CRITIQUE AND COMMENT

'MORE THAN ORDINARY MEN GONE WRONG': CAN THE LAW KNOW THE GAY SUBJECT?

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[This article is primarily concerned with how 'the homosexual' is constructed at law and how homophobia and heterosexism are put into legal discourse. These concepts are explored through an examination of the homosexual panic and homosexual advance defences, as they have been employed in the Australian case of R v M. *The article provides a theoretical analysis of law's power to signify and essentialise. It argues that the law's reliance on religion and medicine in its understanding of homosexuality precludes it from addressing the needs of gay men and lesbians. The law's constructions of homosexuality as sickness and sin become apparent in the article's dissection of the transcript. An analysis of* R v M *also reveals the inadequacy of current legal doctrine to deal with homophobic violence. Finally, the article discusses various strategies for change which may result in lesbians and gay men being truly equal under the law. It is only through relying on theories and tactics that reflect the lived experiences of gay men and lesbians that the possibility of reverse discourses is created and that power can be resisted with counter-power.]*

> I did not have the guts to get into the cot with him so I smashed him in the face with a bottle.[1]

This story is taken from evidence given to the Royal Commission on Human Relationships sub-enquiry into homosexuality. When I first read it, I was a curious 13 year old furtively searching in school and public libraries for any reading matter about a word, let alone a concept, that I barely understood. I remember at the time thinking: why was so much hatred directed at *them*? Twenty years later, I am still wondering why.[2]

I start this article with a story, for the telling of stories is what this article is primarily concerned with — stories told by the law, by the courts, by the players in our legal system. Most importantly, it is about the stories that can and should be told by gay men and lesbians; stories of our lives and selves; stories told as

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1 As quoted in Anne Deveson (ed), *Edited Proceedings of the Royal Commission on Human Relationships 1976: Australians at Risk* (1978) 329.

2 The feminist theorist Martha Mahoney argues that the reluctance of academics to tell personal stories permits continued social blindness about crucial issues: Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1, 14.

strategies to combat the ways in which we are constructed as 'other', as non-persons in the courtrooms of Australia.[3]

I *R v M*: AN INTRODUCTION[4]

In March 1991, 23 year old Robert M killed 65 year old Joe Godfrey in particularly brutal circumstances. Godfrey was stabbed 17 times in the head, neck and chest. His ribcage was crushed with a chair. He was bashed around the head with a telephone and then had his throat cut whilst unconscious. M then collected some 'stubbies', stole fifty dollars and set fire to the flat before leaving. None of these facts was contested by the defence. Subsequently, M was charged with the murder of Godfrey. M argued in court that he had been the victim of a homosexual advance and thus pleaded not guilty by reason of self defence and/or provocation. In May 1992, a jury in the Supreme Court of Victoria acquitted M of all charges.

Although the Homosexual Panic and Advance defences have not been elevated to the status of separate pleas in Australian criminal law, it is arguable that in both this and other Australian murder trials, the concepts underlying these defences have been incorporated into pleas of provocation and self defence.[5]

[3] For a general account of story-telling as a legal strategy, see below n 163 and the references listed therein.

[4] *R v M* (Supreme Court of Victoria, Teague J, 28 May 1992). Further facts of this case will be recounted in later stages of this paper. I have decided to maintain the anonymity of the 'players' in this trial. This is to respect the privacy of the witnesses who testified in court, particularly those of the prosecution. Full details can be ascertained from the trial transcript, Victorian Government Reporting Service, No 60-37119 ('*Transcript*').

[5] In addition to *R v M*, see *Stiles v R* (1990) 50 A Crim R 13, 15 where the defendant's mother gives evidence that the defendant said to her: 'I just bashed somebody up. Don't worry about it, Mum, he's only a poof.' The victim later died. See also *R v Londema and Verco* (Supreme Court of South Australia, Bollen J, 7 December 1992) (grievous bodily harm); *R v McGregor* (Supreme Court of New South Wales, Newman J, 9 October 1993); *R v McKinnon* (Supreme Court of New South Wales, Studdert J, 24 November 1993); *R v Stevenson* (Supreme Court of New South Wales, Studdert J, October 1993); *R v O'Connor* (Supreme Court of Western Australia, 17 February 1994); *R v Turner* (Supreme Court of New South Wales, Grove J, 14 July 1994); *R v Dunn* (Supreme Court of New South Wales, Grove J, 14 July 1994); *R v Bonner* (Supreme Court of New South Wales, Dowd J, 19 May 1995). For further factual accounts of anti-gay killings and Australian cases concerning anti-gay violence, see Attorney-General's Department of New South Wales, *Review of the 'Homosexual Panic Defence'*, Discussion Paper (1996); Anthony Bendall and Tim Leach *'Homosexual Panic Defence' And Other Family Values* (1995); Larry Galbraith, 'He Touched Me', *Outrage* (Melbourne), March 1994, 14; 'Free to Kill', (Leader) *Melbourne Star Observer* 12 June 1992, 1; Roger Booth, 'Enemies', *Campaign* (Australia) March 1993, 23; 'He Made Me Do it Your Honour', *Melbourne Star Observer*, 24 December 1993, 4; Barbara Farrelly, 'Roll a Fag and Go Free', *Sydney Star Observer*, 10 December 1993, 1; Graeme Hindmarsh, 'Getting Away with Murder?', *Sydney Star Observer*, 17 June 1994, 11; Adele Horin, 'Gay deaths: is justice being murdered?', *Sydney Morning Herald*, 27 May 1995, Spectrum 2A. For other cases which are not directly concerned with defences to 'gay murders', but which have featured violence against homosexuals resulting in death or serious injury, usually in the context of an alleged homosexual advance, see *R v Pritchard* [1991] 1 VR 84 (Defendant claimed the brutal killing of the victim in a toilet block was justified in self defence due to a homosexual advance. Defendant appealed on admissibility of evidence); *R v Grmusa* [1991] 2 V R 153 (Joint defendants brutally killed victim in a 'poofter bashing' exercise. Case concerns appeal on sentencing principles); *R v Preston* (1992) 58 A Crim R 328 (Infliction of grievous bodily harm in response to alleged homosexual advance); *Whittaker v R* (1993) 68 A Crim R 476 (Appellant claimed in killing the deceased, he was going to the defence of a friend who was subjected to a homosexual advance by the HIV positive victim).

This article uses the trial of *R v M*, firstly, to discuss the problem of violence towards gay men, and how a heterosexist and homophobic legal system allows defendants to literally 'get away with murder'. Secondly, and aligned to this issue, it examines how in both abstract and material ways the law constructs 'the homosexual'. Finally, the article suggests ways in which these constructions can be subverted.[6]

By studying the evidence given by the 'players' in this trial (the defendant, counsel, expert witnesses and the judge), we observe the production of reality, truth and normality (the three are easily conflated) in legal discourse. The law, it will be argued, has failed to step outside the clinical, penal or religious discourses which construct the 'homosexual' as 'other' in the nation's courtrooms. M's brutal actions as an individual are ultimately insignificant or, at least, less significant than the state-sponsored and produced heterosexism of which they are a reflection. This article argues that the law, and particularly criminal law defences, reflect a heterosexual experience of self and 'society'. Substantive law reform, whilst important, will fail as long as the law cannot 'know' the gay subject.

The law, through its production of 'rituals of truth', condones and upholds violence against gay men and lesbians. It is only through lesbians and gay men exercising their (subjugated) knowledges against law's discursive power that structures of heterosexual hegemony can be challenged.

II SETTING THE SCENE: HOMOPHOBIC VIOLENCE IN AUSTRALIA[7]

It is certainly difficult to measure the level and incidence of violence directed towards gay men and lesbians, although '[t]here is growing evidence that this social group experiences disproportionately high levels of violence, much in the form of "hate crime" — attacks motivated by a deep animosity towards their group identity.'[8]

[6] The author realises that lesbians suffer as much from homophobic violence as gay men do. Indeed, in our misogynist and sexist culture, it is arguable that lesbians suffer doubly, as lesbians and as women. Nonetheless, most cases that come before the courts deal with men attacking men. This is most often the case with murder. See Gail Mason, *Violence Against Lesbians and Gay Men* (1993). I also would not presume to appropriate lesbian experience, whereas being a gay man, to a certain extent, I can speak with regard to gay men (whilst recognising that in itself this is an overarching and reductionist category, ignoring ethnic and class differences). For accounts of why violence against lesbians can be considered a 'double affront', see Andrew Koppelman, 'The Miscegenation Analogy: Sodomy Law as Sex Discrimination' (1988) 98 *Yale Law Journal* 145, 165 where he notes that lesbianism 'challenges male privilege ... [because it] denies that female sexuality exists, or should exist, only for the sake of male gratification.'

[7] The following section is a greatly condensed version of some research I am currently conducting on the level and incidence of violence against lesbians and gay men in Australia. In this article, I am less interested in the incidence of violence than in a detailed analysis of the way homosexuality is put into discourse in one murder trial. For further discussion on violence against gay men and lesbians in Australia, see Bendall and Leach, above n 5. For further discussion of the nature of 'hate crime', see Gregory Herek and Kevin Berill (eds), *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* (1992).

[8] Stephen Thomsen, 'The Political Contradictions of Policing and Countering Anti-Gay Violence in New South Wales' (1993) 5 *Current Issues in Criminal Justice* 209, 209.

As with men's violence against women, there is a 'dark figure' of criminal activity directed towards gay men and lesbians. Some reasons for this include the (natural) reluctance of survivors to report these crimes and particularly the fact that relations between gay men and the police have been at best strained, at worst hostile.[9] Stories abound of the humiliation, aggression and even brutality with which lesbians and gay men have been treated by police after having reported violent incidents — the most common complaint being that they were not taken seriously.[10]

Whilst the establishment of gay and lesbian/police consultative taskforces is an improvement, since, at the very least, they create channels of communication and dialogue between the police and gay community, a more cynical view would be that 'community consultation' is often window dressing by another name.[11] One of the positive initiatives has been for police to maintain beats (irony intended) and foot patrols of areas heavily populated with gay people, such as Melbourne's Commercial Road and Sydney's Oxford Street.[12]

[9] The most notorious Australian example of altercations between police and gay men and lesbians occurred during the raid of the Tasty Nightclub in Melbourne in August 1994. In the early hours of a cold winter's morning, 463 patrons of a gay nightclub were detained and stripsearched, ostensibly for alleged drug possession. Of the 463 patrons, only 5 were found to have any illicit substances in their possession. Over 40 patrons have since taken legal action against the police. See David Peatfield, 'Tasty Legal Action: Full Inquiry Launched', *Melbourne Star Observer*, 19 August 1994, 1. For an account of the incident in the more general context of anti-gay discrimination, see Phillipa Bonwick, 'Victoria's gay rights and wrongs', *The Age* (Melbourne), 13 August 1994, 3. See below n 200 for a further commentary on this litigation.

[10] See, eg, Sonya Voumard, 'Sydney's gays hit back over bashings', *The Age* (Melbourne), 6 February 1993, 2 for an account of the following all too common response: 'They [the attackers] started off by walking onto our ankles, then they got stuck into us. My friend got kidney damage.' Andrew, 27, and his friend walked to a police station covered in blood. 'Because it was a poofter bashing they didn't want to know about our blood. They wanted us out of the station, so we walked to St Vincent's Hospital.'

For other individual tales of violence inflicted on gay men and lesbians, see Gay and Lesbian Rights Lobby, *The Streetwatch Report* (1990) ('*Streetwatch Report*'); Gay and Lesbian Rights Lobby, *The Off Our Backs Report: A Study into Anti-lesbian Violence* (1992) ('*Off Our Backs Report*'); Mason, above n 6.

[11] Peter Moir and Matthew Moir, 'Community-based Policing and the Role of Community Consultation' in Peter Moir and Henk Eijkman (eds), *Policing Australia: Old Issues New Perspectives* (1992) 211, 229 argue that whilst the ideal of police/community liaison is worthy in principle, in reality it certainly is not a partnership of anything approaching equals, since 'police assume the dominant role in the relationship from the beginning and maintain it because they largely control the flow of information .... police definitions of the problems to be addressed and the assumptions which underlie their responses are rarely challenged.' Thomsen observes that there is a contradiction between policing imperatives and protecting gay men and lesbians. On the one hand there are definite 'messages' coming from the policy divisions of Australia's policing agencies, that in 'this equal opportunity climate', gays should at least be seen to be given equal treatment under the law. On the other hand, the enforcement of 'street offences' has increased in recent years, affecting the gay community in particular. As such, 'the requirements of protection in public have sometimes become a pretext for virtual harassment': Thomsen, above n 8, 213.

[12] The formation of the 'Lavender Blues', Australia's first support group for gay and lesbian police officers, and its replacement with the Gay and Lesbian Police Employees Network (GALPEN), represents positive development for gay and lesbian police officers. The benefit of such groups lies in the fact that being openly gay, or 'out', these officers may, by example, help break down barriers, misconceptions and homophobia amongst their non-gay colleagues. This will hopefully result in flow-on effects to the wider community. Gay people can only fulfil symbolic roles of the 'other' or the 'not self' if they are abstract synecdoches, rather than flesh and blood loved ones, co-workers etc. See Herek and Berill, above n 7, 166. For discussion of the formation of

The lack of interest and funding for research into issues surrounding homophobic violence also makes it extremely difficult to get an accurate picture of what is happening 'out there'.[13] Whilst some statistics are collected and collated, and some (infrequent) surveys are conducted by various gay reform and activist groups around Australia, some police bureaux and other bodies (such as the Human Rights Commission), there is no national monitoring service to gain such data in a comprehensive, centralised and systematic manner, such as that collected by United States agencies under the Hate Crimes Statistics Act 1990.[14]

Despite such constraints, it is nonetheless possible to state that levels of physical and non-physical anti-gay violence are high and are increasing.[15] It is arguable that there has been an increase in the level and intensity of violence since the gay community has achieved more visibility with the advent of HIV/AIDS.[16] AIDS has paradoxically increased both the legitimacy and the fear of homosexuality. Davenport-Hines suggests that 'gay murders' may reflect a displaced desire to kill gay men because *they* are perceived as killers by 'introducing' and 'spreading' HIV.[17] The better view seems to be that of Herek and Glunt who posit that AIDS is less of a cause of anti-gay feeling than a focal

the 'Lavender Blues', see Matthew Jones, 'Gay Cops Come Out', *Melbourne Star Observer* (Melbourne), 6 October 1995, 1; Tim Winkler, 'Support Group forms for Homosexual Police', *The Age* (Melbourne), 13 October 1995, 3. As to the formation of GALPEN, see Wayne Miller, 'Coming Out in Force', *Herald-Sun* (Melbourne), 15 June 1996, 7; Wayne Miller, 'Cop Out!', *Weekend* (Melbourne), 15 June 1996, 7. For discussion of violence and victimisation directed at gay police officers, see Mathew Jones, 'Gay Cops Speak Out', *Melbourne Star Observer* (Melbourne), 12 April 1996, 1. For further discussion of the importance of 'Coming Out', see below nn 156-62 and accompanying text.

13 See Mason, above n 6.

14 28 USC 534 (1993).

15 See Bendall and Leach, above n 5; Thomsen, above n 8, 210; *Streetwatch Report*, above n 10; *Off Our Backs Report*, above n 10; Gay Men and Lesbians Against Discrimination, *Not a Day Goes By: Report on the GLAD Survey into discrimination and violence against lesbians and gay men in Victoria* (1994) (*'Report on GLAD Survey'*). This latter report, based on a survey with a response of 1002 people in Victoria, found that 70% of lesbians and 69% of gay men reported being verbally abused, threatened or bashed in a public place. Actual bashings had been experienced at least once by 11% of lesbians and 20% of gay men: *Report on GLAD Survey*, 5. A possible (counter) argument as to why anti-gay crimes over the past decade seem to have risen may be that the figures reflect the increased confidence of the gay community to report these crimes, rather than a true increase in incidence. See, eg, Laura Dean, Shanyu Wu and John Martin, 'Trends in Violence and Discrimination Against Gay Men in New York City: 1984-1990' in Herek and Berill, above n 7, 47. As data and sociological research on why people choose to report or refrain from reporting crimes such as rape or anti-gay violence are minimal, one needs to be careful about positing any firm conclusions of this type.

16 See, eg, Dennis Altman 'AIDS and the Discourses of Sexuality' in Robert Connell and Gary Dowsett (eds), *Rethinking Sex: Social Theory and Sexuality Research* (1992) 32, 43. For some tentative American research findings on the relationship between AIDS and anti-gay violence, see 'Presidential Commission on the Human Immunodeficiency Virus Epidemic 1988', outlined in Herek and Berill, above n 7, 38. It should be noted that there does generally seem to have been far less violent and hysterical responses to HIV/AIDS in Australia. Some of the reasons for this are outlined in Peter Johnston, *Identity, the Gay Movement and Understandings of HIV/AIDS: Implications for Policy Development*, unpublished Master of Arts thesis, Department of Social Science, RMIT, Melbourne (1995). See also Dennis Altman, *AIDS and the New Puritanism* (1986) 185-7 as to the difficulty of comparing levels of violence in different countries.

17 Richard Davenport-Hines, *Sex, Death and Punishment: Attitudes to Sex and Sexuality in Britain since the Renaissance* (1991) 334.

event that crystallises and thus rationalises pre-existing hostility toward gay people.[18]

As with studies on violence against women, the incidence and prevalence of anti-gay violence will also differ depending on how violence is defined. The few existing studies extend the concept of violence from physical acts to include verbal attacks, intimidation and threats.[19] I am more interested, however, in the question of whether certain structural actions, omissions and constructions of the heterosexist State (and particularly the legal apparatus) can be properly viewed as state-sponsored, or at least sanctioned, homophobia.[20]

[18] Gregory Herek and Eric Glunt, 'An Epidemic of Stigma: Public Reaction to HIV/AIDS' (1988) 43 *American Psychologist* 886, 889.

[19] See, eg, Mason, above n 6.

[20] One way of reconceptualising what is perceived as violence is through the use of 'social injury' theory. The concept of 'social injury' has been developed by feminist theorists drawing from, yet radically reformulating, the work of criminologist Edwin Sutherland. See, eg, Adrian Howe, '"Social Injury" Revisited: Towards a Feminist Theory of Social Justice' (1987) 15 *International Journal of the Sociology of Law* 423; Adrian Howe, 'The Problem of Privatized Injuries: Feminist Strategies for Litigation' in Susan Silbey and Austin Sarat (eds), *Studies in Law, Politics and Society* (1990) 119; Liz Kelly, 'The Continuum of Sexual Violence' in Jalna Hamner and Mary Maynard (eds), *Women, Violence and Social Control* (1987); Regina Graycar and Jenny Morgan, 'Injuries to Women: Gendered Harms' (1990) 36 *Refractory Girl* 7; Margaret Thornton, 'Feminism and the Contradictions of Law Reform' (1991) 19 *International Journal of the Sociology of Law* 453. To the best of my knowledge, 'social injury' has not been used as a strategy to assist gay men and lesbians at law. Law's administration needs to be complemented by a theory that takes into account injuries suffered by gays and lesbians *because* they are gays and lesbians. Space does not permit me to develop this argument here, except to say that we require a wider range of 'injuries' toward gays to be viewed as legal harms, including daily routinised harms which do not easily translate to solutions at law. Liz Kelly argues that [women] have no way of specifying, and the law, legislators and the criminal justice system does not allow them to show, how 'typical everyday male behaviour' feels like violence. Kelly's point is well taken and is applicable to experiences of gay men and lesbians: Liz Kelly, 'The Continuum of Sexual Violence' in Jalna Hamner and Mary Maynard (eds), *Women, Violence and Social Control* (1987). Terms such as 'poofter', 'faggot', 'dyke' (and 'nigger', 'chink' etc), even when not used expressly with malice, are ever present reminders of one's outsider status and the potential threat of physical violence. Verbal abuse as a symbolic form of violence is only actionable in very (legally) specific ways, either through anti-vilification laws or civil procedures such as defamation. In the latter form of action, you are essentially defending yourself negatively or denying the very charge that has been levelled at you. Media and popular culture representations of 'poofters', jokes and graffiti, eg G.A.Y. (Got Aids Yet) or public affection being redefined as public indecency, are all for the most part non-actionable harms under conventional law. Social injury theory would characterise such abuse as violence. When I wear an HIV ribbon, or display a gay rights poster on my wall, or lecture to my students on homophobia, I may put myself at risk of 'violence'. Indeed, such indicia are pointers to gays being, for at least some members of society, an acceptable target.

III HOMOSEXUALS IN LAW: MORE THAN 'ORDINARY MEN GONE WRONG'[21]

Postmodernist/feminist theorists argue that 'law' operates in a series of (false) essentialist dichotomies.[22] These 'violent hierarchies' include right/wrong, evil/good, innocence/guilt, man/woman, defendant/victim, black/white, criminal/public-ordinary person, homosexual/heterosexual.[23] Furthermore, '[l]aw operates to render these dichotomies part of mainstream perception, something given and natural.'[24]

The 'neutrality' or 'objectivity' of the legal process is an elaborate discursive manoeuvre or fiction to entrench male (heterosexual) power.[25] The law not only has considerable power to define rights and wrongs, it is also a discursive site of struggle. It does not merely *sanction*, it *produces*; it does not merely *reflect* (heterosexual) relations, it *reproduces* them. The law gives its full approval and protection to those who maintain the 'heterosexual economy', who are ideally the married couple with children.[26] The legal discourses, the rules, the decisions, the personnel and the institutions of law all contribute to the social construction of (homo)sexuality.[27]

[21] The reference is to a passage in *Thompson v R* [1918] AC 221, 235 (Lord Sumner) (emphasis added):

> [homosexuals] ... connote an inversion of normal characteristics ... [they] seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of *ordinary men gone wrong*, but stamps them with a hall-mark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity.

For an interesting account of how legal discourses construct 'the homosexual' as a pathological, addictive and/or sado masochistic identity, see Carl Stychin, 'Unmanly Diversions: The Construction of The Homosexual Body (Politic) in English Law' (1994) 32 *Osgoode Hall Law Journal* 503.

[22] For general discussions of postmodern/feminist accounts of law, see Chris Weedon, *Feminist Practice and Poststructuralist Theory* (1987); Carol Smart, *Feminism and the Power of Law* (1989); Carol Smart, 'Law's Power, the Sexed Body and Feminist Discourse' (1990) 17 *Journal of Law and Society* 194; Mary Joe Frug, 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)' (1992) 105 *Harvard Law Review* 1045; Margaret Davies, *Asking the Law Question* (1994) 167-218.

[23] The term 'violent hierarchies' is taken from Jacques Derrida, *Positions* (1981). Homosexuals within a binary framework would be seen as the negative or lesser pairing, the deviation of heterosexual. However, as I later discuss, the oppositioning of homo/heterosexuality is not so simple, the boundaries by no means so clear. See below nn 44-51 and accompanying text. For a discussion of deconstruction and Derridean analysis in the context of the law, see Davies, above n 22, 260-74; Wayne Morgan, 'Queer Law: Identity, Culture, Diversity, Law' (1995) 5 *Australasian Gay and Lesbian Law Journal* 1, 10-12.

[24] Kristen Walker, 'The Participation of Law in the Construction of (Homo)Sexuality' (1994) 12(1) *Law in Context* 52, 58.

[25] This does not mean that there are no homosexual judges or legislators, but they rarely, if ever, publicly identify as such.

[26] This clearly excludes the homosexual (couple), as well as prostitutes and single mothers. See Monique Wittig, 'The Category of Sex' in Monique Wittig (ed), *The Straight Mind and Other Essays* (1992) 1-8; Margaret Davies, 'The Heterosexual Economy' (1995) 5 *Australian Feminist Law Journal* 27. See also Maggie Troup, 'Rupturing the Veil: Feminism, Deconstruction and the Law' (1993) 1 *Australian Feminist Law Journal* 73, 73 where she argues the courts have 'created a hierarchy of [rape] victims in which a woman who is married and by extension has a family is able to more legitimately claim the protection of the law than a sex worker.'

[27] I agree with Walker's analysis that it is extremely difficult, however, not to fall back into presenting 'the law' in monolithic terms, given the way in which it is perceived (and encourages us to perceive it) by society at large: 'it is clear that the law is a trope in dominant representa-

In the lexicon of the law there is no room for the word 'gay'. The language of the law does not *know* the word 'gay': '[t]o talk otherwise in the law would be to talk in a language which the law does not recognise.'[28] How then has the law put the concepts of the homosexual and homosexuality into legal discourse?

Historically, the law has represented same sex relations between men through the discourses of religion, medicine/pathology or criminality.[29] Each of these

tions of society, so that the law is in a sense reified as a monolith with its own structure and internal truths. This, of course, serves to buttress the power that the law claims and has in society': Walker, above n 24, 58-9.

28 Les Moran, 'Sexual Fix, Sexual Surveillance: Homosexual in Law', in Simon Shepherd and Mick Wallis (eds), *Coming on Strong: Gay Politics and Culture* (1989) 180, 190. Terms such as homosexual and lesbian, are scientific, medical and legal constructions and therefore are ideologically and discursively loaded with all the meanings these signify. Too often the noun 'homosexual' is conflated with the sexual act, so that the act becomes its sole defining feature. One can have the perverse result that being a homosexual at law depends on whether you are committing same sex acts and those acts are illegal. One's identity as a 'homosexual' may depend on whether one lives in Victoria or Tasmania. It may also depend on whether or not one engages in oral and/or anal sex. If one merely kisses or masturbates one's lover, presumably one may not be homosexual. This is the absurd, yet paradoxically logical, result if homosexuality is judged solely on same sex acts. See Marc Fajer, 'Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men' (1992) 46 *University of Miami Law Review* 511, 546. See below nn 35-41 and accompanying text. Terms such as 'homosexual' and to a lesser extent, 'lesbian', are 'identities' primarily prescribed/proscribed by non-homosexuals. As such, Watney has rightfully argued that 'homosexual' is a word that we cannot continue to employ: Simon Watney, 'The Spectacle of AIDS' in Donald Crimp (ed), *AIDS: Cultural Analysis, Cultural Activism* (1988) 71, 79-80. 'Homosexual' also commonly and mistakenly incorporates lesbians, thus maintaining female and lesbian invisibility. 'Gay', on the other hand, is a self chosen appellation by the (male) community and therefore a much more positive construction. However, lesbians rightly argue that gay men reduce all questions of homosexuality to maleness and men's issues by appropriating the term 'gay' to themselves, thus subsuming women into a male dominated discourse. Another problem of terminology is the increasing use of the term 'queer' to describe a certain type of fluid, even post modern, consciousness of sexuality. Its usage has offended some older members of the community for using the (derogatory) terms of those who defined and oppressed us. As noted by Fajer, 'Can Two Real Men Eat Quiche Together?', 535, '[m]any in the gay community who have felt the word's edge as a weapon object to its use as a shield'. Whilst such views are understandable, the ironic and empowering effects of appropriating such signifiers should not be underestimated. It also is helpful in expressing the idea of a fluidity of sexuality, compared to which, even positive words such as gay seem immutable and monolithic. On the nature of 'queer', see Robert Reynolds, 'Postmodernism and Gay/Queer Identities' in Robert Aldrich and Gary Wotherspoon (eds), *Gay Perspectives Two* (1994) 245. Finally as a matter of nomenclature, I avoid the use of the term 'straight' implying as it does that if you are not straight you are bent, crooked etc, in accordance with the practice adopted by Fajer, 'Can Two Real Men Eat Quiche Together?', 536.

29 Apart from discussing these constructions, space does not permit this to be a general account of the 'emergence of the homosexual', albeit to say that until the nineteenth century 'sexuality' was directed at a series of acts rather than identities. See Jeffrey Weeks, *Sexuality and its Discontents: Meanings, Myths and Modern Sexualities* (1985) 90, where he says, '[p]ractising sodomy did not, in any ontological sense, make you a different sort of being. A "sodomite" was someone who practised sodomitical acts .... [b]ut the nineteenth century produced a new definition and a new meaning'. To quote Foucault's famous phrase, '[t]he sodomite had been a temporary aberration; the homosexual was now a species': Michel Foucault, *The History of Sexuality, Volume One: An Introduction* (1978) 43. For general discussion of the 'emergence of the homosexual', see Guy Hocquenghem, *Homosexual Desire* (1972); Dennis Altman, *Homosexual: Oppression and Liberation* (1971); John Gagnon and William Simon, *Sexual Conduct: The Social Sources of Human Sexuality* (1973); Foucault, *The History of Sexuality, Volume One: An Introduction* (1978) 43; Kenneth Plummer, *The Making of the Modern Homosexual* (1981); Jeffrey Weeks, *Sex, Politics and Society: The regulation of sexuality since 1800* (1981); Jeffrey Weeks, *Sexuality and its Discontents: Meanings , Myths and Modern Sexualities* (1985); Brian Pronger, *The Arena of Masculinity: Sport, Homosexuality and the Meaning of Sex* (1990); Robert Aldrich

discourses have had significant impact on judicial decision making.[30] The law has generated a concept of the homosexual at law, which Moran calls the 'homosexual fix', through its traditional process of 'selecting, taking and inhabiting ideas produced elsewhere and then using them to produce effects in law.'[31]

In doing this, the secular legal system can appropriate ecclesiastical categories into its construction of right and wrong, natural and unnatural. It also incorporated the 'dogma' of the 'new religions' of the nineteenth century — psychiatry, criminology and medicine in similar ways.[32] The key genealogy of the homosexual fix is the criminalisation of sodomy — the 'abominable crime', the unspeakable crime against nature. The term 'sodomy':

> reflects and perpetuates the usually unacknowledged parasitic relationship between secular constitutional discourse on the one hand and other normative and discursive systems such as religion and medicine on the other.[33]

That the term sodomy is not an anachronism is evident in that it is still the statutory term used for homosexual acts in most of the United States.[34] In Tasmania, sexual acts between men are proscribed in similarly archaic terms, such as unnatural sexual intercourse, gross indecency and sexual intercourse against the order of nature.[35] Sodomy and equivalent 'unnatural sex laws' are

and Garry Wotherspoon (eds), *Gay Perspectives: Essays in Australian Gay Culture* (1992); Connell and Dowsett, above n 16.

30 See Moran, 'Sexual Fix', above n 28; Les Moran, 'The Homosexualisation of English Law' in Didi Herman and Carl Stychin (eds), *Legal Inversions: Lesbians, Gay Men and the Politics of Law* (1995) 3; Editors of the Harvard Law Review, *Sexual Orientation and the Law* (1990) 1-44; Kendall Thomas, 'Beyond the Privacy Principle' (1992) 92 *Columbia Law Review* 1431; Carl Stychin, above n 21; Leo Flynn, 'The Irish Supreme Court and the Constitution of Male Homosexuality' in Herman and Stychin (eds), *Legal Inversions: Lesbians, Gay Men and the Politics of Law* (1995) 29; Walker, above n 24.

31 Moran, 'Sexual Fix', above n 28, 184.

32 The fact that up until the fourteenth century there was a strong link between the ecclesiastical courts and the courts of King's Bench and Equity facilitated this strong religious judaeo-christian ethic in secular Anglo American law. For a history of this link and the development of the English legal tradition generally, see, eg, William Seagle, *The History of Law* (1946); Sir Frederick Pollock and Sir Frederick Maitland, *A History of English Law* (1st published 1895, 1968 ed); Raoul Caenegem, *The Birth of the English Common Law* (1973).

33 Thomas, above n 30, fn 4. The word 'sodomy' derives from the story in Genesis 18:20 of the Bible. Over time it has been generally agreed that it reflected the sinful misconduct of those of the same sex in the city of Sodom. Recent theological scholarship has argued that this is actually a misreading of the Old Testament and that in fact the crime in question was a 'sadistic lack of hospitality which violated customary law': see John McNeil, *The Church and the Homosexual* (3rd ed, 1988) 42. Whatever the truth, it is undeniable that in discursive and constructive terms the former meaning is the one that has the provenance in secular law. Other biblical sources for the links between sin and homosexual acts include Leviticus 20:13, Romans 1, 26:27.

34 See, eg, Janet Halley, 'Misreading Sodomy: A Critique of the Classification of Homosexuals in Federal Equal Protection Law' in Julia Epstein and Kristina Staub (eds), *Bodyguards: The Cultural Politics of Gender Ambiguity* (1991) 351; Fajer, above n 28.

35 Criminal Code Act 1924 (Tas) s 122: Any *person* who:

(a) has sexual intercourse with any person against the order of nature:

(b) has sexual intercourse with an animal; or

(c) consents to a male person having sexual intercourse with him or her against the order of nature

is guilty of a crime.

Charge: Unnatural sexual intercourse. (Emphasis added.)

normally understood to include oral or anal sex between *any* persons. This is how the law has been interpreted in Tasmania[36] with regard to s122 and in most American states which have outlawed the practice.[37] In practice, and as a matter of discursive understanding, its meaning is that of sex between men. In *Bowers v Hardwick*,[38] one of the most infamous cases of recent American constitutional history, the respondent Michael Hardwick had been arrested and gaoled for performing oral sex on his male lover in the privacy of their own bedroom. Reflecting the selectiveness of this charge and the way sodomy is discursively understood, the United States Supreme Court refused the application of the American Council for Civil Liberties to consider whether a heterosexual couple could be guilty of a sodomy offence, notwithstanding that the Georgia statute outlawing such behaviour was specifically gender neutral.[39] The category of sodomy embodies the misconception that activity is identity; that relationships between gay men consist only and entirely of sex, and lots of it:[40] 'If as a man, you fuck other men or are fucked by other men, you are "a homosexual". The [*Hardwick*] majority predicates homosexual identity upon acts of homosexual sodomy.'[41]

The second major discourse through which the homosexual is constructed at law is that of medicine/science. Most historians agree the term 'homosexual' was coined by Dr Karoly Benkert in 1869.[42] The nomenclature reflects a zeal for scientific taxonomy that was coterminous with the rise of the scientific/medical professions. In the wake of Darwinian theory, homosexuality was seen as biology 'gone wrong'. The homosexual is the 'other' in nature. Sex was now to be discussed in terms of physiology, biology, and zoology, in short, scientifically.

Criminal Code Act 1924 (Tas) s 123:

> Any *male person* who, whether in *public or private*, commits any indecent assault upon, or other act of gross indecency with another male person ... is a guilty of a crime.
>
> Charge: Indecent practice between male persons. (Emphasis added.)

For a general discussion of these sections, see Wayne Morgan, 'Identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations' (1994) 19 *Melbourne University Law Review* 740.

36 Morgan, above n 35, 742.

37 See Editors of the Harvard Law Review, above n 30. For a comprehensive list of American state sodomy statutes, see Halley, above n 34, 355 and Robert Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) 80 *California Law Review* 133, 151, fn 120.

38 478 US 186 (1986) ('*Hardwick*').

39 Note that s 122 Criminal Code Act 1924 (Tas) is for the most part neutral: above n 35. The modern sodomy statutes avoid distinction between heterosexual and homosexual persons. However, Halley claims that that the effect of decisions such as *Hardwick* is to constitute a distinct crime of homosexual sodomy. Homosexuals [at law] are 'a group now not only defined but known by its sodomitical essence': Halley, above n 34, 356.

40 For a detailed discussion of how the judiciary uses this 'pre-understanding' of gay lives and gay men to reinforce their (homophobic) judgements see Fajer, above n 28 and my discussion of this concept below nn 169-79 and accompanying text.

41 Walker, above n 24, 63.

42 See Pronger, above n 29, 87. Foucault on the other hand gives this 'honour' to Westphal whose 1870 medical article on 'contrary sexual sensations' 'can stand as its date of birth': Carl Westphal *Archiv fur Neurologie* (1870) quoted in Foucault, above n 29, 43.

Krafft-Ebbing's landmark treatise *Psychopathia Sexualis*[43] classified the aetiology of sexual variety into normal and abnormal, natural and unnatural: 'In medicine the language of the binary oppositions shifts: healthy/unhealthy, natural/unnatural, sane/insane, mature/immature'.[44]

The homosexual of law is diseased in both mind and body. The male homosexual uses his body as a sewer and his lust is voracious. His physiognomy is that of the 'deviant' and the 'criminal'.[45] He is also 'contagious' in the sense that he will try and corrupt others, particularly minors, to his depraved ways.[46] As one 1960s sex educator put it:

> The greatest danger in homosexuality lies in the introduction of normal people to it. An act which will produce nothing but disgust in a normal individual may quite easily become more acceptable, until the time arrives when the normal person by full acceptance of the abnormal act becomes a pervert also.[47]

If heterosexuality is the natural, true and right path, why must it always be so vigilantly on its guard against its corruption? Why is it so vulnerable to attack? The answer may lie in what Dollimore calls the 'paradoxical perverse'. Drawing from Augustine, Dollimore states:

> Evil ... is at once utterly alien to the good and natural and yet mysteriously inherent within or parasitical upon the good and the natural. Likewise sexual perversion is utterly alien to true sexuality (that sexuality which is good and natural) yet mysteriously inherent within or parasitic upon it, such that this perversion must be rooted out by the ever vigilant.[48]

The powers of evil/perversion will have greater effect on those who are seen as originally of greater innocence/goodness — particularly the young.[49]

The dichotomous, but always uneasy pairing, of homosexual/heterosexual reflects a shift from monistic to dualistic theology, which is embodied in the utter separation of good/evil, natural/unnatural, god and the devil. Yet, as Dollimore convincingly argues, such dualisms are always tense, contingent and contradictory — the 'paradoxical perverse'.

[43] Richard Von Krafft Ebing, *Psychopathia Sexualis* (1st published 1886, 1965 ed).

[44] Moran, 'Sexual Fix', above n 28, 187.

[45] The studies of the criminologist Cesare Lombroso were replete with references to the physical otherness of the degenerate. See Cesare Lombroso, *Crimes: Its Causes and Remedies* (1st published 1911, 1994 ed). For a fascinating account of visual representations of diseased nineteenth century degenerates and prostitutes and how syphilis and other venereal diseases were automatically conflated with these types, see Sander Gilman, *Disease and Representation: Images of Illness from Madness to AIDS* (1988).

[46] All these readings can be seen in Lord Sumner's judgment (above n 21) and have since been put into judicial discourse many times over. In a relatively recent case, Lord Justice Lawton puts into discourse both the medical and Christian constructions of the homosexual. He is 'disordered', 'depraved', 'damaged', 'wicked', 'revolting', 'the driving force of lust', 'corrupt', 'mentally ill', 'uncontrolled' (it should be noted however that his Lordship is considering homosexuality in the context of an assault on a young boy): *R v Willis* [1975] 1 All ER 620, 622-4 (Lawton LJ). Similar examples can be found in *R v Ford* [1977] 1 WLR 1083 and *Norris v Attorney-General* [1984] IR 36. See also Moran, 'Sexual Fix', above n 28, 187; Stychin, above n 21.

[47] Jonathon Rodney, *A Handbook of Sexual Knowledge* quoted in Teresa Boffin and Sunil Gupta, *Ecstatic Antibodies: Resisting the AIDS Mythology* (1990) 9.

[48] Jonathan Dollimore, *Sexual Dissidence: Augustine to Wilde, Freud to Foucault* (1991) 144.

[49] See below n 79 in the context of the *R v M* case.

The same point is made from a secular perspective by Eve Kosofky Sedgewick in her analysis of sexuality. She argues there is an 'always already crossed' boundary between the 'homosocial' and the 'homoerotic' that men must be ever vigilant not to cross: '[f]or a man to be a man's man is separated only by an invisible, carefully blurred, always, already crossed line from being "interested in men."'[50]

Homosociality is partly made possible through the expression, however 'benign', of homophobia. When real 'he-men', such as footy players, horse around in the showers, joking about their genitalia etc, they tread dangerously close to transgressing the straight and narrow:

> Within orthodoxy, affinity between men is a cherished experience. Locker rooms are places where orthodox men like to hang around naked, talking and joking with each other ... touching and pushing against each other [and being without women]. But these are also paradoxical pleasures. Always lurking in masculine camaraderie is a fear that something could go amiss, that the ostensible orthodoxy of a man's world might turn out to be paradoxical. Hidden in the orthodox relations between men is the potential of the homoerotic paradox.[51]

This paradox is also reflected in law. In several jurisdictions there are ordinances which forbid the *promotion* of homosexuality *per se* or the *promotion* of homosexuality as a *pretended family relationship*.[52] But as Dollimore pithily asks, '[h]ow could anything so demonstrably inferior to the real thing ever pretend to be it?'[53]

The emerging medical discourses became a powerful new way to condemn the unnatural in a secular and scientific age without necessarily abandoning the earlier Christian legal tradition.[54] This medicalisation of sexual 'abnormalities' allows the law to do what it is best at — namely looking for causes in terms of genetics, neuroses, delayed development or chemical imbalance,[55] studying

[50] Eve Kosofsky Sedgwick, *Between Men: English Literature and Male Homosocial Desire* (1985) 89.

[51] Pronger, above n 29, 76. This paradox is also felt in reverse. Much gay male pornography uses imagery and iconography drawn from the locker room, the military, the labouring site and other representations of hyper-masculinity. See below n 174.

[52] See, eg, Departments of Labour, Health and Education and Related Agencies Appropriations Act 1988 (US) s 514; Local Government Act 1988 (Eng) s 28; Law Reform (Decriminalization of Sodomy) Act 1989 (WA) ss 23-4. Of related relevance is the extremely ambiguous provision in s 22(1) HIV/AIDS Preventive Measures Act 1993 (Tas) which states that 'a person must not publicly promote participation in sexual activity of a kind which is likely to cause damage to health through the sexual transmission of HIV.' Query whether this would cover contact advertisements in the gay press classifieds?

[53] Dollimore, above n 48, 242.

[54] Whilst the punitive (law) or pathological (medicine) discourses were the hegemonic legal, scientific and epistemological models that constructed the 'homosexual' prior to the 'liberation era', there were other traditions competing for the right to state the 'truth' of sex. Certainly those theories of the free thinkers and radicals associated with Magnus Hirschfeld and Edward Carpenter (homosexuals themselves) were very different. Such theories viewed homosexuals and lesbians as a 'third' but equally valid sex, sometimes called Uranians, neither sick nor deviant: see John Lauritsen and David Thorstad, *The Early Homosexual Rights Movement* (1974).

[55] There is of course no need to question the 'cause' of heterosexuality.

effects such as suicide, mental breakdown and alcoholism, and prescribing punishment, gaol, inversion treatments and psychiatric committal.[56]

Homosexuality in law is therefore not only the 'other', but it is also a great force, a great power, a great danger that — unless contained and kept in its place, unless sustained as something 'other' and marginal — will bring down all: the self, the family, the nation state. The law works with an extravagant image. It sensationalises, magnifies, stoops to immoderation in its production of the idea of homosexuality.[57]

It is no accident that law uses the claims of science to bolster its construction and reproduction of the *idea* of the homosexual, for:

> law makes claims which are sufficiently similar to the claims of science for us to see that power is being deployed in a similar way. For example, law has its own method, its own testing ground, its own specialized language and system of results. Law sets itself apart from and above other discourses in the same way science does.[58]

The law is indeed the supreme heterosexist institution as it incorporates and supersedes most other ideological, material and organisational structures in society such as religion, medicine, media and psychiatry. This process is mediated through the courtroom trial.

[56] This is clearly noticeable in the discussions of the *Wolfenden Report* about prostitution and homosexuality in 1957. Despite its recommendations to decriminalise consensual sexual intercourse between men over 21, the report disdainfully describes homosexuals as men of arrested development, immature psychosexually, at best sad and pathetic individuals, at worst dangerous and corruptive. Lesbians are erased from the Law's purview in this instance, sexual relations between women not being criminalised. Traditionally, and perhaps, apocryphally, the Privy Council could not bring themselves to tell of such 'vices' to Queen Victoria. See United Kingdom, *Report of the Departmental Committee on Homosexual Offences and Prostitution* (1957) Cmnd 247 (*'Wolfenden Report'*). For secondary accounts of the *Wolfenden* deliberations, see Weeks, *Sex, Politics and Society*, above n 29, 239-44; Davenport-Hines, above n 17; Anthony Grey, *Quest for Justice: Towards Homosexual Emancipation* (1992); Stephen Jeffrey-Poulter, *Peers, Queers, and Commons: The Struggle for Gay Law Reform from 1950 to the Present* (1991).

[57] Moran, above n 28, 189.

[58] Smart, 'The Sexed Body and Feminist Discourse', above n 22, 197. Equally important is the fact that the discourses of law and medicine have produced counter discourses, knowledge has produced (subjugated) knowledge and power is resisted by counter power. Foucault demonstrates how the 'othering' of 'perversity' has 'made possible the formation of a "reverse" discourse: homosexuality began to speak in its own behalf, to demand that its legitimacy or "naturality" be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified': Colin Gordon (ed), *Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (1980) 141. The medicalisation of (homo)sexuality at least gave name to the perverse 'other', gave it an identity of sorts, provided the impetus for like-minded outcasts to coalesce into a community. At first meek and quiescent, grateful for the support of the like-minded, gradually the community becomes a movement with a questioning and then resistant voice. For a secondary analysis of Foucault's concept of reverse discourse, see Weedon, above n 22, 109-11; Madan Sarup, *An Introductory Guide to Post-Structuralism and Postmodernism* (1988); Jana Sawicki, *Disciplining Foucault: Feminism, Power and the Body* (1991).

IV THE TRIAL: SYMBOLISM AND LEGITIMATION[59]

On the night of the 20 March 1991, 65 year old Joe Godfrey, after a few beers at the local Football and Cricket Club, went to a nearby hotel to continue drinking.

Robert M and his friends, Wayne and Rodney, had been drinking beer and taking Rohypnol tablets at M's home since morning. Later that evening, M went by himself to the hotel, where he met Godfrey for the first time. The two had a few drinks and chatted about footy and cricket for some time. M claimed that later that night Godfrey asked him back to his flat to share some more beer. At the flat, Godfrey told him that he was going to the bedroom to change into something more 'comfortable'.[60] Godfrey allegedly returned in an open bathrobe with an obvious erection. M, anxious that Godfrey was going to make a pass at him, prepared to leave. Godfrey then put his arms around M and tried to prevent him leaving. M tried to push him away, but Godfrey persisted in grabbing him. M picked up the breadknife from the kitchen table and stabbed Godfrey. Godfrey allegedly followed M into the hall still intent on making a pass. M stabbed Godfrey multiple times and hit him with a chair. Godfrey fell on his back and lost control of his bladder. M then covered Godfrey's head with a tea towel and cut his throat, almost to the point of decapitation.[61] Before leaving, M stole fifty dollars, some stubbies of beer and then set fire to the flat. Six days later, after hiding at his parents' holiday house, M was arrested and charged with murder.

The trial of *R v M* took place over four days in May 1992 at the Supreme Court of Victoria before Teague J. Witnesses included hotel workers, bar patrons, police, forensic personnel, and friends and family of M. Expert evidence for the defence was given by a forensic psychologist. Since M gave unsworn evidence, he was not able to be cross-examined by the Crown.[62] The foregoing recital of facts is premised on the version that was most favourable to the accused, a version which the jury presumably accepted. M was acquitted of all charges by a jury of twelve.

[59] It should be noted that the evidence of what occurred on the night of the murder is incomplete. It is made up of witness recollections, the transcript of the defendant's interview by the police, the forensic evidence and the trial proceedings. As with most murder trials, at the time of the incident there were only two witnesses, one of course being the deceased.

[60] A typical (stereotypical?) gay line.

[61] Such horrific violence is not atypical of gay killings. Thomas states that 'the characteristic "overkill and excessive mutilation" of attacks on gay men and lesbians suggests that this is a species of violence whose form conveys its expressive content: the medium *is* the message': above n 30, 1467. For discussion of the brutality of homophobic killings in the United States, see, eg, Thomas, above n 30; Herek and Berill, above n 7, 19-85; Gregory Herek, 'The Context of Anti Gay Violence: Notes on Cultural and Psychological Heterosexism' in Richard Cleaver and Patricia Myers (eds), *A Certain Terror: Heterosexism, Militarism, Violence and Change* (1993). For British accounts, see, eg, Simon Watney, *Policing Desire: AIDS, Pornography and the Media* (1987); Davenport-Hines, above n 17, 366.

[62] This option is no longer available to defendants in Victorian criminal trials: Evidence Act 1958 (Vic) s 25.

Kristin Bumiller has stated that all criminal trials are symbolic because both defendants and victims come to represent social roles for the 'audience'.[63] I take the 'audience' to mean the jury, but it would also include the wider audience of the media and through them the 'public'.

> The symbolic trial is viewed as a signifier within the dominant legal culture: it is a forum that projects authoritative messages through language and legal form about identity and social relationships in a struggle between the antagonistic world views of the defence and the prosecution ... social reality is reconstructed for the purposes of any trial.[64]

What roles then do the various 'players' in this trial perform?

A *The Victim: Joe Godfrey*

All we know about Godfrey is that he was a 65 year old former sailor,[65] who had been married, but was now a loner, who drank at the local footy club where he was a cleaner. In the hundreds of pages of transcript this is basically all we ever know of him as a human being. Whilst his *body* is always constituted in memory, through discourse or during the trial through forensic photographs and descriptions of the killing, he is otherwise erased as a person. Yet, at the same time, he is also painted as a sexually voracious predator who attacks innocent and vulnerable young men, who are the worse for wear by reason of drugs and alcohol. We do not even know if Godfrey *is* homosexual.[66] The only evidence given of his 'proclivities' is from the defendant himself. Firstly, through evidence that Godfrey put his hand on the buttocks of M whilst at the bar and then through the testimony as to what happened at the flat that night. The first incident is viewed much differently in the light of the evidence of the barman:

Defence Counsel (DC): Did you hear any conversation that was a bit strange that night?

Barman: Yes ... Joe was offering someone to stay for the night. He asked if he was right for a bed ... if he had somewhere to go ... Rob said he'd go back to his house with him.

DC: Did you see Joe do anything when he said that ... did he put his hand on his lower back like that ... [demonstrating].

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63 Kristin Bumiller, 'Fallen Angels: The Representation of Violence against Women in Legal Culture' (1990) 18 *International Journal of the Sociology of Law* 125, 126-30.

64 Ibid 126.

65 And we all know about sailors! The first newspaper accounts of the killing mention this fact, see, eg, Craig Binnie and Michelle Coffey, 'Sailor Found Dead in Burnt Out Flat' *Herald-Sun* (Melbourne) 21 March 1992, 3.

66 As mentioned in my theoretical discussion of homosexuality and the law, it is impossible to call Godfrey gay in the discourse of this trial, even if this is how he viewed himself. The players in the *R v M* trial, even the Crown counsel, only ever refer to homosexuality, at best as an aberration not meriting assault (Prosecution), as abhorrent (Defence) or in a clinical context (Psychologist). Throughout the trial reference is only ever made to homosexual *acts*, thus explaining or conflating homosexual *identity* exclusively with sexual *acts*. See my discussion of the 'sex as lifestyle thesis', below nn 174-84 and accompanying text.

B: On his bum? Yes, more or less.[67]

One wonders after this 'advance', and given M's alleged phobia about homosexuals, *why* he agreed to go back to Godfrey's flat to continue drinking.[68] On the other hand, there was corroborated evidence given by independent witnesses that M had planned to 'roll' (assault and rob) Godfrey that evening:[69]

Prosecutor (P): What did he [M] say?
Bar Patron (F): He talked about taking him for a ride.
P: Taking — ? — Him for a Ride?
F: He just mentioned about taking him for a ride because Joe had some money and I just told him to leave the old guy alone, you know give him a break.[70]

F will later give evidence that M asked him whether he had a knife, giving further credence to the robbery motive.

B *The Defendant: Robert M*

We are told much more about the 23 year old defendant. M's life from childhood is continually remarked upon. He is presented as an 'average bloke'; a 'good mate' who enjoys a game of footy and a few beers with his buddies. He lives with his brother and, whilst unemployed, has had regular work and is now a victim of the recession.[71] In other words, he is a good Aussie bloke. Throughout the trial, M and the defence witnesses are at pains to prove that he is not a homosexual:

Defence Counsel (DC): — My client, the accused man, had a steady girlfriend?
Wayne W (Friend of the Defendant): Yes.[72]

DC: As far as you could judge your brother wasn't homosexual?
David M (Brother of the Defendant): No, he wasn't.[73]

DC: Were you a homosexual?
Defendant(D): No.
DC: Were you homosexually inclined?
D: Not at all, no.[74]

[67] *Transcript,* above n 4, 135.
[68] See below nn 78-83 and accompanying text for a discussion of the key aspect of M's defence, which centered around his fear of homosexual advances due to some 'attacks' made on him since a child.
[69] This was a fact that the prosecution, rather half-heartedly, suggested may have presented a motive for the killing.
[70] *Transcript,* above n 4, 103.
[71] Despite the fact that on the day of the murder he spent his whole unemployment cheque on beer and drugs, with this being glossed over by the defence and not tackled to any extent by the prosecution.
[72] *Transcript,* above n 4, 44.
[73] Ibid 80.

Yet the first thing M does when he arrived at Stanton's hotel is to ask whether it is a 'gay bar'. There are three possible explanations as to why M asked this question. Firstly, he was genuinely interested in attending a gay bar because he was seeking same sex encounters (prosecution strategy). Secondly, he wanted to 'roll a queer'.[75] Thirdly, he was ensuring the 'coast was clear' because he was terrified of being accosted by a homosexual. The last possibility appeared to be what M wanted his audience to accept:

> *Defendant (D):* Because it was a bistro bar and usually in a bistro bar it is full of women and men. It was all full of men and there was only one woman ... and as soon as I sat down at the bar *all the men looked at me* and I thought it was a little strange and that's when I asked the lady, 'This isn't a gay bar now, is it?'
>
> *DC:* Why were you asking that? Were you looking for some homosexual bar?
>
> *M:* No, not at all .... Because if it was a gay bar, I was going to move out.[76]

This last motivation is the core of the defence strategy, the homosexual advance defence (HAD).[77] The homosexual panic defence (HPD) is used to show that the accused reacted violently after being homosexually propositioned, because of insecurities about his own latent or unrecognised homosexual tendencies.[78] Homosexual advance defence, however, does not require the defendant to reveal such tendencies by way of psychological evidence. It is a far preferable defence in terms of keeping one's 'masculine' identity intact. It is not surprising, therefore, that after some brief references to the possibility of M being sexually ambiguous, defence counsel tended to focus on evidence that would suggest HAD, rather than the stigmatising HPD. The key way of doing this was presenting expert analysis of certain key childhood and adult episodes in M's life.

M's fear and hatred of homosexuals, it was argued, was attributable to a number of past experiences. M testified that he has been propositioned continuously by other men since the age of ten and that by the time of the Godfrey 'incident',

[74] Ibid 231.

[75] This was also raised as a prosecution strategy, which seems to contradict their first argument.

[76] *Transcript,* above n 4, 227-8 (emphasis added).

[77] Robert Bagnell, Patrick Gallagher and Joni Goldstein, '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, 500 define 'Homosexual Panic' as:

> [a] state of sudden feverish panic or agitated furore, amounting sometimes to temporary manic insanity, which breaks out when a repressed homosexual finds himself in a situation in which he can no longer pretend to be unaware of the threat of homosexual temptations ... the person who has, perhaps unwittingly, aroused the unwanted sexual feelings is likely to receive the brunt of the outburst.

For a general discussion of these defences, see Gary Comstock, 'Dismantling the Homosexual Panic Defence' (1992) 2 *Law and Sexuality* 37; Editors of the Harvard Law Review, above n 30; Mison, above n 37; Thomas, above n 30; Bendall and Leach, above n 5.

[78] Many psychologists and psychiatrists argue that Homosexual Panic Defence 'rests on unsupported and untenable psychological theory': Editors of the Harvard Law Review, above n 30, 35. See also Comstock, above n 77 and the references listed therein. Such critics argue that homophobia should be viewed as an exposition of culturally determined values, rather than abnormal psychological traits.

he had become so 'sick and tired' of these occurrences that he lost control and killed Godfrey.

According to M, the first incident was when he was playing near an alley and a man wearing a trench coat and dark clothing emerged from the shadows telling M he was a policeman and demanding his name and address. M fled the scene.

At thirteen, whilst doing his paper round, a man allegedly followed him and continued to do so for the next couple of days, until his older brother scared the man away.

At sixteen, a mate of the accused asked him to masturbate with him. M refused.

At seventeen, whilst watching videos with a friend named John, M took a number of sleeping tablets. Later that night, another person called Craig came to the house, allegedly punched John and took M away. Craig stated that John planned to rape M whilst he was asleep.

The last time M was allegedly propositioned was by a workmate, Greg C. Greg C and M, two years prior to the killing of Godfrey, had worked as truck driver and jockey for a mattress factory. They socialised with each other, mainly at the pub. One night after both men had been drinking heavily, Greg C confided to M that his girlfriend had ended their relationship and that he was very down about it. As M tried to comfort his friend, the latter, according to M, attempted to pull down M's jeans and fondle his penis. M was frightened and escaped by jumping out the kitchen window.[79]

M gave evidence that he had even tried to grow a beard or scar his face to disguise his 'boyish' good looks as a way of warding off such advances. His psychologist gives this behaviour the imprimatur of professional judgement:

> he's endeavouring to make himself ... less attractive with the object in mind of prohibiting or stopping any further homosexual advances being made to him or suggestions even being made to him.[80]

The evidence led suggests M has an unfortunate propensity to be continually in the wrong place at the wrong time. On the basis of these *five* incidents over a *twelve* year period, none of which involved actual sexual abuse, the defence based its justification for the killing.[81] At no time do we have irrefutable evidence

[79] Drawing from Dollimore's analysis of the paradoxical perverse (above n 48), if M's stories are to be believed, he is continually surrounded by people (father figures?) who are his 'protectors', keeping him from *straying* down the *wrong* path. These include, the other children with regard to the 'policeman' incident, his brother during the 'paper delivery' incident, Craig, during the 'John' incident. If he is not protected from such 'evil', if he is not continually on his guard, he may 'lapse'.

[80] *Transcript,* above n 4, 256.

[81] I use the term *justification* deliberately. A provoked killing which results in murder being reduced to manslaughter is an *excusable*, but not justifiable, killing. An acquittal signifies that the jury thought in these circumstances the killing indeed was *justified.* For a discussion of the historical and philosophical development of these concepts at criminal law, see Mison, above n 37, 136-47; Joshua Dressler, 'When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances and the Reasonable Man Standard' (1995) 85 *Journal of Criminal Law and Criminology* 726.

that the motivation behind these incidents was sexual.[82] The possible exception is the Greg C incident, which Greg C adamantly denied in evidence.[83] Nonetheless, the testimony of the psychologist in giving this evidence some 'scientific credibility' was of major significance.

C *Forensic Psychologist for the Defence*

The use of expert witnesses, particularly medical ones, is a vexed issue. Such experts seek to establish 'legal truth' by deploying 'scientific truth'. Some research studies show that the jury may unduly defer to the knowledge of experts in returning their verdicts.[84]

The psychologist saw M only three times prior to the trial, yet nonetheless was deferred to (by both sides) as an authoritative figure. The psychologist adds to the profile being presented of M in the following terms:

> I felt there is an aspect of this man's personality that is exceptional or extraordinary, that is that he has an intense or excessive detestation or abhorrence of homosexual advances being made towards him. And it further seems that that has developed over a period of time, probably since the age of ten.[85]

He further suggests that M's homophobia is a permanent trait, which will only be manifest if there is a 'trigger' incident. Thus, when Godfrey 'accosted' M, he panicked and lost self control. The killing of Godfrey was different from the other 'incidents' in as much as, 'he simply felt cornered by the deceased and had no easy way of retreat.'[86]

When the psychologist is asked whether he considered M was homosexual, he rather ambiguously replies, 'when questioned at length he indicated he was not at all homosexual.'[87]

One does not question the professional capability nor credibility of the psychologist. Nonetheless, it must be remembered that he was employed to look after the interests of the defendant. The prosecution did not call a psychologist, nor did they seem to strongly contest the defence expert's interpretation. The homosexual advance theory, in short, was never discredited. It was viewed as *common sense.*

[82] This is not to claim that for a young boy such interpretations are unreasonable. My point is that even if one was to accept the basic premise of the advance and panic defences, this is arguably flimsy evidence on which to base much of your argument.

[83] *Transcript,* above n 4, 191-4.

[84] Most of this research is American, for the simple reason that the Australian criminal justice system does not permit the jury to relate their experience of jury duty. There seems no good reason why Australian juries may not react in similar ways. Study of the trial transcript, the High Court judgment and secondary writings on the (Lindy) Chamberlain case would seem to substantiate this view. For a critical analysis of the jury and expert evidence from an American perspective see, eg, Brian Cutler, Steven Penrod and Hedy Dexter, 'The Eyewitness, the Expert Psychologist, and the Jury' (1989) 13 *Law and Human Behaviour* 311. For an Australian view, see Ian Freckelton, *The Trial of the Expert: A Study of Expert Evidence and Forensic Experts* (1987) 202-17.

[85] *Transcript,* above n 4, 246.

[86] Ibid 225.

[87] Ibid 247.

D *Legal Doctrine and* R v M

1 *Self Defence*

> I went back, the guy pushed me against a bench, tried to pull my pants down, he tried to fuck me.[88]

The question the jury had to decide was whether the defendant believed on reasonable grounds that it was necessary to use deadly force in self defence.[89] The judge instructed the jury as follows:

> how aggressive and how threatening was the deceased? How immediate and urgent was the threat that he posed to the accused? What choices then did the accused have in responding to the threat .... Did what the deceased do appear to warrant the accused responding as he did or did he go further than you consider reasonable?[90]

A person genuinely about to be, or even perceiving that he will be, (homosexually) raped or attacked should not be denied the chance to plead self defence or even provocation. Men, of course, do rape men.[91] Rather, it seems that in most cases where homosexual advance is part of the defence, the evidence simply does not justify it on the law as currently formulated. In other words, in cases such as *R v M*, it is hard to see how the requirements of necessity and reasonableness are met.[92] Homophobia or hatred of homosexuals, whatever the cause, should not of itself be the base of a spurious self defence plea.

On even the most generous reading of the facts according to the defendant, it is questionable whether an acquittal based on self defence was credible. M was a strong 23 year old man, Godfrey was 65. Godfrey was unarmed and used no violence, other than allegedly putting his arms around M. Even after M had stabbed Godfrey, he apparently kept coming at M, presumably erection intact, like some carnal phantasm:

> *Defence Counsel*: What happened in the hallway between you and him?
> *Defendant*: Well, we started struggling because he caught up to me again, because I stopped, and I thought, 'Well, I've just stabbed a man a couple of times in the back and I better stop and say, "Listen, are you allright

[88] Statement by the defendant as allegedly related to his friend Rodney W: *Transcript,* above n 4, 51.

[89] *Zecevic v DPP* (1987) 162 CLR 645 ('*Zecevic*').

[90] *Transcript,* above n 4, 294 (Teague J).

[91] I would posit that most cases of male rape, particularly in institutional settings, are committed by men who would not identify as gay or homosexual. This is one reason that terms such as homosexual rape and homosexual murder are offensive and misleading misnomers. More often than not it is the homosexual who is raped or killed.

[92] In *Zecevic* 162 CLR 645, 662, Wilson, Dawson and Toohey JJ stated that:

> [i]f the response [of using deadly force] of an accused goes beyond what he believed necessary to defend himself or if there were no reasonable grounds for a belief on his part that the response was necessary ... then the occasion will not have been one which would support a plea of self defence.

> [*sic*]? *I am not like that.* Let's sit down"', but he come towards me again.[93]

The only option the defence argued was to bash Godfrey senseless and cut his throat whilst he was prostrate on the hall floor.[94] Yet the senior Crown pathologist gave evidence as follows:

> there is nothing to indicate that the deceased was the aggressor ... the left hand injuries [of the victim] might have been caused in the deceased seeking to defend himself.[95]

Furthermore, the evidence of several witnesses in the bar suggests that M killed Godfrey because he had attacked him and earlier planned to rob him.[96] M himself even indicates this in his statement of interview with the police:

> Q: What was your intention when you cut him?
> A: To kill him
> Q: Is that because you thought he was gunna [*sic*] rape you?
> A: Yes. I knew the next day that he'd go to the police and say I'd bashed and stabbed him.
> Q: What did that have to do with it?
> A: Cause I was scared that I - I - I - thought ... that they'd believe him because he was older.
> Q: And what has that got to do with-with in context of killing him?
> A: So he couldn't say - and he couldn't go to the police and say it.[97]

Later in court the robbery motive is refuted:

> *Defence Counsel (DC):* You have said to the police that you did say to 'F' ... 'What about rolling him?' or words to that effect.
> *Defendant:* Yes, I did.
> *DC:* Did you mean that?
> *Defendant:* Not at all. I was only joking. As my brother stated, in our family we have a dark sense of humour.[98]

Dark indeed! The conclusion seems irrefutable. A defendant's ultra-violent response to an (alleged) non-violent advance, when he had ample means to retreat, was clearly viewed by the jury as reasonable in these circumstances.

[93] *Transcript,* above n 4, 240 (emphasis added).

[94] Forensic evidence for the Crown claims that the angle of the body suggests it was in fact Godfrey who was trying to escape.

[95] *Transcript,* above n 4, 156, 312 (Dr O).

[96] It is characteristic of many homophobic killings that robbery is involved, either before or after the murder, see, eg, Mison, above n 37; Dressler, above n 81, 756 where Dressler states that homosexual advance or panic defences can often be used as subterfuge for 'rolling queers'. M's alleged plans to roll a queer earlier in the evening and his actual theft after the killing seem very calculated acts for someone who has lost self control (provocation) or was panic stricken (self defence).

[97] Police Record of Interview with Robert M, 26 March 1991, 30 (*'Police Interview'*).

[98] *Transcript,* above n 4, 237.

2 *Provocation*

> As the law now stands, a non-violent homosexual advance may constitute sufficient provocation to incite that legal fiction, the reasonable man [*sic*], to lose his self control and kill in the heat of passion.[99]

Apart from the fact that in Anglo-Australian law the objective standard of provocation is according to the actions of the ordinary, rather than the reasonable, person, Mison's statement is arguably a true formulation of how provocation operates with respect to homosexual advances today.[100]

The defence team in M argued provocation in addition to self defence. With regard to provocation, the jury must ask: did the defendant lose self control as the result of a provocative incident — here the alleged advance — and whilst out of control, in anger or fear, kill the victim? This is the subjective aspect of the test. The jury must further consider, whether an ordinary person in the shoes of the defendant, could have reacted in such a way and killed the victim.[101] In other words, could our objective, ordinary person have gone so far as to kill Godfrey after being accosted by him in the same circumstances?

In a recent article, Leader-Elliot has analysed the High Court cases of *Stingel* and *Masciantonio*. He reads them as resulting in a rigid distinction between the issues of gravity and self-control as far as the objective test is concerned:

> The jury must first consider and assess the 'content' and 'extent' or 'gravity' of the provocation. Once that assessment of the gravity of the provocative incident is completed, the jury is supposed to go on to determine whether the defendant's loss of self-control and fatal response to the provocation of that degree of gravity, was so extreme as to deserve condemnation as murder.[102]

This begs the question: who is the ordinary person? What attributes or personality traits can we give him?[103] According to Leader-Elliot's reading of *Stingel*, both the gravity of the provocation and the issue of self-control are tested objectively. However, in testing the gravity of the provocative act, the ordinary person *will* share some of the characteristics of the accused.[104]

99 Mison, above n 37, 133.

100 In Anglo-Australian law, it was thought that a *reasonable* man [*sic*] would, by the very reason of his rationality, *never* lose control and kill. See, eg, *R v Enright* [1961] VR 633, 669 and *R v Johnson* (1976) 136 CLR 619, 635-6 (Barwick CJ).

101 *Stingel v R* (1990) 171 CLR 312 ('*Stingel*'); *R v Masciantonio* (1995) 183 CLR 58 ('*Masciantonio*').

102 Ian Leader-Elliott, 'Sex, Race and Provocation: In Defence of Stingel' (1996) 20 *Criminal Law Journal* 72, 74.

103 The 'ordinary person' is almost invariably constructed as male. Until relatively recently, this was purposefully the case, ie the law would use the term the 'ordinary man' to cover all cases. Recently, judges have begun to instruct with regard to the 'ordinary person'. But see Hilary Allen, 'One Law for All Reasonable Persons?' (1986) 16 *International Journal of the Sociology of Law* 419, where she convincingly argues that this objective cipher is still formulated as male and vested with male attributes: Query whether since *Stingel* and *Masciantonio* the 'ordinary person' is now 'sexless': ibid 91-2.

104 On the basis of older case law, this will presumably exclude pugnacity, excitability and hot-tempered personalities. See *R v Lesbini* [1914] 3 KB 1116; *R v Enright* [1961] VR 663.

> [A]ny one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult.[105]

However, since *Stingel*, when the issue of self-control is tested, the only characteristic of the accused that is attributed to the ordinary person is age, where appropriate.[106]

Echoing feminist criticism of the concept of 'law's neutrality', one should ask how can such a test be truly objective, when those who instruct the jury on the test — the judges — are arguably as susceptible to (conscious or unconscious) bias as 'ordinary people', despite myths of legal and judicial impartiality?[107] Despite the fact that the term 'sodomy' has not been used in Victorian legal discourse since the decriminalisation of homosexual acts in 1975, defence counsel explains Godfrey's (alleged) acts to Teague J as 'not the usual case of an attack where he's going to be killed; it's an attack where he's going to be sodomised, which is almost as grave.'[108] Such formulations arguably reveal a misconception, a lack of awareness of homosexuals and homosexuality which cannot help but influence the jury.

3 *The Ordinary Man as Homophobe?*

The rationale for an ordinary person test is that 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused.'[109]

After some conflicting authority on the issue, the High Court of Australia ruled in two recent cases that the ordinary person of law is to be given absolutely *no* special attributes of the defendant, other than age where appropriate.[110] Presumably this means that whilst Joe Godfrey's alleged advance may be taken into account in determining whether there was a provocative incident and its effect on

[105] *Stingel* (1990) 171 CLR 312, 326. This formulation seems to bring the issue of gravity very close to being tested subjectively. Cf *R v Morhall* [1995] 3 WLR 330, 335 (Lord Goff of Chieveley) and see Leader-Elliott, above n 102, 79, fn 41 where he criticises the case for importing a 'semi-subjectivised' element into the provocation test.

[106] *Stingel* (1990) 171 CLR 312, 331. See also *Director of Public Prosecutions v Camplin* [1978] AC 705, 718 (Lord Diplock).

[107] In the United States, there are some shockingly blatant examples of this 'bias'. Take these widely quoted examples drawn from Kevin Berill and Gregory Herek, 'Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy' in Herek and Berill, above n 7, 294:

> Judge Jack Hampton [in 1988] ... justified his lenient sentence for a man convicted of murdering two gay men by stating, 'I put prostitutes and queers on the same level ... [a]nd I'd be hard put to give somebody life for a killing a prostitute.' In another 1988 case involving the beating death of ... [a] gay man, a ... (Florida) circuit Judge jokingly asked the [prosecutor], 'That's a crime now, to beat up a homosexual?' The prosecutor answered, 'Yes, Sir. And it's also a crime to kill them.' To this the judge replied, 'Times really have changed.'

Lest it be thought that such blatantly 'red neck' comments are restricted to the American bench, it is salutary to remember recent sexist pronouncements by Australian judges, particularly in rape cases. See, eg, Meredith Carter and Beth Wilson, 'Rape: good and bad women and judges' (1992) 17 *Alternative Law Journal* 6; Troup, above n 26.

[108] *Transcript,* above n 4, 332. For a discussion on the nature of 'sodomy', see above n 33.

[109] Mison, above n 37, 142.

[110] *Stingel* (1991) 171 CLR 312; *Masciantonio* (1995) 183 CLR 58 (Cf McHugh J dissenting).

the accused (tested subjectively), the ordinary person is not to be given the attributes of homophobia or a hatred of homosexuals. The defence continually emphasises the defendant's loss of control:

> *David M (Brother):* He was in sheer panic. He just lost control ... [and] ... [H]e [the accused] said he had just had enough because other people had tried to do it to him before and couldn't help himself.[111]
>
> *Defendant:* When I see red, I — David an — and Dad both say that I've got a bad temper and I was just so angry ... 'cause he just wouldn't let me go — he wouldn't let me go out of the house.[112]

The Prosecution, as one would expect, stressed the planned nature of M's actions:

> to cut the deceased's throat the accused had to get a knife, he had to get a towel, he had to deliberately put the towel over the head of the deceased and he had then to inflict seven or more cuts ... the accused decided to kill the deceased for the reason he gave to the police, namely that he did not want the deceased to go to the police. He submitted that you should infer from the actions of the accused prior to and at the time the throat was cut, later in taking the money and stubbies, in lighting the fire that they were not the actions of a man who had lost self control.[113]

Instructing the jury further, Teague J stated:

> Applying the objective test, you must consider how the ordinary person with the characteristics of the accused would react ... you take account of the accused being ... a twenty three year old male. Whether his abhorrence of homosexual approaches is a permanent or transitory characteristic is a matter for you.[114]

This direction no longer represents current criminal law. As stated earlier, since the High Court case of *Stingel*, none of the peculiar attributes of the defendant can be 'given' to the ordinary person at least as far as the issue of self-control is concerned.[115]

Drawing from Leader-Elliot's reading of *Stingel* and *Masciantonio*, the correct instruction in this case would be that once enough evidence had been raised to show that M did in fact lose self-control as a result of the provocative incident

[111] *Transcript*, above n 4, 66, 80.

[112] *Police Interview*, above n 97, 71-2.

[113] Summary of the Prosecution case: *Transcript*, above n 4, 320-1 (Teague J).

[114] *Transcript*, above n 4, 299.

[115] *Stingel* (1991) 171 CLR 312. Although the *R v M* trial was held in 1992 and *Stingel* was decided in 1991, there was some doubts as to whether its ruling applied to Victorian courts. Teague J may have been following the case of *R v Dincer* [1983] 1 VR 460, 463-4, 466-7 ('*Dincer*') in which the Victorian Supreme Court did allow some of the defendant's particular characteristics (his Turkish ethnicity and Islamic religion) to be attributed to the ordinary person. See also *R v Voukelatos* [1990] VR 1. In *R v Shaw* (Supreme Court of Victoria 1991) Teague J considered himself bound to follow *Dincer* in preference to *Stingel*. *Dincer* has since been effectively overruled by the High Court in *Masciantonio*. There is now no doubt that the *Stingel* ruling is the law in Victoria.

(thus allowing provocation to go the jury), the jury would have to determine whether an ordinary person, with M's (alleged) history of sexual advances being made toward him and whose capacity for self control *was not beyond the range of normality* for men and women in the community, might have lost self-control and killed Godfrey in these circumstances.[116]

Even considering that an ordinary person with M's history would perceive the gravity of the situation in the same way as the defendant (based on a reading of the facts most generous to the accused), it is in my view strongly arguable, considering the extraordinary brutality of M's actions, that the ordinary person could not have continued to act in such a way. At the very least, the ordinary person could not have continued to attack the victim once he was lying helplessly on the floor of the hall. In the *R v M* case, it seems that M mutilated the body *after* Godfrey was dead or at least close to death. Such acts are arguably a case of 'brutal ferocity' rather than 'natural anger excited by serious cause'.[117] This seems even more evident when one considers the calculated acts of the later theft and arson. It is not, as Leader-Elliott rightfully argues, that there must be a strict requirement of contemporaneity between the provocative act and the continuance of the violence. M could still be acting from the effects of the provocative incident even at the later stage of mutilating the body, but:

> [e]vidence of the method, degree and continuance of the attack should all be taken into account for the purposes of the objective test .... mutilation of the body of the victim after death has a bearing on the question whether the conduct of the accused reflects a temperament falling within the normal range of human temperaments.[118]

On the facts of this case, if the jury had based their verdict on provocation (notwithstanding the acquittal), it would seem that the conduct of the accused is indeed viewed as falling within 'the normal range of human temperaments'. This is of course pure speculation. Nonetheless, the jury directions in this case suggest that the ordinary man, the 'man on the Clapham Omnibus', is constructed as the ordinary man with an added hatred of homosexuals. Could one go even further

[116] I doubt whether the age qualification — a concession to immaturity — would extend to this case. M, being 23 and all other things being equal, would probably be considered to be an adult. See *Stingel* (1991) 171 CLR 312, 331. Nor can M's alcohol and Rohypnol consumption be taken into account. As Leader-Elliott suggests, above n 102, 78: 'to the extent to which intoxication reduces the capacity for self-control, it is not attributable to the ordinary person. The objective test is meant to ensure that a common standard of conduct applies to the sober and intoxicated alike.' See also *R v O'Neill* [1982] VR 150.

[117] Sir James Fitzjames Stephen, *A History of the Criminal Law in England* (1883) 171 as quoted in Leader-Elliott, above n 102, 84.

[118] Leader-Elliott, above n 102, 94. An arguably contrary view was taken by the Full Court of the Supreme Court of Victoria's in *R v Masciantonio* [1994] 1 VR 577, 595 (Crockett J); 600 (Marks J); cf 616 (Ormiston J). The facts were quite similar and their Honours suggest that provocation would not be open to the defendant if his attack continued after the victim had been rendered helpless. Such a view seems to confuse the doctrines of provocation and self-defence. With respect to their Honours, Leader-Elliott's view is the preferable one. See Leader-Elliott, above n 102, 94 where he argues that contemporaneity has no bearing in this context and that '[t]he entire episode of aggression must be considered and compared with the putative responses of the ordinary person.' Note that a close reading of the High Court's decision in *Masciantonio* (1995) 183 CLR 58 would seem to support the views of Leader-Elliott.

and ask whether in fact the ordinary man is always homophobic? In other words, as homophobia is common in Australia, is it excusable, even justifiable, for an ordinary man to be provoked by a non-violent homosexual advance to the point of killing the deceased? This seems to be so if 'a homosexual advance is considered an affront to prevailing ... heterosexist/homophobic norms and thus may cause passion in the [reasonable] man (ie a reasonable heterosexual homophobic man).'[119]

Thus arguably the strategy of the defendant in seeking to avail himself of the provocation defence is to convince:

> the typical juror ... [to] evaluate the homosexual victim and homosexual overture with feelings of fear, revulsion and hatred. The defendant's goal is to convince the jury that his reaction was only a reflection of this visceral societal reaction: the reaction of a 'reasonable man.'[120]

In *Holmes v DPP*, it was stated that 'as society advances, it ought to call for a higher measure of self-control in all cases.'[121] In *Stingel*, the High Court suggests that the issue of self-control and the ordinary person must be viewed in the context of 'contemporary conditions and attitudes'.[122] It is appalling to contemplate that 'contemporary conditions and attitudes' may extend the parameters of provocation beyond a concession to 'natural anger excited by serious cause' to clear cases of 'brutal ferocity',[123] so that 50 years after *Holmes*, society hasn't advanced terribly far at all. As Mison states:

> [t]o the extent that the reasonable man may be conceived of as heterosexual, he may be also conceived as homophobic and heterosexist .... If the reasonable man is the embodiment of both rational behaviour and the idealized citizen, a killing based simply on a homosexual advance reflects neither rational nor exemplary behavior.[124]

4 *A 'Perverse' Verdict?*

As a matter of law, the jury could not have based their verdict on provocation as M was acquitted, as opposed to having his conviction reduced to manslaughter. Nor on the basis of law, could it be argued that the jury acquitted by reason of self-defence.[125] Whilst we are not privy to the jury's reasoning, it would seem there is a strong possibility that an alternative, perverse, or sympathy verdict was

[119] Dressler, above n 81, 731.

[120] Mison, above n 37, 158.

[121] *Holmes v DPP* [1946] AC 588, 601. Defendant pleaded provocation after killing a prostitute who laughed at his impotence. The Court of Appeal refused to ascribe impotence to the reasonable man.

[122] *Stingel* (1991) 171 CLR 312, 327.

[123] Stephen, above n 117.

[124] Mison, above n 37, 160-61.

[125] Prior to *Zecevic*, a 'compromise' verdict of manslaughter was possible where defendants had genuinely thought it necessary to act in self defence but had acted unreasonably or disproportionately with respect to the amount of force used. Since *Zecevic* this doctrine of excessive self defence is no longer available. As I have already argued however, it is difficult to see how M's actions were necessary, let alone proportionate. Therefore, even this form of voluntary manslaughter is arguably not warranted on the facts.

returned in this case. In Anglo-Australian law the jury has the right in murder cases to return a verdict of manslaughter or even acquit against the weight of all the evidence. Whilst judges can advise jurors to redeliberate, if they persist in returning such a verdict, it cannot be interfered with.[126]

If this is the case, it reflects the prospect that 'mainstream' values are firmly heterosexist.

> When defendants who kill in response to homosexual advances are not convicted of murder, courts and juries reinforce the notion that homosexuality is culpable behaviour and that gay men do not deserve the respect and protection of the criminal justice system.[127]

Whatever one's personal views of gay men and lesbians, the law ought not condone the killing of homosexuals who make passes at other men, any more than it would condone the killing of men who make passes at women. Indeed, as gay activist David Wertheimer wryly comments, '[i]f every heterosexual woman who had a sexual advance made to her by a male had the right to murder the man, the streets of this city would be littered with the bodies of heterosexual men.'[128]

Homosexual advance defences are ways of blaming the victim for his own death. As we have seen in the *R v M* trial, the focus is essentially on the victim's behaviour. This is analogous to leading evidence of a rape survivor's 'promiscuity' to demonstrate consent or lack of credibility.[129]

When gay (men) are killed as a result of an alleged homosexual advance, judges should refuse to let provocation go to the jury in cases where the evidence does not warrant it. Mison suggests that either provocation be determined as a matter of law, with the judge deciding whether the conduct was appropriate in the circumstances, or as a separate rule of proportionality, whereby the defendant's response be proportionate to the provocation offered.[130] Some feminist critics have argued that the defence should be abolished altogether.[131] Whatever solutions are proposed, a homosexual advance should rarely be sufficient *per se* to justify a verdict based on either self defence or provocation. To the extent that they are used in this way, we see a nexus between illegal and 'legal' punishment

[126] See *Gammage v R* (1969) 122 CLR 444; Victorian Law Reform Commission, *Homicide*, Discussion Paper No 13 (1988) 37. Alternative verdicts are usually given on compassionate grounds. It is beyond the scope of this paper to discuss the faults and virtues of the jury system. See generally, Victorian Law Reform Commission, *Appendices: The Role of the Jury in Criminal Trials*, Background Paper No 1 (1985); Mark Findlay and Peter Duff (eds), *The Jury under Attack* (1988). For a discussion of the role of the jury in the context of homosexual advance cases, see Mison above n 37, 161-7.

[127] Mison, above n 37, 174.

[128] Quoted in Thomas, above n 30, fn 188.

[129] This tactic is no longer generally allowed under Victorian law: Evidence Act 1958 (Vic) ss 37-40.

[130] Mison, above n 37, fn 309. Critics of such a proposal argue that if the killing was committed during a genuine loss of self control as a result of provocation, the amount of violence used should be immaterial. See Victorian Law Reform Commission, *Homicide*, Report No 40 (1990) 89-98.

[131] See, eg, Adrian Howe, 'Provoking Comment: The Question of Gender Bias in the Provocation Defence — A Case Study' in Norma Grieve and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (1994) and the references listed therein.

of homosexuality. Indeed, 'it is almost as though state governments view prosecution of those who commit crimes of homophobic violence as an invasion of the perpetrator's rights.'[132] However hyperbolic such a claim may be, if the law through the use of the homosexual advance and panic 'defences' creates doctrinal spaces in which the jury can give expression to their own prejudices, then it is indeed acquiesces in 'civic terrorism'.[133]

E *The Social Meanings of* R v M

> [W]ithin phallocentric culture, sexuality is always presumed to be heterosexuality and thus heterosexuality achieves a spurious universality against which 'deviations' (which are called by special names) are judged.[134]

Throughout this trial heterosexuality was promoted as the natural, right, hegemonic form of sexuality, the only (sanctioned) expression of love and affection and sex:

> *Defence Counsel (DC):* He [the Defendant] appeared to you to be — do you know the meaning of heterosexual? — Yes.
> *DC:* Do you? Good. Well then, he [the Defendant] appeared to be *a normal man*? — Yes.[135]
> *DC:* Because as you have told us, he had a girlfriend and *a normal relationship* and didn't appreciate, to put it mildly being thought a homosexual?[136]

The defence continually uses terms such as 'normal' and 'natural' throughout its presentation. Normality includes drinking stubbies and talking about footy:

> *Defendant:* Well, we would have a few stubbies like any normal situation, have a couple of drinks, have a chat.[137]

Real men drink in pubs, while homosexuals 'frequent' wine bars:

> *Defence Counsel:* You seemed anxious to talk about wine bars and trendy suburbs. Do you have the impression that homosexuals frequent wine bars?[138]

Because homosexuality was constructed and presented as the perverse opposite of heterosexuality, it would not make sense that Godfrey could talk *both* about footy and cricket, drink beers *and* be homosexual. It is this transgression that may very well be the 'crime' for which Godfrey pays with his life. Given that the boundary between homosociality and homosexuality is fine, then Godfrey had crossed this line. The most revealing account of just how fine this line is can be

[132] Thomas, above n 30, 1484.
[133] Ibid 1490.
[134] Smart, 'The Sexed Body and Feminist Discourse', above n 22, 201-2.
[135] Defence Counsel cross examining defendant's friend, Wayne W: *Transcript,* above n 4, 46 (emphasis added).
[136] Defence Counsel examining defendant's friend Rodney W: *Transcript,* above n 4, 60 (emphasis added).
[137] *Transcript,* above n 4, 237.
[138] Defence counsel cross-examining bar patron witness, Graham B: *Transcript,* above n 4, 99.

seen in the Greg C incident.[139] Greg is the trusted workmate, the 'good bloke' who drives trucks and confides to M about the break up with his girlfriend. Unlike Aborigines or Asians who may not 'pass' for 'white', Greg can *pass* for straight, until by words or actions he indicates otherwise. He is duplicitous in M's eyes, because he does not act as the *feminised* other:[140]

> *Defendant:* Well, Greg's got a lot of tattoos and that and I thought maybe he was joking. You don't expect someone to be homosexual if they are covered with tattoos.[141]

Later the Defence counsel asks M whether he had any indications that Godfrey was interested in homosexual activity:

> *Defendant:* No, not at all. He seemed like a *genuine* person ... he seemed like a very *nice* man.[142]

Homosexuals are clearly neither 'nice' nor 'genuine'. This is a view to which the prosecution would also seem to subscribe, since on occasion, a prosecution tactic is to suggest that M is himself homosexual. This time, the homosexual is constructed as either murderous, pathological or both.[143]

Whether M does or does not have 'homosexual tendencies' is ultimately irrelevant; indeed whether Godfrey is or is not homosexual is in one sense beside the point. What we 'witness' at the trial is the way in which homosexuality is put into legal discourse, the 'othering' of homosexuality. It is only ever defined in negative terms: Is he? Isn't he? Did he? Didn't he?

In R v M *there is not one positive reflection on gay men or gay life.*

V STRATEGIES FOR CHANGE.

> An amazing notion: if there is an injury there should be a remedy.[144]

The last section looked at how homosexuality is constructed and viewed within the specific context of anti-gay killings and the criminal trial. As I have already indicated, there are ways in which the law and legal doctrine can be modified or changed to disallow spurious advance/panic evidence. Nonetheless, such changes would not of themselves be sufficient to erase the way homosexuality is viewed or portrayed in either the courtroom, the jury room or the wider community. Similarly, there are many necessary practical strategies which could be outlined

139 See above n 79.

140 The reverse also holds true, ie there are heterosexual men who suffer indiscriminate violence and humiliation because they are *perceived* to be homosexual because of some 'effeminate' traits or manner. There has been much written on homophobia as a form of sexism and misogyny. See below n 173 for further discussion.

141 *Transcript,* above n 4, 233.

142 *Transcript,* above n 4, 239 (emphasis added).

143 Cf Stychin, above n 21.

144 Catharine MacKinnon, 'Feminist Discourse, Moral Values and The Law — A Conversation' (1985) 34 *Buffalo Law Review* 11, 34.

to help combat violence against gay men and lesbians.[145] Such measures, however, traditionally view violence as being restricted to the *physical* acts of an *individual* perpetrator. I want to open up the discussion. I am more interested in ways in which state-sanctioned homophobia/heterosexism in our legal process, including, but also going beyond anti-gay killings, can be challenged. To do this, one needs to question the sufficiency of (modernist) law reform. One also needs to tell stories to challenge 'pre-understanding'.

A *Law Reform?*

Challenging the discursive and practical effects of law's deployment of 'homosexuality' is no easy process and seems to require more than mere 'law reform' as traditionally understood within a liberal frame of reference. Seemingly progressive law reforms can represent simply another change in the mode of social control.[146] Such criticism of traditional law reform strategies is based on the arguable premise of law's claim to truth. Law reform can only ever hope to tinker at the edges:

> the deployment of power is facilitated when the knowledge produced can also make a claim to truth .... it is a feature of modernism that knowledge which can claim to be true (rather than belief, superstition, opinion and so on)[147] occupies a place high up in the hierarchy of knowledges. The claim to truth is therefore a claim to deploy power.[148]

As Smart further states:

> [I]t is not a matter of whether law treats men and women equally or differently, it is the way in which law constructs women [and indeed homosexuals] ... that matters .... Law may benevolently or malevolently confirm us in our discursive place as woman [or man].[149]

If in the 'Law Reform Era' few of our laws are *blatantly* sexist or homophobic or racist, this does not mean they are not masculinist or heterosexist. The law is at

[145] Such strategies could include more funding for research into the cause and effect of such violence, training for judicial officials with regard to gay issues, monitoring statistics and incidence of hate crimes through a national agency similar to that in United States (see above n 14) and school and community education. Better training for the police is also needed, preferably run by the gay community, in ways similar to recent training initiatives for police in domestic violence cases: see, eg, Heather McGregor and Andrew Hopkins, *Working for Change: The Movement Against Domestic Violence* (1991). In short, the criminal justice system must produce programmes that reflect the serious nature of all forms of anti-gay crimes. For a general discussion of 'concrete' policy initiatives and recommendations in this area, see, Berill and Herek, above n 7, 296 ff.

[146] See Howe, above n 131. Howe argues that the law and law reform has failed to satisfactorily address the problem of women who kill their husbands after years of domestic violence. See also Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) for a discussion of the inadequacy of law reform and legislative approaches in dealing with entrenched sexism.

[147] Although one can argue that the law's understanding of (homo)sexuality is based precisely on opinion, belief and superstition.

[148] Smart, 'The Sexed Body and Feminist Discourse', above n 22, 196.

[149] Ibid 203-4.

its most heterosexist and patriarchal when it professes to be objective, neutral, and impartial.

Smart suggests why this might be so when she argues that law is the key technology in producing the legal category of woman and thereby producing woman herself. She asks, 'Does the law create a Frankenstein monster from the bits [of woman's body] and then call it Woman?'[150] The same analysis is apposite when looking at the way in which the homosexual is constructed in law. Does the law also create a sodomitical monster and call it Homosexual? The homosexual as produced by law is also the way in which the 'homosexual' is viewed outside the courtroom. Joe Godfrey is produced as a 'dirty old man' (or child molester, or effeminate, or weak or riddled with AIDS), therefore Joe Godfrey *is* a 'dirty old man'. No amount of law reform can, of itself, change this. Even more problematic is the continual use of experts to define what is appropriate behaviour and experience.

Despite such misgivings, 'law' must be *part* of a strategy for feminists and gays, otherwise it will continue to reflect [heterosexual] men's interests.[151] We *must* address law's assumptions and contradictions but we should not however be so quick to always remedy law with law. We must use law not only as a reformist tool, but as a strategic site of struggle and resistance. We need to explore ways in which the personnel of the law — jurors, judges and experts — can have cognisance of the *meanings* of a woman killing her husband or the 'beingness' of being gay. To do this we need to resist and we need to tell stories.

B *Telling stories: Making us visible.*

Homophobic violence has produced its own resistances, its own reverse discourses.[152] Court monitoring and observer projects,[153] angry demonstrations against 'ludicrous' legal verdicts or sentences[154] and the protests against the

[150] Smart, 'The Power of Law', above n 22, 93.

[151] Legal reforms such as equal opportunity provisions or the decriminalisation of 'homosexual acts' are obviously important. Indeed, research shows homophobic violence is particularly prevalent in those jurisdictions where the state proscribes such conduct. See Thomas, above n 30. For further discussion of why anti-discrimination law is not of itself sufficient to combat the heterosexism of law, see Wayne Morgan, 'Still in the Closet: the Heterosexism of Equal Opportunity Law' (1996) 1(2) *Critical InQueeries* 119.

[152] See above n 20 for a discussion of this concept.

[153] See below n 201.

[154] In the United States, *Hardwick* generated an enormous march through Washington in 1987, resulting in hundreds of arrests when the demonstrators laid their bodies on the steps of the Supreme Court building. 'The protest dramatically underscored the concrete corporal interests that the *Hardwick* Court ignored and evoked the tangible historical experience of gay and lesbian [Americans] in which the case must be situated.': Thomas, above n 30, 1462. In Australia rallies against the murder of gay people and the 'complicity' of the legal system in those killings have taken place in Melbourne and Sydney, with the resultant formation of groups such as anti-gay violence projects and police/gay liaison groups. The outcome of the M case itself saw gay activists protesting outside the Victorian Supreme Court. Many letters of protest were sent to former Premier Kirner and other politicians. See, eg, Jamie Gardener, 'Murder with Gay Abandon' (1992) 6 *Socio-Legal Bulletin* 25.

Indeed the reaction to the *R v M*, *McKinnon* and other 'gay murder' cases 'may have the most significant long term results. [In response to the *McKinnon* decision], [t]he Gay and Lesbian Rights lobby, the Lesbian and Gay Anti-Violence Project and the Lesbian and Gay Rights Legal

intransigence of the Tasmanian government in maintaining their anti-sodomy laws on the statute books are all necessary political actions. The proliferation of gay and lesbian studies is an encouraging development.[155] The Sydney Gay and Lesbian Mardi Gras and the AIDS candlelight vigils act as *visible* sights (and sites) of resistance. As important as all these actions are, the central and most important act of resistance we can make as gay men and women is our (initial) 'coming out'.[156] However traumatic this may be, it is truly a 'moment of epiphany'[157] for most gay men and lesbians. Coming out also results in the empowering ability to choose the way in which you describe yourself, as a 'gay' man rather than a 'poof' or a 'homosexual', or (God forbid!) a 'faggot'. Not to come out means heterosexuals continue to maintain 'the epistemological privilege of unknowing.'[158]

Increasingly, in the era of HIV/AIDS, coming out in a sense has become a collective project: 'our stories are reaching outside the narrow circles of family and friends to society at large.'[159] Coming out as a strategy of resistance is of crucial importance in those jurisdictions where same sex relations are illegal.[160] The trouble associated with such a strategy is that to be 'out' in a State such as Tasmania is to risk being perceived as almost a criminal. Notwithstanding that in Australia such laws are rarely policed, these laws are a powerful disincentive to be open about one's sexuality.[161] Cases such as *R v M*, by stigmatising homosexuals and homosexuality, contribute to the process whereby many men and women will stay in the closet. Rubenfeld argues that the ultimate force of such laws and such cases is that they 'direct gays and lesbians into the institutions of compulsory heterosexuality.'[162]

Coming out is a necessary, but not sufficient, condition of resistance for lesbians and gay men. Legal story-telling is a relatively recent discovery in legal scholarship, being somewhat based on coming out stories. Legal storytelling places its emphasis on the narratives of the law rather than abstract rules and principles. It analyses both the stories of those who come to law as well as those who reinforce the dominant (legal) discourses, the judges and other legal

Service have sought funding for research into ... "homosexual panic defence"': Galbraith, above n 5, 16.

155 Again *Hardwick* has created an enormous amount of academic (legal) writing, almost all of it condemnatory of the decision and how homosexuality is put into legal discourse. See, eg, Editors of the Harvard Law Review, above n 30; Thomas, above n 30; Dressler above, n 81; Walker, above n 24.

156 I put 'initial' in parentheses because as stated above, we are always in a process of coming out.

157 Fajer, above n 28, 547.

158 Eve Kosofsky Sedgwick, *The Epistemology of the Closet* (1990) 5.

159 Fajer, above n 28, 520.

160 Ironically and typically absurdly, gay support and activism through gay clubs, Gayline or student gay societies is not illegal. Only the acts that brand you homosexual are penalised. Again identity is conflated solely with sexual activity.

161 Although as recently as 1988, in Queensland, two consenting gay men were arrested for sodomy and gross indecency on the basis of admissions about acts committed in the privacy of their own bedroom: Bill Lane, 'Harassment of Homosexuals in Queensland: Private Lives, Public "Crimes"' (1988) 13 *Legal Service Bulletin* 154.

162 Jed Rubenfeld, 'The Right of Privacy' (1989) 102 *Harvard Law Review* 737, 800-2.

decision-makers.[163] 'It is the claim that legal narratives are structured in ways which exclude, silence and oppress "outsiders" — those not part of the dominant culture'.[164]

In studying the narratives of legal decision-makers, one examines the stories of both the majority and the dissenters, with the dissenting judgments being used to aid the telling of outsiders' stories.[165] Outsiders themselves can challenge narrative with counter narrative:

> The telling of stories by outsiders, the telling of counter stories is seen as a means of challenging dominant legal stories and thereby transforming the legal system so that it is more inclusive and responsive to the needs of outsider groups.[166]

This story-telling scholarship is indebted to and largely draws from feminist theory, as '[l]istening to women and believing their stories is central to feminist method.'[167]

Legal story-telling creates 'small spaces'[168] whereby gay and lesbian lawyers (and lay people) can use tactics to minimise, and hopefully erase, the types of constructions that were being made in the *R v M* trial. In *R v M,* Joe Godfrey had no 'voice'. His 'voice', his 'stories' were disallowed, erased from the discourse of the courtroom. However, M's story and those of his supporters, particularly the official voice of the experts, were acceptable within this legal milieu.

Fajer's thesis is that judges, and heterosexual/ist society in general, have 'pre-understanding' of the lives of gay men and lesbians and other oppressed groups such as racial minorities. Pre-understanding connotes a background set of knowledge about who we are and what we do:

163 For a general treatment of legal story-telling, see, Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87 *Michigan Law Review* 2411; Lisa Sarmas, 'Storytelling and the Law: A Case study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 701 and the extensive references cited therein. For an account from specifically gay and lesbian perspectives see, eg, Fajer, above n 28.

164 Sarmas, above n 163, 703.

165 An illuminating example is found in the dissenting judgment of Blackmun J in *Hardwick* 478 US 186, 205 (1986)(emphasis added):

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there are many 'right' ways of conducting those relationships, and that much of the richness will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.

166 Ibid.

167 Patricia Cain, 'Feminist Jurisprudence: Grounding the Theories' (1989-90) 4 *Berkeley Women's Law Journal* 191, 195. For further accounts of feminist theory and women's stories, see generally Mari Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323; Kim Lane Scheppele, 'Foreword: Telling Stories' (1989) 87 *Michigan Law Review* 2073; Toni Massaro, 'Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds?' (1989) 87 *Michigan Law Review* 2099; Martha Minow, *Making all the Difference: Inclusion, Exclusion and American Law* (1990). On the issue of domestic violence, see Mahoney, above n 2; Kathryn Abrams, 'Hearing the Call of Stories' (1991) 79 *California Law Review* 971. In relation to rape and sexual assault, see Catharine MacKinnon, *Towards a Feminist Theory of the State* (1989); Jennifer Gregory and Sue Lees, 'In Search of Gender Justice: Sexual Assault and the Criminal Justice System' (1994) 48 *Feminist Review* 80.

168 Thornton, above n 20, 468.

> gay people experience sexual activity differently from non gays. Gay sexuality, according to this common understanding is all encompassing, obsessive and completely divorced from love, long term relationships, and family structure — the civilising influences that keep 'normal' sexuality under control.[169]

In other words, gay men are totally reducible to their search for sex.[170] Fajer calls this the 'sex as lifestyle assumption.'[171] Pre-understanding 'imposes the [listener's] narrative meaning into the story, thereby displacing the narrative meaning of the [storyteller].'[172]

The types of constructions that were being presented in *R v M* were at least partly premised on the contention that not only do most people believe that men are different from women or gays from non-gays, but that most people think they know what constitutes those differences.[173] Such misconceptions include the 'sex as lifestyle' thesis and the cross gender assumption.[174] Each 'ordinary person', in this case the juror, as long as they are 'non-other' (generally read white, heterosexual and male), has the power to become an expert in their own cause. Through their membership in the dominant class, they can 'other the other'. Legal process reflects and reinforces such popular understanding.

169 Fajer, above n 28, 514.

170 It may be correct that gay men have less commitment to sexual exclusivity than heterosexuals, although I am not necessarily convinced of this. Nonetheless, in part this may be because gay men are not given the opportunity to make legal commitments to each other (ie marriage) and, in fact, face innumerable obstacles to maintaining long term relationships. In any case, a practice of sexual 'promiscuity', however distasteful it may appear to some, does not necessarily exclude the possibility of a gay man being in a loving and committed partnership at the same time.

171 Fajer, above n 28, 514.

172 Anthony Alfieri, 'Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative' (1991) 100 *Yale Law Journal* 2107, 2124.

173 A powerful exposition of pre-understanding is found in Edward Said, *Orientalism* (1978) 227 where he shows, in the context of Western culture's construction of Oriental culture, how the dominant, through their pre-understanding, hold the power to define the 'other':

> 'One of them' is the culturally sanctioned habit of deploying large generalisations by which reality is divided into various collectives: languages, races, types, colours, mentalities, each category being not so much a neutral designation as an evaluative interpretation. Underlying these categories is the rigidly binomial opposition of 'ours' and 'theirs', with the former always encroaching upon the latter (even to the point of making 'theirs' exclusively a function of 'ours'):

174 See Fajer, above n 28, 606, 624-33 where he describes this as the belief that gay men behave like 'normal women' and lesbians like 'normal men.' As such, homophobia can be seen as a form of misogyny. Gay men are despised because they are allied with the 'weaker sex'. They have 'voluntarily' given their up 'power', just as lesbians have tried to appropriate real men's power. This is reflected as early as childhood when boys and girls are chastised for engaging in 'cross gender' play. Fajer states that it is, therefore, not accidental that those opposed to gender equality are more likely to be homophobic: Fajer, above n 28, 619.

It could be argued that since 'gay liberation', (some) gay men have, in developing a sense of hyper masculinity in dress, physique etc, used a parodic sensibility to subvert traditional understandings of what it means to be a man. However, such 'performative acts' could be seen as a forms of false consciousness. This is particularly noticeable in gay pornography. Kendall convincingly argues that gay pornography can be viewed as sexist and misogynist, (ie when a gay man is 'fucked' in gay porn he is 'fucked' as a woman). See Christopher Kendall 'Gay Male Pornography: An Issue of Sex Discrimination' (1995) 5 *Australian Feminist Law Journal* 81. On this point, see also Monique Plaza, 'Our Costs and Their Benefits' (1980) *M/f: A Feminist Journal* 4, 31-2. On the link between sexism, misogyny and homophobia see, eg, Sylvia Law, 'Homosexuality and the Social Meaning of Gender' (1988) *Wisconsin Law Review* 187; Suzanne Pharr, *Homophobia: A Weapon of Sexism* (1989).

In *Bowers v Hardwick*,[175] the Attorney-General of Georgia clearly based his arguments defending that State's anti-gay laws on the types of (erroneous) pre-understanding that Fajer discusses:

> [it] should be permissible for the General Assembly to find as *legislative fact* that homosexual sodomy *leads* to other deviate practices such as sado-masochism, group orgies, or transvestism, to name only a few. Homosexual sodomy is often practiced outside the home such as in public parks, rest rooms, 'gay baths' and 'gay bars' and is marked by the multiplicity and anonymity of sexual partners, a disproportionate involvement with adolescents and indeed a possible relationship to crimes of violence.[176]

This extraordinary quote is notable for the insight it gives us into the pre-understanding of gay men by the state, as represented by the Attorney General: gay men are sexually insatiable (multiplicity of partners), indiscreet and indeterminate as to where they have sex (parks, rest rooms), predatory (disproportionate involvement with adolescents), potentially violent and subject to perverse pleasures (sado masochism, orgies). All these attributes are part of the 'sex as lifestyle' assumption. The cross gender assumption is also present (transvestism). *Hardwick* reproduces three commonly held myths about gay men: that they like to cross dress,[177] that they are paedophiles,[178] that men who do anonymous beats are exclusively gay.[179]

Fajer, drawing from Lynne Henderson's critique of *Hardwick*, relates her argument that 'more personalised and vivid storytelling about the lives of gay people might have changed the outcome of the [*Hardwick*] case.'[180] In other words, Hardwick's lawyers' predominant reliance on arguments of abstract constitutional principle may have reduced the empathy that at least some of the judges may have had for gay people.[181] As Massaro states, 'narrative may be a

[175] *Hardwick* 478 US 186 (1986).

[176] Petitioner Michael Bowers, Attorney-General of the State of Georgia, *Bowers v Hardwick: Official Transcript of the Proceedings before the Supreme Court of the United States* (No 85-140) 36-8 as quoted in Lynne Henderson, 'Legality and Empathy' (1987) 85 *Michigan Law Review* 1574, 1640 (emphasis added).

[177] The little research done in this area suggests that cross-dressing is not a product of one's sexual preference and is equally common amongst heterosexuals.

[178] This is despite the well documented evidence that child abuse is predominantly committed by male (heterosexual) perpetrators on girls. See Fajer, above n 28, 541, fnn 143-4; Warren Blumenfeld and Diane Raymond, *Looking at Gay and Lesbian Life* (1988) 372-3; Howard Brown, *Familiar Faces, Hidden Lives: The Story of the Homosexual Man in America Today* (1976) 237-8; Community Services Victoria, Protective Services for Children and Young People, *Child Abuse and Neglect: Understanding and Responding* (1990); Family Violence Professional Education Taskforce, *Family Violence: Everybody's Business, Somebody's Life* (1991). Fajer states that of those men who do abuse boys many would identify as heterosexual and have no interest in adult homosexual activity: Fajer, above n 28, 541.

[179] The Attorney-General rather curiously conflates the public beats (toilets, parks, beaches) with the 'private' gay baths and bars. As I argue elsewhere, it is more likely that men who do beats are 'men who have sex with men' and do not identify as gay. Gay men who are comfortable with their orientation are more likely to go to venues identified as gay. Of course there will always be some overlap between these categories. See Johnston, above n 16.

[180] Fajer, above n 28, 513.

[181] *Hardwick* was a 5:4 decision. It has been stated that Powell J originally voted to find the state of Georgia's anti-sodomy laws unconstitutional but changed his mind. Anecdotal evidence recounted by Fajer indicated that Powell J 'would have voted the other way if he had ever met

particularly powerful means of facilitating empathic understanding: a concrete story comes closest to actual experience and so may evoke our empathic distress response more readily than abstract theory.'[182]

Many of the myths, 'identity markers' and attributes of homosexuality have already been commented upon in *R v M*, the most notable example being how Greg C was not viewed initially as gay, and therefore he was not dangerous, because he drove trucks, drank beer and had tattoos. He did not fit into the cross gender assumption.

In order to subvert pre-understanding, gay litigators and activists 'must attack non-gay myths about gay life directly'.[183] It is of particular importance to contest the 'sex as lifestyle' presumption and the idea that gay issues are not to be discussed publicly. Fajer calls this the idea of 'flaunting'.[184] Whilst for some people being gay may be [just] acceptable, talking about it is not. This is beautifully summed up in the following line: '[t]he love that once dared not speak its name now can't seem to keep its mouth shut'.[185] The more common exhortation is along the lines of 'We don't mind what you do in the privacy of your bedrooms, but do you have to go on about it'. Heterosexuals may believe that sexuality belongs in the private sphere, but in a thousand ways each day, from kissing in Bourke Street Mall to displaying a photograph of their spouse on the office desk, they are reinforcing the public and *sanctioned* nature of their relationships. 'Tolerance' for gays and lesbians is simply oppression cloaked in liberalism. Its most benign expression is found in statements such as, 'But some of my best friends are gay'. At its worst, accusations of 'flaunting' one's sexuality can lead to perceptions that we ask for, or even deserve, 'punishment.' [186]

The method used by 'legal story-tellers/litigants is to relate in court 'empirical' evidence (stories) of how we are adversely affected by the heterosexist world and its social structures. Whether it is our experience of violence, our custody and adoption battles for children, or our contestation of a lover's estate, we must 'identify the aspects of non-gay pre-understanding about gay life that motivate the discrimination being challenged. Then [we] must tell stories to illustrate the existence of pre-understanding in question is flawed.'[187] These include telling

anybody who was gay .... The fact that it is plausible that he believed no one he knew was gay is an indication of the lack of adequate information about gays and lesbians that exists in our society': Fajer, above n 28, 650. This reflects my earlier point that when a person actually has to confront knowing a gay person their opinion of that person *must* change for better or worse. See above n 12.

182 Massaro, above n 167, 2105.

183 Fajer, above n 28, 514.

184 Ibid 570, 587ff.

185 'The Homosexual Newly Visible, Newly Understood', *Time* (New York), 31 October 1969, 56 as quoted in Warren Blumenfeld and Diane Raymond, *Looking at Gay and Lesbian Life* (1988) 354.

186 'Flaunting' reflects the 'moral taxonomy' of the *Wolfenden Report.* Although it viewed homosexuality with distaste as an aberration, the report recommended its decriminalisation in the private sphere. As a consequence, it was policed even more ruthlessly in the public arena. Members of the 'heterosexual public' (surely a tautology?) were to be neither contaminated nor offended. See *Wolfenden Report*, above n 56.

187 Fajer, above n 28, 514.

stories of love and companionship, as well as grief and injustice.[188] The story-telling strategy matches the traditional common law process, whereby judges 'create abstract rules based on evaluation of individual stories.'[189]

That such strategies are not mere academic speculation can be seen in the tactics used by gay and lesbian activists and lawyers. When Nick Toonen, Rodney Croome and the Tasmanian Gay and Lesbian Taskforce told their stories of love and relationship before the United Nations Human Rights Committee to demonstrate how the homophobic laws of Tasmania oppressed them, they were using exactly the type of tactics enumerated by Fajer and the story-telling theorists.[190]

Telling our stories is in effect telling our history, producing our own genealogies, making 'criticism perform its work'.[191] In doing so, we fight 'their' knowledge with 'our' knowledge, as '[p]ublic use of the term 'love' can be very powerful to a society that thinks of gay relationships solely in terms of sex.'[192]

By telling stories in the context of anti-gay violence, we also seek to shift from, or at least not be restricted to, a focus on homophobia, which centres on the individual. Instead, we want to highlight heterosexist violence, with the focus being on the state.[193] When violence is characterised in terms of criminal assault, it is necessary, but not sufficient, to stop that violence. A policy which seeks to

188 These would include stories of material discrimination such as non-access to pensions and benefits that heterosexual spouses would be entitled to, for example, taxation and superannuation benefits or not inheriting a lover's estate because the law fails to recognise your next of kin status as partner. They would also include stories of emotion, such as not being able to visit a dying lover in hospital, particularly poignant in the context of AIDS, not being able to officially grieve over the death of a long term lover when both partners have been closeted or having custody rights removed because of the 'danger' to the children. The material and emotional stories of oppression merge in the State's refusal to allow same sex marriage. For factual accounts of these types of story: Fajer, above n 28, 514.

189 Schepple, above n 167, 2081. I am aware that there are dilemmas in adopting such a strategy. By telling stories, by presenting our lives in such a way, we run the risk of essentialising identity, reducing our lives to a monolithic and immutable idea of gayness. I am still grappling with the inherent contradictions this raises.

190 For a discussion of *Toonen v Australia*, United Nations Human Rights Commission, UN Doc CCPR/C/50/D488/1992 (31 March 1993) (*'Toonen'*) and the use of the United Nations Human Rights Committee, see Morgan, above n 35. *Toonen* exemplifies one powerful form of resistance at law, which gay activists have done well to exploit, that is the use of international human rights law in conjunction with domestic law and the external affairs power contained in Australian Constitution s 51 (xxix). This trend to internationalism in Australian law is a powerful counter-discourse for minority groups such as indigenous Australians: see *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; environmentalists: see *Commonwealth v Tasmania* (1983) 158 CLR 1; refugees and ethnic minorities: see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. It is therefore not surprising that conservative lawyers and commentators view this as a usurpation of Australian sovereignty.

191 Gordon, above n 58, 82.

192 Fajer, above n 28, 552. See also Nan Hunter, 'The Sharon Kowalski Case' in Cleaver and Myers, above n 61, 106. After an horrific car accident Kowalski was permanently paralysed and virtually 'brain dead'. Despite every attempt by Kowalski's family to prevent it, after five years of fighting in the courts her lesbian lover finally won access to her. The judge paid tribute to the strength of the care and commitment that was reflected in the stories told about this relationship.

193 For comprehensive definitions and discussions of heterosexism and homophobia, see Altman, 'AIDS and the Discourses of Sexuality', above n 16, 43-4. I find the following definition by Herek useful: 'Heterosexism [is an] ideological system that denies, denigrates and stigmatises any non heterosexual form of behaviour, identity, relationship or community': Herek, above n 61, 89.

prevent criminal assault may only deter individual men, such that '[t]he essential harm of the systematic indignity, humiliation and subordination of [gays] as a class is not consequently addressed.'[194]

Heterosexism reflects the hegemony of institutional and social settings and their relations to gender. Homophobia, however, 'merely individualises and privatises gay oppression and obscures the social relations that organise it.'[195]

As Thomsen states:

> gay bashers and murderers, however loathsome, may be understood as rational social actors who believe that their attacks are the acting out of dominant views of sexuality, that are in some form condoned by current police practices and judicial findings.[196]

Verity Burgmann puts it more pithily, '[p]oofter Bashers could be regarded as the police of heterosexual dominance.'[197]

Using the law to punish (or not punish) individual perpetrators is insufficient, particularly in jurisdictions such as Tasmania where homosexuality is legally proscribed, thus 'violence against homosexuals is subtly legitimised; the use of state machinery against homosexuals encourages the belief that harassment is acceptable.'[198]

This is an important point. While most gay bashings take place in the public domain, I would argue that the law still views violence against gays as essentially private. The fact that men *know* the law allows them to abuse gay men and lesbians ensures its continuance. By telling *our* stories we resist the power of the law and legal doctrine to define our problems, to define our hurts, to define our injuries.

We need to develop litigation and legal strategies that address the aggregate social harm suffered, such as in the *Toonen* case.[199] Homophobic state practice has been further challenged through the successful litigation relating to the Tasty Nightclub incident.[200] It is not inconceivable that a strategy to challenge the

194 Thornton, above n 20, 461.

195 Garry Kinsman, *The Regulation of Desire* (1987) 109. One advantage of the term 'homophobia' however, is that it puts into discourse anti-gay behaviour as pathological. Heterosexuals are put on the defensive when views, which were once taken for granted as common sense, are now in some limited ways being considered as anti-social. As Dollimore observes, 'the charge of homophobia is itself a kind of reverse discourse facilitated by the dynamic of perversion itself': Dollimore, above n 48, 233.

196 Thomsen, above n 8, 214.

197 Verity Burgmann, *Power and Protest: Movements for Change in Australian Society* (1993) 150. Criminologists would view Burgmann's claim as a reflection of 'derivative deviance', ie the 'victimisation of stigmatised persons because of their inability to avail themselves of the protections of civil society without the threat of being discredited.' See also Joseph Harry, 'Derivative Violence: The cases of extortion, fag bashing, and shakedown of gay men' (1982) 19 *Criminology* 546.

198 Burgmann, above n 197, 150.

199 *Toonen*, United Nations Human Rights Commission, UN Doc CCPR/C/50/D488/1992 (31 March 1993).

200 See above n 9. Already one Victorian County Court judge has awarded a Sydney based litigant $10,000. In May 1996, Judge Ostrowski ruled that the police action amounted to assault as it exceeded what was permitted by the search warrant. See Joanne Dean, 'Tasty Triumph: Judge rules raid "not lawful"', *Melbourne Star Observer*, 24 May 1996, 1. More recently, Tasty litigants have rejected as 'unacceptable' a compensation package put in settlement by Victoria

introduction of spurious homosexual panic/advance testimony will be developed. An example of a project that challenges the 'collective project of oppression'[201] is the New York City Gay Men and Lesbian's Anti Violence (Court Advocacy and Accompaniment) Project, whereby gay men and lesbians act as advocates for the survivors of anti-gay crime on both individual and structural levels. On an individual level, advocates monitor and assist in a given case through arrest, plea bargaining, jury selection, trial and sentence. Liaising and working with prosecutors to ensure they understand the gay 'standpoint', and to advise on and prepare combat defence strategies, such as homosexual panic/advance pleas, have been important aspects of this function.

The Project also attacks institutional legal heterosexism by training observers from the gay community to attend trials and publicly monitor them for signs of blatant or subtle homophobia on the part of counsel, judge or other legal personnel:

> the monitoring process puts the prosecutor, the defense attorney, and the court on notice that the lesbian and gay community is watching as a given case moves forward and will not hesitate to communicate the mishandling of a case directly to the community.[202]

Such an example of praxis could usefully be established in Australia, rather than the non-systematic practice of angry demonstrations and commentary every time another killer 'gets away with murder'.

The efficacy of homophobic violence is the message it sends to those who are not its direct recipients, that at anytime, anywhere, if you are (noticeably) gay, or even an 'effeminate' heterosexual, you *could* be attacked, you are *always* a potential victim. This 'psychic harm'[203] is a reality that current legal doctrine, with its focus on reactive punishment of individual perpetrators, cannot deal with.

VI CONCLUSION: 'FOR THE MASTER'S TOOLS WILL NEVER DISMANTLE THE MASTER'S HOUSE'[204]

Gay men and lesbians are not marching down a road toward 'liberation'. Theories of social evolutionism, teleological laws of historical development and overarching meta-narratives have been discredited in a post Enlightenment age. The change we seek must be practised and repeated continuously in everyday life. Struggle is more often than not located in particularisms, not universalisms. A transformative praxis of the law that will chip away at oppression is clearly a

Police of $8000 per person, as not reflecting adequately their individual [and one could add collective] pain and suffering. The negotiations continue. See Joanne Dean, 'Take Your Millions and Shove 'Em: Tasty Victims Reject Compo', *Melbourne Star Observer*, 18 October 1996, 1.

201 Robert Connell, *Gender and Power: Society, the Person and Sexual Politics* (1987) 215.

202 David Wertheimer, 'Treatment and Service Interventions for Lesbian and Gay Male Crime Victims' in Herek and Berill, above n 7, 227, 238. Such strategies could be theoretically driven from a social injury perspective, see above n 20.

203 The term is that of Thornton, above n 20, 466.

204 Audre Lorde quoted in ibid 453.

long term and continuous project which must be contemporaneous with the 'practical' strategies outlined during the course of this paper.

Nonetheless, there have been important gains made already. The use of human rights and international law will continue to operate as a site of resistance for gay and lesbian activists and their supporters. Our stories will hopefully influence the law in ways that women's stories are beginning to. People will continue to come out in small and big ways and this will continue to be one of the most powerful ways of breaking down heterosexist attitudes and practices.[205]

The *R v M* case gives a message that one group in society is not worthy of the liberties and protections of the law that the dominant take for granted. Are we then not to be viewed as part of the Social Contract? For this is the heart of the matter. It is not enough that our murderers are gaoled, or that we are granted the 'right' to have sex — 'The right to be left alone is not the fundamental issue in gay rights.'[206] No, we must be able to fully participate in Australian civic and social life. We must continually struggle so that 'certain phrases can no longer be spoken so lightly, certain acts no longer, or at least so hesitatingly performed.'[207]

[205] In a tactical sense, the 'bigger' the name of the person who comes out, the greater the effect it will have on the 'wider' society. In Australian culture, this will be particularly true of the sporting arena, thus the real importance of the NSW rugby player, Ian Roberts, publicly 'admitting' his gayness. One day an Australian Football League star of similar standing may do the same.

[206] Fajer, above n 28, 570.

[207] 'Questions of Method: An Interview with Michel Foucault' (1981) 8 *Ideology and Consciousness* 11-12.

CASE NOTES

WESTDEUTSCHE LANDESBANK GIROZENTRALE v ISLINGTON LBC*

RESTITUTION, TRUSTS AND COMPOUND INTEREST

I INTRODUCTION

The long-awaited judgment of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* is a surprising anticlimax. The plaintiff bank was claiming restitution of money paid under a void contract and the case involved two pressing problems in the developing law of restitution: proprietary claims and compound interest. The curious way in which the case was argued in the House of Lords meant that neither issue received the attention it deserved. As Lord Goff stated, 'If restitution lawyers are hoping to find in your Lordships' speeches broad statements of principle which may definitively establish the future shape of this part of the law, I fear that they may be disappointed.'[1] Mixed with this disappointment is a measure of surprise, for Lord Browne-Wilkinson's speech contains *obiter dicta* on the nature of trusts which, if accepted, would lead to a dramatic reformation of that area of law.

II FACTS AND JUDGMENTS

The *Westdeutsche* case involved an interest-rate swap agreement in which the parties made reciprocal loans to each other of £25 million, one at a fixed rate of interest and the other at a floating rate. After it was discovered that the agreement was *ultra vires* the council,[2] the bank brought an action against the council to recover the difference between the £2.5 million paid by the bank and the £1.35m paid by the council during the supposed validity of the agreement. Hobhouse J and the Court of Appeal held that the council was personally liable at common law for that sum as money had and received, plus simple interest under s 35A of the Supreme Court Act.[3] They also held, relying on *Sinclair v Brougham*,[4] that the bank had an equitable proprietary claim to the money, which entitled it to compound interest in equity.

* [1996] 2 All ER 961 (HL) ('*Westdeutsche*') (Lord Goff, Lord Browne-Wilkinson, Lord Slynn, Lord Woolf, Lord Lloyd); varying [1994] 4 All ER 890 (Hobhouse J).

1 [1996] 2 All ER 961, 970.

2 *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1.

3 [1994] 4 All ER 890.

4 [1914] AC 398 ('*Sinclair*').