

Comments

A Matter of Law: The Non-Violent Homosexual Advance Defense Is Insufficient Evidence of Provocation

By ALEXIS KENT*

Broward Circuit Judge Daniel Futch, in a case where a gay man was beaten to death outside a gay bar: "That's a crime now, to beat up a homosexual?" The prosecutor: "Yes, sir. And it's a crime to kill them." Judge Futch: "Times really have changed."¹

Introduction

AN ARCHAIC THEORY exists in the law today that recognizes a non-violent homosexual advance as legally sufficient provocation to reduce murder to manslaughter.² Consider the following: a competitive kickboxer in his twenties, a known homophobe, accompanied a man in his seventies to his hotel room, on the older man's promise to help him find a job.³ The younger man knew the older man to be a homosexual from earlier comments.⁴ Police later found the older man savagely murdered with his wallet missing.⁵ When caught, the younger man claimed the older man, described by others as gentle and dod-

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1. Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 163 (1992).

2. *See id.* at 134.

3. *People v. Cain*, No. D036023, 2002 WL 1767583, at *3. (Cal. Ct. App. July 31, 2002).

4. *Id.*

5. *Id.* at *1-2.

dering, sexually attacked him.⁶ At trial, he raised a provocation defense testifying that he had blacked out and had attacked the old man out of fear.⁷ The judge gave the manslaughter instruction to the jury on this evidence.⁸

In all likelihood, the defendant went to the old man's room to rob him. While it is possible the gentle old man made a pass at the defendant, it is highly unlikely the pass was violent in nature. Most acts accepted as legally adequate provocation require violence by the victim that provokes the killer.⁹ Yet, California courts have consistently given the manslaughter instruction if the murderer was "provoked" by a non-violent homosexual advance.¹⁰ This Comment argues a non-violent sexual advance of one man upon another man by definition involves no violence and should not be considered an act legally sufficient to provoke the reasonable man to murder. Nor should the manslaughter instruction be sent to the jury on such flimsy and unlikely "evidence" of violence. Courts should require a violent act on the part of the victim before giving a jury the manslaughter instruction and should abolish the non-violent homosexual advance defense as legally sufficient provocation. Part I outlines provocation in California. Part II discusses the evolution of the non-violent homosexual advance defense, and Part III follows with a discussion of cases in California that showcases the way the defense has been used. Part IV analyzes whether murder is a "reasonable" reaction to a non-violent homosexual advance. This Comment concludes by offering an answer to this problem of institutionalized homophobia.

I. Provocation in California

Voluntary manslaughter is an intentional killing that lacks malice¹¹ because the killing occurred under circumstances of sufficient provocation such as to rouse a reasonable person to a fit of passion.¹²

6. *Id.* at *3.

7. *Id.*

8. *Id.* at *4.

9. *See infra* note 30 and accompanying text. California cases have found mere words or gestures can rise to the level of adequate provocation. This author strongly disagrees and advocates that only a violent act by the victim should be sufficient to warrant a manslaughter instruction by the judge.

10. *See infra* notes 29, 31.

11. Malice can either be express or implied. CAL. PENAL CODE § 188 (West 2008). "It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." *Id.*

12. *People v. Breveman*, 960 P.2d 1094, 1106 (Cal. 1998).

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The provoking act “must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.”¹³ If the provocation was such that it would cause “an ordinary person of average disposition to act rashly or without due deliberation and reflection,” then the killing will be reduced from murder to manslaughter.¹⁴ The defendant must *actually* kill in the heat of passion,¹⁵ otherwise, “if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter.”¹⁶

The test for sufficient provocation consists of four parts: (1) legally sufficient provocation existed; (2) a reasonable person in similar circumstances would have been tempted to react as the defendant did; (3) the defendant acted due to this passion; and (4) the defendant did not have time to cool off.¹⁷ “While no specific type of provocation is required, slight or remote provocation is not sufficient.”¹⁸

California has not enumerated by statute the acts that constitute sufficient provocation.¹⁹ However, California courts have historically limited legally adequate provocation to select categories: (1) a violent assault or battery by the victim; (2) mutual combat; (3) murder of a family member; (4) illegal arrest; and (5) a wife’s adultery.²⁰ These categories are remnants of the English common law and yet, today,

13. CALIFORNIA JURY INSTRUCTIONS: CRIMINAL 8.42 (2009) [hereinafter CALJIC].

14. *People v. Manriquez*, 123 P.3d 614, 640 (Cal. 2005); *see* CALJIC 8.42 (2009).

15. *Manriquez*, 123 P.3d at 640. Hence, it is possible for the defendant to have *subjectively* acted under the color of passion, but, because his reaction to the provoking act was not one a reasonable person in similar circumstances would have had, he has not met the *objective* component of the heat of passion requirement. *See* CAL. PENAL CODE § 192 (West 2008).

16. *People v. Wickersham*, 650 P.2d 311, 321 (Cal. 1982).

17. *Id.*

18. CALIFORNIA CRIMINAL JURY INSTRUCTIONS 603 (2008).

19. *People v. Ashland*, 128 P. 798, 802 (Cal. Ct. App. 1912) (“[N]o particular cause for such heat of passion is expressly prescribed by our law.”).

20. *People v. Berry*, 556 P.2d 777 (Cal. 1976) (finding a wife’s adultery was adequate to provoke killing); *People v. Elmore*, 138 P. 989 (Cal. 1914) (finding a violent assault by the victim as adequate provocation); *People v. Freel*, 48 Cal. 436 (1874) (finding a quarrel was sufficient provocation); *People v. Brooks*, 230 Cal. Rptr. 86 (Ct. App. 1986) (finding murder of a family member as legally sufficient provocation); *see* I B.E. WITKIN ET AL., CALIFORNIA CRIMINAL LAW, DEFENSES, § 214 (3d ed. Supp. 2008) (stating an illegal arrest is no longer facially sufficient).

they are still considered legally adequate provocation to give a jury the manslaughter instruction.²¹

The first four of the five categories require violence or the threat of violence to satisfy the sufficiency prong of the provocation test.²² The inclusion of the last category—a wife’s adultery (and a non-violent homosexual advance)—rests on society’s perception of the immorality and wrongness of the victim’s “provoking” act.²³ This approach partially blames the victim for his or her own death²⁴ despite the *total lack of violence* on the part of the victim.²⁵

The earliest California Supreme Court cases indicated that where the provocation defense is used, violence must be an element of the provocative act.²⁶ In *People v. Freel*,²⁷ the court held that “when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent and will reduce the offense to manslaughter.”²⁸ The court’s language is clear—violence is a necessary element of the provocative act.²⁹ Some violence or, at the very least, some threat of vio-

21. Christina Pei-Lin Chen, *Provocation’s Privileged Desire: The Provocation Doctrine, “Homosexual Panic,” and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL’Y 195, 207 (2000).

22. A. J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 293 (1976).

23. See *id.* at 294.

24. Justification theory denies the murderer’s reactions were wrong and views “the victim’s wrongful conduct [as the cause of] the defendant’s violent outburst.” Mison, *supra* note 1, at 146. “A defendant’s reaction is partially justified when the victim’s behavior is wrongful in light of the ‘prevailing cultural climate.’ Likewise, only if the provoking act would make the ‘ordinary law-abiding person’ angry will a defendant’s behavior be partially excused.” *Id.* at 147. This analysis casts an often harmless come-on as wrong and unacceptable, and that position should be unacceptable as a matter of law. See *infra* Part IV for an analysis of the excuse versus justification argument.

25. A wife’s adultery (i.e., the oldest form of provocation) as legally adequate provocation has been highly criticized. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71 (1992); Laurie J. Taylor, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1693–97 (1986). See generally Emily L. Miller, *(Wo)Manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665 (2001) (This author believes discovery of adultery should not be considered provocation sufficient to mitigate murder to manslaughter. That discussion, however, is outside the scope of this Comment.).

26. See *People v. Freel*, 48 Cal. 436, 437 (1874).

27. *Id.*

28. *Id.* (emphasis added).

29. However, near the time of *Freel*, courts allowed mitigation of murder charges to manslaughter upon a finding of adultery involving no violence. *People v. Logan*, 164 P. 1121, 1123 (Cal. 1917). “Thus the sight of a wife in adultery, or even a reasonable belief that [the defendant’s] wife was committing an act of adultery, although the belief may be

lence should be required before society sanctions the violent homophobic reaction of the defendant and reduces a murder charge to a manslaughter conviction. However, some California courts have found words or gestures by themselves, or coupled with other circumstances, may be sufficient to provoke a reasonable person to kill.³⁰

II. The Evolution of the Non-Violent Homosexual Advance Defense

In California, a non-violent homosexual advance on a straight man, whether it is real, perceived, or concocted, has been considered evidence of provocation sufficient to send the manslaughter instruction to the jury.³¹ A judge will instruct the jury that if it finds the defendant reacted in a way that the ordinary reasonable man would have acted under the same circumstances, it cannot convict him of murder. This is referred to as the non-violent homosexual advance defense (“NHA”).³² The defense has been argued in cases where it is unclear whether the trial court instructed the jury on voluntary manslaughter.³³ The provocation doctrine is wholly derived from the common law in California; the legislature has yet to act on the subject.³⁴

unfounded, has been held sufficient evidence to go to the jury as creating ‘the heat of passion’ in the mind of the defendant.” *Id.*

30. See *People v. Berry*, 556 P.2d 777, 779–81 (Cal. 1976) (reversing murder conviction for failure to instruct on voluntary manslaughter where defendant was taunted by his wife with her infidelity for two straight weeks directly after marriage; alternatively she would demand sex, after which she would again swear she was in love with another man and would leave defendant). *But see* *People v. Lucas*, 64 Cal. Rptr. 2d 282, 293 (Ct. App. 1997) (denying the defense a provocation instruction where defendant shot occupants of car next to him on the highway for giving him dirty looks and yelling out names). This author believes that when provocation is the proffered defense, the defendant must prove the victim violently provoked his own demise. However, a broad discussion of the provocation defense is beyond the scope of this Comment. For a discussion of the doctrine, see Joshua Dressler, *Criminal Law: Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982), and Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959 (2002).

31. See *People v. Lang*, 782 P.2d 627, 642 (Cal. 1989); *People v. Cornett*, 212 Cal. Rptr. 24, 25–26 (Ct. App. 1985) (defendant charged with murder but pled guilty to voluntary manslaughter); *People v. Long*, 113 Cal. Rptr. 530, 532–34 (Ct. App. 1974); *People v. Cain*, No. D036023, 2002 WL 1767583 (Cal. Ct. App. July 31, 2002); *People v. Estrada*, No. D036756, 2002 WL 31319735 (Cal. Ct. App. Oct. 17, 2002).

32. See *infra* Part III.

33. *People v. Reyes*, 526 P.2d 225, 229–30, 235–36 (Cal. 1974); *People v. Green*, 302 P.2d 307, 310–11, 313–14 (Cal. 1956); *People v. Tapia*, 30 Cal. Rptr. 2d 851, 853, 858–61 (Ct. App. 1994); *People v. Stoltz*, 16 Cal. Rptr. 285, 285–87 (Ct. App. 1961); *People v. Taylor*, 11 Cal. Rptr. 480, 481–82 (Ct. App. 1961).

34. *People v. Ashland*, 128 P. 798, 802 (Cal. Ct. App. 1912) (“[N]o particular cause for such heat of passion is expressly prescribed by our law.”).

NHA evolved out of the so-called Homosexual Panic Defense (“HPD”), a panic that came about when a man sexually approached by another man had an intense reaction resulting in a murderous response, due to his own repressed homosexual tendencies.³⁵ According to one psychiatrist, Dr. Edward Kempf, HPD occurred in men who were afraid of being exposed as homosexual and repressed their feelings, resulting in delusions and hallucinations.³⁶ Repressing these feelings, according to Dr. Kempf, could cause panic, anxiety, visions, voices, trance-like states, and other phenomena.³⁷ A man suffering an extreme homosexual panic episode might react aggressively towards others out of an acute fear of being exposed.³⁸ Dr. Kempf developed the theory during his observations of World War I soldiers who had allegedly suffered homosexual panic during or directly after the war.³⁹ He theorized the panic occurred after the men were grouped together alone for long periods of time.⁴⁰

Later psychiatrists characterized the reaction as a temporary manic insanity occurring when the repressed homosexual’s tendencies toward other men is inadvertently activated and the man experiencing these feelings can no longer pretend to be unaware.⁴¹ This signified the medical community’s shift from viewing the panic as an internal struggle to viewing it as a reaction caused by an external actor.⁴²

Though HPD was not officially raised as a legal defense in California until 1967,⁴³ California defendants had argued self-defense in reaction to a homosexual advance as early as 1949.⁴⁴ In *People v. Zatzke*,⁴⁵ the defendant pled not guilty and not guilty by reason of insanity, but the insanity plea was withdrawn following trial.⁴⁶ The defendant claimed his roommate, Dyer, got into bed with him and then propositioned him, to which he replied “he didn’t go for that damn stuff.”⁴⁷

35. Chen, *supra* note 21, at 200.

36. *Id.* (citing 2 ENCYCLOPEDIA OF HOMOSEXUALITY 941–43 (Wayne R. Dynes et al. eds., 1990)).

37. Chen, *supra* note 21, at 200.

38. *Id.*

39. Robert G. Bagnall, Patrick C. Gallagher & Joni L. Goldstein, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 499 (1984).

40. *Id.*

41. See Chen, *supra* note 21, at 200; see also Bagnall et al., *supra* note 39, at 499–500.

42. Chen, *supra* note 21, at 200.

43. *People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (Ct. App. 1967).

44. *People v. Zatzke*, 202 P. 2d 1009 (Cal. 1949).

45. *Id.*

46. *Id.*

47. *Id.* at 1010 (internal quotation marks omitted).

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According to Zatzke, he got a hammer out of the dresser drawer and told Dyer that if he tried it again, he would kill him.⁴⁸ Dyer kept coming, so Zatzke hit him several times with the hammer. Even as Dyer was trying to pull himself up on the bed, pleading for help, Zatzke struck the fatal blow just to put him out of his misery.⁴⁹ At trial, Zatzke argued Dyer was attempting to commit an act of sodomy upon him, and he necessarily reacted in self-defense.⁵⁰ Unfortunately for Zatzke, evidence was introduced (over objection on grounds of relevance) that he had had an ongoing homosexual relationship in the past and so could not have been averse to the victim's advances.⁵¹ His conviction for first-degree murder was affirmed on appeal.⁵²

The defense in *Zatzke* seems mischaracterized as self-defense because the elements to argue homosexual panic were present: (1) defendant had previous homosexual encounters he was likely ashamed of (or at least did not want revealed); (2) he was faced with an opportunity to engage in such activities again; and (3) he killed in reaction. However, homosexual panic was not argued. HPD was first officially raised in *People v. Rodriguez*,⁵³ where the defendant beat an old man with a stick after the man grabbed him from behind in an alley.⁵⁴ After the murder, and under police interrogation, the defendant claimed he had been with two other boys, and one of the other boys attacked the man while the defendant unsuccessfully tried to stop the fight.⁵⁵ At trial, the defendant changed his story, claiming he had feared the man would molest him and reacted in an uncontrollable rage of homosexual panic. The defendant's conflicting statement was used to impeach him, and the jury ultimately ignored the defense, convicting the defendant of second-degree murder.⁵⁶

HPD has been justified under the larger category of diminished capacity defenses—e.g., a mental defect, trauma, or intoxication that prevents a defendant from forming the requisite intent for murder.⁵⁷

48. *Id.*

49. *Id.*

50. *Id.* at 1015.

51. *Id.*

52. *Id.* at 1011.

53. 64 Cal. Rptr. 253 (Ct. App. 1967).

54. *Id.* at 255.

55. *Id.* at 256.

56. *Id.* at 254.

57. The defense of diminished capacity has been abolished in California. CAL. PENAL CODE § 25 (West 2008). California law now provides:

The defense of diminished capacity is hereby abolished. In a criminal action . . . evidence concerning an accused person's intoxication, trauma, mental illness,

Diminished capacity defenses negate *mens rea*, so HPD acted similarly to other diminished capacity defenses.⁵⁸ Use of HPD was reserved for those considered to have the psychiatric illness of homosexuality. In 1973, the American Psychiatric Association demedicalized homosexuality,⁵⁹ making the future use of HPD problematic. Due to these changes, HPD and its variations are now raised as provocation defenses rather than diminished capacity defenses.⁶⁰

One variation of the defense, the “trans” panic defense, was used successfully by the killers of Gwen Araujo. In 2002, four young men found out their lover, Gwen,⁶¹ was biologically Eddie, and they brutally killed her.⁶² One of the boys pled guilty and testified against his friends; another claimed he only helped bury Gwen in her shallow grave.⁶³ The remaining two defendants argued they had panicked after learning Gwen was biologically male and killed her in a rage.⁶⁴ Jurors deadlocked over murder charges, and the judge declared a mistrial. Upon retrial, the two defendants were convicted of murder and a third pleaded no contest to voluntary manslaughter.⁶⁵ Even though the evidence showed the defendants were not homophobic nor had ever exhibited anti-gay attitudes,⁶⁶ historically a key element of HPD, the defendants nevertheless apparently presented sufficient evidence⁶⁷ for the judge to give the jury the manslaughter instruction.

disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

Id. The use of diminished capacity came under intense scrutiny when former San Francisco Supervisor Dan White shot and killed Mayor George Moscone and out homosexual Supervisor Harvey Milk. Though White packed extra bullets, climbed through a window at City Hall to avoid detection of his fire arm, and shot both men nine times, he was only convicted of voluntary manslaughter. His attorneys argued White was depressed from losing his job and sustained himself only on junk food (the “Twinkie” defense) to the point of creating a chemical imbalance in his brain, which prevented him from premeditating murder. Cornell University Law School Legal Information Institute, www.law.cornell.edu/background/insane/capacity.html (last visited Apr. 11, 2009).

58. Chen, *supra* note 21, at 202.

59. *Id.*

60. Victoria L. Steinberg, *A Heat of Passion Offense: Emotions and Bias in “Trans Panic” Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 499 (2005).

61. *Id.* at 502.

62. *Id.* at 500.

63. *Id.*

64. *Id.*

65. Bradford Bigler, *Sexually Provoked: Recognizing Sexual Misrepresentation as Adequate Provocation*, 53 UCLA L. REV. 783, 784 n.1 (2006).

66. *Id.* at 797.

67. *See infra* Part IV.

Originally, the defendants had attempted to raise HPD as an insanity defense with the goal of “complete exoneration from criminal responsibility and punishment.”⁶⁸ Fortunately:

Cases involving the defense of homosexual panic which have reached the appellate level have never resulted in a defendant’s acquittal by reason of insanity. Neither have the cases turned on this issue standing alone. Nevertheless, no court has barred the defense, either as a matter of law, or because it rests on an untenable psychological theory, or because it is an unwarranted extension of the insanity defense.⁶⁹

Even so, defendants continue to use HPD.⁷⁰

The shift from HPD to the NHA defense may have been due to the fact that homosexual panic only affects latent homosexuals.⁷¹ Given the option, most defendants would likely rather plead blind rage and heat of passion than to admit having homosexual tendencies.

III. The Non-Violent Homosexual Advance Defense in California

A discussion of two recent cases demonstrates how NHA works in practice. Recall the earlier discussion of self-defense in *Zatzke*.⁷² The difficulty in *Zatzke* resurfaces in the cases that follow; it is impossible to know whether the advance really did occur, or whether the defendant (or his attorney) simply believed a jury would excuse the defendant’s behavior based on the perceived insult to his manhood or, perhaps, the jury’s own homophobia.⁷³ “Defendants can manipulate [NHA] to their advantage, raise it knowing that they did not act in the heat of passion, hoping to distract juries and garner sympathy by capitalizing

68. Chen, *supra* note 21, at 201; *see* People v. Rodriguez, 64 Cal. Rptr. 253 (Ct. App. 1967).

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69. Bagnall et al., *supra* note 39, at 501.

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70. *See* People v. Schmitz, 586 N.W.2d 766 (Mich. Ct. App. 1998). Schmitz claimed a version of HPD after his friend, Amedure, confessed a crush on him on the Jenny Jones show. Three days later, Schmitz purchased a shotgun, drove to Amedure’s trailer, and shot him twice through the heart. The jury convicted him only of second-degree murder. *Id.* *See also* Kara S. Suffredini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 279–80 (2001).

71. It has been noted, however, that defendants claiming homosexual panic have failed to plead their reaction was caused by their own repressed homosexual tendencies. Suffredini, *supra* note 70, at 293.

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72. *See supra* Part II.

73. *See* Mison, *supra* note 1, at 147–58 for an excellent, though slightly outdated, discussion of institutionalized homophobia.

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on juries' conscious or unconscious homophobia."⁷⁴ Equally troubling is the fact that defendants who raise NHA almost never allege a violent assault by the victim. Violence, and not a homosexual advance, should be the element in these situations that triggers a manslaughter instruction. However, evidence that the victim violently provoked his own death is scant, if not non-existent.

In *People v. Cain*,⁷⁵ a twenty-four-year-old competitive kick-boxer with a known hatred of homosexuals used the NHA defense by claiming he had killed a seventy-three-year-old professor out of fear.⁷⁶ The victim, Keith Runcorn, was a seventy-three-year-old openly gay geophysicist.⁷⁷ At trial, he was described by a member of his gym as a "fairly large but very gentle, docile, 'doddering, old man.'"⁷⁸ The murder occurred in San Diego, while Runcorn was on a business trip.⁷⁹ During his trip, Runcorn spent time with Douglas Meier, a man he had known for nearly twenty years.⁸⁰ Though Meier was thirty-three years younger, he and Runcorn had an ongoing sexual relationship which consisted of wrestling in bikini briefs, watching videos of nude male wrestling, and having sex.⁸¹ Meier testified he sometimes declined Runcorn's sexual advances, and Runcorn never forced him or used obscene language.⁸² On December 4, 1995, the day before Runcorn's murder, the two men met at Runcorn's hotel room, watched videos, and were intimate.⁸³

The following day, Runcorn was found dead in his hotel room, fully clothed.⁸⁴ He had a strap from his luggage tied around his neck, was badly beaten about his head, face, neck, and shoulders, and had defensive wounds on his forearms and the back of his hand.⁸⁵ The victim's wallet was missing but a pager belonging to the defendant Cain, who had a room near the victim, was found in Runcorn's room.⁸⁶ Cain had checked out on the night of the murder and had rented a room at a nearby hotel under the name Carlisi, Cain's in-

74. *Id.* at 167.

75. No. D036023, 2002 WL 1767583 (Cal. Ct. App. July 31, 2002).

76. *Id.*

77. *Id.*

78. *Id.* at *4.

79. *Id.*

80. *Id.*

81. *Id.* at *1.

82. *Id.*

83. *Id.* at *2.

84. *Id.*

85. *Id.*

86. *Id.*

structor in a bartending course.⁸⁷ The police contacted Carlisi, and Cain was eventually arrested in Mexico at the request of San Diego police.⁸⁸

At trial, two bits of evidence against Cain were particularly damning. First, his former teacher testified that Cain had said on several occasions that if a man ever made a homosexual advance on him he would “beat them . . . senseless” or “f—ing kill them, [by] smash[ing] in their face”⁸⁹ Second, Cain’s former cellmate testified⁹⁰ that Cain expressed a violent aversion towards homosexuals, and also admitted to killing and robbing a professor in his hotel room after propositioning him to get him alone in his hotel room, recounting the exact details of the way Runcorn’s body was found.⁹¹

Cain testified he met Runcorn at the hotel restaurant, and Runcorn told him he was a retired professor and could help Cain get a job.⁹² Cain suspected Runcorn’s homosexuality from his appreciative comments on Cain’s build.⁹³ Cain testified that when they arrived at the room, Runcorn pushed him onto the bed, and said “[y]ou know you want it, you want to suck my dick.”⁹⁴ Cain testified that when Runcorn grabbed him by the shirt he feared he was going to be raped.⁹⁵ He then punched Runcorn, and Runcorn fought back, causing Cain to black out and experience “black rage.”⁹⁶ When he came to, Runcorn lay beaten with the strap around his neck; Cain remembered nothing.⁹⁷

The first trial resulted in a mistrial. In the second trial, an appellate court reversed Cain’s first-degree murder and robbery conviction. The third trial finally resulted in a conviction of second-degree murder. Cain’s conviction for second-degree murder was upheld on appeal.⁹⁸ Cain’s testimony that he feared Runcorn would rape him should have prevented the judge, as a matter of law, from issuing the manslaughter instruction. Only when the judge believes the evidence

87. *Id.*

88. *Id.*

89. *Id.*

90. The former cellmate stated he was testifying because it was the right thing to do, not for protective custody or benefit from the District Attorney or the police. *Id.* at *3.

91. *Id.* at *2.

92. *Id.*

93. *Id.* at *3.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at *1.

of provocation is such that a reasonable jury could convict of manslaughter should the instruction be given.⁹⁹ Not only might such blatant lies prejudice the jury, but they implant in the collective mind of the jury that the defendant was afraid and possibly not acting deliberately. Ultimately, the jury failed to convict Cain of first-degree murder.

The trial court instructed the jury on voluntary manslaughter with the 1989 revision of CALIFORNIA JURY INSTRUCTIONS: CRIMINAL 8.40, which read:

Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of voluntary manslaughter

There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself

In order to prove this crime, each of the following elements must be proved: 1, A human being was killed; 2, The killing was unlawful; and, 3, *The killing was done with the intent to kill.*¹⁰⁰

Murder is an unlawful killing with malice aforethought.¹⁰¹ Malice may be either express or implied.¹⁰² Manslaughter is defined as an unlawful killing that lacks malice.¹⁰³ To be guilty of voluntary manslaughter and not murder, the defendant must have acted in “a sudden quarrel or heat of passion.”¹⁰⁴ The jury was also instructed that

99. *People v. Breverman*, 960 P.2d 1094, 1106 (Cal. 1998).

100. *Cain*, 2002 WL 1767583, at *4 (emphasis added in *Cain*).

101. CAL. PENAL CODE § 187 (West 2008).

102. *Cain*, 2002 WL 1767583, at *7 (internal citations omitted).

103. CAL. PENAL CODE § 192 (West 2008).

104. *Id.* A month after *Cain* was found guilty, the California Supreme Court found it erroneous to instruct that voluntary manslaughter requires intent to kill, because a conviction for voluntary manslaughter may also lie when the death results from an unintentional killing caused by an act committed with a conscious disregard for human life. *Cain*, 2002 WL 1767583, at *5; *People v. Lasko*, 96 Cal. Rptr. 2d 441 (Ct. App. 2000); *People v. Blakely*, 96 Cal. Rptr. 2d 451 (Ct. App. 2000).

This erroneous instruction created the issue that while a defendant who killed in the heat of passion with the intent to kill would be guilty of voluntary manslaughter, a defendant who unintentionally killed in the heat of passion but with a conscious disregard for life could not be guilty of voluntary manslaughter. *Lasko*, 96 Cal. Rptr. 2d at 445–47; *Blakely*, 96 Cal. Rptr. 2d at 455. To remedy the above, the Supreme Court held that voluntary manslaughter does not require an intent to kill and instructing so was error. *Lasko*, 96 Cal. Rptr. 2d at 447–48.

The instruction now provides that to prove voluntary manslaughter, four elements must be proved: (1) a human being was killed; (2) the killing was unlawful; (3) the perpetrator of the killing either intended to kill the victim or acted in conscious disregard for life; and (4) the perpetrator’s conduct resulted in the unlawful killing. CALJIC 8.40 (2004). Though the jury in *Cain*’s case should have been told the intent to kill element can be established either by express intent to kill or by an act with conscious disregard for life, the court found the error harmless. *Cain*, 2002 WL 1767583, at *7.

the offense is manslaughter when the killing “is done in the heat of passion or is excited by a sudden quarrel such as amounts to adequate provocation. . . . In such a case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.”¹⁰⁵ Finally, the jury was properly instructed that the People have the burden of proving beyond a reasonable doubt that the act was not provoked by a quarrel or done in the heat of passion.¹⁰⁶ The appellate court found the jury was properly instructed and gave serious consideration before finding that Cain committed second-degree murder.¹⁰⁷

Though the result in this case was a second-degree murder conviction, this author believes—and the court implied—Cain should have been convicted of first-degree murder.¹⁰⁸ First, the court noted that evidence in the case “strongly suggested a calculated intent to kill,” followed by a graphic description of the force used upon Runcorn.¹⁰⁹ The court then noted the evidence of provocation was weak, and “Cain, a 24-year-old competitive kickboxer, would not likely feel a need—reasonable or unreasonable—to defend himself against a 73-year-old professor, who, while in good condition for his age, was also described as stooped, slow, gentle[,] and doddering.”¹¹⁰

In all likelihood, the trial court’s voluntary manslaughter instruction, prompted by Cain’s extremely weak evidence of provocation, kept the jury from a first-degree murder conviction. In the court’s own words, “it is not reasonably probable that a properly instructed jury would have convicted Cain of the lesser offense of voluntary manslaughter.”¹¹¹ The appellate court rightly criticized the trial court, considering there was no evidence the victim had used force or threatened violence or in any way posed a threat against the murderer—a trained kickboxer nearly fifty years his junior. Violence by the victim should always be present in order to instruct the jury on manslaughter in provocation cases, otherwise the personal bias or prejudice of the jury is allowed to affect the sentence of the murderer.¹¹²

105. *Cain*, 2002 WL 1767583, at *5 (citing CALJIC 8.50 (2009)).

106. *Cain*, 2002 WL 1767583, at *6; CALJIC 8.50 (2009).

107. *Cain*, 2002 WL 1767583, at *6.

108. *Id.* (“Given the strength of the evidence indicating that the killing was not only intentional but premeditated, Cain could have been, but was not, convicted of first degree murder.”).

109. *Id.*

110. *Id.*

111. *Id.*

112. *See infra* Part III.

In *People v. Estrada*,¹¹³ the victim, Dennis Morgan, was found stabbed to death in his parents' driveway.¹¹⁴ His wallet and parents' car were missing.¹¹⁵ There was blood inside the house that someone had tried to clean, and the defendant's fingerprints were pulled from a bottle of rug cleaner.¹¹⁶ Before the victim's body was found, Border Patrol agents stopped the defendant, Estrada, while driving the stolen car, which had blood on the roof.¹¹⁷ The car had not yet been reported stolen so the agents eventually released Estrada.¹¹⁸ Estrada traveled to his sister's house, who, assumed the car was stolen, and reported him to the police. Estrada was arrested when he arrived at his girlfriend's home.¹¹⁹

Estrada initially admitted knowing the car was stolen, and even that it came from Morgan, but told police another man had killed Morgan.¹²⁰ Eventually, Estrada told the police Morgan had picked him up while he was hitchhiking and invited Estrada to come to his house for drinks.¹²¹ Estrada told police that when the two men were at Morgan's home, Morgan asked Estrada for oral sex and Estrada refused.¹²² Estrada said he tried to leave, but when Morgan persisted he stabbed him with a kitchen knife.¹²³ He did not stab Morgan out of fear, but rather because he was offended by Morgan's requests.¹²⁴ Estrada told police Morgan was not aggressive nor a bad person; he was "nice people."¹²⁵

Estrada's defense at trial was more elaborate. He testified that after Morgan picked him up hitchhiking, he told Estrada he was not going in Estrada's direction but rather home, and if Estrada could wait until morning he would help him get a bus ticket.¹²⁶ Estrada said, while at the house, Morgan asked him where they could get some

113. No. D036756, 2002 WL 31319735 (Cal. Ct. App. Oct. 17, 2002).

114. *Id.* at *1.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at *2.

methamphetamine, and Estrada told him he did not know.¹²⁷ Morgan asked Estrada for oral sex, and Estrada simply refused and went into the bathroom.¹²⁸ Estrada testified that when he came out of the bathroom, Morgan grabbed him, threw him onto the bed, then jumped on him and grabbed his penis.¹²⁹ Estrada punched Morgan in the face and pushed him off. He went back into the living room and continued drinking.¹³⁰ Morgan came into the room several minutes later with his erect penis exposed telling Estrada he wanted to engage in oral sex.¹³¹ Estrada claimed Morgan tried to put his penis in Estrada's face, so he broke a drinking glass on Morgan's forehead.¹³² Estrada testified that while Morgan had an icepack on his face, Estrada called his girlfriend to tell her what was happening and that he was leaving.¹³³ As he stepped outside, Morgan blocked him and told him he could not leave.¹³⁴ Estrada testified he was scared, so he went to the kitchen and grabbed a knife.¹³⁵ He went back out and told the victim to stay away from him. Morgan tried to grab the knife, and Estrada to swung it at Morgan. Estrada did not know whether he had made contact.¹³⁶ Morgan paused, then lunged at him and impaled himself on the knife Estrada was holding.¹³⁷ Estrada got some paper towels for Morgan and tried to help him stop the bleeding.¹³⁸ He then went inside to clean the blood in the house with rug cleaner.¹³⁹ When he offered Morgan a ride to the hospital, Morgan declined.¹⁴⁰ Morgan eventually became unconscious and fell face down in the driveway. Estrada fled, and took Morgan's wallet and keys with him.¹⁴¹

At trial, two other men testified that Morgan had previously made persistent but non-violent homosexual advances toward them.¹⁴² Wit-

127. *Id.* The toxicology report done on the victim showed methamphetamine in his system, and the toxicologist testified this substance can cause a person to become excitable and sometimes irrational. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at *3.

ness Adams testified he had met Morgan at a restaurant in 1978.¹⁴³ Shortly after meeting, Adams invited Morgan to his home to smoke marijuana.¹⁴⁴ While there, Morgan asked Adams for oral sex, and Adams refused.¹⁴⁵ Morgan asked if he could at least see Adams' penis, and Adams again refused and left the room.¹⁴⁶ Morgan followed him, and Adams had to tell Morgan twice to go and sit down before Morgan complied.¹⁴⁷ Adams described Morgan as persistent, but not violent, and said he did not have to use physical force to stop Morgan.¹⁴⁸

A second witness, Lay, testified he, Morgan, and two other men were staying at a hotel in Palm Desert in 1986 or 1987, two men to a room.¹⁴⁹ Lay testified that though he and Morgan were not sharing a room, Morgan came into his room, got on his bed, and tried to unbutton Lay's pants.¹⁵⁰ Lay understood Morgan wanted to have oral sex and yelled at him to leave the room.¹⁵¹ Two hours later, Morgan came back and tried again.¹⁵² Lay testified that only after he shoved Morgan against the wall hard enough to make hole in the wall did Morgan leave.¹⁵³ Lay stated Morgan was not violent, and he was not afraid of him.¹⁵⁴ A jury ultimately convicted Estrada of second-degree murder even though they were given the manslaughter instruction.¹⁵⁵

At trial, the prosecutor introduced evidence that Estrada had robbed a man named Sinclair whom he had met under circumstances similar to the way he had met Morgan.¹⁵⁶ Estrada was hitchhiking, and Sinclair gave him a ride.¹⁵⁷ Estrada directed Sinclair to an isolated place, threatened him, and robbed him of his money and ATM card.¹⁵⁸ This evidence was ruled admissible by the trial court under California Evidence Code section 1101(b), where prior crimes or bad acts can be offered not to prove likelihood of guilt, but to show a

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at *1.

156. *Id.* at *8-9.

157. *Id.*

158. *Id.* Sinclair testified at trial that Estrada tried to take his car keys, but it is unclear whether the defendant was successful. *Id.*

common plan or particular intent, or to show the defendant had a certain signature way of committing crimes.¹⁵⁹ The prosecutor attempted to prove a special circumstance that Estrada committed the murder in the course of a robbery, which would warrant a first-degree murder conviction under California's felony murder doctrine.¹⁶⁰ The jury determined instead that Estrada had not intended to rob the victim until after he stabbed and killed him.¹⁶¹

Unlike *Cain*, there was evidence the victim was sexually aggressive. It is disturbing that the defendant's story at trial was markedly different from his statement to the police that the victim was *not* aggressive, and that he had stabbed him because he was offended by Morgan's sexual advances.¹⁶² Still, Estrada's testimony at trial did not establish that the victim's advances on him were violent nor caused him to become enraged and act violently. The defendant's testimony was that the victim propositioned him repeatedly, and at times was aggressive. If an aggressive come-on alone was sufficient provocation to mitigate murder to manslaughter, women approached by aggressive, drunk men might rethink their responses.¹⁶³

The aggressive sexual behavior by the victim was corroborated, but the People also presented evidence that the victim was not violent in nature, including the defendant's own statement that the victim did not act violently. *Estrada* is a key example of when the court should rule as a matter of law that the victim's actions were not legally sufficient provocation. The judge heard evidence that the victim acted aggressively, yet there was no evidence of violence. Estrada's own testimony of the victim's aggressive come-ons was at odds with his statement to police that the victim did not act violently.

159. *Id.* at *8; CAL. EVID. CODE § 1101(b) (West 2008).

160. *Estrada*, 2002 WL 31319735, at *9; CAL. PENAL CODE § 190.2 (West 2008).

161. *Estrada*, 2002 WL 31319735, at *9.

162. *Id.* at *1.

163. However, the literature resoundingly tells us that women do not kill in response to unwanted sexual advances. "Women rarely kill . . . [and when they do,] [f]emale homicide is so different from male homicide that women and men may be said to live in two different cultures, each with its own subculture of violence." Taylor, *supra* note 25, at 1680–81 (internal quotation marks omitted). "[W]omen, as homicide perpetrators, rarely kill when 'provoked' because, as currently defined, adequate provocation and passionate 'human' weakness reflect a male view of understandable homicidal violence. Chen, *supra* note 21, at 219. "[A]lthough violent loss of self-control is a human failing, it is particularly a male weakness, which may cast further doubt on the legitimacy of the [NHA] defense in the eyes of some people." 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, 729 (1995).

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The facts from *Zatzke*, *Cain*, and *Estrada* are disturbing. More disturbing is that the judge in each case gave the manslaughter instruction. Judges are not required to instruct on lesser included offenses, such as manslaughter, unless there is an evidentiary basis for such instruction.¹⁶⁴ “[T]he existence of any evidence, no matter how weak, will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is substantial enough to merit consideration by the jury.”¹⁶⁵ Instruction of the lesser offense is only appropriate when evidence and testimony are substantial enough that a reasonable jury could find only the lesser, not the greater, offense was committed.¹⁶⁶

Applying the substantial evidence standard to the facts of *Estrada*, it appears the trial judge believed a reasonable jury could find the defendant was guilty only of manslaughter, and not murder. Recall the testimony of witnesses Lay and Adams in *Estrada*. Both testified that although the victim’s sexual come-ons were aggressive, they were by no means violent. The jury, having received this instruction, was then free to find the victim’s sexual advance provoked his own demise, even despite other testimony that Morgan was not a violent man. The jury did not reduce the charge in *Estrada*. However, in the abstract, NHA permits defendants to argue they should be excused for killing due to the victim’s non-violent behavior. Violence is required in almost every other area of the provocation defense. The legally sophisticated trial judge must act as a screen and prevent the manslaughter instruction from being heard by the jury when there is not sufficient evidence.¹⁶⁷ When the jury is given the manslaughter instruction, the individual biases and prejudices of the jurors may cause them to misapply the “reasonable man” standard.

164. *People v. Breveman*, 960 P.2d 1094, 1106 (Cal. 1998).

165. *Id.* (internal quotation marks omitted).

166. *Id.*

167. One scholar argues this may be difficult because “although judges are expected to be impartial, they too are susceptible to bias, including homophobia.” Mison, *supra* note 1, at 163. Recall also the quote that began this Comment: *Broward Circuit Judge Daniel Futch, in a case where a gay man was beaten to death outside a gay bar*: “That’s a crime now, to beat up a homosexual?” *The prosecutor*: “Yes, sir. And it’s a crime to kill them.” *Judge Futch*: “Times really have changed.” *Id.*

IV. Do We Really Want to Consider These Actions “Reasonable”?

Many argue the reasonable man does not kill.¹⁶⁸ Professor Dressler counters that while the reasonable man does not kill, he should be partially excused in a situation where other law-abiding people might also lose control.¹⁶⁹ He contends that an unwanted sexual advance is a basis for such justifiable indignation.¹⁷⁰ It is quite a leap from experiencing justifiable indignation resulting from being approached sexually to killing that person in a rage. Although partially excusing a killing precipitated by violence is an acceptable proposition, partially excusing a murderous reaction to non-violent amorous or sexual advance is not.

Scholars disagree as to whether the NHA defense rests on excuse or justification. Professor Dressler argues the defense is based on excuse.¹⁷¹ “To say . . . conduct is justified is to suggest that something which ordinarily would be considered wrong . . . is, in light of the circumstances, socially acceptable or tolerable. A justification, in other words, negates the social harm of an offense.”¹⁷² Alternatively, one who claims excuse is essentially claiming that although he has done something wrong, he is not blameworthy nor criminally culpable.¹⁷³ By employing a provocation defense, the defendant is claiming the victim’s wrongful behavior caused his own death, and so the defendant should not be held to blame.¹⁷⁴ It follows that when a jury finds conduct to be *partially* excused, they still attach some blame to the defendant’s actions. In NHA cases, the manslaughter instruction gives the jury permission to partially excuse the defendant for murdering a man who made a sexual advance upon him. The jury still places blame on the defendant by convicting him of manslaughter,¹⁷⁵ but finds his actions partially excusable because of their personal views about the wrongness of the victim’s actions.

Judges should not instruct juries to consider whether the NHA is adequate provocation. Not only does this provide an opportunity for

168. See, e.g., Mison, *supra* note 1.

169. Dressler, *supra* note 163, at 755.

170. *Id.*

171. *Id.*

172. Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1161 (1987).

173. *Id.* at 1162–63.

174. Mison, *supra* note 1, at 146.

175. Meaning the defendant acted with the intent to kill but without malice. CAL. PENAL CODE. § 192 (West 2008).

biased or homophobic jurors to empathize with the defendant,¹⁷⁶ but also the availability of the instructions can also cloud the jury's perception of what *is* reasonable. The reasonable man standard can be difficult to apply. It is not for the jury to ask what they personally would have done in a situation. Rather, they must ask what the "reasonable" person would have done had that person been in the defendant's situation. "The reasonable man is an ideal, reflecting the standard to which society wants its citizens and system of justice to aspire. It is an entity whose life is said to be the public embodiment of rational behavior."¹⁷⁷ "The argument is not that the ordinary person *would not* be provoked by a homosexual advance, but rather that a reasonable person *should not* be provoked to kill by such an advance."¹⁷⁸

Dressler argues the "reasonable man" should be viewed more like the ordinary man, subject to human weakness.¹⁷⁹ However, it is the province of the law to choose how to define the reasonable person standard. The law has chosen to hold people to a standard that is "sensitive to human weakness, [but] does not excuse extreme character flaws."¹⁸⁰ When faced with a NHA defense, the standard must be that of a person with an average disposition; one who is not racist, prejudiced, or homophobic.¹⁸¹ Therefore, the law must be that violence and murder is an unreasonable reaction to a non-violent homosexual advance. Judges must refrain from sending the manslaughter instruction to the jury without evidence of a violent provocation.

Conclusion

The California legislature could pass laws defining adequate provocation; however, this is unlikely to happen.¹⁸² For over 100 years, juries have decided what acts constitute legally adequate provocation. The most likely and efficient way to end the use and success of the

176. Mison, *supra* note 1, at 161–63.

177. *Id.* at 160–61 (internal quotation marks omitted).

178. *Id.* at 161.

179. Dressler, *supra* note 163, at 753.

180. *Id.* at 757.

181. *Id.*

182. Consider one Article's reasoning on the staying power of the related HPD defense:

The fact that the defense has not been rejected out of hand by the courts and legislatures may suggest that it appeals to the bias of many individuals, including judges, against gays. There can be little doubt that a "black panic" or a "sexual panic" defense would be dismissed quickly by the court system.

Bagnall et al., *supra* note 39, at 515.

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NHA defense is for the courts to require sufficient evidence of a violently provocative act.

Allowing judges to send the manslaughter instruction to the jury sends the message that murder is a reasonable response to non-violent stimuli. One scholar stated succinctly: “[k]illing another person in response to a homosexual advance is a disproportionate and therefore an unreasonable response. Society should demand self-control on the part of individuals who are moved to react violently to such advances.”¹⁸³ Some have argued for a complete judicial bar to both the HPD and NHA defenses because the manslaughter instruction is only appropriate in the event that a violent act by the provoker does stir the heat of passion in a defendant. For that reason, judges should never, as a matter of law, send the manslaughter instruction to the jury on evidence of a non-violent homosexual advance.

183. Mison, *supra* note 1, at 172.

