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## Queers and Provocateurs: Hegemony, Ideology, and the “Homosexual Advance” Defense

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This exploratory article relies upon a historical-interpretive approach to understanding the relationship between legal narrative and popular consciousness in particular historical moments, focusing especially on “troubled times,” in which the legitimacy of a hegemonic worldview embodied in law comes under challenge from a newly ascendant ideology in the popular domain. To discern the nature of that relationship and its implications, I offer a three-pronged analysis, drawing on two original data sets. Initially, each data set is analyzed individually to elaborate the nature of, and changes in, (1) representations of homosexuals circulating in popular culture, and (2) constructions of homosexuals in defendants’ narratives in “homosexual advance” homicide cases between 1946 and 2003. Findings from these two analyses are thereafter combined to explore the relationship between the two constructions of homosexuals across that time period. In combination, these three analyses provide empirical evidence that, rather than mirroring changes in popular discourse about homosexuality, the changes revealed in the defense narratives actually opposed them. I use these findings to argue that, in what Swidler (1986) has called “unsettled times,” ideological pluralism is pronounced and may be discerned in the complex and sometimes counterintuitive relationships that exist within and between legal narrative and popular discourse.

**O**n July 9, 1999, Kenneth Washington and Alexander Nicholai met at a local bar. Sometime after midnight, the pair returned together to Nicholai’s home. There, Washington claims, he passed out. He later awakened, allegedly to find Nicholai on top of him, attempting a sexual assault. Washington says he seized a knife and used it to fend off Nicholai’s advances. Nicholai’s naked and lifeless body was found by police about eight hours later.

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Having confessed to the killing, Washington was brought to trial on charges of first-degree murder. In the courtroom, the defense described the victim to the jury in terms that drew heavily on classic, stereotypical scripts that cast homosexual males as violent, rapacious monsters. Describing the victim as a “Dr. Jekyll and Mr. Hyde” predator, the defense alleged that “[t]here were two Mr. Nicholais. The first one was the outdoorsy guy . . . the guy with the choir, who could hold a job.” The second was a monster—“buying beers for young men, luring them to his home to take [sexual] advantage of them” (“‘Homo Panic’ Defenses in CA and AK,” *The Advocate*, “News and Politics,” 23 May 2000. <http://www.planetout.com/news/article.html?2000/05/23/3> [accessed 3 April 2004]). Washington’s counsel asserted that, given the circumstances, the defendant had the right to stab Nicholai as many times (27) as he felt were needed to be sure he was dead.

Throughout the twentieth century, the specter of the pathological, predatory, sexually violent deviant played a significant role in shaping discourse about homosexuality. In fact, prior to the 1950s, what passed as popular knowledge about male homosexuals could be defined almost exclusively in those terms. I argue, however, that by the time the defense narrative in the case described above was being presented to jurors, prevailing cultural representations of homosexuals were no longer consistent with the images that anchored the defense’s narrative. Instead, homosexuals had come to be represented and talked about in a wide array of new roles, including rights-claimers, life-partners, adoptive or biological parents, politicians, sports heroes, arbiters of taste and fashion, average citizens, etc. In other words, the defense narrative did not fit the times.

At first glance, the defense’s depiction of Nicholai and the prevailing nature of contemporaneous popular representations of homosexuals present a discrepancy that could seem difficult to explain. Within a constitutive framework, for example, law is regarded as a factor that helps organize and interpret phenomena, including social relations; at the same time, social relations shape, give force to, and help determine the content of law. Moreover, the social and legal domains are conceived as mutually embedded and, on the whole, reciprocally constitutive (Mertz 1988; Hunt 1990; Conley & O’Barr 1990, 1998; Sarat & Kearns 1993; Coutin 1994; Hirsch & Lazarus-Black 1994; Sarat, et al. 1998). From this standpoint, law is often seen to function as an instrument of hegemony, playing a part in the constitution of a social terrain circumscribed by tacit ideological interests.

Hegemony, however, is neither static nor ever complete. Once in place, hegemony does not remain so indefinitely, nor does it preclude the existence of conflicting ideologies. Thus, as a more nuanced understanding of constitutive theory suggests—and as cases

such as that involving Washington and Nicholai reveal—although law always contributes to and reflects ideology, its relationship to hegemony is necessarily contingent on whether the ideology it embraces is, at any given moment, either taken for granted or contested.

What, then, can be learned about the relationship among law, ideology, and hegemony from cases such as that discussed above—instances in which the law is seen to embrace an ideology that, although once hegemonic, is later out of step with emerging cultural knowledge? In the following pages, I begin to explore this question through the analysis and comparison of two original data sets. First, I examine the appeals resulting from 14 homicide trials that took place in California between 1946 and 2003. In each of the 14 cases, the defendant alleged that a homosexual advance by the victim triggered the events that led to homicide. Next, I offer an analysis of popular media discourse about homosexuality that circulated across that 58-year period. Through these analyses I reveal the extent to which the defense narratives reflected recognizable, contemporaneous cultural representations of “homosexuals.” At the same time, I document the degree to which the legal narratives changed over time to accommodate emerging cultural knowledge that colored mid- to late-twentieth-century discourse about “homosexuals.” In combination, the two analyses provide empirical evidence that, rather than mirroring changing cultural representations of homosexuality, the changes observed in the defense narratives actually opposed them. In discussing these findings, I suggest that, in what Swidler (1986) has called “unsettled times,” ideological pluralism is pronounced and, in fact, invites increased, active rhetorical work on the part of proponents to maintain legitimacy.

This article is organized around five sections. First, I offer a brief, descriptive overview of the “homosexual advance” defense followed by a discussion of the relationship between the legal and social domains as posited by constitutivist scholars. Thereafter, I describe the sources from which the data for this study were gathered and the means through which they were organized and coded. An analysis of both the defense narratives and contemporaneous media representations of homosexuality follows, with an emphasis on the degree to which changes in each appeared to be reflected in the other over the time period of interest. Finally, I discuss the possible significance of my findings for larger law and society issues.

## **Descriptive Overview**

### **The Homosexual Panic/Homosexual Advance Defense**

In the legal arena, “homosexual panic” was initially proposed, and functioned as, an insanity or diminished capacity defense

against prosecution in cases of homicide. As such, it was invoked—often successfully—by defendants seeking to absolve themselves of criminal responsibility for a homicide that they had admittedly committed. Such cases as these portrayed a sexual advance by a male victim as having triggered a sudden, psychotic reaction in a latently homosexual perpetrator, thereby setting in motion a chain of events resulting in the death of the former (Chen 2000).

The credibility of homosexual panic as an insanity defense was dealt a seemingly mortal blow by the American Psychological Association’s de-medicalization of homosexuality in 1974 (Chen 2000). Rather than being discarded altogether, however, homosexual panic has been restyled as a “homosexual advance” defense and even today continues to be presented to juries in homicide trials. In its current incarnation, the defense falls under the rubric of provocation rather than insanity or diminished capacity. That is, a homosexual advance on the part of the victim is portrayed as having engendered *in an otherwise reasonable perpetrator* a degree of emotion sufficient to negate *mens rea*, thereby reducing the defendant’s culpability and mitigating the crime to manslaughter rather than murder.<sup>1</sup>

Implicit in this categorical shift from an insanity defense to one of provocation is a corresponding doctrinal shift. As an insanity or diminished capacity defense, the sexual advance by the victim was identified only as the *trigger* for homicide. This trigger, in turn, set off a psychotic reaction in an already mentally unbalanced, sexually conflicted perpetrator. The killer’s psychosis was identified as the causal locus for the crime. As homosexual panic morphed into homosexual advance, however, the victim’s behavior became the cause for the killing: the sexual overtures of one man toward another came to be portrayed as so outrageous an offense as to cause an otherwise ordinary, nonviolent, and reasonable individual to lose control and kill.

### The Constitutive Perspective

The constitutive approach to legal analysis takes as its main point that law should be considered neither wholly autonomous nor a socially dependent body of rules. Rather, this mode of analysis holds law to be both constitutive of the social terrain and, at the same time, constituted by subjects’ use of it therein. In part, the

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<sup>1</sup> It should be noted in this context that provocation constitutes an “incomplete defense.” In contrast to self-defense, for example, provocation does not justify a homicide and thus does not absolve a killer of all criminal responsibility. Instead, provocation—when deemed adequate—serves as a *partial excuse* for homicide, such that a charge of murder may be mitigated to manslaughter. It is not an uncommon strategy for defenses of self-defense and provocation to be mounted in tandem in the hope that if a jury does not believe the former, it may accept the latter.

perspective grew out of ongoing debates in the 1970s over the meaning that Marx conceived for the relationship of the base to the superstructure. The ultimate elevation in the importance of ideology in the Marxist model was especially critical to the development of the constitutivist perspective and owes much to Gramsci, whose work shifted “the attribution of causal priority in the development of law” from strictly economic factors to the “interdependent effects of political, juridic, economic and cultural relations” (Milovanovic 1994:173). To accomplish this shift, Gramsci (1971) conceptualized an efficient form of power referred to as *hegemony*, which functions to maintain structures of domination but does so through means that usually remain invisible (Hirsch & Lazarus-Black 1994). Hegemony functions not through coercion “from the top down” but rather through social institutions, legitimizing domination through the creation of a normative and ideological consensus of the dominated. Hegemony establishes a taken-for-granted reality that is rarely questioned. As Hirsch and Lazarus-Black note:

Hegemony refers to power that “naturalizes” a social order, an institution, or even an everyday practice so that “how things are” seems inevitable and not the consequence of particular historical actors, classes and events. It tends to sustain the interests of a society’s dominant groups, while generally obscuring these interests in the eyes of subordinates (1994:7).

Law and society scholars have increasingly engaged in operationalizing and theorizing the constitutive implications of the hegemonic power of the law (Calavita 2001). Calavita (2001) and others have remarked on the extensive scholarship that focuses on the sociocultural ramifications of the law’s discursive power. Henry and Milovanovic, for example, have stressed the notion that language creates “concrete social realities” and that “once social structures are constituted as summary representations, their ongoing existence depends on their continued and often unwitting reconstruction in everyday discourse . . . ” (Henry & Milovanovic 1999:300). Klare has called lawmaking “a form of praxis,” further noting that “legal discourse shapes our beliefs about experience and capacities of the human species, our conceptions of justice, freedom and fulfillment, and our visions of the future” (1979:128).

The law not only places limitations on social relations, proscribes behaviors, and disseminates ideology, but the law itself is constituted by its manifestation and use in everyday life. Along these lines, Silbey has argued, “The law must be viewed as a socially constructed system of action” (1985:18–9). Hunt (1993), in calling for abandonment of the notion that law is either autonomous or

dependent, has further described the interplay between the social and legal spheres:

Law constitutes or participates in the constitution of a terrain or field within which social relations are generated, reproduced, disputed and struggled over, the most important implication being that within such a field . . . the legal discourses in play both place limits of possibility on social action and impose forms of discursive possibility (1993:293).

Ewick and Silbey (1995) have written extensively about the power and function of narrative. Their remarks concerning legal narrative are especially germane to the cases at issue in this study:

[t]he stories and accounts that are told to and by litigants, clients, lawyers, jurors, and other legal actors are not simply reflective of or determined by those dominant meanings and power relations. They are implicated in the very *production* of those meanings and power relations. Through various discursive practices, legal categories, symbols and authority are organized and maintained across time and space (1995:211).

At the same time, however, these authors point to the fact that narrative should not be imagined always to contribute to the reproduction of the hegemonic worldview. Indeed, despite the fact that “the structure, the content, and the performance of stories as they are defined and regulated within social settings often articulate and reproduce existing ideologies and hegemonic relations of power and inequality” (Ewick & Silbey 1995:212), narratives have the potential either to contribute to hegemony or, alternatively, to be “counter-hegemonic.”

### **Data and Method of Analysis**

This analysis focuses on defendants’ narratives in 14 cases of homicide, each of which was originally adjudicated in the Superior Courts of California between 1949 and 2000 and later heard at the appellate level by the California Courts of Appeal and, in some cases, the California Supreme Court. Cases included in this analysis met three criteria: (1) in the case under appeal, the defendant was charged with the crime of murder; (2) the defendant alleged that his motive for killing was significantly related to a homosexual advance by the victim; and (3) the terms *homosexual advance* and *murder*, which were found in the appellate opinion, were in reference to the crime adjudicated in the trial to which the opinion referred.

To generate a pool of cases from which I would identify a sample, I searched California case law using LEXIS legal software. My initial search, using the terms *homosexual advance* and *murder*,

retrieved 18 appellate opinions, 13 of which met the criteria described above. Next, because the term *homosexual panic* is frequently—albeit erroneously—used interchangeably with *homosexual advance*, and because there is some question as to when the term *homosexual advance* became part of the common legal lexicon, I undertook a more inclusive LEXIS search, employing the search terms *homosexual* and *murder*. This second search of California case law resulted in the retrieval of 143 additional cases, only one of which, *People v. Green* (1956), met the criteria for inclusion in this analysis. Thus, the sample of cases for this study included 13 of the 18 cases retrieved by the initial LEXIS search and one additional case, *People v. Green* (1956). Once these 14 cases were identified, they were arranged in order, forming a comprehensive empirical record of all published California appellate cases in which the defense claimed that a homosexual advance by the victim bore a significant relationship to the motive for murder (citations for each of the 14 included cases appear at the end of the reference list).

Because this research was guided, in large part, by an interest in the degree to which the defense narratives drew upon classic stereotypes or instead, mirrored changing representations of homosexuals circulated in popular culture, it was necessary to establish a second data set from which I could discern the latter discourse about male homosexuality. To do so, I turned to the popular press. Using Volumes 15 (1946) through 62 (2002) of *The Reader's Guide to Periodical Literature*, I identified all articles appearing in *Time* and *Newsweek* between 1946 (two years prior to the commission of the crime described in the earliest defense narrative analyzed) and 2003 (two years following the commission of the crime described by the latest defense narrative analyzed) that addressed the topic of male homosexuality.<sup>2</sup> This search led to the identification and collection of 337 articles. These 337 articles became the source of the data used to provide an empirical portrait of evolving cultural representations of homosexuality between 1946 and 2003.<sup>3</sup>

<sup>2</sup> Because Volumes 15 through 21 of *The Reader's Guide* did not include "Homosexuality" as a heading, I searched for pertinent articles under the heading "Sex Perversion." The heading "Homosexuality" first appeared in Volume 22 (03/1957–02/1959). Beginning with that volume, and continually thereafter, I searched *The Reader's Guide* under the heading "Homosexuality," as well as under all its increasingly numerous subheadings (e.g., "Homosexuality and Christianity"; "Homosexuality and Politics"). The headings "Gay" and "Homophobia," appeared initially in Volumes 31 (03/1971–02/1972) and 49 (1989), respectively, and continued to be listed in all subsequent volumes. I therefore expanded my search to include those headings and their various subheadings.

<sup>3</sup> *Time* and *Newsweek* were selected as data sources based on the following criteria: (1) each of these newsweeklies was widely circulated across the time period of interest. By 1946, *Time* had achieved a U.S. circulation rate of more than 1,200,000 copies, and *Newsweek's* U.S. circulation was more than 613,000 copies. In 2003, *Time's* U.S. circulation had increased to almost 4,000,000 copies and *Newsweek's* to about 3,000,000; (2) both *Time* and

A primary empirical objective of this project was to establish a measure of the degree to which each defense narrative, as well as contemporarily occurring cultural knowledge, drew upon stereotypical scripts of male homosexuality. To that end, both the court cases and the magazine articles were organized around key analytic dimensions defined by four classic scripts of homosexuality determined deductively from the literature—homosexual men as (1) effeminate, (2) sick or mentally ill, (3) sexually predatory, and (4) violent, libido-driven monsters (Dreyfus & Rabinow 1983; Edwards 1994; Fone 2000; Halperin 1995; Murray 1996; Terry 1999).

The content of each defense narrative and periodical article was coded according to whether or not it reflected the influence of these four classic scripts of homosexuality. To structure this process, it was necessary to establish parameters by which each of the four analytic dimensions could be defined. To that end, I formulated eight statements about male homosexuals—two corresponding to each of the four scripts listed above.<sup>4</sup> The statements were constructed such that each pair captured what—for the purposes of this project—were determined to be the essential elements of the script to which it corresponded.

I next considered whether or not each of the four pairs of statements appeared to be true in regard to each individual analytic unit. A dichotomous coding scheme was employed to rate the truth of each statement pair as applied to each narrative and periodical article. Each of these units was rated 1, if either or both of the statements in each pair appeared to be true when applied to a particular unit, or 0, if neither statement appeared to be true.<sup>5</sup>

To assess the reliability of my coding scheme, a research assistant coded subsets of the data, including a random sample of 20% of the court cases and 20% of the articles. The coder was provided with the statement pairs used in the original coding of the data, as well as a brief description of how they were to be applied. The results suggest a high degree of inter-rater reliability, with the

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*Newsweek* were published continuously across the entire time period of interest; (3) both magazines are billed as providers of “news with in depth analysis” and thus were likely to cover issues such as homosexuality, even during times when such subjects would have been considered improper, or unacceptable, in family oriented/lifestyle/leisure periodicals; and (4) both newsweeklies favor text over photojournalism in presenting content and thus provide an ample source of data for textual analysis.

<sup>4</sup> See Appendix A for a complete iteration of the statement pairs used to define the four scripts.

<sup>5</sup> The four scripts identified above were not considered to be mutually exclusive; the meaning of each can—and indeed does—overlap and intermingle with that of the others. Effeminacy, for example, has been considered by some to be symptomatic of a “sick or mentally ill” individual. Likewise, a “sexual predator” could be considered a “violent, sex-crazed monster,” should his predation involve the use of brutality. By virtue of his brutality, that same individual might also be “diagnosed” as “sick or mentally ill.” Each of the cases and articles in this study, therefore, could be coded positively on all four dimensions.



coder identifying 100% of the cases and 85% of the articles in accordance with the original results, for an overall reliability of 92.5%.

Once the analytic dimensions of this study were coded and tracked across time, a comparative case study approach to the analysis was initiated (Lipjart 1975).<sup>6</sup> Such a method allows for “pattern matching” (Stake 1995; Yin 1984) using “controlled comparisons” (Lipjart 1975) as a principal means through which internal validity may be increased. Through the comparison of analytic units, I was able to identify and compare patterns and trends in the data, thus allowing me to move beyond simple observation to empirically address the theoretical concerns identified earlier.

## Findings

I present this analysis in three parts. First, I describe the 14 defense narratives and consider their relationship to the four classic scripts of homosexuality. Thereafter, I focus on the representations of homosexuals in the *Time* and *Newsweek* articles, highlighting both the variation in their prevalence over time and the degree to which their content drew on the same four scripts. In the third section, I compare and contrast the construction of the “homosexual” victims in the 14 narratives with contemporaneously occurring cultural representations of homosexuality evidenced in the two newsweeklies.

Systematic analysis of the data indicated that the quantity and content of articles concerning homosexuality that were published annually in *Time* and *Newsweek* varied considerably across the time period of interest. Based on the number and nature of articles published yearly, three distinct periods are discernible, each of which could be distinguished from the others by a disparate average number of articles published annually, coupled with discernible shifts in content (as described in the next sections). Once identified, these three periods became the primary analytic units for this investigation. Thus, for the purpose of analysis, the articles were divided into the following three groups: Time Period I (1946–1968); Time Period II (1969–1980); and Time Period III (1981–2003). To facilitate analysis and pattern-matching, the defense narratives were likewise grouped according to the same temporal parameters.

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<sup>6</sup> Each defense narrative and each periodical article was treated as an individual case that could be combined with, and compared to, other individual cases, both within and between data sets.

### The Defendants’ Narratives

Although this research focuses an analytic lens specifically on the defenses’ narrative construction of their “homosexual” victims—not on the disposition of their cases in the courts—it should be noted that each of these 14 defendants *was*, in fact, convicted of a crime at the trial level. Indeed, had they not been convicted, their cases would not have reached the appellate courts. Their convictions notwithstanding, however, the defendants’ pleas may not have fallen entirely on unsympathetic ears. Indeed, in half of these cases, the accused was convicted of a lesser crime than that with which he had been charged.<sup>7</sup> In the context of the current analysis, however, the extent to which narratives of “homosexual advance” served the purposes of these particular defendants is only marginally relevant. Regardless of whether they succeeded or failed, what is important for present purposes is *that* these stories are told—and that the law provides a forum for telling them.

#### *Time Period I: 1946–1968*

In general, what is most interesting about three of the four cases that occurred prior to 1968 is the defendants’ almost total lack of explanation for killing beyond reporting that they had done so in response to a nonviolent, homosexual advance by the victim. They did not call upon any of the four scripts in constructing their version of events that led to killing. Apparently, the claim that the victim had made a homosexual advance was considered adequate explanation for homicide.

In the earliest case, *People v. Zatzke* (1949), the defendant explained that immediately prior to the homicide, his roommate had approached him, offering “an act of sodomy.” The defendant allegedly replied that he didn’t “go for that damned stuff,” and crossed the room to procure a hammer from a dresser drawer (*People v. Zatzke*, 33 Cal. 2d 482 [1949]). Perceiving that the roommate intended to pursue the matter further, Zatzke hit him in the head with the weapon. The victim fell to the floor under the force of the hammer blow, whereupon Zatzke struck again “two or three times,” allegedly to put the injured man “out of his misery” (*People v. Zatzke*, 33 Cal. 2d 482 [1949]). Prior to the morning of the homicide, there was no evidence that the relationship between the two men had been anything less than cordial, and Zatzke offered no further explanation for his actions beyond the decedent’s sexual overtures.

In *People v. Green* (1956), the defendant explained that he had met the victim, Joseph LaChance, at their mutual place of employment. Shortly after becoming acquainted, the pair decided to

<sup>7</sup> A graphic overview of the various charges and outcomes pertaining to each of the 14 cases is provided in Appendix B.

drive to an Ojai, California, inn to look for seasonal work. Arriving at their destination, they were informed that the manager would not be available for several hours. The pair drove out into the countryside, drank beer, shot at cans with LaChance's shotgun, and played with a baseball and bat to pass the time. Their supply of beer exhausted, the two walked toward a nearby creek to obtain water to drink—the defendant carrying the ball and bat. Along the way, they came upon a water tank and, as LaChance bent to drink from its spigot, Green struck two individually mortal blows with the baseball bat to the head of the victim.

The defendant initially confessed to killing LaChance in order to steal his wristwatch. At trial, however, he repudiated that statement, instead claiming that he had killed when LaChance proposed that they engage in a homosexual act. Only after the killing, he claimed, did he form the intent to steal the decedent's watch. By virtue of the circumstances related in his original confession, in which he claimed to have killed during the perpetration of a robbery, Green was guilty of first-degree murder—a potentially capital offense. His revised version of events, in which he claimed that killing was provoked by an unwanted homosexual advance, painted an entirely different legal picture, thus allowing for jury instructions that included the lesser charges of second-degree murder and voluntary manslaughter.

In *People v. Stoltz* (1961), the defendant and a friend were picked up by the victim, Peter Dorn, as they hitchhiked from California to their home in Washington State. En route, the trio stopped several times to drink whiskey, provided by Dorn. On one of those occasions, as they lay by the banks of the river, Dorn allegedly announced that he had been living with a "queer" and—in the same breath—offered to commit "acts of perversion" on the defendant and the other individual (*People v. Stoltz*, 196 Cal. App. 2d 260 [1961]). Stoltz claimed that he was so frightened by the offer of homosexual attention that, in panic, he picked up a "4 by 4 about 2 feet long" (*People v. Stoltz*, 196 Cal. App. 2d 260 [1961]) and struck the recumbent victim twice in the head with it. At trial, psychiatric testimony for the defense argued that the homicide had been perpetrated while the defendant was in a state of "panic or extreme fear" and that such a panic reaction to a "homosexual situation" was recognized as a bona fide pathology in the field of psychiatry (*People v. Stoltz*, 196 Cal. App. 2d 261 [1961]). Interestingly, in this, as in a number of other cases, subsequent to the homicide the defendant recovered control of his faculties to the extent that he clearly remembered stealing the victim's cash, automobile, and other property.

Of the four cases of homicide that occurred prior to 1968, in only one, *People v. Taylor* (1961), did the defendant call upon any of

the four scripts in describing the behavior of his “homosexual” victim. Both the “predator” script and the “monster” script were salient in Taylor’s narrative. The defendant reported that, while hitching a ride home from a long night of drinking and poker with friends, he had passed out in the back seat of a car. He allegedly awakened some time later to find that the driver, Thurston McGuffick, had pulled off the road and was “attempting to perform an act of oral copulation upon him” (*People v. Taylor*, 189 Cal. App. 2d 493 [1961]). Taylor reportedly “went crazy,” and began kicking McGuffick, causing him to fall from the car. A fight ensued, during which McGuffick reportedly “pulled a knife,” started toward Taylor and jabbed at him with the weapon. At the time of arrest, the defendant reported that, fearing for his life, he had forcibly relieved McGuffick of the knife and “stabbed [McGuffick] three or four times” with the weapon (*People v. Taylor*, 189 Cal. App. 2d 494 [1961]). Later, testifying at trial on his own behalf, Taylor claimed that he could not remember stabbing the victim at all. He did admit, however, to removing the victim’s body from the road to the car, which he subsequently pushed off a cliff into the Klamath River. Both McGuffick’s body and his car were discovered several weeks later. An autopsy conducted on the badly decomposed body indicated that McGuffick had suffered a fractured skull, as well as several puncture wounds to the cranial area and eight vertical puncture wounds to the chest. The cause of death was given as “shock,” resulting from massive cerebral and thoracic hemorrhage (*People v. Taylor*, 189 Cal. App. 2d 493 [1961]).

### **Time Period II: 1969–1980**

Only two of the 14 cases analyzed occurred in Time Period II. As in the majority of cases that occurred in the preceding time period, neither of the defendants drew upon any of the four scripts in his description of events that led to the homicide. In *People v. Long* (1974), the defendant explained that, infuriated by the fact that his friend, and ultimate victim, had “placed his hand on the defendant’s leg and grabbed his groin area” (*People v. Long*, 38 Cal. App. 3d 682 [1974]), he picked up a large metal bolt and struck the victim several times on the head. He then kicked and hit the victim repeatedly and finally, looping an appliance cord around the victim’s neck, pulled it until it snapped. A psychiatrist, testifying for the defense, claimed that, although sane at the time of the killing, Long had been overcome by “emotional anger,” resulting from the victim’s homosexual advance and that the killing was, therefore, carried out without malice (*People v. Long*, 38 Cal. App. 3d 684 [1974]).

Similarly, in *People v. Reyes* (1974), the defendant had been the object of a nonviolent sexual advance by the victim. Reyes claimed that he “went blank” (*People v. Reyes*, 12 Cal. 3d 495 [1974]) but

later came to as he was slicing the wrists, abdomen, and genitals of the victim with a kitchen knife. The coroner's testimony indicated that, during the time period that the defendant claimed not to recall, three separately fatal blows had been administered to the victim's forehead with a hammer. That weapon was later found—with a portion of the victim's brain matter still attached to it—in a vacant lot adjacent to the scene. Psychiatric testimony for the defense indicated that the defendant had suffered from “uncontrollable rage” in response to the victim's sexual advance and that the fatal attack was “an unconscious reaction to an attack on his masculinity” (*People v. Reyes*, 12 Cal. 3d 496 [1974]).

Fone (2000) has described the 1960s and early 1970s as some of the most homophobic years in American history. The two defense narratives from this time period may corroborate that notion. Neither of the defendants drew upon any of the four scripts in his portrayal of the victims' behavior, perhaps indicating that simply claiming to have been the recipient of a homosexual advance was explanation enough for homicide during Time Period II. The apparent, ready availability and willingness of “expert” witnesses to provide “medical” justification for the killing of homosexuals seems not only to support Fone's claim but also to explain why the defendants' narratives did not call on any of the four scripts.

### ***Time Period III: 1981–2003***

In each of the eight cases that occurred after 1981, the defendant called upon more than one of the four classic scripts in his narrative reconstruction of the alleged events that resulted in homicide. During this period, the “sick” script was the most frequently deployed, with every case drawing upon it. The “sick” behaviors that were attributed to the victims ranged from the case of Roy Savage (*People v. Turner* 1990), who declared love for an individual who had just stabbed him in the neck, to Thurman Anderson (*People v. Lang* 1989), whom an expert witness—basing his testimony on “facts contained in the defendant's narrative”—described as belonging to a “subgroup of male homosexuals having very few sexual contacts with men and an almost morbid preoccupation with venereal disease” (*People v. Lang*, 49 Cal. 3d 1007 [1989]). In *People v. Chavez* (2002), the victim was portrayed as a voyeur, attempting to “peep” at the defendant as he was urinating.

In some cases, the sick script and the predator script were conflated. Both Delbert Weaverling (*People v. Cornett* 1985) and Don Collins (*People v. Neal* 2002), for example, were portrayed as prone to satisfying their degenerate sexual urges through copulating a unconscious partner. Clyde Mayer (*People v. Tapia* 1994), additionally, was alleged to have satisfied his degenerate sexual appetites with three young brothers; the first two he was

able to access through their voluntary participation, and the third he forced to sodomize him at knifepoint.

In Time Period III, all but one of the defendants drew on the predator script in his narrative reconstruction of the events that preceded the homicide. The defendants' narratives generally described the victim as an older, more mature, more intelligent, as well as socially and economically better situated individual, who had allegedly used his advantages in attempting to gain sexual access to a somewhat “down-on-his-luck” defendant. The majority of victims were alleged to have used trickery or subterfuge to lure trusting defendants into situations in which they were vulnerable to sexual advance. In both *People v. Turner* (1990) and *People v. Tapia* (1994), for example, the defendants' narratives described older, well-heeled, well-situated “homosexual” victims, who befriended the young, impoverished defendants—offering employment, food, clothing, transportation—all for the alleged purpose of controlling, and ultimately, gaining sexual access to their prey. In *People v. Cornett* (1985), as had been the case in *People v. Taylor* (1961), the “homosexual” victim was alleged to have made sexual advances toward a defendant who was unconscious—in an alcoholically induced stupor—and in *People v. Neal* (2002), the defendant alleged that his anger toward the victim resulted from the victim engaging in sexual activities with him while he was sleeping.

The specter of the predatory homosexual is apparently so culturally pervasive that it was even deployed by defendants in cases where the facts clearly demonstrated the absurdity of such a notion. In the case of *People v. Cain* (2002), for example, the defendant, an unemployed 25-year-old world-class kickboxer with a reputation for rabid homophobia, met the victim, Dr. Keith Runcorn, at a San Diego diner. Runcorn, a somewhat doddering, 78-year-old geophysicist, was slightly effeminate and unabashedly homosexual. As the two conversed over breakfast, Cain agreed to accompany Dr. Runcorn to his hotel, where Runcorn had allegedly promised to provide the name and address of an acquaintance, who he believed would provide Cain with employment.

The following day, a member of the hotel's housekeeping staff found Runcorn's body lying on the floor of his room, a ligature still fastened tightly around his neck. Lacerations, abrasions, and bruises covered Runcorn's face, neck, ears, head, and left shoulder. The majority of his teeth were broken, his gums and tongue were lacerated, and his neck had been fractured in two places. At autopsy, both the victim's hyoid bone and the thyroid cartilage (located in the anterior portion of the neck) exhibited crushing fractures consistent with stomping injuries. The cause of death was found to be multiple, blunt-force trauma to the head and ligature strangulation, either of which would have been individually fatal.

Despite the extreme difference in their ages and physical condition, at trial the defendant's narrative of the events prior to the homicide drew on both the predator and monster scripts to construct Runcorn as a calculating, foul-mouthed, sexually driven and physically imposing figure, who would not hesitate to resort to force to satisfy his homosexual lust. Upon entering the hotel room, Cain claimed, Runcorn placed his hands on Cain's chest and forced him backward onto the bed, saying, "You know you want it! You know you want to suck my dick!" (*People v. Cain*, 2002 Cal. App. Unpub. LEXIS 7242:8 [2002]). Cain reported that he tried to leave but that Runcorn grabbed him and prevented him from reaching the door. At that point, the defendant stated, he feared that he was going to be raped by the elderly professor. He allegedly began to elbow and punch his attacker to break his hold. Cain claimed that Runcorn released him, but immediately "ball[e]d up" into an aggressive stance to attack again. At that point, the defendant testified, everything went black—and in that "black rage," he fought with Runcorn but did not remember anything further until he found the battered victim lying in the floor with the ligature around his neck (*People v. Cain*, 2002 Cal. App. Unpub. LEXIS 7242:8 [2002]).

After the predator script, the monster script was the most often called upon during this time period. Five of the eight defendants discussed their victims in terms of that script. In the case of *People v. Tapia* (1994), for example, the victim, Mayer, was reported to have dragged a "crying and protesting" defendant into the bedroom, where—at knifepoint—Mayer "forced the appellant to get an erection" and ultimately satisfied his lust by inserting the defendant's involuntarily erect penis into his anus (*People v. Tapia*, 25 Cal. App. 4th 1002 [1994]). In *People v. Estrada* (2002), the defendant reported that the victim, Dennis Morgan, "grabbed him, threw him on the bed, jumped on him and grabbed [his] penis" (*People v. Estrada*, 2002 Cal. App. Unpub. LEXIS 9616:5 [2002]). Neither a punch to the face nor the drinking glass that Estrada subsequently smashed into Morgan's forehead seems to have had any effect on the victim's monstrous libido as he subsequently exposed his erect penis and expressed his desire to "suck [Estrada's] dick" (*People v. Estrada*, 2002 Cal. App. Unpub. LEXIS 9616:5 [2002]).

Similarly, in *People v. Turner* (1990), Savage, the victim of the homicide, reportedly began "chasing [Turner] through the house," following the latter's refusal of his sexual overtures. Turner kicked Savage in the stomach, an action that apparently did little to quell Savage's lust. The latter reportedly "grabbed [Turner] around the breast, arm and neck," and resumed his sexual entreaties. Turner next stabbed Savage in the neck with a buck knife, but the hemorrhaging victim's monstrous, homosexual lust allegedly prevailed, as he continued professing his "love" for the defendant while, at

the same time, threatening him with both a knife and a fireplace poker. As the two struggled, Turner grabbed the fireplace tool and attempted to gain possession of the knife that Savage still wielded. Ultimately disarmed, Savage allegedly approached Turner again from behind and “accidentally fell on the blade, which deeply penetrated Savage’s chest and caused severe bleeding.” By now bleeding profusely from two serious stab wounds, Savage allegedly approached yet again, saying “. . . was just talking about Baby I love you.” Brandishing both the poker and a knife, Turner warned Savage to desist in his amorous advances but Savage allegedly kept coming, grabbing Turner again, whereupon the latter stabbed Savage “‘a couple’ of times” (*People v. Turner*, 50 Cal. 3d 684 [1990]). The defendant reported that he then dropped the knife and ran upstairs to retrieve his coat. When he returned, Savage was lying face down on the floor. Turner took Savage’s pulse and, finding none, correctly surmised that the victim was dead. He poured himself a drink and then, taking Savage’s wallet, television set, and keys, drove off in the victim’s car. At trial, an autopsy pathologist testified that Savage had been stabbed 44 to 46 times.

### The *Time* and *Newsweek* Articles

#### *Time Period I: 1946–1968*

The author of one early, mid-century *Newsweek* article remarked, “Like skin disease and real poverty, sodomy is one of those enduring evils not generally favored as dinner table conversation . . .” (*Newsweek*, 16 Nov. 1953, p. 35). Indeed, in the decades following the “discovery” of homosexuality by late-nineteenth-century sexologists, discussion of the subject, in large part, had been confined to the domains of “experts”—the scientists who identified, defined, and pathologized it; the psychiatrists intent on “curing” it; a government determined to control it; legislators and justices bent on criminalizing and punishing it. Nevertheless, following the world wars, the subject of homosexuality began increasingly to dot the landscape of popular discourse. With the publication of the Kinsey Report in the late 1940s, and continuing throughout the 1950s and 1960s with the panic in Washington over the “discovery” of homosexuals in government employ, and decriminalization of *la vice anglais*<sup>8</sup> looming just across the Atlantic, the subject was increasingly visible in the public sphere in America such that, by 1966, an essay in *Time* began by lamenting, “It used to be ‘the abominable crime not to be mentioned.’ Today it is not only mentioned; it is freely discussed and widely analyzed” (*Time*, 21 January 1966, p. 54).

<sup>8</sup> Translated, this means “the English vice,” a popular French term for homosexuality.



A total of only 43 articles addressing the topic of homosexuality were published in *Time* and *Newsweek* between January 1946 and December 1968, an average of less than two articles per year. During this time period, the maximum annual number of articles never exceeded five. These relatively few articles, nevertheless, represented an enormous increase over the preceding years, during which homosexuality went virtually unmentioned in mass circulation newsmagazines and may well have been perceived as a barrage of discourse on the subject in the eyes of mid-century Americans.<sup>9</sup>

During the first part of this initial period, popular discussion of homosexuality was largely concerned with what homosexuals were and where they were to be found. The government's discovery and purge of homosexuals among its rank and file, coupled with the public's growing awareness and general fearfulness of homosexuality, generated much of the discourse about homosexuality during the 1950s. Later, once the "true nature" of homosexuality and the extent of its prevalence had been exposed, popular discourse turned to the consideration of appropriate social reactions to it. Accordingly, articles published in *Time* and *Newsweek* during the 1960s often bore such titles as "To Punish or Pity?" (*Newsweek*, 11 July 1960, p. 78); "Sin or Crime" (*Newsweek*, 21 Feb. 1966, p. 54); and "Dealing with Deviates" (*Time*, 30 Dec. 1966, p. 17).

Coding of the articles published in *Time* and *Newsweek* during this period revealed a strong penchant for discussing homosexuality in terms of the four classic scripts defined in the previous section. Almost 91% of the 43 articles published were coded as having drawn upon at least one of the four scripts. Certain of the scripts appear to have suited the purposes and prejudices of mid-century Americans more than others. Throughout this period, discussions of homosexuality were particularly prone to portray homosexuals as "sick," or mentally ill, with 34 (79%) of the 43 articles on homosexuality that appeared in *Time* and *Newsweek* from 1946 through 1968 drawing on the sick script.

One 1966 article from *Time* is especially noteworthy insofar as it stands head-and-shoulders above any other article published during this time period, both in the tone of authoritative finality with which it pronounced judgment on homosexuals as well as in the

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<sup>9</sup> Prior to 1946, references to homosexuality in *Time* and *Newsweek*—as well as in other popular magazines for that matter—were rare. When the subject was mentioned, it was most often in the context of reviewing the occasional literary or dramatic rendering of the subject (e.g., *Time* first printed the word *homosexual* in its 1930 review of Hemingway's *For Whom the Bell Tolls*, entitled "Death in Spain."). *Time* published two articles (1934, 1941) that briefly mentioned homosexuality in the context of advocating conjugal visits for incarcerated men. *Time*'s first feature article addressing the subject, "The Lonergan Case" (3 April 1944, pp. 68–70), reported on the psychopathologies of a reportedly homosexual male who had murdered his wife. The first feature article to deal with the subject in *Newsweek* was published within the time frame of this analysis (i.e., after 1946).

degree to which it called upon homosexual stereotypes—in particular, the sick script. “The Homosexual in America” (*Time*, 21 January 1966) accused *all* homosexuals of an inability to see life as a whole; as lacking “the deep seriousness over certain things that normal men take seriously” (*Time*, 21 January 1966, p. 40); and as universally suffering from depression, guilt, megalomania, self-hatred, and an irrepressible loathing for one another. The article concluded with the following pronouncement:

[Homosexuality] is a pathetic little second-rate substitute for reality, a pitiable flight from life. As such it deserves fairness, compassion, understanding and, when possible, treatment. But it deserves no encouragement, no glamorization, no rationalization, no fake status as a minority martyrdom, no sophistry about simple differences in taste—and, above all, no pretense that it is anything but a pernicious sickness (*Time*, 21 January 1966, p. 41).

What is most interesting about this period is not so much what changed over time, but rather what did not. Rather than reflecting any change, the articles that appeared toward the end of this time period were more a summation of the notions that had preceded them. Reliance on the use of stereotypes in representing homosexuals kept pace with the increasing volume of discourse on the subject over time. Thus the way in which homosexuality was talked about can be said to have remained largely unchanged across this time period. That is, in 1968, the content of public discourse about homosexuality remained as rooted in scripts and stereotypes as it had in 1946, when popular discussion of the topic amounted to little more than a faint whisper.

### ***Time Period II: 1969–1980***

A total of 61 articles that discussed homosexuality were published between January 1969 and December 1980. The mean number of articles published annually during this period increased over the previous period from an annual average of less than two articles between 1946 and 1968 to an annual average of more than five articles that discussed homosexuality. Moreover, there were substantially more articles published during the second half of this period (37) than during the first half (24).

Examination of the content of these articles revealed that the expanding discourse about things homosexual during this 12-year period often centered on reports of, discussions about, and reactions to ideas and events generated by the rapidly proliferating liberation movement. Indeed, nearly half of the articles bore titles such as “Gay Pride,” “Gay Power,” “Gay Manifesto,” “Gays on the March,” and “Rights for Homosexuals?” Similarly, several articles were concerned with events related to the changing mood and

status of the homosexual community, such as the de-medicalization of homosexuality by the American Psychological Association and the emergence of gay religious and political organizations. At the same time, the anti-homosexual message of Anita Bryant's "Save Our Children" crusade garnered considerable attention in both *Time* and *Newsweek*.

In contrast to the articles published during Time Period I, the majority of articles published between 1969 and 1980 did not draw upon any of the classic scripts. Only 36% of the articles in Time Period II drew on at least one script, while, as previously noted, 91% of the articles in the preceding time period drew upon one or more scripts in their discussion of homosexuality.

As in the previous period, the articles in Time Period II favored some scripts over others. During this period, the predator script replaced the sick script as the modal category, with 23% of the articles published drawing on that script. Many of the articles from this period that called upon the predator script portrayed homosexuals as "recruiters," as intent on swelling the ranks of homosexuals as on satisfying their own perverted lust. Articles reporting on Bryant's "Save Our Children" crusade accounted for many of the instances in which homosexuals were discussed as predators during Time Period II. In general, Bryant's grievance centered on a Dade County, Florida, ordinance that Bryant claimed would mandate the hiring of homosexual teachers, who would lead impressionable youth into a life of sodomy and abominations against God.

Likewise, "The Chickenhawks" (*Newsweek*, 30 April 1973), another article from the same period, highlighted the allegedly predatory nature of homosexuals. This article focused on the plight of runaway boys, allegedly recruited by modern-day, queer "Fagins" into bands—not of pickpockets—but of youthful male prostitutes. Such boys, the article suggested, would "from now on . . . sell [themselves] to middle-aged men, who will eagerly pay up to \$100 for sex with a young boy" (*Newsweek*, 30 April 1973, p. 71). In contrast to articles calling on the predator script in the preceding period, "The Chickenhawks," like the articles reporting on Bryant's campaign, imagined predatory homosexuals more as pedophiles and "recruiters" than as a danger to the heterosexual integrity of grown men.

Taken as a whole, Time Period II differed from the previous time period not only in terms of the percentage of articles published that drew upon the four classic scripts, but also in the overall nature of discussions about homosexuality. The continual reiteration of what historically had been "common knowledge" about homosexuality was interrupted by the injection of new ways of talking about homosexuals that did not draw on the four scripts for which the data in this analysis were coded. In short, the use of the four scripts ceased to be the modal way of talking about homosexuals.

Instead, discussion increasingly focused on the growing visibility and momentum of the gay liberation movement, as well as on imagining how and where gays might—or might not—fit into a society that had previously sought to eradicate them.

### ***Time Period III: 1981–2003***

Perhaps the most outstanding feature of the group of articles published between 1981 and 2003 is their sheer number. In these 23 years, 236 articles that discussed homosexuality appeared in *Time* and *Newsweek*—twice the number of articles that had appeared in the two newsweeklies in the entire 35 years prior. The vast number of articles that discussed homosexuality during this time period is indicative of the growing curiosity about, and visibility of, homosexuals as they increasingly integrated into the American social fabric. Accompanying this integration were the controversies generated by demands for social equality.

The mean number of articles published annually rose from just over five in Time Period II to more than 10 in Time Period III. Of the 236 articles published in Time Period III, however, only 54 drew on at least one script. That figure represents a decline from Time Period II of approximately 16% and a decline of about 71% from Time Period I.

As noted in the analysis of Time Period II, the 1970s witnessed a decline in the overall tendency to discuss the entire homosexual population in terms of the four classic scripts. In Time Period III, that change appears even more pronounced. In large part, during this final period, the use of scripts appears to have been reserved for discussions of either the most deviant of deviants—pedophiles and homosexual serial killers, for example—or in talking about homosexual “fringe groups,” especially those identified with “exotic” sexual practices.

As was the case in previous time periods, the articles published between 1981 and 2003 called upon some of the scripts more often than others. Indeed, despite the de-medicalization of homosexuality—which had officially occurred during the preceding period—of the articles published between 1981 and 2003 that called upon scripts, those calling upon the sick script again became the modal category. However, they represented only 12% of the total articles published during the third time period, a decline from Time Period II of approximately 4% and a decline of 67% from Time Period I. Nevertheless, discursive representations of the “sick” homosexual clearly survived de-medicalization and continued to be deployed sporadically throughout Time Period III.

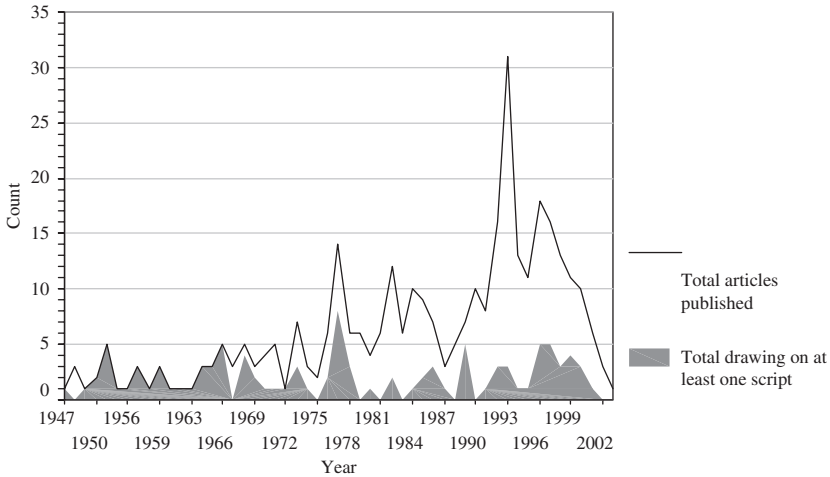
In 1981, for example, “The Gay World’s Leather Fringe” (*Time*, 24 March 1980, pp. 74–5) promised readers a voyeuristic excursion into the gay leather scene—a hyperbolic peek into the

world of “marginal marginal” sexuality. From the outset, however, the author’s unabashed conflation of sadomasochistic and homoerotic desire—as well as his deployment of the sick script to explicate the psychodynamic underpinnings of each—reveals the article to be less a sexual travelogue and more an indictment of homosexuality as a whole. In depicting gay men compulsively wandering through a dark and dangerous urban landscape in search of the bizarre sexual thrills they endlessly crave, the author identifies danger as an element of homosexual cruising in general and a prerequisite of homoerotic arousal. Indeed, the article ultimately traces the root cause of both gruesome “homosexual murders” and mutilations, as well as sadomasochistic desire in general, to a Freudian “power struggle” that it imagines as inherent in all manifestations of male-on-male sexuality. The subtitle of “Leather Fringe,” which asks, “Do homosexual males consciously seek danger?” clearly speaks to the content of this 1981 article more accurately than does the title itself.

Interestingly, analysis of the data across the entire 58-year period revealed that, despite the general decline in the percentage of articles that called upon the classic scripts, the average number of articles that did so annually remained relatively constant across the entire 58 years that comprise the three time periods. In Time Period I, 1.7 articles annually called upon at least one of the four scripts. In Time Period II, 1.8 articles published annually called upon at least one script. In Time Period III, an annual total of 2.2 articles called upon at least one of the four classic scripts. In substantive terms, there was a “baseline” volume of discourse that remained constant, regardless of the volume and content of additional knowledge in circulation. What actually changed over time was not so much the number of articles that called upon the four classic scripts, but the number that did not.

Overall, this phenomenon produced an increasing—albeit somewhat fluctuating—disparity in the total number of articles that drew on the four classic scripts coded for in this study and those that did not (Figure 1). Interestingly, analysis of the data derived from the defense narratives indicated that, when the aforementioned disparity increased, there was an accompanying increase in the tendency of the narratives to call upon the four scripts. Even the single narrative in Time Period I that drew upon the scripts did so in the only year of that period in which there was any discernible disparity between the number of articles that did and did not draw on the four scripts.

When the two data sets used in this study were combined for analysis, a significant, positive relationship was revealed between the percentage of articles not relying on the scripts and the number of narratives that did.<sup>10</sup> That is, as the percentage of articles that



**Figure 1. Total Articles Published Across Entire Time Period of Interest (1946–2003) Contrasted with Total Articles that Drew on At Least one of the Four Classic Scripts of Homosexuality.**

drew on the four classic scripts decreased, there was a corresponding increase in the number of defendants’ narratives that did rely on them. Moreover, as the ubiquitous homosexual stereotypes that permeate popular discourse became ever more diluted by the accumulation of new, or different, knowledge—when homosexuals were represented in the popular domain largely in terms that did not reflect the stereotypes captured by the four scripts—there appeared to be an increased tendency on the part of those seeking to mitigate their culpability for homicide to rhetorically reconstitute these notions in the courtroom.

## Discussion

As popular media representations of homosexuals increasingly turned on new knowledge—no doubt drawing on emerging, or alternative, scripts rather than those coded for in this study—there was a corresponding increase in the iteration of the classic, stereotypical scripts. An explanation of these seemingly counter-intuitive empirical findings may be found in recalling what is known about the nature of hegemony—namely, that it is not a static condition. Once in place, hegemony does not remain so indefinitely. Rather, it emerges and it dissipates or, as Hirsch and Lazarus-Black (1994) note, hegemony is “subject to continual negotiation . . .” (1994:8).

<sup>10</sup> ( $r = 0.682, p = 0.007$ ).

Especially in what Swidler (1986) has called “unsettled times,” periods of social modulation or transformation, “[b]ursts of ideological activism occur” (1986:279). During such periods, new ideologies emerge to compete with the hegemonic or “common sense” worldview, as well as with other emergent and existing ideologies. In the legal domain, where multiple moralities compete for ideological ascendancy, law is seen to reinforce hegemony to the extent that it embraces the taken-for-granted worldview. However, as Calavita (2001) contends, the law also has counterhegemonic or “de-constitutive” (2001:108) potential. That is, during unusually “unsettled cultural periods,” when an ascendant ideology is in the process of establishing itself,” (2001:108) the law may be caught endorsing a worldview that is inconsonant with dominant cultural knowledge. In these “deconstitutive moments” (2001:109), not only are the law’s ideological underpinnings exposed but, in showcasing the “garish features” of an unpopular or outmoded moral vision, the law itself may hasten the cultural demise of the very moral order it affirms.

To illustrate the way in which the struggle for ideological domain and power occur, Comaroff and Comaroff (1991) have conceptualized a “heuristic continuum” (1991:26) with hegemony occupying one pole, and ideologies—the multiple systems of values and beliefs belonging to particular social groups—occupying the other. Unlike the naturalized, hegemonic worldview, ideologies are by no means taken for granted. Rather, they are open to contestation and, therefore, must be more highly articulated. However, given a favorable historical and structural climate, an ideology may, over time, achieve a degree of dominance such that it becomes increasingly less contested and thus moves closer to the hegemonic pole. Conversely, when hegemony unravels, the ideological nature of the previously taken-for-granted, normative reality is exposed. Thus it becomes open to contestation and must be increasingly articulated to maintain legitimacy.

In an article investigating the evolution of the meaning of hate crime statutes, Phillips and Grattet (2000) hypothesize that, over time, as the meaning of a statute becomes ever more settled, institutionalized, or “taken for granted,” the degree of “rhetorical work” required to justify that statute should decline (2000:586). The settling of meaning, Phillips and Grattet argue, reduces the need for discussion. Conversely, I suggest that, as meaning becomes *less* settled—when the “taken-for-grantedness” of a hegemonic worldview begins to crumble under challenge from an ascendant ideology—the degree of rhetorical work required to sustain its legitimacy increases.

At mid-century, there was little popular argument as to the nature of homosexuality. The parameters of what a homosexual male could be were largely defined by the four scripts coded for in

this study. He might be effeminate, sick, a predator, a monster, or some combination thereof. In the mid-century mind, he could be little else and, in that context, those who made use of the provocation doctrine needed to say little more than that they had been subject to a homosexual advance—the perversity of such a scenario could remain unstated.

Across the time period of interest in the current study, however, I suggest that the meaning of homosexuality became less settled, perhaps as a function of the corresponding proliferation of available scripts to define its parameters and, relatedly, the activism of gays and lesbians themselves. Drawing on notions expressed in Russo’s *The Celluloid Closet* (1987), Cooper (2004), for example, has suggested that there are five scripts, or archetypes, that characterize male homosexuals in contemporary popular culture—the “noble figure,” the “villain or deviant,” the “tragic” homosexual, the “excessively flamboyant” comedic homosexual, and the “beneficent friend to a heterosexual woman” (2004:521). Arguably, in light of recent media portrayals, a sixth could be added—the gay man as fashion/style consultant to heterosexual males.

I propose that the four scripts for which the data in the current study were coded are subsets of the second of Russo’s archetypes—the villain or deviant. This villain or deviant stereotype predates the other four scripts and constitutes what had been the hegemonic view of male homosexuals expressed in the provocation doctrine. As new knowledge has accumulated about homosexuality over the past several decades, new scripts, archetypes, or ideologies have emerged to challenge the hegemony of the four scripts for which the data in the current study were coded. As the hegemonic power of the effeminate/sick/predatory/monstrous homosexual has been challenged by a variety of new scripts, there has been a corresponding increase in the amount of rhetorical work required of defendants seeking to employ the homosexual advance defense.

Notwithstanding the increased rhetorical effort required, the homosexual advance/homosexual panic defense continues to be invoked by defendants in American courtrooms with some regularity. Transgendered and transsexual victims have joined male “homosexuals” on the list of “provocateurs,” whose sexual advances have allegedly caused “otherwise reasonable” men to kill. Recalling Nourse’s (1997) words concerning these and similar cases, the invocation of a provocation defense is not a call for sympathy, but rather a demand that jurors recognize a defendant’s murderous outrage as the innately human, understandable reaction of an ordinary, reasonable person. Thus, despite the seemingly enormous social change that has occurred across the past half-century, a place remains reified in law, within which the “reasonableness” of killing sexual transgressors continues not only to be



debated, but debated in terms that rhetorically reconstitute and perpetuate the particular homosexual subject defined by stereotypes that continue to haunt a culture in which they seem to have otherwise largely fallen out of favor.

These findings suggest a need for further research to more fully illuminate the process through which the once hegemonic may, under challenge, recede into ideology and, *possibly*, cultural extinction. The evidence indicating that the level of popular representations of homosexuals drawing on classic stereotypes remained virtually unchanged across the 58-year period suggests that certain ideologies may remain—or at least remain available—in the face of seemingly overwhelming, contradictory knowledge and social change. Further study is necessary to identify the mechanism(s) or agent(s) through which such ideologies are deployed, as well as to understand the implications of their continued circulation in a cultural milieu which, on its face, appears to have moved beyond them.

## **Appendix A: Statement Pairs Used to Code Data**

### **The “Effeminate” Script**

- (1) The “homosexual” is portrayed as a male displaying feminine affect or female physical characteristics, and/or
- (2) The “homosexual” is characterized as a third sex—neither fully male nor fully female.

### **The “Sick” Script**

- (1) The “homosexual” is portrayed as a “degenerate,” and/or
- (2) The “homosexual” is described as suffering from either a mental illness or an arrested emotional development.

### **The “Predator” Script**

- (1) The “homosexual” is portrayed as inclined to take advantage of individuals who are younger, incapacitated, and/or physically or emotionally weaker than he, and/or
- (2) The “homosexual” is depicted as one who characteristically uses lies and/or subterfuge to gain access to the object of his lust.

### **The “Monster” Script**

- (1) The “homosexual” is portrayed as inclined to use coercion, force, or violence to gain access to the object of his lust, and/or
- (2) The “homosexual” is depicted as driven by libidinal urges to actions and/or behaviors beyond those generally considered to be within normal human physical capacity.

## Appendix B Charges, Verdicts, and Appellate Decisions in the 14 Court Cases from which Data Were Obtained

Case	Primary Charge	Collateral Crimes	Conviction	Appellate Decision
<i>People vs. Zalzke</i> (1949)	1st degree murder	Grand theft auto	2nd degree murder+grand theft (auto)	Affirmed
<i>People vs. Green</i> (1956)	1st degree murder	Robbery	1st degree murder+robbery	Conviction affirmed; penalty remanded for retrial
<i>People vs. Stoltz</i> (1961)	1st degree murder	Grand theft+robbery	2nd degree murder+robbery+grand theft	Affirmed
<i>People vs. Taylor</i> (1961)	1st degree murder	None	2nd degree murder	Affirmed
<i>People vs. Long</i> (1974)	1st degree murder	Theft	1st degree murder	Affirmed
<i>People vs. Reyes</i> (1974)	1st degree murder	Robbery	1st degree murder+robbery	Affirmed
<i>People vs. Cornett</i> (1985)	1st degree murder	Robbery+grand theft auto	Voluntary manslaughter+robbery	Conviction affirmed; sentence amended
<i>People vs. Lang</i> (1989)	1st degree murder	Robbery	1st degree murder+robbery	Affirmed
<i>People vs. Turner</i> (1990)	1st degree murder	Robbery	1st degree murder+robbery	Affirmed
<i>People vs. Tapia</i> (1994)	1st degree murder	Robbery+burglary+assault with intent to cause great bodily harm +arson+grand theft	1st degree murder+all other charges	Affirmed
<i>People vs. Cain</i> (2002)	1st degree murder	Robbery	1st degree murder+robbery	Remanded for retrial
<i>People vs. Chavez</i> (2002)	Murder	Robbery+use of deadly weapon in commission thereof	2nd degree murder Voluntary manslaughter	Affirmed Conviction affirmed; remanded to lower court for redetermination of the amount of the fines imposed
<i>People vs. Estrada</i> (2002)	1st degree murder	Grand theft auto+robbery	2nd degree murder+grand theft auto	Affirmed
<i>People vs. Neal</i> (2002)	1st degree murder	Special circumstances	2nd degree murder	Affirmed

## References

- Calavita, Kitty (2001) "Blue Jeans, Rape and the 'De-constitutive' Power of Law," 35 *Law & Society Rev.* 89–116.
- Chen, C. P-L. (2000) "Provocation's Privileged Desire: The Provocation Doctrine, 'Homosexual Panic,' and the Non-Violent Unwanted Sexual Advance Defense," 10 *Cornell J. of Law and Public Policy* 195.
- Comaroff, Jean, & John Comaroff (1991) *Of Revelation and Revolution: Christianity, Colonialism and Consciousness in South Africa*, Vol. 1. Chicago: Univ. of Chicago Press.
- Conley, John M., & William M. O'Barr (1990) *Rules Versus Relationships: The Ethnography of Legal Discourse*. Chicago: Univ. of Chicago Press.
- (1998) *Just Words: Law, Language, & Power*. Chicago: Univ. of Chicago Press.
- Cooper, Evan (2004) "Decoding *Will and Grace*," 46 *Sociological Perspectives* 513–33.
- Coutin, Susan Bibler (1994) "Enacting Law through Social Practice: Sanctuary as a Form of Resistance," in S. Hirsch & M. Lazarus-Black, eds., *Contested States: Law, Hegemony and Resistance*. New York: Routledge.
- Dreyfus, Hubert L., & Paul Rabinow (1983) *Michel Foucault: Beyond Structuralism and Hermeneutics*, 2d ed. Chicago: Univ. of Chicago Press.
- Edwards, Tim (1994) *Erotics & Politics: Gay Male Sexuality, Masculinity and Feminism*. London: Routledge.
- Ewick, Patricia, & Susan S. Silbey (1995) "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative," 29 *Law & Society Rev.* 197–226.
- Fone, Byrne (2000) *Homophobia: A History*. New York: Picador USA.
- Gramsci, Antonio (1971) *Selections from the Prison Notebooks*. London: Lawrence & Wishert.
- Halperin, David M. (1995) *Saint = Foucault: Towards a Gay Hagiography*. New York: Oxford Univ. Press.
- Henry, Stuart, & Dragan Milovanovic (1999) *Constitutive Criminology at Work: Applications to Crime and Justice*. Albany: State Univ. of New York Press.
- Hirsch, Susan F., & Mindie Lazarus-Black (1994) "Introduction: Performance and Paradox: Exploring Law's Role in Hegemony and Resistance," in M. Lazarus-Black & S. F. Hirsch, eds., *Contested States: Law, Hegemony and Resistance*. New York: Routledge.
- Hunt, Alan (1990) "Rights and Social Movements: Counter-Hegemonic Strategies," 17 *J. of Law and Society* 309–28.
- (1993) *Explorations in Law and Society: Toward a Constitutive Theory of Law*. New York: Routledge.
- Klare, Karl (1979) "Law-Making as Praxis," 40 *Telos* 123–35.
- Lipjart, Arend (1975) "The Comparable—Cases Strategy in Comparative Research," 8 *Comparative Political Studies* 158–77.
- Mertz, Elizabeth (1988) "The Uses of History: Language, Ideology and the Law in the United States and South Africa," 22 *Law & Society Rev.* 661–85.
- Milovanovic, Dragan (1994) *A Primer in the Sociology of Law*, 2d ed. New York: Harrow & Heston.
- Murray, Stephen O. (1996) *American Gay*. Chicago: Univ. of Chicago Press.
- Nourse, Victoria (1997) "Passion's Progress: Modern Law Reform and the Provocation Defense," 106 *Yale Law J.* 1331–9.
- Phillips, Scott, & Ryken Grattet (2000) "Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law," 34 *Law & Society Rev.* 567–606.
- Russo, Vito (1987) *The Celluloid Closet*, revised ed. New York: Harper & Row.
- Sarat, Austin, & Thomas R. Kearns, eds. (1993) *Law in Everyday Life*. Ann Arbor: Univ. of Michigan Press.
- Sarat, Austin, et al. (1998) "The Concept of Boundaries in the Practices and Products of Sociolegal Scholarship: An Introduction," in A. Sarat et al., eds. *Crossing Boundaries:*

- Traditions and Transformations in Law and Society Research*. Evanston, IL: Northwestern Univ. Press.
- Silbey, Susan (1985) “Ideals and Practices in the Study of Law,” 7 *Legal Studies Forum* 79.
- Stake, Robert E. (1995) *The Art of Case Study Research*. Newbury Park, CA: Sage Publications.
- Swidler, Ann (1986) “Culture in Action: Symbols and Strategies,” 51 *American Sociological Rev.* 273–86.
- Terry, Jennifer (1999) *An American Obsession: Science, Medicine, and Homosexuality in Modern Society*. Chicago: Univ. of Chicago Press.
- Yin, Robert K. (1984) *Case Study Research: Design and Methods*, 1st ed. Beverly Hills: Sage Publishing.

## Cases Cited

- People v. Cain*, Cal. App. Unpub. LEXIS 7242 (Ct. App. 2002).
- People v. Chavez*, Cal. App. Unpub. LEXIS 12011 ( Ct. App. 2002).
- People v. Cornett*, 165 Cal. App. 3d 752 (Ct. App. 1985).
- People v. Estrada*, Cal. App. Unpub. LEXIS 9616, (Ct. App. 2002).
- People v. Green*, 47 Cal. 2d 209; 302 P2d 307 (Sup. Ct. 1956).
- People v. Lang*, 49 Cal. 3d 991; 782 P. 2d 627 (Sup. Ct. 1989).
- People v. Long*, 38 Cal. App. 3d 680 (Ct. App. 1974).
- People v. Neal*, Cal. App. Unpub. LEXIS 2414 (Ct. App. 2002).
- People v. Reyes*, 12 Cal. 3d 486; 526 P. 2d 225 (Sup. Ct. 1974).
- People v. Stoltz*, 196 Cal. App. 2d 258 (Ct. App. 1961).
- People v. Tapia*, 25 Cal. App. 4th 984 (Ct. App. 1994).
- People v. Taylor*, 189 Cal. App. 2d. 490 (Ct. App. 1961).
- People v. Turner*, 50 Cal. 3d 668; 789 P2d 887 (Sup. Ct. 1990).
- People v. Zatzke*, 33 Cal. 2d 480; 202 P2d 1009 (Sup. Ct. 1949).

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