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## WHEN "HETEROSEXUAL" MEN KILL "HOMOSEXUAL" MEN: REFLECTIONS ON PROVOCATION LAW, SEXUAL ADVANCES, AND THE "REASONABLE MAN" STANDARD\*

JOSHUA DRESSLER\*\*

Most of the time a criminal law that reflects male views and male standards imposes its judgment on men who have injured other men. It is "boys' rules" applied to a boy's fight.<sup>1</sup>

In a recent article,<sup>2</sup> Robert Mison asked the following "simple" question: "Should a nonviolent [homo]sexual advance in and of itself constitute sufficient provocation to incite a reasonable man to lose his self-control and kill in the heat of passion"<sup>3</sup> and, as a consequence, be convicted of manslaughter, rather than murder? Mison's answer was that it should not.<sup>4</sup> Although trial courts almost always instruct juries on the provocation defense in homosexual-advance cases, Mison concluded that "judges should hold, as a matter of law, that a homosexual advance alone is not sufficient provocation to incite a 'reasonable man' to kill."<sup>5</sup>

Mison's article is worthy of attention for various reasons. First, he has asked an important question that has not received academic atten-

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\* The words "heterosexual" and "homosexual" in the title are in quotation marks because it is likely that most persons are neither exclusively heterosexual nor homosexual. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 638 (1948). Therefore, the description of a person, as distinguished from an act, as "homosexual" or "heterosexual" is arbitrary.

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<sup>1</sup> SUSAN ESTRICH, *REAL RAPE* 60 (1987).

<sup>2</sup> Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992).

<sup>3</sup> *Id.* at 133-34.

<sup>4</sup> *Id.* at 136.

<sup>5</sup> *Id.*

tion.<sup>6</sup> Violence directed at gay men and lesbians, as well as against people suspected of being homosexual,<sup>7</sup> is a grave national problem.<sup>8</sup> As with other forms of bias-related crime, physical attacks motivated by animus towards gay men and lesbians communicate the false message that homosexuals do not deserve to be treated with dignity and respect.<sup>9</sup> Therefore, people should not treat lightly Mison's concern that, "[w]hen 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."<sup>10</sup>

Second, Mison's conclusion is likely to strike a responsive chord with many readers. Intuitively, the principle that a man who kills another man in response to a sexual advance should not be allowed to mitigate his crime to manslaughter seems eminently sensible. Because Mison's position seems right at first glance, but is wrong on deeper reflection, his thesis should not go unanswered.

Third, the question of whether a nonviolent homosexual advance (NHA) should mitigate a homicide triggers consideration of issues that go beyond the subject of prejudice directed against gay males. Specifically, the topic raises fundamental questions about the rationale of the provocation defense,<sup>11</sup> the nature of the "Reasonable (actu-

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<sup>6</sup> I am unaware of any scholarly article on the topic. The most comprehensive recent survey of sexual orientation law considers the "homosexual panic" insanity defense, but does not treat the issue of homosexual advances as a form of provocation. *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1542-46 (1989).

<sup>7</sup> As Mison does, I use the word "homosexual" when discussing "the historical and more abstract legal, moral, and social issues raised by homosexuality." Mison, *supra* note 2, at 134 n.3 (quoting 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)).

<sup>8</sup> According to a recent report of the Gay and Lesbian Task Force, homosexual violence in six major cities has increased by 127% in six years (ending in 1993), although incidents of violence declined by 14% from 1992 to 1993. During the same one-year period, anti-gay harassment and violence rose five percent. Sabrina Eaton, *Anti-Gay Violence Drops, But Picture Still Called Serious*, THE PLAIN DEALER, March 9, 1994, at 11A; *Survey Finds Decrease in Anti-Gay Violence*, N.Y. TIMES, March 9, 1994, at A13. In actual numbers, 1813 anti-homosexual acts of violence were reported in 1993 in the six cities. See also Jeff Peters, *When Fear Turns to Hate and Hate to Violence*, HUMAN RIGHTS, Spring 1991, at 2 (summarizing data and concluding that violence, verbal harassment, and hate mail directed at homosexuals was increasing).

<sup>9</sup> See Jeffrie G. Murphy, *Bias Crimes: What Do Haters Deserve?*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 20, 22 ("What is different [in a bias-crime context] is that . . . a degrading and humiliating message is being sent and received, a message of contempt.").

<sup>10</sup> Mison, *supra* note 2, at 174.

<sup>11</sup> I and others have written before about the rationale of the provocation defense. E.g., JEREMY HORDER, PROVOCATION AND RESPONSIBILITY (1992); Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467 (1988); Joshua Dressler,

ally, Ordinary) Man"<sup>12</sup> whose behavior is supposed to guide jury deliberations in heat-of-passion cases,<sup>13</sup> and the extent to which the defense is more-than-ordinarily male-oriented<sup>14</sup> and, therefore, subject to heightened criticism from a feminist perspective.<sup>15</sup>

This Article responds with particularity to Mison's thesis, and reflects more generally on the nature of the defense. As Mison claims, discrimination against gay men and lesbians is a serious legal problem, in part due to public (and judicial) ignorance regarding homosexuals and homosexuality.<sup>16</sup> Nonetheless, Mison fails to make the case for a blanket rejection of the provocation defense in NHA prosecutions. One reason he fails is that he oversimplifies the motivations underlying the violence perpetrated in such cases. The primary reason he fails, however, is that he misapprehends the rationale of the provocation defense and the character of the Reasonable Man in provocation law.

As this Article will show, Mison espouses a utilitarian rationale for abolishing the provocation defense in NHA cases, while the defense is actually based on principles of retribution. He also argues that provocation is a justification defense, when in fact it is an excuse-based de-

*Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982) [hereinafter *Heat of Passion*]; Finbarr McAuley, *Anticipating the Past: The Defence of Provocation in Irish Law*, 50 MOD. L. REV. 133 (1987); Andrew von Hirsch & Nils Jareborg, *Provocation and Culpability in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 241 (Ferdinand Schoeman ed., 1987).

<sup>12</sup> For purposes of clarity, I will describe the standard as Mison does, as the Reasonable Man, until it becomes essential to draw the distinction between the Reasonable Man and the Ordinary Man. See *infra* notes 135 to 144 and accompanying text.

<sup>13</sup> This is not a new topic. See, e.g., A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292 (1976); Peter Brett, *The Physiology of Provocation*, 1970 CRIM. L. REV. 634; Colin Howard, *What Colour is the "Reasonable Man"?*, 1961 CRIM. L. REV. 41; 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 (1987).

<sup>14</sup> That is, even within the context of a justice system in which criminal laws and defenses derive from a predominantly male perspective, the provocation defense (like, for example, rape law) may be even more disproportionately skewed on the basis of gender.

<sup>15</sup> I was taken to task for ignoring this aspect of the subject in Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 99-103 (1992). Although the author's representations of my views were not entirely accurate, she was right to focus on the fact that gender influences anger—specifically its cause and forms of expression. *Id.* at 100 & n.128.

<sup>16</sup> See Joshua Dressler, *Survey of School Principals Regarding Alleged Homosexual Teachers in the Classroom: How Likely (Really) is Discharge?*, 10 U. DAYTON L. REV. 599 (1985); Joshua Dressler, *Study of Law Student Attitudes Regarding the Rights of Gay People to be Teachers*, 4 J. HOMOSEXUALITY 315 (1979); Joshua Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, CIV. LIB. REV., Jan./Feb. 1979, at 19 [hereinafter *Judicial Homophobia*]; Joshua Dressler, *Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession*, 9 RUT.-CAM. L.J. 399 (1978) [hereinafter *Gay Teachers*].

fense.<sup>17</sup> And in making his case, Mison writes as if the Reasonable Man in provocation law is a nearly bloodless, emotionless individual, yet this cannot sensibly be the standard in making culpability-based judgments in heat-of-passion cases. Indeed, most of Mison's arguments against the application of the defense in NHA prosecutions would justify the repeal of the provocation doctrine, rather than its repudiation in just one class of killings.

Certain features of the provocation defense are undeniably troubling. Perhaps the most unappealing aspect of the defense is what it says about humanity. Whereas society excuses insane people because they are abnormal—it is comforting for jurors to say that the insane are different from them—it partially excuses some provoked killers because they are all too normal, *i.e.*, like most people, they occasionally lose their self-control and behave badly. And although violent loss of self-control is a human failing, it is particularly a male weakness,<sup>18</sup> which may cast further doubt on the legitimacy of the defense in the eyes of some people.

But the provocation defense has deep roots in Anglo-American jurisprudence.<sup>19</sup> And the doctrine should remain rooted. Finally, a special rule precluding the use of the provocation defense in homosexual advance (or, more generally, sexual advance) cases is too tenuous to withstand scrutiny.

## I. MISON'S THESIS

### A. THE STATE OF NHA LAW

According to Mison, trial judges often instruct juries on provoca-

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<sup>17</sup> As is now increasingly understood, "justified conduct is conduct that is 'a good thing, or the right or sensible thing, or a permissible thing to do.' A defendant who raises a justification defense . . . says, in essence, 'I did nothing wrong for which I should be punished.'" Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1161 (1987) (quoting J.L. Austin, *A Plea for Excuses*, in FREEDOM AND RESPONSIBILITY 6 (H. Morris ed., 1961)). In contrast,

[a]n excuse is in the nature of a claim that although the actor has harmed society, she should not be blamed . . . for causing that harm. The criminal defendant who asserts an excusing defense says, in essence, "I admit, or you have proved beyond a reasonable doubt, that I did something I should not have done, but I should not be held criminally accountable for my actions." Whereas a justification negates the social harm of an offense, an excuse negates the moral blameworthiness of the actor for causing the harm.

*Id.* at 1162-63.

<sup>18</sup> See *infra* notes 56 to 61 and accompanying text.

<sup>19</sup> See *Heat of Passion*, *supra* note 11, at 422 (noting that a provoked homicide "remains a lesser crime than murder in England, in 49 of the 50 states in this country, and in other portions of the world," and concluding that "[h]eat of passion, as a concept, is an old and well accepted doctrine") (footnotes omitted).

tion in NHA cases.<sup>20</sup> Put differently, most courts believe that a jury could find reasonably that a NHA is sufficient provocation to incite the Reasonable Man to lose his self-control and kill in the heat of passion. Mison states that, although "[t]his 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[,] [a]s the law now stands, . . . only a homosexual advance can mitigate murder to manslaughter."<sup>21</sup>

Mison provides an example of the NHA defense in action. In *Schick v. State*, the defendant, a seventeen-year-old youth, testified that he hitched a ride with the victim after the youth's car broke down.<sup>22</sup> According to the defendant, the two drove around looking for women for sex. At one point the defendant asked the victim, "Where can I get a blow job?" The victim responded, "I can handle that." They continued to cruise, eventually stopped at a store for cigarettes, and then drove to a baseball field. The two wandered into the shadows where the victim pulled down his own pants and underwear, grabbed Schick around the waist, and tried to take hold of Schick's penis. Schick kned the victim in the stomach, hit him in the face, and then brutally stomped on the man. The victim later died from the beating. Before leaving the scene, Schick took money from the victim's wallet.

Schick was charged with robbery resulting in serious bodily injury, felony-murder, intent-to-kill murder (as an alternative theory), and confinement resulting in serious bodily injury. On the murder count, the defendant sought a voluntary manslaughter instruction. The judge granted his request without objection from the prosecutor. The jury acquitted Schick of murder and robbery, instead returning verdicts of voluntary manslaughter, theft, and confinement resulting in serious bodily injury.

Although the judge sentenced Schick to consecutive terms totaling twenty-eight years imprisonment, Mison is sharply critical of nearly everyone involved in the prosecution: the defense converted a straightforward murder with anti-homosexual overtones<sup>23</sup> into a prov-

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<sup>20</sup> See Mison, *supra* note 2, at 135.

<sup>21</sup> *Id.* at 134 (footnote omitted).

<sup>22</sup> 570 N.E.2d 918, 921-22 (Ind. Ct. App. 1991).

<sup>23</sup> There are reasons to doubt Schick's version of the events. If they occurred as he said, why did he go to the "shadows" of the field with someone who had already solicited a homosexual advance? In reality, the defendant may have lied about the advance to cover up a robbery-murder or he might have purposely invited the advance as part of a premeditated "gay-bashing." It is also possible that the defendant subconsciously had homosexual urges, after which he panicked. This scenario would fit a "homosexual panic" claim, which is based on the premise "that a latent homosexual—and manifest 'homophobe'—can be so upset by a homosexual's advances to him that he becomes temporarily insane, in which

ocation case; the prosecutor did not object; the judge instructed the jury on manslaughter; and the jury accepted the defense, notwithstanding the horrific nature of the crime.

Why do most courts instruct juries on voluntary manslaughter in NHA cases? Mison reasons as follows: American society is "heterocentric," *i.e.*, "it is dominated by and centers around a heterosexual viewpoint."<sup>24</sup> One feature of a heterocentric society is "heterosexism," *i.e.*, "straight chauvinism" or "excessive prizing or favoring of heterosexual persons and values."<sup>25</sup> In a heterocentric society, "heterosexuality is seen as morally and socially superior and preferable to homosexuality."<sup>26</sup> Worse still, institutional and individual "homophobia"—which Mison defines as "a hatred of gay men and lesbians,"<sup>27</sup> or "prejudice, comparable to racism and anti-semitism, rather than an irrational fear [of homosexuals or homosexuality]"<sup>28</sup>—is an outgrowth of a heterocentric society. The NHA defense stems from judicial institutionalization of societal homophobia.

Beyond this, the willingness of juries to accept the NHA defense is the result of the application of the Reasonable Man standard. This standard is used in homicide cases to determine what provocation is sufficient to incite a person to lose self-control and kill. Mison writes: "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."<sup>29</sup> In this context, a homosexual advance is considered an affront to prevailing heterocentrist/heterosexist/homophobic norms, and thus may cause passion in the Reasonable Man (*i.e.*, a reasonable heterosexual homophobic man).<sup>30</sup> Thus, the strategy of the defendant in seeking to avail himself of the provocation defense is to convince "the typical American juror—a product of homophobic and heterocentric American society—[to] evaluate the homosexual victim and homosexual overture with feelings of fear, revulsion, and hatred," and, as a consequence, to convince the jury that the defendant's "reaction was only a reflection of

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state he may kill the homosexual." *State v. Escamilla*, 511 N.W.2d 58, 65 (Neb. 1994) (quoting *Parise v. Greer*, 705 F.2d 882, 893 (7th Cir. 1983) (en banc)).

<sup>24</sup> Mison, *supra* note 2, at 147.

<sup>25</sup> *Id.* at 147 n.102 (quoting Wayne R. Dynes, *Heterosexuality*, in 1 *ENCYCLOPEDIA OF HOMOSEXUALITY* 532, 534-35 (Wayne R. Dynes ed., 1990)).

<sup>26</sup> Mison, *supra* note 2, at 147.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 148 (quoting Gregory Herek, *Homophobia*, in 1 *ENCYCLOPEDIA OF HOMOSEXUALITY*, *supra* note 25, at 552). In contrast, in previous articles I defined "homophobia" as the suffix would suggest, as an irrational fear of homosexuality. See *Gay Teachers*, *supra* note 16, at 399 n.3; *Judicial Homophobia*, *supra* note 16, at 19.

<sup>29</sup> Mison, *supra* note 2, at 148.

<sup>30</sup> See *id.* at 160.

this visceral societal reaction: the reaction of a 'reasonable man.'"<sup>31</sup>

#### B. CRITIQUE OF NHA LAW

Mison contends that "[r]egardless of the ultimate verdict, allowing the defense to argue provocation and instructing the jury on the reduced charge of voluntary manslaughter in [NHA cases] is both immoral and inconsistent with the goals of modern criminal jurisprudence."<sup>32</sup> The NHA defense is immoral because it sends the message that a NHA is sufficient provocation to kill, which "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."<sup>33</sup> As for the claim that the defense is inconsistent with the purposes of the criminal justice system, Mison writes:

Criminal law aims to maintain a certain degree of social control. 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." To argue that it can is to encourage the sort of irrational violence that the criminal justice system is designed to control and contain.<sup>34</sup>

#### C. REFORM PROPOSAL

Mison concludes that "[a] murderous personal reaction toward 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."<sup>35</sup> Further, he opines:

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 ad-

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<sup>31</sup> *Id.* at 158.

<sup>32</sup> *Id.* at 135.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 172 (quoting and citing *Heat of Passion*, *supra* note 11, at 468) (footnotes omitted).

<sup>35</sup> *Id.* at 177 (footnote omitted).



vance, but rather that a reasonable person *should not* be provoked to kill by such an advance.<sup>36</sup>

Because "[t]he reasonable man is an ideal, reflecting the standard to which society wants its citizens and system of justice to aspire," Mison implores judges to "consider the growing normative acceptance and understanding of homosexuality . . . and find as a matter of law that a homosexual advance is insufficient provocation."<sup>37</sup>

## II. PRELIMINARY THOUGHTS

### A. RESTATING THE ISSUE

What is a "NHA"? Mison never defines the term, but he doubtlessly does not mean to limit his discussion to homicides provoked solely by verbal sexual solicitations. Early courts developed a short and fixed list of categories of "adequate provocation." These "paradigms of misbehavior"<sup>38</sup> included an aggravated assault or battery, mutual combat, commission of a serious crime against a close relative of the defendant, illegal arrest, and observation by a husband of his wife committing adultery. However, words alone, no matter how insulting or offensive, were insufficient.<sup>39</sup>

The rigid common law categories of "adequate provocation" have largely given way to the view that the issue is one for the jury to decide. As one court explained, "[w]hat is sufficient provocation . . . must vary with the myriad shifting circumstances of men's temper and quarrels."<sup>40</sup> However, the rule that words alone do not constitute adequate provocation has persisted in most jurisdictions.<sup>41</sup>

Even if there were no words-alone rule, in view of Mison's focus on *Schick v. State*,<sup>42</sup> it is evident that he believes that at least some physical touchings fall within the scope of the term "NHA." As noted,<sup>43</sup> the victim in *Schick* grabbed Schick around the waist, and tried to touch Schick's penis.

Based on *Schick*, the events described in other cases cited by Mison, and the facts reported in other appellate opinions involving alleged homosexual advances, the following nonconsensual physical

<sup>36</sup> *Id.* at 161 (footnote omitted).

<sup>37</sup> *Id.* at 160, 176-77 (footnote omitted).

<sup>38</sup> *Brown v. United States*, 584 A.2d 537, 540 (D.C. 1990).

<sup>39</sup> See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 654-59 (2d ed. 1986); ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 85-98 (3d ed. 1982).

<sup>40</sup> *Commonwealth v. Paese*, 69 A. 891, 892 (Pa. 1908).

<sup>41</sup> *Girouard v. State*, 583 A.2d 718, 722 (Md. 1991) (describing this as the "overwhelming" rule).

<sup>42</sup> 570 N.E.2d 918 (Ind. Ct. App. 1991).

<sup>43</sup> See *supra* notes 22 to 23 and accompanying text.

touchings apparently would qualify as "NHAs": (1) while they watched a pornographic movie at A's home, A put his hand on the defendant's knee and asked "Josh, what do you want to do?";<sup>44</sup> (2) in an automobile, B put his hand on the defendant's knee, was rebuffed, and then placed his hand on the defendant's upper thigh "near [the] genitalia," and asked the defendant to spend the night with him;<sup>45</sup> (3) at a party, C asked the defendant "something about gay people," held his hand for fifteen seconds, and later grabbed his right buttock while the defendant was walking through a doorway;<sup>46</sup> (4) D permitted the defendant to enter his house to use his telephone, after which D locked the door, rubbed up against the defendant, and tried to touch his scrotum;<sup>47</sup> (5) E offered the defendant money to perform oral sex, and then pulled the defendant onto his lap and seized his genitals;<sup>48</sup> (6) while naked from the waist down, F embraced the defendant and tried to grab the defendant's penis;<sup>49</sup> and (7) G performed a homosexual act upon the sleeping defendant.<sup>50</sup>

Perhaps Mison would classify some of these sexual advances as violent. But with a slight alteration of a word here or there—C did not "grab" the defendant's right buttock, he "patted" it; E did not "seize" the defendant's genitals, he "fondled" "them"; F did not attempt to "grab" the defendant's penis, he tried to "rub" it—and without applying a strained definition of the term "violence," all of these cases would certainly qualify as NHA cases.

Thus, Mison's thesis may be restated as follows:

(1) a person who kills in sudden heat of passion as the result of a nonviolent sexual touching<sup>51</sup> of the sort described above should be

<sup>44</sup> *Commonwealth v. Halbert*, 573 N.E.2d 975, 977 (Mass. 1991); see also *State v. Latio-lais*, 453 So. 2d 1266, 1267 (La. Ct. App. 1984) (the victim told the defendant that he was homosexual and that he desired to have oral sex with the defendant; after being "re-buked," the victim touched the defendant's knee in a "meaningful" way).

<sup>45</sup> *Commonwealth v. Deagle*, 412 N.E.2d 911, 912 (Mass. App. Ct. 1980).

<sup>46</sup> *State v. Handy*, 419 S.E.2d 545, 548 (N.C. 1992).

<sup>47</sup> *State v. Escamilla*, 511 N.E.2d 58, 61 (Neb. 1994).

<sup>48</sup> *State v. Oliver*, No. 49613, slip op. at 2 (Ohio Ct. App. October 17, 1985); see also *Mills v. Shepherd*, 445 F. Supp. 1231, 1234 (1978) (the victim offered the defendant money to commit a homosexual act, and later grabbed the defendant's "privates and made a 'pass' at him").

<sup>49</sup> *Schick v. State*, 570 N.E.2d 918, 921 (Ind. Ct. App. 1991).

<sup>50</sup> *People v. Lenser*, 430 N.E.2d 495, 496 (Ill. App. Ct. 1981).

<sup>51</sup> I use the term "sexual touching" to mean a consummated or attempted physical touching that, in reasonable context, has sexual overtones. Thus, I exclude from the category of "NHA" physical contacts that, in the absence of special circumstances, would only have sexual meaning to a person irrationally fearful of homosexuality. *E.g.*, *State v. Carter*, No. 82 CA 22, slip op. at 4 (Ohio Ct. App. March 18, 1983) (at the minister-victim's church office, the minister put his arms around the defendant, and said, "I love you"); *People v. Cord*, 607 N.E.2d 574, 576 (Ill. App. Ct. 1993) (the defendant, who had intellectual and sexual-psychological problems, was provoked because the victim twice put his hand on the

convicted of murder; (2) the preceding proposition is correct in all circumstances; and, therefore, (3) a jury should not be permitted to consider the alternative verdict of voluntary manslaughter.

B. NARROWING THE ISSUE, OR SOME THOUGHTS ABOUT GENDER, VIOLENCE, AND THE PROVOCATION DEFENSE

A few words about gender are in order. In discussing the objective standard that is at the core of provocation doctrine, Mison talks virtually exclusively about the "Reasonable Man," as distinguished from the "Reasonable Woman" or "Reasonable Person."<sup>52</sup> This, too, is how courts historically have described the standard in tort law and the law of crimes.<sup>53</sup>

In today's more gender-sensitive era, courts increasingly use the term "Reasonable Person" in instructions to juries on provocation. But this gender-neutrality disguises an important fact, which is that the provocation defense itself is a male-oriented doctrine. That is, while women are often the victims of provoked killings or the stimulus for them (e.g., a party in a sexual triangle, a "seduced" young daughter,<sup>54</sup> or a rape victim whose mistreatment stirs retaliation<sup>55</sup>), men are the predominant beneficiaries of a doctrine that mitigates intentional homicides to manslaughter.

Of course, as long as males are defendants in criminal homicide prosecutions more often than women, men are the primary beneficiaries of *all* criminal law defenses. But having said this, if ever the criminal law follows "boys' rules,"<sup>56</sup> it does here. Consider, first, that men are far more prone to violence than are women.<sup>57</sup> Both daily

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defendant's shoulder in a bar).

<sup>52</sup> He uses the male term because, he says, it is the implicit standard in NHA cases. Mison, *supra* note 2, at 136 n.12.

<sup>53</sup> Perhaps intending what would now be considered politically incorrect humor, one commentator observed that "[i]n all that mass of authorities which bears upon this branch of the law there is no single mention of a reasonable woman." A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW 16 (1930); see Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man"*, 8 RUT.-CAM. L.J. 311 (1977) (discussing the gender of the Reasonable Man at common law, and arguing for a gender-neutral standard).

<sup>54</sup> *Toler v. State*, 260 S.W. 134 (Tenn. 1924).

<sup>55</sup> *State v. Cooper*, 36 So. 350 (La. 1904).

<sup>56</sup> See *supra* note 1 and accompanying text.

<sup>57</sup> See JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME & HUMAN NATURE 117 (1985) ("aggressiveness correlates with male criminality"). It is still a matter of conjecture whether biology, sociology, or a combination of the two factors, best explains the sex differential. See *id.* at 115-24 (summarizing studies in the field; concluding that both biology and sex roles are relevant, but suggesting that biology is probably more important); Debrah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 82-120 (summarizing studies "suggesting that biological factors have relatively more impact

experience and crime statistics support this claim.<sup>58</sup> Although the number of women sentenced for violent offenses has risen slightly in recent years,<sup>59</sup> it is still true that "[w]omen rarely kill," and, to the extent that they do, "female homicide is so different from male homicide that women and men may be said to live in two different cultures, each with its own 'subculture of violence.'"<sup>60</sup>

What is important here, however, is not simply that the average male is more susceptible to violent loss of self-control than is the average woman. It is also necessary to consider how men and women respond to affronts, *i.e.*, to provocations. Women usually submit stoically to their victimization or deny their status as victims by blaming themselves ("I deserve this treatment"); men are more likely to characterize themselves as victims of injustice, or to think that their self-worth has been attacked, and to act offensively as a result.<sup>61</sup> One glance at the common law categories of "adequate provocation"<sup>62</sup> shows that the defense has served a male interest, by mitigating the predominantly male reaction of retaliating for affronts and other "injustices."

The preceding observations might lead to the conclusion that courts should abolish the provocation defense. Arguably, the defense removes an important incentive for persons—primarily men—to learn self-control. And from a feminist perspective, the doctrine specifically "reinforces the conditions in which men are perceived and perceive themselves as natural aggressors, and in particular *women's*

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among females, and environmental factors have relatively more impact among males.").

*Id.* at 118.

<sup>58</sup> *E.g.*, FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1991, at 442 (1992) (reporting that males represented 89.6% of arrestees for murder and nonnegligent manslaughter in 1991).

<sup>59</sup> From 1986 to 1991, the number of women sentenced for violent crimes rose from 8045 to 12,400. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, WOMEN IN PRISON 3 (March 1994).

<sup>60</sup> Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1680, 1681 (1986) (footnotes omitted); see also WILSON & HERRNSTEIN, *supra* note 57, at 114 (quoting David A. Ward et al., *Crimes of Violence*, in CRIMES OF VIOLENCE (D.J. Mulvihill & M.M. Tumin eds., 1969) ("The male and female style of offending was so different even within crime categories that [criminologists] concluded 'that female criminality is a separate and distinct order of criminal behavior.'").

<sup>61</sup> See HORDER, *supra* note 11, at 192:

I am presently concerned with the values commonly thought by men, in particular, to be central to their conceptions of self-worth. For it is threats to these values which are most likely to produce the desire for retaliatory suffering, and thus the violence that is characteristically a male response to provocation.

*Id.*

<sup>62</sup> See *supra* notes 38 to 39 and accompanying text.

natural aggressors."<sup>63</sup>

This is a plausible utilitarian position.<sup>64</sup> But Mison does not argue for the abolition of the provocation defense. He seeks only to remove NHAs from the list of provocations that justify a jury instruction on manslaughter.

This is not an insignificant point. The male-oriented aspect of the defense clearly bolsters the claim that male defendants should have the defense available to them in NHA cases. Mison gives away a lot, therefore, by accepting the basic legitimacy of a defense that may be counter-utilitarian, and which at its core assumes that "men will be men," that men should be partially excused for acting like men, and that the Reasonable Man is, first and foremost, a man.

Society justifies or excuses too many killings—by both men and women.<sup>65</sup> Specifically, most male violence is unjustifiable; and even when men are provoked to act violently, their conduct is nearly always inexcusable. Jurors, therefore, should accept, in large part, the first element of Mison's restated thesis,<sup>66</sup> and treat nearly all killings motivated by sexual advances (whether homosexual or heterosexual in nature) as second-degree<sup>67</sup> murder. The real question for consideration, therefore, is this:

In a criminal justice system prepared to treat some provoked killings as manslaughter, and thus in a system that accepts the principle that provocations beget anger, that anger begets violence, and that some out-of-control homicides in response to provocations should be punished less severely than ordinary intentional killings, why should a homicide motivated by a NHA be treated any differently?

In other words, where Mison and I part company is in considera-

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<sup>63</sup> *Id.*; see also Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 92 (1994) ("the task we [feminists] must undertake is to reconceive and revise the model of responsibility so that it values characteristics traditionally associated with women, as well as with men").

<sup>64</sup> There is a conflicting view: people who lose their self-control as the result of provocation are less dangerous than those who kill without provocation. See Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281 (1937).

<sup>65</sup> Although I have argued in the past for the retention of the diminished capacity defense, see Joshua Dressler, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. CRIM. L. & CRIMINOLOGY 953 (1984), and for expansion of the duress defense beyond its common law and Model Penal Code contours, see Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989) [hereinafter *Exegesis*], I have also warned against excesses in the area: "[O]ur passion for justice and our tendency to express compassion can cause us to excuse people who do not deserve it." Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 674 (1988).

<sup>66</sup> See *supra* note 51 and accompanying text.

<sup>67</sup> A sudden, unpremeditated, and hot-blooded killing, although not the result of adequate provocation, ordinarily constitutes a lesser degree of murder in states that divide the offense into degrees.

tion of the second and third elements of his thesis. I will return to this disagreement shortly.

#### C. REFLECTIONS ON TWO -ISMS AND A PHOBIA

Mison makes much of two -isms (heterocentrism and heterosexism) and one phobia (homophobia). I want to reflect briefly on his comments in this regard, because his assumptions and mine regarding these -isms and homophobia doubtlessly affect our respective legal analyses.

Americans clearly live in a heterocentric society (*i.e.*, a society that is centered on a heterosexual viewpoint of sexuality). It is at least ninety percent heterosexual.<sup>68</sup> But focusing on centrisms, as Mison does, also makes it clear that left-handed persons live in a right-centric society,<sup>69</sup> and Jews, Moslems, and atheists live in a Christian-centric country.

This point is not to make light of Mison's charge of heterocentrism, but to put it in context. Nearly everyone lacks certain characteristics that society values. To some degree, everyone is an outsider in society.<sup>70</sup> To some, the tendency to divide the world into "us" and "them" (more accurately, into many "usses-and-thems") is a weakness in national (or human) character, while for others it is the only way to "true health."<sup>71</sup> But whichever it is, "[o]ur fate is to become one, and

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<sup>68</sup> The number of men or women who are exclusively or partially homosexual is not known. The classic Kinsey study reported that 10.4% of United States males between the ages of 16 and 55 reported psychological or overt experiences that justified their denomination as "predominantly" or "exclusively" homosexual. With the inclusion of bisexuals, the figure was 13.7%. KINSEY ET AL., *supra* note \*, at 638, 654. A more recent study by researchers at the Harvard School of Public Health and the Center for Health Policy Studies in Washington D.C., found that among those surveyed, 20.8% of American men, and 17.8% of American women, reported same-sex "behavior or attraction" after age 15; but only 6.2% of the men and 3.3% of the women reported homosexual conduct in the preceding five years. *Homosexual Attraction Is Found in 1 of 5*, N.Y. TIMES, Sept. 6, 1994, at A14. And according to a University of Chicago survey, only 2.7% of the men, and 1.3% of the women, surveyed reported having had homosexual sex in the past year. Philip Elmer-Dewitt, *Now For the Truth About Americans and Sex*, TIME, Oct. 17, 1994, at 62 (reporting on EDWARD LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY (1994)).

<sup>69</sup> Some products are built as if only right-handed people existed; left-handed products, when they are available, generally cost more. And, of course, the language is skewed against southpaws—*e.g.*, the word "sinister" originates from the French *sinistre*, meaning "on the left side."

<sup>70</sup> And most people are insiders to some degree. To the extent that this is a male-centrist society, gay men are more insiders than are lesbians. White lesbians are more insiders, in some respects, than African-American heterosexual males. And so on.

<sup>71</sup> RALPH ELLISON, INVISIBLE MAN 435 (1947) ("Now I know that men are different and that all life is divided and that only in division is there true health. . . . Let man keep his many parts and you'll have no tyrant states. . . . [The world] is woven of many strands; I would recognize them and let it so remain.").

yet many—This is not prophecy, but description.”<sup>72</sup> For good or for ill, centrism is an inevitable part of life. And acceptance of this fact compels the realization that the contradictory feelings of community and exclusion that centrism generates are also inevitable.

To a significant extent, the exclusionary aspects of centrism should represent only a minor insult to anyone’s sensibilities. Centrism represents a problem, however, when a group crosses the line from celebrating its own culture or attitudes or specialness to condemning other peoples’. The former does not inevitably lead to the latter.<sup>73</sup> But, at some point, in a society that exults in peoples’ differences rather than in their commonalities, centrism can turn into other “isms”—*i.e.*, heterocentrism can turn into heterosexism.

Few people would disagree with Mison that long ago American society crossed the line to heterosexism. People do not view heterosexuality simply as a statistical norm, like they view right-handedness. Rather (to use Mison’s definition of “heterosexism”),<sup>74</sup> heterosexuality is more prized than homosexuality, albeit less so than in the past (as Mison acknowledges,<sup>75</sup> and as anti-gay-rights groups must regret).<sup>76</sup> But just as heterocentrism is not the same as heterosexism,

<sup>72</sup> *Id.* at 435-36. See also HENRY LOUIS GATES, JR., COLORED PEOPLE xiv-xv (1994):

Do you remember when your mother and I woke you up early on a Sunday morning, just to watch Nelson Mandela walk out of prison . . . ? And when he finally walked out of that prison, how we were so excited and teary-eyed at Mandela’s nobility, his princeliness, his straight back and unbowed head? I think I felt that there walked the Negro, as Pop might have said; there walked the whole of the African people . . . And that feeling I had, that gooseflesh sense of identity that I felt at seeing Nelson Mandela, listening to Mahalia Jackson sing, watching Muhammad Ali fight, or hearing Martin Luther King speak, is part of what I mean by being colored. I realize that sentiment may not be logical, but I want to have my cake and eat it, too. . . .

I enjoy the unselfconscious moments of a shared cultural intimacy, whatever form they take, when no one else is watching, when no white people are around. . . .

Even so, I rebel at the notion that I can’t be part of other groups, that I can’t construct identities through elective affinity, that race must be the most important thing about me. Is that what I want on my gravestone: Here lies an African American? So I’m divided. I want to be black, to know black, to luxuriate in whatever I might be calling blackness at any particular time—but to do so in order to come out the other side, to experience a humanity that is neither colorless nor reducible to color. . . . Part of me admires those people who can say with a straight face that they have transcended any attachment to a particular community or group . . . but I always want to run around behind them to see what holds them up.

*Id.*

<sup>73</sup> The fact that someone is green, and celebrates that greenness (along with other similarly situated persons) does not necessarily mean that she believes that people who are not green are less worthy of respect. She is simply glad to be green.

<sup>74</sup> See *supra* note 25 and accompanying text.

<sup>75</sup> Mison, *supra* note 2, at 174.

<sup>76</sup> Although the rate of violence against gay people, as violence generally, may rise and fall cyclically, there has been a short-term drop in gay-bashing. See *supra* note 8. Also, various studies report slowly decreasing levels of intolerance toward homosexuals and of opposition to such “gay-rights issues” as child custody by lesbians, housing and employment anti-discrimination legislation, and homosexual marriages. See Ellen D. Riggle &

neither is heterosexism a synonym for hatred of gays and lesbians ("homophobia," as Mison uses the term).

As a Jew, I might spend too much time celebrating my religion and culture. I might think that Jews value education and family more than other cultures do, that we *are* the Chosen People. In so thinking, I excessively prize my own culture, my own religion, my own values, at the expense of others'. Thus, it is fair to describe me as a Jewish chauvinist. Chauvinism of any sort is a character flaw,<sup>77</sup> one that, in extremis, *may* cross the line to hatred. But the two flaws are not the same, and society should be careful not to treat them similarly.

I may be a heterosexual. I may value my heterosexuality to an extreme. I may want to be around only macho men like me.<sup>78</sup> But it is possible for a chauvinist to take a live-and-let-live attitude. Such a chauvinist might not hate homosexuals, but rather might feel some other emotion, perhaps pity or condescension, toward this "less-advantaged" group. These feelings are founded on myths and falsehoods about gay people. But however unattractive—or even reprehensible—these emotions may be,<sup>79</sup> they are distinguishable from the hatred that often results in violence against gay men and lesbians.

My differences with Mison are thin, but consequential. Society is heterocentrist, but this is a matter of little significance; it does not by itself justify any special legal concern. More damning is the fair accusation that this is a heterosexual society (but less so today than in the past). But people should not automatically equate heterosexism with hatred of gay men and lesbians. Although prejudice against gay people remains a serious problem, an overly facile analysis moves quickly from the obvious and fairly trivial charge of heterocentrism to the more complicated and weighty accusation of homophobia.<sup>80</sup> There-

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Alan L. Ellis, *Political Tolerance of Homosexuals: The Role of Group Attitudes and Legal Principles*, 26 J. OF HOMOSEXUALITY 135, 137 (1994) (citing studies); see also Bruce Bawer, *Notes on Stonewall*, THE NEW REPUBLIC, June 13, 1994, at 24, 25 ("[T]hanks largely to the developments that can trace their inspiration to [the Stonewall] barroom raid, some things *have* changed since 1969. Levels of tolerance have risen; gay rights laws have been passed . . .").

<sup>77</sup> Even if a chauvinist could "prove" such a hopelessly subjective assertion as "my religion/gender/nationality is better than yours," a person manifests a character flaw by spending time thinking about his superior qualities and, thereby, minimizing other people's worth.

<sup>78</sup> People who know me realize that this discussion is entirely theoretical.

<sup>79</sup> A heterosexual chauvinist might still feel sorry for gay people because they are subjected to violence. Obviously, *this* emotion is neither unattractive nor reprehensible, even if his chauvinism *per se* is unattractive.

<sup>80</sup> I am not trivializing the problem of homophobia. I have written that "[t]he homosexual in this country has been the subject of fear, misunderstanding, hate and condemnation." *Gay Teachers*, *supra* note 16, at 399. I have also stated that "the intensity of [negative]



fore, with respect to the NHA issue, the labels Mison uses are less helpful to good analysis than he believes that they are.

### III. PUTTING THE CURRENT LAW IN PERSPECTIVE

Mison paints the following picture of NHA law: "[J]udges may decide as a matter of law that no rational jury could find an alleged homosexual advance sufficient provocation to kill. With few exceptions, however, trial courts have permitted juries to make that decision as a matter of fact."<sup>81</sup> Mison also asserts that, "[a]s the law now stands, . . . only a *homosexual* advance can mitigate murder to manslaughter."<sup>82</sup>

This summary of appellate decisions is correct, but it is potentially misleading. From a better perspective, the legal picture is somewhat less bleak. First, considering the events immediately following the NHA, but also preceding the ultimate homicide, reveals that some NHA cases, including some cited by Mison, do not actually qualify as "nonviolent . . . advance[s] in and of [themselves] . . ."<sup>83</sup> Sometimes, sexual advances escalate into scuffles, ultimately culminating in deadly force. For example, in *Walden v. State*:

Holley [the decedent] was seated at the bar of Hannah's Cafe . . . . Appellant entered the bar and soon he and Holley began arguing [after Holley supposedly made an unspecified homosexual advance]. The argument escalated into a scuffle in which Holley shoved appellant against the back wall of the cafe. Appellant freed himself and began walking toward the exit, as if to leave. Suddenly he reversed his direction, pulled a pistol from his coat pocket, and from a distance of approximately ten feet, shot Holley in the chest. . . .<sup>84</sup>

Likewise, in *Commonwealth v. Medeiros*, the defendant testified that

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feelings about gay people today is greater than those expressed about any other minority group. Many of those who are 'liberal' in their attitudes toward racial, religious, and ethnic minorities still seem unable to extend those values to gay people." *Judicial Homophobia*, *supra* note 16, at 19. And I wrote, "the American judiciary seems to be just as homophobic as the society at large." *Id.*

I stand by these remarks, although anti-homosexual feelings are slowly yielding to education, primarily as the result of the courage of gay men and lesbians who have "come out of the closet." Bawer, *supra* note 76, at 25 ("[I]n the last quarter-century, and especially recently, gay Americans have come out of the closet in increasing numbers. As a result, it has become clear to more and more heterosexuals that gay America is as diverse as straight America . . ."). *Id.* This process of improvement—as with any form of prejudice—is not inevitable. Things often get worse before they get better; and sometimes things get better before they get worse. Indeed, it remains to be seen whether the trend toward tolerance will reverse, in light of the 1994 election of political conservatives to federal and state offices.

<sup>81</sup> Mison, *supra* note 2, at 135 (footnotes omitted).

<sup>82</sup> *Id.* at 134 (footnote omitted) (emphasis added).

<sup>83</sup> *Id.* at 133 (emphasis added).

<sup>84</sup> 307 S.E.2d 474, 475 (Ga. 1983).

Lawrence, the decedent,

made a homosexual advance toward [the defendant] which he warded off by striking the victim. Lawrence then allegedly hit the defendant as he was attempting to leave the apartment and the defendant struck him back, causing the victim to fall onto the bed. The defendant then climbed atop the victim and struck him on the head twice more.<sup>85</sup>

And, in *People v. Saldivar*, the victim allegedly made a homosexual advance. The defendant rebuffed it, and then "a struggle ensued" during which the defendant killed the victim.<sup>86</sup>

The defendants' rebuffs of the advances in these cases might have been motivated by fear or hatred of homosexuals, although such a conclusion is speculative. And, of course, the defendants may have lied about what actually occurred. But, based on the testimony presented, these were *not* NHA cases "in and of themselves." This fact is significant because mutual combat or a hard battery, even in the absence of another provocative act, traditionally justifies a heat-of-passion manslaughter<sup>87</sup> instruction.<sup>88</sup> Therefore, the instructions in these cases would have been proper on the basis of the fisticuffs alone.

Second, Mison focuses nearly all of his attention on the willingness of trial courts to instruct juries on provocation in NHA cases. He considers the jury verdicts virtually irrelevant.<sup>89</sup> But why is this? Although no one knows with any fair degree of certitude what is really going on "in the trenches"—being limited to an incomplete survey of appellate decisions<sup>90</sup>—a survey of NHA appellate opinions shows that

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<sup>85</sup> 479 N.E.2d 1371, 1374 (Mass. 1985).

<sup>86</sup> 497 N.E.2d 1138, 1139 (Ill. 1986).

<sup>87</sup> A voluntary manslaughter verdict need not be based on provocation. Some states recognize "imperfect" self-defense claims in murder prosecutions. This defense, which reduces the offense to manslaughter, is available to people who act on the basis of a genuine, but unreasonable, belief that they are about to be killed, or who use excessive force to repel a nondeadly assault. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.02[C] (1987). For example, based on the events described in *Medeiros*, see *supra* text accompanying note 85, the defendant might have been justified in using nondeadly force against Lawrence. The appellate court assumed, therefore, that the decedent's sexual advances might have justified a voluntary manslaughter instruction on an imperfect self-defense theory, as well as on heat-of-passion grounds. In the case of imperfect self-defense, a manslaughter verdict cannot fairly be treated as an anti-gay verdict; quite the opposite, the factfinder is sending the message that the defendant's conduct was unreasonable under the circumstances.

<sup>88</sup> See *supra* notes 38 to 39 and accompanying text.

<sup>89</sup> Mison, *supra* note 2, at 135 ("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.") (emphasis added).

<sup>90</sup> Excluded from Mison's and my view are NHA prosecutions resulting in pre-trial guilty pleas, acquittals, unappealed convictions, and appeals that are not officially published or available on the legal on-line services.

juries convict defendants of murder far more often than they convict them of heat-of-passion manslaughter.<sup>91</sup> If Mison worries about the societal message of permitting manslaughter instructions in NHA cases, he should not trivialize the message sent by juries that *reject* the opportunity to mitigate the crime. What these verdicts suggest is heartening: juries often believe either that homosexual advances do not constitute adequate provocation for a homicide or that the NHA claims were bogus.

Third, the implication from Mison's article is that the law treats homosexual-advance cases differently than heterosexual-advance cases. The only ground for this conclusion is that, as Mison states, he could not "discover a single case that uses a sexual-advance defense between heterosexuals."<sup>92</sup> It is possible, of course, that this absence is a function of judicial discrimination—*i.e.*, that trial judges are refusing to permit provocation instructions in heterosexual-advance cases, even though they would permit them in comparable *homosexual-advance* prosecutions. But another, perhaps more plausible, explanation for the dichotomy is that women rarely respond violently to unwanted sexual advances (or to other "provocative" acts),<sup>93</sup> so the issue rarely arises. Also, when a male makes a sexual advance upon a woman, and the woman responds with deadly force, she is more likely to claim self-defense than provocation.<sup>94</sup>

Finally, Mison's remark that, "[w]ith few exceptions," trial courts instruct juries on provocation in NHA cases, merits a few words. His

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<sup>91</sup> Murder convictions were secured in *Guthrie v. Warden*, 683 F.2d 820 (4th Cir. 1982); *State v. Skaggs*, 586 P.2d 1279 (Ariz. 1978); *Walden v. State*, 307 S.E.2d 474 (Ga. 1983); *People v. Cord*, 607 N.E.2d 574 (Ill. App. Ct. 1993); *People v. Lenser*, 430 N.E.2d 495 (Ill. App. Ct. 1981); *State v. Ritchey*, 573 P.2d 973 (Kan. 1977); *Commonwealth v. Halbert*, 573 N.E.2d 975 (Mass. 1991); *Commonwealth v. Medeiros*, 479 N.E.2d 1371 (Mass. 1985); *Commonwealth v. Doucette*, 462 N.E.2d 1084 (Mass. 1983); *Commonwealth v. Ewing*, 567 N.E.2d 1262 (Mass. App. Ct. 1990); *State v. Volk*, 421 N.W.2d 360 (Minn. Ct. App. 1988); *State v. Handy*, 419 S.E.2d 545 (N.C. 1992); *State v. Oliver*, No. 49613, slip op. (Ohio Ct. App. October 17, 1985); and *State v. Brimmer*, 876 S.W.2d 75 (Tenn. 1994).

Voluntary manslaughter (provocation) convictions were obtained in *People v. Saldivar*, 497 N.E.2d 1138 (Ill. 1986); *Schick v. State*, 570 N.E.2d 918 (Ind. Ct. App. 1991); *State v. Kulseth*, 333 N.W.2d 635 (Minn. 1983); and *Mills v. Shepherd*, 445 F. Supp. 1231 (W.D.N.C. 1978).

<sup>92</sup> Mison, *supra* note 2, at 134 n.4.

<sup>93</sup> See *supra* text accompanying notes 56 to 61.

<sup>94</sup> See *e.g.*, *People v. Barker*, 468 N.W.2d 492 (Mich. 1991). The defendant (a woman in her twenties, 5 ft. 7 in. tall, and weighing 170 pounds) killed the victim (an 81-year-old man who walked with a cane and was unsteady on his feet) after the latter purportedly made physical sexual advances toward her in his apartment. The defendant claimed that she killed the elderly man because she feared that he would rape her. The Supreme Court of Michigan held that the trial court erred when it failed to instruct the jury on self-defense. *Id.* at 493.

observation apparently<sup>95</sup> is accurate, but the two cases he cites in the "few exceptions" category do *not* represent exceptions to the rule that Mison is attacking. That is, they do not espouse the view that trial courts should never instruct juries on provocation in NHA cases. The true lesson of these cases is quite different.

Both cases Mison cites involved premeditated, purposeful attacks on gay men. In *State v. Volk*,<sup>96</sup> the defendant and an accomplice posed as homosexual prostitutes for the purpose of picking up a gay man and robbing him, which they did. Then, they killed him. At trial, the defendant claimed that he responded in an intoxicated and exhausted condition to a homosexual advance by the decedent. The trial court found that an instruction on manslaughter was "simply not supported by the facts."<sup>97</sup> The appellate court, noting that the "trial judge is in the best position to decide which instructions are necessary,"<sup>98</sup> ruled that the trial court's conclusion was "convincingly supported, and well within the court's discretion."<sup>99</sup>

In *Commonwealth v. Halbert*,<sup>100</sup> the defendant conceded that he participated with others in a horrendous, premeditated, purposeful gay-bashing, in which the perpetrators induced the victim to come to their home, where they watched a pornographic movie. The defendant beat the victim to death after the victim allegedly put his hand on the defendant's knee and asked, "Josh, what do you want to do?" The trial court refused to instruct the jury on provocation, and the Supreme Judicial Court of Massachusetts agreed:

The defendant offered evidence that he was sexually abused as a child and that he was the victim of a homosexual "gang" rape shortly before the night of the murder. While the defendant's history of sexual abuse is tragic, it has no bearing on the question whether the victim's conduct satisfied the objective test of provocation. The issue is: would the victim's nonthreatening physical gesture and verbal invitation have provoked a reasonable person into a homicidal rage?

The victim's question . . . was neither insulting nor hostile; it was at most a salacious invitation. Clearly, neither the question nor the accompanying physical gesture . . . would have been "likely to produce in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint." . . . Because the evidence was insufficient to support a finding of reasonable provocation, the judge did not err in refusing to instruct the jury on

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<sup>95</sup> Again, this assumes that published appellate opinions give an accurate picture of the actions of trial courts.

<sup>96</sup> 421 N.W.2d 360 (Minn. Ct. App. 1988).

<sup>97</sup> *Id.* at 365.

<sup>98</sup> *Id.* at 364.

<sup>99</sup> *Id.* at 365.

<sup>100</sup> 573 N.E.2d 975 (Mass. 1991).

voluntary manslaughter.<sup>101</sup>

Thus, these two cases are not exceptions to the general rule that a NHA may constitute adequate provocation, but rather they reflect the more mundane (but quite relevant) point that a defendant is not entitled to an instruction on any defense, including provocation,<sup>102</sup> unless he presents some credible evidence in support of his claim.<sup>103</sup> A trial court should not instruct the jury on provocation if it determines that, giving full authority to the factfinder to determine credibility, weigh the evidence, and draw reasonable inferences of fact, no jury could reasonably be persuaded to accept the defense on the basis of the testimony presented. As discussed later,<sup>104</sup> this rule screens out cases involving trivial sexual advances, such as that which occurred in *Halbert*.

To summarize: (1) in some, perhaps many, NHA cases, a scuffle precedes the homicide, which muddies the conceptual water, since a battery is itself a provocative act; (2) when given the opportunity, many juries are unsympathetic to defendants in NHA cases; (3) there is no evidence that the law treats homosexual advances differently than heterosexual advances resulting in homicide; and (4) there is no reason to believe that any jurisdiction accepts Mison's thesis that a NHA cannot serve as the basis for a provocation claim, although, as with any other defense, trial judges may, should, and do throw out specious provocation claims.

#### IV. DEFENDING THE CURRENT LAW

##### A. RATIONALE OF THE PROVOCATION DEFENSE

Mison states that "[t]here is no consensus among the states . . . and it is unclear whether the provocation defense rests on principles of justification, excuse, or both."<sup>105</sup> This is not quite true. The common law of provocation *did* include elements of both principles.<sup>106</sup> But today, as a descriptive matter, there is relatively little doubt that

<sup>101</sup> *Id.* at 979 (quoting *Commonwealth v. Walden*, 405 N.E.2d 939 (Mass. 1980)).

<sup>102</sup> *People v. Jefferson*, 628 N.E.2d 925, 931 (Ill. App. Ct. 1993) ("[A]n instruction [on provocation] will not be justified if it is . . . based on the merest factual reference or witness comment."); *People v. Neal*, 446 N.E.2d 270, 273 (Ill. App. Ct. 1983) ("Jury instructions on voluntary manslaughter are not always proper in every case in which some provocative conduct on the part of the deceased is alleged.").

<sup>103</sup> The quantum of evidence required is expressed in a variety of ways. See 1 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* 35-36 (1984) (citing cases using language such as "some evidence," "some credible evidence," "slight evidence," and "evidence sufficient to raise a reasonable doubt").

<sup>104</sup> See *infra* notes 176 to 179 and accompanying text.

<sup>105</sup> Mison, *supra* note 2, at 145.

<sup>106</sup> *Heat of Passion*, *supra* note 11, at 438-43.

the defense is a partial excuse, rather than a partial justification.<sup>107</sup> To see why this is so, it is necessary to distinguish between a provoked actor's anger (or related emotion<sup>108</sup>), which is sometimes justifiable, and the actor's anger-induced homicidal reaction to the provocation, which is *unjustifiable*, but may be partially *excusable*.

Assume that *P*, the provoker, approaches *A*, shoves *A*, calls *A* a "dirty Jew," spits in *A*'s face, laughs, and walks away. *A* becomes enraged. Is this emotion justifiable under the circumstances? By his words and actions, *P* has wronged *A*. *A*'s anger demonstrates that he is aware that he has been wronged, that he resents his mistreatment, and that he is indignant. If *A* did not feel wronged or outraged, this might indicate that he lacks appropriate self-esteem ("Well, after all, I am a Jew, and Jews deserve to be treated this way").<sup>109</sup> This anger, therefore, is a manifestation of *A*'s justifiable indignation.<sup>110</sup>

Not only is *A*'s indignation justifiable, but some measured response to *P* surely is appropriate. Perhaps *A* should lecture *P* on the evils of prejudice or show his contempt for *P* by walking away with a look of disgust on his face. But *P*'s wrongdoing—the push, his anti-semitic insult, and the spitting—certainly does not justify *A* killing him. *P* has mistreated *A*, but he has not threatened *A*'s life, nor is he a continuing threat to *A*'s safety (he was walking away). If the law justified, even partially, *P*'s death, it would be justifying retaliation (disproportionate retaliation, at that). A lesson of justification defenses is that a human life, even that of a wrongdoer, should not be taken unless taking it is necessary to prevent proportional wrongdoing.<sup>111</sup>

<sup>107</sup> The Model Penal Code expressly treats the defense as an excuse. See MODEL PENAL CODE § 210.3(1)(b) (1985) ("[A] homicide which would otherwise be murder [is manslaughter, if] committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."). At least 10 states have adopted this provision. 2 AMERICAN LAW INST., MODEL PENAL CODE AND COMMENTARIES, § 210.3 commentary, at 63 n.57 (1980).

<sup>108</sup> Although courts usually talk about passion as if anger were the only emotion that the law recognizes, any intense emotion will suffice. *People v. Berry*, 556 P.2d 777, 780 (Cal. 1976).

<sup>109</sup> See JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 16-19, 43-60 (1988) (discussing retribution in terms of justifiable resentment and outrage); cf. von Hirsch & Jareborg, *supra* note 11, at 248-51 (describing the "principle of resentment" that can justify provoked anger).

<sup>110</sup> *A*'s anger is a "manifestation" of his justifiable indignation because it is not necessary to this analysis to say that the anger itself is justifiable; instead, its presence provides outward evidence of his indignation, which is justifiable.

<sup>111</sup> 1 ROBINSON, *supra* note 103, § 24(b). The law contains many signs of this rule. For example, deadly force may never be used to protect personal property. In self-defense, the traditional rule is that the victim of a deadly threat may not use deadly force if a nondeadly response will work; and, in many states, a person must retreat to a known place of safety, rather than kill the aggressor. DRESSLER, *supra* note 87, § 18.02 (self-defense) and § 20.02

It is also important to understand that A's justifiable indignation does not even justify a battery on the provoker. According to one legal scholar, the original view of the English common law was that "[f]or men of honour, . . . to act justly in the face of an affront or other injustice is to inflict proportional requital, retaliation of the correct amount, on the perpetrator of the injustice."<sup>112</sup> Even if this is a correct reading of English history, it is not an accurate portrayal of modern American law. That is, "men of honor" do not *retaliate* by battering provokers.<sup>113</sup> Thus, the modern provocation doctrine is not properly explained on the ground that the victim of an injustice who kills has simply "somewhat over-reacted by killing in anger."<sup>114</sup> If this were the explanation of the provocation doctrine, the only relevance of the actor's anger would be to demonstrate that he acted out of "honor" rather than because of an evil character.<sup>115</sup> And if provocation were a partial justification defense, the law ought to provide A with a *full* justification defense if he pummelled, but did not try to kill, the retreating P. But this is not the law.

The true reason for the law's "concession to human weakness"<sup>116</sup>—the reason why, if A kills P in sudden rage at his actions, the law will likely allow A to argue that the jury should reduce the homicide to manslaughter<sup>117</sup>—is that the homicide is the result of an understandable and *excusable* loss of self-control arising from his anger.<sup>118</sup> Common experience teaches that, at some point, anger be-

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(defense of property).

<sup>112</sup> HORDER, *supra* note 11, at 51.

<sup>113</sup> Of course, if the provoker represents a continuing threat, the "man of honor"—indeed, anyone—may act in self-defense. The key word here is "retaliation," which suggests that physical self-defense is not involved.

<sup>114</sup> HORDER, *supra* note 11, at 52 (describing this as the basis for the defense).

<sup>115</sup> See von Hirsch & Jareborg, *supra* note 11, at 251 ("Blame is reduced because the actor was moved to transgress in part because of, rather than despite, his sense of right and wrong.").

<sup>116</sup> 2 AMERICAN LAW INST., *supra* note 107, § 210.3 commentary, at 55; see also Holmes v. Director of Pub. Prosec., [1946] 2 All E.R. 124, 128.

<sup>117</sup> Cf. State v. Reynolds, CA-8524, 1991 Ohio App. LEXIS 5888 (Ohio Ct. App. Dec. 9, 1991) (affirming voluntary manslaughter conviction of wife, D, who killed her husband, P, from whom she was obtaining a divorce, after P came to D's house, yelled at her, grabbed her by the shirt and hair, and spat in her face). In states that apply the Model Penal Code's "extreme mental or emotional disturbance" manslaughter provision, see *supra* note 107, a manslaughter instruction is justified, regardless of the nature of the provocation, "conditional only upon a finding of extreme emotional disturbance in the first instance." People v. Casassa, 404 N.E.2d 1310, 1317 (N.Y. 1980).

<sup>118</sup> *Heat of Passion*, *supra* note 11, at 463-67; see also von Hirsch & Jareborg, *supra* note 11, at 253 (proposing two independent theories of the defense: impaired volition and resentment). The American Law Institute justifies the defense on slightly different grounds. Because the defendant's loss of self-control is an ordinary human weakness, "one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence." 2 AMERICAN LAW INST.,

comes so intense that people find it extremely difficult to control themselves and respond constructively, rather than violently, to the anger-producing stimulus. Therefore, when *A* kills *P* because his reason is "disturbed or obscured by passion to an extent which *might render* ordinary men, of fair average disposition, *liable* to act rashly or without due deliberation or reflection, and from passion, rather than judgment,"<sup>119</sup> he is less to blame than if he killed *P* while he was calm. This is because it is harder for *A* to control his actions when he is angry than when he is calm.

To mitigate murder to manslaughter, however, it is not necessary to conclude that a provoked actor's anger was justifiable, only that it was excusable. For example, assume that *M* and *W* have regular sexual relations with each other. *M* deeply loves *W* and asks *W* to marry him. She refuses. He asks *W* to live with him, but again she refuses, stating that she is not yet prepared to commit herself to anyone. Nonetheless, they continue to see each other and have sexual relations. One day, *M* comes to *W*'s apartment and finds *W* in bed with *X*. Perhaps *M* is not justified in becoming angry—*W* has not wronged *M*, since she never promised sexual fidelity to him—but few people would disagree that *M* may be *excused* for being disturbed by the sighting. His emotions are excusable because an ordinary person, with an ordinary temper and ordinary feelings, would likely become emotionally overwrought in such circumstances. Therefore, if *M* kills *W* while he is overwrought (assuming, of course, that *M* did not have reasonable time to cool off), the homicide may be partially excusable.<sup>120</sup>

For a homicide to be partially excusable, the defendant's passion must not be grossly disproportional to the provocation. Some provocations are sufficiently slight that, although people might become angry, they should not become impassioned enough to lose self-control. For example, suppose that *P* whistles at *D*, a female, as she walks past him on the street. Some women, although offended by *P*'s behavior, would not become angry. A victim might laugh and say, "he just doesn't get it, does he?" But, today, indignant anger is one of various justifiable or excusable emotions that may be expected in such circumstances.<sup>121</sup> Suppose, however, that *D* becomes so enraged that

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*supra* note 107, § 210.3 commentary, at 55.

<sup>119</sup> *Maher v. People*, 10 Mich. 212, 220 (1862) (defining "adequate provocation").

<sup>120</sup> See *People v. Casassa*, 404 N.E.2d 1310 (N.Y. 1980) (holding that facts were sufficient to permit a factfinder to mitigate a homicide to manslaughter where *P* informed *D* that she was not "falling in love" with him and *D*, "devastated," later broke into *P*'s apartment while she was away, disrobed, lay for a time on her bed, and then killed *P* when she returned home and refused to accept his gifts).

<sup>121</sup> See Cynthia G. Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993) (contending that women who are subjected to whistles, leers, and



she shoots and kills *P*. Should she be even partially excused for her actions? Did *P* provoke *D* to the point that a person of ordinary sensibilities and temperament would become angry enough "to act rashly or without due deliberation or reflection, and from passion, rather than judgment," and, therefore, to kill the provoker? Most likely, no reasonable jury would excuse *D*, even partially, for killing *P*. This is a case in which a judge could—and should—refuse to instruct the jury on provocation.<sup>122</sup>

In summary, a provoked killing is unjustifiable. If there were no more to a provocation case than this, the homicide would qualify as murder. The reason the killing can be mitigated to manslaughter is that the law partially excuses an emotional killer for the actions he has taken as the result of provocation sufficiently egregious to stir emotions that might cause an ordinary person to act rashly. In such a circumstance, it is assumed that the actor's capacity for self-control has been reduced to a degree such that it is morally unjust to treat him as a murderer.<sup>123</sup>

#### B. WHERE MISON'S THESIS GOES WRONG

The preceding analysis demonstrates that Mison bases most of his critique on a false proposition. He assumes that heat-of-passion is a justification defense, rather than a partial excuse. Consider, again, his critique of the present law.<sup>124</sup> He states, for example, that when a

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unwanted remarks on the street should have legal recourse for the harm caused by such offensive behavior).

<sup>122</sup> Of course, there is a risk in making this assumption. Professor Bowman, *see id.*, might say that this hypothetical trivializes the provocation. Therefore, readers may assume that *D* is a male victim of whistling by a female. The point remains the same: some improper acts are too trivial for Reasonable Persons to become outraged enough to lose self-control.

<sup>123</sup> The preceding analysis represents a departure in certain respects from my prior analysis of provocation. *See Heat of Passion, supra* note 11. Although I continue to treat provocation as a partial excuse, and continue to base this position on a loss-of-self-control rationale, I am now persuaded that the anger that affects the actor's control mechanisms will often be triggered by justifiable (and not simply excusable) emotions.

Also, I previously described the type of provocation that should result in a partial excuse as provocation "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, yet he would still have sufficient self-control so that he could avoid using force likely to cause death or great bodily harm." *Id.* at 466-67. I am now satisfied that to talk about a person having insufficient control to avoid acting violently, but retaining enough self-control to avoid using deadly force, is an inapt (and unrealistic) way of making my intended point, which was and is that a person's anger or other emotional state may fall along a continuum from "very minor" (the person should be in sufficient control to avoid any violence, in which case no defense should be allowed) to "extreme" (an ordinary person would find it very hard, if not impossible, to remain in control of his actions).

<sup>124</sup> *See supra* part I.B.

judge instructs the jury on manslaughter, this sends the immoral message that "gay men are to be afforded less respect than heterosexual men . . . ." <sup>125</sup> The killing of a gay man in response to a homosexual advance is "a disproportionate and therefore an unreasonable response." <sup>126</sup> He suggests that society "should demand self-control on the part of individuals who are moved to react violently to such advances." <sup>127</sup> To allow the defense is to "encourage the sort of irrational violence that the criminal justice system is designed to control and contain." <sup>128</sup>

All of these assertions are true, but irrelevant. Of course people should not kill in response to homosexual advances. But neither should a man kill because he discovers his wife committing adultery or in any other circumstance in which provocation mitigates the homicide. And certainly killing another person *is* a disproportionate "and, therefore, unreasonable response" to a homosexual advance *or any other provocation*. And, doubtless, the message that gay men deserve less respect than heterosexual men is an immoral one. But if the heat-of-passion defense is a partial excuse, not a justification, then a verdict of voluntary manslaughter sends an entirely proper message regarding the defendant's actions: the provoked homicide was *entirely unjustifiable*. Thus, it is wrong to say that the message of the defense is that the decedent was entitled to less respect, or that his death was a more acceptable outcome than the death of a heterosexual person. Rather, all the excuse defense says in this instance is that people are prepared to mitigate the offense because the actor lost his self-control under circumstances in which ordinary, law-abiding people might also act rashly.

It is difficult to determine whether recognition of the provocation defense in NHA cases encourages irrational violence against gay men, as Mison claims. <sup>129</sup> But if it does, and if deterring violence is the exclusive purpose of the criminal law, Mison is right to object to use of the provocation defense in NHA cases. But if Mison *is* correct, legislatures should probably abolish the provocation defense, rather than tinker with it as Mison suggests. To the extent that the law can have a salutatory effect on human conduct, it is good to tell people, most especially men, that the law does not consider violence an acceptable

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<sup>125</sup> Mison, *supra* note 2, at 136.

<sup>126</sup> *Id.* at 172.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* It is questionable whether the threat of punishment will deter a seriously provoked actor. However, as discussed in the text immediately *infra*, the law might have a longer-term influence in reducing provoked homicides.

way to deal with insults, adultery, or violations of any personal interest except, perhaps, bodily integrity. Perhaps the law's message would cause people to learn constructive ways of channelling aggressive feelings.

Deterrence, however, is not the exclusive goal of the criminal law.<sup>130</sup> Another purpose of the law is to differentiate between more and less serious offenses, and "to safeguard offenders against excessive, disproportionate or arbitrary punishment."<sup>131</sup> These goals of the criminal law require consideration of matters of personal culpability. That is why most states divide murder into degrees, and why provocation is recognized as a partial excuse. It is also why the law recognizes the insanity defense and other complete and partial excuses. A system of laws that refuses to recognize any excusing condition might deter violence and, therefore, might be justifiable in a purely utilitarian system. But excuses, including provocation, are recognized for a non-utilitarian (even counter-utilitarian) reason: they stem from the commitment to afford justice to individual wrongdoers—ensuring that they are not blamed and punished in excess of their personal desert.<sup>132</sup>

Thus, excuses, like provocation, trump utilitarian goals. Mison, however, would allow society's interest in crime prevention to override a wrongdoer's right to personal justice. Along with Holmes, he would sacrifice the individual to the general good.<sup>133</sup> In these times of crime hysteria, this position is politically attractive, but it is inconsistent with the law's recognition of excuse defenses.<sup>134</sup>

Mison also errs in his description of the Reasonable Man who should serve as the objective standard in heat-of-passion cases. Mison

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<sup>130</sup> Indeed, pure retributivists reject deterrence as even a subsidiary aim of the criminal law.

<sup>131</sup> MODEL PENAL CODE § 1.02(2)(c) (1985).

<sup>132</sup> Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 264 (1987):

To blame a person is to express a moral criticism, and if the person's action does not deserve criticism, blaming him is a kind of falsehood and is, to the extent that the person is injured by being blamed, unjust to him. It is this feature of our everyday moral practices that lies behind the law's excuses.

*Id.*

<sup>133</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 48 (Boston, Little Brown 1881).

<sup>134</sup> Of course, Mison could argue that there is an urgent and singular need to deter violence against gay people that justifies a special no-defense rule in this regard. That is, the principle of just deserts should be subordinated to this particular social imperative. Except for the nature of the social imperative, this would not be a unique argument. A pure retributivist, of course, could never justify denying people their just deserts solely as a means to attack a social problem; but if the law is going to take a utilitarian route (which I would not favor), a lot of groups, including women who have been the victims of aggression by provoked men, would favor narrowing of the provocation law. Thus, as stated, Mison's argument, if accepted, would likely result in virtual abolition of the doctrine.

writes:

The reasonable man is an ideal, reflecting the standard to which society wants its citizens and system of justice to aspire. It is an "entity whose life is said to be the public embodiment of rational behavior." If the reasonable man is the embodiment of both rational behavior and the idealized citizen, a killing based simply on a homosexual advance reflects neither rational nor exemplary behavior. The argument is not that the ordinary person *would not* be provoked by a homosexual advance, but rather that a reasonable person *should not* be provoked to kill by such an advance.<sup>135</sup>

It should be noted at the outset that Mison's description of the Reasonable Man runs counter to the trend in the criminal law to subjectivize the Reasonable Man by imbuing him with the defendant's physical and psychological characteristics, including some of his infirmities.<sup>136</sup> In the realm of self-defense, for example, a woman suffering from battered woman syndrome who kills her husband may be judged against the "reasonable battered woman."<sup>137</sup> This is hard to justify in light of the fact that a person suffering from the syndrome is not "the embodiment of rational behavior." Rather, this person is so psychologically beaten down by her partner that she is emotionally paralyzed<sup>138</sup> and, therefore, does not perceive her world as an ordinary, non-battered woman (or battered woman not suffering from the syndrome) would view it. In a sense, a "reasonable woman suffering from battered woman syndrome" is a "reasonable unreasonable person."

This battered woman syndrome analysis suggests that it is possible to argue that the Reasonable Man in provocation law should possess the psychological attributes of the defendant, whom Mison assumes is homophobic. This interpretation of the Reasonable Man, however, would be wrong. Many courts have already gone too far in incorporating a defendant's peculiar character defects into the objective standard.<sup>139</sup> Therefore, contrary to Mison's assumptions, the Reasonable Man in NHA cases is not homophobic.<sup>140</sup> Mison's image of the hypothetical Reasonable Man, although perhaps accurate in the context of

<sup>135</sup> Mison, *supra* note 2, at 160-61 (quoting Collins, *supra* note 53, at 315) (footnote deleted).

<sup>136</sup> *E.g.*, State v. Leidholm, 334 N.W.2d 811, 818 (N.D. 1983) ("[A] correct statement of the law of self-defense is one in which the court directs the jury to assume the physical and psychological properties peculiar to the accused, viz., to place itself as best it can in the shoes of the accused, and then decide whether [he acted reasonably].").

<sup>137</sup> Commonwealth v. Stonehouse, 555 A.2d 772, 784 (Pa. 1989).

<sup>138</sup> State v. Kelly, 478 A.2d 364, 373 (N.J. 1984).

<sup>139</sup> See *e.g.*, Leidholm, 334 N.W.2d at 818 ("[I]f the accused is a timid, diminutive male, the factfinder must consider these characteristics in assessing the reasonableness of his belief" that killing an aggressor was necessary in self-defense.).

<sup>140</sup> See *infra* notes 163 to 165 and accompanying text.

tort law,<sup>141</sup> cannot possibly apply in the implementation of an excuse defense in the criminal law, most especially the defense of provocation.

In the provocation area, the law does not deal with an idealized human being, because an ideal Reasonable Man, by definition, would never become angry enough that he would lose his self-control and kill solely on the basis of passion, rather than reason. Instead, the provocation defense is based on the principle that the defendant is, unfortunately, just like other *ordinary* human beings.<sup>142</sup> That is why the defense represents a "concession to human weakness."<sup>143</sup>

The Reasonable Man in the context of provocation law, therefore, is more appropriately described as the *Ordinary Man* (i.e., a person who possesses ordinary human weaknesses). There is more to be said on this subject,<sup>144</sup> but it is sufficient for immediate purposes to emphasize that the Ordinary Man is someone far less praiseworthy than the Reasonable Man that Mison has in mind.

#### C. A SEXUAL ADVANCE AS AN AFFRONT

If provocation is an excuse, is it possible to develop a principled claim that an impassioned killing in response to a NHA can be mitigated to manslaughter? If it is, the jury is entitled to an instruction on the defense of manslaughter,<sup>145</sup> and Mison's thesis is defeated.<sup>146</sup>

To develop a valid basis for a provocation defense, it is first necessary to determine whether a "victim" of a sexual advance is justified or, at least, excused, for becoming angry enough that he might (as an Ordinary Man) lose self-control.<sup>147</sup> Presumably, Mison would say "no": "the attitudes and beliefs of someone who kills another person for making a homosexual advance includes intolerance, bigotry, and homophobia";<sup>148</sup> and "[t]he homosexual-advance defense by defini-

<sup>141</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 174 (5th ed. 1984) (describing the Reasonable Man as a "model of all proper qualities, with only those human shortcomings and weaknesses which the community will tolerate on the occasion").

<sup>142</sup> See *Heat of Passion*, *supra* note 11, at 460.

<sup>143</sup> See *supra* note 116 and accompanying text.

<sup>144</sup> See *infra* notes 156 to 165 and accompanying text.

<sup>145</sup> As noted, see *supra* notes 65 to 67 and accompanying text, jurors should reject nearly all sexual-advance defense claims.

<sup>146</sup> This assumes that no special rule overriding the general principles of provocation law should be adopted. See *supra* note 134.

<sup>147</sup> The provocation standard is a comparatively soft one in this regard. The provocation need not be so extreme that an out-of-control response is inevitable; it is enough that an ordinary person *might* be provoked to the point of loss of control, i.e., that the person is "disturbed or obscured by passion to an extent which *might* render ordinary men, of fair average disposition, liable to act rashly." See *supra* note 116 to 118 and accompanying text.

<sup>148</sup> Mison, *supra* note 2, at 166.

tion . . . implies that the defendant was motivated to kill *because of his sexual orientation*.”<sup>149</sup> Thus, Mison would probably argue that the law is wrong to justify or even to excuse homophobic-based anger; therefore, the actor’s out-of-control reaction is wholly unjustifiable and inexcusable. But this argument goes too far. It is not necessarily the case that a person who kills after a NHA does so as the result of intolerance, bigotry, or homophobia.

It is true, of course, that a person who responds to a homosexual advance acts with knowledge of the provoker’s sexual orientation, but the victim’s status as a homosexual is not necessarily a motivation for the killing. Consider, again, the NHA cases that have found their way to the appellate courts.<sup>150</sup> Most men—including non-homophobic heterosexuals *and gay men*—would justifiably become indignant if a stranger nonconsensually touched their genitals, fondled their buttocks, or committed a sexual act upon them while they slept. Certainly a woman would become outraged if a man touched her breasts, patted her on the buttocks, or had sexual relations with her while she was asleep. In such circumstances, no one would characterize her indignant response as heterophobic or anti-male in nature. And although a woman in such circumstances would probably not become angry enough to kill in response to the male’s conduct (whereas a man might kill in a similar case of a homosexual advance), this difference in response is not necessarily the result of the man’s homophobia and the woman’s non-heterophobia. Instead, the difference may be that he is a he and she is a she.

The point is that an unwanted sexual advance is a basis for justifiable indignation. The reason it is far more likely that a man would kill under such circumstances than a woman, is that women rarely kill when provoked, but men frequently do. As noted,<sup>151</sup> the provocation defense partially excuses what is primarily male behavior. However, heterosexual and homosexual advance cases are alike in certain key regards: (1) indignation in response to a violation of one’s sexual privacy or autonomy is justifiable; (2) anger, one possible manifestation of such indignation, is justifiable or excusable;<sup>152</sup> (3) any resulting killing is wholly unjustifiable; but (4) if the invasion of privacy is significant, ordinary, fallible human beings might become so upset that their out-of-control reaction deserves mitigated punishment. Thus, in short, there is a valid, non-homophobic basis for recognizing

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<sup>149</sup> *Id.* at 173.

<sup>150</sup> See *supra* notes 44 to 50 and accompanying text.

<sup>151</sup> See *supra* notes 56 to 62 and accompanying text.

<sup>152</sup> It does not matter to the analysis which it is. See *supra* the text of the paragraph ending at note 120.

a partial excuse in many sexual-advance cases.

This is not meant to suggest that a heterosexual man on the receiving end of a homosexual advance is responding to the violation of his sexual privacy in a sexual-orientation-neutral way. While a sexual advance may be unwanted because the recipient does not have a sexual interest in the particular individual who is acting aggressively, if the sexual advance is homosexual in nature, and the recipient of the advance is exclusively heterosexual, the fact that the advance is homosexual in character will be a reason for the recipient's angry reaction.<sup>153</sup>

Nor is this meant to suggest that the displeasure with which the heterosexual recipient reacts—enough anger that he might ultimately lose self-control—is not often aggravated by the fact that, for some men, the thought of participating in a homosexual act is physically (as distinguished from morally) repulsive. Human sexual desires are profoundly complicated and inherently personal. Consequentially, a person's distaste for a particular type of sexual act is, in a significant sense, a natural reaction of *that* person. Unless one assumes that people freely choose their sexual orientation and freely decide which sexual acts will give them pleasure, it is impossible to fairly condemn those heterosexual or homosexual males or females who find some sexual acts—including some sexual activities with persons of their own orientation—extremely distasteful and, therefore, emotionally upsetting.<sup>154</sup>

A heterosexual person's repulsion at the thought of participating

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<sup>153</sup> Thus, of course, a heterosexual male is far more likely to feel affronted by a homosexual advance than by a heterosexual advance.

<sup>154</sup> Does this mean that people are not responsible for their emotions? Some feelings are a manifestation of a state of belief, which belief is capable of moral evaluation. For example, people who feel guilt or shame for committing or omitting a certain act communicate by their feelings a belief about proper human conduct, which belief is subject to approval or condemnation. Likewise, a person who becomes angry or fearful when standing nearby a gay person, Jew, or African-American, may be manifesting hatred or irrational fear of such people, which hatred society should morally condemn or which irrational fear it should deem pathological. But if people develop their sexual orientation before birth or in very early childhood or at both times, and as such it is a part of their nature, then the emotional state that comes from considering a particular sexual act unappealing, *as distinguished from a state of moral belief regarding homosexuality, heterosexuality, or particular sexual acts*, is not fairly subject to moral criticism (although, in extreme cases, may merit therapeutic intervention).

The revulsion people may feel regarding a sexual act is analogous to the reaction of a person's eating food foreign to their experience. If they are disgusted at the mere thought of eating ants, or if they spit out the ants because their texture makes those people gag, they are not expressing a moral judgment about people who eat ants; they are reacting in a narrow culture-specific manner to the food. Admittedly, however, as noted in the text immediately *infra*, it is hard, perhaps impossible, to determine whether the revulsion people feel regarding a particular sexual act has a moral component to it.

in a homosexual act is not always evidence of homophobia. A person may find homosexual conduct distasteful, but not hate homosexuals or want harm to befall them in their personal lives. Indeed, few human actions, especially those related to sexual feelings, are the result of a single motive or emotional strain. When a woman is angered because a man touches her against her will, her emotions may have multiple explanations: anger at the invasion of her sexual privacy; hatred of such "piggish" behavior; fear of another, perhaps greater, invasion of her autonomy. All that the law realistically can do in NHA cases is measure the actor's response—which might, but need not, have homophobic qualities to it—against the standard of the Ordinary Man in the actor's situation.<sup>155</sup> This, in turn, forces more careful consideration of the character of the Ordinary Man.

## V. HOMOPHOBIA AND THE ORDINARY MAN

### A. WHO REALLY IS THE ORDINARY MAN?

The gist of a provocation claim is that "heat of passion reduces punishment because the actor is, unfortunately, like most humans."<sup>156</sup> So it is relevant to ask how most humans behave in a provocative circumstance. Thus, initially, it is plausible to argue that if most people are homophobic, then the Ordinary Man is also prejudiced. But this is not the end of the analysis. The provocation defense has an objective component because, if it did not, the normative anti-killing message of the criminal law would be undermined.<sup>157</sup> Indeed, opinion polls do not resolve issues of morality.<sup>158</sup>

It is possible to learn something about the provocation defense from the duress excuse. The Model Penal Code provides a full excuse to a person who is coerced to commit a crime under circumstances in which "a person of reasonable firmness in his situation would have been unable to resist."<sup>159</sup> This defense recognizes that because the law sometimes "set[s] up standards we cannot reach . . . and . . . lay[s]

<sup>155</sup> This does not mean that a defendant's homophobia is irrelevant to his defense claim. Although a defendant's bad character is not a basis for denying him the opportunity to claim an otherwise valid defense, the fact that he hates homosexuals may be relevant to the question of whether his provocation claim is a subterfuge for a gay-bashing or for "rolling a queer," i.e., "masquerading as a homosexual [so as to] seduce[ ] a gay man in order to rob him." Mison, *supra* note 2, at 167 n.236.

<sup>156</sup> *Heat of Passion*, *supra* note 11, at 460.

<sup>157</sup> See 2 AMERICAN LAW INST., *supra* note 107, § 210.3 commentary, at 62.

<sup>158</sup> Cf., *Exegesis*, *supra* note 65, at 1364 (stating that a coerced actor's conduct "cannot be defended simply on empirical grounds. The fact that the coerced wrongdoer acts typically . . . does not prove by itself that leniency toward the wrongdoer is appropriate.").

<sup>159</sup> MODEL PENAL CODE § 2.09(1) (1985).



down rules which we [can]not . . . satisfy,"<sup>160</sup> there must be an escape valve, allowing morally blameless, but imperfect people to avoid criminal conviction. In the case of duress, in which the critical human weakness is fear, the law does not expect people to demonstrate near-saintly moral firmness.<sup>161</sup> However, the law does not excuse cowardice, even if that is the actor's natural characteristic. In short, the law holds the person to a standard that, while sensitive to human weakness, does not excuse extreme character flaws.

Likewise, with provocation, the law does not excuse people who simply "fly off the handle," even if their short-temperedness is genetic.<sup>162</sup> However, the law does not assume that otherwise law-abiding people can maintain their tempers forever. The Ordinary Man possesses a "fair average disposition." Thus, the Ordinary Man is not short-tempered, but neither does he have the patience of Job, nor does he have Martin Luther King's capacity for dealing with affronts.

If the Ordinary Man standard is to maintain a normative component, it is also important that the law assume this person to be devoid of other extreme character flaws relevant to the defense. Specifically, the Ordinary Man may not possess "idiosyncratic moral values"<sup>163</sup> that manifest the actor's moral depravity and which render the person abnormally likely to take affront and lose self-control. This means that, for purposes of determining whether a person is justified in becoming indignant by an otherwise harmless act, the Ordinary Man is not racist, anti-Semitic, or prejudiced against any class of persons. Thus, too, the Ordinary Man<sup>164</sup> is not homophobic.<sup>165</sup>

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<sup>160</sup> Regina v. Dudley and Stephens, 14 Q.B.D. 273, 288 (1884).

<sup>161</sup> *Exegesis*, *supra* note 65, at 1367.

<sup>162</sup> See Brett, *supra* note 13, at 637 ("a number of factors, some genetic, others environmental, combine to produce the differences of susceptibility and response [to provocation].").

<sup>163</sup> 2 AMERICAN LAW INST., *supra* note 107, § 210.3 commentary, at 62.

<sup>164</sup> Is the objective standard genderless, or should courts instruct the jury that the ordinary person "is a person having the power of self-control . . . of an ordinary person of the sex . . . of the accused. . . ?" Director of Pub. Prosecutions v. Camplin, [1978] 2 All E.R. 168, 175. This instruction is troubling. Although the extent to which biology, as contrasted to cultural attitudes about sex roles, explains male violence is not known, the fact is that men are more aggressive than women. See *supra* note 57. Therefore, a standard that directs a jury to compare the defendant's self-control to an ordinary person of the defendant's sex could inadvertently result in the law holding men, simply because of their gender, to a lesser standard of conduct than it holds women.

A preferable jury instruction holds the defendant to the standard of the ordinary "person in the actor's situation." As the Commentary to the Model Penal Code, which uses the quoted language, concedes, this phrase is "designedly ambiguous." 2 AMERICAN LAW INST., *supra* note 107, § 210.3 commentary, at 62. Essentially, this instruction allows the jury to consider whichever characteristics of the accused it thinks are relevant in determining the actor's culpability. In view of the normative element of the defense, a jury ought to treat men and women alike. "Boys' rules" should not prevail.

## B. DIMINISHING DE FACTO HOMOPHOBIA

Although the Ordinary Man is not homophobic, in provocation law, "[i]n the end, the [issue] is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."<sup>166</sup> It is here that Mison's concerns about homophobia become especially pertinent. Although the law should permit juries to consider some homosexual advances as sufficiently provocative to justify a manslaughter instruction, and although the Ordinary Man is not homophobic, it is true that homophobia (like any other prejudice held by players in the criminal justice system) may creep into the process unless care is taken to extirpate it. For example, some prosecutors<sup>167</sup> might be more willing to plea bargain in NHA cases than in morally and legally comparable cases because of conscious or unconscious anti-homosexual feelings.<sup>168</sup>

In addition, assuming that a murder prosecution proceeds to trial, Mison believes that homophobia inevitably will stain the process:

Individual jurors' biases will . . . inevitably affect juries in cases involving homosexuality and improperly skew the results. 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.<sup>169</sup>

There is truth in these remarks. Juror prejudice<sup>170</sup> is likely to

<sup>165</sup> See *Commonwealth v. Carr*, 580 A.2d 1362 (Pa. Super. Ct. 1990) (*D* observed *V* and *X* in nude "lesbian love-making" at a campsite. In deep passion, *D* killed *V*. The trial court disallowed evidence of *D*'s psychosexual history, which included testimony regarding the etiology of *D*'s extreme anti-lesbian feelings. Held: the court correctly disallowed *D*'s testimony and subsequent request for a provocation instruction).

<sup>166</sup> 2 AMERICAN LAW INST., *supra* note 107, § 210.3 commentary, at 63.

<sup>167</sup> Neither Mison's article nor this one deals significantly with the problem of homophobic police officers. Obviously, some officers trivialize or even approve of (and, in extreme cases, probably participate in) violence against gay people. It is unlikely, however, that many of them would fail to arrest a person in a "straight"-on-gay homicide. Thereafter, responsibility for setting the proper charges and proceeding with appropriate vigor shifts to the prosecutor.

<sup>168</sup> A prosecutor should not fail to prosecute a NHA homicide on the ground that "juries have tended to acquit persons accused of the particular kind of criminal act in question." AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE §§ 3 to 3.9(d) (2d ed. 1980).

<sup>169</sup> Mison, *supra* note 2, at 162.

<sup>170</sup> This is not to minimize judicial prejudice, about which I have written in the past. *Judicial Homophobia*, *supra* note 16. As one court observed, "[g]iven the pervasiveness of cultural bias against gays, judges themselves are frequently not free from anti-homosexual preferences . . . ." *M.V.R. v. T.M.R.*, 454 N.Y.S.2d 779, 783 (1982). In the criminal law context, judicial prejudice against gay people is probably most often manifested in lenient sentencing of persons convicted of gay-bashing or criminal homicide. See, e.g., Lisa Belkin, *Texas Judge Eases Sentence for Killer of 2 Homosexuals*, N.Y. TIMES, Dec. 17, 1988, at 8 (equating "queers" to prostitutes, the judge defended his 30-year sentence of a man convicted of searching out and killing two gay youths, by stating that "I put prostitutes and gays at about the same level, . . . and I'd be hard put to give somebody life for killing a prostitute."); *Killer of Gays Gets 30 Years As Judge Criticizes Victims*, L.A. TIMES, Dec. 16, 1988, at 2. The emphasis

affect *any* case which raises an issue of race, gender, religion, sexual orientation, or any other emotionally-charged subject. For example, racism was probably a factor in the "subway vigilante case," *People v. Goetz*,<sup>171</sup> in which the jury acquitted the defendant, a white man, of attempted murder of four black teenagers because the man feared they were about to rob him when one or two of them requested five dollars from him on a subway.

*Goetz* is a reminder that prejudice often skews results in criminal proceedings.<sup>172</sup> Sometimes racism benefits defendants; probably more often it works against them. But as one observer of the *Goetz* trial noted:

In the end, [Goetz's lawyer's] covert appeal to racial fear may have had more impact on the jury precisely because it remained hidden behind innuendo and suggestion. . . . Openly talking about racial fear in the courtroom might have helped the jury to deal more rationally with their own racial biases.<sup>173</sup>

That is, the way to deal with potential juror prejudice is to deal with the matter openly. In that way, overtly prejudiced persons will, hopefully, be excluded from the jury panel; and jurors who suffer from unconscious prejudices or fears may be compelled "to deal more rationally" with their biases.

To enhance the likelihood of obtaining reliable jury verdicts in NHA cases, courts should put various protections into place. First, trial courts should permit or conduct a *voir dire* that is likely to disclose venirepersons' anti-homosexual feelings. The Supreme Court has stated that in cases that "suggest a significant likelihood that racial prejudice might infect" a trial, the "wiser course . . . is to propound appropriate questions designed to identify racial prejudice. . . ."<sup>174</sup> Surely, the "wiser course" in NHA cases is also to permit close questioning of prospective jurors. Although the *voir dire* cannot root out all unacceptable jurors, it can help uncover the worst cases of prejudice, and the probing *voir dire* process itself might sensitize jurors to the need to act rationally in the deliberative process.

Second, judges should unemotionally determine whether the evidence warrants a provocation defense. As the law now stands, an in-

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here, however, is on the jury, since they are the factfinders, and because prejudice is more likely to fester in shadows, such as during the private deliberations in the jury-room.

<sup>171</sup> 497 N.E.2d 41 (N.Y. 1986).

<sup>172</sup> Regarding the legal implications of the notion that black people are more prone to commit violent offenses, see Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994).

<sup>173</sup> GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 208 (1988).

<sup>174</sup> *Ristaino v. Ross*, 424 U.S. 589, 598 n.9 (1976).

struction on a defense is improper unless the defendant satisfies his admittedly low burden of production regarding the defense,<sup>175</sup> and only if there is sufficient evidence for a jury reasonably to conclude that the defendant has satisfied his burden of persuasion (assuming that the burden is allocated to the defense).<sup>176</sup> Thus, a manslaughter instruction is inappropriate if the homicide was a premeditated gay-bashing or robbery poorly disguised as a NHA case,<sup>177</sup> and also if no reasonable jury could interpret the victim's actions as an unwanted sexual advance. For example, in *State v. Carter*,<sup>178</sup> a defendant assaulted a minister in a church office after the clergyman attempted to hug the defendant and said, "I love you." The minister did not die, but if he had, it would have been improper for the court to give a provocation instruction.<sup>179</sup> In addition, even if a touching might reasonably be construed as sexual in nature, the court should not give a manslaughter instruction if the jury could not reasonably find that the unwanted advance would render an ordinary person liable to lose his self-control and kill. For example, if a victim lightly touches a defendant on the shoulder and asks, "Do you want to have sex with me?," such a solicitation should not result in an instruction on manslaughter.

Third, to reduce the risk that prejudice will affect deliberations, courts should deliver a special instruction of the following sort after they fully set out the elements of the provocation defense, including the definition of "adequate provocation":

The defendant asserts that he was provoked to kill the decedent because, he claims, the decedent made an unwanted sexual advance upon him. In regard to this claim, you should ask and answer three preliminary questions:

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

[You may not consider the defendant's manslaughter claim further unless you find by a preponderance of the evidence that the answer is "yes"]

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<sup>175</sup> See *supra* note 103 and accompanying text.

<sup>176</sup> In states that define murder in traditional common law terms, the prosecution is constitutionally required to bear the burden of persuasion, beyond a reasonable doubt, that the defendant did not kill in sudden heat of passion. *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). In contrast, states that have substituted the Model Penal Code's defense of "extreme mental or emotional disturbance" for the common law provocation defense usually allocate the burden of persuasion for the defense to the defendant, by a preponderance of the evidence. 1 ROBINSON, *supra* note 103, at 483.

<sup>177</sup> See *supra* notes 96 to 103 and accompanying text.

<sup>178</sup> No. 82 CA 22, (Ohio Ct. App. Mar. 18, 1983).

<sup>179</sup> See also *People v. Cord*, 607 N.E.2d 574 (Ill. App. Ct. 1993) (*D*, who had psychosexual problems, was provoked when *V* put his hand on *D*'s shoulder in a bar).

to each of these preliminary questions.]<sup>180</sup>

In considering the defendant's claim further, as I have explained, a homicide that would otherwise be murder, constitutes manslaughter if the defendant, in sudden heat of passion, killed the decedent under circumstances in which an ordinary man,<sup>181</sup> of fair average disposition, would have been disturbed or obscured by passion to an extent which might render him liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment.<sup>182</sup> However, in determining whether an ordinary man in the defendant's situation might act from passion, rather than judgment, I instruct you that such a person would not act as the result of prejudice toward, or fear of, homosexuals or homosexuality. [In this regard, the law does not treat a homosexual advance by the decedent as either more or less provocative than if he had made a comparable sexual advance upon a woman.]<sup>183</sup>

The value of this instruction is that it brings the issue of homophobia to the surface. Hopefully, it would propel conscientious jurors to confront their feelings and, if necessary, cause them to put aside their latent anti-homosexual attitudes to the extent that they might be intruding on the deliberative process. The instruction also empowers other jurors to speak up in the jury-room if they believe that fear or prejudice has infected the deliberations.

Mison does not believe that a cautionary jury instruction will help:

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 instruction to the jury, all practicing lawyers know to be unmitigated fiction." . . .

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," 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." Homophobia, which exists frequently on an unconscious level, presents such a context.<sup>184</sup>

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<sup>180</sup> The bracketed language assumes that the defendant has the burden of persuasion regarding provocation. If the prosecutor has the burden of proof, the judge would instead state: "You must consider the defendant's claim further, unless you are convinced beyond a reasonable doubt that the answer is 'no' to each of these preliminary questions." Regarding the allocation of the burden of proof, see *supra* note 176.

<sup>181</sup> I favor substituting the word "person." See *supra* note 164.

<sup>182</sup> This language is from *Maier v. People*, 10 Mich. 212, 220 (1862).

<sup>183</sup> The bracketed language emphasizes the law's sexual-orientation-free attitude about sexual advances. Of course, this is an empirically incorrect statement to the extent that it suggests that a woman who is a victim of a heterosexual advance is as apt to lose self-control as the male recipient of a homosexual advance. But a defendant is not unfairly convicted if he is held to the standard of a non-prejudiced gender-neutral person.

<sup>184</sup> Mison, *supra* note 2, at 166-67 (quoting *Krulewitch v. United States*, 336 U.S. 440, 453

Mison overstates his case. The law rarely assumes that jurors in criminal trials are unable or unwilling to act pursuant to a specific jury instruction. Moreover, this assumption applies only when the court has strong reason to believe that jurors will ignore the law *to the detriment of the rights of the criminal defendant*, for example, when they are told to disregard a coerced confession by the defendant.<sup>185</sup> Mison's position is much more extreme. He argues that the law should strip the defendant of an otherwise recognized defense because the jury might reach a morally repugnant verdict due to undue *sympathy* for the defendant. Even if there is a risk of undue jury sympathy for a criminal defendant—a remarkable event in these days of crime hysteria—the law does not, and should not, treat such “unfairness” equivalently to jury bias *against* a defendant. Indeed, the Sixth Amendment right to trial by jury exists because, “[i]f the defendant prefer[s] the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he [is] to have it.”<sup>186</sup> A cautionary jury instruction intended to root out juror prejudice is a suitable, albeit imperfect, way to deal with the threat of an anti-gay verdict.

## VI. CONCLUSION

Mison's good motives do not justify bad analysis. Mison correctly reminds his readers that they should be alert to prejudice in the criminal justice system, and that gay men and lesbians are particularly likely to be victims of *de jure* or *de facto* discrimination. Discrimination is especially likely when the victim of violence is a member of a disesteemed group. However, Mison does not demonstrate—indeed, what evidence there is contradicts his conclusion<sup>187</sup>—that juries are unduly sympathetic to defendants in NHA provocation cases. But even if Mison's concerns in this regard are accurate, he reaches the wrong conclusion from equally wrong premises. Contrary to the assumptions underlying much of Mison's article, provocation is an excuse-based, not a justification, defense; it is founded on retributive conceptions of just deserts, rather than utilitarian concerns of crime control. Therefore, much of Mison's argumentation is quite beside the point.

Mison has also asked for too much or too little in his remedy. He has asked for too much in that, as a prophylactic against societal homophobia, he would deny a defendant an opportunity to raise an

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(1949) (Jackson, J., concurring); *Spencer v. Texas*, 385 U.S. 554, 565 (1967); and *Bruton v. United States*, 391 U.S. 123, 135 (1968)) (footnotes omitted).

<sup>185</sup> *Jackson v. Denno*, 378 U.S. 368 (1964).

<sup>186</sup> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

<sup>187</sup> See *supra* notes 90 to 91 and accompanying text.

otherwise valid defense, rather than devise remedies for reducing the risk of jury bias in the trial process. Mison has asked for too little in that he apparently accepts the validity of the provocation defense, even if he misconstrues its rationale. Although the defense ought to survive an attack on the merits, the strongest basis for criticizing it (especially in its traditional formulation) may be the predominantly male-oriented assumption that "there is a certain inevitability to the leap"<sup>188</sup> from provocation to anger to loss-of-control violence. Thus, if critics wish to attack the provocation defense, they should do it from a feminist, not a sexual orientation, perspective.

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<sup>188</sup> Coker, *supra* note 15, at 100.