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R v Green (Australia):
Affective Judging—An Australian Case of Disgust

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Feeling Queer About Law

I first encountered *R v Green* (1997) 191 CLR 334 as a naive undergraduate student in Criminal Law in 2007. Crudely speaking, this case was about a young man who viciously killed a friend because his friend had made a sexual advance towards him. I remember reading the case and feeling angry, disgusted, and upset, as a newly out gay man, at how the highest court in Australia could endorse homophobic sentiments to excuse homophobic violence, to the point of reducing the punishment for murder. We had a lively and passionate discussion about the case in class when exploring defences to murder, with most of my peers at the time expressing similar concerns to me about the normalisation of homophobia in society and the legal system. The emotional discomfort in the classroom was palpable. Yet, rather than give space to our emotions, we channelled our objections to, and critiques of, the case through conventional legal paths like Australian common law precedent and doctrine. In pedagogical texts discussing the majority and minority judgments in *R v Green*, it has been noted that few differences exist in terms of relevant legal principles.[1] The majority held that the issue of provocation should have been left open to the jury, while the minority disagreed. The distinguishing features of these two positions were ascribed to evidentiary interpretations rather than legal propositions.

The affective scene I describe above provides the backdrop to how I approached re-imagining and re-writing one of the judgments of the dissenters in *R v Green* for this collection. Rather than turn away from feelings, I wanted to foreground how emotions shape the individual defendant, the defence of provocation, and the differing opinions of the Court in relation to the evidentiary questions on appeal. In my monograph, *Feeling Queer Jurisprudence: Injury, Intimacy, Identity*, I use emotion analytically

1. David Brown, David Farrier, Sandra Egger, Luke McNamara, and Alex Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales*, 4th ed. (Sydney: The Federation Press, 2006), 619.

to track how cases like *R v Green* crystallise and refract specific emotional enactments that obscure the structural conditions of homophobic injury and limit legal perceptions of queer intimacy and identity.[2] While my existing scholarship discussing the case was descriptive and analytical, the work of re-imagining and re-writing a judgment like *R v Green* from a *pro-queer* perspective took me to a more normative intellectual space. I had to think prescriptively about how I might have given a judgment differently to the High Court judges I critiqued in my book. To talk about queer alongside the normative and prescriptive is to invite a conceptual contradiction, especially as queer scholarship is usually associated with an anti-foundationalist impulse and refusal of norms.[3] For the purposes of re-thinking my judgment in queer terms, I followed Eve Kosofsky Sedgwick, who describes queer as 'the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning when the constituent elements of anyone's gender, of anyone's sexuality aren't made (or can't be made) to signify monolithically.'[4]

In Sedgwick's outline, queer is more than a personalised statement of one's identity or being in the world. Queer is an analytic position from which scholars can expose and critique how social norms organise subjects, issues, politics, and relationships that do not conform to (hetero)normative ideas of reproduction, nationhood, productivity, and domesticity.[5] In bringing queer to law, I drew on work by queer legal scholars like Aleardo Zanghellini and Libby Adler, who note the merging of queer with law enables a critical legal politics that can affirm the lives of sexual and gender minorities while challenging institutions that inhibit their flourishing.[6] To write about emotion in law is also a queer exercise, as it involves writing against law's 'proper objects' that conventionally organise around dispassionate rules and norms.[7]

What is distinctively queer about my judgment in *R v Green*, then, is that it deviates

2. Senthorun Raj, *Feeling Queer Jurisprudence: Injury, Intimacy, Identity* (Abingdon: Routledge, 2020), Chapter 2.

3. Robyn Wiegman and Elizabeth Wilson, 'Introduction: Antinormativity's Queer Conventions,' *differences* 26 (2015), 1–25. Queer theory is not monolithic and has varied theoretical and political commitments to norms. For a brief but insightful discussion of this debate in queer theory, see Robyn Wiegman, 'Sex and Negativity; Or What Queer Theory Has for You,' *Cultural Critique* 95 (2017), 219–243.

4. Eve Kosofsky Sedgwick, *Tendencies* (Durham: Duke University Press, 1993), 8. I have explored the utility of 'queer' for normative LGBTIQ+ legal projects elsewhere. See Senthorun Raj and Peter Dunne, 'Queering Outside the (Legal) Box: LGBTIQ People in the United Kingdom,' in *The Queer Outside in Law: Recognising LGBTIQ People in the United Kingdom*, eds. Senthorun Raj and Peter Dunne (Cham: Palgrave Macmillan, 2020), 1-19.

5. See Ian Barnard, *Queer Race: Cultural Interventions in the Racial Politics of Queer Theory* (New York: Peter Lang, 2004); Lauren Berlant, 'Starved,' in *After Sex? On Writing since Queer Theory*, eds. Janet Halley and Andrew Parker (Durham: Duke University Press, 2011), 79-90; Richard Collier, 'Straight Families, Queer Lives? Heterosexual(izing) Family Law,' in *Sexuality in the Legal Arena,* eds. Carl Stychin and Didi Herman (London: The Althone Press, 2000), 164-179; David Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham: Duke University Press, 2010); Judith Halberstam, *The Queer Art of Failure* (Durham: Duke University Press, 2011); Elizabeth Povinelli, 'Disturbing Sexuality,' in *After Sex? On Writing since Queer Theory*, eds. Janet Halley and Andrew Parker (Durham: Duke University Press, 2011), 257-269.

6. Aleardo Zanghellini, 'Queer, Antinormativity, Counter-Normativity and Abjection,' *Griffith Law Review* 18 (2008), 1–16, and Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Durham: Duke University Press, 2018).

7. Judith Butler, 'Against Proper Objects,' *differences* 6 (1994), 4, and Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions?,' *Minnesota Law Review* 94 (2008), 1997–2074.

from norms of traditional judgment writing by: (1) anchoring jurisprudence in terms of emotion (disgust) rather than doctrine, and (2) using that emotion self-reflexively to pursue an anti-homophobic jurisprudence that affirms the lives of queer people. This focus on emotion draws inspiration from Sara Ahmed's theorisation of the cultural politics of emotion and Eve Kosofsky Sedgwick's concept of reparative reading. For Sedgwick, a reparative reading is one that scans and amplifies the emotions in texts, with a view to following the surprise and pleasures such attentiveness might generate.[8] Reparative analysis aspires for possibility rather than closure. In re-imagining the judgment, I have scanned and amplified disgust in order to follow the disparate ways disgust organises gay intimacy, identity, and injury. While I take Sedgwick's invitation to engage in a reparative reading of disgust when approaching homophobic violence in *R v Green*, I do not allow my re-imagined judgment to roam free of critical anchors. To assist in crafting a critical framework for exploring the emotional grammar of disgust, I think with Sara Ahmed, who writes about reckoning with the politics of emotion in texts.[9] Specifically, I observe how emotion materialises as a textual enactment of jurisprudence in order to map the ways those affective textual enactments (of disgust) reproduce specific relations of gendered/sexualised power and privilege that cohere the ways judges recognise, and might excuse, homophobic violence.

Forming Queer Judgment

The form of my judgment is conversational and this dialogue format might be described as 'jurisprudential drag,' as it centre stages conventional doctrinal ideas of provocation only to then use emotion to expose the legal fiction that norms relating to the 'ordinary person' are objective and to denaturalise their purchase on law.[10] In crafting this judgment, I took inspiration from the *Feminist Judgments Project*, which seeks to 'disrupt the process of gender construction, and introduce different accounts of gender that might be less limiting for women.'[11] As Raj J, I sought to disrupt the ways heteropatriarchal norms of gender and sexuality construct a susceptible straight man and an aggressive gay man, where the former can only relate to the latter through repressed desires and overt violence. My focus on the way in which homosexuality or homophobia is exceptionalized through logics of disgust was deliberate to show how this can undermine the prospect of recognizing homophobic violence and inhibiting gay intimacy and identity.

The content of my re-written judgment is indebted to critical queer and feminist socio-legal scholarship that deconstructs the homophobia in the original case.[12] Much

8. Eve Kosofsky Sedgwick, *Touching Feeling: Affect, Pedagogy, Performativity* (Durham, Duke University Press: 2003), 135–136.

9. Sara Ahmed, *The Cultural Politics of Emotion* (Edinburgh: Edinburgh University Press, 2004), 5.

10. Rosemary Hunter, Clare McGlynn and Erika Rackley, 'Feminist Judgments: An Introduction,' in *Feminist Judgments Project: From Theory to Practice*, eds. Rosemary Hunter, Clare McGlynn and Erika Rackley (Oxford: Hart, 2010), 8.

11. Hunter, McGlynn and Rackley, 'Feminist Judgments,' 7.

12. See Adrian Howe, 'More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses – Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence),' *Sydney Law*

of the public admonition directed towards the outcome in *R v Green* was provoked by the chilling words Green spoke after he was charged with the murder of Gillies. In his statement to the police, Green said, 'Yeah, I killed him, but he did worse to me … he tried to root me.'[13] His statement sought to suggest that his violence should be considered less morally reprehensible than Gillies' attempt to solicit homosexual intercourse from Green. As Adrian Howe and Robert Mison argue, the success of pleading provocation depends on the extent to which social stigmas can engender emotions of hatred and revulsion towards the victim to which the judge(s) and/or jurors can relate.[14] Such emotions are recognised and reproduced by the law.[15] Howe notes that the inability to see the homophobic sentiments that are embedded in law reveals the 'privilege of unknowing,' an ignorance that uncritically accepts the assumption that gay men are dangerous and predatory.[16] Even where reforms have been introduced to remove non-violent sexual advances as the basis for provocation, the fact the Homosexual Advance Defence (HAD as it is referred to in critical scholarship) is underpinned by strong emotional sentiments such as outrage and disgust, suggests that it can be reformulated in self-defence claims or even as 'gross provocation.'[17] Alternatively, Joshua Dressler, who shares Howe's assessment of how emotion is transmitted, argues contra Howe for the retention of provocation. In refuting the justification rationale, Dressler argues for provocation as an excuse because it takes account of the limits of human rationality.[18]

While Dressler has been criticized for condoning heterocentric criminal law defences, his broader argument invites us to ask a vitally important question about how the law remedies injury against sexual minorities: should an individual perpetrator be held responsible for a culturally condoned homophobia that makes individuals susceptible to disgust in the first place? To pursue this question, my queer judgment confronts how disgust was used in *R v Green*. Specifically, I refute that disgust should be used to partially excuse the murder of Gillies and challenge how other justices use it to legitimize the idea that ordinary individuals (read: heterosexual men) have susceptibilities to unwanted same-sex advances.

The critical legal exploration of HAD in my queer judgment raises another important question: if movements of disgust in the law can harm sexual minorities, is their formal

Review 19 (2002), 338; Kara Suffredini, 'Pride and Prejudice: The Homosexual Panic Defense,' *Boston College Third World Law Journal* 21 (2001), 287–301.

13. *R* v *Green* (1997) 191 CLR 334, 391 (Kirby J). The term 'root' is an Australian expression for casual sex.

14. Howe, 'More Folk Provoke Their Own Demise,' 344, and Robert Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation,' *California Law Review* 80 (1992), 135.

15. Disgust is not limited to homophobic violence. Other areas of criminal law, such as those dealing with lethal and non-lethal violence, engender disgust. See Dan Kahan, 'The Progressive Appropriation of Disgust,' in *The Passions of Law*, ed. Susan A Bandes. (New York: NYU Press, 1999), 63-79.

16. Adrian Howe, 'Homosexual Advances in Law: Murderous Excuse, Pluralized Ignorance and the Privilege of Unknowing,' in *Sexuality in the Legal Arena,* eds. Carl Stychin and Didi Herman (London: The Althone Press, 2000), 98.

17. See Crimes Amendment (Provocation) Act 2014 (NSW) and *R v CR* [2008] NSWSC 1208, for an example of how HAD can re-emerge in other defences or even through 'loss of control' caused by a 'serious indictable offence.'

18. Joshua Dressler, 'When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard,' *Journal of Criminal Law and Criminology* 85 (1995), 755.

abolition the key to ending its homophobic a/effects? Formal abolition has been widely touted as key to eliminating the use of disgust and homophobia in the law. However, in crafting a pro-queer judgment, I observed a cautionary note offered by Cynthia Lee in relation to the progressive demands to abolish HAD: a statutory exclusion of HAD will enable homophobia to persist in other, less visible, ways. Lee notes that the only way to contest the stereotypes of gay men as deviants or predators is to draw attention to the cultural (as well as legal) currency that enables such investments.[19] For Lee, the focus on the more formal or technical aspects of HAD (and their abolition) covers the broader concern about how homophobia is articulated in legal defences. Statutory abolition risks covering over institutional forms of homophobia that contribute to violence faced by sexual minorities and impede the flourishing of their intimacies and identities. If HAD derives its judicial force from disgust, then detaching from it will require more than a doctrinal shift in statutory interpretation. In using disgust self-reflexively, my queer judgment outlines how justices might confront the homophobic articulation of provocation through disgust by first recognizing the emotional life of the defendant and then challenging how their individual disgust is recognised, and refracted, institutionally through the Court.

My queer judgment responds to the articulation of touch in the original judgment. For Brennan CJ, McHugh and Toohey JJ, writing the majority opinion in *R v Green*, disgust worked to differentiate between Green and Gillies. Gillies' unwanted queer touching of Green was rendered more disgusting than an advance of a similar heterosexual kind done by men to women. The latter consideration was erased from the majority's discussion. The majority's heightened focus on *queer* touching was developed alongside Green's purported vicarious trauma (having witnessed abuse perpetrated against his sisters) and Gillies' position of trust. Abuse of intimacy (in parental and homosocial relationships) framed the majority accepting Green's claim that Gillies' same-sex advance triggered lethal violence. These facts combined in the majority judgments to form the basis of Green's 'special sensitivity' to an unwanted advance – that is, disgust pointed to queer intimacies and identities that deviate from, or seek to disturb, a fixed heterosexual line.[20] HAD revealed the way in which 'projective disgust' worked to repudiate that which is perceived to contaminate boundaries and bodies.[21] In *R v Green*, the majority's disgust pointed to Gillies' conduct as a violation of Green's heteromasculine bodily and emotional integrity. The judicial reasoning stigmatized and separated the ordinary (heterosexual body) from the monstrous (gay body). Disgust worked in the majority's reasoning to enable the majority to qualitatively differentiate between the gay grope that pressed upon Green and the violent assault that ended Gillies' life. The majority's judicial touch worked to condemn Gillies, while it acted as a (partially) saving grace for Green.

19. Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (New York: NYU Press, 2003), 247–59.

20. Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Durham: Duke University Press, 2006), 145–6.

21. Martha Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton: Princeton University Press, 2004), 88.

Feeling Queer Jurisprudence

Writing a queer judgment in a register of emotion exposes the paradox and ubiquity of disgust when it comes to homophobia. On the one hand, homophobic disgust is cast as banal. In *R v Green*, Gillies' advance became aggressive precisely because the 'ordinary person' could find such an act 'revolting.' Brennan CJ and McHugh J inhabited a judicial space that took comfort in the bodily integrity and normality of heterosexuality. Rhetorical oscillation from the 'aggressive' to the 'revolting' response positioned queerness as a dis-ease. On the other hand, the use of a richly evocative description to define Gillies' conduct created a rather visceral spectacle (of disgust). Even if we focused specifically on Green's familial circumstances as the basis to understand the provocative gravity of Gillies' sexual touch, the majority referenced the fact that the appellant's sisters were allegedly subject to (heterosexual) sexual abuse. The Court justified the injurious gravity of the same-sex advances and, in doing so, revealed how queer intimacies could easily be conflated with violence.

In re-imagining the judgment through disgust, I refused to legitimize violence against those who were cast (by the judges writing in the majority) as socially transgressive. Kirby J's dissent typified a counterpoint to the disgust rhetoric relied on by the majority. Specifically, Kirby J's dissent directed disgust towards the majority's belief that a homosexual advance alone could ever be enough to constitute legal provocation. While that approach sought to work against homophobia, Kirby J's judgment exposed how the problematic mobilization of disgust worked by sticking disgust to some objects, while leaving other (possibly harmful) objects—such as laws denying equality to same-sex couples—without its visceral taint. By localizing Gillies' sexual advance, Kirby J attempted to excise the revulsion that underpinned Green's violence from the rest of society. Both Green's homophobia and the homophobia legitimated by the majority were alien to Kirby J precisely because they sat 'ill' or at odds with other social changes. By seeking to break the coupling of a homosexual advance with the objective requirement for the defence of provocation, Kirby J found that a reasonable jury, properly instructed, could not make a finding that Green was guilty of manslaughter rather than murder. After all, the revulsion that sparked Green's violence was exceptional—not ordinary. While sympathetic to Kirby's moralized use of disgust to challenge homophobia, my queer judgment thinks with disgust to refuse a construction of the ordinary person as being not homophobic. While still upholding the primary judge's refusal to make certain evidence available to the jury, my judgment does not seek to isolate Green and his homophobic violence.[22]

By returning to feelings, I conclude my queer judgment with an invitation for courts to grapple with emotions critically and reflexively. Making (queer) judge—as well as lawyers, scholars, and activists—sensitive to the work of emotion will allow us to better address homophobic violence across individual, interpersonal, and institutional levels.

22. I am indebted to abolitionist literature for emphasizing this point. See Angela Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003).

R v Green (1997) 191 CLR 334

Raj J

[1] This case is about individual and institutional sensitivities. Broadly speaking, this case is about how socialised homophobic sensitivities, like disgust towards same-sex intimacy, institutionalize lethal violence against gay men in society. Narrowly construed, however, this case is about the extent to which Section 23 of the *Crimes Act 1900* (NSW) is applicable to an individual situation where a heterosexual man claims that he was provoked into perpetrating homicide as a result of his 'special sensitivity' to a gay man who made sexual advances towards him.

[2] The institutional and individual sensitivities raised by this case are not mutually exclusive. In order to determine the applicability of Section 23 to the circumstances of this case, it is necessary to understand the emotional life of the defendant in terms of his familial, social, and cultural environment, and how this emotional life might be legally relevant to his criminal responsibility in the context of homicide. My colleagues who write in the majority have, in different ways, expressed their disgust towards some of Donald (Don) Gillies' (the victim) conduct to understand it as provocative to the ordinary person. My colleague, Kirby J, on the other hand, feels disgusted at the normalization of homophobia.

[3] In my dissenting opinion, I feel the need to sensitively engage with the emotional content of what my colleagues have said and outline what I see as anti-homophobic jurisprudence. I start by addressing Malcom Green's (the defendant) hostile emotional reactions towards Gillies. I then trace how his reactions shape the jurisprudential terms through which provocation defences gain meaning and why we, as a Court, must confront our emotions.

Feeling Facts

[4] The facts of the case are painful. On 19th May 1993, Donald Gillies, 36, was brutalized by Malcolm Green, 22, in Mudgee, New South Wales. The two could be described as acquaintances, though I would caution that this description might not be accurate. Without Gillies' testimony, we can only glimpse the nature of their relationship through Green's account of it. Gillies invited Green to stay over at his home. According to Green, at some point during the night, Gillies left his room and got into bed with Green. Gillies lightly rubbed Green's shoulders and back. Gillies tried to touch Green's groin. Green responded to this unwanted touching with violence. According to the medical evidence, Gillies was punched 35 times and then stabbed in the face with a pair of scissors at least 10 times.

[5] It is worth extracting parts of Green's emotional and confusing interview with the police to contextualise his account of what happened:

> Then he started touching me. I pushed him away. He asked what was wrong. I said, 'What do you think is wrong? I'm not like this.' He started grabbing me with both hands around my lower back. I pushed him away. He started grabbing me harder. I tried and forced him to the lower side of me. He still tried to grab me. I hit him again and again on top of the bed until he didn't look like Don to me. He still tried to grope and talk to me that's when I hit him again and saw the scissors on the floor on the right hand side of the bed. When I saw the scissors he touched me around the waist shoulders area and said, 'Why?' I said to him, 'Why, I didn't ask for this.' I grabbed the scissors and hit him again. He rolled off the bed as I struck him with the scissors. By the time I stopped I realised what had happened. I just stood at the foot of the bed with Don on the floor laying face down in blood. I thought to myself how other people can do something like this and enjoy what they do.

[6] Green pleaded that Gillies made unwanted sexual advances towards him. He claimed these advances triggered his latent rage towards his father who had allegedly sexually assaulted his sisters. Green confessed to killing Gillies, but he argued that his act was manslaughter, not murder, on the basis that Gillies' attempt to solicit sexual contact with Green constituted provocation as defined by Section 23 of the *Crimes Act 1900* (NSW), as Brennan CJ has so clearly articulated at 339.

[7] During the trial, the primary judge refused to direct the jury to consider the question of provocation in respect to Green's alleged history of family violence. He was convicted of murder. Green appealed on a number of procedural and evidentiary points relating to the judge's exclusion of evidence and failure to direct properly on the issue of provocation. The NSW Supreme Court of Criminal Appeal dismissed Green's claim that the judge's refusal to allow the jury to consider evidence of family abuse amounted to a substantial miscarriage of justice (with Smart J in dissent).

[8] The case now arrives before the High Court. This Court has to consider whether the trial judge's refusal to allow the jury to consider evidence of the defendant's father's sexual abuse of his sisters, when determining provocation, constitutes a 'substantial miscarriage of justice' per *House v King* (1936) 55 CLR 499. We have to consider the scope of a provocation defence by clarifying the objective character of questions relating to self-control and gravity that are statutorily required per Section 23(2)(b) *Crimes Act 1900* (NSW).

Emotions in the Defence of Provocation

[9] Chief Justice Brennan, in his comprehensive judgment, has offered a more detailed examination of the defence of provocation through its contextualisation in Australian common law. Provocation can reduce a charge of murder to manslaughter (Section 23(1) of the *Crimes Act 1900* (NSW)). The elements of provocation are both subjective and objective in character. To appreciate whether a person 'lost control,' the jury

has to consider the subjective background of the defendant in relation to the provocative conduct in question (Section 23(2)(a)) and then weigh that provocation against such a background to determine, objectively, if it could cause an ordinary person in the position of the accused to have lost self-control and form an intent to kill or inflict grievous bodily harm (GBH) (Section 23(2)(b)).

[10] This Court must determine whether an 'ordinary person in the position of the accused' could have been induced to form an intent to kill or inflict GBH when considering the gravity of Gillies' *homosexual advances* towards Green given his sensitivities.

[11] I depart from Brennan CJ's doctrinal reasoning to further explore how emotions manifest in the pleading of provocation and its subsequent adjudication. The defence of provocation has legal currency because it gains value from emotions such as rage, hatred, and disgust. That is, the defendant must establish an emotional trigger that prompts an unlawful killing, and this emotion must be translated for the judge or jury in order for them to determine if the defendant can be (partially) exculpated for the crime.

[12] In common law jurisdictions, the doctrinal foundations of what some commentators refer to as the 'Homosexual Advance Defence' (HAD) are drawn from insanity, diminished responsibility, provocation, and self-defence. Some academic commentary has been written on this topic.[23]

[13] The most important thing for this Court to note is the subtle doctrinal changes over the decades. Prominent legal academics outline that the legal genealogy of the HAD can be traced back to the 1960s in cases where defendants could seek to mitigate the charge of murder by arguing that the victim's unwanted same-sex sexual advance triggered a psychiatric *panic* by revealing their latent homosexuality. In the 1980s, the declassification of homosexuality as a mental illness precipitated a shift away from defining the defence in terms of a defendant's mental incapacity. If homosexuality could no longer be considered a mental disorder, then the emotional responses that were elicited when people are confronted with their own same-sex attraction could no longer be referred to as a mental defect. Instead, the pathological panic used to legitimate the defence for a number of years gave way to passionate provocation.

[14] Coupling the HAD with provocation rather than insanity crystallized the way emotions could mitigate legal responsibility for murder. Provocation developed from the premise that criminal responsibility must be countenanced with a recognition of human frailty. Such frailties came to be understood in terms of emotions that people (historically referring only to men) were ordinarily susceptible to in various circumstances. These emotions typically included outrage, fear, humiliation, and disgust from a breach of social mores.

23. For example, Robert Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation,' *California Law Review*, vol 80 (1992), 133.

[15] The HAD, as a form of provocation, allows a defendant to be convicted of manslaughter instead of murder where they can demonstrate that the gravity of the same-sex advance constituted sufficiently provocative conduct that could cause an ordinary person in the circumstances of the accused to lose control.

[16] Homophobic violence (which manifests as physical attacks and verbal insults against sexually minoritized people) is attributed to the human sensitivities or frailties of ordinary people. By refracting the focus from the culpability of the perpetrator to the threat posed by the victim, this Court must be wary of how the HAD advances stereotypes of gay men as sick, effeminate, and predatory. We only need to consider the ways broadsheets and tabloids refer to gay men, particularly in the context of the Human Immunodeficiency Virus (HIV), to observe how these tropes emotionally materialize. Professor Robert Mison elaborates that the success of the defence depends on the extent to which these stereotypes can engender feelings of hatred and revulsion towards the victim that the judge(s) and/or jurors can relate to.[24] As judges, we must be careful to avoid reproducing such homophobic stereotypes.

Appeals on/to Emotion

[17] In the appeal before this Court, my colleagues have succumbed to uncritically embracing homophobic stereotypes about how gay intimacy manifests. Smart J's dissent in the Court of Appeal is echoed in this Court's discussion of their disgust towards unwanted same-sex sexual advances as provocative. Smart J notes:

> Some ordinary men would feel great revulsion at the homosexual advances being persisted with... They would regard it as a serious and gross violation of their body and their person… Some ordinary men could become enraged and feel that a strong physical re-action was called for. The deceased's actions had to be stopped.[25]

Smart J's reasoning reveals how provocation tears at the bounded rationality of the male subject through a violation of bodily or sexual integrity. By conflating same-sex advances with 'revulsion' and 'ordinariness,' Smart J transforms unwanted touching into an overtly disgusting gesture. In his words, the approaching intimacy 'had to be stopped.' His reasoning here relies on depersonalizing Green's statement by invoking 'some ordinary [read: heterosexual] men.' However, this becomes more than a simple statement of facts. Smart J's revulsion brings the *queer* body into view as a threat. Smart J focuses on 'ordinary men' in order to justify the fact that such 'feeling' could call for a 'strong physical reaction.' Same-sex touching is presented here as a 'violation of their body.' Yet, Smart J's movement from a more distanced account of 'ordinary men' to a more forceful personalised statement that 'the deceased's actions had to be stopped' reveals something much more troubling: the movement of disgust from the defendant to the judge hearing the case. By construing the ordinary man as disgusted

24. *Id*, at 136.
25. *R v Green* unreported, Court of Criminal Appeal of New South Wales, 8 November 1995 at 24 (Smart J).

by homosexuality, Gillies' physical touches were not only a threat to Green, but they also become affective threats that impress quite forcefully in Smart J's understanding of provocation as per Section 23(2)(b) of the *Crimes Act 1900* (NSW). The HAD, therefore, gets articulated here as something much more than a personal defence of provocation. Smart J's evocative dissent in the NSW Court of Criminal Appeal designates gay sexual advances as ordinarily gross.

[18] My view is that using disgust to tether homosexuality to provocation, in the way Smart J does, is not only homophobic, but it also undermines our responsibilities as judicial officers to separate our emotional biases from the cases we are asked to consider. My attention to emotion, particularly disgust in this case, is not just to challenge some of my colleagues who see the relevance of provocation uncritically because they view gay people in abject terms. Rather, I take a reparative approach in my understanding of the circumstances of this case and the relevant law to show how judges might approach appeals of this nature. Specifically, I outline how judges can: (1) recognise the emotional life of a homophobic defendant for the purposes of law relating to provocation, while (2) reflexively attending to how our emotions might provoke the homophobic terms through which we judge the applicability of provocation to situations involving homophobic violence.

[19] Divergent judicial opinions in this case can be ascribed to emotionally divergent understandings of 'ordinariness' and whether what was recurringly described as the 'sexual interference' by Gillies towards Green could lead a reasonable jury, properly instructed, to make a finding of provocation.[26] In my opinion, the concurring judgments of Brennan CJ, Toohey and McHugh JJ narrate Gillies' advances as 'persistent' as part of a broader jurisprudence defending against the threat of gay intimacy. That is, Gillies' non-violent sexual advance is seen as a microcosm for how same-sex intimacy can demean the integrity of the person. In this particular case, same-sex advances are judicially claimed as 'sexual interferences' when read against Green's personal background of alleged third-party family sexual abuse.[27] Brennan CJ's judgment holds:

> It was essentially a jury question, a question the answer to which depended on the jury's evaluation of the degree of outrage which the appellant might have experienced. It was not for the Court to determine questions of that kind, especially when reactions to sexual advances are critical to the evaluation. A juryman or woman would not be unreasonable because he or she might accept that the appellant found the deceased's conduct 'revolting' rather than 'amorous.' [28]

Provocation is referable to disgust and outrage—an issue that Brennan CJ believes should have been left to the jury to decide in this case. While there is an explicit claim about deferring assessments on anger to juries, the qualifying sentences shape the evaluation of outrage through judicial invocation of disgust. Observing that the conduct of the deceased could reasonably be seen as 'revolting' rather than 'amorous'

26. *R v Green* (1997) 191 CLR 334 at 341–2 (Brennan CJ).
27. *Id*, at 342 (Brennan CJ).
28. *Id*, at 346 (Brennan CJ).

exposes the emotional threat posed by any same-sex advance, regardless of context. Brennan CJ's movement from attraction to disgust in his judgment constructs a scene that foregrounds same-sex intimacy as negative. This jurisprudence suggests we can view unwanted same-sex sexual advances as reasonably capable of disgusting the ordinary person and provoking them to understandable outrage. Through this emotional parameter setting, violently rebuking such touching may not be a reasonable response but it is still, at the very least, an excusable act.

[20] Brennan CJ relies on Green's testimony to frame Gillies' non-violent touching as innately intrusive or aggressive: 'Here, the deceased was the sexual aggressor of the appellant.'[29] Gillies' flirtatious gestures become assaulting ones. Even if I were to accept Green's testimony and see these unwanted advances in such aggressive terms, the fact that Brennan CJ seems to ignore comparable scenarios involving women (Brennan CJ distinguishes *Stingel v The Queen*) who are groped by men, is telling of the way disgust renders a 'sexual advance' in terms that capture the interpersonal dynamics between straight men and gay men.[30] As Brennan CJ points out: 'the real sting of provocation could be found not in the force used by the deceased but in his attempt to violate the sexual integrity of a man who had trusted him.'[31] The physically non-aggressive nature of the touching becomes obscured against the anxious figuration of the same-sex advances as an act of sexual violation. Despite Brennan CJ's attempt to distinguish force from violation, the two terms bleed together when considering Brennan CJ's earlier use of the term 'aggression' to qualify the same-sex advances made to Green.

[21] Moreover, little effort is made in Brennan CJ's judgment to distinguish between wanted and unwanted same-sex intimate activity. Much of his judicial narrative uses his disgust as a means of recoiling from, and pushing back, these purportedly aggressive queer sexual advances. Gillies' advances not only touch Green both literally and emotionally, but they also touch upon our jurisprudence. It becomes a gesture that solidifies legal disgust in this case—an emotive aberration that now justifies the advance of provocation as a defence.

[22] Furthermore, McHugh J's reasoning builds on a similar emotional grammar articulated by Brennan CJ. Despite his attempts to emphasise the sexual nature of Gilles' conduct, rather than its gay sexual character specifically, his judgment obscures the way same-sex sexual contact in this case is rendered public or (hyper)visible. Same-sex advances are impugned, while heterofamilial sexual relationships do not attract such emotional scrutiny. The latter point is particularly important to emphasise, because in this case the alleged sexual violence that made Green 'especially sensitive' arose from a violent heteropatriarchal dynamic, where Green claimed his father consistently sexually abused his sisters. McHugh J tries to decouple private sexuality from public violence:

29. *Ibid.*
30. (1990) 171 CLR 312.
31. *Green,* at 245 (Brennan CJ).

> [T]he fact that the advance was of a homosexual nature was only one factor in the case. What was more important from the accused's point of view was that a sexual advance, accompanied with some force, was made by a person whom the accused looked up to and trusted.[32]

The act of touching becomes a glaring problem of a 'persistent' sexual character. Specifically, Gillies unwanted advances are marked outside the legitimate space of reproductive heterosexual relations. In this case, the 'force' of the touch is considered in terms of the 'special sensitivity' Green had on the basis of alleged child abuse perpetrated against his sisters. Even though McHugh J follows the issues relating to Green's alleged history of abuse more closely, he renders homoerotic touching as a socially unacceptable breach of socially acceptable homosociality. That is, despite the importance of family abuse to underscoring the gravity of the provocation, McHugh J's reasoning focuses mostly on how touching becomes stigmatized as something perverse insofar as it relates to (unacceptable) homoeroticism rather than (acceptable) homosociality.

[23] Rather than categorizing the physicality of the act, the reference to 'some force' reflects a broader discursive and affective problematic that I want to contextualise. The 'force' of Gillies' conduct (touching on the shoulders and back) is jarringly felt in McHugh J's judgment. The literal (sexual advance) and metaphorical (legal response) 'touch' are intimately tied to the overdetermined sexual meaning ascribed to Gillies' same-sex attraction. Gilles was a 'trusted friend' whose non-platonic conduct breached the acceptable (homosocial) integrity of their relationship. Gillies had abused his position of being 'looked up to' by seeking to express his same-sex desire towards Green.

[24] McHugh J articulates the violation differently to Smart J: it is a threat to homosocial friendship rather than heterosexual masculinity. Yet, despite McHugh J's different rhetorical maneuvers, his disgust reinscribes the privileged position of homosocial friendship while recoiling from Gillies' homoerotic act which seeks to abuse that privilege. Gillies' provocative conduct is condemned as an act of violating trust. His articulation of the provocation defence exposes an unusual relationship between the conceptions of dominant (static) masculinity and the 'special sensitivities' towards heterosexual male identity that give rise to provoked homophobic violence. Such sensitivities are understood against a background of same-sex advances along with alleged sexual abuse perpetrated against siblings.

[25] Taken together, Brennan CJ and McHugh J's concurring judgments problematise the coherence of criminal law doctrines relating to personal responsibility and the 'objective' way the ordinary person is understood.[33] Indeed, the ordinary person is not simply some abstract rational or atomistic actor. Rather, in giving emotional force to the HAD, the majority accepts, unproblematically, the 'unusual' sexuality of the victim in the case, and in doing so suggests that ordinary persons are susceptible to homophobic

32. *Id*, at 370 (McHugh J).
33. *Id,* at 346–7 (Brennan CJ) and 372 (McHugh J).

prejudices. While 'special sensitivities' are used to mitigate (or at least understand) the conduct of the perpetrator, my colleagues reveal their own disgusted sensitivities or feelings relating to gay intimacy. By conflating terms like 'advance' and 'aggression' and coupling them with revulsion, the concurring judgments reveal an emotional inability to separate non-violent and violent gestures in relation to gay intimacy.

[26] In refusing the abjecting rhetoric of my colleagues, I find myself drawn in sympathy to Kirby J's dissent. He notes: 'In my view, the "ordinary person" in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or to inflict grievous bodily harm.'[34] Kirby J's judgment seeks to move against the overtures of disgust articulated by the majority by suggesting that a non-violent sexual advance—even given the appellant's specific circumstances—cannot create an excusable intent to kill or inflict grievous bodily harm. The ordinary person is not homophobic. Coupled with Kirby J's previous comments about the role of law in remedying violence against gay men, the common law is recuperated in his judgment as a place for eliminating homophobia. It is not supposed to entrench it, but should safeguard against such harms.

[27] I find Kirby J's dissent appealing because his judgment rejects the disgust of my colleagues and movingly disclaims homophobia. He refuses to accept homophobic disgust as ordinary in the terms required by Section 23 of the *Crimes Act 1900* (NSW). However, I must also note that his words come with emotional erasures of a different kind. Firstly, Kirby J seeks to equate the potential offensiveness of heterosexual and homosexual advances. He says:

> Any unwanted sexual advance, heterosexual or homosexual, can be offensive. It may intrude on sexual integrity in an objectionable way. But this Court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent to kill or inflict grievous bodily harm.[35]

By reading the same-sex advance alongside the heterosexual kind, Kirby J's dissent obscures the way disgust has enabled the majority to reason the existence of the HAD in the first place. These affective differences arise due to the largely invisible positioning of heterosexuality (as a norm), while repudiating 'unusual' homosexuality (as other). Moreover, it is unclear to me whether making room to reject homophobia from a structural point of view (as a Court) means we need to eliminate consideration of how it might manifest in interpersonal relationships. In fact, recognizing that homophobia is structural necessitates careful consideration of how it manifests in social interactions. The extent to which this Court ought to take account of these structural factors when making judgments about individual criminal culpability is not fully explicated by Kirby J in his moving judgment.

34. *Id*, at 409 (Kirby J).
35. *Id* at 416 (Kirby J).

Affecting an Anti-Homophobic Jurisprudence

[28] I have gone to great pains to explore the emotional (homophobic) underpinnings of Green's lethal act, the statutory relevance of provocation to Green's pleadings about his traumatic family history, and the affective jurisprudence of this Court in connecting the two. I have done this in order to understand to what extent the provocation defence allows for homophobic disgust, and how this disgust has taken shape for both Green and this Court.

[29] However, while I recognise the relevance of homophobic disgust to the ordinary person acting homicidally, I also recognise the importance of pursuing an anti-homophobic jurisprudence that critically confronts, rather than casually accepts, homophobic disgust in jurisprudence. It is important to ask then: what are the conditions under which the HAD should be accepted in criminal law and are those conditions made out in this case?

[30] Provocation was designed as a concession to human frailty. It is unsurprising that emotion is central to its exercise. Criminal law recognises that there are circumstances where people react in lethal ways that are not compatible with their character as a result of others' behaviour beyond their control. It is clear that homophobia is a persistent social problem. Homophobic beliefs do not automatically result in violent behaviour, but we cannot underestimate that homophobic disgust in particular has visceral consequences. We must account for this.

[31] Green uses his disgust of Gillies' advance in order to mitigate the heinous nature of killing. My colleagues in writing the majority judgment entertain this homophobic disgust in order to assess the gravity of Gillies' unwanted conduct and whether it amounted to provocation. Gillies' unwanted 'queer' touching of Green is rendered more disgusting than an advance of a similar heterosexual kind done by men to women. The latter consideration is erased from the majority's discussion.

[32] I am willing to accept that Green's anxiety over unwanted same-sex advances might be tied to a history of child sexual abuse in relation to his siblings. Green may have suffered vicarious trauma having witnessed abuse perpetrated against his sisters. However, even accepting these propositions, I am not convinced there was evidence to suggest Gillies' unwanted advances triggered rage towards his father that was subsequently projected upon Gillies. This Court must take care to distinguish angry reactions to parental abuses of kinship from disgusted responses to unwanted same-sex sexual encounters. For the majority, homophobic conflation of unexpected same-sex interactions between friends with patriarchal sexual abuse anchors Green's 'special sensitivity' to provocation. I reject that emotional framing of provocation because it abstracts same-sex intimacy through framings of violation.

[33] It is also important for this Court to recognise that Green's violent reactions are culturally contingent. No argument was made to suggest Green's violence was due to a substantial impairment by abnormality of mind or disease of the mind. Homophobia is, after all, not a mental illness. Homophobia is not unique to Green. Making Green solely responsible for the killing of Gillies may satisfy Kirby J's emotional call to challenge individual a/effects of homophobia, but, in doing so, this Court would obscure the social norms that gave rise to Green's hostilities towards gay intimacy.

[34] While challenging the majority's abject framing of the case, I am wary of turning Green into a *bad apple* to absorb our disgust. Recognizing the institutionalization of homophobia becomes difficult if we uncritically redirect our disgust to individuals like Green. This Court should rightly feel disgusted by homophobic violence, but it should also be cautious about what it does with that disgust. Disgust is institutionally ordinary (in how the majority recognise the recoil Green felt towards Gillies) and individually spectacular (in how Kirby J recognises the brutality of homophobic violence perpetrated by individuals).

[35] Even if we accept, as Kirby J does, that homophobia should no longer be referable to the 'ordinary person,' that does not mean it has simply been expunged from legal circulation. Even legislative reform to explicitly exclude the HAD from the remit of provocation would not affect this. In fact, by suggesting violent homophobia is a non-issue in the broader community, cases that follow a similar emotional tread to this one will only continue to cloud judicial perceptions of just how pernicious and pervasive homophobia (in the forms of physical attacks, sexual abuse, vilification, harassment, discrimination, etc.) is in society.

[36] A cursory examination of the rates of homophobic violence, vilification, and harassment around the time the case was first heard in NSW reveals homophobia persists at terrifyingly common (or even 'ordinary') levels.[36] Homophobia is far from exceptional. In both the majority and minority judgments, my colleagues' respective judgments reveal the problematic way expressions of disgust are invoked to deal with lethal violence perpetrated against sexual minorities.

[37] With these tensions in mind, I am left in the unenviable position of stating whether to accept the appeal or refuse it. In order to arrive at my conclusion, I want to use the disgust present in this case to distinguish between individual and institutional realities. The institutional reality of homophobia and associated homophobic disgust are not grave enough to warrant an individual claim of murder being reduced to manslaughter. To conflate institutional abjection of same-sex attraction with Green's lethal homophobic acts would be to assume too much about the causes of such violent behaviour. Moreover, it would ignore the restraint which Section 23(2)(b) requires ordinary people to possess.

36. NSW Police Service, 'Out of the Blue' (February 1995).

[38] Essentially, the emotional susceptibilities of Green, and those exposed by the jurisprudence of my colleagues in this case, speak to the importance of holding individuals accountable for their actions while recognizing the broader social context of homophobia. Exceptionalising queer intimacies or homophobia through the rubric of disgust risks undermining attempts to protect the former or remedying the latter.

Conclusion

[39] This is an emotional case and rendering a judgment has been an emotional exercise. The case reflects homophobic disgust across varied individual and institutional contexts. Malcolm Green's killing of Donald Gillies is inexcusable, but it is understandable. Green is not evil. He is a product of a homophobic environment. Homophobia is a corrosive social malaise that inhibits our capacity to love and relate to each other. Criminal law is ill-suited to address its deleterious dynamics. We need more than just legal interventions to institutionally dismantle homophobia. So, what can this Court do? I implore my colleagues to think critically with their emotions and not to allow disgust to obscure their views of relevant legal and social issues. As judicial officers, we should take seriously the claims presented before us and approach them with a sensitive, self-reflexive, and anti-homophobic ethic.

[40] I would refuse the appeal and affirm the decision of the trial judge.