"I just bashed somebody up. Don't worry about it Mum, he's only a poof"[1]: The "Homosexual Advance Defence" and Discursive Constructions of the "Gay" Victim.

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Introduction

Gay men and lesbians in Australia are over represented in statistics regarding victims of violent crime and this over representative proportion is increasing.[2] With respect to male homicide, 37 cases, representing 10% of all male homicides in New South Wales between 1990 and 2000, were recorded as gay-hate violence.[3] In a report produced by the New South Wales Attorney General's Department's Working Party in 1998, the term 'homosexual advance defence' (HAD) was adopted to describe cases in which "an accused person alleges that he or she acted in either self-defence or under provocation in response to a homosexual advance made by another person."[4] Although the working party's use of non-gendered language seems laudable, it disguises the fact that in all the cases cited in the report the victim and the accused were male. While HAD is a label for a phenomenon and is not legally recognised as a separate plea in Australian criminal law,[5] the underlying principles of this defence have been incorporated into the existing pleas of self-defence and provocation as the definition and concepts of these defences are ambiguous and pliable.[6]

The Working Party identified two key issues arising from the defence: whether a non-violent homosexual advance should be considered sufficient to ground a plea of provocation or self-defence and the inherent difficulty of negating such a claim as usually the only witness,

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[1] *R v Stiles* (1990) 50 A Crim R 13 at 15. The accused said this in response to an inquiry concerning his bloodstained clothing. The victim, Saviour Muscat, later died.

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[2] Mason, G, *Violence Against Lesbians and Gay Men*, Australian Institute of Criminology, Canberra, 1993.

[3] Mouzos, J & Thompson, S, *Gay Hate Related Homicides: An Overview of Major Findings in New South Wales, Australian Institute of Criminology*, Canberra, 2000

[4] New South Wales Attorney General's Working Party on the Review of the Homosexual Advance Defence, *Review of the "Homosexual Advance Defence,"* 1998 at [2.1]

[5] Note 4 at [2.1]

[6] Johnston, P, "'More Than Ordinary Men Gone Wrong': Can the Law Know the Gay Subject?," (1996) 20 *Melbourne University Law Review* 1152, p 1153.

apart from the accused, was the deceased victim.[7] Some problems with this latter issue have been overcome by the abolition of unsworn dock statements,[8] however this extirpation has not eliminated all concerns raised by HAD.[9] The successful use of HAD provides evidence that the objective tests for provocation and self-defence are applied with a liberal dose of homophobia, and this raises questions about the willingness and utility of the law to provide protection to and justice for gay men.[10]

Concentrating on three trials conducted after the High Court's pronouncement in *Green v The Queen*,[11] this paper investigates the inherent heterosexist privilege and the construction of the "homosexual" as the devalued "other" in courtroom discourse. Specifically, this paper examines the manner in which the character of the victim is vilified in order to exploit tenacious anti-gay community attitudes. As the only witness to the alleged advance was the victim, this paper reveals how such use of language constructs a caricature of the victim undeserving of sympathy or the protection of the law. This is contrasted against the construction of the accused's heterosexuality, youthfulness and 'sexual innocence' as more valuable and deserving of protection. It is argued that evidence pertaining to the sexual reputation of victims should be inadmissible under existing evidentiary exclusions contained in the *Evidence Act 1995* (NSW). Excluding such anachronistic constructions may ameliorate the current trend which results in male violence being granted a degree of acceptance beyond that which would be extended had the violence not been a response to "homosexuality".

Green v the Queen and the 'Ordinary Person' Standard

Both provocation and self-defence require the tribunal of fact to assess the accused's actions against those that could be expected of the hypothetical 'ordinary person'. With respect to self defence, which is found at common law, the High Court held in *Zecevic*[12] that the accused must believe *on reasonable grounds* that it was necessary in self defence to do what she or he did. The partial defence of provocation in a trial for murder is provided in s 23 *Crimes Act 1900*

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[7] Note 4 at [2.6].
[8] *Crimes Legislation (Unsworn Statements) Amendment Act* 1994 (NSW).
[9] Note 4 at [2.7].
[10] Tomsen, S, "Hatred, Murder & Male Honour: Gay homicides and the 'homosexual panic defence,'" (1994) 6 *Criminology Australia* 2, p 3.
[11] (1997) 148 ALR 659.
[12] *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645.

(NSW). Section 23(2)(b) provides an ordinary person test which the High Court held in *Stingle*[13] concerns the power of self control to be expected of the ordinary person subject to the degree of provocation as subjectively assessed; that is, was the accused's response to the provocation "so extreme as to deserve condemnation as murder."[14]

Whilst it purports to be representative, the ordinary person standard is constructed within the dominant white, middle-class, Christian, heterosexual, male culture which operates to surreptitiously perpetuate, not only an overwhelming gender bias against women, but also a homophobic intolerance of the homosexual other. When an "objective" standard ignores sexual orientation, a presumption of heterosexuality almost invariably arises.[15] As Papathanasiou and Easteal declared "what is dominant in our society is, at a minimum, in fact '*triply* dominant': once for being masculine, twice for being Anglo-Saxon and *trice* for being heterosexual" [original emphasis].[16] Consequently, the 'ordinary person' may be conceived, not only as heterosexual, but also as heterosexist and/or homophobic. Indeed, these were attributes ascribed to the ordinary person by a majority of the High Court in *Green v The Queen*.[17]

On appeal from the New South Wales Court of Criminal Appeal,[18] which upheld a verdict of guilty of murder, *Green* provided the High Court with the first opportunity to halt the operation of HAD in Australia by declaring that the 'ordinary person' is not homophobic. Regrettably, in a pronouncement accurately described by Howe as "a deplorable decision"[19] the majority,[20] while not elevating HAD to the status of a separate plea, surreptitiously affirmed that a non-violent homosexual advance can ground a defence of provocation. Most disturbingly, Toohey and McHugh JJ reasoned their judgments

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[13] *Stingle v R* (1990) 171 CLR 312.
[14] Leader-Elliott, I, "Sex, Race and Provocation: In Defence of Stingel," (1996) 20 *Criminal Law Journal* 72, p 74.
[15] Mison, R, B. "Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation", (1992) 80 *California Law Review* 133, p 160.
[16] Papathanasiou, P and Easteal, P. "The 'Ordinary Person' In Provocation Law: Is the 'Objective' Standard Objective?", (1999) 11(1) *Current Issues in Criminal Justice* 53, p 55.
[17] (1997) 148 ALR 659.
[18] *R v Green* (NSW Supreme Court CCA, 8 November 1994, Priestley JA, Smart and Ireland JJ, unreported).
[19] Howe, A, "The Provocation Defence: Finally Provoking Its Own Demise," (1998) 22 *Melbourne University Law Review* 466, p 466.
[20] Brennan CJ, Toohey and McHugh JJ in separate judgments.

without even directly mentioning HAD,[21] preferring to concentrate on the accused's claim that the victim's conduct rekindled narratives of his father's alleged sexual abuse of his sisters which had been previously recounted to him.

Brennan CJ reasoned that "[T]he real sting of the provocation could have been found... in [the victim's] attempt to violate the sexual integrity of [the accused]"[22] and that provocation was "of a very grave kind."[23] Ignoring the boundaries of the 'ordinary person' test in *Stingel*, his Honour held that "*Some ordinary men* would feel great repulsion at the homosexual advances... and could be induced to so far lose their self-control as to form the intention to and inflict grievous bodily harm" [emphasis added].[24] The only conclusion that can be drawn from this pronouncement is that "the ordinary man (sic) [is] judicially inscribed as a violent homophobe."[25]

In a strong dissenting judgment, Kirby J admirably delivered a thoroughly researched decision and concluded that HAD sabotages endeavours "designed to remove such violence responses from society, grounded as they are in irrational hatred and fear"[26] and that an unwanted sexual advance should not be considered "objectively... sufficient to provoke the intent to kill..."[27] His Honour's consummation is unequivocally veracious: the 'ordinary person' is *not*, and should not be judicially opined homophobic and could not be provoked by a non-violent (homo)sexual advance to so lose control as to form an intent to kill.

Tom Molomby, Green's counsel, referred to Green in heroic terms, claiming that "[H]anding himself in [to police] was a highly moral and courageous act. That is the true inspiration of Malcolm Green's story..."[28] This seems an astonishingly preposterous remark, even for a defence counsel, especially when it is considered that Green, in his admission to police, attempted to justify his conduct by blaming his

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[21] Bradfield, R, "Criminal Cases in the High Court: Green v The Queen," (1998) 22 *Criminal Law Journal* 296, p 301.
[22] (1997) 148 ALR 659 at 665.
[23] (1997) 148 ALR 659 at 665 quoting with approval *R v Green* (NSW Supreme Court CCA, 8 November 1994, Priestley JA, Smart and Ireland JJ, unreported) at 22 per Smart J.
[24] (1997) 148 ALR 659 at 665.
[25] Howe, A, "More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses- Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)," (1997) 19 *Sydney Law Review* 336, p 364.
[26] (1997) 148 ALR 659 at 714.
[27] (1997) 148 ALR 659 at 719.
[28] Molomby, T, "'Revisiting Lethal Violence by Men'- A Reply," (1998) 22 *Criminal Law Journal* 116, p 118.

victim: "[Y]eah, I killed him, but he did worse to me... [H]e tried to root me."[29] Apparently, in the mind of the accused (and a majority of the High Court), repeatedly stabbing a person with scissors, causing their death, is not nearly as grave an offence as a non-violent homosexual advance.

A Tale of Three Killings

Since the High Court's pronouncement in *Green*, the profile of HAD has been raised by the reporting in the mainstream press of the murder of Stephen Dempsey by Richard Leonard[30] and the murders of David O'Hearn and Frank Arkell by Mark Valera.[31] Fifteen cases heard in the NSWSC in 1999 and 2000 in which the accused claimed a homosexual advance were located and one explanation for the proliferation of HAD is that publicity generated by antecedent HAD cases has alerted defence lawyers to the availability and appeal of the defence.[32] These fifteen cases are tabulated in the Appendix and the following three cases were selected and their trial transcripts analysed.

R v Hodge[33]

The accused (18 at the time) claimed that on 13 February 1988, he was walking home after attending a party when Leo Press (63) offered him a lift and then invited Hodge to his house. After consuming beer at the victim's home, the accused claimed that he fell asleep and awoke to find Press touching him in the genital area. He lashed out and the next thing he remembered was being downstairs where the victim allegedly approached him. He picked up a stone mason's mallet and struck the victim ten to twelve times to the back of the head. The only evidence tending to identify the victim's assailant were fingerprints on two empty beer cans. The police were unable to match those fingerprints at the time, but the investigation was reopened in 1998, by which time

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[29] Quoted in *Green v The Queen* (1997) 148 ALR 659 at 700 per Kirby J.
[30] *R v Leonard*, NSWSC, 13/10/97-29/10/97, Badgery-Parker J., unreported; *Leonard v R*, NSWCCA, 7 December 1998, McInerney, James and Bruce JJ., unreported.
[31] *R v Valera* (NSWSC, 70039/99, 21 December 2000, Studdart J, unreported).
[32] Note 4 at [3.5].
[33] ([2000] NSWSC 897, SC 70062/99, 04-07, 10-11 July and 25 August 2000, Dunford J, unreported) *See* Cornford, P "Print on Can Leads to Murder Allegation" *Sydney Morning Herald*, 10 October 1998, p 11; Goodsir, D. "Hammer Killing Probe" *Sydney Morning Herald*, 27 December 1998, p 19; Sutton, C. "Killed Man's 'Sexual' Advances", *Sun Herald* 24 January 1999, p 17; Gibbs, S. "Teenage Killer Jailed 12 Years After Murder", *Sydney Morning Herald*, 07 September 2000, p 4.

Hodge's fingerprints were on record and they matched those on the beer cans. At the trial, the accused claimed that Press had chased him down the stairs. The Crown claimed that the fact that the blows were to the back of the head indicated that it was the accused who had chased the victim. The jury were instructed on provocation and self-defence and, after seeking clarification on provocation, returned a verdict of guilty of murder. Hodge was sentenced to imprisonment for 15 years with a non-parole period of 7 years.

R v Graham[34]

Graham (20) originally told police that he had been knocked unconscious and, when he regained consciousness he was being raped by a stranger, and claimed that he had killed the victim in self-defence. However, police inquiries discovered that there had been contact between the victim and the accused prior to the killing. Graham then changed his story claiming that, on 3 March 1999, he made two calls to the "Hot Gossip Chat Line". He received a response to his message from a man who called himself James (his real name was Brendan McGovern (29)). "James" made it clear that he was gay and left a message inviting Graham to contact him. Graham tried to ring "James" on two occasions but was unsuccessful because the numbers were incomplete. He rang the chat line again and obtained the correct phone number. He rang this number twice and an arrangement was made for the two to meet that evening. Graham said that he knew "James" was gay and that wanted to find out at this meeting whether he was gay himself.

When they met, McGovern drove the two to a reserve and there was some talk of a sexual nature between them in the car. The two walked down a bush track off the pathway and sat down beside one another. There then occurred consensual mutual genital touching and both men had an erection, but when McGovern asked him to engage in oral sex he refused. Graham said that McGovern persisted and Graham stood up, kicked him in the shoulder and turned to run. He claimed that McGovern chased him and tackled him and they rolled around on the ground wrestling. Graham, fearing he was going to be raped, held McGovern in a head lock for two to three minutes after his body had

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[34] ([2000] NSWSC 1033, 70078/99, 21, 23-25, 28, 30-31 August; 01, 04-06 September; 20 October and 10 November 2000, Whealy J, unreported) *See* Kennedy, L. "Plea to Gays Over Murder", *Sydney Morning Herald*, 09 March 1999, p 14; "Murder Arrest" *Sydney Morning Herald*, 12 March 1999, p 2; "Murder Charge" *Sydney Morning Herald*, 13 March 1999, p 5; "I was Assaulted, Claims Accused Killer of Gay Man", *Sydney Morning Herald*, 01 April 1999, p 11; Jackson, A. "Three Years Jail for Killing Gay Man in Park", *Sydney Morning Herald*, 11 November 2000, p 3.

gone limp. The cause of death was asphyxiation. Graham then stole the victim's wallet and mobile phone from the victim's body before leaving in the victim's car.

The jury were instructed on self-defence and provocation and, despite the fact that Graham had said that the path on which the struggle took place was muddy and slippery and yet neither his or the victims clothes were dirty, the jury returned a verdict of guilty of manslaughter. Graham was sentenced to five years imprisonment with a non-parole period of three years.

R v Andrew[35]

In May 1990, Andrew (16) and an accomplice, Kane (16) went to the home of the victim, Wayne Tonks (35), armed with a small baseball bat and a roll of industrial tape. Tonks let them into the unit where he was struck on the head with the bat, had his hands and feet bound and had a plastic bag placed over his head and bound around the neck with tape. The cause of death was suffocation. Andrew claimed that two weeks earlier he had found Tonk's telephone number in a public toilet and had contacted Tonks, a man he had never met, for the purpose of discussing his sexuality as he "thought I might be gay". Tonks invited him to his house where Andrew claimed that Tonks raped him. Andrew claimed that on the day of the killing he went to the flat to "talk" to Tonks about the prior incident but Tonks had made a sexual advance which resulted in the attack.

Kane told a different story, claiming that about two weeks prior to the date of the killing, he and Andrew were approached in a street and invited to a party by two men, one of whom was Tonks. The two accepted the invitation and went in company with the other men to Tonks' home. There they were given some drinks and a pornographic video was played. Kane said that he was going to leave, and made to do so, in company with Andrew. Thereupon, both were overpowered and bound and Tonks raped Kane. After the assault had concluded, the two were untied and allowed to leave. Kane claimed that he and Andrew thereafter discussed what had happened to them and eventually agreed to go back to the unit for the purpose of "kicking the shit out of" the victim.

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[35] ([1999] NSWSC 647, 70071/97, 19-30 April and 02 July 1999, Sully J, unreported) *See* Goddard, M. "In the Gay Killing Fields" *Sydney Morning Herald*, 06 April 1991, p 39; Papadopoulos, N. "Teacher Killed for Gay Sex Acts: Inquest", *Sydney Morning Herald*, 12 October 1993, p 3.

The co-accused were tried separately nine years after the killing and in both trials the jury was instructed on both provocation and self-defence. Kane was convicted of murder and Andrew was convicted of manslaughter.[36] Both successfully appealed and were granted new trials.[37] At his second trial, Kane was again convicted of murder[38] and Andrew was acquitted. Kane again appealed but was unsuccessful.[39] Only the transcript from Andrew's trial is examined in this paper.

The use of HAD in numerous cases both prior to and after *Green*, raises the question of why juries are so often willing to accept a sexual advance as justification or a partial excuse for killing a human being. In cases such as *Hodge*, where the forensic evidence does not support the accused's version,[40] it might be easy to identify why it fails, but this does not explain why it works when such evidence is not available. As Kiley stated: "Remember the truth's irrelevant. The fact that most of the cases associated with homosexual panic (sic) are in reality gay bashing in that long productive Australian tradition: that's beside the point. What we have to ask is why the defensive fictions of apocalyptic poofs works so well."[41] The rationale behind such startling and disturbing verdicts may be explained by the heterocentric and heterosexist nature of our society.

Heterocentricity, Heterocentrism and Homophobia

Australia is a heterocentric society in that it is centred on the heterosexual view of sexuality. In and of itself, heterocentrism, whilst undoubtedly exclusionary, can function in a relatively benign manner. That is, a heterocentric society can accept and value sexual minorities. However, when a society not only celebrates the dominant culture or attitude but also moves to protect its privilege by condemning and denigrating subcultures, it moves from heterocentrism to

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[36] *R v Andrew and Kane* ([1999] NSWSC 647, 2 July 1999, Sully J, unreported).
[37] *Andrew v R* (CCA 60373/99 [2000] NSWCCA 310, 07 August 2000, Spigelman CJ, James & Sperling JJ, unreported); *Kane v R* (CCA 60393/99, [2000] NSWCCA 402, 11 October 2000, Wood CJ, Adams J, Foster AJA, unreported).
[38] *R v Kane* (70087/97, [2000] NSWSC 1061, 17 November 2000, Barr J, unreported).
[39] *R v Kane* (60717/00, [2001] NSWCCA 150, 03 May 2001, Handley JA, Ipp AJA, James J, unreported).
[40] In an unconvincing effort to explain how the victim was struck in the back of the head when it was claimed that the victim chased him, Hodge stated: "I raised the hammer to the back of his head when we were face to face... I picked it up and lunged, hit him in the back of his head when we were face to face." *Transcript* pp 161-162.
[41] Kiley, D. "I Panicked and Hit Him With a Brick", (1994) 1 *Law/Text/Culture* 81, p 89.

heterosexism.[42] Heterosexism is a "belief in the superiority of heterosexuality, which is threatened by activities that challenge the dominance of heterosexual constructions of individuals and society."[43] In such a society, non-heterosexual sexualities might be considered "distasteful" but may nonetheless be "tolerated". Heterosexism is not synonymous with homophobia, the latter referring to a fear and/or hatred of homosexuals, where tolerance gives way to intolerance. Whilst heterosexism may not invariably lead to homophobia, it is arguable that in contemporary Australian society, heterosexism is informed by notions of homophobia. Consequently, our society's "unconscious heterosexism and homophobia create a monolithic and discriminatory social environment."[44] Thus, almost every aspect of our culture reflects and engenders negative feelings and images of "the homosexual", perpetuating normative assumptions that are a product of its heterocentric and heterosexist substrate.

Violent and often fatal attacks on gay men are not a characteristic peculiar to contemporary Australian society and have featured in many societies and throughout history. Perhaps most notorious is the persecution of gay men by the Nazi regime in Germany, during which gay men were subject to 'medical experimentation' and, for those who could not be 'cured', extermination[45], but such state sanctioned violence continues in countries such as Brazil, China and Iran.[46] Many studies have focused on hate related violence against lesbians, gays and transsexuals in Australia[47] and such violence illustrates our

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[42] Dressler, J. "When "Heterosexual" Men Kill "Homosexual " Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard", (1995) 85 *The Journal of Criminal Law and Criminology* 726, p 739.

[43] George, A. *Homosexual Provocation: The Courtroom as an Area of Gender Conflict in Australia*. A thesis submitted to the Faculty of Arts and Social Sciences in partial fulfilment of the requirements for the Bachelor of Arts (Honours) degree in the Department of Sociology and Anthropology, University of Newcastle, January 1995, p 9.

[44] Note 15 at 156.

[45] Garkawe, S. Book Review, *Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933-1945*, Gunter, G. (ed), translated by Camiller, P., Cassell, London, 1995. In (1997) 21 *Melbourne University Law Review* 738, p 740.

[46] Thomsen, S. "The Political Contradictions of Policing and Countering Anti-Gay Violence in New South Wales", (1993) 5(2) *Current Issues in Criminal Justice* 209, p 210.

[47] See for example note 3; Dempsey, D, *Enough is Enough: A Report on Discrimination and Abuse Experienced by Lesbians, Gay men, Bisexuals and Transgender People in Victoria*, Victorian Gay and lesbian Rights Lobby, Victoria, 2000; Johnson, C, *New South Wales Government Initiatives on Hate -Related Violence Against Gays and Lesbians*, Sydney Lesbian and gay Anti-Violence Project, Sydney, 1998; NSW Police

heterosexist society's intolerance of non-hetero lifestyles, and serves to intimidate and disempower, not just the victims, but all gay men.[48] Perpetrators of violence toward gay men "may be understood as rational social actors who believe that their attacks are the acting out of dominant views of sexuality, that they are in some form condoned by current police practices and judicial findings."[49] Individual hostility towards gay men reflects prevailing heterosexist societal notions about masculinity, and permissible behaviour and feelings between men.[50] Consequently, gay-hate homicides remain a recurring feature of Australian society and are "as much a product of the society as they are of the individual."[51] Likewise, the acceptance of HAD by juries and individual jurors reflects prevailing heterosexism, and prejudicial views are fuelled by the construction of a hetero/homo binary in courtroom discourse which can be exposed by the application of post-structuralist theory.

Structuralism, Post-structuralism and the Hetero/Homo Binary

Credited largely to the French linguist Saussure, structuralism maintains that language has a structure. Saussure asserted that, contrary to conventional thought, language does not simply provide a method of naming or describing objects that are experienced in our reality, but that "the linguistic sign unites... a concept and a sound image."[52] The concept, or "signified", is purely cognitive and refers to the representative imaging evoked by a particular sound image in the mind of a subject, and is to be distinguished from the "referent", the actual object.[53] The sound image, or "signifier", is sense-data which triggers the signified. These two concepts, which together form the "sign" of an object, are inseverable as "one can neither divide sound

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Service, *Out of the Blue. A Police Survey of Violence and Harassment Against Gay Men and Lesbians*, 1995; Cox, G, *The Count and Counter Report: a study into hate related violence against lesbians and gays*, LGAVP, Sydney, 1994; Schembri, A, *The Off our Backs Report: a study into anti-lesbian violence*, Gay and Lesbian Rights Lobby, Sydney, 1992; Cox, G, *The Streetwatch Report*, Gay and lesbian Rights Lobby, 1990.

[48] Editors of the Harvard Law Review. "Developments: Sexual Orientation and the Law", (1989) 102 *Harvard Law Review* 1511, p 1541.

[49] Note 46 at 241.

[50] Note 15 at 155.

[51] Golden, C J, Jackson, M.L. & Crum, T A, "Hate Crimes Etiology and Intervention" In Hall, H V & Whitaker L C (eds) *Collective Violence- Effective Strategies for Assessing and Interviewing in Fatal Group and Institutional Aggression*, CRC Press, Boca Raton.

[52] Williams, G, "Structuralism." In Williams, G, *French Discourse Analysis: The Method of Post-Structuralism*, Routlage, 1999, p 35.

[53] Matthews, E, "Structuralism: Lacan and Foucault." In Matthews, E, *Twentieth Century French Philosophy*, Oxford University Press, 1996, p 137.

from thought not thought from sound."[54] The consequences of this concept are momentous because, if thought is reliant on language, meaning is arbitrary. Although this arbitrariness is partially confined by logical limitations, as there are no preordained relations between a particular signifier and meaning, meaning is malleable.

Saussure revealed that meaning is constructed within a system whereby the content of a word is defined by the relationship with everything that it is not. Davies referred to this definition by exclusion as the inside/outside dichotomy, whereby signs are defined relationally, contrasting the inside, what something is purported to be, from the outside, everything that it is not.[55] Derrida noted that these contingent 'binary oppositions' are not benign tools of communication but are value-laden constructs, creating a series of hierarchical dichotomies.[56] Usually, the preceding term is granted authority, power or value over the following term: man/woman, objectivity/subjectivity, heterosexual/homosexual. In this way, language does not merely describe but constructs a hierarchical system of contrasts, prescribing value to a sign at the expense of another. Most importantly, the relations are arbitrary products of accumulated power, revealing the implicit violence and coercion in binarism.[57] Deconstruction reveals that there is no single relationship between Saussure's signified and signifier, they are historically contingent.[58] Consequently, language constructs our reality and influences the way in which we react to it.

Deconstruction seeks to expose where a text "reveals its non-conformity to its own internal ideals [and] overflows its teleological limits"[59] revealing it to be something other than what it claims to be. To unravel the inherent hegemony of the primary term, the subordinate term is displaced and removed from its subordinate position, revealing the dominate term as reliant on the second and exposing the arbitrariness of construction. Poststructural theory provides insights into the use and power of language in courtroom discourse and this is of particular importance in HAD cases because, as he is dead, the victim only exists as a linguistic construction. By defining the

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[54] Note 52 at 36

[55] Davies, M, *Asking the Law Question*, LBC, Sydney, 1994, pp 15-16.

[56] Troup, M, "Rupturing the Veil: Feminism, Deconstruction and the Law," (1993) 1 *Australian Feminist Law Journal* 63, p 66.

[57] Derrida, J, *Positions*, University of Chicago Press, Chicago, 1981, p 19.

[58] Airo-Farulla, G, "Dirty Deeds Done Cheap: Deconstruction, Derrida, Discrimination and the Differance/ence in (the High) Court," (1991) 9(2) *Law in Context* 102, p 102

[59] Note 56 at 68.

"homosexual" as "other", "deviant", "morally abhorrent", "unknowable", the binary opposition is thus constructed and maintained. If there is to be the heterosexual, there must be an opposing concept, the homosexual and the heterosexual is silently constructed as "normal". As Walker noted, by participating in the construction of the "other", "the law gives content and meaning to the normal; by participating in the construction of homosexuality, the law participates in the construction of heterosexuality."[60] Heterosexuality is defined in terms of what it is not- it is not abnormal, abhorrent, morally repugnant, unacceptable or evil- it is not homosexuality. As the law has only ever known the homosexual within the discourses of religion, medicine, psychiatry and criminality, ecclesiastic and medical constructions have been appropriated by the law and continue to have a significant influence on legal outcomes.[61] Perhaps the most powerful of these essentialist assumptions is that the "homosexual" is predatory and his prey are vulnerable young males, reflected in the construction of the predator/prey binary in the HAD trials studied.

The Construction of the Predator/Prey Binary

In courtroom discourse, the hetero/homo binary is informed by another binary which constructs the victim as a sexual predator and the accused as his prey. This reflects and reinforces the essentialist notion of gay men possessing an uncontrollable and voracious appetite for sex, particularly with young 'straight' men. The perception is that people of greater innocence, particularly youth, are more susceptible to the 'corruptive powers' of the homosexual as they are less able to repel the perversion. In law, homosexuality is paraded as a powerful, unyielding and dangerous force, amassing coverts whenever and however it can. If this force is not regulated, marginalised and contained as other, it threatens to destroy everything that heterosexism exults. Thus, homosexuality is depicted as an extravagant caricature, sensationalised and magnified. As Wiley caustically mused: "We're all walking pressure-paks of testosterone, just waiting for fissures in the facade of heterosexuality, cracks in the dam of every other man's normality. Whereupon we'll stick our dick in the dyke whether wanted or not."[62]

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[60] Walker, K. "The Participation of the Law in the Construction of (Homo)Sexuality", (1994) 12(2) *Law in Context* 52, p 57.
[61] Note 6 at 1159-1160.
[62] Note 41, p 87.

In *Hodge*, a statement made by a police officer who investigated the murder, which was an amalgam of statements given by anonymous informants, was read by another officer. The following passage presents the victim as an older man who cruised the streets looking for unsuspecting young men:

> "We have been informed that it was common practice for the deceased to go driving late at night and pick up young male hitch hikers, to whom he made propositions of a sexual nature. He would generally give these persons his name and telephone number for future contact, and often a gift of money."[63]

The suggestion here is that not only did the victim hunt for young men, but that he also turned them into prostitutes. The activities of the victim were also constructed as clandestine nocturnal activities- Leo was the boggy man, operating under the cover of darkness:

> ... the deceased man was in the habit of leaving the house at midnight in a rather *secretive fashion* and not returning home for some hours. Although it is not certain, it appears that the deceased on those occasions drove about the local area picking up *young* male hitchhikers. It is *possible* too that he *may* have had liaisons with a particular person or persons on those occasions [emphasis added].[64]

Well, of course it's *possible* that Leo *may* have had "liaisons", but it is equally possible that he didn't (and if he did, so what?). Additionally, Leo was an adult who shared a house with his brother and it was not the practice of the two to inform the other of their movements and whereabouts. Leaving the house without informing his brother where he was going was hardly "secretive". Furthermore, a niece of Leo's who spent some months living in the house gave an alternate version that had nothing to do with sex. Leo, a St Vincent de Paul branch president, simply felt compelled by charity to offer a helping hand to "down and out" men:

> *CP:* Did you tell the police that your uncle Leo would often pick up hitchhikers and go out of his way to be friendly with them?

[63] Note 33, *Transcript* at 106.
[64] Note 33, *Transcript* at 107.

> *P:* Yes, he did.[65]

Still, defence counsel sought to make something sinister of the fact:

> *DC:* Did you tell [a friend] before this happened that your Uncle Leo would often bring home down and out male persons, give them a meal and money and a bed for the night?
>
> *P:* ... I probably would have told her he would have brought male people home but I am unaware of the bed and breakfast thing.[66]

In *Andrew*, the defence sought to establish that the victim had a sexual appetite for "boys" based on pornographic videos found in the victim's flat:

> *DC:* You actually name two of the three video cassette tapes by reference to their titles?
>
> *W:* Yes.
>
> *DC:* One of them was apparently called "Memories of 18"?
>
> *W:* Yes, sir.
>
> *DC:* And was it apparent from just the general nature of the illustrations on the cover that that was related to *young males*?
>
> *W:* I can't honestly recall, sir, what the cover included.
>
> *DC:* If I could suggest to you that "Memories of 18" was a title referring to 18 year old *boys* rather than 18 something-elses?
>
> *W:* That's a possibility, sir, yes [emphasis added].[67]

Despite counsel's suggestion, eighteen-year-olds are adults, not "boys". Even with the higher age of consent for male-male sex,[68] eighteen-year-olds are legally entitled to consent to gay sex. However, later in the trial it becomes clear why counsel was intent on suggesting that the victim had a penchant for "boys", and this had much to do with the higher age of consent.

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[65] Note 33, *Transcript* at 83-84.
[66] Note 33, *Transcript* at 87-88.
[67] Note 35, *Transcript* at 36.
[68] ss 78N and 78G *Crimes Act 1900* (NSW).

The Working Party identified the higher age of consent as a contributing factor to the success of HAD as it "reinforces the perception that homosexual males abuse or prey upon children".[69] These discriminatory laws perpetuate the hetero/homo binary by privileging and dignifying heterosexual relations over gay relations. Heterosexuality defends and secures its privilege, superiority and acceptability by criminalising and regulating its 'opposite'. Additionally, the continuing criminalisation of gay sexual activity that would not be illegal if the participants were not both men "disgraces and stigmatises, makes perverse, those who engage in such practices."[70] In this way, the law continues to reinforce the socially constructed sexual hierarchy and is actively complicit in formulating and reinforcing prejudices. This is clearly evidenced in *Andrew*, where the higher age of consent for gay sex enabled defence counsel to construct the victim as a "child molester"[71]. Evidence was adduced that inferred the victim had engaged in consensual sex with seventeen-year-old males. The higher age of consent enabled defence counsel to state the following in closing:

> "The crime of having sexual intercourse with a male under 18- and it does not matter whether there was consent or not- is a crime. It carries 10 years gaol. It's not just strange behaviour or funny goings on; it's a *serious criminal offence* [emphasis added]."[72]
>
> "If you look at what the truth is, not scuttle-bug, not rumour, not totally unsubstantiated allegations against some poor, innocent victim. It is a disgraceful history of a human being's conduct..."[73]
>
> "I suggest to you on all the evidence that you have got in this case that you would be ignoring reality to say that what [Andrew] said wasn't true. Its exactly the way this man *operated* [emphasis added]."[74]
>
> "... this matter has nothing at all to do with the fact that Wayne Tonks was homosexual... This case has got a lot to do with *child sexual abuse* [emphasis added]."[75]

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[69] Note 4 at [6.17].
[70] Note 60, p 58.
[71] His Honour noted that defence counsel, in the opening address, had referred to Tonks as a "child molester" see note 34, *Transcript* at 72.
[72] Note 35, *Transcript* at 282.
[73] Note 35, *Transcript* at 282.
[74] Note 35, *Transcript* at 283.
[75] Note 35, *Transcript* at 279.

Really? Whilst the matter certainly should not have anything to do with whether or not Tonks was gay, it also had nothing to do with child abuse. The issue was whether Andrew murdered Wayne Tonks. These statements demonstrate just how effective HAD can be in distracting the jury from the ultimate issue- the accused's guilt. The victim is constructed as a criminal, a disgraceful child abuser with a *modus operandi*- definitely not an innocent victim. This is despite the fact that none of the evidence suggested that the previous sexual activity was non-consensual. However, the different age of consent for gay sex facilitated the construction of the victim as a predatory monster.

In *Graham*, the victim was represented as deceiving young men as to his age to facilitate seduction:

> *DC:* And he said something like words to the effect "I say I'm 25 because I prefer to get younger guys"?
>
> *W:* That's right.[76]

In fact, McGovern was 29 years of age. If he did claim to be 25, it was only a slight and unimportant exaggeration (and one practiced by many 'heterosexuals'). However, when this is combined with suggestions that McGovern preferred sex with "heterosexual" men, he is constructed as a predator of 'straight boys':

> *DC:* Is it true to say from your knowledge that one of Brendan's fantasies was to pick up a straight guy?
>
> *S:* It is true to say.
>
> *DC:* Is it true to say... "He used to try to pick up straight guys"?
>
> *S:* Brendan has picked up straight guys in the past.[77]

This inference is enhanced by suggestions that the victim had called the 'chat line' for the sole purpose of seducing 'heterosexual' young men:

> *DC:* Did he ever tell you that he had used the chat lines as a means of contacting or making contact with heterosexual men?

[76] Note 34, *Transcript* at 121.
[77] Note 34, *Transcript* at 158.

> *S:* I don't know if it was as a means of meeting them. He had mentioned occasionally that some of the guys that were on there may have been heterosexual but I don't think it was Brendan's intention to ring up to deliberately speak to heterosexual men.
>
> *DC:* However, you were aware that he made attempts to pick up heterosexual men outside; do you agree with that?
>
> *S:* We had discussions along those lines.[78]

It can be seen here how the rigid hetero/homo binary only recognises two clearly demarcated sexualities.[79] McGovern, constructed a 'homosexual' was out to corrupt a 'heterosexual', and Graham was that heterosexual. Indeed, in his sentencing judgement Whealy J stated:

> "He was a heterosexual young man himself and he had a steady girl friend named Amy."[80]

Yet it was Graham who made repeated efforts to contact his victim, and it was he who set up the meeting. Despite the fact that Graham was in a relationship with a female, his efforts to meet with his victim for sex indicate that his sexuality does not fit comfortably into either recognised category. However, as they are the only categories recognised, he must fit into one of them and thus he is constructed as 'heterosexual'. Consequently, the victim is the normative dangerous individual, corrupting and recruiting assailable 'straight' boys into the realm of the homosexual 'other'. This construction was bolstered by the suggestion that the victim had a well-planned and often drilled *modus operandi*. Much was made of evidence which suggested that the park in which the victim was killed was known to the victim and may have been used by him on previous occasions for the purposes of sexual encounters:

> *DC:* Did he tell you something about having been to that place before?
>
> *W:* Yes.

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[78] Note 34, *Transcript* at 158.
[79] Hodge, N. "Transgressive Sexualities and the Homosexual Advance" (1998) 23(1) *Alternative Law Journal* 30, p 31.
[80] Note 34, *Sentencing judgement* at 8.

> *DC:* And having had sexual contact with men in the bushes near where the car was parked?
>
> *W:* Yes.[81]

> *DC:* Did he indicate to you that he knew the area?
>
> *M:* That's correct.
>
> *DC:* Had he used it previously for sexual encounters?
>
> *M:* Not that I know of.[82]

In closing, defence counsel rencountered as fact the familiarity of the area to the victim and his previous use of it for seducing young males:

> "... it was a place known to the deceased. It was a place that he knew could be used *for this purpose*."[83]

The combined effect of such statements is that they construct the victim as a predator of young, confused and therefore vulnerable young men, who took great pleasure in luring his innocent victims into his lair for the purpose of violation. The construction clearly worked as Whealy J described the victim as:

> "…an experienced 29 year old homosexual who had used the Chat Line and other chat line type services on a number of previous occasions to meet men for sexual encounters. Some of these meetings had been at the Huntley's Point Reserve... It seems clear Brendan McGovern had chosen to use the men/girls Chat Line to listen to heterosexual messages, presumably with a view to persuading a heterosexual man to have sex with him." [84]

In *Andrew* and *Graham*, defence counsel secured the predator/prey binary by 'exposing' the victim as promiscuous, with a voracious appetite for anonymous sexual encounters. In *Andrew* evidence was adduced of a statement to police of two anonymous informants, "SJL" and "Mr M", which suggested that the victim engaged in sex with strangers and recorded his contact details on the walls of public toilets in view of soliciting males, including schoolboys, for sex:

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[81] Note 34, *Transcript* at 120-1.
[82] Note 34, *Transcript* at 144.
[83] Note 34 *Transcript* at 387.
[84] Note 34, *Sentencing judgement* at 9.

> *DC:* At page 2 of the statement it's said by SJL "I ascertained that Wayne enjoyed going to public toilets to find casual, anonymous sexual encounters"?
>
> *S:* Yes.[85]
>
> *DC:* Did it also say "Underneath that in different handwriting was mentioned 34 year old teacher, likes schoolboys" or something like that "Nice apartment in Artarmon" or something like that and something like "Let me take you back there"?
>
> *S:* Yes, that was the recollection of Mr M on reading that writing.

In adducing this evidence, counsel was attempting to "slip one passed the keeper". This was revealed when an astute Sully J intervened:

> *His Honour:* Did you check the particular toilet nominated?
>
> *S:* Yes sir, and the information was not seen by me.[86]

Likewise, in *Graham* the victim is constructed as a single-dimensional insatiable sexual creature and this reflects the normative assumption that gay relationships are identified by, and consist entirely of sex- and plenty of it:[87]

> *DC:* Is it true to say "Brendan would do anything for sex. It dominated his mind"?
>
> *S:* There was a period where Brendan was quite sexually active, yes, but that wasn't all of the time I knew Brendan, it was just a period where he was keen to have sex.[88]
>
> *DC:* You said in your statement he talked about sex all the time, is that correct?
>
> *S:* We both talked about sex a lot, yes.[89]

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[85] Note 35, *Transcript* at 179.
[86] Note 35, *Transcript* at 176.
[87] Fajar, M. "Can Two Real Men Eat Quiche Together? Storytelling, Gender-role Stereotypes, and Legal Protection for Lesbian and Gay Men", (1992) 46 *University of Miami Law Review* 511, p 546.
[88] Note 34, *Transcript* at 159.
[89] Note 34, *Transcript* at 161-162.

In a remarkable exchange, counsel attempted to attribute something sinister to a statement made by a friend of the victim to the effect that the victim did not always wear underpants!

> *DC:* To your knowledge... is it the case that Mr Brendan McGovern hardly ever used to wear underpants?
>
> *S:* I can't be sure of that. I can't be sure of that.
>
> *DC:* Would you have a look at paragraph 11 of your statement?
>
> *S:* I've read my statement. I remember saying that.
>
> *DC:* The first words in paragraph 11, it seems to be fairly clear?
>
> *S:* That was a response to a question when I was interviewed.
>
> *DC:* So your response to the question was: "Brendan hardly ever used to wear underpants even sometimes when he went to work he didn't wear them". That was your response?
>
> *S:* They were responses to questions.[90]

The witness here reveals a vital point that is often missed when witnesses are lead through previously made statements, or when statements are read to the court in the maker's absence. The witness repeatedly sought to distance himself from the parts of the his statement that were read to him and this is probably because the statement was not authored solely by him. All statements are in fact authored by at least two people- the person giving the statement and the police officer/s asking questions which are omitted from the final document. The structure and content of S's statement, and all other statements presented in these trials, were produced for the purpose of aiding the police investigation prior to the arrest of the accused. Presumably, the police were asking an innocuous question because the victim was found not wearing underwear, and the police were probably attempting to establish whether his underwear may have been taken by the killer as a 'trophy'. However, in the absence of the question, defence counsel is able to insinuate that S volunteered the information, attributing to it an importance it never had. In this way counsel is able to ascribe a sexually sinister peculiarity to the suggestion that the victim did not wear underwear, irrespective of how ridiculous the inference might appear.

Contrasted against this representation of the victim as promiscuous is a construction of the accused as sexually inexperienced. This

[90] Note 34, *Transcript* at 163.

constructs a chaste/unchaste binary which informs the predator/prey binary. In *Andrew*, the accused was represented as a boy inexperienced in sexual matters, and it was inferred that the victim was aware of this and found it titillating. Additionally, despite the fact that, at the time of the trial the accused identified as gay, defence counsel maintains the possibility of the accused engaging in sex with a female, a possibility that may have been realised but for the actions of the victim:

> *A:* He started to ask me... have I, you know been involved with any boys in boarding school- have I ever kissed a guy and I said "No, I'm a virgin, I haven't done anything".
>
> *DC:* Was that in fact the truth?
>
> *A:* Yes.
>
> *DC:* At that stage you had no sexual experience of any kind at all, is that the situation?
>
> *A:* That is right.
>
> *DC:* With males or females for that matter?
>
> *A:* Males or females.
>
> *DC:* Did you tell him that?
>
> *A:* Yes.
>
> *DC:* What was his reaction to that?
>
> *A:* It excited him.[91]

Likewise, in *Graham*, the accused was represented as inexperienced in sexual matters despite the fact that he was sexually active:

> *DC:* What were you expecting out of this meeting with McGovern? What was it for?
>
> *G:* I wanted to see, to find out, if I was gay.
>
> *DC:* When you say "gay" what do you mean? Do you mean "homosexual"?
>
> *G:* Yes.
>
> *DC:* Had you had experiences with other men, sexual contact, before?
>
> *G:* No.[92]

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[91] Note 35, *Transcript* at 192-3.
[92] Note 34, *Transcript* at 190.

> *DC:* Did you tell him, the person you knew as James, anything about yourself in terms of your experience in sexual matters?
>
> *G:* I did say that it was the first time.[93]

Although Graham was sexually active, the use of the phrase "the first time" is certainly suggestive of virginity and this phrase was adopted by defence counsel in closing, also suggesting that the victim found this titillating:

> "Brendan McGovern seemed very interested in the fact that it was the accused's first time."[94]

The effectiveness of the chaste/unchaste binary is evidenced in the sentencing judgement in *Graham* where Whealy J stated:

> "The deceased was an older man well experienced in sexual encounters... The prisoner on the other hand was nine years younger and relatively inexperienced in sexual matters."[95]

The final method employed to create the predator/prey binary was the construction of the victim as being surreptitious about his sexuality. The victims were constructed as homosexual lechers, masquerading as heterosexual to infiltrate the heterosexual social body. The term "double life" was utilised to describe the victim's behaviour in both the *Hodge* and *Andrew* trials. In *Hodge*, the statement of the investigating police officer that was read to the court stated that:

> "... the victim led what might be termed a "double life", in that outwardly, he presented as a single, elderly gentleman devoted to his business, church and charity work. It has been ascertained, however, that he was a very active homosexual."[96]

The suggestion here is that a man can not be genuinely devoted to business, church and charity work and have sexual relations with other men. Any admirable qualities of the 'homosexual' are a facade and must be discarded as nothing more than a cunning ploy to fool heterosexual society. This negating of the meritorious qualities of the victim by their sexual activity is epitomised in the defence closing in *Andrew*:

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[93] Note 34, *Transcript* at 192.
[94] Note 34, *Transcript* at 391.
[95] Note 34, *Sentencing judgement* at 26.
[96] Note 33, *Transcript* at 105-106.

> "But there is one thing that you know, that everybody in this courtroom knows and you are entitled to know; that he led a "double-life". No matter how many admirable qualities, how respected he was, how dedicated he was as a teacher, he had aspects of his character which any reasonable person I would suggest to you, would regard as *despicable* [emphasis added]."[97]
>
> "This man lived a "double life". This material is not being put before you just for the sake of blackening his character, its being put to you because it tends to suggest that what [Andrew] said about what happened to him is probably true because it happened to a lot of other people..."[98]

The final sentence of this extract is particularly misleading. Andrew claimed that he was raped by Tonks. However, all evidence adduced at the trial concerning previous sexual activity of the victim confirmed that it was consensual. What Andrew claimed did not "happen to a lot of other people". In fact, on the evidence, it did not happen to anyone. Additionally, the suggestion that the evidence was not adduced to blacken the victim's character is preposterous. Despite this, the respective judges in both trials accepted the 'cloak and dagger' construction of the victim's sexual activity. In *Andrew*, Sully J stated:

> "This material established that the late Mr. Tonks pursued a **clandestine but active homosexual lifestyle**. He had a particular homosexual attraction towards teen-aged boys and young men [emphasis added]." [99]

Likewise, in *Hodge* Dunford J held that:

> "Police inquiries established that although the deceased maintained an **air of respectability**, he was **an active homosexual**...[emphasis added]" [100]

The construction of the predator/prey binary exposes that, while privileged heterosexuality masquerades as normal, natural and immutable, it is also precarious, precious and fragile, under the

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[97] Note 35, *Transcript* at 279.
[98] Note 35, *Transcript* at 283.
[99] Note 35, *Sentencing judgement* at 26.
[100] Note 33, *Sentencing judgement* at 8.

constant threat of homosexuality which can devour and transform unwitting and unwilling (young) men, dragging them kicking and screaming into the realm of the unnatural other. Heterosexuality shrieks in terror at the menace and has little hesitation in sanctioning recourse to violent repulsion to protect itself from perceived continual predatory encroachments of its contained other.[101] As Meure stated: "the homosexual outlaw has to be expelled from the community to which he never really belongs. Indeed, the very existence, survival/continuity of the heterosexual community demands symbolic and actual violent expulsion of the homosexual from the community."[102]

The result of these narratives is that the violent death of the victim is reconstructed into the tragedy of the accused; a naive boy whose misfortune arises from events beyond his control- a victim of circumstance. In *Hodge*, Dunford J stated that:

> "The case is a tragic one, not only for the deceased who, **whatever his shortcomings** did not deserve to die in the manner in which he did, but it is also a tragedy *for the prisoner*... [emphasis added]" [103]

Whilst the killer is glorified, "the silenced victim dies a guilty monster, a freak, evil, the despised 'other'".[104] The main obstacle to the prosecution when such claims are made is that, not only is the victim not available to offer an alternative version of the alleged provocative act, but he is also unavailable to negate such unfavourable stereotyping. As jurors are privy to this victim devaluation in courtroom discourse, it is perhaps not surprising that "these negative images could serve to excuse the actions of accused killers in the deliberations of many jurors,"[105] particularly as some jurors will enter the court burdened with their own entrenched homophobic stereotypes. Additionally, the jury sympathy created for the accused by presenting him as the victim of a sexual predator can be even more damaging to the prosecution in HAD cases. However, it is not only the

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[101] Fuss, D. "Inside/Out". In Fuss, D. (ed) *Inside/Out: Lesbian Theories, Gay Theories*, Routledge, New York, 1991, p 2.
[102] Meure, D. "Hetero-Homo Panic in the High Court: A discourse analysis in the form of a meditation on law, sexuality and violence", paper presented to the *Australian Legal Philosophy Conference*, 2000, p 3.
[103] Note 33, *Sentencing judgement* at 14.
[104] Note 102, p 3.
[105] Tomsen, S, "Sexual Identity and Victimhood in Gay-hate Murder trials." In Cunneen, C, Fraser, D & Tomsen, S (eds), *Faces of Hate. Hate Crime in Australia*. Hawkins Press, Sydney, 1997, p 108.

jury which can be persuaded to assess the evidence in a prejudicial manner. Jurists are also susceptible to essentialist notions of the homosexual as constructed in HAD cases, evidenced in *Hodge* where Dunford J invented evidence, stating that:

> "Although there is no evidence of it, there is also the possibility that the beers he consumed at the deceased's house contained some foreign substances." [106]

Not only was there "no evidence of it" there was also no suggestion of the possibility in the trial. His Honour's statement attributes normalist ideas of the *modus operandi* of a "homosexual predator" in response to the unfavourable construction of the victim, inscribing the accused as a victim of a drugging that did not occur. These prejudicial discourses operate to diminish the legitimacy of the deceased's status as a victim.[107]

The Solution Recommended by the Working Party

The Working Party considered that a "non-violent homosexual advance" does not justify the use of homicidal force in self-defence but a "sexual attack" may suffice.[108] With respect to provocation, the Working Party recommended that legislative reform should preclude a non-violent homosexual advance from grounding the partial defence.[109] Likewise, academics have argued that "the homosexual-advance defence is a misguided application of provocation theory..."[110] However, this may be an oversimplification of the problem. Simply because HAD results in verdicts that seem perverse does not necessarily mean that the provocation doctrine is being misapplied. Indeed, as provocation is designed to recognise and partially excuse the frailty and fallibility of the (heterosexual male) human condition, it could be argued that HAD is a logical and legitimate extension of it.

The preclusion of exculpatory defences except when the victim's conduct constitutes a "sexual assault" is plagued with practical difficulties. It might be extraordinarily difficult to determine what acts are amorous sexual advances and which constitute sexual assault. The

[106] Note 33, *Sentencing judgement* at 17.
[107] Note 43, p 27.
[108] Note 4 at [4.11].
[109] Note 4 at [6.7].
[110] Note 15, p 136.

difficulty in determining an "advance" from an "assault" is evidenced by the fact that neither academics nor the judiciary have attempted to define the term "unwanted homosexual advance" and this would cause considerable difficulties in demarcating what alleged conduct the special class of case would include. This issue was raised in *Hodge* when defence counsel tried to have a psychologist define the alleged actions of the victim as a "sexual assault" rather than a "sexual advance". How a psychologist could make this determination is difficult to grasp and his Honour intervened. However in doing so, his Honour demonstrated the unwillingness of the judiciary to draw the distinction:

> *His Honour:* This is all very interesting as a matter of semantics and definition, but is it really going to help the jury at all in relation to the issues in the case. We all know what has been alleged, what is claimed, what it is called.[111]

Do we? What *is* it called? His Honour's statement is curious because it confuses the issue further. Are we to assume from the remark that any touching of a man by another that can be inscribed as sexual is an assault? Whilst his Honour is dismissive of the issue as being only of interest "in the manner of semantics and definition", the distinction is of paramount importance.

In raising HAD, and introducing selective narratives of the victim's character, the accused trusts that the typical Australian juror will evaluate the victim with feelings of fear, revulsion and hatred. In many cases, the jury has been eager to oblige. However, whether this justifies never allowing provocation to go to a jury when HAD is raised is questionable. Many arguments against HAD would justify the expiration of the provocation defence in its entirety, rather than its repudiation in just one class of killings.[112] The creation of such a special class of case would be an enormous insult to feminist critics such as Howe[113] and Brown[114], who have earnestly campaigned to have provocation abolished in its entirety on the accurate basis that it is a gendered defence which is especially detrimental to women. It would be inequitable to justify preclusion of a claim of a non-violent homosexual advance whilst denying an exception to, for example, a women's exercise of her right to choose her sexual partners. It is

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[111] Note 33, *Transcript* at 196.
[112] Note 42, p 729.
[113] Howe, A, "Reforming Provocation (More or Less)," (1999) 12 *The Australian Feminist Law Journal* 127, pp 130-131.
[114] Brown, H, "Provocation as a Defence to Murder: To Abolish or to Reform," (1999) 12 *The Australian Feminist Law Journal* 137.

therefore not surprising that the recommendations of the Working Party and demands from academics for a special preclusion have been ignored by the legislature. Whilst experiencing fear or hatred in response to a non-violent homosexual advance should not provoke the "ordinary person" to lose self control so as to form an intent to kill or cause grievous bodily harm, as the High Court has held that it can, and the legislature has demonstrated an unwillingness to intervene, solutions must function within those parameters. It is therefore necessary to examine evidence adduced in the three trials in the context of existing evidentiary exclusions.

Evidentiary Exclusions in the Evidence Act

Hearsay

Section 59 of the *Evidence Act 1995* (NSW) ("the Act") states that "Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation." Whilst the hearsay rule is subject to a multitude of exceptions, all exceptions included in Division 2 of Part 3.2 of the Act are applicable only to "first hand" hearsay; that is, they apply only to previous representations made by a person who had "personal knowledge" of the asserted fact (s62(1)). Section 62(2) states that a person only has "personal knowledge" if that person "saw, heard or otherwise perceived", but a representation made by another party is insufficient. In *Hodge*, evidence was adduced form a police officer regarding a written statement that had been prepared by another officer who could not be located. The statement was an amalgam of statements made by anonymous informants concerning the behaviour of the victim, and provided the only evidence for establishing a tendency. It seems clear from the uncertain expression of the assertions in the statement ("although it is not certain…"; "it appears that…"; "it is possible that…"; "he may have…") that the informants did not have "personal knowledge" of the alleged tendencies. Therefore this evidence was a representation of a representation of a representation of a representation. Consequently, it is astounding that the evidence was admitted.

Likewise in *Andrew*, evidence was adduced from a police officer which consisted of comments made by anonymous acquaintances of the victim. The comments from the informants consisted primarily of things they had been told by the victim. The Crown objected on the basis of hearsay and, during the *voir dire*, defence counsel claimed that:

> "...it's not put forward as a means of raising his character with a view to seeking the jury to form some adverse view. That's not the intention at all."[115]

His Honour responded:

> "Nonetheless, what they said to a police officer in circumstances about which we know nothing and on dates a long time ago will be put before the jury in terms which, beyond any question at all, will induce the jury to form about Mr Tonks an attitude which might not be entirely correct or fair at all."[116]

Despite this, his Honour allowed the evidence, claiming in the sentencing judgment that "the relevant operation of the *Evidence Act 1995* (NSW) made Mr. Smith's evidence of that hearsay information admissible, notwithstanding that none of the informants was tested by cross-examination, either in the presence of the jury or at all."[117] This is difficult to understand as many of the statements began with phrases such as "Wayne told me...", "From what Wayne told us...", and " I ascertained...". Clearly, the informants did not have "personal knowledge".

Relevance and Tendency

Section 56(2) of the Act states that "evidence that is not relevant in a proceeding is inadmissible in the proceeding." Relevant evidence is defined as evidence that "if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding" (s55(1)). In a criminal proceeding, only the factual elements of the offence charged and any defence are facts in issue.[118] Related to the relevance provisions in the Act is the tendency rule which states that:

97 (1) Evidence of a person's character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had that tendency (whether because of the

[115] Note 35, *Transcript* at 67.
[116] Note 35, *Transcript* at 68.
[117] Note 35, *Sentencing judgement* at [28].
[118] Odgers, S. *Uniform Evidence Law*. 4th Ed. LBC Information Services, Sydney, 2000, para [55.3].

person's character or otherwise) to act in a particular way, or to have a particular state of mind if:

(a) the party adducing the evidence has not given reasonable notice…;or

(b) the court thinks that the evidence could not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Since s97(1)(b) refers to significant probative value, the evidence must be more than merely relevant to the assessment of the probability of a fact in issue but need not have a "substantial" degree of relevance.[119] The evidence may also need to be "important" or "of consequence".[120] Therefore, s97 creates a more onerous test for such evidence than does the relevance provisions. It could be argued that evidence relating to the sexuality and sexual reputation of a victim in a murder trial is not admissible under either s55 or s97. When an accused raises exculpatory defences based on an alleged sexual advance made by the victim, the victim's conduct is brought into question and becomes a fact in issue. However, this should be limited to the specific conduct alleged by the accused. To suggest that a victim's 'homosexuality' and 'promiscuity' is relevant makes no more sense than to suggest that the sexual reputation of a woman is relevant to the issue of consent in a sexual assault proceeding. However, in *Andrew* the defence went further, seeking to adduce evidence that the victim had engaged in *consensual* sex with seventeen-year-old males to support the accused's claim that the victim had sexually assaulted him. The Crown objected on the grounds of relevance and tendency during legal argument defence counsel said:

> *DC:* The *fact* that he had behaved in what is contended to be an *unusually unnatural manner* towards other people of a similar age to the accused is relevant [emphasis added].[121]
>
> *DC:* You have evidence available that there might not be anything to conclusively establish that this man had not behaved in precisely an identical way before.[122]

[119] *Locker* (1996) 89 A Crim R 457; *Lock* (1997) 91 A Crim R 356 at 361 per Hunt J.
[120] *Lock* (1997) 91 A Crim R 356 at 361 per Hunt J; *R v Osman* (NSWCCA, 60101/97, 10 March 1998, Wood J, unreported).
[121] Note 35, *Transcript* at 106.
[122] Note 35, *Transcript* at 170.

When the double negative is unravelled from the second extract, it seems to suggest that there is an onus on the Crown to provide conclusive evidence to prove that the victim had not sexually assaulted anyone. Despite the fact that this suggestion is wrong, the evidence was ruled admissible. Whilst his Honour's reasons for allowing the evidence are not recorded in the transcript, it is difficult to envisage any justification for its inclusion.

A similar situation arose in *Graham* where the accused claimed that he had responded violently to the victim's advance because he feared the victim was going to rape him. The defence requested a *voir dire* on the admissibility of tendency evidence and, astonishingly, the Crown stated that "the defence should be entitled to that evidence."[123] The evidence adduced referred only to non-violent consensual sexual activity, and yet, in closing defence counsel stated that "...the evidence about Mr McGovern's character and those tendencies... simply supports the accused account." This evidence should not be admissible because any suggestion that a victim's homosexuality or reputation for consensual sex is relevant to whether the victim attempted to sexually assault the accused will have a much greater prejudicial than probative effect. It should not require mentioning that being gay does not demonstrate a propensity to sexually assault any more than evidence of a man's heterosexuality demonstrates a propensity to sexually assault a woman.[124] Male to male sexual assault, as an act of violence, serves a variety of motives including mastery and control through conquest, with sexual gratification of secondary or non-existent importance.[125] Additionally, the preponderance of perpetrators in stranger sexual assaults are ostensibly heterosexual[126] and 5% -10% of victims of gay bashings reported sexual assault by their heterosexual perpetrators.[127] Consequently, this evidence ought to have been ruled inadmissible on the grounds of relevance and tendency.

Section 135

Section 135 of the Act provides that "the court may refuse to admit evidence if its probative value is substantially outweighed by the

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[123] Note 34, *Transcript* at 26.
[124] Note 48, p 1548.
[125] Groth A N. and Burgess A W. "Male Rape: Offenders and Victims" (1980) 137 *American Journal of Psychiatry* 806, p 810.
[126] Stermac L., Sheridan, P M. and Dunn, S. "Sexual Assault of Adult Males", (1996) 11 *Journal of Interpersonal Violence* 52, p 62.
[127] Comstock, G D. "Victims of Anti-gay/Lesbian Violence", (1989) 5 *Journal of Interpersonal Violence* 101, p 105.

danger that the evidence might", *inter alia*, be unfairly prejudicial to a party (135(a)) or be misleading or confusing (135(b)). As the section requires that the probative value "substantially" outweighs the danger, it creates an onerous test for the party seeking to have the evidence excluded. Additionally, even if the test is met, the court is not obliged to exclude the evidence.[128] In criminal proceedings it is unlikely that the court will rule that evidence sought to be adduced by the accused has little probative value.[129] However, evidence "may be unfairly prejudicial to a party if there is a real risk that the evidence will be misused by the jury in some unfair way."[130] Additionally, in *Papakosmas v The Queen*, McHugh J stated that the assessment of probative value "would necessarily involve considerations of reliability."[131] Odgers suggests that evidence may be misleading or confusing if "the trial judge believes there is a real danger that evidence of a minimal probative value will be given much more significance by the tribunal of facts than it deserves."[132] Therefore, the Crown might request a s135 discretionary exclusion in conjunction with an objection on the grounds of hearsay, relevance or tendency if it is unable to properly challenge the reliability of the evidence.

The Problem of the Proposed Solutions

The primary concern with the solutions proposed above is that it necessitates an imposed silence resulting in invisibility for the victim's sexuality. Whilst it is clear that victims' sexuality, reputation and social relations are not accurately or honestly portrayed in courtroom discourse, deeming any mention of this aspect of the life of the victim inadmissible may not be acceptable to many members of the gay community. A study conducted by the Victorian GLRL reported that "invisibility" including "the practice of self-censorship which many were forced to adopt in order to protect themselves from harm and other types of discrimination resulting from the general assumption that heterosexuality is the only legitimate form of sexuality" was a significant concern to a majority of respondents.[133] As Kendall stated:

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[128] Note 118 at [135.2].
[129] *R v Crisologo* (1998) 99 A Crim R 178 at 190 per Simpson J.
[130] *R v BD* (1997) 94 A Crim R 131 at 139 per Hunt J. Quoted with approval by McHugh J in *Papakosmas v The Queen* (1999) 196 CLR 297.
[131] (1999) 196 CLR 297.
[132] Note 118 at [135.5].
[133] Dempsey, D, *Enough is Enough: A Report on Discrimination and Abuse Experienced by Lesbians, Gay men, Bisexuals and Transgender People in Victoria*, Victorian Gay and lesbian Rights Lobby, Victoria, 2000, p 24.

> "'Silence', or the mere failure to raise the issue, is not necessarily homophobic, in that no hatred or fear of... gay men is expressly stated. It is, however, 'heterocentric', in that it reinforces the view that only heterosexuals exist or matter in law. It is also slightly dishonest, as it excludes a given perspective without considering the consequences... of this exclusion."[134]

So just what are the consequences of the exclusion of such evidence? Of paramount importance is that it demonstrates an acquiescence to heterosexist notions of what is acceptable sexual behaviour.[135] If gay discourse is silenced, is this not surrendering to prevailing societal perceptions of same-sex intimate relations as other, depraved, perverse and unknowable? Such forced invisibility results in gay men being forced to live the "double life" of which so much was made by defence counsel. As long as the law fails to recognise, accept and protect the sexual "other", gay men will be forced to modify their behaviour in public at the risk of becoming, or remaining, invisible.

Presumptions of heterosexuality pervade almost all sites of activity in our heterosexist culture, from perceptions of family, to art, entertainment and literature and to criminality. If a victim's gay life is muzzled and excluded from courtroom discourse, there will result either a presumption of heterosexuality or "homosexuality" within accepted heterosexist notions. The latter might include a presumption of sexual encounters occurring within a "respectable" (hidden) and/or "responsible" (monogamy or serial monogamy) context. Whilst this might ameliorate juror prejudice, or prevent defence counsel inflaming it, it might be criticised as dishonest. Perhaps pandering to heterosexist notions of tolerable gay behaviour is too high a price to pay for substantive justice. Furthermore, silencing the victim, by acquiescing to prevailing attitudes, sanctions heterosexism and lends credence to its dominance. However, such an argument might only be persuasive if juries were not encouraged to infuse their deliberations with prejudice that was fuelled by *dishonest* representations of who the victim was.

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[134] Kendall, C. "Sexuality: What's Law got to do with it?", (1995) 20(6) *Alternative Law Journal* 266, p 267.

[135] Bagnall, R. Gallagher, P and Goldstein, J. "Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties", (1984) 19 *Harvard Civil Rights- Civil Liberties Law Review* 497, p 497.

Conclusion

A primary motivation for violence against homosexuals, and more specifically in cases were HAD is raised, is a societal perception that retaliatory violence is an appropriate response to an affront to 'male honour' such as a homosexual advance.[136] Lamentably, this anachronistic macho logic also permeates the court room, jurists and juries so that male violence is granted a degree of acceptance beyond that which would be extended had the violence not been a response to homosexuality.[137] Although manslaughter is still a very serious offence, as provocation excuses the conduct of the accused, that conduct "is viewed to some extent as 'understandable' in the circumstances."[138] Therefore, HAD functions as a licence for men to kill other men who they allege made a sexual advance toward them.[139] As Coss asserts: "[T]he message is a simple one: unwanted homosexual overtones are an abomination and the perpetrators deserve everything they get..."[140]

It seems abundantly clear that HAD works, at least in part, because of sympathy created for the accused and a corresponding animosity toward the victim. Our criminal justice system relies heavily on individual juror's life experience in deliberations, and deliberations are not only infused with the life experiences of individual jurors, but also prejudices and fears, often possessed subconsciously. [141] In a heterosexist culture such as ours, homosexuality is likely to be amongst the issues that implicates long-held and deep-seated prejudices.[142] Whilst denying provocation to all accused who claim HAD would halt its operation, such a proposal may be too reactionary. Rather, it might be in the interests of justice for the law to prevent prejudicial constructions by excluding such evidence under existing provisions of the Act. The operation of HAD sans this framework of victim vilification could then be monitored. Presumably, if 'the Emperor has no clothes' the exclusion of such inflammatory evidence would bring about the natural demise of the defence.

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[136] Note 10, p 5.
[137] Note 105, p 107.
[138] Coss, G, "A Reply to Tom Molomby," (1998) 22 *Criminal Law Journal* 119, p 120.
[139] Note 113.
[140] Coss, G, "Revisiting Lethal Violence by Men," (1998) 22 *Criminal Law Journal* 5, p 8.
[141] Note 15, p 161.
[142] Buchanan, D. "Forum on the Homosexual Advance Defence" paper presented to the *NSW Young Lawyers Assembly*, Terrigal, 2 November 1994, pp 5-6.

Appendix: Table of had Cases in NSWSC 1999/2000

CASE	VICTIM	V'S ALLEGED PROV-OCATIVE CONDUCT	A'S RESPONSE	VERDICT	SENTENCE
Andrew (16)	Wayne Tonks (35)	Put on pornographic video and made sexual advance. A claimed V had raped him on a previous occasion	With accomplice Kane, struck V on the head with bat, bound his hands and feet and placed a plastic bag over V's head and bound it around the neck.	First trial: guilty manslaughter . Successfully appealed. Second trial: acquitted (self-defence)	
Bellamy	Harry Jansons (57)	A awoke to find V masturbating. V moved toward him.	Repeatedly kicked V in the head and neck. Robbed V's mother at knife point. A claimed he had been raped in goal (not by V)	Plead guilty to manslaughter and armed robbery	Manslaughter: 5 yrs min 3 yrs. Armed robbery: 5 yrs min 3 yrs.
Four juveniles, two aged 12, two aged 15	Ralph Mason	One accused claimed V had sexually assaulted him.	Four bashed V to death during a robbery.	3 pleaded guilty to robbery with an undertaking to give evidence against A who claims HAD.	2 yrs probation.
Graham (20)	Brendan McGovern (29)	After consensual genital touching, A claimed V attacked him.	Held V in headlock around neck until 2 to 3 minutes after he stopped moving.	Guilty manslaughter (provocation or unlawful and dangerous act)	5 yrs, non-parol period of 3 yrs.
Hodge (18)	Leo Press (63)	Claimed fell asleep and awoke to V touching his genitals.	Struck V 10-12 times with hammer to the back of the head.	Guilty murder	15 yrs, non-parol period of 7 yrs.
Kane (16)	Wayne Tonks (35)	Claimed killing was revenge for being raped by V in company with Andrew on previous occasion.	See *Andrew* (above)	First trial: Guilty murder. Successfully appealed. Second trial: Guilty murder. Appeal dismissed.	10 yrs, 6 months. Non-parol period of 7 yrs, six months.
Kerr (25)	Arthur Chudleigh (72)	A alleged history of V sexually assaulting him.	V suffered blow the head, brain haemorrhage and heart attack. A burned down V's house and buried V's body hundreds of klms away.	Not guilty (self-defence or causation)	

CASE	VICTIM	V'S ALLEGED PROV-OCATIVE CONDUCT	A'S RESPONSE	VERDICT	SENTENCE
Korhonen (16)	Geoffrey Boyson	V touched A on the leg. A claimed V had raped him previously.	Went to the kitchen, procured a knife and repeatedly stabbed V.	Guilty manslaughter (diminished respons-ibility)	Four year, $500 bond.
Norris (17)	Barry Coulter (68)	A claimed V had raped him two years previously.	A shot V.	Guilty manslaughter (provocation)	3 yrs to be served in juvenile detention center.
Polanski	Jozef Zimmer (64)	Played pornographic video and offered A $50 for oral sex	Bashed V with fire extinguisher, stabbed V and stole V's property	Found unfit to be tried. Special hearing verdict- V committed murder	To be detained in a mental health facility for a limiting term of 13 years.
Privett, Dean & Michael	Dr Peter Browne Rowland	Hearsay evidence that V was killed because he was gay.		Guilty murder	D: 17 yrs, nine months, NP 14 yrs, 6 months; M: 14 yrs, eight months, non-parol 11 yrs.
Robinson, Christopher (17)	Trevor Parkin (36)	A claimed V made a "sexual approach"	Stabbed V numerous times before mutilating V's body and stealing V's property	Plead guilty to murder.	Adams J did not accept HAD claim. Sentence to 45 years, non parole 35 years
Robinson, Harry (27)	John Kennett (47)	Murdered in Junee Prison. A claimed V was a child molester		Guilty murder.	22 yrs, non-parol 15 yrs
Valera	David O'Hearn (59) & Frank Arkell	O'Hearn: V undressed and asked A for a massage; Arkell: Claimed to have had sex with V before but "felt put on the spot" when V asked him to play the "active role"	O'Hearn: "Whacked" V on the head with wine decanter, decapitated and mutilated body; Arkell: Bashed V to death and mutilated body.	Guilty murder x 2.	2 x life imprisonment. No non-parol period set.