violence and to prohibit any self-help which interfered with enforcement of the law.").

17. 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.10, at 270 (1986). Strict liability for killings also encouraged the use of self-defense as a mitigating factor. Donovan & Wildman, *supra* note 16, at 442.

18. Bernard J. Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law,* 7 AM. J. LEGAL HIST. 310, 311 (1963).

19. *Id.* at 312. Although the defendant escaped capital punishment, he was still punished by the forfeiture of his property to the crown. *Id.* at 310.

20. *See* 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 44-46 (London, MacMillan 1883) (statutes provided lesser penalties for provoked killings).

The Statute of Stabbing may have been passed to prevent the jury from misunderstanding the subtleties of the law previously created by the judges in response to mandatory capital punishment. *See* J.M. Kaye, *The Early History of Murder and Manslaughter* (pt. 2), 83 LAW Q. REV. 569, 601 (1967) (the Statute of Stabbing of 1604 removed the benefit of clergy for some types of manslaughter). "It is one thing to make, as a point of law, a distinction between 'sudden killings accomplished when the blood was heated' and sudden killings done in cold blood, but it is another thing to get juries to take that point." *Id.*

21. Such killings were instances of "chance-medley." 3 COKE, *supra* note 15, at 56. Eventually the chance-medley defense was absorbed into provocation theory as that theory expanded to include other "provocative" situations. Brown, *supra* note 18, at 313 (increase in popularity of provocation defense led to demise of chance-medley defense).

22. Donovan & Wildman, *supra* note 16, at 446.

frailty of human nature"[23] and allowed an accused to rebut the presumption of malice with evidence of the provocative conduct of the deceased.[24] Provocation theory thus introduced a new factor into the equation determining the degree of culpability of a defendant:[25] if the deceased acted in such a way "as to excite [the accused] designedly to destroy the person that gave it him," there was no malice in the accused's actions and the killing was not murder[26] but rather manslaughter, a noncapital offense.[27] A violent reaction was understandable under the circumstances if the accused did not react "beyond the proportion of the provocation."[28]

B. Provocation: The Evolution of a Definition

As provocation theory evolved, the most important task the courts faced was determining what acts of the victim could constitute "adequate provocation." In the early common law this determination was considered a question of law for the courts alone to determine.[29] Accordingly, the courts developed discrete categories of provocative acts. These acts reflected "the relative gravity of the provocation and the consequent probability that it was an understandable weakness of self-control rather

23. Maher v. People, 10 Mich. 212, 219 (1862), *overruled on other grounds by* People v. Woods, 331 N.W.2d 707 (Mich. 1982), *cert. denied,* 462 U.S. 1134 (1983). Many cases, from both sides of the Atlantic, reiterated this position. *See, e.g.,* United States v. Lewis, 111 F. 630, 634 (W.D. Tex. 1901) ("[Defendant's act] . . . was not the result of a cool, deliberate judgment, and previous malignity of heart, but solely imputable to human infirmity."); 4 WILLIAM BLACKSTONE, COMMENTARIES *191 ("[T]he law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt.").

24. *See* 1 HALE, *supra* note 15, at 455 ("what is such a provocation, as will take off the presumption of malice in him that kills another"); A.J. Ashworth, *The Doctrine of Provocation,* 35 CAMBRIDGE L.J. 292, 292-94 (1976) (emergence of the defense); *cf.* Regina v. Mawgridge, 84 Eng. Rep. 1107, 1114 (Q.B. 1707) (a killing is an act of implied malice, and sufficient provocation lessens the act of killing "so as to reduce it to be but a bare *homicide*").

25. *See* HANS VON HENTIG, THE CRIMINAL & HIS VICTIM: STUDIES IN THE SOCIOBIOLOGY OF CRIME 436 (1948) ("The victim is one of the causative elements, and we would do well to pay more attention to him in judging the criminal and his action and in suggesting perfected methods of punishment, reform, and prevention."); Ashworth, *supra* note 24, at 307-08 ("The complicity of the victim cannot and should not be ignored, for the blameworthiness of his conduct has a strong bearing on the court's judgment of the seriousness of the provocation and the reasonableness of the accused's failure to control himself.").

26. *Mawgridge,* 84 Eng. Rep. at 1113; *see also* Addington v. United States, 165 U.S. 184, 185 (1897) (" '[T]he distinguishing trait between manslaughter and murder is the absence of malice; it must spring from a gross provocation, and of such character as to temporarily render the party incapable of that cool reflection that otherwise makes it murder.' " (quoting district court instructions to the jury in defendant's murder trial)).

27. *See Maher,* 10 Mich. at 218-19 (defining manslaughter); MODEL PENAL CODE § 210.3 cmt. at 44 (1980) (discussing common-law background of manslaughter).

28. *Mawgridge,* 84 Eng. Rep. at 1113. For example, ill-behaved children may be "a great grief to parents, and when found in ill actions, are a great provocation. But if upon such provocation the parent shall exceed the degree of moderation, and thereby in chastising kill the child, it will be murder." *Id.* at 1114.

29. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 86 (3d ed. 1982).

than wickedness of mind which caused the offence."[30]

In 1707 Lord Holt specified four categories of acts that constituted legally sufficient provocation. These were: (1) hearing angry words followed by a physical assault; (2) seeing a friend being assaulted; (3) observing a citizen detained by force; and (4) seeing one's wife in bed with another.[31] Courts added more categories during the eighteenth and nineteenth centuries[32] as they struggled with their conception of "narrowly defined provoking circumstances."[33]

Concern that expanding these categories could weaken the normative force of the criminal law led the courts to pinpoint types of behavior that would not cause a reasonable man to lose control.[34] The acts legally insufficient at common law to constitute provocation included: (1) mere words; (2) insulting gestures; (3) trespass to property; (4) misconduct by a child or servant; and (5) breach of contract.[35] When the allegedly provocative act fell within one of these categories, the accused's act of killing the provocateur was considered a disproportionate response[36] and, therefore, malicious.[37]

Classifying the multitude of possibly provocative acts ultimately proved too difficult and led judges to abandon the per se approach.[38]

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30. Ashworth, *supra* note 24, at 295.

31. *Mawgridge,* 84 Eng. Rep. at 1114-15.

32. *See generally* Note, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man,* 106 U. PA. L. REV. 1021, 1024-36 (1958) (categories of sufficient provocation that developed during eighteenth and nineteenth centuries).

33. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 441 (5th ed. 1989). One commentator criticized the categories for causing "unrealistic interpretation of the facts" and "lack of uniformity in the application of the law." Note, *supra* note 32, at 1024.

34. *See* Ashworth, *supra* note 24, at 295 n.16 ("if trivial provocations were allowed as sufficient, this would 'weaken a salntary check, and withhold a signal mark of disapprobation stamped by the authority of the law' " (quoting Criminal Law Commissioners (Fourth Report, 1839 Parl.Pap. [168] xix-235))).

35. *Mawgridge,* 84 Eng. Rep. at 1112-14; *see also* R.A. Horton, Annotation, *Insulting Words as Provocation of Homicide or as Reducing the Degree Thereof,* 2 A.L.R.3d 1292, 1294 (1965) (under the traditional common-law rule, "words of reproach or infamy [were] not sufficient provocation to mitigate murder to a lesser offense").

36. Ashworth, *supra* note 24, at 295-97; *see also Mawgridge,* 84 Eng. Rep at 1112-13 (killing a trespasser, disobedient servant, or child would be "beyond the proportion of the provocation"). *But see* Glanville Williams, *Provocation and the Reasonable Man,* 1954 CRIM. L. REV. 740, 744 (proportionality requirement ignored by judges).

37. *Mawgridge,* 84 Eng. Rep. at 1113 ("[T]hough [one] might correct his servant for both his neglect and unmannerliness, yet exceeding measure therein, it is malicious."); 1 EDWARD H. EAST, A TREATISE OF THE PLEAS OF THE CROWN 234 (Philadelphia, P. Byrne 1806) (when actor's reaction "is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty.").

38. *See, e.g.,* Maher v. People, 10 Mich. 212, 217-18 (1862) (adequacy of provocation to be determined on the facts of the case), *overruled on other grounds by* People v. Woods, 331 N.W.2d 707 (Mich. 1982), *cert. denied,* 462 U.S. 1134 (1983). Although standards for determining the adequacy of provocation have changed, a case that "*clearly* falls within one" of the common-law

Accordingly, the adequacy of provocation became a question of fact for the jury to determine according to an objective standard.[39] Courts explained that the jury was better able to make the moral decision as to what constituted sufficient provocation because the jury was more experienced in "the workings of passion."[40] In order to determine the adequacy of provocation, however, the jury was to use the "reasonable man" test: the provocation should be such that it would arouse a reasonable and ordinary man to lose control and kill the provocateur.[41]

Although no standard definition of provocation exists,[42] the doctrine as currently formulated can be summarized as follows:

> In order for a killing which would otherwise be murder to be reduced to manslaughter under the "rule of provocation" there are four requirements:
>
> (1) There must have been adequate provocation.
>
> (2) The killing must have been in the heat of passion.
>
> (3) It must have been a sudden heat of passion—that is, the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool.
>
> (4) There must have been a causal connection between the provocation, the passion, and the fatal act.[43]

Most modern statutory definitions of manslaughter have incorporated these common-law elements of provocation. Of these elements, it is the "presence or absence of heat of passion on sudden provocation" that is the "single most important factor in determining" an individual's cul-

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categories may still be found to constitute sufficient provocation in the twentieth century. Note, *supra* note 32, at 1023.

39. *See* MODEL PENAL CODE § 210.3 cmt. at 61-62 (1980) ("essentially objective charaeter" of inquiry regarding provocation). The Model Penal Code specifically recognizes this shift from judge to jury as an abandonment of "preconceived notions of what constitutes adequate provocation." *Id.* at 61.

40. *Maher,* 10 Mich. at 221; *see also* Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale,* 73 J. CRIM. L. & CRIMINOLOGY 421, 464 (1982) ("[i]f the ordinary law-abiding person would not become angry by a particular provocative situation, then the defendant's violent response as a result of his anger is subject to moral condemnation"). *But see* FLETCHER, *supra* note 13, at 247 (criticizing shift from judge to jury as an attempt to evade moral issues raised by the defense itself by tying it to "the likely behavior of the 'reasonable person' ").

41. [I]n law it is necessary that there should have been serious provocation in order to reduce the crime to manslaughter, as, for instance, a blow, and a severe blow—something which might naturally canse an ordinary and reasonably minded man to lose his self-control and commit such an act.

Regina v. Welsh, 11 Cox Crim. C. 336, 339 (Central Crim. Ct. 1869); *see also* United States v. Chapman, 615 F.2d 1294, 1300 (10th Cir.), *cert. denied,* 446 U.S. 967 (1980) (passion must be that " 'as would be aronsed naturally in the mind of the ordinary reasonable person under the saine or similar circumstances' ").

42. *See* Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide* (pt. 2), 37 COLUM. L. REV. 1261, 1280 n.49 (1937) ("[t]he word provocation is used ambiguously in legal literature").

43. PERKINS & BOYCE, *supra* note 29, at 85 (citing State v. Frederick, 579 P.2d 390, 394 (Wash. Ct. App. 1978)).

pability.[44] Thus, many statutes require "extreme mental or emotional disturbance,"[45] a "sudden, violent, and irresistible passion,"[46] or "heat of passion"[47] in response to the alleged provocation. Some states retain the element of "a sudden quarrel" in their codification of manslaughter.[48] In addition, most statutes stress that the emotional response must be immediate[49] and compelling.[50]

C. *Provocation and the Reasonable Man*

Derived from tort law,[51] the reasonable-man standard was first used in a manslaughter case in the United States in 1862[52] and in England in 1869.[53] The reasonable-man standard soon became an integral part of the provocation defense.[54]

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44. Mullaney v. Wilbur, 421 U.S. 684, 696 (1975).

45. *E.g.*, MODEL PENAL CODE § 210.3(1)(b) (1980); *see also* ARK. CODE ANN. § 5-10-104(a)(1) (Michie 1987) ("extreme emotional disturbance for which there is reasonable excuse").

46. *E.g.*, GA. CODE ANN. § 26-1102 (Harrison 1983) (voluntary manslaughter); IOWA CODE ANN. § 707.4 (West 1979) (voluntary manslaughter).

47. *E.g.*, ALA. CODE. ANN. § 13A-6-3 (Michie Supp. 1989) (manslaughter); ALASKA STAT. § 11.41.115 (1989) (defense to murder); ARIZ. REV. STAT. ANN. § 13-1103 (1989) (manslaughter). Fear and anger are the two emotions most commonly classified as the type necessary to constitute "heat of passion." *See* Note, *supra* note 32, at 1024-26.

48. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1103 (1989); CAL. PENAL CODE § 192 (West 1988); IDAHO CODE ANN. § 18-4006 (Michie 1987); KAN. STAT. ANN. § 21-3403 (1988); NEB. REV. STAT. § 28-305 (1989); N.M. STAT. ANN. § 30-2-3 (Michie Supp. 1984).

49. *See, e.g.*, COLO. REV. STAT. § 18-3-104 (1986) (if interval between provocation and killing "sufficient for the voice of reason and humanity to be heard, the killing is murder"); GA. CODE ANN. § 26-1102 (Harrison 1983) (same); IOWA CODE ANN. § 707.4 (West 1979) (interval between provocation and killing must be short enough so that a "person of ordinary reason and temperament" would not regain control); LA. REV. STAT. ANN. § 14:31 (West 1986) ("sudden passion or heat of blood immediately caused by provocation"); OHIO REV. CODE ANN. § 2903.03 (Anderson 1987) ("sudden passion or in a sudden fit of rage"); TEX. PENAL CODE ANN. § 19.04 (West 1989) ("immediate influence of sudden passion"); WYO. STAT. § 6-2-105(a)(i) (1988) ("upou a sudden heat of passion").

50. *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 203 (West Supp. 1989) (killing committed under "the influence of extreme anger or extreme fear brought about by adequate provocation" is manslaughter); OHIO REV. CODE ANN. § 2903.03 (Anderson 1987) (killing committed "while under the influence of sudden passion or in a sudden fit of rage" brought on by serious provocation is voluntary manslaughter). The "compelling" quality of the emotional response is a carryover from the common law "chance-medley." *See supra* note 21 (chance-medley defense).

51. *See generally* Vaughan v. Menlove, 132 Eng. Rep. 490 (1837) (introducing reasonable-man standard in tort law); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32 (5th ed. 1984); O.W. HOLMES, JR., THE COMMON LAW 108-09 (Boston, Little, Brown & Co. 1881) (discussing development of reasonable man to meet needs for a uniform standard).

52. Maher v. People, 10 Mich. 212 (1862), *overruled on other grounds by* People v. Woods, 331 N.W.2d 707 (Mich. 1982), *cert. denied*, 462 U.S. 1134 (1983); *see also* KADISH & SCHULHOFER, *supra* note 33, at 441-42.

53. Regina v. Welsh, 11 Cox Crim. C. 336 (Central Crim. Ct. 1869).

54. For example, in 1896 the Supreme Court approved a jury instruction that described "gross provocation" as such that caused the defendant to "be laboring at the time he performs the act under intense mental excitement such as would render any ordinarily prudent person for the time being incapable of that cool reflection that otherwise makes it murder." Addington v. United States, 165

The provocation defense requires that one first ask whether provocation was sufficient.[55] If a reasonable man would not be provoked, there is no need to determine whether the defendant's response arose "by passion rather than by reason."[56] If the killing was committed in cold blood, however, the crime is murder, regardless of whether there was sufficient provocation.[57] As Professor Dressler explained, "we must require as an initial prerequisite that the provocation be sufficiently egregious that the juror or ordinary, usually law-abiding person would be expected to become enraged."[58]

The "reasonable man" was originally measured by a purely objective standard.[59] The jury could not take into account any of the defendant's unique attributes when determining whether his reaction was reasonable.[60] The courts were unwilling to adopt a subjective standard, fearing the ultimate collapse of the defense.[61] They believed that if one individual's insanity or physical disability were taken into account, another's bad temper would also merit special consideration.[62] No matter how egregious an individual's behavior might seem if judged by general standards, it could be "reasonable" under a subjective standard. By adhering to an objective standard, the courts ensured that "no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused."[63] This common-law objective standard has been codified in many jurisdictions.[64]

U.S. 184, 185-86 (1897). For criticism of the reasonable-man standard as applied by juries when considering the homosexual-advance defense, see *infra* notes 173-94 and accompanying text.

55. *See, e.g.*, Commonwealth v. Whitfield, 380 A.2d 362, 366 (Pa. 1977) ("*If and when* sufficient provocation is found, then the focus of inquiry for the trier of fact shifts to the defendant's response to that provocation . . . .").

56. PERKINS & BOYCE, *supra* note 29, at 99.

57. *See id.* ("There can be no mitigation in the case of a cold-blooded killing.").

58. Dressler, *supra* note 40, at 465.

59. *See supra* note 39 and accompanying text.

60. *See, e.g.*, Bishop v. United States, 107 F.2d 297, 301 (D.C. Cir. 1939) (intoxication); People v. Washington, 130 Cal. Rptr. 96, 98 (Cal. Ct. App. 1976) (homosexuality); People v. Golsh, 219 P. 456, 458 (Cal. Dist. Ct. App. 1923) (sunstroke); State v. Madden, 294 A.2d 609, 620-21 (N.J. 1972) (race); Jacobs v. Commonwealth, 15 A. 465, 466 (Pa. 1888) (excitable temperament); Bedder v. Director of Pub. Prosecutions, [1954] 2 All E.R. 801, 803-04 (H.L.) (appeal taken from Eng. C.A.) (impotence). *But see* State v. Wanrow, 559 P.2d 548, 558-59 (Wash. 1977) (sex of female defendant must be taken into account in determining reasonableness of self-defense claim); Director of Pub. Prosecutions v. Camplin, [1978] 2 All E.R. 168, 174 (H.L.) (appeal taken from Eng. C.A.) (reasonable 15-year-old); Regina v. Raney, 29 Crim. App. 14, 17 (1942) (physical disability taken into account where defendant had only one leg and victim had knocked away his crutch).

61. FLETCHER, *supra* note 13, at 249.

62. *Id.* (criticizing this reasoning as a non-sequitur "typical of the confusion that characterizes the decline of moral sensitivity in the analysis of culpability").

63. People v. Logan, 164 P. 1121, 1122 (Cal. 1917).

64. *See* COLO. REV. STAT. ANN. § 18-3-104(1)(c) (West 1990) (reasonable person); GA. CODE ANN. § 16-5-2(a) (Harrison 1990) (reasonable person); LA. REV. STAT. ANN. § 14:31(1) (West 1986) ("average person"); MO. ANN. STAT. § 565.002(1) (Vernon Supp. 1991) ("person of ordinary temperament"); NEV. REV. STAT. ANN. § 200.050 (Michie 1986) (reasonable person); TENN. CODE

As the role of the reasonable man in provocation theory developed and increased in importance, two major objections to the standard arose. The first objection attacked the basic assumption that a reasonable man would kill.[65] The second found the objective standard unjust and urged a more subjective approach that accounted for at least some of the defendant's individual characteristics.[66]

The Model Penal Code[67] and a minority of states[68] employ a more subjective understanding of the reasonable man.

> (1) Criminal homicide constitutes manslaughter when:
>
> . . . .
>
> (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.[69]

The drafters of the Code claimed that this standard represented a "substantial eulargement of the class of cases which would otherwise be murder"[70] by enlarging the categories of sufficient provocation to any event that arouses " 'extreme mental or emotional disturbance.' "[71] The Code, however, undercuts its liberalization of the standard by requiring the jury

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ANN. § 39-13-207(a) (Michie Supp. 1989) (reasonable persou); TEX. PENAL CODE ANN. § 19.04(c) (West 1989) ("person of ordinary temper"); WIS. STAT. ANN. § 939.44(1)(a) (West Supp. 1990) ("ordinarily constituted person"). Some states require "reasonable explanation or excuse." *E.g.*, CONN. GEN. STAT. ANN. § 53a-54a(a) (West 1985); DEL. CODE ANN. tit. 11, § 641 (1987); HAW. REV. STAT. ANN. § 707-702(2) (Michie 1988) ("reasonable explanation"); KY. REV. STAT. ANN. § 507.020(1)(a) (Michie/Bobbs-Merrill Supp. 1990); N.D. CENT. CODE § 12.1-16-01(2) (1985) ("reasonable excuse"); UTAH CODE ANN. § 76-5-205(3) (1990).

65. *See, e.g.*, Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 33 (1984) ("Reasonable people do not kill no matter how much they are provoked, and even enraged people generally retain the capacity to control homicidal or any other kind of aggressive or antisocial desires." (footnote omitted)); *see also* MODEL PENAL CODE § 210.3 cmt. at 56 (1980) (a reasonable person does not kill).

66. *See, e.g.*, M. Naeem Rauf, *The Reasonable Man Test in the Defence of Provocation: What are the Reasonable Man's Attributes and Should the Test be Abolished?*, 30 CRIM. L.Q. 73, 80-81 (1987) (objeetive test "has led to affronts to common and moral sense").

67. MODEL PENAL CODE § 210.3(1)(b) (1980).

68. *See, e.g.*, ARK. CODE ANN. § 5-10-104(a)(1) (Michie 1987) (reasonableness determined "from the viewpoint of a person in the defendant's situation under the circumstances as he believes them to be"); HAW. REV. STAT. ANN. § 707-702(2) (Michie 1988) (same); KY. REV. STAT. ANN. §§ 507.020(1)(a), 507.030(1)(b) (Michie/Bobbs-Merrill Supp. 1990) (same); MINN. STAT. ANN. § 609.20(1) (West Supp. 1990) ("a person of ordinary self-control under like circumstances"); MONT. CODE ANN. § 45-5-103(1) (1989) ("from the viewpoint of a reasonable person in the actor's situation"); OR. REV. STAT. ANN. §§ 163.118(1)(b), 163.135(1) (Butterworth 1985) ("from the standpoint of an ordinary person in the actor's situation under the circumstances as the actor reasonably believes them to be").

69. MODEL PENAL CODE § 210.3(1)(b) (1980).

70. *Id.* § 210.3 cmt. at 49.

71. *Id.*

to evaluate the "disturbance" from the "viewpoint of a person in the actor's situation under the circumstances as he believes them to be" rather than from the defendant's own viewpoint.[72] The jury may look only at the defendant's " 'situation' . . . [and] not his scheme of moral values."[73] Therefore, "[t]he ultimate test . . . is objective."[74] The Model Penal Code's changes, nevertheless, raise questions about the legal theories underlying the defense.

D. The Rationale for Provocation Theory

Killings committed in the heat of passion commonly receive a lesser sentence than killings committed in cold blood.[75] " 'The rule of law that provocation may, within narrow bounds, reduce murder to manslaughter, represents an attempt by the courts to reconcile the preservation of the fixed penalty for murder with a limited concession to natural human weakness.' "[76] This balancing act might have been more understandable when all killings carried the penalty of death.[77] Now that homicide is no longer automatically a capital offense, a more satisfying theoretical justification for the differential treatment afforded defendants accused of provoked and nonprovoked killings is necessary.[78]

The concepts of justification and excuse have traditionally been used to explain this differential treatment: "A justification negates an assertion of wrongful conduct. An excuse negates a charge that the particular defendant is personally to blame for the wrongful conduct."[79] If one individual kills another in self-defense, for example, his action is justified: he has committed no wrongful act.[80] On the other hand, if one individ-

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72. *Id.* § 210.3(1)(b).

73. *Id.* § 210.3 cmt. at 50.

74. *Id.; see also* KADISH & SCHULHOFER, *supra* note 33, at 456 (under the Model Penal Code "the defendant's response to the disturbing external circumstances [is] in some sense 'reasonable' ").

75. *Compare* CAL. PENAL CODE § 190.2(a) (West Supp. 1991) (punishment for murder ranges from the death penalty to life imprisonment) *and* MASS. GEN. LAWS ANN. ch. 265, § 2 (West 1990) (same) *with* CAL. PENAL CODE § 193 (West 1988) (punishment for manslaughter limited to a maximum of eleven years imprisonment) *and* MASS. GEN. LAWS ANN. ch. 265, § 13 (West 1990) (punishment for manslaughter limited to a maximum of twenty years or a fine).

76. 2 LAFAVE & SCOTT, *supra* note 17, § 7.10 at 270 (quoting Report of the Royal Commission on Capital Punishment 52-53 (1953)).

77. *See supra* notes 15-19 and accompanying text.

78. For a discussion on proposed rationales for provocation theory in modern America and England, see FLETCHER, *supra* note 13, at 242-50; Dressler, *supra* note 40.

79. George P. Fletcher, *The Right and the Reasonable,* 98 HARV. L. REV. 949, 958 (1985) (justification is the absence of wrongfulness) [hereinafter Fletcher, *The Right and the Reasonable*]. *See generally* George P. Fletcher, *Excuse: Theory* (pt. 1), *in* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 16, at 724 (excuse defenses "question whether the actor is personally accountable for the wrongful act"); George P. Fletcher, *Justification: Theory* (pt. 1), *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 16, at 941 ("A justification concedes the nominal violation of the prohibitory norm but holds that the violation is right and proper.").

80. *See, e.g.,* CAL. PENAL CODE § 197 (West 1988) (self-defense is "justifiable homicide");

ual kills another while insane, then his action is excused: the actor is not blameworthy even though his action is wrong.[81] This justification and excuse framework is incorporated into the structure of manslaughter statutes in some penal codes.[82] There is no consensus among the states, however, and it is unclear whether the provocation defense rests on principles of justification, excuse, or both.[83] The question thus becomes whether society is "measuring the injustice committed by the provoker (justification), or, instead, the reasonableness of the defendant's rage (excuse)."[84]

Under pure justification and excuse theory, a defendant would be acquitted for his conduct: those who have done nothing wrong (justification) or who are not blameworthy (excuse) do not deserve punishment.[85] Because modern manslaughter statutes do not acquit a defendant, but only mitigate the punishment,[86] commentators have referred to justification and excuse as partial, in contrast to whole, defenses.[87] These theories recognize that defendants deserve some punishment for the intentional killing but not to the same extent as for murder.[88]

IND. CODE ANN. § 35-41-3-2(a) (West 1986) (person justified in using reasonable force in self-defense); MODEL PENAL CODE § 3.04 cmt. at 33-34 (1985).

81. *See* MODEL PENAL CODE § 4.01 cmt. at 181 (1985); *see also, e.g.*, IND. CODE ANN. § 35-41-3-6(a) (West 1986) (person affected by a mental disease or defect not responsible for having engaged in prohibited conduct).

82. The Model Penal Code, for example, is expressly excuse oriented. MODEL PENAL CODE § 210.3(1)(b) (1980) ("reasonable explanation or excuse"). Some states appear to be excuse oriented in that they apply voluntarism language (that is, irresistible passion or loss of self-control). *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1101(4) (1989); GA. CODE ANN. § 26-1102 (Harrison 1983); IOWA CODE ANN. § 707.4 (West 1979); NEV. REV. STAT. ANN. § 200.050 (Michie 1986). Other states retain justification-based language (that is, that the victim be the provoker). *See, e.g.*, ALASKA STAT. § 11.41.115(a) (1989); ILL. ANN. STAT. ch. 38, para. 9-2(a)(1) (Smith-Hurd Supp. 1990). Some states combine the two theories within the same statute. *See, e.g.*, COLO. REV. STAT. § 18-3-104(1)(c) (1986) (a killing "upon a sudden heat of passion, caused by a serious and highly provoking act of the intended victim" is manslaughter).

83. *Compare* Dressler, *supra* note 40, at 464 ("provocation is an excuse premised upon involuntariness") *with* Ashworth, *supra* note 25, at 307 ("the doctrine of provocation . . . rests just as much on notions of justification as upon the excusing element of loss of self-control").

84. Dressler, *supra* note 40, at 445; *see also* Fletcher, *The Right and the Reasonable, supra* note 79, at 955 ("Claims of justification direct our attention to the propriety of the act in the abstract; claims of excuse, to the blameworthiness of the actor in the concrete situation.").

85. *See supra* note 79 and accompanying text (defining justification and excuse).

86. *See supra* note 75 and accompanying text.

87. *See, e.g.*, Dressler, *supra* note 40 (advocating partial-excuse analysis); Finbarr McAuley, *Anticipating the Past: The Defence of Provocation in Irish Law*, 50 MOD. L. REV. 133, 139-42 (1987) (advocating partial-justification analysis); *see also* Dressler, *supra* note 40, at 423 n.18 ("[Provocation] is partial in that its proof does not result in complete exoneration. It is complete in that it results in acquittal of murder.").

88. 2 LAFAVE & SCOTT, *supra* note 17, at 251 ("[M]anslaughter is an intermediate crime which lies half-way between the more serious crime of murder . . . and . . . justifiable or excusable homicide, which is not criminal at all.").

The first rationale, justification, denies "that the defendant's actions were entirely wrongful in the first place."[89] Instead, the victim's wrongful conduct caused the defendant's violent outburst.[90] The defendant was "partially justified in reacting as he did because of the untoward conduct of his victim."[91] The harm to society from the intentional killing is reduced "by the magnitude of the immoral nature of Victim's provocative conduct."[92]

The common-law categories of sufficient provocation are best explained by this "provocation as justification" analysis: they focus on the wrongfulness of the victim's conduct. For example, a married man who killed his wife upon seeing her in flagrante delicto with another man was guilty only of manslaughter.[93] On the other hand, unmarried individuals who killed their lovers or fiancées after observing sexual unfaithfulness were guilty of murder.[94] Although both married and unmarried men are subject to similar passions, they were judged differently. Because a wife's act of adultery was a crime against her husband—but one lover's act of sexual disloyalty was not a crime against the other—the husband was guilty of manslaughter and the unmarried lover of murder.[95] The provoking wife, therefore, received her due punishment and the defendant husband only conducted a premature deserved execution.

The concept of excuse provides the second possible rationale for the doctrine of provocation. An excused defendant "is not blameworthy, although he committed a harmful and undesired act."[96] Because anger can make people "less *able* to respond in a legally and morally appropriate fashion,"[97] the defendant who responds to a provoking act in the heat of passion is not as blameworthy as a cold-blooded killer. Provoked defendants "are (partially) excused, although they had the capacity to control their behaviour, because they lacked a fair opportunity (in light of the provocation) to control themselves."[98] In such cases the drafters of the Model Penal Code argued that "a homicidal reaction, albeit unreasonable in some sense, merits neither the extreme condemnation nor the

89. McAuley, *supra* note 87, at 139.

90. *Id.* at 137.

91. *Id.* at 139.

92. Dressler, *supra* note 40, at 457.

93. *See supra* notes 31-37 and accompanying text (categories under common-law provocation law).

94. *See, e.g.*, People v. McDonald, 212 N.E.2d 299 (Ill. App. Ct. 1965) (mistress); Rex v. Greening [1913] 3 K.B. 846 (couple living together).

95. *See* Dressler, *supra* note 40, at 440.

96. *Id.* at 460.

97. *Id.* at 464.

98. Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467, 471 (1988); *see also* Dressler, *supra* note 40, at 464 ("[P]rovocation is an excuse premised upon involuntariness based upon reduced choice-capabilities.").

extreme sanctions of a conviction of murder."[99]

No matter which theory one uses to rationalize the provocation defense, however, the analysis still focuses on the victim's behavior. A defendant's reaction is partially justified when the victim's behavior is wrongful in light of the "prevailing cultural climate."[100] Likewise, only if the provoking act would make the "ordinary law-abiding person" angry will a defendant's behavior be partially excused.[101]

The homosexual advance is a direct outgrowth of provocation theory's roots in mitigating the punishment for a defendant's behavior based on the behavior of the victim. If the defendant can persuade the trier of fact that the victim's conduct was sufficiently egregious to inflame the passions of a reasonable man, then the defendant is guilty only of manslaughter. When that behavior is alleged to be homosexual in character, prevailing cultural climate more than normative and objective elements on which manslaughter theory is dependent affects the ultimate verdict.

II

HOMOPHOBIA AND THE SUFFICIENCY OF PROVOCATION

Presumptions of heterosexuality pervade American perceptions of marriage, family, sexual desires, visual art, entertainment, literature, and criminality. American society is heterocentric in that it is dominated by and centers around a heterosexual viewpoint. From this perspective, heterosexuality is seen as morally and socially superior and preferable to homosexuality.[102] Homophobic behavior is an outgrowth of this heterocentric society.

As used in this Comment the term "homophobia" refers to a hatred of gay men and lesbians[103] rather than to a clinical fear of homosexu-

99. MODEL PENAL CODE § 210.3 cmt. at 56 (1980).

100. McAuley, *supra* note 87, at 138.

101. Dressler, *supra* note 40, at 464; *see also id.* at 466 (provocation must be "so great that the ordinarily law-abiding person would be expected to lose self-control to the extent that he could not help but act violently").

102. "Heterosexism" is a part of a heterocentric society. Heterosexism can either refer to the assumption that someone is heterosexual, *see* Marcus Mabry, *A View from the Front,* NEWSWEEK, Dec. 24, 1990, at 55, or, as used in this Comment, be a label for "straight chauvinism," which is an "excessive prizing or favoring of heterosexual persons and values," Wayne R. Dynes, *Heterosexuality, in* 1 ENCYCLOPEDIA OF HOMOSEXUALITY, *supra* note 3, at 532, 534-35 (tracing word "heterosexism" to the gay radical movement in the 1970s).

103. Some writers have dealt with the vagueness of the term by using other terms. *See* MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE 90S, at xxiv-xxv (1989) (coining "homo-hatred" to compensate for the inadequacy of "homophobia" in describing society's hatred of homosexuals beyond the psychiatric definition of "phobia"); ALBERT D. KLASSEN ET AL., SEX AND MORALITY IN THE U.S. 204 n.1 (Hubert J. O'Gorman ed., 1989) (using the term "antihomosexuality" instead of homophobia).

als.[104] It should be understood as a "prejudice, comparable to racism and anti-semitism, rather than an irrational fear similar to claustrophobia or agoraphobia."[105]

While a detailed analysis of the roots of heterocentric society is beyond the scope of this Comment, one needs a basic understanding of the pervasive presence of prejudices against gay men and lesbians in America to appreciate the problems inherent in the homosexual-advance defense.[106] In order to determine the defendant's culpability in a provocation case, the trier of fact compares the defendant's acts with society's standard of acceptable behavior. Homophobia is not uncommon in America,[107] and a homosexual advance might be considered an affront to prevailing norms capable of offending a reasonable man.

The term "homosexual" did not originate until the late nineteenth century.[108] At that point the concept of homosexuality as an identity entered into scientific discourse and became associated with "disease" and "psychopathy."[109] Once defined, however, "homosexual" became a

104. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 916 (2d ed. 1987).

105. Gregory Herek, *Homophobia, in* 1 ENCYCLOPEDIA OF HOMOSEXUALITY, *supra* note 3, at 552, 552.

106. For general information on homophobia, see ROGER J. MAGNUSON, ARE GAY RIGHTS RIGHT? (updated ed. 1990) (homophobia is "only the natural revulsion a normal person feels in the face of sexual perversion," *id.* at 17); SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM (1988) (feminist perspective on homophobia); MICHAEL RUSE, HOMOSEXUALITY: A PHILOSOPHICAL INQUIRY (1988) (philosophical exploration of forces that shape societal attitudes towards homosexuality); Joseph Bristow, *Homophobia/Misogyny: Sexual Fears, Sexual Definitions, in* COMING ON STRONG: GAY POLITICS AND CULTURE 54-75 (Simon Shepherd & Mick Wallis eds., 1989) (homophobia's roots in alleged misogyny); Judith E. Krulewitz & Janet E. Nash, *Effects of Sex Role Attitudes and Similarity on Men's Rejection of Male Homosexuals,* 38 J. PERSONALITY & SOC. PSYCHOL. 67 (1980) (homosexuals disliked because they do not conform to perceived heterosexual sex roles).

For information on homophobia in American law and the courts, see EDITORS OF THE HARV. L. REV., *supra* note 6 (general survey of the state of the law with respect to gay men and lesbians); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender,* 1988 WIS. L. REV. 187 (negative social and legal attitudes toward homosexuality preserve traditional concepts of masculinity and femininity); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States,* 30 HASTINGS L.J. 799 (1979) (account of the hysteria and prejudice that surround the revelation of homosexual behavior in court); Anthony Russo & Laud Humphreys, *Homosexuality and Crime, in* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 16, at 866 (general survey of homosexuality and the common law).

107. In 1973, 73% of the respondents to a National Opinion Research Center survey felt that same-sex sexual activity was always wrong. In 1989 this figure was 74%. AN AMERICAN PROFILE—OPINIONS AND BEHAVIOR, 1972-1989, at 583 (Floris W. Wood ed., 1990) [hereinafter AN AMERICAN PROFILE].

108. *See* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 42 n.4 (1980) (discussing the English introduction of the term in the 1890s); JEFFREY WEEKS, COMING OUT: HOMOSEXUAL POLITICS IN BRITAIN, FROM THE NINETEENTH CENTURY TO THE PRESENT 3 (1977) (attributing 1869 coinage of term to Swiss doctor); Dynes & Johansson, *supra* note 3, at 555 (discussing first public usage of the term in Germany in 1869).

109. LYNNE SEGAL, SLOW MOTION: CHANGING MASCULINITIES, CHANGING MEN 136-37 (1990).

distinct, despised, and persecuted category of person.[110]

Today the plight of the homosexual in American society is analogous to that of other minorities, including women.[111] Homosexuals, like other minorities, are victims of prejudice, stereotyping, and generalization that "[render] the classifications that disadvantage homosexuals suspicious."[112] Unlike race and gender, however, homosexuality is not a physical trait that is readily observable. This factor, combined with societal pressures on homosexuals not to manifest their sexual orientation (that is, to remain "in the closet"), perpetuates the myth that gay men and lesbians are rare.[113]

A. Institutional Homophobia

Homophobia can be divided into two categories: institutional and individual.[114] Institutional homophobia manifests itself "through anti-gay laws, policies, and pronouncements from legislatures, courts, organized religion, and other groups within society" and through "the social processes that reinforce the general invisibility of lesbians and gay men in society."[115]

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110. *See* BARBARA EHRENREICH, THE HEARTS OF MEN 24 (1983) (fear of homosexuality represented a peculiar kind of adolescent escapism); LON G. NUNGESSER, HOMOSEXUAL ACTS, ACTORS, AND IDENTITIES 64-67 (1983) (how the word "homosexual" and identification of a homosexual class affected the development of a sexual identity); EVE K. SEDGWICK, BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSEXUAL DESIRE 89 (1985) (homophobia used to regulate male relations); John Marshall, *Pansies, Perverts and Macho Men: Changing Conceptions of Male Homosexuality, in* THE MAKING OF THE MODERN HOMOSEXUAL 133, 138 (Kenneth Plummer ed., 1981) (controlling homosexuality was intended to strengthen the family and regulate male lust); Mary McIntosh, *The Homosexual Role,* 16 SOC. PROBS. 182, 184 (1968) (category of "homosexuals" was created as mechanism for controlling society); Craig Owens, *Outlaws: Gay Men in Feminism, in* MEN IN FEMINISM 219, 230 (Alice Jardine & Paul Smith eds., 1987) (homophobia used to prevent intimacy in male friendships in order to facilitate the functioning of modern institutions like the army and the bureaucracy); *cf.* DONALD W. CORY, THE HOMOSEXUAL IN AMERICA 228 (1951) ("no homosexual problem except that created by the heterosexual society").

111. *See* Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979) ("The aims of the struggle for homosexual rights . . . bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities."); William Paul, *Minority Status for Gay People: Majority Reaction and Social Context, in* HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL AND BIOLOGICAL ISSUES 351 (William Paul et al. eds., 1982) (exploring similarities and differences between "homosexual" and racial and ethnic minorities, and considering whether gay men and lesbian women may legitimately be considered a minority group).

112. JOHN H. ELY, DEMOCRACY AND DISTRUST 162-64 (1980).

113. According to the seminal study done by the Kinsey Institute in 1948, however, homosexuality among humans is not a rare phenomenon. ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 651 (1948) (approximately 10% of white male population is homosexual); *see also* KIRK & MADSEN, *supra* note 103, at 13-18 (Americans underestimate the number of homosexuals).

114. Herek, *supra* note 105, at 552. Herek also identified a third category of homophobia, internalized homophobia, which is best nnderstood as a rejection of one's own homosexual orientation. *Id.* at 554.

115. *Id.* at 552.

The law is replete with examples of homophobia that perpetuate legal restrictions on and discrimination against gay men and lesbians. For example, although nuclear and extended families are constitutionally protected,[116] no state recognizes same-sex marriages. In addition judges often consider homosexuality a negative factor when making custody decisions involving gay or lesbian parents.[117] Some states explicitly prohibit gay men and lesbian women from adopting children[118] or becoming foster parents.[119]

116. *See* Moore v. City of East Cleveland, 431 U.S. 494, 500-06 (1977) (finding unconstitutional an East Cleveland housing ordinance that limited occupancy to members of a single family in such a way as to disqualify appellant, who resided with her son and two first cousin grandsons); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (finding a Connecticut law prohibiting use of contraceptives to violate the right to marital privacy within the penumbra of the specific guarantees of the Bill of Rights).

117. *See, e.g.*, G.A. v. D.A., 745 S.W.2d 726, 727 (Mo. Ct. App. 1987) (natural mother being lesbian "tipped the scales" in favor of awarding custody to the father); N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980) (denying custody to a natural mother in part because of her "relationship" with another woman); Constant A. v. Paul C.A., 496 A.2d 1, 5 (Pa. Super. Ct. 1985) (creating rebuttable presumption against awarding custody to gay parent); Roe v. Roe, 324 S.E.2d 691, 693-94 (Va. 1985) (homosexual relationship rendered natural father an unfit custodian for his daughter). *But see* S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) (holding court may not rely on "any real or imagined social stigma" attaching to a parent's status as a homosexual when deciding the best interest of the child in a custody case).

These considerations might reflect the judiciary's fear of even appearing to accept homosexuality and same-sex relationships. *Cf. In re* Appeal in Pima County Juvenile Action B-10489, 727 P.2d 830, 835 (Ariz. Ct. App. 1986) (it would be "anomalous" for state to outlaw homosexual conduct but not to disapprove of it in custody proceedings); *In re* Adoption of Charles B., No. CA-3382, 1988 Ohio App. LEXIS 4435, at *2 (Ohio Ct. App. Oct. 28, 1988) ("the concepts of homosexuality and adoption are so inherently mutually exclusive and inconsistent, if not hostile, that the legislature never considered it necessary to enact an express ineligibility provision"), *aff'd*, 552 N.E.2d 884 (Ohio 1990).

Some commentators have suggested strategies for dealing with this problem. *See, e.g.*, ANTI-SEXISM COMM. OF S.F. BAY AREA, NAT'L LAWYERS GUILD, SEXUAL ORIENTATION AND THE LAW (Roberta Achtenberg ed., 1990) (protecting parental rights of gay and lesbian clients); DONNA J. HITCHENS, LESBIAN MOTHER LITIGATION MANUAL (1982) (discussing law in the area and recommending strategies for lawyers representing lesbian mothers); Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 (1976) (advising lesbian mothers to try to reach private settlements with fathers and to work to have their lesbianism treated as a tangential factor in formal proceedings); Gary L. Cardwell, Note, *Doe v. Doe: Destroying the Presumption that Homosexual Parents Are Unfit—The New Burden of Proof*, 16 U. RICH. L. REV. 851 (1982) (discussing precedential use of Virginia Supreme Court's ruling that homosexual fathers are per se unfit).

118. *See, e.g.*, FLA. STAT. ANN. § 63.042(3) (West 1985); N.H. REV. STAT. ANN. § 170-B:4 (1990). *But see Family Law*, 59 U.S.L.W. 2727 (June 4, 1991) (citing Seebol v. Farie, No. 90-923-CA-18 (Fla. Cir. Ct. Monroe County, Mar. 15, 1991) (Florida court found that state statute prohibiting homosexuals from adopting children violated both their right to privacy under the Florida Constitution and federal due process and equal protection provisions).

119. *See, e.g.*, N.H. REV. STAT. ANN. § 161:2(IV) (1990). Massachusetts effectively prohibits gay men and lesbians from becoming foster parents by requiring applicants to state their sexual orientation, MASS. REGS. CODE tit. 110, § 7.103(3)(a) (1987), and ranking the types of foster-care homes so that gays and lesbians have almost no chance of becoming foster parents, MASS. REGS. CODE tit. 110, § 7.101(1).

Widespread prohibitions against consensual sodomy provide further evidence of the law's unwillingness to accept same-sex relationships. Although most existing statutes prohibit oral or anal sex between heterosexuals as well as homosexuals,[120] six states prohibit only homosexual acts of sodomy.[121] Despite recent successful challenges at the state level,[122] these statutes are valid under the federal constitution.[123]

The prejudice against gay men and lesbians that permeates legislatures also manifests itself in symbolic ways. On October 11, 1990, Governor Deukmejian of California ordered the gay flag taken down from the state capitol flagpole.[124] The flag was flown at the request of a state senator to mark National Coming Out Day.[125] Although flags fly over the Capitol commemorating Earth Day, prisoners of war, Black History Week, and a variety of other causes and groups,[126] the Governor's

120. Nineteen states prohibit consensual sodomy between all individuals. ALA. CODE ANN. § 13A-6-65(a)(3) (1982); ARIZ. REV. STAT. ANN. § 13-1411 (1989); D.C. CODE ANN. § 22-3502(a) (1981); FLA. STAT. ANN. § 800.02 (West 1976); GA. CODE ANN. § 16-6-2(a) (Harrison 1990); IDAHO CODE § 18-6605 (1987); LA. REV. STAT. ANN. § 14:89.A(1) (West 1986); MD. ANN. CODE art. 27 § 554 (1987); MICH. COMP. ANN. §§ 750.158, 750.338-338b (West 1991); MINN. STAT. ANN. § 609.293(1) (West 1987); MISS. CODE ANN. § 97-29-59 (1972); MONT. CODE ANN. § 45-5-505(1) (1989); N.C. GEN. STAT. ANN. § 14-177 (1990); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); R.I. GEN. LAWS § 11-10-1 (1969); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TENN. CODE ANN. § 39-2-612 (1982); UTAH CODE ANN. § 76-5-403 (1990); VA. CODE ANN. § 18.2-361 (Michie 1988).

121. ARK. CODE ANN. § 5-14-122(a)6 (Michie 1987); KAN. STAT. ANN. § 21-3505(1) (1988); KY. REV. STAT. ANN. § 510.100(1) (Michie/Bobbs-Merrill 1985); MO. ANN. STAT. § 566.090(1) (Vernon 1979); NEV. REV. STAT. ANN. § 201.190(2) (Michie 1986); TEX. PENAL CODE ANN. § 21.06(a) (West 1989). All of these statutes also prohibit sodomy with minors of the opposite sex.

Defendants in states prohibiting consensual sodomy would have three defenses based on an alleged homosexual advance: self-defense, provocation, and justification. *See* State v. Dorman, 805 P.2d 386 (Ariz. 1991) (defendant contended that he was justified in using force to prevent the crime of sodomy).

122. *See Texas Appeals Sodomy Ruling,* 1991 LESBIAN/GAY L. NOTES 33 (discussing *Morales v. State,* in which an Anstin judge ruled that Texas' sodomy law violated the state constitution); *Phase One Success in Michigan Sodomy Test Case,* 1990 LESBIAN/GAY L. NOTES 53 (discussing *Michigan Organization for Human Rights v. Kelley,* a Michigan Circuit Court decision holding that antisodomy and gross-indecency statutes violated right to privacy under Michigan Constitution); *Kentucky Court Overturns Sodomy Law; Michigan Decision Overdue,* 1990 LESBIAN/GAY L. NOTES 45 (noting *Commonwealth v. Wasson,* a Kentucky Circuit Court decision holding that Kentucky's antisodomy law violated state constitution); *see also* Robb London, *Gay Groups Turn to State Courts to Win Rights,* N.Y. TIMES, Dec. 21, 1990, at B6 (observing that gay rights groups enjoy relative success in state court challenges to sodomy laws).

123. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (affirming the constitutionality of Georgia's antisodomy laws).

124. Greg Lucas & David Tuller, *'Gay Flag' at the Capitol Ordered to Be Removed,* S.F. CHRON., Oct. 13, 1990, at A4.

125. *Id.* National Coming Out Day, also known as Gay Pride Day, commemorates the October 11, 1987, gay-rights march in Washington, D.C. It is a day when gay men and lesbians celebrate their heritage and culture. In order to dispel various myths about gay men and lesbians, including the belief that there are not many gay men and lesbians in America, *see supra* note 113 and accompanying text, National Coming Out Day encourages gays and lesbians to express their sexual orientation in the course of everyday activities.

126. Lucas & Tuller, *supra* note 124.

spokesperson nevertheless told reporters that the flag was removed because "[f]lags are not to be flown over the Capitol that represent any kind of special-interest group, lifestyle or issue."[127]

Federal politics are not immune from homophobia. Congress recently passed the Hate Crimes Statistics Act of 1990,[128] which requires the Department of Justice to collect data on crimes based on race, religion, sexual orientation, and ethnicity. In an effort to frustrate the passage of the Act, Senator Helms proposed Amendment 1251 expressing the following sentiment:

> (1) the homosexual movement threatens the strength and the survival of the American family as the basic unit of society;
>
> (2) State sodomy laws should be enforced because they are in the best interest of public health;
>
> (3) the Federal government should not provide discrimination protections on the basis of sexual orientation; and
>
> (4) school curriculums should not condone homosexuality as an acceptable lifestyle in American society.[129]

Although Senator Helms' proposed amendment was never adopted, the Act ultimately embraced the following heterocentric language:

> Congress finds that—
>
> (1) the American family life is the foundation of American Society,
>
> (2) Federal policy should encourage the well-being, financial security, and health of the American family,
>
> (3) schools should not de-emphasize the critical value of American family life.[130]

The amendment also stipulated that "[n]othing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality."[131]

Prohibitions against the presence of homosexuals in the military exemplify institutional homophobia.[132] Persons who engage in or have ever engaged in homosexual acts, who state that they are homosexual or bisexual, or who attempt to marry members of the same sex must be

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127. *Id.*

128. Pub. L. No. 101-275, 1990 U.S.C.C.A.N. (104 Stat.) 140 (to be codified at 28 U.S.C. § 534). *See generally* Peter Finn & Taylor McNeil, The Response of the Criminal Justice System to Bias Crime: An Exploratory Review (Oct. 7, 1987) (report submitted to the Nat'l Inst. of Justice, U.S. Dep't of Justice).

129. 136 CONG. REC. S1169 (daily ed. Feb. 8, 1990).

130. Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, § 2(a), 1990 U.S.C.C.A.N. (104 Stat.) 140, 141 (to be codified at 28 U.S.C. § 534). This language was derived from an amendment proposed by Senators Hatch, Simon, and Helms. 136 CONG. REC. S1169 (daily ed. Feb. 8, 1990).

131. Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, § 2(b).

132. *See generally* ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO 8-33, 255-79 (1990) (origins of antihomosexual regulations in the early 1940s and their lasting effect); KATHERINE BOURDONNAY ET AL., FIGHTING BACK: LESBIAN AND GAY DRAFT, MILITARY AND VETERANS ISSUES (Joseph Schuman & Kathleen Gilberd eds., 1985) (military's policies against gay and lesbian servicepersons).

discharged.[133] Servicepersons who do not disclose their homosexuality at the time they enlist are subject to discharge for fraudulent enlistment.[134] Courts have consistently upheld the military's policy.[135]

The homophobia present in government institutions does nothing to check homophobic attitudes that persist in the private sector. The Cracker Barrel Country Store and Restaurant, which runs 100 country store-and-restaurants in the Southeast, instituted a policy under which all homosexual employees would be summarily dismissed and none would be hired in the future. The company's vice-president explained that continued employment of those " 'whose sexual preference fails to demonstrate normal heterosexual values which have been the foundation of families in our society' " was inconsistent with the company's values and the " 'perceived values of [its] customer base.' "[136] After pressure from gay and lesbian advocacy groups, Cracker Barrel rescinded the outright ban and left the decision whether to fire or hire gay and lesbian employees to each individual restaurant.[137]

College campuses are bastions of homophobia. In a 1989 opinion poll, thirty-three percent of the respondents felt that a homosexual should not be allowed to teach in a college or university.[138] Fraternities are particularly homophobic. For example, a fraternity at Syracuse University recently distributed T-shirts the front of which read "Homophobic and Proud of It!"[139] The back read "Club Faggots Not Seals!" and pictured the fraternity's mascot holding a club and standing over a faceless beaten figure.[140] Although the University permanently suspended all members of the fraternity from participating in fraternity activities,[141] the distribution of the shirts is nonetheless disturbing.

Finally, the pronouncements of various religions perpetuate

133. 32 C.F.R. pt. 41, app. A, pt. 1.H.1.a-c, at 75 (1991).

134. *Id.* pt. 1.E.4.a.

135. *See, e.g.*, Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). *But see* Pruitt v. Cheney, 943 F.2d 989 (9th Cir. 1991) (remand to district court to determine whether Army's discrimination based on sexual orientation rationally related to a permissible governmental purpose).

136. Ronald Smothers, *Company Ousts Gay Workers, Then Reconsiders*, N.Y. TIMES, Feb. 28, 1991, at A22 (quoting William A. Bridges, Cracker Barrel's vice president).

137. *Id.*; *Unions Join Cracker Barrel Boycott*, Daily Lab. Rep. (BNA) No. 130, at A-12 (July 8, 1991).

138. AN AMERICAN PROFILE, *supra* note 107, at 574. This figure has decreased since 1973, when 51% of the respondents felt that a homosexual had no place in American institutions of higher education. *Id.*

139. *Anti-Homosexual T-Shirts Prompt Suspension of Syracuse Fraternity*, N.Y. TIMES, June 26, 1991, at B4.

140. *Id.*

141. *Id.*

homophobia.[142] Homosexuals are not widely accepted as leaders in churches[143] or synagogues.[144] The Catholic Church has made its position clear. A 1986 pastoral letter to the Bishops of the Catholic Church stated that the sexual behavior of homosexual persons is neither "compulsive" nor "inculpable." Such persons are accountable for their conduct because "the fundamental liberty which characterizes the human person and gives him his dignity [should] be recognized as belonging to the homosexual person."[145] The Church asked for the "abandonment of homosexual activity" and called this process "a conversion from evil."[146]

B. Individual Homophobia

Individual homophobia, comparable to individual racism and individual anti-Semitism, is an individual's conscious and/or unconscious hostility or insensitivity[147] toward gay men and lesbians. Individual homophobia pervades many aspects of society. Homophobic acts include verbal abuse, physical assault, and vandalism.[148] Moreover, in contrast to its overt disapproval of racism or even sexism, heterosexual society tolerates and even encourages individual expressions of homophobia in

142. *See, e.g.*, 1 *Corinthians* 6:9 (King James) (neither "effeminate, nor abusers of themselves with mankind" shall "inherit the kingdom of God"); *Leviticus* 20:13 (King James) ("If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination . . . ."); 1 *Timothy* 1:10 (King James) (law is made for "them that defile themselves with mankind"). *See generally* BOSWELL, *supra* note 108 (how Christianity has viewed homosexuality throughout the ages); John E. Boswell, *Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and Its Impact on Minorities*, 1 YALE J.L. & HUMAN. 205 (1989) (similarities between anti-Semitism and homophobia).

143. The Episcopal Church nationwide has tried to discourage ordination of homosexuals, but local dioceses have nonetheless ordained gay priests. *See* Patrice Gaines-Carter, *Episcopalians to Ordain Gay Woman*, WASH. POST, June 5, 1991, at A1.

144. The organization of Reform Rabbis affirmed the presence of homosexual rabbis in the summer of 1990, but has come under fire. *Reform Rabbis Endorse Homosexual Clergymen*, CHI. TRIB., June 26, 1990, § 1, at 3.

145. CONGREGATION FOR THE DOCTRINE OF THE FAITH, ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS 8 (1986).

146. *Id.* The National Conference of Catholic Bishops recently issued a statement that being homosexual is not a sin—although engaging in homosexual behavior is. *See* Peter Steinfels, *Bishop Issues Warning on Birth Control*, N.Y. TIMES, Nov. 15, 1990, at A22.

147. Insensitivity refers to prevailing social assumptions that (1) a person is heterosexual; (2) to be normal, a person must be heterosexual; and (3) given the chance, a homosexual would prefer to be heterosexual. *See* Dynes, *supra* note 102, at 535 (heterosexuality "remains an unspoken assumption underpinning much popular thinking").

148. The National Gay and Lesbian Task Force (NGLTF) has since 1985 published an annual catalogue of antigay violence, victimization, and defamation. The number of overt homophobic acts is overwhelming. Among the 7031 incidents reported to NGLTF in 1989, approximately two-thirds were acts of verbal abuse. Of the remaining 2322 incidents, 34% were physical assaults, 31% were threats of violence, 17% were acts of vandalism, 14% were police abuse, 3% were homicides, and 1% were acts of arson or other victimization. NATIONAL GAY AND LESBIAN TASK FORCE, ANTI-GAY VIOLENCE, VICTIMIZATION & DEFAMATION IN 1989, at 1 (1990).

order to perpetuate a heterocentric society.[149]

Individual hostility and insensitivity towards gay men are "intimately tied to widely held notions about the nature of masculinity and to what males are and are not permitted in the way of behavior and feelings."[150] As a result, heterosexuals often experience fear and anxiety towards gay men and homosexuality.[151] One psychoanalytic interpretation related this anxiety to the fear men in our society have about the feminine side of themselves.[152] Another theory compared homophobia's origins to "forms of social prejudice directed against members of other low-powered groups."[153]

C. *A Heterocentric Society*

Regardless of their origins, institutional and individual homophobia combine to create and maintain a heterocentric society. Governments at the local, state, and national levels enact laws that prevent and criminalize homosexual behavior. Court rulings uphold and support these laws. Individuals work to prevent gays from organizing, fraternizing, speaking out, belonging to religious communities, sustaining chosen employment, residing in certain neighborhoods, and pursuing the exercise of fundamental civil rights. Citizens, individually and in groups, publicly vent their disapproval of homosexuals and homosexuality by shunning, harassing, and physically assaulting gay men and lesbians.[154] Kirk and

149. *See infra* notes 154-71 and accompanying text.

150. MARTIN HOFFMAN, THE GAY WORLD 181 (1968); *see also* GOODWIN, *supra* note 3, at 65-77 (attributing conflict between homosexuals and heterosexuals to misogynistic stereotypes in Western society and exploring expressions of this conflict found in American humor); Linda E. Weinberger & Jim Millham, *Attitudinal Homophobia and Support of Traditional Sex Roles,* 4 J. HOMOSEXUALITY 237, 244 (1979) (relating homophobia to maintenance of the traditional masculine-feminine distinction).

151. In a revealing letter calling for unity between the Black Panthers and the women's and gay-rights movements, Huey P. Newton, Supreme Commander of the Black Panther Party, called for male Black Panthers to confront their insecurities about homosexuality:

> When I say "insecurities" I mean the fear that there is some kind of threat to our manhood. I can understand this fear. Because of the long conditioning process that builds insecurity in the American male, homosexuality might produce certain hangups in us. I have hangups myself about male homosexuality where on the other hand I have no hangups about female homosexuality. I think it's probably because male homosexuals may be a threat to me, and the females aren't. It's just another erotic sexual thing.

Huey Newton, *A Letter From Huey, in* THE GAY LIBERATION BOOK 142, 144 (Len Richmond & Gary Noguera eds., 1973); *see also* Stephanie A. Shields & Robert E. Harriman, *Fear of Male Homosexuality: Cardiac Responses of Low and High Homonegative Males,* 10 J. HOMOSEXUALITY 53, 65 (1984) (homosexuals represent deviation from the heterosexual male norm and loss of traditional male identity, thus causing anxiety and fear in heterosexual males); Weinberger & Millham, *supra* note 150, at 243 (noting personal anxiety in the presence of homosexuals).

152. SEGAL, *supra* note 109, at 70-82, 158.

153. Thomas J. Ficarrotto, *Racism, Sexism, and Erotophobia: Attitudes of Heterosexuals Toward Homosexuals,* 19 J. HOMOSEXUALITY 111, 112 (1990).

154. *See generally* KIRK & MADSEN, *supra* note 103, at 64-109 (how Americans prevent homosexual behavior, deny gays fundamental civil rights, and vent their disapproval of gays).

Madsen aptly captured the experience:

> Consider what gays are up against: the wall. It stretches high and broad, like the Great Wall of China, across the full expanse of American society. Today there is almost no social interaction between straights and gays wherein the latter can safely ignore the barricade of dislike and fear which separates them from the rest.[155]

Like American society's unconscious racism,[156] America's unconscious heterocentrism and homophobia create a monolithic and discriminatory social environment. The belief that heterosexuality is the way things are and should be "survives as part of the inherited social amalgam that makes up the deep structure of modern societies, the tacit body of unexamined postulates that form a kind of collective 'operating procedure.' "[157] Various components of American social structure perpetuate this view. These institutions include, but are not limited to, cinema,[158] drama,[159] educational institutions,[160] and the media.[161]

Much of how Americans feel about homosexuals and homosexuality originates in the lessons of culture absorbed from family, friends, and social environment. As Professor Lawrence wrote:

> culture—including, for example, the media and an individual's parents, peers, and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world.[162]

One lesson of perception conveyed is the categorization of other people into groups defined by class, race, gender, and sexual orientation. Through this categorization people learn to label others as "poor" or "homosexual," for example, and to react to them in accordance with the category into which they fall. "These categories (e.g., class, caste, race, gender) can be so deeply ingrained in individuals' understandings of the world that they appear to be 'natural' rather than the products of social

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155. *Id.* at 3.

156. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317 (1987) (unconscious racism in discriminatory practices and judicial application of discriminatory-purpose doctrine).

157. Dynes, *supra* note 102, at 535.

158. *See, e.g.,* VITO RUSSO, THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES (rev. ed. 1987) (one-dimensional portrayal of homosexuality in the movies).

159. *See, e.g.,* James W. Carlsen, *Images of the Gay Male in Contemporary Drama, in* GAYSPEAK: GAY MALE & LESBIAN COMMUNICATION 165 (James W. Chesebro ed., 1981) (portrayal of homosexuals in drama before and after the groundbreaking play *The Boys in the Band*).

160. *See, e.g.,* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 85-90 (1991) (criticizing the depiction of gay men as spreaders of AIDS in law school exam murder question).

161. *See, e.g.,* Steve Weinstein, *Back Into the Closet: Gay Roles Disappear as Homophobia Sweeps Industry,* S.F. CHRON., May 26, 1991, Datebook, at 45 (complete lack of continuing gay characters on network television programs).

162. Lawrence, *supra* note 156, at 323.

interaction."[163] Thus homophobia, like racism, is learned by tacit understanding.

Just as Americans do not recognize how their cultural experience shapes their beliefs about race and how those beliefs affect their actions,[164] Americans do not recognize how their cultural experience influences their beliefs about homosexuality and their actions toward homosexuals. For example, the Boy Scouts of America have publicly stated that the term "morally straight" as applied in the Boy Scout pledge " 'means, among other things, that a person not be homosexual.' "[165] As a result, over four million youths[166] receive the message that it is morally wrong to be gay or lesbian and the stereotype that homosexuals cannot provide positive role models for children gains strength and credibility.[167] The American cultural experience, itself a product of heterocentrism and homophobia, not surprisingly engenders negative emotions and opinions about those who are homosexual.[168]

The word "homosexual" itself raises the negative imagery and characteristic stereotyping that society has imputed to the term.[169] Common negative images and stereotypes include: homosexuals are loathsome sex addicts who spread AIDS and other venereal diseases; homosexuals are unable to reproduce, and therefore must recruit straight males to perpetuate their ranks; homosexuals are unproductive and untrustworthy members of society; homosexuals are insane and dangerous because homosexuality is a mental illness.[170] Thus, "people may respond to homosexuals and homosexuality not only on the basis of 'cognitive'

163. Gregory M. Herek, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men,* 10 J. HOMOSEXUALITY 1, 3 (1984).

164. Lawrence, *supra* note 156, at 321, 330.

165. Laurie Becklund, *Scouts Can Bar Gay Man as Leader, Judge Rules,* L.A. TIMES, May 22, 1991, at B1, B8. According to Judge Disco of the Los Angeles Superior Court, ruling in the case of *Curran v. Mt. Diablo Council of the Boy Scouts of America,* the Boy Scouts can legally fire an openly gay Scoutmaster, for " '[i]nclusion of a homosexual Scoutmaster . . . would either undermine the force of the Boy Scout view that homosexuality is immoral and inconsistent with the Scout oath and law, or would undermine the credibility of the Scoutmaster who attempts to communicate that view.' " *Id.* at B8.

166. Michael McCabe, *Boy Scouts Under Attack in Court,* S.F. CHRON., July 1, 1991, at A1, A8 (about 4.3 million scouts in 1991).

167. *See* Becklund, *supra* note 165, at B8.

168. *See* DENNIS ALTMAN, THE HOMOSEXUALIZATION OF AMERICA 67 (1982) (homosexuals depicted as a threat to "dominant social values" and thereby become scapegoat for societal changes); KLASSEN ET AL., *supra* note 103, at 165 (homosexual relationships challenge way American culture deals with sexuality); MICHAEL SCHOFIELD, SOCIOLOGICAL ASPECTS OF HOMOSEXUALITY 206 (1965) (use of homosexual minority as a convenient scapegoat); *supra* notes 150-51 and accompanying text (social influence on heterosexual males creates anxiety toward gays).

169. THOMAS S. WEINBERG, GAY MEN, GAY SELVES: THE SOCIAL CONSTRUCTION OF HOMOSEXUAL IDENTITIES 15 (1983) (identifying connotations imputed to term "homosexual," such as "effeminate" and "over-sexed").

170. *See* KIRK & MADSEN, *supra* note 103, at 26-62; *see also* KLASSEN ET AL., *supra* note 103, at 169-73 (survey data conveying same).

information . . . but also on the basis of such cathectic elements as fear, hatred, disgust, or enjoyment."[171]

The homosexual-advance defense capitalizes on the social and individual responses of fear, disgust, and hatred with regard to homosexuals. The accused asserts that the victim made a homosexual advance, which is presumably a terrifying and disgusting event. A variety of responses—including fear, anxiety, anger, and hatred—then consumed the accused. These responses displaced all other possible reactions, including self-control, tolerance, and compassion. Thus goaded into a heat of passion, the accused killed the homosexual victim.

In seeking to avail himself of the provocation defense the defendant hopes that the typical American juror—a product of homophobic and heterocentric American society—will evaluate the homosexual victim and homosexual overture with feelings of fear, revulsion, and hatred. The defendant's goal is to convince the jury that his reaction was only a reflection of this visceral societal reaction: the reaction of a "reasonable man."

III

A CRITIQUE OF THE HOMOSEXUAL-ADVANCE DEFENSE

In the murder trial of a defendant who raises the homosexual-advance defense, the judge must decide whether the issue of provocation and the attendant question of whether the reaction was reasonable shall go to the jury. Even in modern manslaughter law, which allocates most questions about the adequacy of provocation to the jury, the judge retains discretion to refuse to instruct the jury on voluntary manslaughter when no rational jury could conclude that the killing was in response to adequate provocation.[172]

This Part of the Comment endeavors to expose the means whereby homophobia and heterosexism undermine jury rationality and operate unjustly in favor of defendants raising the homosexual-advance defense, blaming victims for their real or imagined sexuality and ignoring important trends in social change. Accordingly, this Part examines the three areas where our judicial system is most vulnerable to the unsalutary influence of homophobia: the "reasonable man" standard, the individual views and values of jurors and judges, and the application of trial safeguards. Because of the inevitable abuse of the homosexual-advance

171. WEINBERG, *supra* note 169, at 15.

172. *See, e.g.*, Stevenson v. United States, 162 U.S. 313, 315 (1896) (court has right to instruct the jury that they would not be justified in finding a verdict of manslaughter where there was no evidence upon which to base such a finding); *see also* FLETCHER, *supra* note 13, at 243-44 (judge should make preliminary decision whether circumstances constituted adequate provocation as a matter of law); Milton J. Roberts, Annotation, *Propriety of Manslaughter Conviction in Prosecution for Murder, Absent Proof of Necessary Elements of Manslaughter*, 19 A.L.R.4TH 861 (1983).

defense resulting from homophobia's influence over these aspects of criminal trials, this Comment concludes that judges should hold as a matter of law that a homosexual advance alone is insufficient to establish a provocation defense.

A. "No reasonable man . . . ."

As discussed in Part I, the threshold issue for a defendant claiming provocation is the reasonableness of his reaction.[173] The reasonableness of a reaction, however, is not determined by an abstract universal standard. The defendant's reasonableness, for example, was traditionally determined with reference to ouly one gender: the reasonable man.[174] Feminist jurisprudence criticized the standard, noting that it was "not a neutral, generic term, but one that has always been latent with gender bias."[175] In response, many states modified their statutes to refer to the reasonable person.[176] Although the language has been changed, the underlying standard and the problems inherent in it remain the same.[177] The failure of the reasonable man to represent "the social reality in which it operates"[178] can create prejudicial and untenable results.

At least two courts, for example, have recognized that the reasonable-man standard can produce prejudicial results due to sexist stereotyping. In *Ellison v. Brady*[179] the Ninth Circuit applied the "reasonable woman" standard to a sexual harassment case under Title VII of the Civil Rights Act of 1964.[180] In using a gender-conscious standard instead of the reasonable-person standard, the court noted that a "sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[181] In *State v. Wanrow*[182] the Washington Supreme Court reversed a female defendant's conviction for second-degree murder. The court held that a jury instruction on the reasonable-man standard and self-defense was errone-

173. *See supra* notes 55-58 and accompanying text.

174. *See* Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense,* 33 UCLA L. REV. 1679, 1687, 1690 (1986) (no references to the reasonable woman in common law); *supra* note 12.

175. Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man,"* 8 RUT.-CAM. L.J. 311, 312 (1977).

176. *See supra* note 64 (statutory definitions of reasonableness standard).

177. *See* Bender, *supra* note 12, at 22. According to Bender:

> As our social sensitivity to sexism developed, our legal institutions did the "gentlemanly" thing and substituted the neutral word "person" for "man." Because "reasonable man" was intended to be a universal term, the change to "reasonable person" was thought to continue the same universal standard without utilizing the gendered term "man."

Id.

178. Donovan & Wildman, *supra* note 16, at 466.

179. 924 F.2d 872 (9th Cir. 1991).

180. *Id.* at 879.

181. *Id.*

182. 559 P.2d 548 (Wash. 1977).

ous because the instruction's continual use of masculine pronouns left the jury with the impression that the relevant objective standard to be applied was that applicable to "an altercation between two men"[183] despite the fact that the altercation occurred between a woman and a man.

Just as *Wanrow* and *Ellison* questioned the sexist attributes of the reasonable man, commentators have questioned other attributes of the standard. They have attacked presumptions about the race,[184] ethnicity,[185] and socioeconomic background[186] of the reasonable man. The assumption that the standard is masculine in character (or reflects a certain majoritarian view of the reasonable man's race or ethnicity) is similar to the assumption that it is heterosexual in nature. After all, no individual is lacking a sexual identity—whether heterosexual, homosexual, or bisexual.[187] Applying the *Ellison* court's reasoning,[188] when the reasonableness standard is blind to sexual orientation, the presumption of sexual identity is almost invariably heterosexual.[189]

Like sexist stereotypes, homophobia and heterocentrism[190] affect the way the reasonable-man standard is perceived and applied by judge and jury alike. To the extent that the reasonable man may be conceived of as heterosexual, he may also be conceived of as homophobic and heterosexist. This heterocentric conception of the reasonable man has a direct effect on the application of provocation doctrine.

The reasonable man is an ideal, reflecting the standard to which society wants its citizens and system of justice to aspire.[191] It is an

183. *Id.* at 558.

184. *See* Donovan & Wildman, *supra* note 16, at 436-37.

185. *See* Bernard Brown, *The "Ordinary Man" in Provocation: Anglo-Saxon Attitudes and "Unreasonable Non-Englishmen,"* 13 INT'L & COMP. L.Q. 203, 212-20 (1964) (examining use of "reasonable Englishman" standard in former English colonies such as India); Stanley M.H. Yeo, *Ethnicity and the Objective Test in Provocation,* 16 MELB. U. L. REV. 67 (1987) (arguing for recognition of ethnicity as a characteristic of the reasonable person).

186. Donovan & Wildman, *supra* note 16, at 464.

187. Similarly, as Professor MacKinnon has argued, there is no gender-neutral norm "because no individual is asocial, lacking gender." Catharine A. MacKinnon, *Toward Feminist Jurisprudence,* 34 STAN. L. REV. 703, 718 n.73 (1982).

188. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

189. From an objective point of view, there are statistically more heterosexuals than homosexuals. *See supra* note 113 and accompanying text (10% percent of the white male population is homosexual). On the other hand, heterosexual "awareness of the size of the gay population exists in a weird psychological twilight, half there and half absent, known and yet not known." KIRK & MADSEN, *supra* note 103, at 15; *see also* John Balzar, *American Views of Gays: Disapproval, Sympathy,* L.A. TIMES, Dec. 20, 1985, at A1, A30 (more than half of survey respondents said they did not know or believe that any associates or family members were homosexual).

190. *See supra* notes 147-71 and accompanying text.

191. *See* FLETCHER, *supra* note 13, at 247 (reasonable person invoked as an "exemplary person"); Bender, *supra* note 12, at 21 (reasonable-man standard attempts to create a "universally applicable measure for conduct"); Collins, *supra* note 175, at 315 (reasonable man is a model of behavior to which others aspire); *see also* A.P. HERBERT, MISLEADING CASES IN THE COMMON

"entity whose life is said to be the public embodiment of rational behavior."[192] 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 not that the ordinary person *would not* be provoked by a homosexual advance,[193] but rather that a reasonable person *should not* be provoked to kill by such an advance.

The reasonable man should not possess prejudices and biases such as homophobia and heterosexism. Even if the reasonable-man standard allows for "shortcomings and weaknesses which the community will tolerate,"[194] courts should decide that homophobia, especially when expressed through violent acts, is not among those shortcomings that are tolerable. As the following Sections show, homophobia should not be allowed to play a role in the law of provocation because it undermines the fairness and rationality of jury decisionmaking, blames gay victims instead of their victimizers, and frustrates positive social change.

B. "No rational jury . . . ."

The jury evaluates the provocative act and the defendant's reaction as a question of fact based on the reasonable-man standard.[195] This requires the individual juror to draw on his or her own experiences, but there is still a need for a logical fact-finding process.[196] The tension between the need for jury rationality and jurors' tendency to draw on unreasonable prejudice and bias is especially great when the homosexual-advance defense is raised by a defendant.

American jurisprudence greatly values the input of individual jurors' prior experiences in the decisionmaking process.[197] An individual juror, however, brings not only his world knowledge into the jury box but also his individual biases and prejudices—even those the juror is not conscious he possesses.[198] Several safeguards have been designed to prevent these individual prejudices from infecting the decisionmaking process of the jury.

LAW 16 (1930) (reasonable man is "a monument in our Courts of Justice . . . appealing to his fellow-citizens to order their lives after his own example").

192. Collins, *supra* note 175, at 315.

193. *See supra* Part II (homophobia is a societal problem infected with elements of both fear and anger—the crucial emotions in provocation).

194. KEETON ET AL., *supra* note 51, § 32, at 174.

195. *See supra* text accompanying notes 51-64.

196. *See, e.g.*, Roger J. Traynor, *Fact Skepticism and the Judicial Process*, 106 U. PA. L. REV. 635, 640 (1958) (calling for reform in methods used to find and evaluate facts in judicial process).

197. *See* REID HASTIE ET AL., INSIDE THE JURY 130 (1983); *see also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 31-44 (1986) (development and role of American jury).

198. *See supra* notes 156-71 and accompanying text (unconscious heterocentrism and homophobia).

1. *Representative Cross Section of the Community*

The United States Constitution requires a jury drawn from a representative cross section of the community.[199] This requirement is designed to counteract individual biases by ensuring that the jury represents a wide range of views.[200] For the most part jurors are able to set aside their individual biases when they sit together as a group.[201] In certain types of cases, however, most notably in those involving rape,[202] the death penalty, and racial prejudice, "the subject matter awakens deep-seated personal values over which people adamantly disagree."[203] Homosexuality is no less a matter that implicates deep-seated prejudices than these other categories.[204] Individual jurors' biases will thus inevitably affect juries in cases involving homosexuality and improperly skew the results.[205] These biases are so widespread that selection from a cross section of the community is likely to produce a homophobic jury despite the safeguards of the voir dire.[206] As a result, one cannot always rely on

199. U.S. CONST. amend. VI; Taylor v. Louisiana, 419 U.S. 522, 527-28 (1975) (Sixth Amendment requires that petit jury be selected from a representative cross section of the community).

200. *See* James H. Druff, Comment, *The Cross-Section Requirement and Jury Impartiality,* 73 CALIF. L. REV. 1555, 1556 (1985); *see also* Cookie Stephan, *Selective Characteristics of Jurors and Litigants: Their Influences on Juries' Verdicts, in* THE JURY SYSTEM IN AMERICA 97, 109 (Rita J. Simon ed., 1975) (sex, socioeconomic status, race, demographic variables, and individual attitudes all come into play within the jury).

201. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL 208 (1988).

202. *See* HASTIE ET AL., *supra* note 197, at 140-41 (differences in responses of male and female jurors to rape cases).

203. KASSIN & WRIGHTSMAN, *supra* note 201, at 208. The authors also note that in cases involving emotional issues "individual juror biases is a force to be reckoned with." *Id.* at 203.

204. *See supra* Part II.

205. *See, e.g.,* United States v. Gillespie, 852 F.2d 475 (9th Cir. 1988) (in a child molestation case, evidence of homosexuality was extremely prejudicial and constituted reversible error); Cohn v. Papke, 655 F.2d 191, 194 (9th Cir. 1981) (introduction of evidence of homosexuality creates "a clear potential that the jury may have been unfairly influenced by whatever biases and stereotypes they might hold with regard to homosexuals"); *cf.* Lawrence J. Leigh, *A Theory of Jury Trial Advocacy,* 1984 UTAH L. REV. 763, 765 (jurors make up their minds before the deliberation stage).

206. Through voir dire, counsel attempt to eliminate those jurors who appear to be predisposed against their clients. However, it is unconstitutional to systematically remove potential jurors based upon their race. Batson v. Kentucky, 476 U.S. 79 (1986) (Fourteenth Amendment due process violation). It is highly unlikely that the Court would extend this analysis to prevent systematic exclusion of homosexuals or homophobic jurors from the petit jury. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia sodomy statute despite homosexual respondent's claim that it violated Fourteenth Amendment due process rights).

The voir dire can also be tainted by questions based upon heterocentric assumptions. For example, prospective jurors might be asked whether they are married or have children. *See* Dennis Conkin, *Gay Man Objects to Jury Selection Bias,* BAY AREA REP., May 2, 1991, at 5, 12. One juror in the Northern District of California objected to these questions on the grounds that they were not of material interest to the court and that they discriminated against men and women who are not married, especially gays and lesbians who cannot be legally married. *Id.* at 5. Judge Thelton Henderson, chief judge of the District, responded to the juror's objections in a letter, stating that the

a jury drawn from a cross section of the community to balance out the homophobic prejudices of individual jurors.

2. *The Judge*

The trial judge should also provide a safeguard against jury prejudice through his or her role in voir dire, trial administration, and jury instructions. Because legal rules express social policies, a "judge's conception of such policies responds more or less, to his social, economic and political outlook, which, usually derives from his education, his social affiliations, his social environment."[207] Thus although judges are expected to be impartial,[208] they too are susceptible to bias,[209] including homophobia.[210] Consider, for example, the following account of a "fag-bashing" incident in Florida:

> In 1987, Daniel Wan was beaten outside a gay bar . . . . According to testimony, the assailants called Mr. Wan and his friends "faggot," kicked him repeatedly and threw him against a moving vehicle. Two days later, Mr. Wan died from his injuries. At a pre-trial hearing where the anti-gay nature of the crime was discussed, Broward Circuit Judge Daniel Futch jokingly asked the prosecuting attorney, "That's a crime now, to beat up a homosexual?" The prosecutor replied, "Yes, sir. And it's a crime to kill them." To that, the judge quipped, "Times really have changed."[211]

In another case, at the sentencing hearing of a man convicted of brutally killing two homosexuals in 1988, Judge Jack Hampton issued a

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question is "an integral part of our jury selection procedure" and is used to get at the occupational information of a spouse. *Id.* at 12. Judge Henderson noted, however, that judges should attempt to elicit the information in as neutral a manner as possible. *Id.*

207. JEROME FRANK, COURTS ON TRIAL 147-48 (1949). There are few openly gay or lesbian judges in the United States today. *See* Deb Price, *Going to Court Regularly,* Gannett News Service, Apr. 16, 1991, *available in* LEXIS, Nexis Library, GNS File (approximately 12 openly gay judges preside in San Francisco, New York, and Los Angeles).

208. *See, e.g.,* 28 U.S.C. § 455 (1988) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."); MODEL CODE OF JUDICIAL CONDUCT Canon 3C(1) (1990) ("A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice . . . .").

209. *See* FRANK, *supra* note 207, at 147 ("[w]e must eliminate the myth or legend that judges are more—or less—than human").

210. Joshua Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock,* CIV. LIBERTIES REV., Jan.-Feb. 1979, at 19, 20 (although individual exceptions exist, the judiciary as a whole is just as homophobic as the rest of society); *cf.* Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (to hold that homosexual sodomy is protected as a fundamental right would be "to cast aside millennia of moral teaching").

211. Suzanne Bryant, Nat'l Lesbian & Gay Law Ass'n, Remarks Before the A.B.A. Judicial Conduct Subcommittee 4 (Sept. 22, 1989) (transcript on file with author) (Comments on the Draft Revisions to the A.B.A. Code of Judicial Conduct). Although Judge Futch immediately apologized and stated that he was "kidding," he was removed from the case. The American Civil Liberties Union also asked the Florida Bar Association to pass an ethics rule banning discrimination on the basis of sexual orientation. NATIONAL GAY AND LESBIAN TASK FORCE, ANTI-GAY VIOLENCE, VICTIMIZATION & DEFAMATION IN 1988, at 25 (1989).

thirty-year sentence instead of the life sentence requested by the prosecutor.[212] He justified his lenient sentence with the following remarks:

> "These two guys . . . wouldn't have been killed if they hadn't been cruising the street picking up teen-age boys" . . . .
>
> "I don't much care for queers cruising the streets picking up teenage boys." . . .
>
> . . . "[I] put prostitutes and gays at about the same level," . . . "[and] I'd be hard put to give somebody life for killing a prostitute."[213]

Judicial homophobia also contributes to the continued existence of the homosexual-advance defense. For example, following a case in San Francisco in which the defense presented a homosexual-advance defense and the jury returned a manslaughter verdict, California Superior Court Judge Daniel Weinstein commented that the victim " 'contributed in large part to his own death' by his 'reprehensible conduct.' "[214]

3. *Jury Instructions*

The trial judge's instructions to the jury are intended to provide a further safeguard against individual bias. In trials where a provocation defense is raised, the court instructs the jury to evaluate the sufficiency of the provocation using the objective, reasonable-man standard.[215] In addition, the judge generally instructs the jury to avoid sympathizing with the defendant.[216] These instructions are intended to minimize the impact of individual jurors' biases. Unfortunately, the instructions frequently fail to achieve this goal.

The contradictory nature of many jury instructions on manslaughter serves to encourage prejudiced evaluations. California's jury instruction on the "ordinarily reasonable person," for example, requires jurors to apply an objective test.[217] Yet the same instruction's reference to a "nat-

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212. *Panel to Examine Remarks by Judge on Homosexuals,* N.Y. TIMES, Dec. 21, 1988, at A16.

213. *Id.; see also Dismissal of Judge Demanded After Remarks on Homosexuals,* WASH. POST, Dec. 20, 1988, at A9.

Hampton is not the only judge who has refered to a homosexual man with a derogatory label. In another case, *Steffan v. Cheney,* the plaintiff alleged that the Navy's exclusion of homosexuals is unconstitutional. *Judge Denies Recusal Motion Over "Homo" Remark,* 1991 LESBIAN/GAY L. NOTES 34. When discussing the scope of discovery, District Judge Oliver Gasch said, " 'The most I would allow is what relates to this plaintiff, not every "homo" that may be walking the face of the earth at this time.' " *Id.* Despite Judge Gasch's disparaging reference to the plaintiff, he refused to recuse himself from the case. *Id.*

214. Robert Lindsey, *After Trial, Homosexuals Say Justice Is Not Blind,* N.Y. TIMES, Mar. 21, 1988, at A17.

215. *See supra* notes 173-94 and accompanying text (myth of the reasonable man).

216. *See, e.g.,* 1 CALIFORNIA JURY INSTRUCTIONS CRIMINAL pt. 1, CALJIC 1.00, at 4 (Arnold Levin ed., 5th ed. 1988). The instruction does include a catchall phrase that tells the juror not to be influenced by "sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."

217. "The heat of passion which will reduce a homicide to manslaughter must be such a passion as *naturally* would be aroused in the mind of an ordinarily reasonable person in the same

urally"[218] aroused person suggests that jury members compare the defendant's behavior with their own:

> [T]he more strongly [the jury] would be moved to kill by circumstances of the sort which provoked the actor to the homicidal act, and the more difficulty they would experience in resisting the impulse to which he yielded, the less does his succumbing serve to differentiate his character from theirs.[219]

The subjective evaluation inherent in the word "naturally" renders the jury incapable of objectively evaluating what an "ordinarily reasonable person" would do in the same circumstances. The jurors are forced to draw upon their own personal experiences and consequently they draw upon their own biases.

To counteract these numerous extrinsic influences on a jury's decision,[220] the judge will usually issue a sympathy instruction.[221] Jury prejudice and jury sympathy, in particular, have a profound effect on the jury's fact-finding abilities.[222] Even though jury prejudice against the defendant is clearly a danger to rational fact-finding, jury sympathy for the defendant can be far more damaging in homosexual-advance cases.

Sympathy has two aspects: empathetic feelings towards the defendant and negative feelings about unappealing qualities of the victim. The latter aspect generally tends to enhance the former.[223] When a juror

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circumstances." *Id.* at pt. 8, CALJIC 8.42, at 341 (emphasis added); *see also* 2 EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 41.14, at 223 (1977) (substantially same wording).

218. CALIFORNIA JURY INSTRUCTIONS CRIMINAL, *supra* note 216, at pt. 8, CALJIC 8.42, at 341.

219. Wechsler & Michael, *supra* note 42, at 1281.

220. *See generally* Francis C. Dane & Lawrence S. Wrightsman, *Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts, in* THE PSYCHOLOGY OF THE COURTROOM 83 (Norbert L. Kerr & Robert M. Bray eds., 1982) (research regarding effect of various extrinsic characteristics on jury verdicts); Hubert S. Feild, *Rape Trials and Jurors' Decisions: A Psycholegal Analysis of the Effects of Victim, Defendant, and Case Characteristics,* 3 LAW & HUM. BEHAV. 261 (1979) (impact of extraevidential factors on jurors' decisions in rape trials); Norbert L. Kerr, *Effects of Prior Juror Experience on Juror Behavior,* 2 BASIC & APPLIED SOC. PSYCHOL. 175 (1981) (effect of prior trial experience on jurors' decisioumaking); Daniel H. Swett, *Cultural Bias in the American Legal System,* 4 LAW & SOC'Y REV. 79 (1969) (how prejudicial bias permeates the criminal trial process); Denis C.E. Ugwuegbu, *Racial and Evidential Factors in Juror Attributions of Legal Responsibility,* 15 J. EXPERIMENTAL SOC. PSYCHOL. 133 (1979) (research regarding influence of race on juror decisionmaking); Neil Vidmar, *The Other Issues in Jury Simulation Research,* 3 LAW & HUM. BEHAV. 95 (1979) (criticizing analysis of jury simulation research and discussing generalizations and character judgments by jury).

221. *See, e.g., supra* note 216 (California's instruction).

222. *See* FRANK, *supra* note 207, at 122; *see also* Norbert L. Kerr, *Trial Participants' Behaviors and Jury Verdicts: An Exploratory Field Study, in* THE CRIMINAL JUSTICE SYSTEM: A SOCIAL-PSYCHOLOGICAL ANALYSIS 261, 281 (Vladimir J. Konecni & Ebbe B. Ebbesen eds., 1982) ("even small or infrequently applied juror biases may be important, particularly when they are based on extralegal factors").

223. HANS & VIDMAR, *supra* note 197, at 133. Sympathy presents other problems. In their explanation of what constitutes a reasonable explanation or excuse, the drafters of the Model Penal

empathizes with the defendant, the juror identifies attitudes and beliefs of the defendant that are similar to his or her own.[224] The attitudes and beliefs of someone who kills another person for making a homosexual advance include intolerance, bigotry, and homophobia. The jury should not legally base its decision upon these irrational feelings, even if it shares them. To do so would undermine the normative force by which society condemns a killing.

As Ronald Dworkin argued:

> 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 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 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 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 rationalizations 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.[225]

Even if the trial judge explicitly tells the jury to set aside its homophobia and heterocentrism, the jury is unlikely to apply this instruction effectively. As Justice Jackson once noted, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."[226] In addition jurors may neither comprehend nor comply with instructions.[227]

Code ask "whether the actor's loss of self-control can be understood in terms that *arouse sympathy* in the ordinary citizen." MODEL PENAL CODE § 210.3 cmt. at 63 (1980) (emphasis added). "Arouse sympathy" could either mean an ordinary citizen's affinity with the defendant's reaction to the provocation (justification), or compassion towards the defendant's momentary weakness (excuse).

224. *See* HANS & VIDMAR, *supra* note 197, at 133 (psychological research on interpersonal attraction demonstrates that people are attracted to the beautiful and the similar).

225. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 254 (1977) (emphasis added).

226. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citation omitted).

227. *See* HASTIE ET AL., *supra* note 197, at 231 (jurors acknowledge impossibility of perfect conceptual clarity on the accuracy of the law as instructed by the judge and accept crude

One commentator noted that "[t]ime and money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language."[228]

While courts generally express faith in "the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions,"[229] there are some contexts "in which the risk that the jury will not, or cannot, follow instructions is so great . . . that the practical and human limitations of the jury system can not be ignored."[230] Homophobia, which exists frequently on an unconscious level, presents such a context.[231]

C. *Abuse of the Defense*

Defendants frequently raise the homosexual-advance defense either as an alternative theory to self-defense[232] or alone as a theory of voluntary manslaughter.[233] The homosexual-advance defense should be rejected as a matter of law not only for the reasons discussed above but also because of its enormous potential for abuse. Defendants can manipulate the homosexual-advance defense to their advantage, raise it knowing that they did not act in the heat of passion, hoping to distract juries and garner sympathy by capitalizing on juries' conscious or unconscious homophobia.[234]

In *Mills v. Shepherd*[235] the defendant told his two roommates that he had "rolled a queer"[236] and displayed the victim's ring, watch, and bracelet. The defendant claimed he met the victim in a gay bar where the victim offered him money to commit a homosexual act. The defendant

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approximations); KASSIN & WRIGHTSMAN, *supra* note 201, at 147-51 (jury's lack of comprehension of instructions is "cause for alarm").

228. JEROME FRANK, LAW AND THE MODERN MIND 181 (1936).

229. Spencer v. Texas, 385 U.S. 554, 565 (1967).

230. Bruton v. United States, 391 U.S. 123, 135 (1968) (reversing a conviction in which jury instructed to ignore confession of a codefendant); *see also* Jonathan D. Casper et al., *The Tort Remedy in Search and Seizure Cases: A Case Study in Juror Decision Making,* 13 LAW & SOC. INQUIRY 279 (1988); Michael Allen, *When Jurors Are Ordered to Ignore Testimony, They Ignore the Order,* WALL ST. J., Jan. 25, 1988, at 33; Don Colburn, *The Jury That Knew Too Much,* WASH. POST, Apr. 12, 1988, Health, at 7; *'Jurors Will Disregard' Is Often Not Regarded,* N.Y. TIMES, Mar. 28, 1988, at A16.

231. *See supra* notes 156-63 and accompanying text (unconscious bias).

232. *See, e.g.,* State v. Dorman, 805 P.2d 386 (Ariz. 1991) (trial court erred in refusing to instruct jury on self-defense at trial of defendant who also raised homosexual-advance defense). *But cf.* People v. Gaurige, 522 N.E.2d 1306 (Ill. App. Ct. 1988) (defendant who killed homosexual victim after victim placed hand on defendant's knee did not act in self-defense).

233. *See* cases cited *supra* note 4.

234. *See supra* notes 156-63 and accompanying text (unconscious bias).

235. 445 F. Supp. 1231 (W.D.N.C. 1978).

236. "Rolling a queer" is a slang term used to describe the process in which a heterosexual male masquerading as a homosexual seduces a gay man in order to rob him.

accompanied the victim in his car to an isolated spot where the victim allegedly made a sexual advance. The defendant pushed the victim out of the car, chased him, knocked him down, kicked him, pulled his pants down to hinder pursuit, took his jewelry, left him lying near the creek in which the body was later found, and drove home in the victim's car.[237] Despite strong evidence that the defendant intended to prey on a gay man, he successfully raised the homosexual-advance defense at trial. The jury found him guilty of voluntary manslaughter and sentenced him to twenty years.[238] Absent the defendant's homosexual-advance defense, his acts would certainly have constituted murder or felony-murder.[239]

Commonwealth v. Doucette[240] demonstrated that a defendant can attempt to manipulate any given set of facts to support a homosexual-advance defense.[241] In that case the defendant brutally killed the victim in a motel room. Immediately following the killing the defendant related the events to a third party as follows: the defendant lured the victim to the motel by promising there were some women waiting to meet them; he then stabbed the victim in retaliation for an alleged confrontation between the victim and the brother of the defendant's girlfriend; and he admitted slitting the victim's throat when the victim called for help.[242] Later that evening, however, the defendant contended that he had been drunk and followed the victim to his motel where the victim had made a homosexual advance, which provoked the defendant to kill.[243] Although the jury ultimately convicted the defendant of first-degree murder, the judge still instructed the jury on provocation.[244]

A defendant's claim of a homosexual advance can also generate a minitrial highlighting the sexual orientations of the victim and the defendant, distracting the jury from the ultimate issue—the defendant's guilt. In *State v. Rivera,*[245] for example, the victim's wife and friends all testified as to the heterosexuality of the victim to rebut the defendant's claim

237. *Mills,* 445 F. Supp. at 1234.

238. *Id.* at 1232.

239. *See, e.g.,* People v. Valentino, 475 N.E.2d 627, 629 (Ill. App. Ct. 1985) (where defendant admitted to friends that he "knocked a gump, a homosexual," jury convicted him of murder despite his reliance on the homosexual-advance defense); State v. Volk, 421 N.W.2d 360 (Minn. Ct. App. 1988) (affirming trial court's refusal to admit homosexual-advance defense where the evidence showed that defendant had intended to target a homosexual).

240. 462 N.E.2d 1084 (Mass. 1984).

241. *Doucette* plansibly illustrates another potential abuse of the homosexual-advance defense: how a defendant concerned with concealing his own homosexual activity can manipulate the facts to support a sexual-advance defense. Semen was found in the rectum, mouth, and throat of the victim, implying that the defendant and the victim had engaged in sexual activity. *Id.* at 1090.

242. *Id.* at 1089.

243. *Id.* at 1095-96.

244. *Id.* at 1093.

245. 733 P.2d 1090, 1100 (Ariz. 1987) (testimony regarding victim's sexual orientation admitted over objection that such evidence was inadmissible as "negative evidence").

of a homosexual advance. In *People v. Strieter*[246] the trial court permitted the prosecutor to impeach the defendant's claim that he was heterosexual by using the defendant's dishonorable discharge from military service because of homosexual activity.[247]

The introduction of highly prejudicial and often irrelevant evidence in homosexual-advance cases also diverts the fact finders' attention. In *People v. Saldivar*[248] the defendant claimed that a homosexual advance provoked him to kill. On the defense's motion, the court admitted into evidence the victim's "homosexual paraphernalia," which had been locked in a closet away from where the killing occurred.[249] After a bench trial, the defendant was convicted of voluntary manslaughter.[250]

Other courts have recognized the potential for negative influences to arise from such evidence and have denied its admission. In *People v. Limas*[251] the defendant tried to introduce an artificial penis found on the victim's body to corroborate his story of a homosexual advance. The lower court refused to admit the object, agreeing with the prosecution's contention that "admission of the penis would arouse 'prejudicial emotion' among the jurors."[252] The reviewing court upheld the trial judge's decision, finding that there was "no showing that an individual with such a device on his person was more likely to be an aggressor."[253] Similarly, in *Page v. State*[254] the defendant was charged with first-degree murder after he admitted to stabbing his victim, tying him up, and leaving him to die. The defendant claimed that the victim made an aggressive homosexual advance towards him and pleaded both self-defense and provocation.[255] The defendant's efforts to introduce pornographic magazines found in a locked strongbox under the victim's bed in order to establish a nexus between the magazines and the victim's tendency towards aggressive homosexual activity were unsuccessful.[256]

Perhaps the most blatant abuse of the homosexual-advance defense occurs when it is raised by a third party who is not himself the subject of the advance. In *Vujosevic v. Rafferty*[257] the defendant and a friend were harassing the victim, a stranger, in an abandoned lot. The defendant

246. 250 N.W.2d 562 (Mich. Ct. App. 1976).

247. *Id.* at 563-64.

248. 497 N.E.2d 1138 (Ill. 1986) (affirming voluntary manslaughter conviction).

249. *Id.* at 1140.

250. *Id.* at 1138.

251. 359 N.E.2d 1194 (Ill. App. Ct. 1977).

252. *Id.* at 1199.

253. *Id.* at 1200. Although evidence of the device was suppressed, the jury returned a verdict of voluntary manslaughter. *Id.* at 1196.

254. 657 P.2d 850 (Alaska Ct. App. 1983).

255. *Id.* at 851.

256. *Id.* at 851-52 (magazines included *Penthouse* and *Playboy*). Nonetheless, the jury convicted the defendant of the lesser included offense of second-degree murder. *Id.* at 851.

257. 844 F.2d 1023 (3d Cir. 1988).

walked away to urinate. When he returned, his friend was beating the victim. At first the defendant asked him to stop the beating, but when his friend told him that the victim had made a homosexual advance, "something snapped" in the defendant's head and he joined in the beating.[258] The lower court issued instructions on three levels of homicide[259] because the defendant participated in the beating but not in the choking that caused the victim's death. The defendant was convicted of aggravated manslaughter.[260] The Third Circuit reversed the conviction of aggravated manslaughter for failure to instruct the jury on the lesser included offense of aggravated assault.[261]

In *Wills v. State*[262] the victim also allegedly made a homosexual advance to a third party. The defendant kicked and beat the victim twice within an hour.[263] The defendant was convicted of manslaughter in the second degree.[264] Even if a victim is not in fact homosexual, these courts' decisions send the message to potential "fag-bashers" that they can claim the homosexual-advance defense even when the victim's alleged conduct is directed toward a third person.[265]

As the foregoing examples illustrate, the homosexual-advance defense can be abused by defendants in many different contexts. The homosexual advance, however, is usually not such defendants' only defense. But because of the defense's inherent reliance on the sexuality of the victim and the defendant, the moral appraisal of the sexual advance, and irrelevant and prejudicial evidence, it is the one defense most likely to be abused by defendants raising it.

D. Blaming the Victim

This Comment earlier asked[266] whether in determining the defendant's criminal liability society is "measuring the injustice committed by the provoker," a justification-based rationale.[267] Given the existence of societal homophobia,[268] a jury (or judge) might improperly place more weight on the nature of the victim's conduct than on the defendant's

258. *Id.* at 1025-26.

259. *Id.* at 1026 (murder, aggravated manslaughter, and voluntary manslaughter).

260. *Id.*

261. *Id.* at 1028.

262. 636 P.2d 372 (Okla. Crim. App. 1981).

263. *Id.* at 373.

264. *Id.*

265. *But see* People v. Pecina, 477 N.E.2d 811, 813-15 (Ill. App. Ct.) (trial court did not err in refusing to issue voluntary-manslaughter instruction requested by defendant claiming he reacted to victim's homosexual advance on a third party; reversed on other grounds), *rev'd on other grounds*, 477 N.E.2d 820 (1985).

266. *See supra* Part I.

267. Dressler, *supra* note 40, at 445.

268. *See supra* Part II (homophobia in society).

reaction.[269] In those cases the jury's focus on the victim's atypical behavior is magnified and the jury might "view the defendant in a less harsh light than it would if the victim was neutral or even an attractive character."[270]

In rape cases, for example, juries have a tendency to weigh the conduct of the victim in judging the guilt of the defendant.[271] A similar balancing process might occur in cases where the homosexual-advance defense is raised. The defendant can be permitted by statute to prove a trait[272] of the victim—the victim's alleged homosexuality or the fact that the victim was the aggressor.[273] While the victim in a rape case can be present to rebut the defendant's claims, the same is not true in a murder case when a homosexual-advance defense is raised. Thus although the trial judge may instruct the jury to analyze the factual question in terms of whether the defendant should have controlled his reaction,[274] the jury may be inclined to blame the victim.[275] A homophobic jury might conclude that the gay victim, by virtue of his sexual orientation, deserved to be a victim.[276]

Overemphasis on the victim's conduct reflects reliance on justification theory.[277] Justification theory interprets the defendant's act as one that is socially permissible[278] or "not affirmatively undesirable."[279] Taking this to an extreme, under this interpretation the death or killing of a homosexual would be socially permissible. However, "[i]t is morally questionable to suggest that there is less societal harm in [the] Victim's

269. This is similar to a jury's view of a rape victim where, based upon the victim's prior sexual conduct, the jury might feel that "she got what she deserved." *See* 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5382, at 514-15 (1980) (jurors use past sexual conduct to determine whether rape victim is a "good" woman who is deserving of legal protection or a "bad" woman who is not). The jury judges the defendant not on the basis of his guilt, but on the "moral worth of his victim." *Id.* § 5382, at 522.

270. HANS & VIDMAR, *supra* note 197, at 133.

271. *See* HARRY KALVEN, JR., & HANS ZEISEL, THE AMERICAN JURY 250-51 (1966); *see also supra* note 269 and accompanying text.

272. FED. R. EVID. 404(a)(2).

273. KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 193, at 572-73 (Edward W. Cleary ed., 3d ed. 1984); 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[06] (1990) (character of the victim).

274. *See supra* notes 96-99 and accompanying text (excuse as a defense).

275. Juries in murder trials, upon learning of the victim's past sexual conduct, might feel that the victim deserved to be killed: "in a murder trial, unlike a trial for rape, there is no witness to claim that the testimony concerning [his or her] prior sexual conduct interfered with [his or her] right of privacy and there is no witness for the jury to observe." Joan L. Brown, Comment, *Blaming the Victim: The Admissibility of Sexual History in Homicides,* 16 FORDHAM URB. L.J. 263, 283-84 (1988).

276. *See supra* note 271 and accompanying text.

277. *See supra* notes 89-92 and accompanying text.

278. Fletcher, *The Right and the Reasonable, supra* note 79, at 977.

279. Dressler, *supra* note 40, at 446.

death merely because he acted immorally."[280] Nor should a victim's conduct "make his life less deserving of protection by society."[281] Whatever a person's opinion may be of gay men and lesbians, "the law does not condone or excuse the killing of homosexuals any more than it condones the killing of heterosexuals."[282]

Under excuse theory, the killing of a homosexual would be considered wrongful. Because the defendant's reaction to a homosexual advance might be viewed as reasonable, however, the defendant's act might not be found blameworthy. When society focuses on the reasonableness of the defendant's reaction to the provocation or offers a concession to human weaknesses, it is using excuse theory.[283] A killing based on a homosexual advance, however, is neither a reasonable nor an acceptable lapse of self-restraint.

Criminal law aims to maintain a certain degree of social control.[284] This is especially evident in provocation theory, where the difference between murder and manslaughter turns on the distinction between behavior society finds acceptable and behavior that it does not. An individual might have unreasonable impulses to break the law where society expects him to exercise self-restraint. If an individual acts on such unreasonable impulses, a jury should find him guilty of murder and not manslaughter. Killing another person in response to a homosexual advance is a disproportionate and therefore an unreasonable response. Society should demand self-control on the part of individuals who are moved to react violently to such advances. A homosexual advance *should not* "render the ordinarily reasonable and law-abiding person in the same situation liable to become so emotionally upset that he would be wholly incapable of controlling his conduct."[285] To argue that it can is to encourage the sort of irrational violence that the criminal justice system is designed to control and contain.

Recently lawmakers in various states have made conscious policy decisions not to excuse hate-motivated violence, including crimes motivated by the sexual orientation of the victim.[286] Some jurisdictions have

280. *Id.* at 457.

281. *Id.*

282. Commonwealth v. Carr, 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990).

283. *See supra* notes 96-99 and accompanying text.

284. HERBERT MORRIS, ON GUILT AND INNOCENCE 33-34 (1976).

285. Dressler, *supra* note 40, at 468.

286. Thirteen states and the District of Columbia have passed hate-crime statutes that include sexual orientation among the protected classes of persons. *See* CAL. CIV. CODE § 51.7(a) (West 1992) ("All persons . . . have the right to be free from any violence . . . committed against their persons or property *because of* their race, color, religion, ancestry, national origin, political affiliation, sex, *sexual orientation* . . . ." (emphasis added)); CAL. PENAL CODE § 422.6(a) (West 1988) (prohibiting injury or threat to person or damage to property *because of* specified beliefs or characteristics, including sexual orientation); CONN. GEN. STAT. ANN. § 53a-181b (West Supp. 1991); D.C. CODE ANN. §§ 22-4001 to -4002 (Supp. 1991); FLA. STAT. ANN. § 874.02 (West Supp.

enacted statutes under which evidence that a crime was motivated by racism, anti-Semitism, sexism, or homophobia aggravates offenses instead of mitigating them.[287] These initiatives are generated by a desire to create a more tolerant and safe society for all citizens regardless of race, color, religion, national origin, sex, and/or sexual orientation.[288]

The homosexual-advance defense by definition, however, implies that the defendant was motivated to kill the victim *because of* his sexual orientation. Continued acceptance of the homosexual advance as legally sufficient provocation subverts legislative initiatives condemning hate-motivated violence. Even in jurisdictions where homophobic attacks are not statutorily recognized as hate crimes, court sanctions of the homosexual-advance defense through excuse analysis condone expressions of intolerance and bigotry as reasonable and acceptable human weaknesses.

Moreover, just because a society is heterocentric does not mean it has to tolerate or encourage violent homophobic acts. Florida and New Hampshire, for example, believe that a heterosexual family structure is superior to that of a same-sex model and forbid gay men and lesbians to adopt children.[289] At the same time these two states consider crimes against persons because of their sexual orientation a hate crime.[290] In addition, several states that forbid consensual sodomy nonetheless also

1991); ILL. ANN. STAT. ch. 38, para. 12-7.1(a) (Smith-Hurd Supp. 1991); IOWA CODE ANN. § 729.5.1. (West Supp. 1991); MINN. STAT. ANN. § 609.2231(4)(a) (West Supp. 1991); NEV. REV. STAT. ANN. § 207.185 (Michie Supp. 1991); N.H. REV. STAT. ANN. § 651:6(I)(g) (Supp. 1991); N.J. STAT. ANN. § 2C:12-1.e. (West 1991); OR. REV. STAT. ANN. § 166.155 (1989); VT. STAT. ANN. tit. 13, § 1455 (1991); WIS. STAT. ANN. § 939.645(1)(b) (West Supp. 1991); Act effective Oct. 1, 1991, ch. 91-83, 1991 Fla. Sess. Law Serv. 502 (West) (amending FLA. STAT. ch. 775.085); Act effective June 17, 1991, ch. 214, 1991 R.I. Pub. Laws 214, *available in* LEXIS, States Library, RICODE File (amending R.I. GEN. LAWS ch. 11-15). Several states that do not include sexual orientation in their hate-crime statutes nonetheless require state police to collect and analyze information relating to incidents directed against a person or group because of sexual orientation. *See, e.g.,* Act effective July 5, 1991, ch. 322, 1991 Ariz. Legis. Serv. 1788 (West) (amending AZ. REV. STAT. § 41-1750); Act effective Jan. 1, 1992, ch. 206, 1991 Me. Legis. Serv. 422 (West) (amending ME. REV. STAT. ANN. tit. 25, § 1544); Act efective July 1, 1991, ch. 411, 1991 Md. Laws 411 (repealing and recnacting MD. ANN. CODE art. 88B, § 9), *available in* LEXIS, States Library, MDCODE File; *see also* ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES STATUTES: A 1991 STATUS REPORT (1991).

287. *See, e.g.,* CAL. PEN. CODE § 422.7 (Deering 1991); ILL. ANN. STAT. ch. 38, para. 1005-5-3.2(10) (Smith-Hurd Supp. 1991); IOWA CODE ANN. § 729.5.4. (West Supp. 1991); N.H. REV. STAT. ANN. § 651:6(I) (1990); NEV. REV. STAT. ANN. § 207.185 (Michie Supp. 1991); N.J. STAT. ANN. § 2C:44-3.e. (West Supp. 1991); VT. STAT. ANN. tit. 13, § 1455 (1990); WIS. STAT. ANN. § 939.645 (West Supp. 1991).

288. *See, e.g.,* CAL. PENAL CODE § 186.21 (Deering 1991) ("it is the right of every person, regardless of race, color, creed, religion, national origin, sex, age, sexual orientation, or handicap, to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals"); FLA. STAT. ANN. § 874.02(1) (West Supp. 1991) (same).

289. N.H. REV. STAT. ANN. § 170-B:4 hist. (1990) (prohibits adoption because homosexuals fail to provide a "healthy environment and a role model" for children (quoting Act effective July 24, 1987, 1987 N.H. Laws 343)); FLA. STAT. ANN. § 63.042(3) (West 1985).

290. *See* N.H. REV. STAT. ANN. § 651:6(I)(g) (Supp. 1991); FLA. STAT. ANN. § 874.02 (West

condemn hate crimes directed towards persons because of their sexual orientation.[291]

A homosexual advance should not provide grounds for mitigating a murder to manslaughter. Because no reasonable man, at least one who is not homophobic,[292] would react to a homosexual advance by killing the provoker, such an act is not only wrongful but also blameworthy. When defendants who kill in response to homosexual advances are not convicted of murder, courts and juries reinforce the notion that homosexuality is culpable behavior and that gay men do not deserve the respect and protection of the criminal justice system.[293]

E. The Homosexual Advance as Insufficient Provocation in a Changing Society

Despite the litany of hate catalogued in Part II, our society is changing and progress has been achieved in both the legal rights and social acceptance of gay men and lesbians. Although the obstacle of institutional homophobia may seem insurmountable,[294] it is gradually eroding. The Supreme Court found Georgia's statute criminalizing sodomy to be constitutional in *Bowers v. Hardwick*,[295] but three state courts have recently found that their states' sodomy laws violate the states' constitutions.[296] Some of the most notable developments have occurred in the area of family law.[297] For example, the definition of the family unit is

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Supp. 1991); Act effective Oct. 1, 1991, ch. 91-83, 1991 Fla. Sess. Law Serv. 502 (West) (amending FLA. STAT. ch. 775.085).

291. The following jurisdictions forbid sodomy, yet condemn hate crimes: Washington D.C., D.C. CODE ANN. § 22-3502 (1989) (prohibiting sodomy); D.C. CODE ANN. §§ 22-4001 to 22-4004 (Michie Supp. 1991) (hate-crime statute); Florida, FLA. STAT. ANN. § 800.02 (West 1976) (prohibiting sodomy); FLA. STAT. ANN. § 874.02 (West Supp. 1991) (hate-crime statute); Act effective Oct. 1, 1991, ch. 91-83, 1991 Fla. Sess. Law Serv. 502 (West) (amending FLA. STAT. ch. 775.085) (same); Minnesota, MINN. ANN. § 609.293 (West 1987) (prohibiting sodomy); MINN. STAT. ANN. § 609.2231.4.(a) (West Supp. 1991) (hate-crime statute); Nevada, NEV. REV. STAT. ANN. § 201.190 (Michie 1986) (prohibiting sodomy); NEV. REV. STAT. ANN. § 207.185 (Michie Supp. 1991) (hate-crime statute); Rhode Island, R.I. GEN. LAWS § 11-10-1 (1969) (prohibiting sodomy); Act effective June 17, 1991, ch. 214, 1991 R.I. Pub. Laws 214, *available in* LEXIS, States Library, RICODE File (amending R.I. GEN. LAWS ch. 11-15) (hate-crime statute).

292. *See supra* notes 173-94 and accompanying text (reasonable-man standard).

293. *See* 2 STEPHEN, *supra* note 20, at 81-82 ("the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense"); Royal Comm'n on Capital Punishment, Minutes of Evidence 207 (1950) (memorandum submitted Dec. 1, 1949 by the Rt. Hon. Lord Justice Denning) ("Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them").

294. *See generally supra* Part II.

295. 478 U.S. 186 (1986).

296. *See supra* note 122.

297. *See* Deb Price, *Redefining the Family*, Gannett News Service, Apr. 16, 1991, *available in* LEXIS, Nexis Library, GNS File (summary of recent developments in gay and lesbian family law).

changing to include same-sex couples. New York's highest court recently held that a gay couple can constitute a family for purposes of New York City's rent and eviction laws.[298] In addition several cities in the United States have adopted domestic partnership ordinances that permit same-sex couples to register at their city halls.[299]

There have also been changes in the custody and adoption rights of gay men and lesbians. In 1985 the Alaska Supreme Court, citing *Palmore v. Sidoti,*[300] ruled that a court could not rely on "any real or imagined social stigma" attaching to a parent's status as a homosexual when deciding the best interest of the child in a custody case.[301] In Florida, a state that statutorily bans the adoption of children by homosexuals,[302] a state court recently found that statute in violation of the Florida Constitution's privacy provisions, as well as federal and state due process and equal protection clauses.[303]

Monolithic institutions like the federal government and organized religion have also begun to show some signs of change.[304] While Congress did include some heterosexist language in the Federal Hate Crime Statistics Act,[305] it marks the first time the federal government enacted legislation taking affirmative action against homophobia. In addition, 1990 saw the end of the discriminatory immigration policy that restricted entrance of gay men and lesbians into the United States.[306]

Organizations such as the National Center for Lesbian Rights, Lambda Legal Defense and Education Fund, American Civil Liberties Union, and National Gay and Lesbian Task Force combat the homophobia present in the courts and the legislature. Four states[307] and

298. Braschi v. Stahl Assocs., 543 N.E.2d 49, 51 (N.Y. 1989).

299. Maria Goodavage, *S.F. Takes Step Toward Same-Sex Matrimony,* USA TODAY, Feb. 14, 1991, at 5A. The cities include Berkeley, San Francisco, and West Hollywood, California; Madison, Wisconsin; and Seattle, Washington. Though largely a symbolic move, recognition of domestic partnerships can have practical implications. For example, in May 1991, the San Francisco Board of Supervisors extended health insurance benefits to the domestic partners of some 2,000 city employees. Marc Sandalow, *Domestic Partners Benefits OKd,* S.F. CHRON., May 7, 1991, at A1.

300. 466 U.S. 429 (1984).

301. S.N.E. v. R.L.B., 669 P.2d 875 (1985); *see also Ohio Supreme Court Approves Adoption by Gay Man; Reverses Most Homophobic Opinion of Recent Years,* 1990 LESBIAN/GAY L. NOTES 29 (citing *In re Adoption of Charles B.,* No. 88-2163 (Ohio, Mar. 28, 1991)) (reversing Court of Appeals decision denying the adoption of a child by a gay male).

302. FLA. STAT. ANN. § 63.042(3) (West 1985).

303. *Family Law,* 59 U.S.L.W. 2727 (June 4, 1991) (citing Seebol v. Farie, No. 90-923-CA-18 (Fla. Cir. Ct. Monroe County, Mar. 15, 1991)).

304. *See supra* note 135 (court questioning the validity of military discrimination based on sexual orientation); *supra* notes 143-44 (religion).

305. *See supra* notes 128-31 and accompanying text.

306. *Congress Repeals Anti-Gay Immigration Policies; Some Arts Funding Restrictions,* 1990 LESBIAN/GAY L. NOTES 77; *see also* Immigration Act of 1990, Pub. L. No. 101-649, 1990 U.S.C.C.A.N. (104 Stat.) 5067 (amending 8 U.S.C. § 1182) (ammended grounds for exclusion of aliens).

307. *See* 1991 Conn. Legis Serv. 106 (West) (employment and housing); MASS. GEN. LAWS.

over sixty cities and counties[308] now include sexual orientation in legislation that prohibits discrimination in employment and housing.

Provocation theory and the reasonable-man standard should evolve with the society whose normative aspirations they are intended to reflect.[309] The adequacy of provocation is "shaped by social convention."[310] But what constitutes provocation in one generation "may well be differently estimated in differing ages"[311]—pulling a man's nose was considered sufficient provocation in the past[312] but would not be sufficient today.

Although it is perhaps designed to reflect contemporary moral changes in society without judicial intervention,[313] the reasonable-man standard rarely does. "[T]he objective reasonable man standard in provocation . . . has resisted alteration in accord with the emerging social reality of women, minority group members, and individuals not in the mainstream of middle-class values."[314] It comes as no surprise that because homosexuality falls outside mainstream values, the reasonable man still reflects only a heterosexual perspective of society. Until the hypothetical day arrives when the reasonable man reflects the realities of a pluralistic society, judges should actively guide and temper the application of this monolithic standard. Accordingly, when a defendant raises the homosexual-advance defense, judges should consider the growing normative acceptance and understanding of homosexuality reflected by

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ANN. ch. 151B, § 4 (West Supp. 1991) (employment); MASS. GEN. LAWS. ANN. ch. 272, § 92A (West 1990) (public accommodation); WIS. STAT. ANN. §§ 101.22, 234.29 (West 1987) (housing and employment); *see also* Act effective Mar. 21, 1991, 1991 Haw. Sess. Laws 2 *available in* LEXIS, States Library, HICODE File (amending HAW. REV. STAT. §§ 368, 378) (employment).

308. *See* EDITORS OF THE HARV. L. REV., *supra* note 6, at 158 n.51 (listing cities and counties).

309. *See* Holmes v. Director of Pub. Prosecutions, 1946 App. Cas. 588, 601 (appeal taken from Eng. C.A.) ("[A]s society advances, it ought to call for a higher measure of self-control in all cases."). Implementing this higher standard of self-control could be achieved in two ways. First, the sufficiency of provocation might be determined as a matter of law. *See id.* at 597. Second, the law could require that a response be proportionate to the provocation. *See supra* notes 36-37 and accompanying text (common-law proportionality requirement); Williams, *supra* note 36, at 748-50. Critics of this proposal have argued that if the killing were committed in the heat of passion, no importance should attach to the mode or degree of violence. *See* Ashworth, *supra* note 24, at 303. While this is consistent with the rationale behind provocation as a concession to human frailty, it does raise some issues about the subjectivity of the defendant's reaction and to that of a reasonable man. Thus, although a reasonable man might be provoked by a homosexual advance, would a reasonable man stab the victim 17 times? *Compare* State v. Flowers, 574 So.2d 448, 451 (La. Ct. App.), *cert. denied,* 580 So.2d 666 (La. 1991) (reasonable person would be sufficiently provoked) *with* State v. Latiolais, 453 So.2d 1266 (La. Ct. App.), *cert. denied,* 458 So.2d 125 (La. 1984) (homosexual advance was not sufficient provocation to justify defendant's attack with a screwdriver, which blinded the victim).

310. FLETCHER, *supra* note 13, at 243.

311. *Holmes,* 1946 App. Cas. at 601; *see also* 4 BLACKSTONE, *supra* note 23, at *191; 2 LAFAVE & SCOTT, *supra* note 17, at 256.

312. *Holmes,* 1946 App. Cas. at 600-01.

313. *See supra* note 309.

314. Donovan & Wildman, *supra* note 16, at 464.

the developments discussed in this Section and find as a matter of law that a homosexual advance is insufficient provocation.[315]

CONCLUSION

At common law, words and gestures alone were never enough to justify voluntary manslaughter.[316] There were certain provocative contexts in which, as a matter of policy, the law refused to offer any concessions.[317] A homosexual advance should be such a context. A killing based upon such a sexual advance should not be the type of behavior a rational jury can identify as a frailty of human nature. Even though it is common in our heterocentric society, homophobia must not be elevated to the rank of a normative social aspiration incorporated into the standards that govern jury decisionmaking.[318] A murderous personal reaction towards gay men should be considered an irrational and idiosyncratic characteristic of the defendant and should not be allowed to bolster the alleged reasonableness of the defendant's act.[319] Granting homophobia as the basis for a defense is at odds with the long-term good of society:

> People seem to live constantly in eras when one group or another feel justified in ending human life for reasons thought to be sufficient.

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315. Some courts have done so. *See, e.g.*, State v. Latiolais, 453 So.2d 1266, 1270 (La. Ct. App.), *cert. denied*, 458 So.2d 125 (La. 1984) (defendant's "excessive hostility toward and fear of homosexuals" did not render the victim's touching defendant's leg provocation sufficient to justify killing); State v. Ritchey, 573 P.2d 973, 975 (Kan. 1977) (deceased's vocal and physical homosexual advances, which were nonviolent and nonthreatening, were not enough to cause an ordinary man to kill); State v. Volk, 421 N.W.2d 360, 365 (Minn. Ct. App. 1988) (defendant's revulsion from homosexual victim's advances was not "provocation sufficient to elicit a heat of passion response. A person of ordinary self-control under like circumstances would simply have left the scene").

By precluding defendants from raising a homosexual advance defense, courts would not be infringing on the accused's Sixth Amendment rights. Previous cases have held that, while a defendant's request for a lesser included offense should be freely granted by the court, "there must be a rational basis for the lesser charge." United States v. Collins, 690 F.2d 431, 438 (5th Cir. 1982), *cert. denied*, 460 U.S. 1046 (1983); *see also* David E. Rigney, Annotation, *Propriety of Lesser-Included-Offense Charge to Jury in Federal Criminal Case—General Principles*, 100 A.L.R. FED. 481 (1990).

316. *See supra* note 35 and accompanying text; *see also* Perigo v. State, 541 N.E.2d 936 (Ind. 1989) (words consisting of sexual taunts and confession of illicit sex were insufficient provocation); State v. Park, 193 A.2d 1 (Me. 1963) (remark that defendant was "queer" was insufficient provocation); State v. King, 181 A.2d 158 (N.J. 1962) (verbal abuse accusing defendant of sexual perversion was insufficient provocation).

317. *See* Ashworth, *supra* note 24, at 295.

318. *See supra* notes 173-94 and accompanying text (defects in reasonable-man standard).

319. The Model Penal Code, in calling for an inquiry into the reasonableness as determined "from the viewpoint of a person in the actor's situation," warns:

> [I]t is equally plain that idiosyncratic moral values are not part of the actor's situation. An assassin who kills a political leader because he believes it is right to do so cannot ask that he be judged by the standard of a reasonable extremist. *Any other result would undermine the normative message of the criminal law.*

MODEL PENAL CODE § 210.3 cmt. at 62 (1980) (emphasis added).

> History is replete with examples of utmost cruelty being inflicted upon those termed heretic, witches, sodomites and the like. . . .
>
> If there was no law, there would be an impressive list of words and deeds that would minimize the seriousness of taking of life by someone offended or stimulated.[320]

In allowing the homosexual-advance defense to go to the jury, the judge's message is clear: a reasonable jury could find a homosexual advance sufficient provocation to mitigate a killing. The courts' continued acceptance of the homosexual-advance defense is an unacceptable judicial affirmation of homophobia. Such a violent reaction to nonthreatening behavior cannot be condoned by the courts or society. As it is, gay men and lesbians are more often the victims of hate violence than Afro-Americans, Hispanics, Asians, or Jews.[321] The homosexual-advance defense perpetuates society's heterocentric view of acceptable behavior. As Professor Dressler has commented, "[t]he judiciary must be in the forefront of the battle against the expression of public whims and prejudices."[322] The trial judge must be careful not to allow his own prejudices to interfere with the duty of his office.[323]

For far too long the judiciary and the public have remained complacent as this defense escaped legal and ethical scrutiny. This Comment has attempted to expose some of the legal, practical, and ethical problems inherent in provocation theory as applied in the homosexual-advance defense. A better understanding of these shortcomings will hopefully enable judges and prosecutors to eliminate a defense that does little more than play on jury prejudices and legitimize the continued denigration of gay men and lesbians.

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320. Commonwealth v. Carr, No. CC-385-88, slip op. at 13 (Pa. Ct. Common Pleas, Adams Cty. Apr. 19, 1989) (opinion on postverdict motions) (Spicer, J.).

321. FINN & MCNEIL, *supra* note 128, at 2; *see, e.g., Anti-Gay Crime Zooms in U.S.*, U.P.I., Mar. 6, 1991, *available in* LEXIS, Nexis Library, UPI File; Renee Graham, *86% of Gay Men, Lesbians Polled Report Bias*, BOSTON GLOBE, Mar. 7, 1991, at 27; Bernice Hirabayashi, *119 'Hate Crimes' Recorded in County During 2 Years*, L.A. TIMES, Mar. 13, 1991, at B2; Dick Lilly, *Lesbians, Gays Still Harassed, Survey Shows*, SEATTLE TIMES, Mar. 5, 1991, at A1, *available in* LEXIS, Nexis Library, SEATTM File; Judith Schoolman, *Bias Crimes Against Gays Increasing in Major U.S. Cities*, REUTERS, Mar. 6, 1991, *available in* LEXIS, Nexis Library, REUTER File.

322. Dressler, *supra* note 210, at 20.

323. This is especially true when weighing the probative value of evidence against its potential for jury prejudice. *See* FED. R. EVID. 403 (conditions when evidence may be excluded); *see also supra* notes 210-14 and accompanying text (judicial homophobia).