

PROVOCATION'S PRIVILEGED DESIRE: THE
 PROVOCATION DOCTRINE, "HOMOSEXUAL
 PANIC," AND THE NON-VIOLENT
 UNWANTED SEXUAL
 ADVANCE DEFENSE

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INTRODUCTION

On October 25, 1999, the opening day of Aaron McKinney's trial for the alleged beating death of Matthew Shepard, public defender Jason Tangeman, in a "chilling opening argument," not only admitted McKinney "savagely beat Shepard and left him for dead a year ago" but also revealed McKinney's motive: homosexual panic.¹ Tangeman told the jury panel of ten men and six women, three of whom are students at the University of Wyoming where Shepard was a freshman, that on October 6, 1998, while riding in McKinney's father's pickup truck, Shepard "reached over and grabbed [McKinney's] genitals and licked his ear."² According to Tangeman, Shepard's alleged homosexual advance unleashed McKinney's traumatic childhood memories of homosexual abuse by the neighborhood bully and triggered "five minutes of emotional rage and chaos."³ During this fit of uncontrollable homicidal rage, McKinney fastened Shepard to a wood fence in the remote outskirts of Laramie, Wyoming, and whipped him with a .357 Magnum pistol.⁴ Shepard subsequently slipped into a coma and died five days later.⁵

McKinney, who was charged with first-degree murder, kidnapping, and robbery, could have been sentenced to the death if convicted by the lay jury.⁶ His defense strategy was to shift focus away from the first-degree murder charge by introducing elements of homosexual panic. This type of "heat-of-passion" defense would negate the premeditation-deliberation mens rea element required for first-degree murder. The ultimate goal of public defender Tangeman was to save McKinney's life by

¹ Julie Cart, *Defense Says Homosexual Advance Triggered Slaying*, L.A. TIMES, Oct. 26, 1999, at A20.

² Tom Kenworthy, "Gay Panic" Defense Stirs Wyoming Trial: Homosexual Acts Called Trigger of "Rage and Chaos" in Student's Alleged Killer, WASH. POST, Oct. 26, 1999, at A2.

³ Cart, *supra* note 1.

⁴ See Robert W. Black, *Gay Student Dies From Beating*, ASSOCIATED PRESS ONLINE, (Oct. 12, 1998) available at 1998 WL 21171100.

⁵ See *id.*

⁶ See *id.* On November 3, 1999, Aaron James McKinney was found guilty of two counts of felony murder. See Julie Cart, *Killer of Gay Student Is Spared Death Penalty Courts*, L.A. TIMES, Nov. 5, 1999. The following day, just as the penalty phase was about to begin, a sentence plea agreement was announced by Wyoming District Court Judge Barton Voigt. See *id.* McKinney agreed to serve two consecutive life sentences, one for kidnapping and the other for felony murder robbery, without the possibility of parole. See *id.* In addition, McKinney waived the right to any appeals, and the felony murder kidnapping charge was dropped. See *id.* In court, McKinney made a statement in which he apologized to the Shepard family and said he was ashamed of his past actions. See *id.*

mitigating the conviction to second-degree murder or voluntary manslaughter.

This Note critically investigates the legal impact of the homosexual panic-advance defense within criminal homicide prosecutions and, more broadly, the provocation doctrine as it pertains to differences in sex, gender, and sexual orientation. Part I contextualizes the genesis of “homosexual panic” as an insanity defense and explains its shift into “homosexual advance” as a provocation defense. Part II surveys relevant areas of substantive criminal law, detailing how the “homosexual advance” defense operates within the provocation doctrine, in addition to demonstrating where the provocation doctrine fits within the system of criminal defenses. Part III frames the debate between an opponent of the “homosexual advance” defense and a proponent of the much broader “unwanted sexual advance” defense, focusing on the issue of whether either should be legally recognized as a valid provocation defense. Part IV first analyzes how, as applied, the unwanted (homo)sexual advance defense and its larger provocation defense creates a disparate legal impact upon various sex-gender-sexual orientation groups. Part IV then critiques the operation of the provocation doctrine as it pertains to sex, gender, and sexual orientation differences by interlocking these disparate legal impacts to reveal a specificity of privilege favoring defendants who are both male and heterosexual. Finally, Part IV offers a narrowly tailored two-prong proposal to counteract the dynamics operating within the currently formulated provocation doctrine that create its disparate legal impact upon different identity groups.

In view of this critical investigation, the Note's thesis is that the unwanted (homo)sexual advance defense crystallizes the fact that within the law of criminal defenses, the provocation doctrine – as formulated and as it pertains to sex, gender, and sexual orientation differences – creates a disparate legal impact that adversely affects certain discrete groups while at the same time reinforcing and perpetuating another group's longstanding privilege.

I.e HISTORICAL BACKGROUND^e

“Contemporary condemnation of gay and lesbian people is not simply a matter of individual attitude or idiosyncrasy, but rather is deeply embedded in the structures of our culture and law.”^{7a}

⁷ Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 195 (1988).

A. THE CENSURE OF HOMOSEXUALITY

For two thousand years before late nineteenth century sexologists⁸ developed medical and psychoanalytic theories utilizing scientific terminology to define “heterosexuality” and “homosexuality” as concepts rooted within every person’s identity,⁹ the Judeo-Christian tradition had dominated the sexual discourse in the West.¹⁰ This ecclesiastical tradition vehemently condemned homosexual activity first as an abominable sin, then as an abominable sin against natural law.¹¹ The Bible gravely announces this sin in Leviticus: “if a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.”¹² In the Middle Ages, theologian Thomas Aquinas elaborated on the Biblical text by labeling the abomination as one against natural sexual practices or *peccata contra naturam* (sins against nature).¹³ Beginning with the assumed premise that procreation by husband and wife is the only natural and legitimate end of all sexual acts, Aquinas concluded that any use of sexual organs outside matrimony for any non-procreative purpose, such as same-sex activity or heterosexual sodomy, violated the law of nature as sins against God.¹⁴ His reasoning defined the core underpinnings for the Judeo-Christian demonization of homosexual activity¹⁵ and survives today as the rationale for the “Religious Right’s” public denunciation of homosexuality as an unnatural sexual deviance.

Since the nineteenth century, a competing perspective based upon the medical and scientific study of homosexuality has “supplemented and ultimately supplanted the natural law viewpoint”¹⁶ espoused by the moral-religious tradition. Medical-scientific discourse rejected Western

⁸ This modern term is applied retrospectively to denote doctors and scientists who deployed and shaped the dominant medical-scientific discourse surrounding “human sexuality.” See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* 134 (1997).

⁹ See *id.* at 133-34 (explaining how the “medicalization” of sex, gender, and sexuality by sexologists produced medical theories that have “served as the intellectual basis for much of the regulation as well as definition of sexuality in the twentieth century”); see also MICHEL FOUCAULT, *HISTORY OF SEXUALITY VOLUME ONE: AN INTRODUCTION* 42-43 (Robert Hurley trans., Vintage Books 1978).

¹⁰ See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 15 (1981).

¹¹ See *id.*

¹² *Id.* at 16 (quoting *Leviticus* 20:13).

¹³ See DERRICK SHERWIN BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 115-16 (1955).

¹⁴ See *id.* Aquinas maintained “[t]he sins against nature are against God himself, and in fact they are worse than sacrilege since the order of nature is more basic and stable than the laws which are derived from nature by reason.” Law, *supra* note 7, at 198 (quoting *Summa Theologica*, in *HOMOSEXUALITY AND ETHICS* 40 (E. Batchelor ed. 1980)).

¹⁵ See BAYER, *supra* note 10, at 17.

¹⁶ ESKRIDGE & HUNTER, *supra* note 8, at 136.

Christianity's pre-modern view of human behavior as based on deterministic will and moral categories of good and evil.¹⁷ Science came to be viewed as the rational source for secular value and reliable knowledge. Adherents in this Age of Reason believed it offered the methodology for refuting divine truths and achieving objective knowledge through neutral observation and experimentation.¹⁸ Nonetheless, early sexologists employed medical categories to locate heterosexuality in the "normal" end of the psychosexual development spectrum and homosexuality in the "pathological sexual perversion" end while assuming this scientific continuum was morally neutral.¹⁹

Sigmund Freud, the most influential of the sexologists, and followers of his psychoanalytic theory of homosexuality have played a powerful role in the medical and popular characterization of homosexuality as a pathological mental illness.²⁰ For most of the twentieth century, the dominant medical-scientific discourse defined and enforced its pathological status. It was not until 1973 that the American Psychiatric Association formally removed homosexuality from its official nomenclature in the *Diagnostic and Statistical Manual of Psychiatric Disorders* (DSM-II).^{21e}

B. THE GENESIS OF "HOMOSEXUAL PANIC"^e

It is within this context of homosexual censure by both religious and secular worldviews that "homosexual panic" first emerged as a psychological disorder, and then as a legal defense within criminal prosecution. The phrase "homosexual panic" and its corresponding psychological condition were first posited in 1920 on the pages of *Psychopathology* by

¹⁷ See BAYER, *supra* note 10, at 18.

¹⁸ See Law, *supra* note 7, at 202-03.

¹⁹ See BAYER, *supra* note 10, at 18 (arguing that "rather than challenge the historical rejection of homosexuality, the new [medical-science] perspective seemed to buttress it. In place of a Divinely determined standard for sexuality, it put one thought to exist in nature.").

²⁰ See ESKRIDGE & HUNTER, *supra* note 8, at 142 (stating Freud believed "the normal sexual object is an adult human of the opposite sex . . . any choice of a sexual object other than an adult human of the opposite sex is a perversion"); Law, *supra* note 5, at 203-205.

²¹ BAYER, *supra* note 10, at 40. In its first official listing of mental disorders in 1952, the American Psychiatric Association in the *Diagnostic and Statistical Manual, Mental Disorders* (DSM-I) classified homosexuality and other sexual deviations as sociopathic personality disturbances. See *id.* at 39. Such disturbances were defined by the "absence of subjectively experienced distress or anxiety despite the presence of profound pathology." *Id.* Thus, the homosexual psychology and behavior itself established the pathology. In 1968, the revised DSM-II continued to classify homosexuality as a mental illness but did not list it as a sociopathic personality disturbance. See *id.* at 40. Before homosexuality was declassified as a mental illness in 1973, it was listed among the "other non-psychotic mental disorders." See *id.* at 40.

psychiatrist Edward J. Kempf.²² He coined the phrase to describe a “panic due to the pressure of uncontrollable perverse sexual cravings” that threatened and at times overcame the afflicted individual’s ego and sense of self-control.²³ According to Kempf, an afflicted individual’s fear of being socially identified as “homosexual” led one to repress one’s uncontrollable homosexual desires, causing erotic hallucinations and severe delusions to gratify those sexual cravings.²⁴ The conflict between the social fear of homosexuality and the delusional fantasy of homoeroticism could precipitate anxiety or panic, and produce symptoms such as erotic visions and voices, “drugged” feelings, seductive and hypnotic influences, irresistible trance states, and the like.²⁵ Furthermore, Kempf believed afflicted individuals whose sexual delusions were experienced as external reality suffer more severe episodes of homosexual panic.²⁶ At its most severe, individuals laboring under an acute aggression panic episode would undergo a personality dissociation and were likely to react with dangerous hatred toward others because homosexual panic induced autonomic reactions, wherein the afflicted felt threatened by undue malignant influence, physical violence, or impending death.²⁷

This psychological theory of homosexual panic was refined by later psychiatrists and psychologists who elaborated upon Kempf’s definitional foundation. Homosexual panic continued to be defined as an individual’s reaction to the threatened collapse of heterosexual self-image, but now it was styled “as a state of sudden feverish panic or agitated furore, amounting sometimes to temporary manic insanity, which breaks out when a repressed homosexual finds himself in a *situation* in which he can no longer pretend to be unaware of the threat of homosexual temptations.”²⁸

In short, homosexual panic evolved from an internally induced psychological disorder with external symptoms to become predominately characterized as an immediate and irrational reaction to real, external stimuli. Indeed, as recently as the late 1970s, one psychiatric encyclopedia continued to medically define and classify homosexual panic and its paradigmatic stimulus as “an abnormal psychogenic reaction of intense

²² 2 ENCYCLOPEDIA OF HOMOSEXUALITY 941-43 (Wayne R. Dynes et al. eds. 1990) (quoting EDWARD J. KEMPF, PSYCHOPATHOLOGY (1920)); see also EDWARD J. KEMPF, PSYCHOPATHOLOGY 477-515 (1920).

²³ 2 ENCYCLOPEDIA OF HOMOSEXUALITY, *supra* note 22 at 942.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*

²⁸ Robert G. Bagnall, Patrick C. Gallagher, & Joni L. Goldstein, Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 499-500 (1984) (emphasis added) (quoting DONALD J. WEST, HOMOSEXUALITY RE-EXAMINED, 202-203 (1977)) [hereinafter Bagnall].

anxiety occurring in males whose repressed homosexual tendencies are suddenly inadvertently activated by another male.”²⁹

C. THE SHIFT FROM HOMOSEXUAL PANIC AS AN INSANITY DEFENSE TO HOMOSEXUAL ADVANCE AS A PROVOCATION DEFENSE

Taking its cue from medical-scientific discourse, the legal defense of “homosexual panic” first emerged as an insanity defense to homicide prosecutions. However, it has since morphed with the evolving medical discourse and the demedicalization of homosexuality³⁰ to become a provocation defense used to mitigate murder charges to voluntary manslaughter convictions. Beginning as a psychological syndrome raised within the larger rubric of an insanity defense, “homosexual panic” was invoked by defendants with hopes of murder charge acquittals, and goals of complete exoneration from criminal responsibility and punishment.³¹ Typically, the defense argued that the homicide victim provided the triggering stimuli that initiated a violent, uncontrollable psychotic reaction in the latently gay defendant. Whether the defendant was conscious of it or not, he was said to be so intensely anxious about his repressed homosexual orientation that the triggering stimuli—in many cases, a non-violent verbal or physical homosexual advance—started a psychological chain reaction which ultimately caused the defendant to temporarily lose the capacity to distinguish moral or legal right from wrong, and thus kill.³²

Most jurisdictions that recognized the partial defense of diminished capacity began accepting homosexual panic as negation of the mens rea

²⁹ *Id.* at 500 (citing A CONCISE ENCYCLOPAEDIA OF PSYCHIATRY 184 (D. Leigh, C. Pare & J. Marks eds. 1977)). Another medical text describes homosexual panic as “an acute, severe episode of anxiety related to the fear (or delusional conviction) that the subject is about to be attacked sexually by another person of the same sex, or that he is thought to be a homosexual by fellow-workers.” *Id.* (citing L. HINSIE & R. CAMPBELL, PSYCHIATRIC DICTIONARY 348 (4th ed. 1970)).

³⁰ See BAYER, *supra* note 10 at 40; *supra* text accompanying note 21.a

³¹ One article reports:^a

The first reported judicial mention of homosexual panic came in *People v. Rodriguez*, 256 Cal. App. 2d 663, 64 Cal. Rptr. 253 (1967). The defendant claimed that the victim had grabbed him from behind while he was urinating in an alley and that his violent assault resulted from “acute homosexual panic brought on him by the fear that the victim was molesting him sexually.” *Id.* at 667, 64 Cal. Rptr. at 255 a The jury rejected the defendant’s insanity defense and found him guilty of second-degree murder.a

Bagnall, *supra* note 28, at 499 n.4a

³² Early case law showcasing this factual description for homosexual panic as an insanity defense includes *Commonwealth v. Shelley*, 373 N.E. 2d 951, 4953 (Mass.App. Ct. 1978); *State v. Thornton*, 532 S.W. 2d 37, 44 (Mo. Ct. App. 1975); *People v. Parisie*, 287 N.E. 2d 310, 314-15, 325 (Ill. App. Ct. 1972), *rev’d and remanded sub nom*, *Parisie v. Greer*, 671 F.2d 1011 (7th Cir. 1982), *vacated per curiam*, 705 F.2d 882 (7th Cir. 1983) (en banc) (affirming district court’s unpublished summary judgment). For a brief survey of these cases, see Bagnall, *supra* note 28, at 502-510.a

element of the offense charged.³³ Although the case law is extremely sparse, “no court recognizing the partial defense of diminished capacity has barred evidence of homosexual panic as a matter of law or because homosexual panic rests on an unsupported and untenable psychological theory.”³⁴ However, very few jurisdictions allowed the diminished capacity defense to mitigate murder to heat-of-passion voluntary manslaughter.³⁵

Under both the insanity and diminished capacity variants of the homosexual panic defense, the defendant’s acute psychotic reaction of homicidal violence was explained by the medical-scientific discourse as directly premised upon the latent homosexual’s mental disorder of repressed sexual perversion.³⁶ According to this formulation, although the reactive panic may have been triggered by external stimuli such as a homosexual advance, it was expressly recognized as originating from defendant’s larger psychiatric illness of homosexuality.³⁷ This formulation of the defense became problematic, however, when the American Psychiatric Association in 1973 formally demedicalized homosexuality and deleted it from DSM-II,³⁸ thus stripping homosexual panic of its medical-scientific legitimacy as a defense and as an illness premised upon homosexual latency. The homosexual panic defense no longer rationally functioned within the criminal defense frameworks of insanity or diminished capacity because no defined mental defect existed.

Remarkably or understandably, depending on one’s point of view, instead of losing currency as a viable criminal defense, the homosexual panic defense is still used today in defense of homicides committed against victims who did not violently instigate confrontation.³⁹ Popularly misidentified under its old “homosexual panic” moniker by the media, the same defense is today known within the academe as the Non-violent Homosexual Advance (NHA) Defense⁴⁰ and is presently stylized

³³ *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1519, 1545 (1989) [hereinafter *Developments*].

³⁴ *Id.*

³⁵ *See id.*

³⁶ *See supra* text accompanying notes 19-29.

³⁷ *See cases cited infra* notes 31-32. In *Parisic*, expert psychiatrists testifying for the defense blamed defendant’s homicidal reaction on his own reciprocation of victim’s homosexual advances, rather than the advances themselves. *See Developments, supra* note 33, at 1544 n. 166.

³⁸ *See supra* text accompanying note 21.

³⁹ The non-violence of the sexual advance is crucial because any type of violence intermixed with the solicitation allegedly initiated by the victim automatically enables the defendant to invoke a self-defense claim for justifiable homicide. If successful, the defendant will be fully acquitted. Historically, pleas of self-defense have been successfully invoked by defendants who claimed their homicide victims had attempted to homosexually rape them. *See Bagnall, supra* note 28, at 498; *see also Developments, supra* note 33, at 1546-47.

⁴⁰ *See infra* Part II.D.

as a heat-of-passion or provocation defense rather than as an insanity defense.⁴¹

This categorical move marked a complete doctrinal shift. Previously, the external stimulus merely precipitated the homosexual panic that triggered the acute psychotic reaction and temporary insanity that *caused* the latent homosexual to kill. That is, the mental disorder of homosexual panic caused the killing. Under the current provocation rubric, the external stimulus — the homosexual advance — has been reformulated as the trigger or “adequate provocation” for heat-of-passion killing. Simply put, the homosexual advance itself provokes the understandable loss of normal self-control that incites uncontrollable homicidal rage in any reasonable person, regardless of homosexual tendencies. Re-conceptualized as such, the internal triggering mechanism of homosexual panic now becomes the external provoking force of an unwanted, non-violent homosexual advance so that, whereas before the mentally ill defendant killed because his homosexual panic caused an abnormal psychogenic homicidal reaction, now the reasonable and ordinary person provoked by a homosexual advance kills because the solicitation itself causes an understandable loss of normal self-control.

II.e LEGAL BACKGROUND_e

A.e THE LAW OF CRIMINAL HOMICIDE

Criminal homicide is the unlawful killing of a human being. Within criminal law, intentional homicide is sub-divided into the crime of murder and the lesser offense of voluntary manslaughter.⁴² Murder, defined as intentional homicide with “malice aforethought,” is divided into first- and second-degree categories in most United States jurisdictions and involves the highest degree of culpability and moral blameworthiness. As a result, the murder convict receives the harshest penal sentence.⁴³ An intentional homicide absent “malice aforethought” is graded as voluntary manslaughter and, as a result, carries a lesser sentence than homicides classified as murder.⁴⁴

⁴¹ This is not to suggest that different uses of homosexual panic evidence is something new. When homosexual panic was rationalized largely as an insanity defense, the “gay advance” defense, which introduced evidence of a victim’s homosexuality and sexual advance to support claims of self-defense or, alternatively, provocation, had also been invoked by defendants. See *Developments, supra* note 33, at 1546-47. However, now homosexual panic and gay advance have been collapsed into each other as one defense under the provocation doctrine.

⁴² See MODEL PENAL CODE § 210.3 cmt. at 44 (1980) (stating that courts defined “murder in terms of the evolving concept of ‘malice aforethought’ and treated manslaughter as a residual category for all other criminal homicides”) [hereinafter MPC].

⁴³ See Laurie J. Taylor, Comment, *Provoked Reason In Men And Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1683 (1986).

⁴⁴ See *id.*

Traditional statements of English criminal law distinguish one type of killing as “homicide, even if intentional . . . to be without malice and hence manslaughter if committed in the heat of passion upon adequate provocation.”⁴⁵ Adopted in the United States, this form of homicide mitigates an intentional killing, that would otherwise be murder, to voluntary manslaughter, if the defendant can prove that the killing was done in a heat-of-passion caused by the victim’s provocative conduct.⁴⁶ The law’s rationale is that the defendant’s passion prevented the premeditation or formation of the requisite intent to murder. Put another way, heat-of-passion upon adequate provocation negates the mens rea element of malice aforethought, decreasing the defendant’s moral culpability.⁴⁷

B. THE PROVOCATION DOCTRINE WITHIN THE CRIMINAL DEFENSE SYSTEM

Criminal legal defenses are systematically classified within one of five major definitional categories:⁴⁸ (1) Failure of Proof Defense; (2) Offense Modifications; (3) Justifications; (4) Excuses; and (5) Nonexculpatory Public Policy Defenses.⁴⁹ The two categories relevant to the controversy surrounding the provocation doctrine in general, and more specifically the provocation defense of Non-Violent Homosexual Advance (NHA),⁵⁰ are justifications and excuses. The debate centers on whether the provocation doctrine should be legally grounded in principles of justification, excuse, or a mix of both.⁵¹ Specifically, because justification and excuse principles are completely divergent defense theories,⁵² the doctrine’s definition as one, the other, or a combination of

⁴⁵ MPC, *supra* note 42.

⁴⁶ See Taylor, *supra* note 43, at 1679.

⁴⁷ Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J.ACRIM. L. & CRIMINOLOGY, 424, 442 (1982).

⁴⁸ For a comprehensive article on the systemization of criminal law defenses under a conceptual framework, see Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982).

⁴⁹ See *id.* at 203. Of course, these categories are not mutually exclusive. Some categories converge such as when “failure of proof defenses often appear to overlap with offense modifications” depending on the form in which the specific defense is drafted. *Id.* at 205. Moreover, some defenses defy definition; “Mistake provides a clear example of how a single label may in fact embody defenses within several different definitional categories.” *Id.*

⁵⁰ See discussion *infra* Part II.D.

⁵¹ See Robert B. Mison, Comment, *Homophobia In Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 140 (1992).

⁵² The most important distinction between justification and excuse is that a justified actor commits no criminal wrong whereas an excused actor has violated a law but under the circumstances is not held criminally responsible. As Professor Robinson writes:

[T]he conceptual distinction remains an important one . . . a Justified conduct is correct behavior which is encouraged or at least tolerated. In determining whether conduct is justified, the focus is on the *act*, not the actor. An excuse represents a legal conclusion that the conduct is wrong, undesirable, but that the criminal liability

both determines whether the provocation defense operates by asking juries to measure the social wrong or harm committed by the provocateur (justification), or to determine the understandability of the defendant's loss of normal self-control (excuse).

The debate is fueled in part by the fact that the common law of provocation included elements of both justification and excuse.⁵³ Early English common law, with its use of *per se* provocation categories, limited the use of the defense to situations where the homicide was justified by the provocateur's immoral or unlawful act,⁵⁴ i.e., adultery, physical assault and the like. However, under current United States law, excuse is the legal rationale underlying the provocation doctrine.⁵⁵ That is, successful invocation of the provocation defense today results in the partial *excuse* of heat of passion killings via a reduction in the conviction from murder to voluntary manslaughter.⁵⁶

C. THE PROVOCATION DOCTRINE

The provocation doctrine may have evolved considerably from its English common law origins but its structural aspects have remained constant. Although no universally accepted formulation of the doctrine exists, to mitigate a killing to voluntary manslaughter under the "rules of provocation:"

- (1) there must have been adequate provocation; (2) the killing must have been [in fact] in the heat of passion; (3) it must have been a sudden heat of passion—that is, the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool; and (4) there must have been a causal connection between the provocation, the passion, and the fatal act.⁵⁷

The underlying rationale of the provocation doctrine has also remained constant. As William Blackstone remarked, "[t]he law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the

is inappropriate because some characteristic of the actor vitiates society's desire to punish him. Excuses do not destroy blame . . . they shift it from the actor to the excusing conditions. The focus in excuses is on the *actor*. Acts are justified; actors are excused.

Robinson, *supra* note 48, at 229.

⁵³ See Dressler, *supra* note 47, at 438.

⁵⁴ See Taylor, *supra* note 43, at 1685-86.

⁵⁵ See, e.g., Dressler, *supra* note 47, at 441-442; Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1339 (1997).

⁵⁶ See Nourse, *supra* note 55, at 1339.

⁵⁷ Mison, *supra* note 51, at 140.

same footing with regard to guilt.”⁵⁸ The fact “that provocation may, within narrow bounds, reduce murder to manslaughter, represented an attempt by the [English] courts to reconcile the preservation of the fixed [death] penalty for murder with a limited concession to natural human weakness.”⁵⁹ Today in the United States, the provocation doctrine remains criminal law’s limited concession to the natural human weakness that occurs when individuals are “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.”⁶⁰ The popular rationalization of the provocation defense is that, though the defendant intended to kill the victim, this mens rea is mitigated by the victim’s provocative conduct such that the murder charge should nonetheless be reduced to a manslaughter conviction.⁶¹ Alternatively, the minority view holds that the defendant’s passion “must be so great as to destroy his or her intent to kill, in order to accomplish the reduction of homicide to voluntary manslaughter.”⁶² Either way, if the provocateur is intentionally killed in an uncontrollable homicidal rage and that passion is “the result of an understandable and excusable loss of self-control arising from . . . anger,”⁶³ then the defendant should be deemed less culpable than a murderer who killed with malice aforethought and convicted only of voluntary manslaughter.

1. *Adequate Provocation*

While the overall structure and underlying rationale of the provocation doctrine have remained fairly constant over time, the critical legal definition of what constitutes “adequate provocation” and the factual determination of what actions constitute adequate provocation have undergone an evolution.⁶⁴ Early English provocation law focused on the defendant’s subjective state of mind. That is, the defendant carried the burden of proving that a specific provocative event had in fact caused the defendant to lose self-control and to react violently, but without malice,

⁵⁸ *Id.* at 138 n.23 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *191) (alteration in original).

⁵⁹ WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, § 7.10(h), at 664 (2d ed. 1986) (quoting REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 52-53 (1953)).

⁶⁰ Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 748 (1995) (quoting *Maier v. People*, 10 Mich. 212, 220 (1862)).

⁶¹ See LAFAYE & SCOTT, *supra* note 59, § 7.10(a) at 653.

⁶² *Id.* at 653-54.

⁶³ Dressler, *supra* note 60, at 747.

⁶⁴ Mison, *supra* note 51, at 139-141.

at the moment of killing.⁶⁵ Over time, the standard for determining sufficient provocation was objectified and placed within the sole province of English courts as a question of law.⁶⁶ As a result, courts developed discrete categories of provocative acts sufficient “to rebut the implication of murder with malice.”⁶⁷ In 1707, Lord Holt articulated the four species of acts deemed legally adequate provocation under English common law: (1) angry words followed by a physical assault; (2) the sight of an assault on a friend; (3) the sight of another illegally arrested by force; (4) the sight of one’s wife committing adultery with another man.⁶⁸

Manslaughter law within the United States today has aligned the determination of adequate provocation to a question of fact ultimately for the jury to decide. Courts abandoned the *per se* categorical approach because “classifying the multitude of possibly provocative acts ultimately proved too difficult.”⁶⁹ In addition, abandonment of the categorical standard acknowledged the growing realization that what provoked loss of self-control in a reasonable nineteenth-century Englishman might not necessarily produce the same reaction in today’s reasonable man.⁷⁰ However, the English common law categorical approach continues to influence the legal thinking of practitioners and scholars today.⁷¹ United States courts consider, *inter alia*, the following categories, derived from English common law, to be the kinds of conduct that qualify as *prima facie* evidence of provocation: (1) Adultery, (2) Battery, (3) Mutual Combat, (4) Assault, (5) Illegal Arrest, and (6) Injuries to Close Relatives.⁷² Nonetheless, the lay jury is the ultimate arbiter of what constitutes provocation sufficiently egregious to incite the kind of passionate emotions that could cause loss of self-control and resulting homicidal rage. Its fact-finding function highlights the critical importance of the legally formulated test it is bound to apply when determining adequate provocation.

2. *Reasonable Man Test*

In determining what constitutes adequate provocation, the jury must utilize the “reasonable man” test. Under this objective standard of reasonableness, adequate provocation is “provocation which causes a reasonable man to lose his normal self-control; and, although a reasonable

⁶⁵ See Taylor, *supra* note 43, at 1685.

⁶⁶ See Mison, *supra* note 51, at 138.

⁶⁷ Taylor, *supra* note 43, at 1685.

⁶⁸ See Mison, *supra* note 51, at 139 (citing *Regina v. Mawgridge*, 84 Eng. Rep. 1107, 1114 (Q.B. 1707)).

⁶⁹ See Mison, *supra* note 51, at 139.

⁷⁰ See LAFAYE & SCOTT, *supra* note 59, § 7.10(b) at 655.

⁷¹ See *id.*

⁷² See *id.* at 655-58..

man who has thus lost control over himself would not kill, yet his homicidal reaction to the provocation is at least understandable.”⁷³

As the above definition illustrates, the provocation doctrine does not envision the reasonable man to be an ideal human being embodying community standards of reasonable and prudent behavior. The reasonable man standard does not represent a normative ideal toward which people aspire; instead, it is an empirical test that recognizes that the defendant is, “unfortunately, just like other ordinary human beings.”⁷⁴ Thus, to find adequate provocation, the jury must apply the reasonable man test to the factual circumstances and conclude that the defendant’s homicidal response was understandable because the victim’s conduct would have caused the loss of normal self-control in any ordinary man with typical human shortcomings.

The law’s determination that the reasonable man is of ordinary form does not in and of itself define the content of “ordinary.” Traditionally, the reasonable man of “ordinary human weakness” was defined by a strictly objective standard. Courts quite uniformly disallowed the jury from considering any unique attributes possessed by the defendant (such as physical abnormalities or mental peculiarities) that might have caused him to lose self-control on the occasion in question.⁷⁵ The concern was that such subjective considerations would permit the defendant to standardize his own irrational and idiosyncratic characteristics, and thereby partially excuse his homicidal reaction because his particular passions were ignited.⁷⁶ Thus the strictly objective test sought to measure how the victim’s conduct affected a reasonable man with neutral characteristics.

In response to objections⁷⁷ and academic criticism⁷⁸ against the strictly objective reasonable man test, the Model Penal Code⁷⁹ (MPC)

⁷³ See *id.* at 654. For a feminist critique, see *infra* Part IV.A.1.

⁷⁴ Dressler, *supra* note 60, at 753 (“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).”).

⁷⁵ See LAFAYE & SCOTT, *supra* note 59, § 7.10(b) at 655.

⁷⁶ See Mison, *supra* note 51, at 142.

⁷⁷ The increasing importance of the reasonable man standard aroused two major objections. See *id.* at 143. First, opponents attacked the assumption that the reasonable man would kill in response to provocation. See *id.* Second, opponents argued that the objective standard was unjust because of its disparate impact upon women as a group. See *id.* These critics urged a more subjective approach that would account for at least some of a defendant’s unique characteristics. See *id.*

⁷⁸ Although empirical, the objective reasonable man of ordinary human weaknesses “has resisted alteration in accord with the emerging social reality of women, minority group members, and individuals not in the mainstream of middle-class values.” *Id.* at 176 (quoting Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 *LOY. L.A. L. REV.* 435,464 (1981)).

⁷⁹ The Model Penal Code provides in relevant part:

and a minority of state criminal codes have adopted a more subjective understanding of the reasonable man test.⁸⁰ The MPC provision “states a middle ground between a [strictly objective] standard which ignores all individual peculiarities and one which makes emotional distress decisive regardless of the nature of its cause.”⁸¹ A degree of subjectivity is introduced with the phrase “viewpoint of a person in the actor’s situation,”⁸² as if allowing the jury to consider the defendant’s “personal handicaps and some external circumstances”—such as “blindness, shock from traumatic injury, and extreme grief”—but not his “idiosyncratic moral values.”⁸³ Nonetheless, the MPC’s standard for provocation remains objectively based because the jury must still judge the defendant’s conduct from the objective point of view of a reasonable person in the defendant’s situation, rather than wholly from the point of view of the defendant himself.⁸⁴ Furthermore, despite criticism, a majority of jurisdictions continue to require the jury to determine adequate provocation by applying the strictly objective “reasonable person” test.⁸⁵

The precise formulation of the objective to subjective balance within the reasonable man test is of utmost significance here. With the test’s current formulation as either strictly objective (majority view) or primarily objective with secondary situation-based subjective factors (minority view), the reasonable man is heterosexual as a matter of course.⁸⁶ With heterosexuality as the presumptive standard, homosexuality, where relevant, does not factor into the reasonable man test because it remains a part of the homosexual defendant’s subjective mental peculiarity. This is illustrated by the fact that “courts in the United States . . . have declined to create a different standard of reasonableness for the male homosexual.”⁸⁷

[A] homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.

MPC, *supra* note 42, § 210.3 cmt. at 62-63 (1980). The test’s subjective element requires juries to evaluate the “disturbance” from the “viewpoint of a person in the actor’s situation.” *Id.*

⁸⁰ See LAFAYE & SCOTT, *supra* note 59, § 7.10(b) at 660.

⁸¹ *Id.*

⁸² MPC, *supra* note 42, § 210.3 cmt at 62-63 (1980).

⁸³ *Id.* § 210.3 cmt. at 62.

⁸⁴ *Id.* § 210.3 cmt. at 50 (“[T]he ultimate test . . . is objective.”); see also Mison, *supra* note 51, at 143-44.

⁸⁵ See Taylor, *supra* note 43, at 1688-89.

⁸⁶ See Mison, *supra* note 51, at 160. (“[N]o individual is lacking a sexual identity—whether heterosexual, homosexual, or bisexual [Thus] when the reasonableness standard is blind to sexual orientation, the presumption of sexual identity is almost invariably heterosexual.”). *Id.*

⁸⁷ Taylor, *supra* note 43, at 1688.

In sum, under the currently formulated provocation doctrine, the jury, using an objective standard of reasonableness, evaluates as a question of fact (1) whether the victim's acts constituted adequate provocation; and (2) whether the defendant's homicidal response was understandable.⁸⁸ Specifically, the jury determines whether a reasonable man, or more precisely an *ordinary man* with typical human weaknesses would be provoked by the victim's conduct and whether the defendant's response to the provocation was that of an ordinary man, who lost his normal self-control as a result of typical human weaknesses.

D.e NON-VIOLENT HOMOSEXUAL ADVANCE DEFENSEE

As currently conceived, murder defendants utilize the NHA defensee to systematically mitigate murder charges into convictions for voluntary manslaughter, by characterizing the intentional homicide as a heat-of-passion killing provoked by a non-violent homosexual advance. Although doctrinally distinguishable, the NHA defense factually operates in largely the same manner as the homosexual panic defense. Both are predicated upon the factual sequence of (1) victim directs a homosexual advance at the defendant; (2) defendant violently reacts to the homosexual advance; and (3) defendant kills the victim. The doctrinal difference lies in how the defendant's reaction is legally characterized. Under the insanity defense, the homosexual panic that leads to killing is symptomatic of the mental illness (i.e., latent homosexuality) whereas, under the provocation defense, killing in a homosexual panic is merely an understandable reaction to the victim's homosexual advance.

As a result of this externally induced loss of normal self-control, the defendant flies into an understandable, yet uncontrollable, homicidal reaction and kills the victim. However, not all types of non-violent homosexual advances may support the NHA defense: "Words alone, no matter how insulting or offensive, [are] insufficient" provocation.⁸⁹ Some non-consensual physical contact is required. Examples of unwanted touching include the following:

- (1)ewhile they watch a pornographic movie at A's home,e A put his hand on the defendant's knee and asked "Josh,e what do you want to do?"; (2) in an automobile, B putse his hand on the defendant's knee, was rebuffed, and there placed his hand on the defendant's upper thigh "neare [the] genitalia," and asked the defendant to spend thee night with him; (3) at a party, C asked the defendante "something about gay people," held his hand for fiftene

⁸⁸ See Mison, *supra* note 51, at 161.

⁸⁹ See Dressler, *supra* note 60, at 733.

seconds, and later grabbed his right buttock while the defendant was walking through a doorway; (4) D permitted the defendant to enter his house to use the telephone, after which D locked the door, rubbed up against the defendant, and tried to touch his scrotum; (5) E offered the defendant money to perform oral sex, and then pulled the defendant onto his lap and seized his genitals; (6) while naked from the waist down, F embraced the defendant and tried to grab the defendant's penis; and (7) G performed a homosexual act upon the sleeping defendant.⁹⁰

As the above examples illustrate, no prototypical factual situation qualifies as adequate provocation under the NHA defense. What is deemed "sufficient provocation . . . must vary with the myriad shifting circumstances of men's temper and quarrels."⁹¹ Thus, determinations of what does or does not constitute adequate provocation are ultimately questions of fact for the jury as guided by several legal rules of the provocation doctrine discussed above.

III.e FRAMING THE DEBATE: NON-VIOLENT (HOMO)SEXUAL ADVANCE DEFENSE

A. HOMOSEXUAL ADVANCE AS INSUFFICIENT PROVOCATION

In *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, Robert B. Mison argues, "a murderous personal reaction towards gay men should be considered an irrational and idiosyncratic characteristic of the defendant and should not be allowed to bolster the alleged reasonableness of the defendant's act."⁹² Accordingly, Mison concludes judges should find "as a matter of law that a homosexual advance defense is insufficient provocation"⁹³ because the "courts' continued acceptance of the homosexual-advance defense is an unacceptable judicial affirmation of [society's] homophobia."⁹⁴

Mison's reasoning derives from psychological and sociological analysis. He states, "although the trial judge may instruct the jury to

⁹⁰ *Id.* at 734 (citing the following cases in sequence: *Commonwealth v. Halbert*, 573 N.E.2d 975, 977 (Mass. 1991); *Commonwealth v. Deagle*, 412 N.E.2d 911, 912 (Mass. App. Ct. 1991) (alteration in original); *State v. Handy*, 419 S.E.2d 545, 548 (N.C. 1992); *State v. Escamilla*, 511 N.E.2d 58, 61 (Neb. 1994); *State v. Oliver*, No. 49613, slip op. at 2 (Ohio Ct. App. October 17, 1985); *Schick v. State*, 570 N.E.2d 918, 921 (Ind. Ct. App. 1991); *People v. Lenser*, 430 N.E.2d 495, 496 (Ill. App. Ct. 1981)).

⁹¹ *Id.* at 733 (citing *Commonwealth v. Paese*, 69 A.2d 891, 892 (Pa. 1908)).

⁹² Mison, *supra* note 51, at 177.

⁹³ *Id.*

⁹⁴ *Id.* at 178.

analyze the factual question in terms of whether the defendant should have controlled his reaction, the jury may be inclined to blame the victim⁹⁵ since jurors may unconsciously or, even worse, explicitly pass negative social judgment on the victim's homosexuality. Mison explains when the provocative "behavior is alleged to be homosexual in character, [the] prevailing cultural climate more than normative and objective elements on which manslaughter theory is dependent affects the ultimate verdict."⁹⁶ In short, Mison believes that, to appreciate the problems inherent in the homosexual advance defense, one must take into account the pervasive presence of prejudice against gays and lesbians in American society.

From the sociological perspective, Mison details why the victim's homosexuality is likely to improperly skew the results of homicide prosecutions. Because of American society's heterocentricity, "heterosexuality is seen as morally and socially superior and preferable to homosexuality."⁹⁷ Mison argues "America's unconscious heterocentrism and homophobia create a monolithic and discriminatory social environment"⁹⁸ in which society's heterosexism and disapproval of homosexuality are beliefs "so much a part of the culture, they are not experience[d] as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world."^{99a}

According to Mison, the sociological phenomena of societal heterocentrism, heterosexism, and homophobia have become deeply ingrained within the psychology of individuals, to varying extents, as personal heterosexist prejudices that appear natural or commonsensical, rather than as a particular worldview manufactured by the currently dominant social discourse.¹⁰⁰ This subtle and pervasive conditioning of heterosexism and/or homophobia is especially problematic in relation to the homosexual advance provocation defense because "to determine the defendant's culpability . . . the trier of fact compares the defendant's acts

⁹⁵ *Id.* at 171 (citing Joan L. Brown, Comment, *Blaming the Victim: The Admissibility of Sexual History in Homicides*, 16 *FORDHAM URB. L.J.* 263, 283-84 (1988)).

⁹⁶ *Id.* at 147.

⁹⁷ *Id.*: see also *supra* Part I.A.

⁹⁸ Mison, *supra* note 51, at 156.

⁹⁹ *Id.* (quoting Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317, 323 (1987)).

¹⁰⁰ As one author explains, "discourse"

is not a language or a text but a historically, socially, and institutionally specific structure of statements, terms, categories, and beliefs. Foucault suggests that the elaboration of meaning involves conflict and power, that . . . the power to control a particular field resides in claims to (scientific) knowledge embodied not only in writing but also in disciplinary and professional organizations and institutions as well as words; all these constitute texts or documents to read.

Joan Scott, *Deconstructing Equality Versus Difference: Or, The Uses of Poststructuralist Theory for Feminism*, 14 *FEMINIST STUD.* 33, 35 (1988)).

with society's standard of acceptable behavior."¹⁰¹ Therefore, when examined within the context of the larger societal phenomena beyond the case at bar, the victim's "homosexual advance might be considered an affront to the prevailing norms capable of offending a reasonable man"¹⁰² already ingrained with unconscious or conscious biases. As such, "the homosexual-advance defense capitalizes on the social and individual responses of fear, disgust, and hatred with regard to homosexuals."¹⁰³ Mison illustrates this problematic within the non-violent homosexual advance (NHA) defense by declaring:

In seeking to avail himself of the provocation defense, the defendant hopes that the typical American juror—a product of homophobic and heterocentric American society—will evaluate the homosexual victim and homosexual overture with feelings of fear, revulsion, and hatred. The defendant's goal is to convince the jury that his [homicidal] reaction was only a reflection of this visceral societal reaction: the reaction of a "reasonable man."¹⁰⁴

B. UNWANTED SEXUAL ADVANCE AS ADEQUATE PROVOCATION

In *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, Professor Joshua Dressler critiques Mison's article and argues in favor of the unwanted sexual advance (USA) defense—a provocation defense larger in scope than the non-violent homosexual advance (NHA) defense.¹⁰⁵ Unlike Mison, Dressler's inquiry dismisses sociological analysis and larger societal phenomena like heterosexism and homophobia. Dressler refocuses the unit of analysis and re-frames the inquiry in terms of substantive criminal law by rhetorically asking:

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,

¹⁰¹ Mison, *supra* note 51, at 148.a

¹⁰² *Id.*

¹⁰³ *Id.* at 158.

¹⁰⁴ *Id.*

¹⁰⁵ See Dressler, *supra* note 60, at 727 ("Because Mison's position seems right at first glance, but is wrong on deeper reflection, his thesis should not go unanswered.")

why should a homicide motivated by NHA be treated any differently?^{106a}

Dressler ultimately concludes:

[T]he victim's status as a homosexual is not necessarily a motivation for the killing The point is that an unwanted [heterosexual *or* homosexual] sexual advance is a basis for justifiable indignation [O]rdinary, 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 a partial excuse in many sexual-advance cases.¹⁰⁷

This includes unwanted sexual advances from individuals of any sexual orientation.

Dressler's critique first trivializes Mison's sociological rationales,¹⁰⁸ then offers legal reasons why the USA defense does qualify as a provocation defense doctrinally based upon excuse principles. First, Dressler claims to put Mison's sociological rationale of heterocentrism into context by reasoning that "focusing on centrism . . . also makes it clear that left-handed persons live in a right-centric society, and Jews, Moslems, and atheists live in a Christian-centric country."¹⁰⁹ As a result, Dressler deterministically concludes "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 generate are also inevitable."¹¹⁰

However, Dressler does recognize that "long ago American society crossed the line [from heterocentrism] to heterosexism."¹¹¹ Nevertheless, he notes that "just as heterocentrism is not the same as heterosexism, neither is heterosexism a synonym for hatred of gays and lesbians ("homophobia," as Mison uses the term) People should not automatically equate heterosexism with hatred of gay men and lesbians."¹¹² This observation is one of the most important to Dressler's ultimate finding that a valid, non-homophobic basis exists for recognizing USA as a partial excuse provocation defense.

¹⁰⁶ *Id.* at 737.

¹⁰⁷ *Id.* at 754-55.

¹⁰⁸ *See id.* at 738 ("Mison makes much of two -isms (heterocentrism and heterosexism) and one phobia (homophobia).").

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 739.

¹¹¹ *Id.* at 739; *see supra* text accompanying notes 9-20.

¹¹² *Id.* at 739-40.

Secondly, Dressler argues that Mison's thesis is doctrinally wrong because Mison misapprehends the principle underlying the provocation doctrine and mischaracterizes the reasonable man test.¹¹³ In response to Mison's assertion that allowing the NHA defense is to "encourage the sort of irrational violence that the criminal justice system is designed to control and contain,"¹¹⁴ Dressler argues that Mison's utilitarian rationale of deterrence is misguided because the provocation doctrine is based upon principles of excuse and retributivism, not principles of justification and utilitarianism.¹¹⁵ Dressler elaborates that, "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."¹¹⁶ Thus, upon the adequate provocation of an unwanted homo- or heterosexual advance, society should determine the defendant's just desert to be something less than murder because the defendant's loss of normal self-control was precipitated by a situation in which ordinary, law-abiding people might also act rashly.

Dressler also faults Mison for mischaracterizing the "reasonable man" test — the objective standard of reasonableness used to determine adequate provocation—as a hypothetical normative ideal that reflects "the standard to which society wants its citizens and system of justice to aspire."¹¹⁷ Dressler responds that the reasonable man is a positivistic notion because:

In the provocation area, the law does not deal with an idealized human being, because the ideal Reasonable Man, by definition, would never become angry enough that he would lose his self-control and kill Instead, the provocation defense is based on the principle that the defendant is, unfortunately, just like other *ordinary* human beings 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).^{118a}

¹¹³ See *id.* at 749-53.

¹¹⁴ *Id.* at 750 (quoting Mison, *supra* note 51, at 172).

¹¹⁵ *Id.*

^{116a} *Id.* at 751.a

¹¹⁷ *Id.* at 751-52 (quoting Mison, *supra* note 51, at 160).a

¹¹⁸ *Id.* at 753. Nonetheless, Dressler's conclusory assumption regarding the non-homophobic nature of Ordinary Man remains in and of itself problematic, because such an assumption has the collateral and legitimizing effect of reinforcing society's pervasive heterosexism and (un)conscious denial of its homophobia. The USA defense rests on the falsely individualizing and pathologizing premise that hatred of homosexuals and disgust of homosexuality is so private, so atypical, and yet so understandable a phenomenon in this culture as to qualify for partial excuse from criminal responsibility. The premise privatizes homophobia as

For Dressler then, the provocation doctrine “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.”¹¹⁹ Indeed, Dressler goes so far as to argue that the “male-oriented aspect of the defense clearly bolsters the claim that male defendants should have the defense available to them in NHA cases.”¹²⁰

However, Dressler is not completely oblivious to the sexist implications¹²¹ of the male-oriented provocation doctrine. Conceding that the provocation doctrine is not without its critics and faults, he concludes:

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 predominately male-oriented assumption that “there is a certain inevitability to leap” 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.¹²²

IV.e ANALYSIS, CRITIQUE AND A PROPOSAL^e

Mison and Dressler’s arguments typify the parameters of the academic debate surrounding the Non-Violent (Homo)Sexual Advance Defense.¹²³ Opponents of the defense, like Mison, argue that NHA capitalizes upon society’s heterosexist and homophobic disposition, while proponents, like Dressler, refute that view as an unsupported assumptive proposition, but then point myopically to doctrinal principles validating USA as a provocation defense. In the end, opponents and supporters talk past each other because neither is willing to entertain the other’s foundational premise that homophobia is (opponents) or is not (supporters) a factor. Part IV will reconcile this discursive chasm and articulate a more comprehensive method of analyzing the USA defense

occurring in atypical individuals, while the widespread acceptance of this defense seems to establish, to the contrary, that hatred of homosexuals is public, the cultural norm, and socially acceptable. See EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 19 (1990) (arguing that a similar public/private dynamic surfaces in the context of the “homosexual panic” defense).

¹¹⁹ Dressler, *supra* note 60, at 737.

¹²⁰ *Id.*

¹²¹ See *infra* text accompanying Part IV.A.I.

¹²² Dressler, *supra* note 60, at 763 (quoting Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71, 100a (1992)).

¹²³ To date, these two articles are the only law review or journal articles mainly devoted to a discussion of the Homosexual Advance Defense within the Provocation Doctrine. Search of WESTLAW, JLR (Journals & Law Reviews) Database (performed March 31, 2001).

as it pertains to sex-gender, sexual orientation, and the law of provocation.

A. ANALYSIS

The analytical starting point is “representative thinking” in the place of everyone else.¹²⁴ That is, the point of departure is to begin from the middle between interlocutors who are embedded in particular situations and cultures. As Charles Taylor explains: “The task of reasoning, then, is not to disprove some radically opposed first premise . . . but rather to show how the policy is unconscionable on premises which both sides accept, and cannot but accept.”^{125a}

Accordingly, the aim of this Note is not to disprove Mison or Dressler’s respective foundational premises. Rather it is to use the legal impact of the USA defense on various groups of offenders and victims as a method of analysis. Since this legal impact analysis already has a basis within the feminist critique of the provocation defense, this Note’s sexual orientation critique of the provocation defense will be informed by the example of the feminist critique. Moreover, Dressler and Mison both accept the feminist critique that the male-oriented provocation defense is gender biased with sexist ramifications.¹²⁶

1. *Sex-Gender Perspective*

Particularly with crimes of violence, the sex-gender of a person is one of the strongest predictors of criminality.¹²⁷ Data from arrest, self-report, and victimization sources consistently show that men and boys commit significantly more crimes than women and girls.^{128a}

The dominant feminist critique is of the defense’s disparate impact upon men and women. Generally, the argument goes, although homicide is an overwhelmingly male act,¹²⁹ women are nearly always killed by

¹²⁴ See Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435, 1465-66 (1998) (citing political theorist/philosopher HANNAH ARENDT, LECTURES ON KANT’S POLITICAL PHILOSOPHY 104 (Ronald Beiner ed., 1982)).

¹²⁵ *Id.* at 1465 (quoting CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 36 (1995)). Nourse writes, “[R]epresentative Thinking[] aims to persuade by proceeding from the ‘middle,’ from premises that are likely to be shared rather than from demands that first premises be resolved before we can address real-life dilemmas.” *Id.* at 1469.

¹²⁶ See Dressler, *supra* note 60, at 735-37, 763; Mison, *supra* note 51, at 159-60.

¹²⁷ See Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 80 (1994).a

¹²⁸ *Id.* at 80-81.a

¹²⁹ In 1998, 76% of all homicide victims and 89% percent of all homicide offenders were male. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1998 14 (1999) [hereinafter 1998 CRIME REPORTS]. Percentages reflect the fact that, of the estimated 16,914 homicides in 1998, supplemental biographical data was provided for 14,088 victims and 16,019 offenders. *Id.* Percentages re-

flecting the male nature of homicide have remained consistent throughout the 1990s. *Id.* Statistics reflect the combination of single victim/single offender and single victim/multiple offenders situations. *Id.* In 1997, 77% of all homicide victims and 90% percent of all homicide offenders were male. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1997 16 (1998) [hereinafter 1997 CRIME REPORTS]. Percentages reflect the fact that, of the estimated 18,209 homicides in 1997, supplemental biographical data was provided for 15,289 victims and 17,272 offenders. *Id.* In 1996, 77% of all homicide victims and 90% percent of all homicide offenders were male. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1996 14 (1997) [hereinafter 1996 CRIME REPORTS]. Percentages reflect the fact that, of the estimated 19,645 homicides in 1996, supplemental biographical data was provided for 15,848 victims and 18,108 offenders. *Id.* In 1995, 77% of all homicide victims and 91% percent of all homicide offenders were male. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1995 14 (1996) [hereinafter 1995 CRIME REPORTS]. Percentages reflect the fact that, of the estimated 21,597 homicides in 1995, supplemental biographical data was provided for 20,043 victims and 22,434 offenders. *Id.* In 1994, 79% of all homicide victims and 91% percent of all homicide offenders were male. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1994 14 (1995) [hereinafter 1994 CRIME REPORTS]. Percentages reflect the fact that, of the estimated 23,305 homicides in 1994, supplemental biographical data was provided for 22,076 victims and 25,052 offenders. *Id.* In 1993, 77% of all homicide victims and 91% percent of all homicide offenders were male. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1993 14, 17 (1994) [hereinafter 1993 CRIME REPORTS]. Percentages reflect the fact that, of the estimated 24,526 homicides in 1993, supplemental biographical data was provided for 23,271 victims and 26,239 offenders. *Id.* In 1992, 78% of all homicide victims and 90% percent of all homicide offenders were male. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1992 17 (1993) [hereinafter 1992 CRIME REPORTS]. Percentages reflect the fact that, of the estimated 23,760 homicides in 1992, supplemental biographical data was provided for 22,540 victims and 25,180 offenders. *Id.* In 1991, 78% of all homicide victims and 90% percent of all homicide offenders were male. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1991 14,16 (1992) [hereinafter 1991 CRIME REPORTS]. Percentages reflect the fact that, of the estimated 24,073 homicides in 1991, supplemental biographical data was provided for 21,505 victims and 24,578 offenders. *Id.* In 1990, 78% of all homicide victims and 85% percent of all homicide offenders in single victim/single offender situations. Percentages reflect the fact that, of the estimated 23,438 homicides in 1990, supplemental biographical data was provided for 20,045 of victims. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1990 9 (1991) [hereinafter 1990 CRIME REPORTS]. Unlike the subsequent annual reports, this one did not include the number of offenders for which supplemental data was provided.

The annually published Uniform Crime Reports reflect incidents and investigations voluntarily reported by 17,000 city, county, and state law enforcement agencies not the determination of a medical examiner, coroner, court, jury, or other judicial body. 1998 CRIME REPORTS, *supra*, at I. The annual publication of this nationwide statistical effort organized under the Uniform Crime Reporting Program is the most widely publicized national criminal statistics in the United States. *See id.*

While the Program's primary objective is to generate a reliable set of criminal statistics for use in law enforcement administration, operation, and management, its data over the years have become one of the country's leading social indicators. The American public look to Uniform Crime Reports for information on fluctuations in the level of crime, while criminologists, sociologists, legislators, municipal planners, the media and other students of criminal justice use the statistics for varied research and planning purposes.

men¹³⁰ - often men with whom they were involved intimately.¹³¹ Consequently, when men kill women in the heat-of-passion, that passion is most likely connected to the victim's gender and sexuality.¹³² On the other hand, women, as homicide perpetrators, rarely kill when "provoked"¹³³ because, as currently defined, adequate provocation and passionate "human" weakness reflect a male view of understandable

Id.

¹³⁰ For single victim/single offender situations in 1998, reported data indicates that 9 out of every 10 female victims were killed by males. *See* 1998 CRIME REPORTS, *supra* note 129, at 17. In contrast, 87% of male victims were killed by male offenders. *See id.* This singlea victim/single offender statistic has remained consistent throughout the 1990s. *See id.* In 1997,a data indicates that 9 out of every 10 female victims were killed by males. *See* 1997 CRIME REPORTS, *supra* note 129, at 16. In contrast, 88% of male victims were killed by male offenders. *See id.* In 1996, data indicates that 9 out of every 10 female victims were killed by males.a *See* 1996 CRIME REPORTS, *supra* note 129, at 14. In contrast, 89% of male victims were killeda by male offenders. *See id.* In 1995, data indicates that 9 out of every 10 female victims werea killed by males. *See* 1995 CRIME REPORTS, *supra* note 129, at 14. In contrast, 89% of malea victims were killed by male offenders. *See id.* In 1994, data indicates that 9 out of every 10a female victims were killed by males. *See* 1994 CRIME REPORTS, *supra* note 129, at 14. Ina contrast, 88% of male victims were killed by male offenders. *See id.* In 1993, data indicatea that 9 out of every 10 female victims were killed by males. *See* 1993 CRIME REPORTS, *supra* note 129, at 17. In contrast, 88% of male victims were killed by male offenders. *See id.* Ina 1992, data indicates that 9 out of every 10 female victims were killed by males. *See* 1992a CRIME REPORTS, *supra* note 129, at 17. In contrast, 87% of male victims were killed by malea offenders. *See id.* In 1991, data indicates that 9 out of every 10 female victims were killed bya males. *See* 1991 CRIME REPORTS, *supra* note 129, at 17. In contrast, 87% of male victimsa were killed by male offenders. *See id.* In 1990, data indicates that 9 out of every 10 femalea victims were killed by males. *See* 1990 1991 CRIME REPORTS, *supra* note 129, at 13. Ina contrast, 85% of male victims were killed by male offenders. *See id.*

¹³¹ *See* Taylor, *supra* note 43, at 1680. In 1998, 32% of all female victims were killed by a husband or boyfriend. *See* 1998 CRIME REPORTS, *supra* note 129, at 17. In contrast, 4% of all male victims were slain by wives or girlfriends. *See id.* In 1997, 29% of all female victims were killed by a husband or boyfriend. *See* 1997 CRIME REPORTS, *supra* note 129, at 17. In contrast, 3% of all male victims were slain by wives or girlfriends. *See id.* In 1996, 30% of all female victims were killed by a husband or boyfriend. *See* 1996 CRIME REPORTS, *supra* note 129, at 17. In contrast, 3% of all male victims were slain by wives or girlfriends. *See id.* In 1995, 26% of all female victims were killed by a husband or boyfriend. *See* 1995 CRIME REPORTS, *supra* note 129, at 17. In contrast, 3% of all male victims were slain by wives or girlfriends. *See id.* In 1994, 28% of all female victims were killed by a husband or boyfriend. *See* 1994 CRIME REPORTS, *supra* note 129, at 17. In contrast, 3% of all male victims were slain by wives or girlfriends. *See id.* In 1993, 29% of all female victims were killed by a husband or boyfriend. *See* 1993 CRIME REPORTS, *supra* note 129, at 17. In contrast, 3% of all male victims were slain by wives or girlfriends. *See id.* In 1992, 29% of all female victims were killed by a husband or boyfriend. *See* 1992 CRIME REPORTS, *supra* note 129, at 17. In contrast, 4% of all male victims were slain by wives or girlfriends. *See id.* In 1991, 28% of all female victims were killed by a husband or boyfriend. *See* 1991 CRIME REPORTS, *supra* note 129, at 18. In contrast, 4% of all male victims were slain by wives or girlfriends. *See id.* In 1990, 30% of all female victims were killed by a husband or boyfriend. *See* 1990 CRIME REPORTS, *supra* note 129, at 13. In contrast, 4% of all male victims were slain by wives or girlfriends. *See id.*

¹³² *See* Taylor, *supra* note 43, at 1692.

¹³³ *See* Dressler, *supra* note 60, at 755.

homicidal violence.¹³⁴ Feminists highlight and, one in particular argues that the neutrality of the modern term “reasonable person” masks a profoundly gender-based and sex-specific standard. Catharine MacKinnon has warned of the danger inherent here: “When [the state] is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied.”¹³⁵

In short, since men frequently kill when provoked¹³⁶ and women — who are more frequently homicide victims than offenders¹³⁷ — rarely kill at all¹³⁸ and when they do, rarely upon provocation,¹³⁹ the provocation doctrine as defined, and the defense as applied, greatly burden women as a group while simultaneously not benefiting them. At the same time, men in fact do benefit from the provocation doctrine because it serves their interests by mitigating the predominantly male reaction of retaliation for affronts and other wrongs.¹⁴⁰

The wife who commits adultery with her lover presents the perfect doctrinal illustration of this sexist disparate impact, for an adulterous act is the classic example of adequate provocation, and paradigmatic situation for judging the excusability of the heat of passion reaction.¹⁴¹ Com-

¹³⁴ See Taylor, *supra* note 43, at 1681.

¹³⁵ *Id.* at 1690 (quoting Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 173, 196 (1983) (alteration in original)).

¹³⁶ See Dressler, *supra* note 60, at 755.

¹³⁷ In 1998, reported data indicate approximately 3 female victims for each female offender. See 1998 CRIME REPORTS, *supra* note 129, at 16. This statistic has remained consistent throughout the 1990s. See, e.g., 1997 CRIME REPORTS, *supra* note 129, at 18; 1996 CRIME REPORTS, *supra* note 129, at 16; 1995 CRIME REPORTS, *supra* note 129, at 16; 1994 CRIME REPORTS, *supra* note 129, at 16; 1993 CRIME REPORTS, *supra* note 129, at 16; 1992 CRIME REPORTS, *supra* note 129, at 16; 1991 CRIME REPORTS, *supra* note 129, at 16. The total number of female offenders was not reported for 1990.

¹³⁸ In 1998, reported data indicates that approximately 8% of all homicide offenders were female. See 1998 CRIME REPORTS, *supra* note 129, at 16. This percentage has remained fairly consistent throughout the 1990s. See *id.* In 1997, reported data indicates that approximately 7% of all homicide offenders were female. See 1997 CRIME REPORTS, *supra* note 129, at 18. In 1996, reported data indicates that approximately 7% of all homicide offenders were female. See 1996 CRIME REPORTS, *supra* note 129, at 16. In 1995, reported data indicates that approximately 6% of all homicide offenders were female. See 1995 CRIME REPORTS, *supra* note 129, at 16. In 1994, reported data indicates that approximately 7% of all homicide offenders were female. See 1994 CRIME REPORTS, *supra* note 129, at 16. In 1993, reported data indicates that approximately 7% of all homicide offenders were female. See 1993 CRIME REPORTS, *supra* note 129, at 16. In 1992, reported data indicates that approximately 7% of all homicide offenders were female. See 1992 CRIME REPORTS, *supra* note 129, at 16. In 1991, reported data indicates that approximately 7% of all homicide offenders were female. See 1991 CRIME REPORTS, *supra* note 129, at 16. The total number of offenders in 1990 was not reported. However, for single victim/single offender situations, reported data indicates that approximately 13% of these offenders were female. See 1990 CRIME REPORTS, *supra* note 129, at 11.

¹³⁹ See Dressler, *supra* note 60, at 755.

¹⁴⁰ See *id.* at 736.

¹⁴¹ See Taylor, *supra* note 43, at 1693, 1695 (“Jealousy is the rage of a man, and adultery is the highest invasion of property . . . a man cannot receive higher provocation.” (quoting *Regina v. Mawgridge*, Kel. I, 117 reprinted in 84 Eng. Rep. 1107, 1115 (1707))).

menting on this specific variant of prima facie adequate provocation, Professors LaFave and Scott write:

It is the law practically everywhere that a husband who discovers his wife in the act of committing adultery is reasonably provoked, so that when, in his passion, he intentionally kills either his wife or her lover (or both), his crime is voluntary manslaughter rather than murder. So too a wife *may be reasonably provoked* into a heat of passion upon finding her husband in the act of adultery with another woman.¹⁴²

As Professors LaFave and Scott correctly point out, the provocation defense is legally available to alleged spousal killers regardless of their respective sex-gender. However, this theoretical and practical potentiality misses the point for two reasons. First, as immediately mentioned above, women as a group rarely kill at all; and, when women do commit homicide, they do not do so when provoked. In reality, therefore, husbands are the predominant beneficiaries of the provocation doctrine. Second, and more importantly, as feminist commentators have argued, “the development and application of . . . [the provocation doctrine’s] requirements of adequate provocation and reasonable response stem from perceptions of male violence—often male rage directed toward female victims—and fail to reflect common patterns [and motivations] of female violence.”¹⁴³ For example, in a domestic abuse situation where a battered wife allegedly kills her abusive husband, the defendant-battered wife can not successfully invoke the provocation defense because her cumulative terror and fear does not qualify as an adequate passionate “human” weakness.¹⁴⁴ The reason is that rage, not fear or terror, is the only legally recognized and criminally excusable definition of passionate emotion.¹⁴⁵

Nonetheless, one could counter-argue that the disparate impact of the provocation defense is purely a function of the previously discussed historic and current empirical facts regarding homicide offenders and victims.¹⁴⁶ Specifically, one could point to large-scale statistical studies

¹⁴² See LAFAVE & SCOTT, *supra* note 59, § 7.10(b) at 656 (citing *Scroggs v. State*, 94 Ga. App. 28, 93 S.E.2d 583 (1956)); *see id.* at 656-57 n.36. (citing *Holmes v. Director of Public Prosecutions*, [1946] A.C. 588 for the proposition that the rule concerning voluntary manslaughter “must apply to either spouse alike, for we have left behind us the age when the wife’s subjection to her husband was regarded by law as the basis of the marital relation”).

¹⁴³ See Taylor, *supra* note 43, at 1682.

¹⁴⁴ See *id.* at 1730 (The definition of “when provocation is adequate is inevitably partial and political. It has also served the interests of men as a class, for example, by its readiness to partially excuse their killing of women when jealous rage is involved.”).

¹⁴⁵ See *id.* at 1711-12 (rage is the paradigmatic emotion for heat of passion).

¹⁴⁶ See *infra* text accompanying notes 141-144; *see also* Taylor, *supra* note 43, at 1680.

which show considerable proportionality in gender of perpetrators in spousal killings within the United States. These studies from the early 1990s reveal that “for every one hundred men accused of killing their wives, about seventy-five women are accused of killing their husbands.”¹⁴⁷ However, of relevance here, these studies do not account for the most significant point: whether female perpetrators who kill male intimates do so following provocation as often as male perpetrators who kill female intimates when provoked. In fact, women do not kill following provocation as often as men do. As Professor Denno highlights:

[C]ritics do not recognize a crucial factor—the gender differences in the motives for killing. A large proportion of women kill in self-defense, but men almost never do. Also, women rarely kill in response to the motives that appear to provoke men, such as a failed relationship, infidelity, or long periods of abuse and assaults.¹⁴⁸

Moreover, empiricism may explain annual statistics but it does not justify the unavoidable conclusion of disparate impact. This disparate impact results because, the provocation doctrine is defined and applied so that women as a group are often slain by men who qualify for the heat-of-passion defense but who can not in turn mitigate their own killing of men under the provocation doctrine.

2. *Sexual Orientation Perspectives*

Professor Dressler argues that because an unwanted sexual advance is a valid basis for justifiable indignation and hence adequate provocation,¹⁴⁹ male or female defendants of all sexual orientations may invoke the USA defense. However, regardless of who can *theoretically* invoke the defense, a systematic legal impact analysis reveals overwhelming disparities in benefits distributed and burdens carried between different sex-gender-sexual orientation group that affect the reality of who can successfully invoke the USA defense. Tables 1 through 4 depict the general disparities and offer an explanation.¹⁵⁰

¹⁴⁷ Denno, *supra* note 127, at 150 (citing generally MURRAY A. STRAUS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES* (1990); Margo I. Wilson & Martin Daly, *Who Kills Whom in Spouse Killings? On Exceptional Sex Ratio of Spousal Homicides in the United States*, 30 *CRIMINOLOGY* 189 (1992) (“This is an equivalency peculiar to the United States, and does not appear to be related to the availability of guns or increasing ‘women’s liberation.’”)).

¹⁴⁸ Denno, *supra* note 127, at 150 (citing Wilson & Daly, *supra* note 147, at 206-07 and noting that this conclusion is countered by other research based on self report evidence which has been criticized).

¹⁴⁹ See Dressler, *supra* note 60, at 754.e

¹⁵⁰ This tabular illustration is not encyclopedic in that it does not account for sex-sexuality identity groups beyond the four general categories depicted, i.e. bisexuals, transsexuals,

TABLE 1.

<i>Defense Invoked by Defendant</i>	<i>Male Heterosexual Advancer</i>	<i>Male Homosexual Advancer</i>	<i>Female Heterosexual Advancer</i>	<i>Female Homosexual Advancer</i>
Male Heterosexual Defendant Advancer	Provocative advance is situationally impossible.	Unwanted Sexual Advance Defense	Insufficient Provocation because prevailing cultural norms very likely to overrule USA Defense. ¹⁵¹	Provocative advance is situationally impossible.

TABLE 2.

<i>Defense Invoked by Defendant</i>	<i>Male Heterosexual Advancer</i>	<i>Male Homosexual Advancer</i>	<i>Female Heterosexual Advancer</i>	<i>Female Homosexual Advancer</i>
Male Homosexual Defendant Advancer	<i>Provocative advance is situationally impossible.</i>	Insufficient Provocation because victim is sexual object of choice. OR Unwanted Sexual Advance Defense. ¹⁵²	Insufficient Provocation because prevailing cultural norms very likely to overrule USA Defense. ¹⁵³	Provocative advance is situationally impossible.

transgender, neuter, inter-sexual, etc. Admittedly, this essentialism is problematic. Nonetheless, the four sex-sexuality groups represented are sufficient for this specific provocation defense examination because (1) for the heterosexual defendant, the nature of the victim's *act* will be dependent on the defendant's perception at the time of the sexual advance as homosexual or heterosexual not on the actual *identity* of the advancer as bisexual, transsexual, or transgender; and (2) for the non-heterosexual defendant, the nature of the victim's *act* as perceived by the defendant is secondary since the reasonable person standard used to determine adequate provocation is as a matter of course constituted as a male heterosexual. See *supra* Part II.C.2.

¹⁵¹ See Mison, *supra* note 51, at 134. ("This sexual advance defense could be used by a male or female who claims that he or she killed in reaction to the victim's sexual advance. As the law now stands, however, only a homosexual advance can mitigate murder to manslaughter."). Mison argues that a "defendant's reaction is partially justified [as adequate provocation] when the victim's behavior is wrongful in light of the 'prevailing cultural climate.'" *Id.* at 147. After all, Mison reminds readers that although "[t]he adequacy of provocation is 'shaped by social convention[.]' . . . what constitutes provocation in one generation 'may well be differently estimated in differing ages' — pulling a man's nose was considered sufficient provocation in the past but would not be sufficient today." *Id.* at 176.

¹⁵² See *supra* Part II.D. Defendant's homosexuality, as part of his subjective peculiarity, does not factor into the reasonable man standard. Accordingly, whether the homosexual advance is adequate provocation will be determined by the reasonable heterosexual man standard as a matter of course. Presumably, then, a homosexual defendant will be able to successfully invoke the USA defense. The perverse result is that male homosexuals as a group are victimized twice. First, as victims, they are killed by male heterosexual defendants—the defense's most common beneficiaries. Second, as defendants, they can only successfully invoke the defense if the sexual advance is deemed adequate provocation based upon the reasonable heterosexual man standard.

¹⁵³ Dominant cultural norms surrounding female sexuality coupled with the heterosexual reasonable man standard make it unlikely that a female's unwanted sexual advance upon a male homosexual will be seen as sufficient provocation. See *infra* text accompanying notes

TABLE 3.

<i>Defense Invoked by Defendant</i>	<i>Male Heterosexual Advancer</i>	<i>Male Homosexual Advancer</i>	<i>Female Heterosexual Advancer</i>	<i>Female Homosexual Advancer</i>
Female Heterosexual Defendant Advancee	Self-Defense ^{154e}	Provocative advance is situationally impossible.	Provocative advance is situationally impossible.	Women rarely kill—other women or at all. ^{155e}

TABLE 4.

<i>Defense Invoked by Defendant</i>	<i>Male Heterosexual Advancer</i>	<i>Male Homosexual Advancer</i>	<i>Female Heterosexual Advancer</i>	<i>Female Homosexual Advancer</i>
Female Homosexual Defendant Advancee	Self-Defense ^{156e}	Provocative advance is situationally impossible.	Provocative advance is situationally impossible.	Women rarely kill—other women or at all. ^{157e}

As the above tables make plain, overwhelming disparities exist between male heterosexuals and male homosexuals. Male heterosexuals, as a group, appear to be the primary if not paradigmatic beneficiaries of the USA defense. As offenders, they can invoke the USA defense with ease since its pedigree is linked to the NHA defense and both operate within the male-biased doctrine of provocation. As victims, male heterosexuals are not burdened with the possibility that their non-violent unwanted sexual advance may partially excuse their killers because, first, women rarely kill at all¹⁵⁸ even when provoked.¹⁵⁹ Second, male heterosexuals do not make sexual advances upon males (who do kill and often upon provocation) of any sexual orientation. It is a situational impossibility. Thus, under the USA defense, male heterosexuals become an insulated class accruing all the benefits attached with no burdens because they are protected by the defense's very definition.

164-172: *see also* Mison, *supra* note 51, at 160 (arguing that “no individual is lacking a sexual identity—whether heterosexual, homosexual, or bisexual [Thus,] when the reasonableness standard is blind to sexual orientation, the presumption of sexual identity is almost invariably heterosexual”); Taylor, *supra* note 43, at 1688 (“Courts in the United States . . . have declined to create a different standard of reasonableness for a male homosexual.”).

¹⁵⁴ *See* Dressler, *supra* note 60, at 743 (“[W]hen 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.”). This is so because a self-defense claim, if successful, results in acquittal, and because the male-biased provocation doctrine requires a finding of a homicidal rage that rarely befalls women.

¹⁵⁵ *See supra* note text accompanying note 138; *see also* Dressler, *supra* note 60, at 743 (“[W]omen rarely respond violently to unwanted sexual advances.”); Taylor, *supra* note 43, at 1680-81 (“Women rarely kill When women did kill, they frequently killed men”); *infra* text accompanying note 165.

¹⁵⁶ *See supra* text accompanying note 154.

¹⁵⁷ *See supra* text accompanying note 155.

¹⁵⁸ *See supra* text accompanying note 138.

¹⁵⁹ *See supra* text accompanying note 139.

On the other hand, male homosexuals as a group shoulder nearly all of the burdens of the USA defense with negligible benefits that accrue only through a truly perverse dynamic: They are the defense's primary if not paradigmatic casualties. As victims, male homosexuals are extremely burdened with a high likelihood that their non-violent unwanted sexual advance will partially excuse their male killers because: (1) the USA defense is premised upon the very notion that a sexual advance is adequate provocation; and (2) not only is homicide an overwhelmingly male act,¹⁶⁰ the provocation doctrine is wholly skewed to favor homicidal male rage "by mitigating the predominately male reaction of retaliating for affronts and other 'injustices.'"¹⁶¹

As offenders, male homosexual defendants are equally burdened in that: (1) as a group, they are unable to assert the USA defense against its primary beneficiaries — male heterosexuals — because of the situational impossibility of a male heterosexual sexual advance toward other males; and (2) in instances where insufficient provocation is not found outright, success of the USA defense appears largely dependent upon whether the jury finds the victim's homosexual advance to be adequate provocation based upon the reasonable heterosexual man standard not a reasonable homosexual male standard¹⁶² — the actual identity group of these defendants. Therefore, the perverse dynamic is that, whether as victims or defendants, under the USA defense, male homosexuals are targeted, acted upon, and subverted by American society's censure of homosexuality.¹⁶³ The nature of his involvement in violence as a victim, as well as his fractured identity as a defendant, highlights his status as an illegitimate social actor and the object of subordination.

Although women can theoretically invoke the USA defense, as a group they are unexceptional and miniscule factors within the defense's disparate impact calculus. On the one hand, as recipients of unwanted sexual advances, the fact remains that women, regardless of their sexual orientation rarely, if ever, commit homicide.¹⁶⁴ But when they do, rarely

¹⁶⁰ Taylor, *supra* note 43, at 1679-80 ("In 1984, eighty-seven percent of those arrested in the United States for homicide and seventy-five percent of victims were male. Male victims were almost always killed by other males, and when men killed, three times out of four they killed other men."); *see supra* text accompanying note 129.

¹⁶¹ Dressler, *supra* note 60, at 736.

¹⁶² *See supra* text accompanying notes 86-88.

¹⁶³ *Id.*; *see also supra* Part I.A.

¹⁶⁴ *See supra* text accompanying note 155.

do they kill other women¹⁶⁵ out of provoked rage.¹⁶⁶ In the rare instances when they do kill, female defendants are very likely to have killed a male¹⁶⁷ and to invoke the justification of self-defense rather than the provocation defense.¹⁶⁸ On the other hand, as the sexual advancer, a woman's non-violent unwanted sexual advance seems very unlikely to elicit a violent homicidal response from advancees who are either women or men of any sexual orientation because cultural mores and social norms appear determinative. Rooted in society's longstanding cultural history, moral normativity prescribes that women should be "good girls" who are sexually restrained and modest¹⁶⁹—more specifically, that women

¹⁶⁵ For single victim/single offender situations in 1998, reported data indicate that 1 out of every 10 female victims was killed by another female. See 1998 CRIME REPORTS, *supra* note 129, at 17. This single victim/single offender statistic has remained consistent throughout the 1990s. See, e.g., 1997 CRIME REPORTS, *supra* note 129, at 16; 1996 CRIME REPORTS, *supra* note 129, at 14; 1995 CRIME REPORTS, *supra* note 129, at 14; 1994 CRIME REPORTS, *supra* note 129, at 14; 1993 CRIME REPORTS, *supra* note 129, at 17; 1992 CRIME REPORTS, *supra* note 129, at 17; 1991 CRIME REPORTS, *supra* note 129, at 17; 1990 CRIME REPORTS, *supra* note 129, at 13.

¹⁶⁶ See *supra* text accompanying notes 138 and 139.

¹⁶⁷ See *supra* text accompanying note 155.e

¹⁶⁸ See *supra* text accompanying note 154.e

¹⁶⁹ Today, decades after the sexual revolution and the women's movement of the late 1960s to 1970s, women remain reluctant to have uncommitted premarital intercourse—recreational sex—because traditional theological and patriarchal notions that were highly powerful during the Victorian Age (circa 1830-1890) still strongly resonate. IRA L. REISS, AN END TO SHAME: SHAPING OUR NEXT SEXUAL REVOLUTION 94-95 (1990). Women must avoid the appearance of being too cavalier about sex because they are still expected to be responsible for controlling sexual expression; there are still lingering hopes that brides be virgins, or at least expectations they not be too sexually experienced. *Id.* Indeed, the empirical study SEX AND MORALITY IN THE U.S., conducted under the auspices of The Kinsey Institute for Research in Sex, Gender, and Reproduction, underscores the cultural continuity between the present and the traditionalism and conservative sexual morality which existed prior to the twentieth-century. See ALBERT D. KLASSEN ET AL., SEX AND MORALITY IN THE U.S.: AN EMPIRICAL ENQUIRY UNDER THE AUSPICES OF THE KINSEY INSTITUTE 83 (Hubert J. O'Gorman ed., 1989). The study states, "Cultural continuity may not be as exciting a notion as sexual revolution, but it certainly seems to be a more accurate picture of events. We simply do not find evidence that in 1970 recent societal events had brought about a sweeping liberalization of public moralities." *Id.* As a traditional influence and structure of meaning, the Judeo-Christian religion remains the most powerful and continues to provide the social context for sexuality for most Americans. *Id.* at 268. Further, the role of gender is a key factor between males and females in differential socialization and exposure to liberalizing influences: "[B]eing female is related to less exposure to, or being shielded from, sexual experiences and environments that challenge adherence to conservative sexual norms." *Id.* at 107.

Historically, these modern conservative sexual norms may be traced to the Victorian Age. See STEVEN SEIDMAN, ROMANTIC LONGINGS: LOVE IN AMERICA 1830-1980, 58-59 (1991). During this time, America's cultural landscape was dominated by the nineteenth-century bourgeois consciousness. See *id.* The bourgeois or middle class, guided by Evangelical Protestantism, constructed the virtue of female prudence, self-control, and chastity. *Id.* at 58. This evangelical conception of femininity elevated women as essentially spiritual and moral beings. See *id.* However, it also simultaneously disavowed the potency of women's sexual instinct and erotic feelings: "The female sexual instinct was thought of as basically spiritual in its motivation Women's sexual desires are 'very moderate compared to those of the male'

should serve as passive sexual prey¹⁷⁰ This dominant gender construct creates a powerful dichotomy that stereotypically labels the female advancer as a “bad girl” who is merely sexually aggressive and promiscuous¹⁷¹ and not a sexual predator. In turn, the typical and expected reaction from the advancee in response to a sexual advance from a female is not homicidal rage but is rather neutral in nature or eroticized as a “turn on.”¹⁷² Moreover, in the rare cases where the advancee is provoked into a homicidal rage by a female victim's sexual advance, these same prevailing cultural norms would likely lead a jury to a finding of insufficient provocation, because a murderous reaction to a woman's sexual overtures will most likely be viewed as an irrational and idiosyncratic response, not something society comprehends to be an impetus for the loss of normal self-control. Therefore, though women do not really benefit from the USA defense as defendants, they are not burdened by it as victims either.

In summary, similar to the disparate impact between males and females (sex-gender), the provocation doctrine's disparate impact between sexual orientation groups in terms of benefits accrued by heterosexuals

and are motivated by the need ‘to please him [i.e. her husband] and the ‘desire for maternity.’” *Id.* at 24 (quoting WILLIAM ACTON, *THE FUNCTIONS AND DISORDERS OF THE REPRODUCTIVE ORGANS* 133 (3rd ed. 1865)).

Most importantly, the strong social resonance of the traditionalist sexual morality which still permeates American society is attributable to the sizable populace that not only hold conservative sexual norms, but also believe in their Judeo-Christian underpinnings. See KLASSEN ET. AL, *supra* at 275. For example, early Christian theology taught the “virtues of celibacy and the condemnation of the flesh, with sex being seen as carnal, sinful, and inferior to all things of the spirit. Thus woman is inherently evil insofar as she lures man toward the sexual and away from God. Correspondingly, the noblest achievement for women is virginity.” *Id.* at 268-69.a

¹⁷⁰ This concept of women as prey can also be traced to the Victorian Age's instructions on appropriate female comportment. The bipolar gender order between active males and passive females was thought to require that men assumed the controlling role while women prepared to receive them: “We would say . . . that the female should lie upon her back All other positions are unnatural and unhealthy.” SEIDMAN, *supra* note 169 at 25 (1991) (quoting J. WILLIAM ASHTON, *THE BOOK OF NATURE* 47 (1870)).

¹⁷¹ As is popularly known, the bad girl stereotype derives from its diametric opposite, “good girl” stereotype. Sociology professor Steven Seidman writes of the centrality of the good girl concept in middle-class female life: “A good girl exemplifies feminine virtues. She is pleasant, considerate and modest. A good girl controls and conceals her sexual interests. She restricts sexual expression to a sign of love. *Good girls are not sexually assertive or lustful*” *Id.* at 153-54 (emphasis added).

¹⁷² *Id.* at 128 (quoting *THE JOY OF SEX*, a very popular and widely available mainstream sex manual that recommends exploring sexually aggressive feelings). As Professor Seidman underscores, “eroticizing aggression and games of power pushes sexuality deeper into the realm of fantasy. These manuals encourage the reader not to resist since the sexual sphere represents an ideal setting for probing tabooed wishes and fears.” *Id.* Likewise, the woman's sexual advance may signal a harmless game of power and be experienced as sexually arousing to the male advancee since her unwanted sexual advance represents the transgression of the “good girl” social norm and an open invitation to explore the female sexual aggression tabooed by society.

and burdens shouldered by homosexuals is readily apparent and, without question, not due to empirical factors such as who kills whom more often. However, the dynamic causing the sexual orientation disparate impact is not the same as the one creating the sex-gender disparate impact. The sex-gender disparate impact, as highlighted by the dominant feminist critique, is attributable to a *definition differential* within the defense's formulation. That is, females are often killed by males in the heat of passion but female homicide offenders, many motivated by passions of cumulative terror and fear, can not qualify as having "lost normal self-control" because the provocation doctrine's paradigmatic passion is homicidal rage and anger. The disparate impact between (male) heterosexuals and (male) homosexuals is caused by the next logical extreme of the sex-gender definition differential—a *definitional impossibility*. Male heterosexuals accrue the greatest benefits as defendants but carry no burdens of victimization because, as defined, their unwanted advance is considered completely incapable of inciting indignation and homicidal rage in another "reasonable" male or female.¹⁷³ Conversely, male homosexuals accrue negligible benefits from the USA defense while shouldering the biggest burdens as the defense's paradigmatic victims because, as currently defined, the USA defense recognizes the unwanted homosexual advance as the epitome of adequate provocation for inciting homicidal rage.

B. CRITIQUE: INTERLOCKING PERSPECTIVES REVEAL A SPECIFICITY OF PRIVILEGE

Interlocking the disparate impact critiques from both the feminist and sexual orientation perspectives provides a fuller picture of the overall impact of the provocation doctrine as it pertains to sex, gender, and sexuality. Focusing on the convergence of the definition differential (with its negative impact on females) and the definitional impossibility (with its negative impact on homosexuals) reveals that the provocation doctrine's purpose and effect is to maintain male heterosexuality as the most privileged sex, gender, and sexuality. The doctrine is not just male-oriented or just heterosexist as evinced above. The provocation defense is sexist and heterosexist. It is male heterosexist.

Provocation privileges male heterosexuality by partially excusing the male defendant's dominance of female sexuality.¹⁷⁴ The classic ex-

¹⁷³ This is not to say that a male heterosexual advance does not instigate strong emotions. To be sure, female defendants do invoke self-defense claims when prosecuted for killing a male advancer. However, the dominant emotions are fear and terror upon the reasonable apprehension of imminent death or serious bodily harm.

¹⁷⁴ JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* 192 (1992) ("One must now ask whether the doctrine of provocation, under the cover of an alleged compassion for human infirmity, simply reinforces the conditions in which men are perceived and perceive them-

ample of this is the adulterous wife whose infidelity “provokes” the cuckolded husband’s homicidal rage. As the logical complement, provocation also understands when the male defendant’s disgust of (male) homosexuality¹⁷⁵ motivates his homicidal rage to kill the “provocateur” of a non-violent sexual advance. To be sure, provocation has always privileged *male heterosexuals*. If not, then the partially excused killing by a husband upon discovering his wife’s indiscretion would not be the paradigm for adequate provocation. Here, the husband’s sex and gender appears to be the most privileged identity axes, but not the only ones because he is not without a sexual orientation. His heterosexuality is just not emphasized because its privileged status is not readily apparent since his victim’s—be it his wife or her lover—sexual orientation is also heterosexual. This does not prove, however, that heterosexuality is an unprivileged identity axis within provocation. But for heterosexuality as the overarching, dominant force in intimate relations between men and women, the paradigmatic provocation of an adulterous wife would be non-existent. Its premise of a husband-wife relationship would also be non-existent. Heterosexuality’s elision and hence power as a privileged identity axis within the provocation doctrine derives precisely from its phenomenological ability to be experienced and understood by heterosexual persons, e.g., the ordinary man on the jury, as an invisible, commonsensical worldview – neither underprivileged nor privileged but presumptively non-privileged.

Consequently, this experiential invisibility makes it harder to leverage arguments asserting that the provocation doctrine traditionally privileged heterosexuality, because it is not viewed as privileged when a husband kills his wife or her lover over her sexuality, even though heterosexuality is the basis for these intimate relationships. Most importantly, this phenomenological invisibility has reinforced or perhaps even helped to create a conceptual and analytical blind-spot within the debate surrounding the provocation doctrine as it pertains to sex, gender, and sexu-

selves as natural aggressors, and in particular *women’s* natural aggressors. Unfortunately, the answer is yes.”).

⁷⁵ See Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1637 (1998) (reviewing WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997)). The article states:

Whereas anger and fear react to transgressions against one’s own person, disgust takes aim at a more diffuse object—namely, the threat that open deviance poses to the status of those who faithfully abide by dominant norms. Merely rebuffing the odd homosexual advance isn’t enough to protect the homophobe from that sort of threat: rather he must undertake the “much more intensive and problematic labor” of “cleansing and purifying” the normative environs. Mitigating the punishment of those who shoulder the burden enables legal decisionmakers to show that they, too, are committed to the norms that underwrite status in homophobic communities.

Id.

ality. This blind-spot is obvious in the final sentence of Professor Dressler's response to Mison wherein Dressler declares, "thus, if critics wish to attack the provocation defense, they should do it from a feminist, not a sexual orientation, perspective."¹⁷⁶ The statement begs the question: why not both? In short, the conceptual blind spot within the traditional critiques of the provocation doctrine treats the sex-gender and sexual orientation analytical perspectives as tangentially relevant to each other, as seemingly mutually exclusive and/or just not inextricably interconnected. This Note puts forward the idea that an interlocked and connected examination from *both* the sex-gender and sexual orientation perspectives provides opportunities for a fuller and more complex analysis of the provocation doctrine.

C. A PROPOSAL

The point of interface between sex, gender, and sexual orientation perspectives provides the location for seeing and reasoning from a multidimensional analytic viewpoint. This viewpoint heightens analysis and better interrogates the provocation defense because all individuals, defendants and victims alike, possess one unique personhood, defined by the conflation of these axiomatic identifying axes. To effectuate this proposed interlocking analysis of multiple perspectives, future academic investigation and critique must venture beyond the traditional analytical technique of myopically focusing only on dissimilarities between one class of victims and their respective offenders. For example, this occurs in the focus on sex-gender differences between victims and defendants by the feminist perspective, and the focus on human sexuality differences between the same actor types by the sexual orientation perspective. These individual perspectives no doubt remain very important. However, each perspective alone is not as powerful as it would be enjoined with the other because the whole appears to be greater than the sum of its parts.

This Note advocates a critical examination by future inquiring minds, through incorporation of a viewpoint that interlocks sex, gender, and sexual orientation perspectives. This interlocked perspective comparatively examines (1) intragroup identity differences between various classes of victims and their respective offenders; (2) intergroup identity differences between various victim classes themselves; and most importantly (3) intergroup identity similarities between defendants who kill various victim classes or more precisely *any* victim class and regardless can always avail themselves of society's understanding in the form of a par-

¹⁷⁶ Dressler, *supra* note 60, at 763.

tial excusal.¹⁷⁷ Without question, male heterosexuals are privileged by the provocation doctrine over and above any other sex-gender-sexuality group because their passions and “understandable” loss of self-control are deemed to merit the law’s compassion.

This Note’s proposal is not drastic in that it does not declare the provocation doctrine to be a wholesale failure or seek the complete abolition of this mitigating defense. Abolition is not advocated because most heat-of-passion killings of males victims by male offenders do not revolve around the participants sex, gender, and or sexual orientation. As such, these killings do not result in a disparate impact along differences that are most likely be influenced by the larger sociocultural phenomena of sexism and heterosexism. As important, these provocation killings do not effectuate a disparate impact that in turn compounds such influence by further perpetuating sexism and heterosexism.

This modest proposal is narrowly tailored to address the provocation defense as it pertains to sexual orientation and sex-gender differences. It only counters the two dynamics that currently operate within the doctrine to effectuate its disparate impact upon historically marginalized groups—that is, the definitional impossibility adversely affecting homosexuals and the definition differential adversely affecting females. The proposal is a two-prong approach calling for (1) a *counterfactual inquiry* to correct the disparate impact that occurs precisely because the definitional impossibility ensures male heterosexuals will not be USA victims of male homosexual offenders, and (2) an *expanded redefinition of passionate emotion*¹⁷⁸ to correct the disparate impact that occurs because the definition differential prevents women who kill male victims from invoking the provocation defense solely because they were “provoked” by passionate emotions other than the male-defined homicidal rage.

1.e *Counterfactual Inquiry*

The first prong of counterfactual inquiry functions as a delimiting mechanism to determine as a matter of law when the defense is unavailable to a defendant. For this inquiry, the respective roles of the victim and offender are transposed or reversed so that, in this counterfactual world, the actual victim (counterfactual offender) allegedly killed the actual of-

¹⁷⁷ See Nourse, *supra* note 55, at 1393 (“The important point to see here is that the provoked killer’s claim for our compassion is not simply a claim for sympathy; it is claim of authority and a demand for our concurrence.”).

¹⁷⁸ See generally Taylor, *supra* note 43 (proposing a broadening of adequate provocation to include long-term physical violence and an expanded definition of heat-of-passion to include cumulative fear and terror, not only the traditional anger and rage, so as to include women’s most frequent motivation for killing and subject them to same level of accountability and protection as men when they are provoked beyond reason).

fender-defendant (counterfactual victim). With all factors and circumstances held constant (i.e., the provocative conduct and the sex-gender, sexual orientation, and race of participants) except the aforementioned role reversal, the inquiry would assess whether the actual victim (counterfactual offender) in this hypothetical world would be able to invoke the USA defense for his or her killing of the counterfactual victim (actual accused offender-defendant); if so, then the actual accused is not legally precluded from invoking the same defense.

The actual offender-defendant's legal ability to invoke the provocation defense would thus hinge on whether the actual victim would be able to do the same if the roles of victim and accused offender were reversed. For example, the male defendant accused of killing a female victim would be able to at least invoke the provocation defense in cases where the female victim would also have been able to invoke the defense if she had killed the male defendant following his unwanted sexual advance. Whether the jury factually finds and partially excuses his homicidal reaction to her unwanted sexual advance as that of an ordinary person is a totally different matter not relevant to the threshold question of whether the defendant may utilize the USA defense. On the other hand, if the actual victim as the counterfactual offender would be unable to invoke the provocation defense due to a situational impossibility, then the actual accused offender-defendant is denied the provocation defense as a matter of law when not to do so would reinforce discrimination based upon identity bias(es) against historically marginalized groups. For example, the actual heterosexual defendant is not allowed the provocation defense because the actual homosexual victim (as the counterfactual offender) is never able to invoke the defense precisely because, in the counterfactual world, the counterfactual provocative conduct – an unwanted sexual advance by the heterosexual toward a same-sex person – is, by definition, impossible.

Only in very infrequent instances would the actual defendant be denied the provocation defense as a matter of law because the requirement of a situational impossibility in the counterfactual world—that is, where the provocative event is impossible in reverse—would be rarely met. The situational impossibility requirement is a high standard to attain because its satisfaction during a counterfactual inquiry would not be completely dependent on the respective legal statuses of the individuals involved. For example, suppose the husband-defendant kills his wife's paramour in a jurisdiction where “the rule of mitigation does not . . . extend beyond the marital relationship so as to include engaged persons, divorced couples, and unmarried lovers.”¹⁷⁹ The husband-defendant

¹⁷⁹ LAFAYE & SCOTT, *supra* note 59, § 7.40(b) at 657.

would not be denied the defense simply because, in a counterfactual world, the victim-boyfriend as the counterfactual offender would not be able to invoke the defense due to a jurisdiction's denial of the defense to unmarried persons – in short, an impossibility due to a legal bar. By only taking into account whether the occurrence of acts and actions are physically possible, the situational impossibility requirement involves a higher level of abstraction and requires that a higher threshold be met than just the occurrence of mere legal impossibilities which may arise due to the law's use of many different categories and classifications.

Even if a counterfactual situational impossibility were detected, that in and of itself would not be enough to foreclose the actual defendant from invoking the defense. The situational impossibility is only one part of the analysis. The second part makes the USA defense legally unavailable only where failing to do so reinforces discrimination based upon identity bias(es) against historically marginalized groups. This ensures that the denial of the defense would not be over-inclusive, but would only occur in specific circumstances where a counterfactual situational impossibility is attributable to invidious group classifications historically used to discriminate.

2.e Re-defining "Heat of Passion"

The second prong of the proposal functions as an inclusion mechanism by doctrinally expanding the traditional legal definition of "heat-of-passion" beyond just homicidal rage. The expanded redefinition calls for the inclusion of other reactive passions that most often motivate women to kill, such as cumulative fear and terror,¹⁸⁰ as fully as it includes the aggressive passion of homicidal rage. Such an expansion would recognize the sex-gender differences between homicides by men, homicides by women, and inter-sexual homicides between intimates. Studies and informed analyses of homicides by women and inter-sexual homicides between intimates suggest that men and women very often kill each other under different circumstances and for very different motives.¹⁸¹ Insofar as the law continues to ignore this sex-gender disparity by not adopting an expanded definition of passionate emotion, the provocation doctrine will continue to fail in its stated goal of providing compassion for ordinary "human" weaknesses because the present defense does not come close to forgiving, much less understanding, the full spectrum of human behavior—a spectrum that includes not just male heterosexuals but both men and women of any sexual orientation.

¹⁸⁰ See Taylor, *supra* note 43, at 1682.

¹⁸¹ See *id.* at 1683; Denno, *supra* note 127, at 150.

V. CONCLUSION

For two millennia, homosexual acts and/or identity have been the target of utmost censure. Although the Judeo-Christian tradition first demonized homosexual activity while, thereafter, the medical-scientific discourse abnormalized homosexuality, it would be naive to assume that the law, be it ecclesiastical or secular, has not played its part in this project of censure through, for example, the criminalization of consensual same-sex sodomy, non-recognition of same-sex marriage, the non-violent homosexual advance defense, and the like. After all, the law is:

[A] language, a form of discourse, and a system through which meanings are reflected and constructed and cultural practices organized. Law is a language of power, a particularly authoritative discourse. Law can pronounce definitively what something is or is not and how a situation or event is to be understood. The concepts, categories, and terms that law uses, and the reasoning structure by which it expresses itself, organizes its practice, and constructs its meanings, has a particularly potent ability to shape popular and authoritative understandings of situations It reinforces certain worldviews and understandings of events.¹⁸²

Yet, some jurists continue to overlook the law's constitutive power and ability to ratify an individual's homophobic vigilantism in the misguided belief that the law's "ever present neutrality" and "unsituated objectivity" is somehow above and beyond the influence of much broader social phenomena structured into the very nature of dominant familial, economic, and political relationships—here, heterosexism and sexism. Negative ramifications from such blindness are evident in the provocation doctrine as it pertains to sex, gender, and sexual orientation.

With all due respect to Professor Dressler, although homophobia may not be the motivating factor behind the recognition of the non-violent unwanted (homo)sexual advance defense within the provocation doctrine, that is beside the point as homophobia is not necessary. Regardless of whether the presence of the USA defense within the family of acceptable criminal defenses evolved solely out of homophobia, the fact is that two millennia of heterosexism and the self-perpetuating male heterosexual privilege which the USA defense itself provokes and reinforces is more than sufficient in our new millennium.

Analysis reveals that the provocation doctrine's formulation and operation produces an unconscionable disparate legal impact upon homo-

¹⁸² Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 888 (1989).

sexuals and women as discrete groups when compared to their most frequent assailants — male heterosexuals. The examined literature highlights the doctrine's desire to maintain male heterosexuality as the most privileged of all. In response, this Note advocates a narrowly tailored two-prong proposal of a counterfactual inquiry and an expanded redefinition of passionate emotion. Unless the provocation doctrine is reformed, the disparate legal impact of nil benefits/all burdens for non-male heterosexual groups will remain the natural, logical complement required to effectuate and reinforce the all benefits/nil burdens privilege of male heterosexuality.

Although legally neutral on its face, the *de facto* disparate impact of the provocation doctrine highlights the criminal law's unwitting and unseemly involvement in, sanctioning of, and, to a certain degree, legitimization of sexism against women and heterosexism against homosexuals. From a meta-sociological perspective, the provocation doctrine can be understood as just one manifestation of this society's inequitable structure of power and its universe of hierarchical privileges. Viewed in the context of its legal ramifications and the reality of larger socio-cultural phenomena, the provocation doctrine's disparate impact upon historically marginalized groups is unjustifiable and can not be reconciled with the law's egalitarian aspirations or revered guiding principles of fairness and justice because the law makes these principles unattainable by definition.

