Inconsistent Legal Treatment of Unwanted Sexual Advances:

A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace

Kavita B. Ramakrishnan†

ABSTRACT

In this Article, I contend that unwanted sexual advances on men are treated differently under the law than are unwanted sexual advances on women. I compare the legal conceptualization and redress of two of the most common types of unwanted sexual advances faced by women—street harassment and sexual harassment in the workplace—with the legal treatment of unwanted sexual advances on men as seen through the homosexual advance defense. I argue that the law recognizes certain advances on men as inappropriate enough to deserve legal recognition in the form of mitigation of murder charges while factually indistinguishable advances on women are not even considered severe enough to rise to the level of a legally cognizable claim.

Unwanted sexual advances on men do not receive the same level of scrutiny as unwanted sexual advances on women. First, unwanted advances on men are often conclusively presumed to be unwanted and worthy of legal recognition, whereas unwanted advances on women are more rigorously subjected to a host of procedural and doctrinal barriers. Further, while one nonviolent same-sex advance on a man may be sufficient to demonstrate provocation, there is currently no legal remedy that adequately addresses a nonviolent same-sex advance on a woman. Thus, a woman may not receive legal recognition for experiencing the

† J.D., UCLA School of Law, 2009. B.A. University of Pennsylvania, 2004. A previous version of the paper was presented at the 2009 Law and Society Conference in Denver, Colorado. I would like to thank Professor Russell Robinson and my fellow students in the 2008-2009 Critical Race Theory Writing Circle for their invaluable suggestions and input. I would also like and the staff of the Berkeley Journal of Gender, Law & Justice, particularly Rachel Baum, Dan Dwyer, and Sonja Tonesen. I would also like to express my gratitude for the unending support and encouragement of my parents, my sister Jyothi, Deepa Ravikumar, and Josh Liebling.
same advance that, directed toward a man, may allow him to mitigate commis-
sion of a violent crime.

Though Title VII provides some protection in the workplace, even within
Title VII jurisprudence, unwanted sexual advances on women and queer men are
afforded less recognition than advances on heterosexual men. The difficulty
women face in proceeding with Title VII and street harassment claims indicates
that certain levels of harassment against women are considered acceptable and
do not warrant a legal response. Further, the ease with which men charged with
murder may make a sufficient showing of provocation based on an unwanted a-
dvance—thus justifying their violent response—indicates that violence against
queer men is afforded a form of legitimation under the law. Thus, heterosexual
men receive more protection from unwanted sexual advances than do women
and queer men. Queer men who make sexual advances on men risk legal action
or even death; however, heterosexual men who make sexual advances on women
can generally expect impunity.

I conclude this Article by calling for the reconciliation of the legal treat-
ment of unwanted sexual advances to ensure that women and queer men receive
the same protections as heterosexual men.

INTRODUCTION

I. THE HOMOSEXUAL ADVANCE AS A FORM OF PROVOCATION

   A. The Doctrine of Provocation

      1. Background
      2. Current Law

   B. The Homosexual Advance as a Form of Provocation

      1. Development of the “Homosexual Panic” Insanity Defense
      2. Homosexual Advances as Adequate Provocation
      3. What Constitutes an Adequate Homosexual Advance?

II. HOMOSEXUAL ADVANCE DEFENSE AS A DEFENSE OF MASULINITY

   A. Provocation is a Heterosexual Male Defense
   B. The Homosexual Advance Defense as a Defense of Masculinity

III. UNWANTED SEXUAL ADVANCES ON WOMEN

   A. Street Harassment

      1. Harms Associated with Street Harassment
      2. Ineffective Remedies
      3. Comparison to the Homosexual Advance Defense

   B. Sexual Harassment Leading to a Hostile Work Environment

      Under Title VII

      1. Harms Resulting from Sexual Harassment in the Workplace
      2. Ineffective Remedies
      3. Comparison to the Homosexual Advance Defense

IV. INCONSISTENCIES IN THE TREATMENT OF SEXUAL ADVANCES ON
HETEROSEXUAL MEN IN COMPARISON TO WOMEN AND MEN
PERCEIVED AS QUEER UNDER CRIMINAL AND ANTI-DISCRIMINATION
INTRODUCTION

Imagine that Matt and Felicity are co-workers who respond to 911 calls.1 Matt approaches Felicity as she is taking a call and places his hand on her stomach, “comment[ing] on its softness and sexiness.”2 Felicity tells Matt to stop touching her and pushes her away.3 Later, Matt stands behind Felicity’s chair while she is taking another call, “boxing her in against the communications console.”4 He then forces his hand underneath her sweater and bra to “fondle her bare breast.”5 Felicity removes his hand and tells him that he has “crossed the line,” and Matt responds, “you don’t have to worry about cheating [on your husband], I’ll do everything.”6 He approaches Felicity a third time “as if he would fondle her breasts again,” but stops when another co-worker arrives.7 Felicity later learns that two other co-workers had had similar experiences with Matt. Felicity takes a leave of absence “immediately afterward” and begins seeing a psychologist.8

Felicity sues her employer, claiming that she experienced sexual harassment constituting a hostile work environment in violation of Title VII.9 The employer responds by filing a motion for summary judgment.10 The court grants the employer’s motion, finding that, while Matt’s actions were “egregious,” the incident “happened within the course of a few minutes and was part of a single episode.”11 Thus, the court finds Matt’s actions insufficiently severe or pervasive to constitute a hostile work environment.12 Felicity ultimately loses her lawsuit, and the case is never heard by a jury.

Now imagine that Matt meets Malcolm at a bar.13 Matt offers Malcolm twenty dollars to “commit a homosexual act.”14 Matt and Malcolm then drive in Matt’s car to a nearby cove.15 While still in the car, Matt grabs Malcolm’s “pri-
mates” and makes a “pass” at Matt. Matt does not have as much money as promised and persists. Malcolm pushes Matt out of the car. He then chases Matt a short distance, knocks Matt down and kicks him with his boots, causing him “head injuries and a massive crushing injury to his chest.” There is blood on Malcolm’s jeans and human hair on his boots from the attack. Malcolm then takes Matt’s jewelry and drives home in Matt’s car. When Malcolm arrives home, he “freely admit[s] to his friends that he had robbed and assaulted” Matt. Matt is later found dead in the cove. Malcolm is charged with second-degree murder. The defendant argues that a reasonable jury could find that the victim’s homosexual advance was sufficient provocation for the defendant’s acts and requests that the judge also include jury instructions for the lesser charge of voluntary manslaughter. After the judge authorizes this jury instruction, the jury finds that the victim’s homosexual advance constituted adequate provocation to mitigate the defendant’s second-degree murder charge to voluntary manslaughter.

These two hypothetical scenarios were drawn from actual cases. The former scenario was derived from Brooks v. City of San Mateo, a case that is representative of the way courts generally treat sexual harassment claims under Title VII. The latter scenario was derived from Mills v. Shepherd, a typical example of a case in which a defendant successfully raises the “homosexual advance defense.”

In both situations, Matt made unwanted sexual advances. These unwanted advances angered both Felicity and Malcolm. However, Felicity and Malcolm responded very differently to these advance. Felicity responded by reporting the incident and filing suit against her employer. Malcolm responded by killing Matt. Thus, while Felicity attempted to use the law to affirmatively obtain redress, Malcolm violated the law to obtain redress.

The judicial response to the two incidents also varied significantly. Despite Felicity’s seemingly more rational response to the incident, the court was unwilling to

16. See id.
17. See id.
18. See id. at 1233.
19. See id.
20. See id. at 1234.
21. See id.
22. See id.
23. See id. at 1232.
24. See id. at 1234.
25. See id.
26. The homosexual advance defense is distinct from what was previously called the “homosexual panic defense,” which was formerly employed as an insanity defense. See infra Part II.A. The mere sight of a same-sex couple engaging in sexual acts is now considered insufficient provocation to mitigate a murder charge to manslaughter. See, e.g., Commonwealth v. Carr, 580 A.2d 1362 (1990). However, many scholars continue to use the terms “homosexual panic defense” and “homosexual advance defense” interchangeably. See, e.g., Cynthia Lee, The Gay Panic Defense, 42 U.C. DAVIS L. REV. 471 (2008); Morgan Tilleman, (Trans)forming the Provocation Defense, 100 J. CRIM. L. & CRIMINOLOGY 1659 (2010).
ling to recognize her injury. Despite Malcolm’s violent reaction to the same advance, the court was willing to mitigate Malcolm’s murder charge.\(^\text{27}\) The only significant factual difference between the two triggering events seems to be the gender of the harassed individual.\(^\text{28}\)

As these two cases demonstrate, women and men are both subjected to acts that they perceive as unwanted sexual advances. The acts Matt inflicted upon Felicity and Malcolm are similar in nature—the harasser made a comment and engaged in a nonviolent\(^\text{29}\) act. But the law treated the two situations very different-

27. Although most of the cases cited relating to the homosexual advance defense took place before the year 2000, this issue remains relevant today. Within the past two years, defendants have invoked both “gay panic” and homosexual advance defenses, and in some cases, the courts continue to entertain these defenses. See, e.g., Howard Ballou, Money May Not Have Been the Sole Motive for Barrett Murder, WLBT 3 (Apr. 23, 2010), http://www.wlbt.com/global/story.asp?s=12367018 (noting that defendant McGee alleged the man he killed made sexual advances on him, apparently sending the defendant into a rage that ended in murder); Zach Christman, Gay Panic Defense Gets Murder Defendant Off, NBC CHICAGO (July 28, 2009), http://www.nbcchicago.com/news/local-beat/Gay-Panic-Defense-Gets-Murder-Defendant-Off.html (noting that the defendant Biedermann was acquitted in the violent killing of his neighbor, who the defendant claimed tried to rape him); Eric Zorn, Murder Defendant Takes a Gamble—and Wins, CHICAGO TRIBUNE BLOG (July 17, 2009), http://blogs.chicagotribune.com/news_columnists ezorn/2009/07/gaypanic.html (asking, “How do you stab and slash someone 61 times, not just killing but slaughtering him, then walk free?” and noting “[t]he answer, in [defendant Biedermann’s] case, is that you cast yourself as the victim of an attempted homosexual rape, then you throw in all-or-nothing with the jury.”). Moreover, as will be discussed later in the piece, the assumptions underlying the defense—i.e., that harassment or advances that are perceived as “queer” are often actionable and that resulting violence may be legally legitimized due to the queer nature of the violent act, whereas harassment by men generally receives impunity—continue to be relevant today.

28. Sexual orientation is also implicated in this scenario. Inferences about Matt’s sexual orientation were made by the court based on the gender of his target in each situation. Indeed, sex and gender are intertwined with one another; one’s perception about another person’s sexual orientation is often based on assumptions about gender norms. See Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 WIS. L. REV. 187, 219 (“Preservation of gender distinctions and traditional family relations premised upon them is the core objective of secular social thinkers who condemn homosexuality.”); Courtney Weiner, Comment, Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX, 37 COLUM. HUM. RTS. L. REV. 195-202 (2005) (arguing that discrimination based on sexual orientation is based on assumptions about gender norms). But see Janet E. Halley, Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick, 79 VA. L. REV. 1721, 1724-26 (1993) (“[A]ny assumption that hetero/homosexual dynamics must originate in, or ultimately produce, gender hierarchy or gender identity give analytic priority to heterosexuality, with its definitional dependence on the concept of male and female, of masculine and feminine, as matching opposites.”). However, in this piece I seek to illuminate gender differences in treatment of unwanted sexual advances and thus focus on gender.

29. In this piece, I use the term “nonviolent” to refer to acts that are not likely to be criminally actionable. However, the pinching of one’s butt may be perceived as violent. Similarly, street harassment often involves a barrage of comments and gestures that are not individually actionable, however objectionable they may be. See infra Part III.A. I describe these acts as “nonviolent” not as a judgment about the nature of the act, but rather to draw a sharp contrast between the advances that queer victims make (which are argued to be “provocation”) and the brutal, heinous attacks that result from these relatively less harmful advances. I also use the term “nonviolent” to contrast the life-threatening acts that gave rise to the provocation doctrine with the less harmful acts that are today sufficient to constitute provocation. See infra Part I.A.
ly. The court found the advance on Malcolm presumptively sufficient to demonstrate provocation, which resulted in a jury instruction for voluntary manslaughter.30 The court found the advance on Felicity, however, to be legally insufficient to even sustain a claim for workplace harassment, as courts consider such advances to be part of a “normal” level of harassment that women must face.31

Indeed, one may argue that the difference in legal treatment may result from the seeming unrelatedness of the two types of cases. The homosexual advance defense relates to a criminal defendant’s plea to mitigate his own level of punishment whereas a workplace sexual harassment claim involves a civil plaintiff’s claim that would result in vicarious liability for her employer. Second, one may argue that the two cases are treated differently because a sufficient demonstration of workplace sexual harassment places full culpability with the harasser, whereas the homosexual advance defense only yields a partial excuse for conduct where it is successfully argued. However, these structural differences do not explain why the unwanted advance on Felicity was scrutinized and subject to procedural and doctrinal barriers, while the advance on Malcolm was considered presumptively severe to warrant judicial recognition in the form of the provocation defense.32 They also do not explain why a woman’s injuries go similarly unrecognized in the street harassment context, which does not involve a question of vicarious liability.33

In this Article, I contend that unwanted sexual advances on men are treated differently under the law than are unwanted sexual advances on women. I argue that the law recognizes certain advances on men as inappropriate enough to deserve legal recognition in the form of mitigation of murder charges while the same advances on women are not even considered severe enough to rise to the level of a claim that may be heard in front of a jury. I base this argument on a comparative analysis of the homosexual advance defense, street harassment, and sexual harassment under Title VII of the Civil Rights Act of 1964.

Scholarship critiquing the homosexual advance defense has traditionally focused on sexual orientation to argue that the defense exists to protect perceived affronts to masculinity.34 In doing so, these scholars have focused on the defense

31. See Brooks v. City of San Mateo, 229 F.3d 917, 923, 927 (9th Cir. 2000) (finding that the incident did not rise to the level of “severe or pervasive” harassment); Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (finding that the “ordinary tribulations of the workplace” include “the sporadic use of abusive language, gender-related jokes, and occasional teasing”) (citations omitted).
32. One may argue that other factors account for the difference in legal response to the unwanted advance. For example, Felicity experienced the unwanted sexual advance in the workplace, arguably in the presence of others, while Malcolm experienced the unwanted sexual advance outdoors and outside the presence of others. Moreover, Felicity sued her employer rather than the harasser himself. These issues are addressed, respectively, in Parts IV and V.
33. See infra Part III.A.
within the context of the provocation doctrine and the fact that it is overwhelmingly used by men. 35 The present Article broadens this analysis and examines the homosexual advance defense, not merely within the context of criminal law, but within a larger legal regime consisting of both criminal and civil law that addresses unwanted sexual advances. Unlike other scholars, I conceptualize the homosexual advance defense as a legal device that legitimizes heterosexual men’s responses to unwanted sexual advances from men. At present, no scholar has engaged in a comparative study of the legal treatment of unwanted sexual advances based on gender. My article seeks to provide this analysis.

In this piece, I compare the legal conceptualization and redress of two common types of unwanted sexual advances perpetrated by men against women—street harassment 36 and sexual harassment in the workplace—with the legal treatment of unwanted sexual advances of men against men, as evidenced in cases examining the homosexual advance defense. 37 I choose this comparison because all three cases illustrate different ways that courts approach the issue of unwanted sexual advances, whether a particular advance is inappropriate in a particular situation, and why.

First, I argue that the courts’ failure to mention women in their analysis of the homosexual advance defense implicitly suggests that advances on women by people of any sex are deemed less worthy of protection. Indeed, the defendants and victims who have raised the defense appear to have been primarily, if not

35. See, e.g., Dressler, supra note 34, at 735; Pei-Lin Chen, supra note 34, at 225-26.
36. Scholars have described harassment as unwanted sexual advances. See, e.g., Vicki Schultz & Eileen Goldsmith, Sexual Harassment: Legal Perspectives, in INT'L ENCYC. OF SOC. AND BEHAV. SCI. 13982 (2001). I follow suit and use the terms interchangeably throughout the piece.
37. See 1 ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE 14-15 (3d ed. 2000) (noting that no group of women has escaped sexual harassment in the workplace and summarizing the results of studies about the demographics of complainants); Cynthia Grant Bowman, Street Harassment and the Informal Ghettoization of Women, 106 HARV. L. REV. 517, 529 (1993) (“[S]treet harassment is a worldwide phenomenon . . . .”); see also MICHELE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT 11 tbl.1-6 (1991) (finding that females are more likely to be victims of rape than males and providing a summary of research studies on the incidence of sexual harassment in academic settings). There is a third common type of unwanted sexual advance: rape. See NAT’L INST. OF JUSTICE & CTRS. FOR DISEASE CONTROL AND PREVENTION, PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 3-4 (Nov. 1998) (finding that 1 in 6 women had been “forced to do something sexual” in their lifetime); U.S. DEPT. OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 tbl.2 (May 12, 2011) (finding that 203,830 people were victims of rape, sexual assault, or attempted rape (including verbal threats of rape) in 2008 and that more than 80% of the victims were female). A number of the cases of harassment involve violations that could potentially rise to the level of attempted rape or rape itself. Rape is also disproportionately faced by women and is often underreported. Moreover, while it is recognized as a crime under the law, there are numerous barriers to women’s access to justice when they are raped. However, an analysis of treatment of rape and attempted rape is beyond the scope of this piece given the complexity of the topics.
Some scholars argue that courts exclude women from the discussion of the defense for the very reason that women are less likely to raise the defense at the outset. However, while the homosexual advance defense recognizes that unwanted sexual advances on men deserve legal redress, even if men kill in response to them, there is no similar legal vehicle for the recognition of unwanted sexual advances on women.

Legal responses to these unwanted sexual advances reflect the courts’ views about the harassment in question. Judges engage in little inquiry about the adequacy of the provocation when men kill in response to one unwanted homosexual advance. Women, however, have great difficulty obtaining recognition of their claims when they respond to the act lawfully by filing criminal or antidiscrimination actions. There are currently no legal remedies that adequately address street harassment. Moreover, while sexual harassment in the workplace is legally cognizable under Title VII of the Civil Rights Act, women face many procedural and doctrinal barriers that may prevent their claims from being evaluated on the merits. This Article is also among the first to address the disparate legal recognition of men’s claims of workplace harassment, as compared to similar claims made by women. While women disproportionately experience sexual harassment in the workplace, they nonetheless may have to endure more severe and long-term harassment before receiving legal recognition for their injuries.

I do not examine women and men as monolithic groups in this piece. Rather, I engage in an intersectional analysis in order to demonstrate the ways in which the perception of one’s identity plays a significant role in one’s legal treatment as both a harasser and a target of harassment. For example, the homosexual advance defense focuses purely on the defendant’s perception of an act as a same-sex advance. The sexual orientation of the victim is not the primary issue. A heterosexual man’s act, if perceived by a defendant as a “homosexual advance,” may be claimed as provocation and could mitigate the murder of that man, despite his actual sexual orientation. By examining the legal treatment of women who bring suit in response to unwanted sexual advances, I provide a critique of the homosexual advance defense that places the defense within the large-
er context of a legal system that overlooks harms to women and queer men. In Part I, I provide a legal backdrop of the history of the provocation doctrine and discuss the evolution of the homosexual advance defense as a provocation defense. In Part II, I discuss the way in which the homosexual advance defense serves to defend traditional notions of masculinity. I describe how the homosexual panic defense is raised exclusively by men and was developed based on the experiences of heterosexual men who acted violently in reaction to acts by other men. In Part III, I examine two areas in which women commonly face unwanted sexual advances: street harassment and sexual harassment in the workplace. I discuss the failure of the law to address the harassment women face in both contexts, providing a comparison with similar cases in which the homosexual advance defense was invoked. In Part IV, I argue that, based on the findings of the previous section, gender and perceived sexual orientation play a large role in the legal treatment of unwanted sexual advances. Women face numerous procedural and doctrinal barriers to having their claims considered, while heterosexual men can prevail on similar claims if they introduce evidence that their harassers are homosexual. Unwanted sexual advances on women are scrutinized and subject to procedural and doctrinal barriers whereas unwanted sexual advances on men are afforded far less scrutiny and thus receive recognition under the law in the form of the provocation defense or a cognizable Title VII claim. I also examine the normative implications of treating unwanted sexual advances inconsistently. Finally, in Part V, I conclude by arguing for a reconsideration of the laws addressing unwanted sexual advances, including the homosexual advance defense and Title VII, based on their inconsistent treatment under the law.

I. THE HOMOSEXUAL ADVANCE AS A FORM OF PROVOCATION

The homosexual advance defense is based on the notion that an unwanted homosexual advance is a form of provocation sufficient to mitigate a murder charge to manslaughter. This section describes the evolution of the homosexual advance defense and the current legal doctrine. First, I briefly discuss the origin of and the current legal requirements for provocation. Next, I discuss the origin

43. I use the word “queer” rather than LGBT in order to encompass the myriad variations of sexuality that exists even beyond lesbian, gay, bisexual, and transgender, such as intersex. “Queer is by definition whatever is at odds with the normal, the legitimate, the dominant. There is nothing in particular to which it necessarily refers.” DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 62 (1995). The word “queer” itself arguably essentializes and erases the distinctions that exist among the experiences of lesbians, trans individuals, people of color and others. However, I use the term for ease of use and to emphasize the way in which one’s perceived sexual orientation can be as significant as one’s self-definition of her sexual orientation. Moreover, throughout the piece, I refer only to “queer” individuals to refer to those who are perceived by others as queer, regardless of their own self identification. I do this not to suggest that the experiences of queer individuals and those perceived as queer are similar – indeed they are not at all – but rather for ease of use.

44. But see Dressler, supra note 34, at 726 (1995) (arguing that the homosexual advance defense is based on the idea that any unwanted sexual advance should constitute a form of provocation).
of the homosexual advance defense as an insanity defense and its transition into a form of provocation. Finally, I examine cases invoking the homosexual advance defense to determine the types of unwanted homosexual advances that courts have determined to be sufficiently provoking.

A. The Doctrine of Provocation

If a defendant successfully argues that he or she was provoked to kill another, a judge will permit a jury instruction for the lesser charge of voluntary manslaughter. Subsequently, the jury will decide whether the victim’s act constituted adequate provocation to mitigate the defendant’s murder charge to manslaughter.45

1. Background

The provocation defense has its origins in English law. Traditionally, English law presumed that all killings possessed malice aforethought,46 and the killings were consequently punishable by death.47 The category of manslaughter eventually surfaced as a judicial recognition that certain killings, while still deserving of punishment, resulted from “natural” human weaknesses and thus deserved less punishment.48 These human weaknesses were believed to stem not from the “secret hatred or design in the breast of the slayer,” but from a provocative act by the deceased which incited passion in the slayer.49

English courts delineated four general categories of events that could sufficiently rebut the implication of malice.50 First, a victim’s actions were sufficient to rebut the implication of malice where the victim assaulted the accused. Malice could also be rebutted where the accused witnessed the victim assault another—in particular, where an accused killed after seeing the victim assault a friend or relative,51 illegally deprive another of liberty,52 or engage in an adulterous act with the accused’s wife.53

If the defendant acted in response to an aforementioned event, the court considered the loss of control reasonable as long as the defendant was subjec-

45. See Mison, supra note 34, at 135.
47. Joshua Dressler, Rethinking Heat of Passion: A Defense in Search of a Rationale, 73 J. CRIM. L. & CRIMINOLOGY 421, 422-23 (1982) (noting that, prior to the creation of the provocation defense, “the mandatory death penalty . . . was . . . invoked in all cases of homicide”).
48. Ashworth, supra note 46, at 292-93.
49. Id. at 292-93.
51. Id. at 1112-15.
52. The court was specifically referring to a situation in which a person witnesses the illegal arrest of another. Id. at 1115-16.
53. Id. at 1116. The specific use of the word “wife” further demonstrates that the provocation defense was intended only to apply to men, as the concept of same-sex marriage was never contemplated by courts at the time.
tively enraged. A murder could not be reduced to manslaughter, however, where the provocation was based on “words alone, affronting gestures, trespass to property, misconduct by a child or servant, [or] breach of contract.”

2. Current Law

The American legal system adopted the English law of provocation. Courts continued to find provocation where a defendant perceived adultery by his or her spouse or experienced serious battery. In many states, however, the victim’s acts no longer needed to fall within a particular category in order to provide legally cognizable mitigation to the accused. This continues to be true today. At present, for a court to mitigate a murder charge to voluntary manslaughter, states generally require a defendant to demonstrate that (1) there was reasonable provocation; (2) the defendant was in fact provoked by the act in question; (3) a reasonable person would not have had time to cool off between the time of the provocation and the time of the killing; and (4) the defendant did not in fact cool off between the time of the provocation and the time of the killing. In most jurisdictions, any act that meets this standard is therefore adequate to demonstrate provocation.

The doctrine has also been expanded beyond acts to address mere words in some cases. The reasonableness of the provocation and whether a “reasonable person”

54. Dressler, supra note 47, at 427-28. A.J. Ashworth found that provocation was “sufficient” to reduce a murder charge to manslaughter where there was an actual assault or physical threat or if there were unlawful or immoral acts undertaken by the victim. Ashworth, supra note 46, at 293.

55. Ashworth, supra note 46, at 293 (list formatting omitted).

56. Dressler, supra note 47, at 430. The provocation doctrine has been codified in state criminal statutes. The few modifications to the law have occurred only through common law at the state level, rather than through statutory modification. Dressler, supra note 47, at 429.

57. See State v. Saxon, 86 A. 590 (Conn. 1913).


59. See generally Dressler, supra note 47, at 430-31 (explaining that the Model Penal Code and a “fairly significant minority” of states have moved away from particular categories).

60. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 571 (1972).

61. Id. at 140. An additional proportionality requirement has been codified in English law. In England the manner in which one kills the victim is a factor in determining the reasonableness of the killing; it may render a killing presumptively malicious if the homicidal response is disproportionate to the provoking act. Dressler, supra note 47, at 429. See Regina v. Brown, (1972) 2 Q.B. 229. See generally Ashworth, supra note 46, at 295-97. American law does not seem to have the same explicit requirement. Dressler, supra note 47, at 428, 430, 430 n.99. In the United States, the focus of the inquiry is purely on the victim’s act. If a defendant responds to an adequate provocation disproportionately, the presumption of malice is still negated due to the existence of a provoking act. Dressler, supra note 47, at 430.

62. While insulting words are inadequate to demonstrate provocation, courts have found that words that inform the accused of an act that would itself constitute sufficient provocation and that leads to a killing are sufficient to mitigate a murder charge to manslaughter. Dressler, supra note 47, at 430 & n.93. Thus, in Commonwealth v. Berry, the court held that the accused could claim provocation where the victim informed him that he had assaulted his mother. See Commonwealth v. Berry, 362 N.E.2d 910, 913 (1977).
would have had time to cool off is theoretically based on an objective standard.\textsuperscript{63} However, the purported “objective” standard is not objective in practice. The “reasonable person” standard suggests that, regardless of one’s identity characteristics, one should react to a situation in a particular way. While a reasonable person is presumably without gender or sex, in practice, it is women whose experiences are not taken into account.\textsuperscript{64} This inquiry does not focus on the “reasonable woman.”\textsuperscript{65} At least one court has found that a defendant’s identity as a homosexual should not lead to determination of reasonableness from the perspective of the reasonable homosexual.\textsuperscript{66} However, a minority of states allows for some use of subjective viewpoint in assessing reasonableness.\textsuperscript{67}


\textsuperscript{64} See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (noting that “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women”). Indeed, references to the “reasonable man” in criminal law more explicitly exclude women. See Karen Busby, The Maleness of Legal Language, 18 MANITOBA L.J. 191, 200 (1989) (finding that references to the “reasonable man” ultimately “exclu[de] women, in situations where their experiences might be different from that of men . . . .”).

\textsuperscript{65} See Laurie J. Taylor, Provoked Reason in Men and Women: Heat of Passion Manslaughter and Self-Defense, 33 UCLA L. REV. 1679, 1691 (1986). But see State v. Wanrow, 559 P.2d 548, 558 (Wash. 1977) (holding that jury instruction on the reasonable man standard in a case involving a female defendant was erroneous because the instruction’s use of masculine pronouns implied that the relevant standard was “an altercation between two men”). The reasonable woman standard has been adopted by the Ninth Circuit in the context of Title VII cases. See, e.g., Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (noting that the reasonable woman standard is necessary because “women share common concerns which men do not necessarily share[,] . . . women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior[,] . . . Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser’s conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.”). See also infra Part III.


\textsuperscript{67} See ARK. STAT. ANN. § 5-10-104(a)(1)(B) (2011) (reasonableness is determined “from the viewpoint of a person in the actor’s situation under the circumstances as the actor believed them to be”); CONN. GEN. STAT. tit. 53a §§ 53a-54a, 53a-55 (2011); DEL. CODE ANN. tit. 11, § 63 (2011); HAW. REV. STAT. § 707-702 (2010) (reasonableness is determined “from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be”); KY. REV. STAT. ANN. §§ 507.030-050 (West 2011) (same); MINN. STAT. § 609.20(1) (2010); N.H. REV. STAT. ANN § 630.2 (2011); N.Y. PENAL LAW §§ 125.15, 20 (McKinney 2011); N.D. CENT. CODE § 12.1-16-02 (2011); OR. REV. STAT. § 163.115 (2009) (“[R]easonableness . . . must be determined from the standpoint of an ordinary person in the actor’s situation under the circumstances that the actor reasonably believed them to be.”). These states have chosen to follow the American Legal Institute’s Model Penal Code. See
B. The Homosexual Advance as a Form of Provocation

This section discusses the origins of the homosexual advance defense and its current use as a form of provocation. It also examines the types of acts that courts have found to constitute unwanted homosexual advances sufficient to demonstrate provocation under the law.

1. Development of the “Homosexual Panic” Insanity Defense

The homosexual advance defense originated from the now-defunct idea of homosexual panic. As early as the nineteenth century, homosexuality was commonly believed to be a psychiatric illness. In 1920, a psychiatrist named Edward Kempf expanded upon this foundation and coined the phrase “homosexual panic” to describe what he saw as a disorder whereby one “panic[s] due to pressure of uncontrollable perverse sexual craving.” According to Kempf, the panic could be triggered either where one was in the presence of only those of the same sex or in the absence of a member of the same sex to whom the patient had become emotionally attached. Thus, the two determinants of the disorder were

AM. LEGAL INST., MODEL PENAL CODE & COMMENTARIES § 210.3 at 43 (“from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be”).

Dressler argues that, in these states, factors such as the accused’s “sex, sexual preference, pregnancy, physical deformities” may be considered in determining the reasonableness of his or her behavior. Dressler, supra note 47, at 431. This would suggest that the gender and sexual orientation of a person who faces an unwanted advance may be considered in determining whether there is adequate provocation. Thus, evidence of the defendant’s homosexuality may prevent him from claiming provocation when faced with an unwanted advance by a male in these states. See Caroline Forell, Book Review, Homicide and the Unreasonable Man, 72 GEO. WASH. L. REV. 597, 607-18 (2004).

However, it is unclear whether, in fact, states that have adopted a more subjective standard have considered identity characteristics such as sexual orientation and gender. I was unable to find any case in which one’s race, gender, or sexual orientation explicitly played a role in a court’s determination of provocation. Some courts have, instead, argued that objective analysis must still be applied to the subjective standard in order to determine whether a “reasonable” person in the actor’s situation and possessing the actor’s characteristics would find the provocation in question adequate. See State v. Hannon, 703 N.W.2d 498 (Minn. 2005); State v. Quick, 659 N.W.2d 701 (Minn. 2003). Indeed, the Model Penal Code drafters have themselves suggested that the ultimate test of provocation is objective. See AM. LEGAL INST., MODEL PENAL CODE AND COMMENTARIES 49-50 (1980). Thus, while this formulation provides room for taking into account one’s identity characteristics in determining provocation, it does not seem that courts have been interpreting the subjective standard in this way.

70. This environment was believed to trigger anxiety due to the tension between the patient’s attraction to members of the same sex and his belief that these feelings were socially unacceptable. Id.
71. Id.
believed to be “(1) the patient’s terror of her or his attraction to homosexuality and (2) his or her fear of heterosexuality.” Once patients entered a panic state, they were believed to hallucinate that others were influencing, controlling, and ultimately attacking them. Kempf’s studies demonstrated that patients could inflict violence on themselves during such episodes, reportedly in a manifestation of self-hatred. However, Kempf’s case studies notably indicated that, while patients may hallucinate attacks by or against others, there was no evidence that such patients were actually violent towards others.

Despite this lack of evidence of outward violence, psychiatrists later built on Kempf’s foundation by defining homosexual panic as an insanity state involving outward aggression. While there is little literature on actual incidents of homosexual panic, evidence indicates that homosexual panic was recognized as an official diagnosis in the 1952 version of the Diagnostic and Statistical Manual of the American Psychiatric Association. Because they retained outward aggression as a criterion for diagnosing “homosexual panic,” psychiatrists perpetuated the myth that outward violence resulted from the “disease.”

In 1967, defendants began raising homosexual panic as an insanity defense to homicide prosecutions. The defense was described as follows, drawing on Kempf’s theory to scientifically and medically explain the behavior of men who murdered gay men:

72. Id. (citing Kempf) (list reference numbers added to quote for clarity and original emphasis omitted).
73. Id. at 85. According to Kempf, “a patient typically feels he is being hypnotized or fears losing control when another individual, whose characteristics happen to coincide with the conditioned needs of the dissociated sexual cravings, thereby stimulating them, comes into the patient’s environment.” Id. at 84.
74. See id. at 86-87.
75. Id. at 85.
76. See, e.g., DONALD JAMES WEST, HOMOSEXUALITY RE-EXAMINED 202-3 (1977) (describing the common psychiatric definition of homosexual panic as a “state of sudden feverish panic or agitated furor, 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”); Robert G. Bagnall et al., Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties, 19 HARV. C.R.-C.L. L. REV. 497, 499 n.4 (1984). But see Comstock, supra note 69, at 83 (arguing that there was no set meaning attached to the diagnosis).
77. See Comstock, supra note 69, at 83.
78. Id. at 87. Kempf himself noted that patients who hallucinate assaults may attack innocent people or “yield to the hallucinated assault.” It is possible that psychiatrists grasped onto this particular statement in associating “homosexual panic” with violence. However, Kempf’s case studies do not demonstrate any specific support for this statement. See id. at 86.
79. Lee, supra note 26, at 491 (2008). In People v. Rodriguez, the victim allegedly grabbed the defendant from behind in an alley and the defendant, believing the victim was “trying to engage in a homosexual act”, beat the victim with a stick, ultimately killing him. 256 Cal. App. 2d 663, 666 (1967). An expert witness for the defense testified that the “defendant did not know the nature and quality of his act at the time of the attack and was acting as a result of an acute homosexual panic brought on him by fear that the victim was molesting him sexually.” Id. at 667. See also State v. Thornton, 532 S.W.2d 37, 43 (Mo. Ct. App. 1975) (permitting defendant to offer psychiatric evidence that he “was in a state of ‘homosexual panic’” when he killed the victim).
Typically the victim in such a case is a gay or purportedly gay man who is severely beaten or murdered. The theory of the defense is that the gay victim triggered a violent psychotic reaction in a latently gay defendant. The triggering action may have been merely a non-violent verbal or gestural solicitation by the victim. The solicitation caused the defendant to temporarily lose the capacity to distinguish right from wrong. Thus the defendant claims, like any defendant who successfully raises an insanity defense, he is absolved of responsibility.  

If homosexual panic was successfully raised as an insanity defense, the defendant obtained complete exoneration from criminal punishment. However, the use of homosexual panic in a legal context was problematic for several reasons. First, by allowing the defense when the defendant has killed another, courts perpetuated the mischaracterization of the homosexual panic disorder, which was primarily associated with depression and suicidal tendencies. Second, the defense lead to evidentiary problems, as anyone who killed a homosexual person despite not acting on homosexual impulses could claim that he was “latently homosexual.” In fact, evidence indicates that defendants who invoked the defense identified as heterosexual and were not reportedly troubled by homosexual feelings. Third, despite the fact that Kempf’s case studies found that homosexual panic occurred in both men and women, only men invoked the homosexual panic defense in response to murders.

2. Homosexual Advances as Adequate Provocation

In 1973, the American Psychiatric Association finally declared that homosexuality was not a mental illness and removed it from the Diagnostic and Statistical Manual. By 1980, homosexual panic had also been declassified as a mental illness. As such, the assumptions supporting the use of the homosexual panic defense—the classification of homosexuality as a mental illness and the misinterpretation of homosexual panic as a psychological trigger for physical violence toward another individual—have been eliminated. Thus, the homosexual panic defense no longer has any scientific legitimacy. As a result, defendants to-

80. Comstock, supra note 69, at 82 (quoting Bagnall, supra note 76, at 499 n.4).
81. Christina Pei-Lin Chen, supra note 34, at 201.
82. See Comstock, supra note 69, at 88 (“That legal defenses have linked the disorder with the defendant’s need to defend himself from dangerous physical harm misrepresents not only the primary cause of the panic but also a cardinal symptom of patients, i.e., they feel powerless to defend themselves from anything and are ‘not able to function at all.’”).
84. Comstock, supra note 69, at 88-89.
85. Id. at 89.
87. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1980).
day generally cannot use it as the basis for a full insanity or diminished capacity defense, since they can no longer prove that their loss of control was due to a mental illness or defect. 88

Nevertheless, many defendants have found that psychiatric diagnosis is unnecessary for exculpation or mitigation of a murder charge for the killing of an individual whom they believe is queer. Though it is no longer the basis for a full defense, aggressors who introduce evidence of a homosexual advance have successfully claimed provocation, ultimately achieving some mitigation of their murder charges. 89

The use of homosexual panic as an insanity defense differs from the use of the homosexual advance as a form of provocation. The homosexual panic defense places blame on an internal stimulus: the defendant faces inner turmoil due to a mental illness, and he or she must therefore be exculpated for a killing. In contrast, the homosexual advance argument for provocation or self-defense places blame for the defendant’s violent act on the external stimulus of another individual’s sexual advance; the victim’s act serves as the trigger that allegedly causes the defendant to lose control and kill in the heat of passion. 90 Thus, in allowing for exculpation or mitigation of a murder charge in the context of homosexual advances, courts arguably blame the victim by implication for engaging in nonviolent acts. 91

88. Pei-Lin Chen, supra note 34, at 202. Nonetheless, homosexual panic has been invoked as an insanity defense several times since its scientific basis was eliminated. See, e.g., Commonwealth v. Cutts, 831 N.E.2d 1279 (Mass. 2005); Commonwealth v. Doucette, 462 N.E.2d 1084 (Mass. 1984); State v. Escamilla, 511 N.W.2d 58 (Neb. 1994).

89. Developments in the Law—Sexual Orientation and the Law, supra note 83, at 1546. Many defendants have also claimed self-defense where they have introduced evidence of homosexual advances. Id.

There is a serious question regarding whether a homosexual advance meets the doctrinal requirements for self-defense. To meet such requirements, a defendant must “reasonably believe that he or she is in immediate danger of unlawful bodily harm from his or her victim and that the use of force is necessary to avoid the danger. The actor must also use only a reasonable amount of force.” Taylor, supra note 65, at 1700. Recall the homosexual advance that took place in Mills v. Shepherd, where the victim grabbed the genitals of the defendant. The defendant in Mills attempted to obtain a jury instruction for self-defense. 445 F. Supp. at 1236. The court noted that the defendant knew the victim’s intentions when he accompanied the victim to the car and that, rather than leave the car, he pushed the victim out of the car “and without further provocation beat and kicked him.” Id. at 1237. Thus, the court determined that self-defense instruction was improper because “there was no evidence that defendant was free from fault in bringing on the encounter, that [defendant] reasonably or otherwise feared death or great bodily harm, that [defendant] was the victim of a felonious assault, or that [defendant] could not have retreated at any time during the encounter.” Id. at 1236-37.

90. See, e.g., Escamilla, 511 N.W.2d at 64 (“A victim’s homosexuality, without some evidence that the defendant was resisting a homosexual assault, is not material [to] and therefore not relevant [to determining whether provocation exists].”). In the context of self-defense, the alleged homosexual advance is the trigger in response to which some courts believe deadly force is a reasonable response.

91. See David L. Annicchiarico, Consistency, Integrity, and Equal Justice: A Proposal to Rid California Law of the LGBT Panic Defense, 5 DUKEMINIER AWARDS BEST SEXUAL ORIENTATION L. REV. 121, 127 (2006). But see Dressler, supra note 47, at 438 (arguing that provocation defense may serve as a partial justification for the defendant’s behavior, rather than a partial excuse). Further, in order to meet the doctrinal requirements for self-defense
The normative implications of this shift are also worth noting. In its use as an insanity defense, homosexual panic treated homosexuality as an inherent defect of which one needed to be cured. However, the shift to provocation did not completely eliminate the legal conceptualization of homosexuality as abnormal. Recall the purpose and requirements for provocation. First, the category of manslaughter was created to recognize that certain killings resulted from “natural” human weaknesses and thus deserved less punishment.\textsuperscript{92} Second, current provocation doctrine requires defendants to demonstrate that a “reasonable person” would be provoked by the act in question.\textsuperscript{93} Therefore, allowing perceived homosexual advances to serve as sufficient provocation to mitigate murder charges to manslaughter suggests both that (1) a violent response to perceived homosexual advance is due to a “natural” human weakness and (2) a reasonable person would be provoked by a homosexual advance.\textsuperscript{94} The provocation defense thus partially excuses\textsuperscript{95} and ultimately legitimizes violence in response to perceived homosexual advances.

Moreover, by allowing homosexual advances to be considered as evidence of provocation, courts maintain that homosexual advances are “sufficiently egregious to stir emotions that might cause an ordinary person to act rashly.”\textsuperscript{96} The description of homosexual advances as egregious in turn places them in the realm of the deviant and abnormal. Thus, while criminal law no longer legitimizes the notion of homosexuality as inherently abnormal, it perpetuates a notion that acts that may be perceived as homosexual advances are abnormal.\textsuperscript{97} As such, the shift is nominal; while the judiciary no longer explicitly classifies homosexuality as deviant, it has not eradicated the normative judgment of homosexuality as an aberration sufficient to warrant judicial response.

3. What Constitutes an Adequate Homosexual Advance?

This section considers the types of homosexual advances that courts have deemed adequate to provoke a defendant to kill. As provocation doctrine indicates, suggestive words alone are not enough.\textsuperscript{98} Moreover, the mere sight of two

\textsuperscript{92} Ashworth, supra note 46, at 292-93.

\textsuperscript{93} Mison, supra note 34, at 140.

\textsuperscript{94} I specify ‘homosexual’ advances here, as advances by men on women typically need to be severe or pervasive in order to be recognized by the law. See infra Part III.

\textsuperscript{95} Dressler has argued that provocation now functions as a partial excuse, not a partial justification. Thus, the victim is not blamed for his actions; rather, the defendant is seen as behaving reasonably in response to the victim’s actions. See Dressler, supra note 34, at 745-46.

\textsuperscript{96} Id. at 749.

\textsuperscript{97} The homosexual advance defense further disincentivizes individuals to act in a manner that would be perceived as queer. See infra Part IV.B.

\textsuperscript{98} Dressler, supra note 34, at 733.
people of the same sex engaging in a sexual act is also insufficient. However, words and a nonviolent act by the defendant have been found to be sufficient provocation by some courts.

Recall Mills v. Shepherd, the provocation case illustrated in the Introduction. In that case, the defendant voluntarily accompanied the victim to a cove after the victim offered him twenty dollars to “commit a homosexual act.” While still in the car, the victim grabbed the defendant’s “privates” and made a “pass” at him, prompting the defendant to push the victim out of the car. The defendant then chased the victim a short distance, knocked him down, and kicked him with his boots, causing the victim head and chest injuries. Despite the fact that the defendant chased the victim “without further provocation” and then kicked him, the trial court allowed jury instruction for voluntary manslaughter and the defendant was ultimately convicted of this mitigated charge.

In Commonwealth v. Medeiros, the victim “made verbal overtures to [the defendant] and tried to pull the defendant towards him” while the defendant was visiting his apartment. The defendant struck the victim. As the defendant attempted to leave, the victim struck the defendant and the defendant responded by once again striking the victim, causing the victim to fall on a bed. The defendant climbed on top of the victim and struck his head twice. The victim’s face was bloody; he was rendered unconscious and thus completely subdued. The defendant then put a pillow over the victim’s face to suffocate him and tied a rope around the victim’s neck to strangle him. The victim died of asphyxiation and strangulation. Here again, the judge permitted an instruction for voluntary manslaughter.

In Schick v. State, a case involving a potentially consensual encounter, the court allowed jury instruction for voluntary manslaughter. In this case, the defendant hitched a ride with the victim and the two “had a discussion about girls and oral sex.” The defendant asked the victim if he knew where he could get a blowjob. The victim responded that he “could handle that.” They continued to drive, bought cigarettes and eventually went to a local school’s baseball
field. They both got out of the car. The victim pulled down his own pants and underwear, approached the defendant, grabbed his waist and attempted to grab the defendant’s penis.\textsuperscript{115} The defendant kneed the victim in the stomach and hit him in the face. The victim fell and the defendant continued to stomp on and kick the victim. The defendant ultimately stole the victim’s money and left the victim to die, returning to the scene only to wipe the victim’s car clean of his fingerprints.\textsuperscript{116} In this case, not only did the court allow jury instruction for voluntary manslaughter, the jury ultimately found the defendant guilty of this lesser charge.\textsuperscript{117}

In each of these cases, a nonviolent act had occurred. In such cases, judges will permit a jury instruction for voluntary manslaughter if, given the weight of the evidence, they believe that a rational juror could find the act in question to be reasonably provocative. Notably, none of the trial courts in the cases above engaged the threshold question of whether the act may serve as reasonable provocation when granting jury instruction for voluntary manslaughter. The trial court in \textit{Schick v. State}, for example, presumed that a rational juror could find that a reasonable person would be provoked not merely to commit battery, but to kill, in response to the unwanted sexual advance in question.\textsuperscript{118}

However, not all courts make this presumption. The \textit{Schick} appellate court’s description of this case demonstrates why nonviolent homosexual advances are insufficient provocation.\textsuperscript{119} While considering whether to allow instruction for self-defense,\textsuperscript{120} the court reasoned that the victim did not place the defendant in any danger, as the victim was smaller than the defendant and did not attempt to fight the defendant.\textsuperscript{121} Thus, the court found it clear that the ad-

\begin{itemize}
\item \textsuperscript{115} Id. at 921-22.
\item \textsuperscript{116} Id. at 922. In this case, the court made a motion in \textit{limine} prohibiting references to the victim’s alleged homosexuality and sexual conduct, and the defendant attempted to use the homosexual nature of the sexual advances to argue that he should have been convicted of an even lesser offense. \textit{Id.} at 929. On appeal, the defendant unsuccessfully argued that his lawyer’s failure to challenge the court’s motion in \textit{limine} prohibiting references to the victim’s alleged homosexuality and sexual conduct and failure to propose instruction for involuntary manslaughter demonstrated that his counsel was ineffective. \textit{Id.} Notably, even though overt references to perceived sexual orientation were prohibited, the facts themselves could reasonably imply to a jury that the defendant himself was homosexual—based on the blowjob proposition and the victim’s attempt to grab the defendant’s penis alone—and it may still prejudice the jury as such. \textit{Cf.} \textsc{Susan Estridge}, \textsc{Real Rape} \textsc{80}, \textsc{88-92} (1987) (arguing that, despite rape shield laws that explicitly prohibit the introduction of a rape victim’s sexual history as evidence, defense counsel has been successful at making an end-run around the statute by implying that this sexual history exists based on descriptions of clothing and non-sexual activity that the jury may associate with ‘loose’ women).
\item \textsuperscript{117} Id. at 922. In this case, the court made a motion in \textit{limine} prohibiting references to the victim’s alleged homosexuality and sexual conduct, and the defendant attempted to use the homosexual nature of the sexual advances to argue that he should have been convicted of an even lesser offense. \textit{Id.} at 929. On appeal, the defendant unsuccessfully argued that his lawyer’s failure to challenge the court’s motion in \textit{limine} prohibiting references to the victim’s alleged homosexuality and sexual conduct and failure to propose instruction for involuntary manslaughter demonstrated that his counsel was ineffective. \textit{Id.} Notably, even though overt references to perceived sexual orientation were prohibited, the facts themselves could reasonably imply to a jury that the defendant himself was homosexual—based on the blowjob proposition and the victim’s attempt to grab the defendant’s penis alone—and it may still prejudice the jury as such. \textit{Cf.} \textsc{Susan Estridge}, \textsc{Real Rape} \textsc{80}, \textsc{88-92} (1987) (arguing that, despite rape shield laws that explicitly prohibit the introduction of a rape victim’s sexual history as evidence, defense counsel has been successful at making an end-run around the statute by implying that this sexual history exists based on descriptions of clothing and non-sexual activity that the jury may associate with ‘loose’ women).
\item \textsuperscript{118} \textsc{Susan Estridge}, \textsc{Real Rape} 80, 88-92 (1987) (arguing that, despite rape shield laws that explicitly prohibit the introduction of a rape victim’s sexual history as evidence, defense counsel has been successful at making an end-run around the statute by implying that this sexual history exists based on descriptions of clothing and non-sexual activity that the jury may associate with ‘loose’ women).
\item \textsuperscript{119} The defendant appealed the case on a number of procedural issues. Of note are two particular issues he raised. First, he argued that the jury should have been instructed regarding self-defense. Second, he argued that his voluntary manslaughter charge was due to ineffective counsel. The court did not uphold either argument. \textit{570 N.E.2d} at 927-30..
\item \textsuperscript{120} The court ultimately refused to provide instruction here. \textit{Id.} at 927.
\item \textsuperscript{121} \textit{Id.} at 927.
vance was not dangerous in any way. Moreover, the court noted that, on the facts of the case, the defense counsel’s success in arguing for a voluntary manslaughter instruction at the trial court level was a “remarkable accomplishment.”

Indeed, several courts have been unwilling to grant an instruction on voluntary manslaughter for similarly nonviolent same-sex advances. Some of these courts explicitly engaged the threshold question of whether or not reasonable provocation existed and responded negatively. For example, in *State v. Skaggs*, the court was unwilling to provide jury instruction for a manslaughter charge, finding that undefined “homosexual advances” and a proposition to enter into a relationship with the defendant would not provoke a reasonable person to kill. In another case, the court was unwilling to provide instruction where a defendant argued that the victim “indicated he was homosexual, stated that he desired to have oral sex with the defendant, and touched the defendant’s knee in a “meaningful” way.

The court in *Commonwealth v. Halbert* explicitly stated why it affirmed the trial court’s refusal to grant jury instruction on voluntary manslaughter for a nonviolent homosexual advance. In this case, the victim placed his hand on the defendant’s knee and asked, “Josh, what do you want to do?” The defendant’s friend choked the victim and pushed his face into the couch. The defendant kicked and punched the victim in the testicles, slashed the victim’s neck twice with a razor blade he was carrying, and hit him on the head twice with a bottle.

Even in light of the defendant’s attempt to demonstrate that he had been sexually abused in the past, the court explained that it would not grant jury instruction for voluntary manslaughter for such an act:

The issue is: would the victim’s nonthreatening physical gesture and verbal invitation have provoked a reasonable person into a homicidal rage. The victim’s question (“Josh, what do you want to do?”) was neither insulting nor hostile; it was at most a salacious invitation. Clearly, neither the question nor the accompanying physical gesture (the victim’s placing his hand on the defendant’s

122. Id. at 930 n.14.
123. There are some courts that have granted an instruction for manslaughter where homosexual advances have taken place only because the victim also engaged in other unrelated behavior that was sufficiently provocative. See, e.g., *Jones v. State*, 565 So. 2d 1157, 1158-60 (Ala. Crim. 1989) (finding that the victim sufficiently provoked the defendant where the victim and the defendant had an altercation due to a drug transaction and the victim grabbed the defendant’s shirt and threatened to kill him while wielding a knife). These courts do not consider the homosexual advance as evidence of provocation.
127. Id. at 978–79.
128. Id. at 977.
129. Id. The defendant’s two friends continued to stab and beat the victim after the defendant ceased his violence. Id. The defendant’s two friends were convicted of first-degree murder. Id. at n.2.
knee) would have been “likely to produce in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint”. Because the evidence was insufficient to support a finding of reasonable provocation, the judge did not err in refusing to instruct the jury on voluntary manslaughter.\(^\text{130}\)

Another court similarly found that, given the de minimus nature of the homosexual advance in question, the defendant’s killing must have been provoked by his anger alone.\(^\text{131}\) Thus, it found that there was insufficient evidence of provocation to warrant jury instruction for voluntary manslaughter.\(^\text{132}\)

The facts of those cases, in which jury instruction for voluntary manslaughter was granted, do not differ greatly from the cases in which jury instruction was not granted. The inconsistent outcomes appear to stem primarily from the courts’ divergent views about whether evidence of a nonviolent homosexual advance is sufficient to demonstrate reasonable provocation. The judges in the former cases accepted the defendant’s claim that such advances would reasonably cause someone to lose control. They have accepted, with limited scrutiny, claims that advances faced by defendants are both unwanted and sufficiently provoking. In contrast, the judges who refused to grant the instruction, at a minimum, questioned the latter assumption. By examining the homosexual advance defense as a male defense of masculinity, the next section explores why courts may not critically question these assumptions.

**II. HOMOSEXUAL ADVANCE DEFENSE AS A DEFENSE OF MASCULINITY**

In this section, I build upon the foundation of the last section by demonstrating the ways in which the homosexual advance defense may be construed as a “male” defense. I begin by demonstrating that the provocation defense itself developed in response to acts by men. I then discuss the ways in which the deployment of the homosexual advance defense reflects the gendered nature of the provocation defense.

A. Provocation is a Heterosexual Male Defense

The “male” nature of the provocation defense is clear from its origins in English law.\(^\text{133}\) English law explicitly based the original four categories of provocation on the perspective of the heterosexual male. In *Regina v. Mawgridge*, the English case that set the foundation for the provocation defense, the court described assault, adultery, and the other sufficiently provoking acts in specifically

\(^\text{130}\) *Id.* at 979 (citation omitted).

\(^\text{131}\) State v. Hannon, 703 N.W.2d 498, 511 (Minn. 2005).

\(^\text{132}\) *Id.*

\(^\text{133}\) See CYNTHIA LEE, MURDER AND THE REASONABLE MAN 70 (2003); Dressler, *supra* note 34.
gendered terms. In its discussion of adultery, the court stated that “[j]ealousy is the rage of a man and adultery is the highest invasion of property.”

One might argue that the court intended “man” to be interpreted as “anyone, male or female.” However, an examination of the law at the time indicates that only men, particularly heterosexual men, were beneficiaries of the defense. Consider adultery, the one act in which women were specifically mentioned. Originally, the law did not apply to a situation in which a woman caught her husband engaging in an adulterous act with a woman. Adultery could only occur where a husband discovered his wife engaging in adulterous relations. At the time, women lost their “legal existence” in marriage both in England and in the United States. They were instead subject to their husbands’ control and, consequently, lost their right to bring suit. Thus, the law was specifically designed to recognize slights felt only by married men. Even after women obtained independent legal standing, the law long assumed that women did not experience the same rage as men upon perception of a spouse engaging in adulterous acts. It was not until 1946 that English courts allowed women to claim the provocation defense after killing their husbands or husbands’ lovers.

Consensual acts between two same-sex individuals were also not considered, or perhaps even contemplated, in the description of the categories of provocation; the law did not consider a situation in which one’s spouse was found engaging in an adulterous act with someone of the same sex. In these situations, the discovery of one’s spouse engaging in same-sex relations would likely lead to the state-sanctioned killing of the spouse engaging in the relations. If a woman discovered that her husband was engaging in adulterous acts with a man, her husband could be put to death by the state for engaging in “buggery.” If a man discovered that his wife was engaging in same-sex relations with a woman, a court arguably would not have recognized the act as a sexual act, as many argue that same-sex desire in women was not widely recognized un-

135. Id. at 1116.
136. Id.
137. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 441-44 (1897).
138. See id.
139. Taylor, supra note 65, at 1694.
140. Id.
141. See Lawrence v. Texas, 539 U.S. 558, 568 (2003) (“The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century.”).
142. See RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 17 (1987) (noting that, at the time, homosexuality was regarded as an unspeakable moral offense and that buggery was a felony punishable by death).
143. See Donald J. West & Andrea Wöelke, England, in SOCIOLEGAL CONTROL OF HOMOSEXUALITY: A MULTI-NATION COMPARISON 197-98 (Donald J. West & Richard Green eds., 1997). In 1861, the Offenses Against the Person Act was enacted to lower the penalty to ten years to life imprisonment. Id.
til 1900.\textsuperscript{144} Even if the law recognized the act as sexual, it is arguable that a woman would also be put to death for engaging in buggery.

Scholars also argue that the provocation defense continues to primarily benefit men.\textsuperscript{145} Statistics alone suggest that men in fact benefit from the defense in greater numbers than women. The Department of Justice reported that there were eight times as many murder investigations in which men were the offenders than women in 2009.\textsuperscript{146} Because homicide is overwhelmingly committed by men, men have a greater chance of benefiting from the doctrine.\textsuperscript{147} In contrast, women are primarily the victims of provoked killings or are deemed to be the provoking trigger for them.\textsuperscript{148} Women have rarely invoked the defense.\textsuperscript{149}

The circumstances under which courts have granted a jury instruction for voluntary manslaughter further demonstrate the “male” nature of the provocation. The instruction is often granted for perceived affronts to masculinity. For example, a defendant who killed a prostitute after she taunted him for his impotency invoked the provocation defense.\textsuperscript{150} The evidence of provocation was mere words; yet, the court granted an instruction for voluntary manslaughter.\textsuperscript{151} Defendants have also invoked this defense in numerous cases where their female partners have attempted to leave the relationship.\textsuperscript{152}

It is for these reasons that provocation, invoked by men against affronts to masculinity, is properly viewed as a “male” defense.

\section*{B. The Homosexual Advance Defense as a Defense of Masculinity}

This section examines the homosexual advance defense in light of the discussion of provocation as a male defense. In describing the use of the homosexual panic defense, Gary David Comstock notes that only men raised this defense, despite Kempf’s finding that both women and men could experience the “disorder” that initiated (and ultimately terminated) judicial recognition of this de-

\begin{thebibliography}{99}
\bibitem{144} See \textsc{Terry Castle}, \textit{The Apparitional Lesbian} 8-9 (1995).
\bibitem{145} See \textsc{Dressler}, \textit{supra} note 34, at 735; \textsc{Taylor}, \textit{supra} note 65.
\bibitem{146} In 2009, 10,391 men committed murder and 1,197 women committed murder. \textsc{U.S. Dep’t of Justice, Crime in the United States: Expanded Homicide Data Table 3, Murder Offenders} (2009), http://www2.fbi.gov/ucr/cius2009/offenses/expanded_information/data/shtable_03.html. An act is classified as “murder” in the Uniform Crime Report’s data “based solely on police investigation as opposed to the determination of a court, medical examiner, coroner, jury, or other judicial body.” \textsc{U.S. Dep’t of Justice, Crime in the United States: Murder, 1} (2009), http://www2.fbi.gov/ucr/cius2009/documents/murdermain.pdf.
\bibitem{147} See \textsc{Dressler}, \textit{supra} note 34, at 735 (“[M]en are the predominant beneficiaries of a doctrine that mitigates intentional homicides to manslaughter.”).
\bibitem{148} \textit{Id.} at 735; \textsc{Victoria Nourse}, \textit{Passion’s Progress: Modern Law Reform and the Provocation Defense}, 106 \textsc{Yale L.J.} 1331, 1135–36 (1997).
\bibitem{149} See \textsc{Taylor}, \textit{supra} note 65, at 1689-90.
\bibitem{150} See \textsc{Nourse}, \textit{supra} note 148, at 1402 (discussing \textit{Bedder v. Director of Pub. Prosecutions}, 2 \textsc{All E.R.} 801 (H.L. 1954)).
\bibitem{151} \textit{Id.} at 1402.
\bibitem{152} \textit{Id.} at 1343-45.
\end{thebibliography}
fense. This same phenomenon seems to be true with regard to the homosexual advance defense: in most if not all homosexual advance cases, it seems that the defendants and victims are all men. As a subset of provocation, the homosexual advance defense, it appears, is indeed a “male” defense.

Several scholars have offered explanations for this phenomenon. Comstock argued that women might not have used the homosexual panic defense due to the lack of “anti-lesbian murder” by women. Indeed, in general, far fewer women kill than men, and when women do kill, they tend to kill men with whom they are intimately involved. Moreover, men and women are socialized differently in responses to conflict and the acceptability of aggression. Men learn from an early age that aggression is an acceptable and even admirable form of conflict resolution. Thus, men may respond to unwanted sexual advances by men with violence. Women, on the other hand, are socialized to be passive and submissive in the face of unwanted advances. As such, they may respond to unwanted sexual comments and advances either by freezing or by pretending to ignore them. These patterns help explain the apparent absence of cases in which

153. See Comstock, supra note 69, at 89-90.
154. I conducted the following search within the Westlaw database for all U.S. state cases: (homosexual or gay or queer or lesbian or trans*) /3 (panic or advance). The search rendered 475 cases. In 268 of these cases, the court either referred to or addressed a killing in response to a homosexual advance, and, in each of these cases, men perpetrated the killing. At least one case, however, evidences a killing based on anti-lesbian sentiment, though no sexual advance was involved; a daughter helped two boys kill her mother and her mother’s lesbian lover. See Comstock, supra note 69, at 89 n.67.
155. Lee, supra note 133, at 73; Dressler, supra note 34; Mison, supra note 34, at n.7. Lee summarizes the phenomenon of the homosexual advance defense most convincingly: While it is not inconceivable that a woman might panic and respond violently to a lesbian sexual advance, a search for lesbian panic homicide turned up no such cases. The lack of such cases suggest that gay panic is the product of a specific construction of masculinity, one that values heterosexism and violence as traits of the masculine.
156. See Comstock, supra note 69.
157. See Taylor, supra note 65.
158. See Richard L. Davis, Domestic Violence: Facts and Fallacies 107 (1998) (finding that boys are socialized to be tough through violence in media, sports, and male family members and that this socialization may lead to abusive behavior); Michael S. Kimmel, Global Masculinities: Restoration and Resistance, in A MAN’S WORLD?: CHANGING MEN’S PRACTICES IN A GLOBALIZED WORLD 34 (Bob Pease & Keith Pringle, eds., Zed Books Ltd. 2001) (“From an early age, boys learn that violence is not only an acceptable form of conflict resolution, but one that is admired.”).
159. See Bowman, supra note 37, at 560-61 (1993).
161. Bowman, supra note 37, at 537, 561. Bowman explains: Women may react this way because they are unwilling to admit their powerlessness in the situation, are afraid of physical attack, or are reluctant to draw attention to themselves or to be displeasing. In other circumstances, they are simply annoyed and do not want to reward the harasser with a response, or they are embarrassed to have been treated in such a degrading manner. They freeze; they put on a blank
women kill in response to unwanted same-sex advances and, by extension, the dearth of judicial consideration of such a scenario.

Joshua Dressler argues that when women do respond violently to unwanted sexual advances, they typically claim self-defense. However, he supports this argument by citing only one case, People v. Barker, in which the female defendant’s request to instruct the jury on self-defense was granted where the male victim made unwanted sexual advances towards her. Yet, in Barker, the court granted the instruction because the nature of the advance reached the level of sexual assault, which was doctrinally sufficient for exculpation under a self-defense theory. It is unclear what the defendant would have claimed if the advance had fallen short of criminal behavior and was instead factually more similar to the grabbing of her “privates” like the advance in Mills v. Shepherd.

The more likely case, made by Cynthia Lee, is that the homosexual advance defense is not only a male defense, but a specifically heterosexual male defense. First, this defense is grounded in the perspective of the heterosexual male. Male-on-male advances are perceived as threats to male heterosexual identity for several reasons. To begin, male-on-male advances challenge the notion that men are supposed to be interested in women, not men. Furthermore, such advances challenge the traditional view of men as sexual aggressors rather than as objects of sexual advances. Violent behavior towards men appearing to be queer may be perceived as merely a performance of masculinity. Thus, this...
twofold threat to heterosexual male identity suggests that violence in response to homosexual advances is reasonable.\textsuperscript{171}

Second, the reasonableness requirement of the provocation defense suggests that only heterosexual men can prevail on such claims. Because they are expected to respond nonviolently to unwanted sexual advances, women, including queer women, would have a difficult time convincing a jury that violence in response to an unwanted sexual advance is reasonable.\textsuperscript{172} A queer man would have a similarly difficult time if he were approached by a woman, since advances by women on men are not perceived as offensive.\textsuperscript{173}

While heterosexual men are the primary beneficiaries of this defense, queer men seem to be the primary targets. Some scholars argue that in cases where the homosexual advance defense has been invoked, the defendants actually have committed bias crimes against queer individuals.\textsuperscript{174} They argue that a violent response to homosexual advances results not merely from the victim’s act but from a general distaste for queer individuals.\textsuperscript{175}

This argument finds further support in a recent line of cases wherein the defendant kills an acquaintance, or even an intimate partner, after discovering that the individual is transgender.\textsuperscript{176} In these cases, the provocation defense is sometimes called the “trans-panic” defense.\textsuperscript{177} In a typical case, a man has sexual relations with a woman, subsequently learns that she was born biologically male, and then kills her, claiming provocation.\textsuperscript{178} The defendant argues that his discovery of a difference between the victim’s sex assigned at birth and the victim’s current gender identity caused him to lose control and kill in the heat of passion,

\textsuperscript{171} Id. at 83.

\textsuperscript{172} Id. at 84.

\textsuperscript{173} Id. at 84-85.

\textsuperscript{174} See, e.g., Annnicchiario, supra note 91; Scott D. McCoy, The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict, 22 CARDOZO L. REV. 629, 629-33 (2001) (finding that the killing of two men whose killers invoked the homosexual advance defense was “bias-motivated” and “because of their sexual orientation”).

\textsuperscript{175} See Scott D. McCoy, supra note 174, at 634 (calling the violence in the killings based on the homosexual advance defense “homophobic”).

\textsuperscript{176} See Lee, supra note 26, at 513.


\textsuperscript{178} See Bradford Bigler, Sexually Provoked: Recognizing Sexual Misrepresentation as Adequate Provocation, 53 UCLA L. REV. 783 (2006). I describe the phenomenon in gendered terms, as men have almost exclusively, if not exclusively, made these claims. See, e.g., Carey Goldberg, Shunning ‘He’ and ‘She,’ ‘They Fight For Respect, N.Y. TIMES, Sept. 8, 1996, at 24 (noting “the deaths of several transsexual women who were killed by men they dated); Carolyn Marshall, Two Guilty of Murder in Death of Transgender Teen, N.Y. TIMES, Sept. 13, 2005; see also Lee, supra note 26, at 478.

Men also kill transgender individuals in another category of cases: where men discover men with whom they are acquainted were born biologically female. There are far fewer cases that fall into this category, but the most widely publicized one was the murder of Brandon Teena. See Court Increases Award to Kin in Hate Crime, N.Y. TIMES, Apr. 21, 2001, at A9; Chris Summers, The Victims of Prejudice, BBC NEWS ONLINE, Dec. 26, 2003, http://news.bbc.co.uk/2/hi/americas/3219591.stm. However, the defendants in this case did not claim either insanity or provocation.
thereby specifically arguing the homosexual advance or panic defense in these instances. Yet there are no “homosexual advances” in these cases. The trigger is the perceived deception, not a sexual advance, as the advance was consensual at the time it occurred. Moreover, the advance is not perceived as “homosexual” until the discovery of the victim’s sex assigned at birth. Regardless, courts have generally refused to entertain these arguments, whether characterized as “homosexual advance” or “trans-panic” defenses.

Attempts to raise the homosexual advance defense or the “trans-panic” defense when a male defendant kills in response to a homosexual advance can be perceived as a way in which men try to legitimize violent responses to unwanted sexual advances. Thus, when courts permit a jury instruction for voluntary manslaughter in these instances, the defendants’ response receives legitimization regardless of whether they ultimately receive a reduced sentence. The mere provision of the jury instructions indicates that the judge believes that the defendant’s sentence could be mitigated under the law in light of the unwanted advance. However, as the next section demonstrates, women have trouble obtaining any type of legal recognition for unwanted sexual advances by men.

III. UNWANTED SEXUAL ADVANCES ON WOMEN

An examination of contexts in which women face unwanted sexual advances further supports Lee’s conception of the homosexual advance defense as one that positively values male expressions of heterosexuality and violence. Some scholars argue that because women rarely respond violently to unwanted sexual advances or other stimuli that incite anger or fear, the provocation defense need not be considered in the context of women facing unwanted sexual advances. However, as this section will demonstrate, women who face unwanted sexual advances often do not receive legal protection, regardless of their response. In this section, I will explore the phenomena of street harassment and sexual harassment in the workplace—two common areas where women deal with unwanted sexual advances.


180. See, e.g., Marshall, supra note 178; see also David Schoetz, Transgender Teen’s Murder Suspect Snapped, ABC NEWS (July 31, 2008), http://abcnews.go.com/US/Story?id=5487781&page=3 (noting that these claims have been “largely unsuccessful”). But see People v. Merel, No. A113056, 2009 WL 1314822, at *9 (Alameda County Super. Ct. May 12, 2009) (allowing a mitigation-to-manslaughter instruction for the unlawful killing of Gwen Araujo, a transgender woman who was killed after several former associates discovered her sex assigned at birth). The exact number of cases in which the homosexual panic defense has been raised in response to the killing of a transgender person is unknown. A search for “trans* /3 (panic or advance)” in state court cases yielded no results in the LexisNexis legal database.

181. See, e.g., Dressler, supra note 34, at 743.
A. Street Harassment

Street harassment, as defined by Cynthia Grant Bowman, is harassment in public places by strangers. Street harassment, as defined by Cynthia Grant Bowman, is harassment in public places by strangers. It is a worldwide phenomenon whereby individuals experience verbal and nonverbal sexual advances in public. The targets of street harassment are generally female. The harassers, on the other hand, are almost always male and may come from a wide variety of backgrounds. They are often unacquainted with their targets. The harassment encounter is generally face-to-face, and the forum is an area to which the public generally has access. Finally, the content of harassing speech is not intended as public discourse but rather is aimed specifically at the individual.

1. Harms Associated with Street Harassment

Street harassment causes numerous harms to women. In addition to independent psychological injuries, women also experience fear that verbal harassment will turn into physical harm, including rape, and may experience additional emotional distress, depression, anxiety, stress, and a resulting lack of motivation. Street harassment is a unique form of harassment in that it invades wom-
en’s privacy in the public sphere. A woman may hear very few comments each time she enters the public sphere; however, people tend to enter the public sphere often, and the comments thus invade women’s lives with regularity. The cumulative effect of these comments and acts, which range from vaguely complimentary to threatening, can be debilitating.

In response to these repeated invasions, many women feel restricted in their ability to move about freely in public areas. For example, women may avoid certain places or activities for long periods of time in order to avoid harassment. Given that harassment occurs not only on streets, but also in subways, taxis, and other public areas, harassment can severely limit a woman’s ability to safely, comfortably, and independently engage in her daily activities. Further, street harassment may encourage a woman to seek male escorts in public arenas, thereby increasing her dependence on men.

The actual or perceived race of the woman may exacerbate the harms of street harassment. Women of color have historically been viewed as sex objects. This historical backdrop affects both the harassment that a woman of color faces as well as her experience of the accompanying injury. Women identified as racial or ethnic minorities often experience street harassment with greater frequency due to their perceived sexual accessibility. Black women, for example, may be subjected to more harassment because of the stereotype that they are “over-sexed” and thus sexually accessible. Yet, these same women may be afforded less protection under the law for the very reason that they are more likely to be perceived as sexual objects. In at least one case, for instance, a court found that three black women solicited on the street by a white man who believed they were prostitutes had no cause of action under a street harassment

192. *Id.; ANITA ALLEN,UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 131-32 (1988) (arguing that the cumulative effects of sexual harassment faced by women in public places can lead to anxiety). Given the pervasive and ubiquitous nature of male-female street harassment, these harms are very gender-specific when a female is harassed, especially when the harasser is male. The experience of a woman harassed by a man is not the same as the experience of a man harassed by a woman. To equate them ignores the effect on the harassed. Olukemi Laniya, supra note 190, at 99-101. Women are harassed publicly at a higher rate than men. Moreover, where women perceive street harassment, some men state that they perceive compliments. *Id.* at 100-101.
193. Bowman, supra note 37, at 539.
194. *Id.*
195. See ALLEN, supra note 192, at 132 (finding that women who experience continual invasions of privacy in public “become debilitated by anxiety about being alone in public and making use of public facilities [and] [s]ome women stay home”); Bowman, supra note 37, at 529-30.
196. Bowman, supra note 37, at 540.
198. Bowman, supra note 37, at 532-34
199. See *Id.* (discussing the street harassment of black women). See generally Hernández, supra note 197.
201. Hernández, supra note 197, at 195.
Moreover, women of color may suffer from street harassment more intensely due to the historical associations evoked in the moment of harassment. For example, the harassment of black women “resonates with remnants of a slave-era mentality,” wherein black women were treated as the sexual property of their masters. Thus, the harassment “evokes a long history of disrespect, degradation and inhuman sexual mistreatment to which Black women have been subjected over the years.” The harassment of Asian women evokes a related history of sexual subjugation, in which Asian women were brought into the United States as prostitutes and have served as “comfort women” to soldiers abroad. Thus, women of color may tend to experience street harassment, as well as other forms of sexual harassment, more acutely.

Queer women and women perceived as queer “have a uniquely offensive experience,” when they are harassed by men, “as they [are] ‘punished’ for being women and assumed to be what they are not—heterosexual.” In these situations, men often make comments suggesting that they are not real women since they do not prefer men sexually. Men may also make comments indicating a desire to “turn the women straight.” Women perceived as or known to be queer may also face serious and increased violence in addition to harassment. Finally, queer women of color experience harms that are further exacerbated by the complicated interaction of race, gender, and sexual orientation. Queer women of color are still women of color and, as such, are perceived as sexually accessible and available to street harassers. However, the sexual availability of women of color is premised upon the assumption that the woman in question is heterosexual. When harassers believe that a woman of color may

202. See People v. Malausky, 485 N.Y.S.2d 925 (Rochester City Ct. 1985). For further discussion, see also infra n.244.

203. Bowman, supra note 37, at 533-34.

204. Id.


206. Bowman, supra note 37, at 531-32.


208. See, e.g., Mattilda Bernstein Sycamore, News Hounded: The New Jersey 4’s Trial by Media, BITCH, Fall 2008, at 25 (describing a harasser who yelled, “I’ll fuck you straight” at his lesbian target); see also Arthur S. Leonard, Anti-Lesbian High School Teacher Fired, GAY CITY NEWS (Nov. 27-Dec. 3, 2003), http://204.2.109.187/gcn_248/antilesbian.html (reporting that a teacher was fired because he told a student that he would “find a guy to turn her straight”).


211. See Bowman, supra note 37, at 532-34.
be queer, two assumptions are problematized: first, that as a woman, she is sexually available to her harasser and second, that as a woman of color, she is particularly sexually available to her harasser. Thus, when confronted with these seemingly incongruous realities, harassers may instead view queer women of color as dangerous or man hating and may thus respond with increased violence. For example, Sakia Gunn, a 15-year-old black girl, was waiting for a bus with two friends in Newark, New Jersey when she was sexually propositioned by two men in a car. She and her friends rebuffed the men’s advances and Gunn told the men she was a lesbian. The men responded by getting out of the car and physically assaulting the women. One man pulled out a knife and stabbed Gunn, killing her. Under his plea agreement, he was sentenced to 20 years in prison for aggravated assault, aggravated manslaughter, and bias intimidation. Yet despite the horrific circumstances surrounding her death, the incident received little press coverage or community recognition.

2. Ineffective Remedies

Notwithstanding the numerous harms that women face as a result of street harassment, such harms do not fit neatly within any civil or criminal causes of action. Yet, there are several analytical possibilities for addressing this form of harassment. To begin, states could enact laws specifically targeting street harassment. While some might question whether these laws infringe upon the freedom of speech, measures to regulate street harassment and provide redress to victims would likely withstand First Amendment scrutiny. Many of the street harassment speech acts would not fall within the contours of the First Amend-
street harassment. Moreover, street harassment is “low-value speech” that would be subjected to minimal constitutional scrutiny. However, statutes specifically targeting street harassment faced by women have not yet been enacted in any state.

Barring large-scale enactment of laws specifically targeting street harassment, several classes of existing laws could provide legal remedies for women who are harassed in public. For example, municipalities could initiate criminal prosecution of street harassers under assault or “fighting words” statutes. In addition, harassed individuals may have civil tort remedies including assault, intentional infliction of emotional distress, and invasion of privacy. Some states, such as New York, have enacted criminal harassment laws prohibiting harassment in public arenas.

Yet, it is likely that the aforementioned remedies will stop short of providing women with full protection in the context of street harassment. First, street harassment is so pervasive and normalized that it is often exceedingly difficult to prove that it constitutes exceptional, unreasonable, or outrageous behavior—the most common legal standards applied in such cases. Second, many of the po-

224. Id. at 543-44. For example, assault would not fall receive First Amendment protection. Id.
225. Id. at 544. For example, harassment might fall under the exception of defamation. Id. If a harasser calls the target “whore” in the presence of another passerby, the harassment would constitute defamation. Id.
226. Id. at 545. “Low-value speech may include the following: (1) speech that is far afield from the central concern of the First Amendment—the effective popular control of public affairs; (2) speech that has purely noncognitive appeal; and (3) speech that is not intended to communicate a substantive message.” Id. at 545.
227. See Holly Kearl, STOP STREET HARASSMENT: MAKING PUBLIC PLACES SAFE AND WELCOMING TO WOMEN 190-202 (2010).
228. Bowman, supra note 37, at 548.
229. See id. Some states have “fighting words” statutes, which prohibit the use of words that “are likely to provoke the hearing to violence and thus breach the peace.” Id. at 559.
230. See id. Bowman does not indicate that there is any significant difference between civil and criminal assault statutes. See id.
231. See id. 538-69.
232. See N.Y. CRIM. LAW § 240.25 (McKinney 2011) (“A person is guilty of harassment in the first degree when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury.”); see also N.Y. CRIM. LAW §§ 240.26, 240.30 (McKinney 2011).
233. Bowman, supra note 37, at 571. One self-help remedy has become quite popular since the Article was written, due to the popularity of the Internet. In 2005, a woman named Emily May created a website entitled “Holla Back,” which serves as a forum for women “to post photographs [of harassers] and stories about their experiences being groped, catcalled or otherwise sexually harassed in public.” Aubrey Fox, The Fight Against Street Harassment, GOTHAM GAZETTE, Jan. 24, 2008, http://gothamgazette.com/article/crime/20080124/4/2412. See Holla Back NEW YORK CITY, http://hollabacknyc.blogspot.com/. The site has brought attention to the phenomenon of street harassment, and there are now fifteen city-specific Holla Back sites nationwide. Id.
234. For example, intentional infliction of emotional distress requires a showing that extreme emotional distress is “so severe that no reasonable man could be expected to endure it.” See RESTATEMENT (SECOND) OF TORTS § 46 cmt. j. Women have had to harden themselves against street harassment, and because they have learned to endure it, they are often barred
tential causes of action listed above require proof of an intent to harm, a standard that presents similarly burdensome evidentiary issues. 235 Third, some jurisdictions also require a showing of repeated acts in order to state a valid cause of action. 236 As such, unless harassment is conducted against the same person twice by the same individual or has some obsessive quality to it, courts may find it insufficient to give rise to a legal claim. 237

Assault statutes embody the essentially insurmountable burdens that a woman who is harassed on the street must overcome in order to state a successful cause of action. As Cynthia Grant Bowman explains, because harassers may claim that they intended their gestures as a compliment, the harassed woman may be unable to demonstrate the requisite intent to initiate offensive contact. 238 In addition, the woman must demonstrate that her harasser had the “present capacity to inflict the injury feared.” 239 If a woman is not within very close range of the harasser, this capacity requirement would be difficult to meet. 240 Finally and perhaps most damningly, “mere words” or “mere solicitation” are not actionable in the context of assault, even if the words incite the fear of rape in the woman. 241

Street harassment is also extremely difficult to remedy under state statutes addressing general harassment. 242 While plaintiffs need not demonstrate reasonable fear of imminent offensive contact under most harassment statutes, they still must demonstrate that the defendant had the “intent to harass, annoy or alarm.” 243 Proving intent in this context is often difficult. The woman’s very

from recovery. Bowman, supra note 37, at 565-66. Courts have expected women to harden themselves to burdensome situations in other areas of the law as well. See, e.g., Jesperson v. Harrah’s Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc) (holding that makeup and hairstyle requirements imposed on women, but not men, did not constitute gender discrimination under Title VII); Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985) (upholding a district court ruling that a rigorous appearance standard applied to female television news anchors did not constitute gender discrimination under Title VII).

Interestingly, “fighting words” statutes require a showing that a victim would respond violently to the words uttered. In a parallel to the homosexual advance defense, the “fighting words” standard may require a determination that the defendant’s words in fact had a tendency to provoke the victim to violence. Bowman, supra note 37, at 561.

235. These remedies include assault and intentional infliction of emotional distress. See Bowman, supra note 37, at 552-64.
236. Harassment statutes require a showing of repeated conduct. Id. at 558.
237. Bowman argues that street harassment, without physical violence, would only be actionable “when harassment has a repeated or obsessive quality.” Id. at 554.
238. Id. at 552.
239. Id. at 555.
241. Bowman, supra note 37, at 552-54.
243. Bowman, supra note 37, at 556.
presence in a public space may render a man’s actions more reasonable in the
eyes of the (often male) judge or jury, and this inference of reasonableness may
in turn diminish the trier of fact’s belief that the defendant possessed the requi-
site “intent to harass or annoy.”

Moreover, female judges and jurors may have
internalized the belief that such harassment is a “normal” part of life and thus,
like their male counterparts, expect female plaintiffs to develop a thicker skin.

Furthermore, as in assault cases, unless the harassment was repeated,
courts are unwilling to find the harassment actionable under general harassment
statutes. There have been a few limited successes even under this restrictive
standard. For example, in People v. Murray, the court found a “course of con-
duct” sufficient to demonstrate harassment. Here, the defendant offered the
victim $100 to accompany him to Central Park, and when the victim tried to
walk away, the defendant proceeded to follow along-side the victim, despite her
repeated requests that he leave her alone. The defendant then thwarted the vic-
tim’s efforts to enter her office building, slamming the door shut when she tried
to open it, and then grabbing the victim’s arm as she tried to retreat. When the
victim then sought help from the occupant of a parked car, the defendant pulled
her away, warning the victim to “shut up” as she screamed. The defendant
stopped only after a security officer from a nearby building pulled him away
from the victim.

Similarly, in Commonwealth v. Duncan, the plaintiff prevailed where the
defendant approached her, stated, “I never ate a pussy before,” and repeatedly
requested to engage in cunnilingus despite her objections. The court found that
the defendant’s repetitive speech acts, in light of the plaintiff’s clear objections,
constituted harassment.

However, the dissenters in Duncan thought that it was unwise to criminal-
ize this type of behavior at all:

244. See People v. Malausky, 485 N.Y.S.2d 925 (Rochester City Ct. 1985) (finding that a white
man who invited three black women back to his apartment for some wine and offered them
$100 “for companionship” did not have the necessary intent for harassment under the state’s
harassment statute). Despite the humiliation of the women involved, the judge found that the
man’s “intent to obtain female companionship” based on his belief that they were prostitutes
did not constitute harassing behavior. Id.

245. See Suzanne Pharr, Homophobia as a Weapon of Sexism, in RACE, CLASS, AND GENDER IN
THE UNITED STATES 171 (7th ed. 2007) (arguing that internalized sexism causes women to
tolerate (if not accept) violence against other women, as “[o]ur society presents images of
women that say it is appropriate to commit violence against us”); DERALD WING SUE,
MICROAGGRESSIONS IN EVERYDAY LIFE 104 (2010) (describing internalized sexism as an
“underlying attempt to please oppressors in order [to] avoid punishments and attain rewards .
. . at the cost of one’s identity or sense of integrity”).


247. Id. at 929.

248. Id.

249. Id.

250. Id.

251. 363 A.2d 803, 805 (Pa. Super. Ct. 1976). Cunnilingus was also considered an “illegal sex
act” at the time of the case, which may have influenced the court’s decision. See id.

252. Id. at 805-06.
INCONSISTENT LEGAL TREATMENT OF UNWANTED SEXUAL ADVANCES

(1) [T] he state runs the risk of criminalizing generally accepted behavior, leaving the actor without reasonable notice that his conduct is criminal; (2) such incidents are too frequent for the justice system to handle them efficiently; (3) courts cannot be expected to arbitrate what are frequently personal disputes by use of the criminal process.\(^{253}\)

Thus, these judges argued that because harassment is omnipresent, it should not be criminally prosecuted. Barring the egregious circumstances that resulted in these limited successes, very few street harassment incidents have been found actionable under general harassment statutes.\(^{254}\)

3. Comparison to the Homosexual Advance Defense

Incidents of street harassment may appear very factually similar to the homosexual advances claimed in provocation cases. For example, \textit{Mills v. Shephard}, the case in which the victim grabbed the defendant’s “privates.”\(^{255}\) It is easy to imagine the same type of harassment occurring on the street and being directed at a woman.\(^{256}\) In light of Bowman’s research, it is unlikely that the act would be found actionable under an assault or general harassment statute, given its lack of repetition. Similarly, it is hard to demonstrate “intent to initiate offensive contact,” where the victim intends to demonstrate his appreciation for the defendant.

Yet, though the comparison is tempting, it is too simplistic to simply change the sexes in these cases and thereby equate the harms that result from these two types of harassment. Despite the legal recognition given to unwanted homosexual advances on men and withheld from street harassment, the forms of harassment that commonly confront women are actually more injurious than are unwanted homosexual advances upon men. As Bowman’s research demonstrates, women face numerous harms as a result of the omnipresence of street harassment, such as a very real fear of rape. Conversely, there is no evidence indicating that men face homosexual advances with any frequency. Furthermore, although men may argue that, as in male-on-female advances, a man fears being raped by the victim when he experiences a homosexual advance, there are several differences that make women’s fear of rape more compelling. Women tend to be physically smaller than men; as a result, they are less likely than men to be able to fend off a physical confrontation with a man. Thus a woman’s fear of rape is also related to her fear that she will be unable to fend off male ad-

\(^{253}\) Duncan, 363 A.2d at 809 n.4.
\(^{254}\) See supra n.242 and accompanying text.
\(^{256}\) See Deborah Thompson, \textit{Woman in the Street: Reclaiming the Public Space from Sexual Harassment}, 6 YALE J.L. & FEMINISM 313, 315 (1994) (noting that street harassment may involve “grabs [and] pinches,” including the pinching of a woman’s breast or the slapping of her buttocks) (citing Karen Avenso, \textit{Capturing Harassment on Camera}, TIMES-PICAYUNE, Sept. 8, 1993, at E1).
of protection as homosexual advances because street harassment occurs, by definition, in public.\textsuperscript{261} The privacy expectations that one has in private settings cannot exist in public areas. In public, one is subject to numerous comments and other annoyances on a daily basis and, given the concentration of individuals in certain public arenas, no one can reasonably expect to be free from the comments of others. In contrast, homosexual advances alleged to provoke killings appear to typically take place in private settings where a higher level of privacy can be expected.

However, the sexual nature of the comments that women regularly face distinguishes street harassment from the more common annoyances that are normal part of venturing into in public spaces. As Anita Allen argues, the fre-

---

\textsuperscript{257} See MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR 46 (1991) ("But from the point of view of the victim, rape is rarely experienced only as an act of political dominance because it involves sexual organs as well as physical violence. It exploits the physical differences between men and women in size and strength.").

\textsuperscript{258} See CENTERS FOR DISEASE CONTROL AND PREVENTION, UNDERSTANDING SEXUAL VIOLENCE 1 (2007), \url{http://www.cdc.gov/ViolencePrevention/pdf/SV-FactSheet-a.pdf} ("In the United States, 1 in 6 women and 1 in 33 men reported experiencing an attempted or completed rape at some time in their lives.").

\textsuperscript{259} Gay men have been targeted and raped as a result of anti-gay animus. See MICHAEL SCARCE, MALE-ON-MALE RAPE 31-34 (2001). There is also evidence of black men being targeted and raped due to racism. \textit{Id.}

\textsuperscript{260} In 2007, 15.9\% of hate crimes were committed due to sexual-orientation bias. U.S. DEP'T OF JUST., VICTIMS, 2007 HATE CRIME STATISTICS, \url{http://www2.fbi.gov/ucr/hc2007/victims.htm} (noting that 1512 of 9535 hate crime victims were known to have been targeted due to sexual-orientation bias). Of those, 58.9\% of victims were targeted due to the "offender's anti-male homosexual bias." \textit{Id.} (emphasis added). Another 24.8\% of victims were targeted due to a non-gender-specific bias against homosexuals.

Note that all of the homosexual advances discussed have taken place in private locations (not in public). Interestingly, the National Coalition of Anti-Violence Programs (NCAVP) reports that, in 2009, the "most common site for hate violence" against queer individuals was a private residence (twenty-nine percent). NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST THE LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER COMMUNITIES IN THE UNITED STATES IN 2009 23 (2010), \url{http://www.avp.org/documents/NCAVP2009HateViolenceReportforWeb.pdf}. The next largest percentage reported that violence took place in the street or in another public area (twenty percent). \textit{Id.} The NCAVP also found that there may be a "correlation between increased visibility and increased vulnerability and targeting of [queer] people." \textit{Id.} at 11. These findings are thus consistent with the fact that men may face a serious threat of violence if they are perceived as queer.

\textsuperscript{261} There are those that argue that there is no rigid public/private dichotomy. See, \textit{e.g.}, HEAVEN CRAWLEY, REFUGEES AND GENDER 18-21 (2001) (arguing that the two exist on a continuum); LAW COMMISSION OF CANADA, NEW PERSPECTIVES ON THE PUBLIC-PRIVATE DIVIDE (2004) (arguing that the two are deeply interconnected).
quency of street harassment creates a cumulative effect on the numerous harms that alone may seem *de minimis*.\(^{262}\) Thus, street harassment “ensur[es] that women will not feel at ease, that they will remember their role as sexual beings available to men and not consider themselves equal citizens participating in public life.”\(^{263}\) Men, on the other hand, are not subject to such sexual comments on a daily basis. In fact, the homosexual advance defense is premised on the notion that unwanted homosexual advances are not common occurrences but anomalies. If unwanted homosexual advances were commonplace occurrences, judges may find that it is less reasonable to respond with violence. Moreover, the public nature of the comments may actually exacerbate the harm the woman experiences because the comments will often be accompanied by public humiliation.\(^{264}\)

The difficulty that women have in receiving adequate legal remedies for street harassment also demonstrates why street harassment faced by women cannot be equated with unwanted same-sex advances on heterosexual men. As argued earlier, the assumption that certain levels of harassment faced by women do not warrant a legal response makes it difficult for women to obtain legal redress for the harassment. That assumption also makes it very unlikely that a woman who killed in response to street harassment would be found to be “adequately provoked” to mitigate a murder charge, especially if she were queer and/or a woman of color. The incident involving the “New Jersey 4” is informative on this point.

On August 16, 2006, seven black lesbians were sexually propositioned by a man on the street.\(^{265}\) He yelled, “Let me get some of that!”\(^{266}\) One of the women offered him her soda can, thinking that the man was in need of cash.\(^{267}\) In response, the man yelled, “I’ll fuck you straight, sweetheart!” As the women continued walking, he yelled anti-lesbian slurs, grabbed his genitals, and made obscene remarks.\(^{268}\) When the women confronted him, he spat at one of the women and threw a lit cigarette at them.\(^{269}\) A physical altercation ensued, during which the man ripped hair off the scalp of one of the women.\(^{270}\) Ultimately, one of the

\(^{262}\) Allen, *supra* note 192.

\(^{263}\) Wang, *supra* note 189, at 165.

\(^{264}\) Cf. Lee, *supra* note 133, at 83-84 (suggesting that, where a homosexual advance takes place in public, the defendant may feel more intensely injured and juries may be more likely to find provocation reasonable).


\(^{270}\) Henry, *supra* note 268. The surveillance tapes that caught the brawl demonstrate that two men also joined in the altercation and one of them stabbed the defendant. See Chaffers, *supra*
women stabbed the man, injuring him. The women faced numerous charges, including gang assault and attempted murder. Though three women were able to obtain plea-bargains and one successfully appealed, the other three now face jail sentences of three and a half to 11 years. Two women were charged with second-degree gang assault, and the third was charged with third-degree assault. They claimed self-defense, but the jury convicted them. At sentencing, the judge found that the women instigated the physical altercation because the harasser had merely been uttering words beforehand. The judge chastised the women at sentencing for not walking away from the situation.

To be clear, the women in this case did not claim provocation. However, even if these women had claimed provocation, it is unclear whether they would have prevailed due to the complications posed by their race, gender, and sexual orientation. Their identities as queer black women clearly played a role in the manner in which they were portrayed by the media. Titles of articles covering this case include, “Attack of the Killer Lesbians” and “Lesbian Wolf Pack Guilty.” Bill O’Reilly of Fox News described the incident as part of a larger phenomenon whereby a “national underground network” of lesbian gangs was “raping young girls,” forcibly indoctrinating children into the lesbian lifestyle, and “terrorizing people.” Moreover, the New York Times referred to the women as a “group of marauding lesbians,” and the New York Daily News de-

note 267. However, the judge believed that the tapes demonstrated that the women instigated the fight and that they needed to be punished. Four Women Sentenced Over Attack on Man, MSNBC, June 15, 2007, http://www.msnbc.msn.com/id/19233888/ns/us_news-crime_and_courts/.

271. Hartocollis, supra note 269.

272. Chaffers, supra note 267; Four Women Sentenced Over Attack on Man, supra note 270.


274. John Eligon, Two Convictions Overturned in Attack on Man in Village, N.Y. TIMES, June 20, 2008, at B2. Her second-degree gang assault conviction was later overturned. Id.

275. Hartocollis, supra note 269.

276. See Hartocollis, supra note 269 (noting that, at sentencing, the judge recited the rhyme, “Sticks and stones will break my bones, but names will never hurt me,” and said that Mr. Buckle may have used “insulting words, stupid words, . . . but that doesn’t justify hurting a human being.”).

277. See Part III.A.i.


scribed them as a “lesbian wolf pack.”\textsuperscript{282} Despite the fact that the man’s unwanted sexual advances triggered the incident, these women were depicted as the perpetrators by the media. The titles of articles covering this case demonstrate the media’s view of queer black women as predatory and dangerous.\textsuperscript{283} The media conversely assumed that the man’s actions were friendly.\textsuperscript{284} The racialized references in the articles reinscribe notions of Black dangerousness and thus support the exculpation of the male perpetrator, particularly in the minds of the public.

The fact that black women were rebuffing the advances of a man further complicates the situation. As in the Sakia Gunn case, the harasser became hostile upon being rebuffed and learning about the sexual orientation of the women.\textsuperscript{285} Moreover, both the general unacceptability of violence by females\textsuperscript{286} and the fact that at least one of the women could be perceived as gender-nonconforming\textsuperscript{287} with respect to her appearance may have contributed to the media’s decision to portray the women as threatening.\textsuperscript{288} Thus, the portrayal of the women as man-hating and dangerous is also based on their gender, gender performance, and sexual orientation. Assuming the jury held biases similar to those portrayed by the media, if the women had in fact claimed provocation, they would likely face

\textsuperscript{282} Martinez, supra note 279.

\textsuperscript{283} The women were also referred to as a “gang” repeatedly by the media. One could argue that this reference relates to the gang assault charge that they faced. However, the media did not cite any evidence of actual gang affiliation to support connecting these women with the specter of violent, organized crime. Especially given the lack of evidence of gang activity, the gang activity charge seems racialized due to its implicit assumption that black women walking in the city as a group must be engaging in criminal behavior. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1373 (1988).

\textsuperscript{284} Interestingly, the man in this case was also black. Given the common demonization of black men as criminals and sexual predators, it is interesting that the media chose to instead demonize the women in this particular case as criminals and predators. See Harris v. Maricopa Cnty. Superior Court, 631 F.3d 963, 977 (9th Cir. 2011) (“Prejudiced individuals have long promulgated a pernicious image of black men as sexual predators; a view that they do not hold with respect to men of other racial backgrounds or with respect to black women.”). The interaction of their race and sexual orientation likely played a role.


\textsuperscript{286} As Marion Underwood argues:

\begin{quote}
[Girls’ bad behavior (be it violence or social aggression) severely violates our stereotypes of girls as nice, compliant, and prosocial. That such behavior undermines our deepest-held assumptions about what it means to be female might tempt us to pathologize all forms of girls’ aggression rather than seek to understand why girls might engage in them.]
\end{quote}

\textsc{Marion K. Underwood, Social Aggression Among Girls} 183 (2003).

\textsuperscript{287} “Gender-nonconforming” individuals dress, speak, act, and generally comport themselves in ways which are not consistent with traditional or societal expectations regarding what is appropriate for someone of their sex. HUMAN RIGHTS WATCH, HATRED IN THE HALFWAYS 55 (2001).

\textsuperscript{288} The pictures of the women indicate that one wears her hair very short and wears baggy clothes. See Martinez, supra note 279. Thus, the harasser may have viewed her as gender-nonconforming. See HUMAN RIGHTS WATCH, supra note 287, at 55.
a number of obstacles in demonstrating that they were adequately provoked.

Even if these women did not face bias based on their identity characteristics, as a doctrinal matter, a jury may be reluctant to find that they were adequately provoked in this situation because of their gender. Recall the dissent’s argument in Commonwealth v. Duncan—that a remedy should not be granted for an omnipresent phenomenon such as sexual harassment. In this vein, a jury may determine that, because street harassment is omnipresent, women should have been socialized to accept it. Thus, a jury may consider a violent response to such a common phenomenon to be unreasonable. Accordingly, the women in this case may have been unable to meet doctrinal requirements notwithstanding the identity-related bias they faced.

The New Jersey 4 case thus provides a clear illustration of the inadequacy of the legal system to provide recourse for women who face street harassment. The assumption that certain levels of harassment faced by women do not warrant a legal response makes it difficult for women to find legal remedies for unwanted sexual advances. Moreover, as the New Jersey 4 case demonstrates, that assumption also impedes a woman’s ability to argue that the advance was severe enough to demonstrate provocation sufficient to mitigate a murder charge.

B. Sexual Harassment Leading to a Hostile Work Environment Under Title VII

While the law provides scant remedies for women who face street harassment, it provides a greater measure of relief to women who experience sexual harassment in the workplace. Under Title VII of the Civil Rights Act of 1964, it is unlawful “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin. . . .” In Meritor Savings Bank v. Vinson, the Supreme Court found that Title VII’s prohibition on discrimination “because of . . . sex” was intended to protect against sexual harassment in the workplace.

However, it is more difficult for women to obtain remedies under Title VII than it is for heterosexual men to obtain relief for similar advances for which a male defendant may invoke the homosexual advance doctrine. Further, it is also more difficult for women to obtain remedies under Title VII itself.

290. Queer men who kill in response to street harassment by heterosexual men may face a similar problem, as anti-gay comments and actions may be seen as a part of normal social discourse. See BERNICE E. LOTT & DIANE MALUSO, THE SOCIAL PSYCHOLOGY OF INTERPERSONAL DISCRIMINATION 104 (“‘Gay-bashing’ may . . . serve a ‘recreational’ function for some adolescent men, and it may be the social acceptability of anti-gay/lesbian attitudes, beliefs, and behaviors rather than personal attitudes that encourages anti-gay/lesbian aggression.”).
291. As discussed earlier, the reasonableness of a victim’s reaction to provocation is the crux of the provocation defense. See supra Part I.A.
1. Harms Resulting from Sexual Harassment in the Workplace

Most of the harms that women experience as a result of street harassment also occur in the context of workplace sexual harassment. The harassed individual is “the subject of involuntary sexualization that serves to disempower and subordinate her.” However, women who face sexual harassment in the workplace may face additional harms not experienced by victims of street harassment. In addition, targets of sexual harassment in the workplace may experience loss of income. Sexual harassment targets often resign or face termination or reassignment due to the harassment. In fact, the Merit Systems Protection Board found that, in 1995, sexual harassment in the workplace resulted in the loss of 973,000 hours and $4.4 million in wages due to leave taken without pay. Additionally, women are within close quarters of their harassers on a daily basis and may have to work with them or report to them regularly, so workplace harassment is even more likely than street harassment to be repetitive.

As with street harassment, women experience the harms of workplace sexual harassment differently than do men. As Russell Robinson argues, men and women typically have different experiences with respect to the threat of sexual violence. Women are more likely to fear rape and sexual assault on a daily basis, and this fear may be coupled with the fear of losing one’s job if one attempts to report the harassment to others. Moreover, sexual harassment can reduce women’s self-confidence and sense of self-worth. “[I]nvolutionary sexualization of a woman is uniquely imbued with the message that, at the end of the day, however smart and competent a woman may be, she is still ‘just a girl.’” Such a connotation may thus affect a woman’s job performance, and as a consequence, sexual harassment can serve as a direct barrier to advancement.

---

296. Id. at 770.
298. See Johnson, supra note 295, at 766 (explaining that respondents to a survey about targets of sexual harassment in the workplace noted the anxiety and stress associated with having to encounter their harassers on a regular basis in the workplace).
300. Id. (citing Irina Anderson, What Is a Typical Rape? Effects of Victim Participant Gender in Female and Male Rape Perception, 46 BRIT. J. SOC. PSYCHOL. 225, 228 (2007)).
301. See id. at 1147 (noting that women fearing retaliation may not report harassment in the workplace).
302. Render, supra note 294, at 135.
303. See HEIDI GOTTFRIED & LAURA ANN REESE, EQUITY IN THE WORKPLACE 137 (2004) ("Sexual harassment remains a career stopper. If women file a complaint, they are labeled a trouble maker and doomed. If they fail to complain, they continue to be intimidated and reminded of their second-class status. A woman’s response to sexual harassment will often
2. Ineffective Remedies

Under Meritor, a colleague’s harassment is actionable if it leads to a hostile or abusive work environment.\(^{304}\) Even if a tangible term of employment is not affected, the harassment remains actionable if it is “sufficiently severe or pervasive.”\(^{305}\) To demonstrate that harassment meets this standard, a plaintiff must demonstrate (1) that the plaintiff experienced verbal, visual, or physical propositions, advances, insults, or invasions of person, (2) that the plaintiff experienced the harasser’s misconduct as subjectively unwelcome, and (3) that the nature and magnitude of harassment was sufficient to create an objectively intimidating, hostile, offensive, or abusive work environment.\(^{306}\)

Though the cause of action applies to all such harassment, the targets of sexual harassment in the workplace tend to be women rather than men.\(^{307}\) In addition, women of color are particularly vulnerable to sexual harassment because they are stereotyped as sexually available, and in the case of black and Latina women, the most economically vulnerable.\(^{308}\)

Some courts have attempted to account for the differences that women and racial minorities experience regarding harassment in the workplace. The Ninth Circuit, for instance, has begun to assess hostile work environment claims using a “reasonable woman” standard, whereby a woman’s subjective experience of the conduct in question may be considered in light of the history and prevalence of violence against women.\(^{309}\) The Ninth Circuit has also found that “allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.”\(^{310}\) Thus, women of color who differentially experience sexual harassment may have their harm her career more than she will imagine.”\(^{311}\)

306. There are also two additional requirements. First, the defendant must have a relationship with the plaintiff that would render the employer liable under agency law. Second, there is a requirement that the propositions or insults were “because of sex,” as distinct from the plaintiff’s sexual orientation, which is not protected under Title VII. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998). This latter requirement has generated much scholarship. See, e.g., Brian Lehman, The Equal Protection Problem in Sexual Harassment Doctrine, 10 COLUM. J. GENDER & L. 125 (2000).
308. MacKinnon, supra note 161, at 53. See generally Hernández, supra note 197.
309. See Ellison v. Brady, 924 F.2d 872, 879 & n.10 (9th Cir. 1991). Creating a “reasonable woman” standard is not necessarily the solution to the problem however. The formulation of a “reasonable woman” standard itself leads to myriad questions: How does a reasonable woman differ from a reasonable man? To what circumstances might she react differently? How might she react to these circumstances differently? Most importantly, who makes these determinations? See generally MAES HAJIDIN, THE LAW OF SEXUAL HARASSMENT 85-101 (2002) (critiquing the “reasonable woman” standard).
310. McGinest v. GTE Service Corp., 360 F.3d 1103 (9th Cir. 2004).
subjective experience considered within the Ninth Circuit.\textsuperscript{311}

Even without the application of the “reasonable woman” standard, courts have found that unwanted sexual advances on women may constitute a hostile work environment. For example, in \textit{Gentry v. Export Packaging Company}, a female employee was subject to 40 hugs, 15 shoulder rubs, the petting of her cheek, and a kiss on the cheek by her male supervisor, with whom she shared an office.\textsuperscript{312} The supervisor also suggested that the employee’s clothes would look good on the floor, asked her to spend the night with him, and asked her to “try out the back counter.”\textsuperscript{313} He once gave her a calendar with pictures of people in various sexual positions and asked her to pick out her favorite days. The harasser’s own supervisor even referred to the target as a “‘sex’retary.”\textsuperscript{314} In \textit{Johnson v. Booker T. Washington Broadcasting Services},\textsuperscript{315} the female employee experienced 15 separate incidents of harassment over the course of four months by her supervisor. These incidents included “giving [her] unwanted massages, standing so close to [her] that his body parts touched her from behind, and pulling his pants tight to reveal the imprint of his private parts.” Both courts found that the acts at issue were “severe or pervasive.”\textsuperscript{317}

However, cases demonstrate that women who have been severely and/or repeatedly harassed have had great difficulty in obtaining relief under Title VII. Women often have difficulty demonstrating that the nature and magnitude of harassment was sufficient to create an objectively intimidating, hostile, offensive, or abusive work environment. Courts have found that there is a certain level of sexual suggestiveness that is reasonable in a workplace.\textsuperscript{318} In \textit{Oncale}, the Court

\begin{itemize}
  \item \textit{Gentry}, 238 F.3d at 842 (7th Cir. 2001).
  \item \textit{Id.} at 845.
  \item \textit{Id.} at 845.
  \item \textit{Id.} at 845.
  \item \textit{Id.} at 845.
  \item \textit{Id.} at 509.
  \item \textit{Gentry}, 238 F.3d at 851; \textit{Johnson}, 234 F.3d at 509.
  \item See \textit{Meriwether v. Carauster Packaging Co.}, 326 F.3d 990, 992-93 (8th Cir. 2003) (finding that a plaintiff did not demonstrate “severe or pervasive” harassment where her co-worker grabbed her buttock “with force, not merely a pinch, but a hold near her upper thigh”); \textit{Baskerville v. Culligan Intern. Co.}, 50 F.3d 428, 430-31 (7th Cir. 1995) (noting that sexual assault, unwanted physical contact and pornographic pictures are inappropriate in the workplace, but that “occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers” is permissible).
\end{itemize}
justifies this requirement by stating that it “ensure[s] that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory conditions of employment.”

Where a court finds “a ‘normal’ level of workplace obscenity, isolated sexual suggestiveness or propositions, and even some single instances of unwelcome touching,” it may determine that the harassment is insufficiently severe to warrant legal response and thus constitutes horseplay or intersexual flirtation.

For example, in Meriwether v. Carauster Packaging Company, a male colleague grabbed a woman’s buttock in a manner that the woman described as “not merely a pinch, but a hold near her upper thigh.” The next day, the man and another co-worker blocked her passage and joked about the incident with the woman. The woman responded by requesting a shift change and was absent for five work days. The Court granted the employer’s motion for summary judgment, finding there was no hostile work environment since (1) the employer promptly responded by temporarily suspending the man and warning him that he would be fired if he acted again; and (2) the incidents did not rise to the level of severe or pervasive harassment.

Other courts have also determined that some unwanted sexual advances on women are insufficiently severe, implying that such activity is merely “intersexual flirtation.” One court granted an employer’s motion for summary judgment in a case involving a single incident of forcible fondling. Another court similarly granted an employer’s motion for summary judgment in a case where the female target experienced five episodes of inappropriate behavior, including sexual comments, and was both followed and stared at over an 11-month period.

In the latter case, the court refused to recognize staring at and following the target as harassing behavior and individually examined and dismissed the ep-

319. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (quotation omitted). The reference to male-on-male horseplay and intersexual flirtation is significant for two reasons. First, the Court is implying that acts that fall into these categories are outside the bounds of Title VII protection. Second, this reference specifically ignores the harassment of women by women. Male-on-male horseplay would be a factor where a male harasses another male. Intersexual flirtation would be implicated where a man harasses a woman or a woman harasses a man. However, neither account for a woman who harasses another woman. Yet, given the lack of case law and scholarship on the harassment of women by women, it is most likely that this omission was unintentional and reflects the invisibility of queer women under the law. Indeed, when the court discusses a scenario in which a female supervisor may harass a female employee, the scenario was used to demonstrate harassment that may occur due to “general hostility” towards those of the same sex. Id. at 80.
320. LEWIS & NORMAN, supra note 305, at 104.
321. 326 F.3d 990, 992 (8th Cir. 2003).
322. Id.
323. Id.
324. Id.
326. Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000).
isodes in which harassing comments were made. Thus, the court did not attempt to examine the cumulative effect of the acts on the target; instead, it noted that the incidents were not “physically threatening or humiliating” enough, nor frequent enough, to survive summary judgment.

Men may also be the targets of sexual harassment in the workplace, and their harassers are often also men. However, case law demonstrates that male targets of workplace sexual harassment prevail on claims of unwanted sexual advances that are similar to those unsuccessfully alleged by women. Moreover, heterosexual male targets are more likely to prevail on these claims than men perceived as queer. Thus, even within Title VII jurisprudence, heterosexual men who face unwanted sexual harassment appear to receive more protection than women and queer men who face similar advances.

In Oncale v. Sundowner Offshore Services, the male target was subjected to verbal harassment by three colleagues. One of them threatened to rape him. The men assaulted the target and attacked him in the shower. The target ultimately quit, as he feared he would be raped. In this case, the Supreme Court recognized same-sex harassment for the first time.

However, some men appear to be able to survive summary judgments motions with a lesser showing of harassment than is required of women. For example, in Quick v. Donaldson Company, the Court found that sexual comments accompanied by intentional grabbing and squeezing of a man’s testicles was sufficient evidence of sexual harassment to avoid summary judgment. In Gerd v. United Parcel Serv., Inc., a court allowed a claim to withstand summary judgment where the harasser “rubbed[ed] his . . . hands up and down his thighs with his pelvis thrust forward in a fornicating gesture.” In these cases, courses of action involving only one or two incidents were sufficient for the purposes of summary judgment.

In contrast, women who face a single incident of sexual harassment find it difficult to meet the “severe or pervasive” requirement. For example, in

328. See id. at 1248-52. (emphasizing that words were not spoken by the defendant during some of the episodes). See also id. at 1270-71 (Barkett, J., concurring in part and dissenting in part).
329. Id. at 1248.
330. Before 1998, many male-on-male cases were dismissed purely because the court found that same-sex sexual harassment claims were not actionable under Title VII. See, e.g., Martin v. Norfolk S. Ry. Co., 926 F. Supp. 1044, 1047 (N.D. Ala. 1996). Same-sex sexual harassment in the workplace has only been actionable under the law nationwide since the Supreme Court’s 1998 decision in Oncale.
332. Id.
335. 90 F.3d 1372, 1379 (8th Cir. 1996).
337. See, e.g., Whittaker v. N. Ill. Univ., 424 F.3d 460 (7th Cir. 2005); Saxton v. Am. Tel., 10 F.3d 526 (7th Cir. 1993). Cf. Alfano v. Costello, 294 F.3d 365 (2d Cir. 2002) (five incidents
Brooks v. City of San Mateo, the Title VII case described in the Introduction, the court was unwilling to find sexual harassment constituting a hostile work environment where there was a “single, rather unsavory, episode of workplace sexual harassment” against a female employee. In this case, a male employee placed his hand on a woman’s stomach, commenting on its softness and sexiness. She pushed him away, and he “forced his hand underneath her sweater and bra to fondle her bare breast.” After she once again removed his hand and told him that he had “crossed the line,” he approached her to fondle her breast again but did not complete the act as another employee entered the room. As a result of the experience, the female employee sought psychological help. The court did not reach the merits of the case. However, it did strongly suggest that the “highly offensive” incident did not meet Title VII requirements for severity:

If a single incident can ever suffice to support a hostile work environment claim, the incident must be extremely severe. . . . [The target] was harassed on a single occasion for a matter of minutes in a way that did not impair her ability to do her job in the long-term, especially given that the city took prompt steps to remove [the harasser] from the workplace. . . . The harassment here was an entirely isolated incident. It had no precursors, and it was never repeated.

The Brooks court further concluded that, for one incident of harassment to be considered “severe,” it may need to be violent in nature. It distinguished the case from Al-Dabbagh v. Greenpeace, in which a male employee “slapped [a female employee], tore off her shirt, beat her, hit her on the head with a radio, choked her with a phone cord,” and raped her. The aggressor in that case also held her captive overnight and when she managed to escape, she had to be hospitalized. The Brooks court argued that the female employee “did not allege that she sought or required hospitalization; indeed, she did not suffer any physical injuries at all. The brief encounter . . . was highly offensive, but nothing like the ordeal suffered by the unfortunate young woman in Al-Dabbagh, who was held captive from evening until early the next morning.”

In distinguishing the Al-Dabbagh case, the court argued that the Brooks incident was not sufficiently severe. However, neither the Quick nor the Gerd cases involved the hospitalization or injury of the targeted employee, and yet, these cases survived summary judgment. Moreover, the level of harassment faced by

---

338. 229 F.3d 917, 921 (9th Cir. 2000).
339. Id.
340. Id.
341. Id. at 924.
342. Id. at 926-27.
344. Id.
345. Brooks, 229 F.3d at 926.
the target in Al-Dabbagh is an inappropriate standard for women to meet in order to state a claim for sexual harassment in the workplace because criminal remedies and other civil remedies are available to redress that level of violence. By requiring women to state a claim for harassment that also gives rise to other legal remedies, the court gives no meaning to Title VII as a vehicle for remedy separate and apart from traditional civil and criminal remedies.

The Brooks court also attempted to distinguish its case from other authority by reasoning that the situation therein might have constituted hostile work environment sexual harassment if the harasser had been a superior rather than colleague. However, in Della Valle Fontanez v. Aponte, a different court suggested that one incident of harassment by a supervisor would not rise to the level of “severe or pervasive” harassment. In this case, a male supervisor called the female employee to his office, closed the door behind her, forced himself on her twice such that “she felt the defendant’s erect sexual organ against her body.” The advance lasted for five minutes. The facts of the case are similar to those of Gerd in that the harasser forced his body against the plaintiff’s body. However, whereas the court in Gerd did not question the severe or pervasive nature of the harassment, the court in Della Valle Fontanez strongly questioned its existence. Thus, the same incident of harassment that a court considered to be sufficient harassment as against a male target was insufficient to demonstrate actionable harassment where the target was female.

However, if a male target is queer or perceived to be queer, he may have a more difficult time demonstrating a sufficiently severe hostile work environment than a heterosexual male target. The barriers that these men face further demonstrate that the manner in which the law grants redress for unwanted sexual ad-

346. One court found that a female plaintiff had adequately demonstrated a hostile work environment based on an isolated incident where, during an overnight business trip, her supervisor “appeared barely clothed at [her hotel room] door, he sat on her bed, he touched her thigh, and attempted to kiss her.” Moring v. Ark. Dep’t of Corr., 243 F.3d 452, 456 (8th Cir. 2001). However, it is notable that the supervisor also “told [the plaintiff] that she ‘owed’ him,” which the plaintiff “understood to mean she owed him a sexual favor for getting her [current] position.” that he was “responsible for her having the position” and that “no one would believe anything she reported.” Id. at 454. Because he arguably threatened her with adverse employment action, the plaintiff may have been able to demonstrate quid pro quo sexual harassment. See Webster v. Bass Enters. Prod. Co., 192 F. Supp. 2d 684, 692 (N.D. Texas 2002) (“Cases based on threats of adverse employment action or promises of favorable employment action are quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.”) (quotation omitted). However, the Eighth Circuit’s opinion in Moring does not indicate whether the plaintiff tried to claim quid pro quo sexual harassment. See Moring, 243 F.3d 452 (8th Cir. 2001).

347. Brooks, 229 F.3d at 927 n.9.

348. 660 F. Supp. 145, 149 (D.P.R. 1987). The court did not reach the merits of the case, but still explicitly stated that it would not find the conduct in question to be harassment even if it were to reach the merits. Id.

349. Id. at 147.

350. Id.

vances varies based on the target’s gender and sexuality. Title VII does not protect individuals from discrimination based on sexual orientation. The Supreme Court affirmed this notion in *Oncale*, determining that Title VII focuses on the sex (rather than the sexual orientation) of the individual who has been harassed. As such those who have been harassed due to their perceived sexual orientation have great difficulty meeting the doctrinal requirements for relief.

The difficulty that women have in obtaining redress for workplace harassment suggests that their male harassers receive impunity for their actions under the law. However, men who are perceived as queer do not share this relative level of impunity for their actions. If a male harasser is perceived to be queer, this identity, whether self-defined or imposed, may be used as a matter of doctrine to demonstrate the harasser’s blameworthiness. *Oncale* provides three evidentiary routes for demonstrating that same-sex harassment is discrimination “because of sex” actionable under Title VII. One evidentiary route permits the introduction of evidence demonstrating the harasser’s sexual desire. A target

---

352. See 42 U.S.C. § 2000e-2(a)(1) (2006); see also Vickers v. Fairfield Med. Ctr, 453 F.3d 757, 763 (6th Cir. 2006) (finding that Title VII does not apply to discrimination based on sexual orientation); Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005) (same); Hamn v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1062-65 (7th Cir. 2003) (same); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259-61 (1st Cir. 1999) (same). But see Rene v. MGM Grand Hotel, 305 F.3d 1061, 1063, 1068 (9th Cir. 2002) (finding that “an employee’s sexual orientation is irrelevant for the purposes of Title VII” and that conduct may be considered “severe or pervasive” regardless of the real or perceived sexual orientation of the victim or harasser).

353. *Oncale* v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998). The Supreme Court determined that discrimination “because of . . . sex” was distinct from discrimination based on sexual orientation, reasoning that same-sex harassment need not be motivated by sexual desire, explaining that a female may harass another woman using “such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.” *id*

354. This issue is beyond the scope of this paper. However, a large amount of scholarship has been devoted to this topic. For a discussion of the difficulty in claiming discrimination based on sexual orientation in the context of Title VII, see Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual “Horseplay:” Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE J.L. & FEMINISM 155 (1999); Mary Coombs, *Title VII and Homosexual Harassment After Oncale: Was it a Victory?* 6 DUKE J. OF GENDER, L. & POLICY 113 (1999); Diefenbach, supra note 334; Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1 (2004).

355. Of course, while a man may not be legally recognized as a harasser, a company may respond to a woman’s sexual harassment claims internally and reprimand the male harasser for his actions. However, the actions of employers in response to harassment claims is beyond the scope of this piece.


who can provide “credible evidence that the harasser was homosexual” can state a legally cognizable claim for same-sex harassment under Title VII.  

The court in La Day v. Catalyst Technology, Incorporated found that this evidentiary route was satisfied by evidence of the harassment itself. In this case, a male supervisor told his male employee, “I see you got a girl. You know I’m jealous.” Later, the supervisor approached the employee from behind and fondled his anus. The court believed that these actions alone were “credible evidence” of the supervisor’s jealousy and anger regarding the employee’s heterosexuality, and the sexual harassment claim was therefore able to withstand summary judgment. La Day suggests that, while it is difficult for a queer target to successfully claim harassment, it is easier to make a successful harassment claim against a queer harasser.

Even without La Day, one may argue that the evidentiary route of demonstrating the harasser’s sexual desire makes the harassment of heterosexual men by queer men more cognizable than all other forms of harassment. Consider four basic harassment scenarios: male-on-male, male-on-female, female-on-male, and female-on-female. In cases involving male-on-female harassment and female-on-male harassment, heterosexuality is presumed. As such, demonstrating sexual desire in these cases would be fruitless as heterosexuality is the assumed status quo. Thus a demonstration of heterosexual desire would not lower the burden placed on women to make legally cognizable sexual harassment claims.

If a male employee produces evidence of the heterosexuality of his harassing male supervisor, this would lead to a presumption that “horseplay” is taking place, an action outside the bounds of Title VII. However, if a male employee demonstrates that his supervisor is queer, this suggests sexual desire. Thus this

---

358. Oncale, 523 U.S. at 80.
359. 302 F.3d 474, 480-81 (5th Cir. 2002).
360. Id. at 476.
361. Id.
362. Id. 480-81. The court acknowledged the fact that the supervisor’s actions could have come from a heterosexual individual. However, it found that the supervisor’s statement regarding his jealousy and the act itself were “credible evidence” of the supervisor’s homosexuality, and thus, the target was able to withstand the summary judgment motion. Id.
363. See Devon Carbado, Straight Out of the Closet, 15 BERKELEY WOMEN'S L.J. 76, 95 (2000) (“The normalization of heterosexuality is only achieved through the ‘abnormalization’ of homosexuality. Yet, rarely do heterosexuals critically examine their identities as heterosexual, their sexual identity privilege.”); Kramer, supra note 351, at 4-5 (“[W]e tend not to think about heterosexuals as having a sexual orientation. Instead, heterosexuality is merely the normative baseline against which non-normative sexual orientations are tested. . . . [C]ourts rarely even acknowledge the existence of heterosexuals, let alone its legal implications. In the realm of employment discrimination law in particular, courts hardly even consider the ways in which employees’ discrimination claims implicate their heterosexuality.”).

It is important to note that not all male-on-female harassment or female-on-male harassment takes place within a heterosexual construct. Conceivably, there may be cases where gay men harass lesbian women and vice versa. I emphasize in this piece the way that women, regardless of sexual orientation, have difficulty claiming workplace sexual harassment in comparison to heterosexual men.
evidentiary route is only significant in the context of male-on-male harassment where there is evidence that the harasser is queer. Consistent with La Day, the evidentiary route suggests that when a man harasses another man and the target can provide evidence that his harasser is queer, the court may be more likely to allow the target to prevail on summary judgment.

It is unclear how these dynamics affect claims involving female-on-female harassment. There is indeed evidence of female-on-female harassment. In Williams v. District of Columbia, a pre-Oncale case, a female supervisor made comments about the size of a female employee’s breasts and the color of her bras and asked her to go away with her more than once. The supervisor repeatedly touched the employee’s breasts and rubbed her own breasts against the employee’s back. She also slammed the employee into a wall twice, causing her back injuries. The court denied the employer’s motion to dismiss, finding that the supervisor’s conduct was prohibited by Title VII.

Despite the holding in Williams, it is unclear how courts would treat a single instance of female-on-female harassment, particularly after Oncale. On one hand, if the target could provide evidence that her harasser was queer and motivated by sexual desire, she may be able to prevail. As the La Day case demonstrates, one’s sexual orientation may play a factor in the court’s perception of the severity of the harassment. On the other hand, female employees may generally face a higher burden challenging employers’ summary judgment motions. As the cases above demonstrate, male employees are able to withstand summary judgment after demonstrating one harassing incident and one comment, whereas women have a more difficult time in doing so.

As this section demonstrates, while Title VII was intended to provide women redress for workplace sexual harassment, women are unable to obtain a remedy for harassment they face, while heterosexual men are able to for the same types of harassment. While women’s inability to obtain a remedy for harassment suggests that many male harassers receive impunity for their actions, if the male harasser is perceived to be queer, the Supreme Court has determined

---

364. See, e.g., King v. M.R. Brown, Inc., 911 F. Supp. 161, 164-65, 168 (E.D. Pa. 1995) (finding that same-sex sexual harassment was actionable under Title VII without discussing the merits of the case), The harassing supervisor in this case was a lesbian, but her sexual orientation did not play a direct role in the court’s analysis. Id.
366. Id. at 3.
367. Id. There was no inquiry into the sexual orientation of the supervisor in this case.
368. Id. at 10.
369. Carolyn Grose suggests that this outcome would have occurred even before Oncale. See Carolyn Grose, Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII, 7 Yale J.L. & Feminism 375, 396 (1995). Little legal scholarship has been dedicated to the discussion of queer women as distinct from queer men. Analysis of violence against those perceived as queer tends to proceed on the notion that those affected are white men. See generally DIANE HELENE MILLER, FREEDOM TO DIFFER: THE SHAPING OF THE GAY AND LESBIAN STRUGGLE FOR CIVIL RIGHTS 1-38 (1998). Moreover, women have been marginalized within the larger LGBT movement itself. URVASHI VAID, VIRTUAL INEQUALITY: THE MAINSTREAMING OF GAY & LESBIAN LIBERATION 274-306 (1996).
that his queer identity provides an evidentiary route for a male target to obtain redress for any harassment that he might experience. However, if the male target is queer, he will have difficulty demonstrating harassment even in this case because Title VII provides him with no protection against discrimination based on sexual orientation. Thus, courts’ decisions regarding sexual harassment in the workplace in and of themselves demonstrate the benefits the law provides to heterosexual men to the detriment of women and queer men.

3. Comparison to the Homosexual Advance Defense

There are at least two differences between sexual harassment in the workplace and the homosexual advance defense that one could argue justify the greater cognizability of harm in homosexual advance cases. First, the two types of cases are seemingly unrelated. The homosexual advance defense relates to a criminal defendant’s plea to mitigate his own level of punishment whereas a workplace sexual harassment claim involves a civil plaintiff’s claim that would result in vicarious liability for her employer. Second, a sufficient demonstration of workplace sexual harassment places full culpability with the harasser, whereas a successful invocation of the homosexual advance defense only yields a partial excuse for conduct. The harasser (ultimately, the victim) is not held fully responsible for the unwanted homosexual advance. Rather, demonstrating harassment simply mitigates a murder charge to manslaughter, and the defendant is still charged with homicide. Since demonstrating harassment has a smaller effect in this latter instance, one could argue that the required burden of proof should be correspondingly lower.

Yet, these arguments ignore the disparate treatment of an unwanted sexual advance within the larger context of the cases in which these claims are made. In claims regarding sexual harassment, female employees have been harassed. They are attempting to meet summary judgment and motion to dismiss standards with a showing of one harassing incident. Thus, women are only requesting the opportunity to proceed with their claims and to have their claims considered by the court. In provocation claims, men have affirmatively broken the law and killed other men. They are trying to mitigate the punishment they receive by arguing that they are not entirely at fault for the victim’s death. Thus, the law does not permit women to receive legal recognition for experiencing the same advance that allows men to receive lesser punishment for a crime they committed. As demonstrated in Part I, courts routinely allow men to obtain voluntary manslaughter jury instruction for killings in response to one unwanted advance.

Moreover, the problem with allowing provocation as a partial excuse is that provocation is not an empirical claim, but rather, a normative claim. As Victoria Nourse argues:

370. Nourse, supra note 148, at 1382.
In assessing emotion, courts have consulted neither quickened heart-beats nor shallow breathing, trembling lips nor weakened limbs. They have looked to cultural ideas of "rational emotion."\(^{371}\)

Thus, even if the homosexual advance defense is a partial excuse, it still functions as a normative claim that it is reasonable to kill in response to a homosexual advance. Permitting jury instruction for voluntary manslaughter for one incident of harassment provides the same normative message, and speaks volumes about our jurisprudence's commitment to defending heterosexual masculinity. A more appropriate normative message, however, would be sent by setting a lower standard for defeating a summary judgment motion than obtaining jury instructions for a lesser charge in a case involving a violent killing.

Similarly, the nature of the liability that attaches in the homosexual advance defense cases in contrast to workplace harassment cases does not explain why unwanted advances on women are not given any level of legal cognizability. Some courts have stated that the "severe or pervasive" requirement for a hostile work environment exists in order to provide employers with notice so that they can discipline harassers themselves without the court's intervention.\(^{372}\) Thus, a single incident is insufficient for the purposes of stating a legally cognizable claim because it interferes with the employer's ability to provide its own redress in matters of which it may not previously have had any notice. A repeated pattern of behavior, on the other hand, demonstrates that the employer has not sufficiently addressed the situation despite constructive, if not actual, notice and that court intervention may be appropriate.\(^{373}\) An employer can escape liability for an employee's harassment of another employee by exercising "reasonable care" to prevent and correct the behavior and demonstrating that the target unreasonably failed to take advantage of the employer's procedures for addressing sexual harassment.\(^{374}\) As the street harassment cases demonstrate, Title VII provides the most direct vehicle for female targets to have their harassment claims legally recognized. While the notice requirement may protect the employer as a policy matter, it also creates a significant prerequisite that a female target must fulfill before she may even attempt to prove to the court that her harassment was severe and pervasive.

Most importantly, on a more fundamental level, the doctrinal differences between workplace sexual harassment and the homosexual advance defense do not provide an adequate reason for the disparate treatment of advances on heterosexual men within Title VII jurisprudence itself. While courts affirmatively inquire into the severity of advances faced by women, they seem less likely to do

\(^{371}\) Id. (quotation omitted).
\(^{372}\) See Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000).
\(^{373}\) See id.
so where a man is facing the unwanted advance. As a result, courts seem to be more likely to allow men to proceed with their claims or defenses against those who made the advances.\textsuperscript{375}

Courts have found that one instance of harassment is sufficient to state a Title VII claim, but it seems that one must be a heterosexual man to benefit from this interpretation. Recall \textit{Brooks v. City of San Mateo}, the case illustrated at the beginning of this piece, where the male employee fondled a female employee’s breast. In that case, the court conducted an inquiry into the severity of the advance and determined that the advance was not sufficiently severe to constitute a hostile work environment. Thus, courts seem to indicate that, where only one instance of harassment has occurred, they are more likely to inquire into the nature of the harassment. One instance of harassment is not insufficiently severe \textit{per se}, as the court in \textit{Al-Dabbagh} found that a very violent incident involving the rape and resulting hospitalization of an employee could proceed beyond summary judgment. However, the court in \textit{Brooks} suggested that one instance of harassment must be nearly as severe as that which occurred in \textit{Al-Dabbagh} in order for a female employee to proceed with her claim.

However, where men face one single harassing incident, courts are more likely to find the incident to be presumptively severe and allow male employees to withstand their employers’ summary judgment motions. This phenomenon can be found both in the context of workplace harassment and the homosexual advance defense. In \textit{Gerd}, where a male supervisor thrust his pelvis at a male employee and rubbed his thighs, the court did not engage in a discussion of the “severity” of this single act and allowed the defendant to proceed on his sexual harassment claim. In doing so, the court implicitly indicated that this single act was sufficient to constitute a hostile work environment for the purposes of Title VII. Similarly, \textit{Mills v. Shepherd} demonstrates that courts are willing to find a similar advance—the grabbing of another’s genitals—as sufficient to mitigate a murder charge. The \textit{Mills} court was seemingly unwilling to take up the question of whether or not a reasonable person would be provoked by the advance in question. Instead, by allowing instruction for voluntary manslaughter, the court indicated that a reasonable jury could find such a response to be reasonable.

Moreover, laws regulating sexual harassment in the workplace, examined in conjunction with the homosexual advance defense, demonstrate that queer men do not receive the same protection as heterosexual men as targets of harassment. In the context of Title VII sexual harassment doctrine, queer men and men who are perceived as queer are more likely than heterosexual men to be victimized as harassment targets.\textsuperscript{376} Furthermore, due to the confusion regarding the

\textsuperscript{375} This pattern also suggests that courts may assess the “reasonable care” that employers have employed in addressing harassment and a target’s efforts to rectify the matter based on the gender of the plaintiff.

\textsuperscript{376} \textit{Cf.} Margaret S. Stockdale et al., \textit{The sexual harassment of men: Evidence for a broader theory of sexual harassment and sex discrimination}, 5 \textit{PSYCHOL., PUB. POL. & L.} 636 (1999) (noting that “a prevailing reason why a male target is harassed (especially by other
evidentiary routes set out for same-sex sexual harassment in *Oncale*, men who are perceived as queer and who are victimized continue to have difficulty articulating a cognizable Title VII claim.\(^{377}\) Thus, their claims are often not addressed on their merits. When the merits are considered, the incident may be dismissed as “male-on-male horseplay.”\(^{378}\)

Queer men and men perceived as queer similarly may face challenges raising the homosexual advance defense in response to unwanted same-sex advances. On one hand, in *Schick v. State*, the court found that a man who engaged in arguably voluntary sexual activity could obtain jury instruction for voluntary manslaughter.\(^{379}\) However, if the defendant’s sexual orientation is in question, judges and juries may be less likely to find that there was provocation to kill. Thus, men may make an effort to affirmatively assert their heterosexuality when raising this defense.\(^{380}\)

Indeed, even advances by queer men are subject to more scrutiny than advances by heterosexual men. As harassers, queer men and men perceived as queer are more likely to be held responsible under Title VII due to the evidentiary route in *Oncale* allowing for the introduction of sexual desire by the harasser. Similarly, in the context of the homosexual advance defense, the defense specifically applies to advances by queer individuals. Since women have not claimed the defense in response to unwanted sexual advances, queer men are its only targets of record. Moreover, in several cases, defendants claiming the homosexual advance defense have affirmatively made efforts to introduce evidence of the victim’s homosexuality.\(^{381}\)

Thus, on a more fundamental level, the doctrinal differences between workplace sexual harassment and the homosexual advance defense do not provide an adequate reason for the disparate treatment of advances on heterosexual men. Courts have found that one instance of harassment is sufficient to state a Title VII claim, but it seems that one must be a heterosexual man to benefit from this interpretation. Advances on women and queer men are treated differently even within Title VII jurisprudence and advances by queer men are more likely to receive a legal response than advances by heterosexual men.

---

380. See, e.g., People v. Strieter, 250 N.W.2d 562 (Mich. Ct. App. 1976) (allowing the admission of evidence of the defendant’s discharge from the military for homosexual activity for the purpose of impeaching the defendant’s testimony that he was not homosexual).
381. Courts have been varied in their response to defendants’ attempts to introduce “evidence” of the victim’s homosexuality. See Mison, *supra* note 34, at 168.
IV. INCONSISTENCIES IN THE TREATMENT OF SEXUAL ADVANCES ON HETEROSEXUAL MEN IN COMPARISON TO WOMEN AND MEN PERCEIVED AS QUEER UNDER CRIMINAL AND ANTI-DISCRIMINATION LAW

An examination of cases involving the homosexual advance defense, street harassment, and sexual harassment in the workplace demonstrates that there are inconsistencies in the treatment of sexual advances. Specifically, heterosexual male targets who experience unwanted advances face fewer procedural and doctrinal barriers to making claims than women and queer men. In this section, I examine the procedural and doctrinal inconsistencies demonstrated in the legal treatment of these three areas. I then look at the normative messages that result from these inconsistencies.

A. Procedural and Doctrinal Inconsistencies

The analysis of workplace sexual harassment and street harassment law provides several insights when considered together with the literature on the homosexual advance defense. In sum, the law is inconsistent in its determination of appropriate procedural responses to harassment, and these inconsistencies favor the claims of men over women. The same advance that may rationally lead to a killing is insufficient to demonstrate a hostile work environment.

Women who face harassment have a very difficult time demonstrating that they have cognizable claims. Barring widespread enactment of street harassment statutes, women’s claims of harassment in public will continue to be plagued by the procedural barriers that come with a lack of a direct legal cause of action. Yet, even in the Title VII context, where such a cause of action exists, women who face sexual harassment in the workplace must deal with a number of procedural barriers before their cases are even heard. These women must use the employer’s complaint and grievance process. If a woman does not properly use the employer’s complaint and grievance processes, she may not recover damages at all. Moreover, a harasser may escape liability if the woman is found not to have sufficiently avoided or mitigated the harm of her harassment. Finally, because Title VII is a remedial employment statute, it provides no redress for a harassment target unless she can sufficiently demonstrate that the harassment she faced resulted from the negligence of her employer, as an entity, in responding to the harassment. Thus, in addition to proving that the conduct she faced rose to the level of actionable harassment, the target must also prove that her employer was vicariously liable in its failure to promptly respond to the harassing behavior. If there is no “tangible detriment” to the target of harassment—typically

382. See Faragher v. City of Boca Raton, 524 U.S. 775, 804 (1998) (finding that a target must utilize the procedures created by the employer’s sexual harassment policy before stating a cognizable Title VII claim).
383. Id.
384. Id. at 806.
in the form of economic loss—an employer can avoid liability by raising an affirmative defense and proving by a preponderance of the evidence both “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”

As a result, a woman who experiences workplace harassment must herself take corrective steps before she has a cognizable Title VII claim. Moreover, if an employer promptly responds to the situation and punishes the harasser via temporary suspension, the woman may no longer have a cognizable claim, even though she may be harassed again upon the harasser’s return. Furthermore, even if a woman is able to defend against the employer, she may lose on summary judgment if she is unable to demonstrate that the harassment she faced was severe or pervasive.

In contrast, certain groups of men experience comparatively fewer barriers to receiving judicial recognition of their injuries following an unwanted sexual advance. Cases in which a voluntary manslaughter jury instruction is provided for homosexual advances demonstrate that this is true even when men exercise “self-help” and kill in response to the unwanted advance.

Though men experience many of the same procedural barriers regarding internal grievance procedures and the duty to mitigate harm, heterosexual male targets are able to proceed on claims of workplace sexual harassment with little or no court inquiry into the nature of the harassment. Furthermore, men generally do not have to face any significant procedural challenges when they kill in response to unwanted sexual advances. Some courts do not engage the threshold question assessing the adequacy of the nonviolent homosexual advance as provocation. The case law also demonstrates that only a single small and nonviolent act is needed to serve as an adequate trigger. For example, in Mills v. Shepherd, the court granted a voluntary manslaughter instruction for one isolated incident where the victim grabbed the defendant’s “privates” without questioning whether a reasonable person would have been provoked to kill at such an act. While grabbing another person’s genitals is indeed offensive behavior, the

386. LEWIS & NORMAN, supra note 305, at 110.
387. Id. at 110 & n.119.
388. Burlington Indus., 524 U.S. at 746; Faragher, 524 U.S. at 779.
389. See Meriwether v. Caraustar Packaging Co., 326 F.3d 990, 992 (8th Cir. 2003).
390. See id at 993.
391. See supra Part III.B.ii.
392. But see State v. Latiolais, 453 So. 2d 1266, 1267 (La. Ct. App. 1984) (“Even assuming that the allegations of advances . . . are true, these advances are not provocation sufficient to justify the vicious attack by defendant.”); Commonwealth v. Halbert, 573 N.E.2d 975, 978-979 (Mass. 1991) (finding provocation insufficient where the defendant violently killed the victim after the victim put his hand on the defendant’s knee and asked, “Josh, what do you want to do?”).
court failed altogether to look into the nature of the advance and instead jumped to two conclusions without any prior analysis: that such an advance would provoke a reasonable person to kill and that the defendant had in fact been adequately provoked to kill when confronted with the nonviolent homosexual advance.\footnote{Mison, supra note 34, at 135. See, e.g., State v. Skagg, 586 P.2d 1279 (Ariz. 1978); People v. Saldivar, 497 N.E.2d 1138 (Ill. 1986); People v. Spaich, 688 N.Y.S.2d 324 (App. Div. 1999).} Allowing such an instruction indicates that judges themselves believe that a “jury could find reasonably that a [nonviolent homosexual advance] is sufficient provocation to incite the [r]easonable [m]an to lose his self-control and kill in the heat of passion.”\footnote{Mison, supra note 34, at 135. See, e.g., State v. Skagg, 586 P.2d 1279 (Ariz. 1978); People v. Saldivar, 497 N.E.2d 1138 (Ill. 1986); People v. Spaich, 688 N.Y.S.2d 324 (App. Div. 1999).}

Some courts have even demonstrated a willingness to broaden the application of the defense beyond the doctrinal limits of provocation, providing legal recognition for unwanted advances even when the provision of the criminal defense is improper.\footnote{Dressler, supra note 34, at 730.} In addition to not engaging the threshold question of whether there is adequate provocation, a few courts have even allowed the defendant to claim provocation for a homosexual advance on an unrelated third party.\footnote{See generally Mison, supra note 34, at 167-171.} For example, in \textit{Wills v. State}, a defendant was able to claim a reduction to manslaughter where the victim made a homosexual advance on a third party,\footnote{See, e.g., Vujosevic v. Rafferty, 844 F.2d 1023 (3d Cir. 1988); Wills v. State, 636 P.2d 372 (Okla. Crim. App. 1981).} despite the fact that provocation doctrine typically does not allow defendants to claim provocation based on noncriminal triggering acts towards a third party.\footnote{636 P.2d 372 (Okla. Crim. App. 1981). The relationship between the third party, the defendant, and the victim was not defined. In this case, the court did not explain the nature of the homosexual advance but instead explained that the third party was in a leg cast and “could not defend himself against” the victim; thus, the defendant began arguing with the victim and ultimately kicked and beat the victim. An hour later, the defendant knocked the victim to the floor again, this time kicking him in the head and stomach repeatedly. The victim ultimately died. \textit{Id.} at 374-75.} Further, some courts have also permitted the defense where a consensual sexual encounter may have taken place between the victim and the defendant.\footnote{See Dressler, supra note 47, at 430.} For instance, in \textit{People v. Lenser}, the defendant and the victim engaged in undefined “homosexual encounter[s]” and “act[s],” and the court found that the defendant was provoked to kill his victim without considering who initiated the acts, the nature of the acts, and the fact that acts took place between the two.
over a period of time. Thus, where women are held to rigid procedural and doctrinal standards in redressing unwanted sexual advances, men are allowed to proceed in these cases after by passing a much lower judicial threshold.

Some argue that this disparity would be at least partially resolved by permitting women to invoke a provocation-type defense as a way to address unwanted sexual advances. Joshua Dressler suggests that women who kill due to unwanted sexual advances should be permitted to claim the homosexual advance defense. According to Dressler, "the reason a killing can be mitigated to manslaughter is that the law partially excuses an emotional killer for the actions he has taken as the result of provocation sufficiently egregious to stir emotions that might cause an ordinary person to act rashly." An act need not rise to the level of criminal activity to constitute adequate provocation; yet, he acknowledges that the provocation defense is indeed a male defense, created in response to men and used primarily by men. "[W]hile women are often the victims of provoked killings or the stimulus for them . . ., men are the predominant beneficiaries of a doctrine that mitigates intentional homicides to manslaughter." However, he suggests that both men and women should benefit from the provocation defense, but women do not do so because they respond to violence differently than men.

While Dressler’s suggestion is intriguing, it does not appear that courts have adopted this view. Women do respond to unwanted sexual advances with violence on occasion. For example, in Meriwether, the target punched her supervisor when he grabbed her buttock. In the “New Jersey 4” incident, the women responded with violence as well. However, in both cases, the law refused to recognize their claims. The plaintiff in Meriwether demonstrated her anger through her violence, and though she did not face criminal charges, the Court refused to recognize the severe nature of the advance that she faced. Similarly, the “New Jersey 4” were not given mitigated sentences despite the fact that they had re-

401. See Lenser, 430 N.E.2d at 496. Here, a homosexual advance turned into multiple, possibly voluntary, sexual encounters. Thus, there is a question of whether actual provocation exists, as the killing took place only after these sexual encounters. Comstock found that defendants who claimed homosexual panic prior to its removal from the DSM also reported participating in arguably voluntary sexual encounters with the victim prior to the killing. See Comstock, supra note 69, at 92. Without examining evidence of the voluntariness of the encounters, the defense presumes that homosexual acts are involuntary. This in turn allows men who may regret prior homosexual encounters to mitigate killings that may subsequently take place. Moreover, as in Wills, time had passed between the homosexual advance and the killing. Thus, a reasonable person could have likely cooled off between the time that the “advance” took place and the time of the killing. Yet there was no inquiry into this issue by the court. It is also unlikely that homosexual panic was reintroduced as a defense; the defendant’s primary argument was that he was intoxicated at the time of the killing. Lenser, 430 N.E.2d at 497.
402. See Dressler, supra note 34, at 754 (arguing that a man may respond with violence to an unwanted sexual advance while a woman does not because “he is a he and she is a she”).
403. Id. at 749.
404. Id. at 735.
405. See id. at 754-55 (finding that “there is a valid, non-homophobic basis for recognizing a partial excuse [in the form of the provocation defense] in many sexual advance cases” regardless of the gender and sexual orientation of the parties).
sponded with violence to a provocative sexual advance. Moreover, even if the provocation defense was gender-neutral in practice, men whose acts are perceived as same-sex advances by violent individuals remain unprotected.

Dressler argues that the unwanted sexual advance defense, as he calls it, is justified under the law because it is ultimately an issue for the jury. In the end, it is the jury that decides whether provocation is adequate. Judges merely decide whether to allow a jury to hear manslaughter instructions based on a provocation defense. Thus, Dressler argues that the jury instruction should be allowed where a rational jury may find for the defendant.

However, as the cases demonstrate, the judge’s determination of what a rational jury might find is itself a judgment about the severity of advances on men in comparison to advances on women. In homosexual advance cases, men are able to obtain a jury instruction for manslaughter because the judge believes that a rational juror may find that he was incited to kill as a result of unwanted physical contact. Moreover, men have actually won jury verdicts for manslaughter in these cases, demonstrating that juries have found the defendant’s belief to be reasonable. In contrast, many women who experience unwanted physical contact are unable to make legally cognizable claims. When they are able to make a claim, they are often unable to survive summary judgment. Thus, many courts have determined that no rational juror could find that a woman is experiencing a severe and pervasive harassment in her work environment despite the fact that her experience is factually indistinguishable from the provocation in homosexual advance cases. In sum, the same advance that may rationally lead to a killing is insufficient to demonstrate a hostile work environment.

There may be a few reasons for this inconsistency. First, the judges involved in making these determinations are from different circuits with different opinions and backgrounds, and thus have different ideas about the line between harassment and inappropriate but non-actionable behavior. Second, the fact that the judiciary is primarily white, male, and heterosexual may also play a role. Women and men arguably perceive sexual harassment differently; some studies have shown that women may perceive sexual touching and sexual comments where men do not. However, where most judges are white, male, and probably heterosexual, the judge’s perception of the rational juror’s thought process will likely be grounded in a heterosexual white male perspective. Thus, homo-

406. See supra Part I.B.ii.
407. See supra Part III.
408. Robinson, supra note 299, at 1113-17.
409. See Clara Torres-Spelliscy et al., Brennan Center for Justice, Improving Judicial Diversity 49 (2008), available at http://brennan.3cdn.net/96d16b62f331b13ac_kfm6bplue.pdf (noting that, in a survey of ten states, the judiciary was primarily white and male).
410. See Allan Edward Barsky, Social Work Research and the Law: How LGBT Research Can Be Structured and Used to Affect Judicial Decisions, in HANDBOOK OF RESEARCH WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDER POPULATIONS 376 (William Meezan & James I. Martin eds., 2009) (noting that the judiciary is “predominantly heterosexual”); Ro-
sexual advances will not be questioned as adequate provocation to a murder, while in the context of street harassment and sexual harassment, many women will be unable to make a cognizable claim altogether.

B. Normative Messages Resulting from Inconsistencies

A comparison of the treatment of unwanted advances in the contexts above provides a study on the ways in which one’s gender and sexual orientation affect the legal recognition one receives when redressing unwanted advances. Conversely, the comparison demonstrates the ways in which one’s gender and sexual orientation affect the punishment one receives for engaging in those advances.

Street harassment, experienced almost exclusively by women and men perceived as queer, has been deemed non-actionable because courts have found that it is too pervasive to address. The judicial response to workplace harassment is similarly indifferent, as the fondling of one’s breasts seems to fall within the purview of non-actionable intersexual flirtation, and one incident of harassment is insufficient to survive an employer’s summary judgment motion. In contrast, men who can demonstrate that their harassers are homosexual in the context of workplace sexual harassment may survive a summary judgment motion with only one incident of harassment. Moreover, if a man kills his harasser after one incident as a violent form of “self-help,” the law finds that the killing is partially excused.

The inability of women to obtain legal recognition is not unique to Title VII and street harassment claims; rather it extends into criminal law generally. Laurie Taylor argues that, while the criminal defenses have been expanded to accommodate situations in which men kill, women are unable to meet the doctrinal requirements for criminal defenses in situations in which they kill. Women are unable to mitigate murder charges in the circumstance in which they most frequently kill: after years of abuse by their partners. In fact, courts tend to apply doctrinal rules all the more rigidly in these cases. Thus, courts are willing to expand doctrine to recognize affronts perceived by husbands who are unhappy

binson, supra note 299, at 1157 (“Although the reasonableness test is framed as ‘objective,’ in application the judge’s intuitions about reasonableness are likely to be shaped by the judge’s race and gender, which will usually be white and male.”).

411. Bowman supra note 37, at 523 & n.31
412. Id. at 571.
413. See, e.g., Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000).
415. Cf. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (“Courts and juries have found the inference of discrimination easy to draw . . . [where] the challenged conduct . . . involves explicit or implicit proposals of sexual activity; . . . [This] chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.”).
416. See Taylor, supra note 65, at 1704-1707.
417. See id. at 1704-1707.
with their spouse’s desire for independence but simultaneously unwilling to expand doctrine to recognize women seeking this independence. In doing so, courts implicitly incentivize women to stay in abusive relationships rather than divorce or separate.”

In contrast, men who kill women to whom they are or were married have benefited from loose interpretations of the provocation defense and obtain jury instructions for voluntary manslaughter for killings in response to minor acts. In a study of provocation cases, Victoria Nourse found that a significant number of cases in which provocation was found involved “only the desire of the killer’s victim to leave a miserable relationship.” Juries have found defendants guilty of manslaughter, not murder, where “the defendant claims passion because the victim left, moved the furniture out, planned a divorce, or sought a protective order.” Similarly, manslaughter verdicts were found where infidelity was demonstrated where “a fiancée danced with another, . . . a girlfriend . . . decided to date someone else, . . . and . . . a divorcée [was] found pursuing a new relationship months after the final decree.”

Where Nourse’s and Taylor’s studies demonstrate incentives for women in relationships, the study of street harassment and sexual harassment in the workplace demonstrate incentives outside this context.

An examination of the legal treatment of unwanted sexual advances demonstrates that women must endure a higher level of discomfort not only within the confines of marriage but in their public and work lives as well. Doctrinal and procedural requirements remain rigid for women in this arena as well. In contrast, men who perceive slights by their wives or in their public or work lives receive remedies fairly easily under both criminal and antidiscrimination law. Moreover, the legal treatment of sexual advances by queer men is consistent with the findings of scholars who argue that the law provides incentives to rigidly perform heterosexuality. Homosexuality itself is no longer explicitly deemed immoral, criminal, or deviant under the law. Nonetheless, current legal discourse incentivizes individuals to not perform in a manner that would be perceived as queer. As Janet Halley argues, “the legal burdens imposed on homosexuality in our society deter people from appearing gay.” While the legal focus has shifted from identity to acts, one’s queer identity continues to be implicated in the regulated acts.

In Bowers v. Hardwick, the Supreme Court was explicit in its desire not

418. Nourse, supra note 148, at 1334.
419. Id. at 1332.
420. Id. (citations omitted).
421. Id. at 1332-33.
to promote sodomy, which it conceptualized as an act that took place primarily between two homosexual individuals.\footnote{Eskridge, supra note 422, at 1329 & nn.2-3. See generally Halley, supra note 28.} However, some sodomy statutes defined sodomy as oral sex as well as anal sex, and most sodomy statutes at the time prohibited sodomy between any two consenting adults.\footnote{Halley, supra note 28, at 1722.} The Bowers court proscribed an act it conceptualized as “homosexual,” and in doing so, prevented homosexual and heterosexual individuals from crossing the boundaries of what it deemed to be acceptably heterosexual. Thus, as Janet Halley argued, sodomy statutes ultimately served as a “rhetorical mechanism in the subordination of homosexual identity and the superordination of heterosexual identity.”\footnote{Halley, supra note 28, at 1722.}

However, even after Bowers was overruled by Lawrence v. Texas,\footnote{Lawrence v. Texas, 539 U.S. 558 (2003).} laws remain that incentivize individuals to perform heterosexuality.\footnote{It is legal to fire an employee based on her sexual orientation or gender identity in 29 states. Joshua Block, The Best Person for the Job...Fired for Being Gay, ACLU BLOG OF RIGHTS, (Oct. 18, 2010, 14:46 p.m.), http://www.aclu.org/blog/lgbt-rights/best-person-job-fired-being-gay; Editorial, The Rights of Gay Employees, N.Y. TIMES, Sep. 13, 2009, at WK15.} William Eskridge notes that the stated rationale for the Defense of Marriage Act was as follows: “Rather than compulsory heterosexuality, the intolerant stick-like Hardwick policy, or even the closet-based policy of ‘don’t ask, don’t tell,’ the state ought to be free to adopt a policy of preferred heterosexuality, a more tolerant, carrot-like policy.”\footnote{William N. Eskridge, Jr., Multivocal Prejudices and Homo Equity, 74 IND. L.J. 1085, 1096 (1998) (emphasis added).}

The shift from the homosexual panic defense to the homosexual advance defense followed a similar change in normative messaging. The de-classification of homosexuality as a mental illness eliminated the basis for the homosexual panic defense. Thus, men can no longer claim to kill based on an inherent defect. Indeed, since the shift to the homosexual advance defense, one who kills another he perceives as queer cannot claim insanity based solely on an advance by the victim and completely relinquish all culpability. Instead, the homosexual advance defense implicitly punishes behavior perceived as queer by providing a legal vehicle for recognizing such activity as sufficient to incite one to murder. Thus, because the introduction of any same-sex desire by the victim can mitigate the murder charge, a normative message condemning same-sex desire results.

The homosexual advance defense demonstrates how this phenomenon affects heterosexual individuals as well. The homosexual advance defense suggests that it is reasonable to respond to a nonviolent act that one perceives as queer with violence. Thus, both heterosexual and homosexual individuals are deterred from acting in a way that may be perceived as “queer.” The problem, however, is that there is no definition for what constitutes “queer” behavior. This determination is made by the killer, and as the cases demonstrate, often there is no inquiry by the court as to whether the behavior is in fact a homosexual advance. Thus,
people of all sexual orientations are incentivized to monitor their day-to-day actions to ensure that they are not perceived as queer.

Workplace sexual harassment cases demonstrate that this monitoring also takes place at work. Discrimination against queer individuals \textit{qua} queer individuals is not prohibited under Title VII. Thus, when a queer individual is harassed and attempts to make a claim for sexual harassment constituting a hostile work environment under Title VII, courts will not recognize the claim as covered under the statute unless the victim can proffer a basis for this harassment not grounded in sexual orientation. Further, because discrimination based on sexual orientation is not protected under Title VII, employees may be fired based solely on their sexual orientation. By excluding sexual orientation from the statute’s protected classes, Title VII implicitly allows discrimination against and harassment of queer individuals. Thus, in order for queer individuals to avoid facing discrimination, they must avoid acting in a way that would be perceived as queer by their colleagues.

Moreover, there are other arenas wherein the perception of one as queer can have disastrous effects. The performance of homosexuality can result in the loss of employment, certain public benefits, housing, custody of children, resident alien status, medical insurance, or even physical safety.\footnote{Halley, supra note 423, at 918.} Thus “[closeting] occurs whenever legal norms are created against the equal treatment of homosexuals in employment or other spheres, against same-sex marriage or sodomy, or against gay adoption or custody.”\footnote{Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,” 108 YALE L.J. 485, 543 (1998) (citations omitted).}

The cumulative effect of these laws is to force queer individuals to cover or pass as heterosexual.\footnote{“Passing means that a group is forced to hide its identity. . . . Covering means that a group is permitted both to retain and articulate its identity as long as it mutes the difference between itself and the mainstream.” Id. at 500. For example, the military’s “Don’t Ask, Don’t Tell” policy required queer individuals to pass, whereas Title VII encourages individuals to cover. See id.} Heterosexual individuals are themselves disincentivized to act in ways that may be perceived as queer. Moreover, the pressure experienced by queer individuals to cover or pass is not without injury. Kenji Yoshino argues that there are at least three harms associated with homosexuals under pressure to “act heterosexual.” First, they face stigmatization from heterosexuals and homosexuals.\footnote{Id. at 527.} Second, the psychological cost of the work required in order to pass is massive. Queer individuals must constantly monitor their behavior and their speech in order to avoid revealing their identity. Moreover, they must maintain a safe distance from others to reduce inquiries into their personal lives.\footnote{Id. at 528.} Finally, there is a moral harm when acts of covering ultimately prove unsuccessful, since discovering that someone is homosexual despite having performed heterosexuality is seen as tantamount to discovering that the person has
been lying.  

The resulting normative messages are as follows: Women are expected to withstand a higher level of harassment than men before the law may intervene. Queer men who make sexual advances on men risk legal action or even death, whereas heterosexual men who make sexual advances on women can generally expect impunity. Moreover, heterosexual individuals may be penalized with legal action or death if they act in a way that is perceived as queer. These messages are consistent with findings of scholars regarding the larger normative messages surrounding laws affecting women and queer men.  

V. CONCLUSION

Courts should reconcile their inequitable treatment of unwanted sexual advances under the law. Street harassment and workplace sexual harassment cases demonstrate that the unwanted sexual advances most commonly perpetrated against women need to be dramatically severe in order to receive any legal recognition. However, merely one instance of a nonviolent advance by someone of the same sex can mitigate a murder charge when experienced by a heterosexual male.

The lack of recognition of street harassment is inexcusable. Refusing to provide any legal recognition for street harassment outside traditional civil and criminal remedies, which have been proven useless in addressing the issue, demonstrates to women that they must learn to tolerate the harassment without legal recourse. Enacting street harassment statutes would be a basic first step towards addressing the issue. In Bangladesh, men have begun to be arrested for street harassment, but this legal progress occurred only after a number of women committed suicide in response to repeated street harassment. It should not take suicides to ensure that women are protected.

Similarly, the lack of protections that queer individuals have against violence of all kinds is unacceptable. A harasser’s queer identity can mitigate charges for his murder and the mere fact of his identity can serve as evidentiary support for a claim of harassment. A target’s queer identity puts her at risk for violence any time she performs her sexual orientation while precluding her from receiving Title VII protection altogether. These laws implicitly legitimize violence against queer individuals.

To ensure that unwanted sexual advances are all treated similarly under the law, courts should consider abolishing the homosexual advance defense alto-

436. Id. at 529.
437. See generally Nourse, supra note 148; Taylor, supra note 65.
Inconsistent Legal Treatment of Unwanted Sexual Advances 355

together. Courts could draw from English law and self-defense doctrine and begin requiring proportionality before allowing jury instruction on manslaughter in provocation cases.440 However, the proportionality requirement still would not address the central issue of judges deeming certain nonviolent homosexual advances as appropriate to mitigate any murder charges.

Courts should also reconsider their treatment of street harassment and workplace sexual harassment in light of the homosexual advance defense. The pervasive nature of street harassment suggests that a legal remedy is needed to address the issue. Rather than dismissing street harassment as a mere annoyance faced by women, statutes addressing street harassment would provide a starting point for recognizing the harms that street harassment cause women.441 Moreover, courts could consider the cumulative effects of street harassment when women attempt to obtain legal redress. While this reform may lead to the labeling of a large number of heterosexual men as harassers, it would be an important step in approaching parity in the way the judiciary regards different types of sexual advances.

Similarly, in the context of Title VII sexual harassment cases, judges may want to consider presuming that even one incident of sexual harassment faced by a woman is sufficient to withstand summary judgment. Moreover, workplace sexual harassment could become a criminal act, not merely a civil one, as is the case in other countries.

Of course, none of these solutions will rectify the inconsistencies in jurisprudence that have no objective answers. At the core, these claims require primarily male judges to determine, based on the law and their own experience, whether an act constitutes a sexual advance and whether the act is severe enough to be actionable. Because the primary victims of the harassment, women and queer men, are typically not those who make these determinations, it is unlikely that such decisions will change. However, examining the ways in which both criminal and civil laws fail to protect women and queer men is the first step towards achieving justice.


441. Six men were recently jailed in Bangladesh for street harassment. However, the arrests occurred after a rash of suicides by women who had faced harassment.