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LINDSAY V THE QUEEN: HOMICIDE AND THE ORDINARY PERSON AT THE JUNCTURE OF RACE AND SEXUALITY

Abstract

Recently, in *Lindsay v The Queen,*[1] the High Court reaffirmed a place in Australian law for the 'homosexual advance defence'. The case involved the killing of a white man by an Aboriginal man for offering to pay for sex, exposing a number of problems with provocation and the ordinary person test at the intersection of race and sexuality. This article first unpacks the Court's reasoning to reveal a hidden assumption that the ordinary person is from the outset white and violently homophobic. The article then sketches a history of these incidents of ordinariness — tracing normalised whiteness and homophobia to the colonial era — in order to address the future of the ordinary person and the options for its reform. Unravelling conflicting Indigenous and queer law reform agendas, the article ultimately concludes that provocation in South Australia should be abolished or reformed to exclude the homosexual advance defence. However, because racism and homophobia can manifest in murder trials despite legal change, a broader cultural shift must accompany the reform of provocation. The lessons of history from the frontier can help to show other ways of being ordinary, allowing a pathway for ordinariness itself to be coloured and queered.

I Introduction: Facts and Queer Theory

In the early hours one morning in 2011, in a suburb south of Adelaide, an Aboriginal man killed a white man for offering to pay for sex. At his trial two years later, the accused sought to rely on the partial defence of provocation which operates to reduce what would otherwise be murder to manslaughter. The objective limb of the test of provocation centres on what an 'ordinary person' would do. The Full Court of the South Australian Supreme Court framed the case as one about sexuality, leading it to conclude that a non-violent homosexual advance, without more, can

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[1] (2015) 255 CLR 272 ('*Lindsay*').

never provoke a lethal response from the ordinary person. On appeal, the High Court emphasised the racial dimension of the case and found that the ordinary person — inscribed with the Aboriginality of the accused — is capable of losing self-control and forming an intention to kill when confronted with a gay proposition. This article traces these conflicting narratives of race and sexuality to two revelations about the nature of the ordinary person. That the ordinary person must be placed in the shoes of an Aboriginal person reveals that the ordinary person is always already white. That the ordinary person is liable to kill in defence of their heterosexual honour reveals that the ordinary person is violently homophobic.

By reference to deep-seated ideas about what is normal or ordinary, the ordinary person test draws upon societal norms with long histories, such as norms about gender. Indeed, the ordinary person test arose in Victorian England in tandem with particular norms about gender and violence in that era, which it continues to draw upon and enforce. This article proposes that the ordinariness of being white and violently homophobic has a similar cultural lineage. When the ordinary person test was first crafted in England in 1837,[2] the Frontier Wars were being waged at the edges of colonial authority across Australia. The following year was marred by the Myall Creek Massacre,[3] which stands out as emblematic of the brutal divide between colonists and Indigenous peoples, between 'us' and 'them'. Around the same time, the Molesworth Committee reported to the House of Commons in 1838 that the transport of convicts had led to rampant homosexuality in the Australian colonies.[4] Ordinary Australians suffer a collective amnesia about the Frontier Wars and the Molesworth Committee's findings, but the collective shame reverberates today in received ideas of ordinariness.

However, as a construct, the ordinary person is not predetermined by historical forces and can be changed. Options for reform include: eliminating the ordinary person test from provocation, adopting an ordinary Aboriginal person test, removing the homosexual advance defence from the ambit of provocation, and abolishing provocation altogether. This article argues that by one means or another, South Australia must address the homosexual advance defence. Yet each of these options for reform carries the risk of unintended consequences, such as contributing, even if marginally, to the over-representation of Indigenous people in prison. Reform may even fail to achieve the desired outcome of dispelling racist and homophobic narratives from the courtroom. The reason for this is that the ordinariness of being white and violently

2 *R v Kirkham* (1837) 7 C & P 115.

3 John Connor, *The Australian Frontier Wars 1788–1838* (UNSW Press, 2002) 102–3.

4 Select Committee of the House of Commons on Transportation, United Kingdom, *Report from the Select Committee of the House of Commons on Transportation; Together with a Letter from the Archbishop of Dublin on the Same Subject: and Notes by Sir William Molesworth, Bart, Chairman of the Committee* (1838) 18, 30 (*'Molesworth Committee Report'*).

homophobic can manifest in spite of legal change. Therefore, law reform must be accompanied by a wider cultural change. The ordinary must be queered.[5]

Queer theory provides a useful lens through which to explore the limits of ordinariness. Broadly, queer theory sees established sexuality and gender norms — and by extension all norms — as social constructs which have been made, and which, therefore, can be unmade. On this account, there is nothing immutable about being white, a man, or a heterosexual, and this revelation of mutability offers a way to undermine their self-evident ordinariness. However, queer theory's obsession with destabilising norms has given it a reputation for being anti-normative. The problem is that blameworthiness for killing — and the ordinary person test designed to capture that blameworthiness — is by definition normative. The need for a broader cultural shift to solve the problems posed by the ordinary person thus raises interesting questions for queer politics, not least of which is whether queer theory's disdain for normativity lies so at odds with notions of the ordinary, that it is a theoretical impossibility to attempt to queer the ordinary. Drawing upon a branch of queer thought that places the queer inside the norm, this article argues that there is an avenue available for queering and colouring the ordinary from within. To do this, we must normalise the potential for the other in the ordinary. One way to draw out the potential for other ways of being is by recourse to history, by remembering forgotten perspectives from the 'other' side of the frontier and by remembering the homosexual potential of mateship on the frontier.

II A Victim and a Defendant: Andrew Negre and Michael (Sun Sun) Lindsay

Andrew Negre stood out in a crowd. He was very tall and striking with long, blond, shiny hair.[6] He was confident yet easy to get along with, the kind of guy who could walk into a bar full of strangers and leave with friends. He was by all accounts Caucasian. On 31 March 2011, Andrew went with his girlfriend to the Hallett Cove Tavern on the outskirts of Adelaide in South Australia. As the night wore on, she wanted to go home to bed while he wanted to party on. They fought and parted ways. Then Michael Lindsay walked in. Michael went by the name Sun Sun. He had an intellectual disability that made him eager to please and be accepted, and he had a habit of showing off.[7] As far as labels went, he was an Aboriginal man, though over the coming years, in all the dissecting of what made him tick, his Aboriginality was never given any more depth than a label. Andrew and Sun Sun struck up some

5 'Queer' in this article is used not in the sense of an umbrella term for lesbian, gay, bisexual, trans and/or intersex, but as a mode of being that deviates from the norm. Because queer is anti-normative, it resists the logic of identity constructs. Likewise, 'to queer' is to question the normativity of being an identity as well as to destabilise binaries like 'man' or 'woman', 'gay' or 'straight' and 'black' or 'white', in order to open up a space for queer modes of being.

6 *R v Lindsay* (2014) 119 SASR 320, 351 [111].

7 Ibid 344 [75].

conversation in the tavern and went back to Sun Sun's house, where a small group had gathered, to continue the party.[8]

The group sat around drinking under the back pergola. At one point, the conversation drifted to something about someone being gay. This must have given Andrew the idea to straddle Sun Sun and grind his hips back and forth. Sun Sun reacted with a threat. 'Don't go doing that sort of shit or I'll hit you,' he said. His de facto wife growled and protested, 'he's not gay'. Andrew apologised and laughed it off as a joke and the tension soon dissipated.[9]

As the party stretched into the early hours of the morning, the group moved inside. Andrew grew tired and Sun Sun offered him a spare bed to sleep in. But Andrew did not want to be alone; he wanted Sun Sun to join him. Andrew's desire for company manifested in spite of Sun Sun's earlier threat of violence. Perhaps Andrew was lost in the grip of *jouissance* — 'the paradoxical form of pleasure that may be found in suffering'[10] — or the 'death instinct' that '[s]ex is worth dying for'.[11] Whatever drove Andrew, his pleading with Sun Sun culminated in him saying, in front of the others, 'I'll pay you for sex then'. 'What did you say cunt?' Sun Sun said, and Andrew asked again, offering to pay several hundred dollars. Sun Sun punched him twice in the face and he collapsed to the floor. Sun Sun kept punching Andrew in the head, then grabbed a fistful of hair and began slamming his head into the ground. Andrew struggled to get up but Sun Sun asked another man present, Luke Hutchings, to hold him down. With Andrew still offering to pay money, Sun Sun rifled through Andrew's pockets, Andrew's pants somehow coming off in the process. At some point, Sun Sun armed himself with a knife, put on gloves, and stabbed Andrew repeatedly in the arm, chest, and abdomen approximately 25 times.[12] One of the stab wounds completely severed the aorta.[13] The blood loss would have caused Andrew to lose consciousness within 20 to 30 seconds, and to die minutes later.[14] Apparently in order to defuse the situation, Luke then took the knife off Sun Sun and slit Andrew's throat to show he had already died.[15] A week later, Andrew's body was found dumped in a creek bed nearby.[16]

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8 Ibid 348 [93].

9 Ibid 324 [10] (Gray J), 349–50 [103]–[107] (Peek J).

10 Tim Dean, 'Lacan and Queer Theory' in Jean-Michel Rabaté (ed), *The Cambridge Companion to Lacan* (Cambridge University Press, 2003) 238, 248.

11 Michel Foucault, *The Will to Knowledge: The History of Sexuality Volume 1* (Robert Hurley trans, Penguin Books, 1998) 156 [trans of: *La volonté de savoir* (first published 1976)].

12 Transcript of Proceedings, *Lindsay v The Queen* [2017] HCATrans 131 (16 June 2017) 127.

13 *R v Lindsay* (2014) 119 SASR 320, 353 n 39.

14 *Lindsay* (2015) 255 CLR 272, 277 [11] (French CJ, Kiefel, Bell and Keane JJ).

15 Transcript of Proceedings, *Lindsay v The Queen* [2017] HCATrans 131 (16 June 2017) 401–2.

16 *R v Lindsay* (2013) 117 SASR 307, 308 [3].

III The Ordinary Person

At his first trial in the South Australian Supreme Court in 2013, Sun Sun's primary position was not that Andrew's homosexual advances had provoked him to lose control. Instead, his lawyers argued that the prosecution could not prove beyond a reasonable doubt that Sun Sun had delivered the fatal blow. Nonetheless, given the evidence of the two homosexual advances, the trial judge directed the jury to consider provocation.[17]

Provocation operates effectively as a partial defence to murder: it 'reduce[s] what would otherwise be murder to manslaughter'.[18] The idea is that if the victim causes their own demise by saying or doing something that 'stir[s the] blood'[19] of the accused into a homicidal rage, then, as a concession to 'human frailty',[20] the killing should be labelled as manslaughter rather than murder. The partial defence succeeds if the jury is satisfied that two things are reasonably possible. First, that the provocative conduct actually caused the accused to lose self-control and kill 'before he has had the opportunity to regain his composure'.[21] Second, that the provocative conduct — measured in gravity from the perspective of the accused — was capable of causing an ordinary person to lose self-control and form an intention to kill or cause grievous bodily harm.[22]

There is an obvious moral dimension to provocation. In labelling the killing as manslaughter rather than murder, provocation assigns less culpability and enlivens a lower sentencing range. Judges sometimes speak of provocation as 'justifying' or 'excusing' the violent reaction.[23] With more nuance, academics have traced the development of provocation from a justificatory model in the Middle Ages — when angry outrage at an insult to honour was seen as virtuous — to the present-day excusatory model. This model provides that anger arising from loss of control is 'entirely beyond the

17 See *R v Lindsay* (2014) 119 SASR 320, 329 [22].

18 *Lindsay* (2015) 255 CLR 272, 278 [15] (French CJ, Kiefel, Bell and Keane JJ).

19 *Royley's Case* (1611) Cro Jac 296; 79 ER 254.

20 *R v Hayward* (1833) 6 C & P 157, 159 (Tindal CJ) ('in compassion to human infirmity'); *Parker v The Queen* (1963) 111 CLR 610, 627 (Dixon CJ), 652 (Windeyer J); *Johnson v The Queen* (1976) 136 CLR 619, 656 (Gibbs J); *Lindsay* (2015) 255 CLR 272, 284 [28] (French CJ, Kiefel, Bell and Keane JJ).

21 *Masciantonio v The Queen* (1995) 183 CLR 58, 66 (Brennan, Deane, Dawson and Gaudron JJ). See also *Lindsay* (2015) 255 CLR 272, 278 [15] (French CJ, Kiefel, Bell and Keane JJ).

22 *Masciantonio v The Queen* (1995) 183 CLR 58, 66 (Brennan, Deane, Dawson and Gaudron JJ); *Lindsay* (2015) 255 CLR 272, 278 [15] (French CJ, Kiefel, Bell and Keane JJ).

23 *R v McCarthy* [1954] 2 WLR 1044, 1047 (Lord Goddard CJ) ('when we say "excused" we mean enough to reduce the killing to manslaughter'); *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119, 1121 (Lord Simonds LC), quoting with approval the direction given by the trial judge, 'the provocation must be such as would reasonably justify the violence used'.

reach of rational control or moral judgment'[24] but 'can in appropriate circumstances be understood, sympathised with, and therefore be partially condoned or excused'.[25] Whereas the moral quality of the provocative conduct was central to justification, moral judgment is hidden in the excusatory model. Nowhere in the test of provocation outlined above is the question asked: *should* the accused have responded to the provocation with violence? Instead it asks: *would* the ordinary person have responded with violence? Yet, as Alan Norrie points out, 'justificatory issues retain a subterranean importance: that is, they continue to be there, but are impossible to rationalize within the law's theoretical structure'.[26] For Mayo Moran, this plays out in the way that the ordinary person 'seamlessly intertwines the normative and descriptive': characteristics that matter normatively as well as characteristics that simply go to notions of what is ordinary or normal.[27] This article posits that normativity arises in questions about what is normal or what may be excused, no less than in questions about what may be justified. Suffice to say for now, lurking somewhere in the ordinary person test is a moral judgment about the blameworthiness of killing.

After four weeks of hearing evidence and nearly two days of deliberation, the jury found Sun Sun guilty of murder by unanimous verdict, and found his co-accused, Luke Hutchings, guilty by majority verdict of the alternative charge of assisting an offender.[28] The jury must have come to one of two conclusions: either that Sun Sun was not provoked or that the ordinary person would not have been. There was never any real doubt that Andrew's offer to pay for sex might have subjectively caused Sun Sun to lose control,[29] though it was also open to the jury to find that in the time it took Sun Sun to obtain a knife, put on plastic gloves and rifle through Andrew's pockets, the moment of 'suspend[ed] … reason'[30] had passed.[31] In any event, the real dispute centred on what the ordinary person would have done.

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24 Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, 1992) 78. See also *R v Smith* [2001] 1 AC 146, 159–61 (Lord Hoffmann).

25 Alan Norrie, 'The Coroners and Justice Act 2009 — Partial Defences to Murder (1) Loss of Control' [2010] *Criminal Law Review* 275, 279.

26 Alan Norrie, 'The Structure of Provocation' (2001) 54 *Current Legal Problems* 307, 324.

27 Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press, 2003) 2.

28 Tessa Akerman, 'SA Jury Convicts One Man of Murdering Andrew Negre, Finds Second Guilty of Assisting an Offender', *The Advertiser* (online), 15 August 2013 <http://www.adelaidenow.com.au/news/south-australia/sa-jury-convicts-one-man-of-murdering-andrew-negre-finds-second-guilty-of-assisting-an-offender/news-story/30e8df3c37f76465189f7d2fae6ab121>.

29 *R v Lindsay* (2014) 119 SASR 320, 378 [228] (Peek J); *Lindsay* (2015) 255 CLR 272, 278 [13] (French CJ, Kiefel, Bell and Keane JJ), 302 [86] (Nettle J).

30 Edward Hyde East, *A Treatise of the Pleas of the Crown* (Butterworth, 1803) vol 1, 238.

31 When it is further considered that Sun Sun said, 'I can't let him go, he'll go to the cops', and that he told his sister to stop filming what was going on with her smartphone, it seems quite plausible that he was the 'master of his mind' when he began stabbing Andrew: *R v Lindsay* (2014) 119 SASR 320, 338 [60] (Gray J); Transcript of Proceedings, *Lindsay v The Queen* [2017] HCATrans 131 (16 June 2017) 388–420.

On appeal to the Full Court of the Supreme Court, Sun Sun argued that the trial judge had erred in the directions he gave to the jury about provocation. A majority agreed but found it did not matter. The objective limb could not be satisfied in the circumstances of the case, such that provocation should not have been left to the jury in the first place. Justice Peek — with whom Kourakis CJ agreed — focused on the threshold question of law: was there sufficient evidence on which a reasonable jury could find provocation? This is a question for the judge and not the jury. The rationale for the threshold question is 'the necessity of applying an overriding or controlling standard for the mitigation allowed by law'.[32] This guiding hand of the judge allows the courts to treat the objective test as an 'instrument of policy'.[33] After all, the purpose of the objective test is to lay down 'the minimum standard of self-control required by the law'.[34] The House of Lords famously wielded this instrument of policy in the case of *Holmes v Director of Public Prosecutions*.[35] Viscount Simon held that as a matter of law, words alone, other than in circumstances of a most extreme and exceptional character, cannot amount to provocation.[36] In stating the law in this way, the House of Lords was well aware it was raising the bar. Words alone had previously been enough.[37] But, as Viscount Simon said, 'as society advances, [the law] ought to call for a higher measure of self-control in all cases'.[38] Back in Australia, Gibbs J applied the same progressivist logic in *Moffa v The Queen*:

> The question has to be decided in the light of contemporary conditions and attitudes, for what might be provocative in one age might be regarded with comparative equanimity in another, and a greater measure of self-control is expected as society develops.[39]

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32 *Packett v The King* (1937) 58 CLR 190, 217 (Dixon J), cited with approval in *Parker v The Queen* (1963) 111 CLR 610, 660 (Windeyer J); *Lindsay* (2015) 255 CLR 272, 283 [24] (French CJ, Kiefel, Bell and Keane JJ).

33 *R v Lindsay* (2014) 119 SASR 320, 380 [234] (Peek J), which Nettle J said was an apt description on appeal: *Lindsay* (2015) 255 CLR 272, 300 [82].

34 *Masciantonio v The Queen* (1995) 183 CLR 58, 66–7 (Brennan, Deane, Dawson and Gaudron JJ). See also *Stingel v The Queen* (1990) 171 CLR 312, 327 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

35 [1946] AC 588 ('*Holmes*').

36 Ibid 600 (Lords Macmillan, Porter, Simonds and du Parcq agreeing), reversed in the United Kingdom by the *Homicide Act 1957* (UK) 5 & 6 Eliz 2, c 11, s 3, but largely reintroduced as part of defence of 'loss of control' by the *Coroners and Justice Act 2009* (UK) c 25, ss 54–6. *Holmes* was also incorporated into Australian common law and code jurisdictions: see, eg, *Criminal Code Act 1899* (Qld) sch 1, s 304(2); *Moffa v The Queen* (1977) 138 CLR 601, 605 (Barwick CJ), 613 (Gibbs J), 619 (Stephen J), 620 (Mason J).

37 *R v Rothwell* (1871) 12 Cox CC 145, 147 (Blackburn J).

38 *Holmes* [1946] AC 588, 601 (Lords Macmillan, Porter, Simonds and du Parcq agreeing). See also *R v Smith* [2001] 1 AC 146, 173 (Lord Hoffmann).

39 (1977) 138 CLR 601, 616–17. Although his Honour was in dissent, this aspect of his Honour's reasons was subsequently adopted by the whole court in *Stingel v The Queen* (1990) 171 CLR 312, 327 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

For Peek J in the South Australian Full Court, the time had come to raise the bar again and to extricate the law from its complicity in legitimising homophobic violence. His Honour said:

> There is no doubt that in former times, when acts of homosexuality constituted serious crime and men were accustomed to resort to weapons and violence to defend their honour, a killing under the provocation present here would have been seen as giving rise to a verdict of manslaughter rather than murder. However, times have very much changed … I have come to the firm view that in 21st century Australia, the evidence taken at its highest in favour of the appellant in the present case was such that no reasonable jury could fail to find that an ordinary man could not have so far lost his self-control as to attack the deceased in the manner that the appellant did. Accordingly, the judge was incorrect in his decision to leave the partial defence of provocation to the jury in this case.[40]

However, at this point, Peek J was required to do some fancy footwork to square his ruling with *Green v The Queen*,[41] which stood as High Court authority that a non-violent homosexual advance *can* provoke an ordinary person into killing their would-be seducer. In that case, Malcolm Green had responded to 'gentle' touching[42] from another man by 'punch[ing him] about thirty-five times, ram[ming] his head repeatedly against a wall and stab[bing] him ten times with a pair of scissors as he … rolled off the bed'.[43] When police later questioned Malcolm, he said, '[y]eah, I killed him, but he did worse to me'.[44] There are some parallels in the way *Green* and *Lindsay* proceeded through the courts. As with Sun Sun, the jury found Malcolm guilty of murder at first instance. On appeal, the New South Wales Court of Criminal Appeal found that the trial judge had fallen into error, but that no injustice had occurred because provocation was not open on the facts. According to Priestley JA, as a matter of law, 'amorous physical advances' could not satisfy the objective test of provocation.[45] His Honour held, 'I do not think that the ordinary person could have been induced by the deceased's conduct so far to lose self-control as to have formed an intent to kill or inflict grievous bodily harm'.[46] On further appeal, the High Court controversially found that the ordinary person is liable to kill when faced with a

40 *R v Lindsay* (2014) 119 SASR 320, 380 [235]–[236]. For obiter prefiguring this conclusion, see *R v Hajistassi* (2010) 107 SASR 67, 90 [105] (Kourakis J).

41 (1997) 191 CLR 334 ('*Green*').

42 Ibid 360 (McHugh J), quoting Malcolm Green.

43 Bronwyn Statham, 'The Homosexual Advance Defence: "Yeah, I Killed Him, but He Did Worse to Me" *Green v R*' (1999) 20 *University of Queensland Law Journal* 301, 303.

44 *Green* (1997) 191 CLR 334, 391 (Kirby J), quoting Malcolm Green.

45 *R v Green* (Unreported, New South Wales Court of Criminal Appeal, 8 November 1995) 25–6 (Ireland J agreeing). Cf 23–4 (Smart J, dissenting).

46 Ibid 26 (Priestley JA).

non-violent homosexual advance.[47] Part of the reason for that conclusion was that the homosexual nature of the provocation was 'only one factor in the case'.[48] There was also what Brennan CJ called 'the sexual abuse factor'.[49] Malcolm believed that his sisters had been sexually abused by his father. He had never witnessed the abuse or been subject to it himself, but, in the eyes of the High Court, he therefore had a 'special sensitivity'[50] to a sexual advance from one adult man to another (rather than, it might be said, a sexual advance from an adult man to a prepubescent girl). According to the High Court, the ordinary person could indeed react the way Malcolm did once invested with his special sensitivity. Faced with the binding authority of *Green*, Peek J latched onto the absence of the 'sexual abuse factor' in this case and emphasised that he had arrived at his conclusion 'purely on a case specific basis'.[51] In seeking to raise the bar and make new law, he disavowed doing so.

On appeal, the High Court confirmed the court's policy role in setting the boundaries of provocation.[52] However, it again refused to exercise that power and rule that a non-violent homosexual advance can never amount to provocation in law. Of course, Peek J was bound by *Green*, but the High Court was not. It has 'undoubted authority' to overturn its own previous decisions.[53] In choosing, without discussion, to maintain the status quo,[54] the High Court again opted to send the message that ordinary men are liable to react to homosexual overtures with lethal violence. In terms of the moral dimension of provocation, this means both that homosexual advances are 'provocative' — opening up questions of whether the retaliation was justified and allowing a space for victim-blaming — and that the ordinary person is 'provocable' by homosexual advances — meaning that we can sympathise with and excuse the accused's homophobia. As Bronwyn Statham said in the wake of *Green*, the High Court 'condone[d] — it re-inscribe[d] as "justifiable," as "ordinary" — a reaction of extreme and excessive violence premised upon feelings of hatred, fear, revulsion and

47 *Green* (1997) 191 CLR 334, 346 (Brennan CJ), 357 (Toohey J), 369–71 (McHugh J). Cf 383–4 (Gummow J), 415–6 (Kirby J).

48 Ibid 370 (McHugh J).

49 Ibid 342.

50 Ibid 357 (Toohey J), 369 (McHugh J).

51 *R v Lindsay* (2014) 119 SASR 320, 380 [237], 381 n 122.

52 *Lindsay* (2015) 255 CLR 272, 283 [26] (French CJ, Kiefel, Bell and Keane JJ), 300 [82] (Nettle J).

53 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 18 [27] (French CJ, Kiefel, Bell, Gageler and Keane JJ), 45 [131] (Gordon J agreeing). Granted, on appeal the Crown did not seek leave to reopen *Green* (it sought to distinguish *Green*), and the High Court is ordinarily reluctant to depart from authority in the absence of argument on the point: cf *McCloy v New South Wales* (2015) 257 CLR 178, 281 [308] (Gordon J). However, the High Court's practice of requiring a party to seek leave to reopen authority before considering whether to do so is not an 'inflexible rule, and much will depend on the nature of and the court's "interest" in the issue': D F Jackson, 'The Lawmaking Role of the High Court' (1994) 11 *Australian Bar Review* 197, 208.

54 For example, Nettle J said simply 'the law remains now as it was then': *Lindsay* (2015) 255 CLR 272, 301 [84].

disgust, similarly re-inscribed as "justifiable" and "ordinary."'[55] Ordinary men, on this view, are likely to '[defend] the vulnerability of heterosexual identity by reacting against both sexual advances on a masculine body and the dishonour of objectification'.[56] Applied in this way, the function of the ordinary person test in setting societal expectations becomes, in truth, the policing of the heteronormative order, the punishment of those who transgress it, and the rewarding of those who enforce it, as violently as necessary.

As in *Green*, the reason why the High Court declined to take this step is that it saw 'a larger dimension' to Andrew's provocation than simply its homosexual nature.[57] For one thing, Andrew's proposition involved the very different, though equally queer (that is, deviant), sexuality of prostitution. Moreover, there was the racial dimension. As four of the judges said in a joint judgment:

> it was open to a reasonable jury to consider that an offer of money for sex made by a Caucasian man to an Aboriginal man in the Aboriginal man's home and in the presence of his wife and family may have had a pungency that an uninvited invitation to have sex for money made by one man to another in other circumstances might not possess.[58]

Likewise, Nettle J, in a separate concurring judgment, said, 'it is not impossible that a jury could reasonably infer that, because the appellant is Aboriginal, he perceived the deceased's conduct towards him to be racially based and for that reason especially insulting'.[59]

Sun Sun's barrister acknowledged that there was no evidence of the racial dimension,[60] but such evidence would not have been hard to find. Even within the gay community, Gary Lee has noted the prevalence of 'loaded assumptions that all Black men are "hot sex", "easy roots", "good fucks", "have big dicks", or that "they can never

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55 Statham, above n 43, 309.

56 Stephen Tomsen and Thomas Crofts, 'Social and Cultural Meanings of Legal Responses to Homicide among Men: Masculine Honour, Sexual Advances and Accidents' (2012) 45 *Australian & New Zealand Journal of Criminology* 423, 426.

57 *Lindsay* (2015) 255 CLR 272, 300 [81] (Nettle J).

58 Ibid 287 [37] (French CJ, Kiefel, Bell and Keane JJ), citing Transcript of Proceedings, *Lindsay v The Queen* [2015] HCATrans 52 (11 March 2015) 239–47 (M E Shaw QC).

59 *Lindsay* (2015) 255 CLR 272, 300 [81], citing *Masciantonio v The Queen* (1995) 183 CLR 58, 67 (Brennan, Deane, Dawson and Gaudron JJ).

60 Transcript of Proceedings, *Lindsay v The Queen* [2015] HCATrans 52 (11 March 2015) 243 (M E Shaw QC). See also *R v Lindsay* (2014) 119 SASR 320, 331 [29] (Gray J) (after noting that Sun Sun was an Aboriginal man, his Honour said that '[t]he evidence did not reveal any particular characteristic of Lindsay relevant to the issue of provocation').

resist a White man"'.[61] These assumptions are based on seeing Aboriginal men as 'savages', rendering them both an object of fetish as well as a disposable resource: 'The Aborigine is still perceived as a "primitive" in a "degenerative" culture, of not much use except as a cheap resource (including the sex industry) or convenient easy lay'.[62] Moreover, this is only one aspect of ongoing experiences of colonialism. In a sense, the High Court is suggesting that, as an Aboriginal man in White Australia, Sun Sun has been experiencing racial taunts his entire life. The colonial state has intervened in every aspect of his life: his finances have been controlled by Centrelink and then the Public Trustee;[63] since his teenage years his liberty has been regulated by white police, white judges and white gaolers.[64] The racial hierarchy imposed by Andrew on Sun Sun was simply the latest of a lifetime of such impositions, and their cumulative effect tipped him over the edge. The High Court's narrative follows that of the Australian classic, *The Chant of Jimmie Blacksmith*.[65] In Thomas Keneally's novel, set in the lead up to federation, Jimmie Blacksmith was removed from his family and forced into servitude by whites, which he internalised as an ambition to assimilate.[66] However, after one too many liberties taken by a white man and one too many racist taunts, Jimmie Blacksmith snapped and went on a murderous rampage across New South Wales. Towards the end of the book, one of Jimmie's white masters surmised, '[a]s inexcusable as Blacksmith's crimes are, there was almost certainly some white provocation'[67] The High Court appears to be saying the same here: as inexcusable as Sun Sun's crime was, there may very well have been some white provocation.

A person's race is no doubt relevant to their subjective experience of the world, but how does it inform an objective standard? As critical law theorists like Norrie point out, the objective standard is an appeal to the abstract.[68] Moral justification continues to animate the test in some unarticulated way, yet it is impossible to cast a moral judgment without knowing something about the social and moral context in which the crime occurred. For this reason, a purely objective ordinary person test 'will not work because it needs to know something about the particularity of

61 Wendy Dunn/Holland et al, 'Peopling the Empty Mirror: The Prospects for Lesbian and Gay Aboriginal History' in Robert Aldrich (ed), *Gay Perspectives II* (University of Sydney, 1993) 1, 16.

62 Ibid 18.

63 *R v Lindsay* (2013) 117 SASR 307, 321 [79] (Sulan J).

64 *R v Lindsay* (2014) 119 SASR 320, 342–3 [72] (Gray J).

65 Thomas Keneally, *The Chant of Jimmie Blacksmith* (Angus and Robertson, 1972).

66 As fictional as Jimmie Blacksmith was, he was based on the very real story of Jimmy Governor: Tony Birch, 'Tony Birch on "The Chant of Jimmie Blacksmith" by Thomas Keneally for Reading Australia' (2015) 372 *Australian Book Review* <https://www.australianbookreview.com.au/reading-australia/thomas-keneally/the-chant-of-jimmie-blacksmith-by-thomas-keneally>.

67 Keneally, above n 65, 174–5.

68 Alan Norrie, *Law and the Beautiful Soul* (GlassHouse Press, 2005) 128–9.

the accused if it is to get any kind of handle on judgment'.[69] Thus, since 1990, the High Court has recognised that the provocative conduct must be contextualised if we are to properly understand how the ordinary person would react.[70] According to the majority judgment, this is because:

> Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done.[71]

However, in contextualising the ordinary person, the courts are careful to avoid hollowing out the objective limb and completely subjectivising the test of provocation.[72] For most of the accused's attributes, race included, the courts do this by drawing a distinction between the subtly different concepts of the 'provocativeness' of the victim's conduct — which may be contextualised given the underlying moral questions about whether the retaliation was justified — and the 'provocability' of the accused — which must remain subject to a universal standard irrespective of the context.[73] On the current test, the accused's race is considered normatively relevant to the provocativeness of the victim's conduct but not to the ordinary person's provocability. Of course, this need not be so. Age is deemed normatively relevant to both aspects of the objective test,[74] and as we will see, race has been treated the same way in previous articulations of the objective test. In any event, presently race is taken into account to determine the objective gravity of the provocation experienced by the ordinary person (provocativeness) but not the objective power of self-control expected of the ordinary person (provocability). So, having assessed the gravity of the provocation 'from the standpoint of the accused',[75] the question then becomes whether that degree of provocation could cause a 'truly hypothetical "ordinary

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69 Ibid 128.

70 *Stingel v The Queen* (1990) 171 CLR 312, 325–6 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

71 *Masciantonio v The Queen* (1995) 183 CLR 58, 67 (Brennan, Deane, Dawson and Gaudron JJ).

72 In Lord Hoffmann's words, 'to hold the line against the complete erosion of the objective element in provocation': *R v Smith* [2001] 1 AC 146, 169. Though for his Lordship, whether the line is to be held is a matter entirely for the jury: at 171.

73 A J Ashworth, 'The Doctrine of Provocation' (1976) 35 *Cambridge Law Journal* 292, 300; Norrie, above n 26, 313, 321, 330–1 (disagreeing with Ashworth about whether the provocativeness/provocability dichotomy aligns neatly with the justification/excuse dichotomy).

74 *Director of Public Prosecutions v Camplin* [1978] AC 705, 717–8 (Lord Diplock); *Stingel v The Queen* (1990) 171 CLR 312, 329 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

75 *Lindsay* (2015) 255 CLR 272, 284 [28] (French CJ, Kiefel, Bell and Keane JJ).

person"', without the accused's attributes, to lose control.[76] The courts acknowledge that this transition back to the abstract from the particulars of the accused requires the jury to engage in 'mental gymnastics'[77] and to draw a division between provocativeness and provocability, which is of 'too great nicety' for the real world.[78] But, however difficult the task, the jury in *Lindsay* was effectively required to conjure into being an ordinary person who then stood in Sun Sun's shoes and took on his Aboriginality in order to assess the effect of Andrew's proposition.[79] Having done that, the ordinary person cast off Sun Sun's Aboriginality to exercise purely objective, racially-neutral powers of self-control.

That the ordinary person must be made Aboriginal, however, reveals that the ordinary person is not Aboriginal to begin with. The same cannot be said of the construction of the ordinary person in cases involving Anglo-Saxon defendants. Take for example Malcolm Green. As careful as the High Court was to attribute the ordinary person with Malcolm's special sexual sensitivity, it found no need to attribute his whiteness. Perhaps whiteness is never bestowed on the ordinary person simply because it is never relevant to the gravity of the provocation: as the dominant race, whites are more likely to be impervious to racist insults directed at them.[80] But the irrelevance of whiteness from the perspective of white institutions and judges only serves to reinforce its invisibility:

> whites' social dominance allows us to relegate our own racial specificity to the realm of the subconscious. Whiteness is the racial norm. In this culture the black person, not the white, is the one who is different … Once an individual is identified as white, his distinctively racial characteristics need no longer be conceptualized in racial terms; he becomes effectively raceless in the eyes of other

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76 *Stingel v The Queen* (1990) 171 CLR 312, 327 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

77 *R v Rongonui* [2000] 2 NZLR 385, 457 [236] (Tipping J). See also at 446 [205] (Thomas J).

78 *Director of Public Prosecutions v Camplin* [1978] AC 705, 718 (Lord Diplock).

79 The High Court has warned against directing the jury to 'put themselves, as the embodiment of the ordinary person, in the accused's shoes', as jurors may inadvertently 'substitute himself or herself, with his or her individual strengths and weaknesses, for the hypothetical ordinary person': *Stingel v The Queen* (1990) 171 CLR 312, 327 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See also *R v Lindsay* (2014) 119 SASR 320, 366–8 [173]–[178] (Peek J). However, the issue with the direction was with jurors embodying the ordinary person, rather than the ordinary person embodying the accused.

80 *Kelly-Country v Aboriginal & Torres Strait Islander Social Justice Commissioner* (2004) 181 FLR 352, 373–4 [92] (Brown FM):

> No doubt, if a [white] New Zealander brought a complaint about [a Kiwi joke], he or she would be quickly dismissed as being unduly thin skinned. However, for obvious reasons, a joke about a historically oppressed minority group, which is told by a member of a racially dominant majority, may objectively be more likely to lead to offence.

> whites. Whiteness is always a salient personal characteristic, but once identified, it fades almost instantaneously from white consciousness into transparency.[81]

The more likely reason that the ordinary person need never be invested with whiteness is that white is the default position in our society. Indeed, as Glanville Williams said in the 1950s, apparently without racial self-consciousness, the opposite of 'ordinary' is 'un-English'.[82] The ordinary person then is not some opaque, colourless construction waiting to be inscribed with a race. It is always already white, even with the best race-neutral intentions of High Court judges.

Of course, the Full Court's narrative of sexuality and the High Court's narrative of race are both oversimplifications. This was not a case of a heterosexual man killing an out and proud gay man. As with so many cases in which the homosexual advance defence is deployed, Andrew may not have been homosexually inclined at all.[83] He was at the time living with his female partner and as far as his father was concerned, Andrew was 'very much a ladies man'.[84] No doubt, the persistence of Andrew's advances towards Sun Sun might suggest otherwise.[85] In an attempt to preserve the narrative of sexuality, Peek J latched onto something other than Andrew's persistence. His Honour said, '[t]he possibility that the suggestions [were not jokes and] were seriously taken might reasonably be strengthened in the mind of the jury' by the fact that Andrew had long hair.[86] That is, it would be reasonable for a jury to link homosexuality with long hair. Presumably, that is because if a person is not performing their gender properly in one regard, it is safe to assume they are not performing their gender properly in other ways too.[87]

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81 Barbara Flagg, '"Was Blind but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent' (1993) 91 *Michigan Law Review* 953, 971 (citations omitted).

82 Glanville Williams, 'Provocation and the Reasonable Man' (1954) *Criminal Law Review* 740, 746. For a recent example of an assumption made in oral submissions in the High Court that all Australians are British, see Transcript of Proceedings, *Re Canavan; Re Ludlam; Re Waters; Re Roberts; Re Joyce; Re Nash; Re Xenophon* [2017] HCATrans 201 (12 October 2017) 9078–9 (Mr Newlinds SC) ('"…all these British people" — which of course is all of us').

83 See, similarly, Kent Blore, 'The Homosexual Advance Defence and the Campaign to Abolish it in Queensland: the Activist's Dilemma and the Politician's Paradox' (2012) 12(2) *QUT Law & Justice Journal* 36, 45.

84 Tessa Akerman, 'Family of Murder Victim Andrew Negre Tells Supreme Court of Their Loss Ahead of Sentencing', *The Advertiser* (online), 11 September 2013 <http://www.adelaidenow.com.au/news/south-australia/family-of-murder-victim-andrew-negre-tells-supreme-court-of-their-loss-ahead-of-sentencing/news-story/7b871581ef8d9e3d14f730571d19ea49>.

85 *R v Lindsay* (2014) 119 SASR 320, 371 [195] (Peek J).

86 Ibid 350 [111].

87 Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, first published 1990, 2006 ed) 184, 190–3. The High Court recently endorsed a view that gender is performative in *AB v Western Australia* (2011) 244 CLR 390. In interpreting the requirement that a person has adopted the 'lifestyle' of the gender to which

As to the racial dimensions of the case, the High Court ignored other attributes of Sun Sun, which were arguably of far more significance than his Aboriginality in attempting to understand the offence he took to Andrew's offer. Sun Sun was hit by a car when he was nearly two and again when he was seven years old.[88] He had an acquired brain injury as a result, and associated with that he had a significant intellectual disability and a behavioural disorder. According to one psychologist, this meant he was unable 'to discriminate the motives of other people in interpersonal relationships'.[89] A further consequence of his intellectual disability was low self-esteem, making him 'very vulnerable to negative peer group pressure' because he was 'eager to be accepted by a peer group to bolster his self-esteem'.[90] It might be thought that Sun Sun was therefore more susceptible to the gender and sexuality norms of his peer group. Indeed, one psychologist noted that under peer pressure, Sun Sun's previous criminal 'offending ha[d] become an expression of his masculinity and boldness'.[91] The gravity of the homosexual advance in front of Sun Sun's peer group takes on a whole different light once the ordinary person is imbued with his intellectual disability, the difficulty he faced in reading Andrew's motives, and his vulnerability to any tacit homophobia that might have existed in his peer group on account of his peculiar need to fit in. Given the explanatory force of Sun Sun's intellectual disability, it might be wondered why the High Court emphasised his race instead. Perhaps their Honours were reluctant to consider Sun Sun's intellectual disability because of the difficulty of dissecting its impact on the way the ordinary person 'would view some provocative conduct on the one hand [from] the way he or she would respond emotionally to that conduct on the other';[92] that is, the difficulty of considering provocativeness and provocability in isolation. And if the ordinary person is invested with the accused's characteristics that go to loss of control — such as being paranoid, impulsive, short tempered and easily angered — this would do damage to the myth sustaining the ordinary person test and ultimately the entire criminal justice system: 'that all persons are equally responsible for their actions'.[93]

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they seek reassignment under the *Gender Reassignment Act 2000* (WA), French CJ, Gummow, Hayne, Kiefel and Bell JJ said at 403 [28], 'maleness or femaleness … has both a private and a public dimension. Many lifestyle choices made by a person are observable by other members of society, by reference to how that person lives and conducts himself or herself'.

88 *R v Lindsay* (2013) 117 SASR 307, 309 [6]–[7] (Sulan J).

89 Ibid 309 [8] (Sulan J), paraphrasing Dr Bollard.

90 *R v Lindsay* (2014) 119 SASR 320, 344 [75] (Gray J), quoting Mr Balfour.

91 Ibid.

92 *Masciantonio v The Queen* (1995) 183 CLR 58, 72–3 (McHugh J), quoting Stanley Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3, 7.

93 *R v Hill* [1986] 1 SCR 313, 343 (Wilson J dissenting). Indeed, it is instructive that the case in which the ordinary person test was finally settled in England involved the question of whether the objective standard should reflect the mental ability of the defendant. In adopting a 'reasonable man' test, Lord Reading CJ said, 'This Court is certainly not inclined to go in the direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his

In any event, the Full Court focused on sexuality and the High Court focused on race, leaving us with a white and violently homophobic ordinary person. On appeal the first time, to the Full Court of the Supreme Court, Kourakis CJ asked Sun Sun's barrister, '[h]ow does the jury go about formulating the conception of the ordinary person here?'[94] Defence counsel responded with the High Court's standard question-begging response: 'The ordinary person is simply a person with ordinary powers of self-control'.[95] But 'how', Kourakis CJ wanted to know, 'do they go about working out what that is?'[96]

As Moran notes, this resort to 'common sense' by defence counsel and the High Court hides more than it reveals.[97] Her solution is to avoid common sense altogether and focus instead on untangling the normative characteristics of the ordinary person from mere descriptions of ordinariness.[98] This leads Moran to identify attentiveness to the interests of others as the key norm lying at the heart of the ordinary person.[99] But there is something of a false dichotomy in that approach. Notions of normalcy or ordinariness cannot be described as anything but normative: our judgment of what is normal, 'our image of the world[,] is always a display of values as well'.[100] Moreover, as will be explored in greater depth in the final section of the article, it is not altogether clear how normative characteristics can be isolated without reference to some calculation of a societal average for what is accepted behaviour; that is, by

acts': *R v Lesbini* [1914] 3 KB 1116, 1120. See also *Luc Thiet Thuan v The Queen* [1997] AC 131, 145 (Lord Goff), in which the Privy Council refused to ascribe brain damage to the ordinary person. For a critique of the abstract responsible individual at the heart of the criminal law, see Ian Dennis, 'The Critical Condition of Criminal Law' (1997) 50 *Current Legal Problems* 213, 237–41; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014) ch 1–2.

94 *Lindsay* (2015) 255 CLR 272, 296 [69].

95 Ibid, quoting defence counsel at the appeal before the Full Court of the Supreme Court of South Australia, in turn echoing *Masciantonio v The Queen* (1995) 183 CLR 58, 67 (Brennan, Deane, Dawson and Gaudron JJ) ('the characteristics of the ordinary person are merely those of a person with ordinary powers of self-control'). See also Timothy Macklem, 'Provocation and the Ordinary Person' (1988) 11 *Dalhousie Law Journal* 126, 152, regarding a similar tautology in the objective test in Canada in *R v Hill* [1986] 1 SCR 313.

96 *Lindsay* (2015) 255 CLR 272, 296 [69].

97 Moran, above n 27, 163.

98 Ibid 14, 281.

99 Ibid 257–66, 291–2. Although Moran primarily has in mind the reasonable person in the tort of negligence, she also links the norm of having regard for others to self-control in the context of provocation: at 305. Further, while her focus is the 'reasonable person', her theorisation applies equally to the 'ordinary person' as applied in provocation in Australia.

100 Georges Canguilhem, *On the Normal and the Pathological* (Carolyn R Fawcett and Robert S Cohen trans, Zone Books, 1991) 179 [trans of: *Le Normal et le Pathologique* (first published 1966)], quoted in Moran, above n 27, 145. For Moran's acknowledgement of the normative quality of ordinariness, see also at 143–4, 155.

reference to some notion of what is normal or ordinary. Attentiveness to others is no doubt commendable, but it is only normative if society deems it so. Norms are not immanent, logical deductions. As François Ewald frames it, '[w]ithin the normative order, values are not defined a priori but instead through an endless process of comparison that is made possible by normalization'.[101] Properly seeing norms as intersubjective social constructs, Moran's focus on attentiveness to others looks less like a distillation of a normative characteristic from irrelevant considerations of ordinariness, and more like an attempt to prioritise that value in the calculation of what is acceptable, normal, or ordinary — to normalise attentiveness. In any event, Moran acknowledges that when judges and juries draw upon the ordinary person, they do not differentiate between normative and descriptive attributes.[102] Accordingly, we cannot rely on Moran's theory to sidestep common sense. If we are to understand the ordinary person, we must confront common sense.

The reason why attempts to define the ordinary person often descend into tautologies and assertions that the answer is self-evident, is because the answer is in fact very complex. The origins of the ordinary person test can be traced easily enough to a case heard in the first year of Queen Victoria's reign in 1837,[103] but ordinariness itself is the product of innumerable discourses taking place in society, each with a history so deep that it can be taken for granted as obvious. Patriarchal and sexist regimes of knowledge are obvious examples of discourses with deep roots in society.[104] Indeed, the modern law of provocation owes much to the 'reconstruction of manliness' in the early Victorian era when England became gripped with a concern 'to reduce violence and "civilize" men in general'.[105] In the process, the ideal of the 'man of honor' gave way to the 'man of dignity',[106] which goes a long way to explaining provocation's transition from a justificatory to an excusatory model. However, while Victorian morality decried male violence, it also condoned the mistreatment and killing of 'bad' women.[107] These norms about gender and violence have fed into the gendered nature of provocation: its excuse of male violence against women but condemnatory silence when it comes to female violence against men. Although gender loomed large in the interaction between Sun Sun and Andrew, it played out through the gender norm of heterosexuality. For that reason, this article leaves the exploration of the larger dimension of gendered ordinariness to others.

Whiteness and violent homophobia are two other discourses with particularly deep roots. They are by no means unique to Australia, though Australia does have a distinct

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101 François Ewald, 'Norms, Discipline, and the Law' (1990) 30 *Representations* 138, 152.

102 Moran, above n 27, 13, 65, 307.

103 *R v Kirkham* (1837) 7 C & P 115.

104 See Moran, above n 27, 151.

105 Martin J Wiener, *Men of Blood: Violence, Manliness, and Criminal Justice in Victorian England* (Cambridge University Press, 2004) 5.

106 Ibid 6.

107 Ibid 29, 170–6.

historical relationship with these discourses, which may help to explain why 'in Australia, male panic at [a] homosexual advance and questions of ethnicity have … been significant' in the debate about provocation.[108] At the same time that masculinity and violence were being reconfigured in Victorian England, settlers in Australia found an exception to the condemnation of male violence in the 'large opportunities to unleash their aggressive impulses against non-Europeans'.[109] Victorian morality was also conflicted between its condemnation of male violence and its reprobation of 'bad' men who had breached sexual mores, and the newly forged link between masculinity and heterosexuality. This had particular bite in Australia when the moralising gaze of Victorian England turned to homosexuality here. Yet the historical forces that have entrenched whiteness and violent homophobia as ordinary have been repressed in Australia's collective memory. Shorn of a history, they appear to spring into existence 'armed and of full stature' as though they truly are a priori and precede any historical explanation.[110] Thus the history of whiteness and violent homophobia needs to be reclaimed if we are to fully understand, and then undermine, their self-evident ordinariness.

IV A History of the Ordinary Person: Two Founding Secrets at the Root of Australian Ordinariness

If Bishop Ullathorne is to be believed, white men have been propositioning Indigenous men in Australia for a very long time. Reflecting on the immorality of the convicts he visited in the early 1800s, he wrote, '[t]he naked savage, who wanders through those endless forests, knew of nothing monstrous in crime, except cannibalism, until England schooled him in horrors through her prisoners'.[111] The Bishop and others repeated those 'horrors' in similarly euphemistic terms to the Molesworth Committee in 1837 and 1838. By the time the Committee's final report was laid before the House of Commons in August 1838, the secret of widespread sodomy in the antipodes had been revealed.[112] Sir William Molesworth himself described the social experiment of transporting convicts to Australia as having resulted in 'Sodom

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108 Norrie, above n 68, 125 n 15. Compare also the very different cultural rationales underlying the homosexual advance defence in Australia and the gay panic defence in the United States, as well as the greater propensity of US States to enact gay hate crime legislation, suggesting a distinct historical relationship with homophobia: Ben Golder, 'The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform' (2004) 11 *Murdoch University Electronic Journal of Law* [15]; Alan Berman and Shirleene Robinson, *Speaking Out: Stopping Homophobic and Transphobic Abuse in Queensland* (Australian Academic Press, 2010) 208.

109 Wiener, above n 105, 13.

110 *Re Richard Foreman & Sons Pty Ltd; Uther v Commissioner of Taxation (Cth)* (1947) 74 CLR 508, 530 (Dixon J) (using the metaphor of the birth of Athena in an unrelated context).

111 Quoted in Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia 1787–1868* (Collins Harvill, 1987) 265.

112 *Molesworth Committee Report*, above n 4, especially 18, 30.

and Gomorrah'.[113] As modern authors have pointed out, the Molesworth Committee had a clear agenda to abolish the system of transporting convicts to Australia.[114] In the context of Victorian moral sensibilities, there was an obvious incentive in overstating the evidence that homosexuality was rife among those transported.[115] However, there was certainly abundant evidence. Colonial courts heard cases of sodomy,[116] convicts wrote contemporaneous accounts of homosexuality in the barracks and in the road gangs,[117] and official investigations concluded that homosexuality 'ha[d] [indeed] taken a certain root amongst the convicts'.[118]

No doubt much of the homosexuality among convicts was situational — among whites there were four times as many men as women in the cities, and 20 times as many in the bush.[119] Much of it also reflected the harsh penal conditions in which convicts lived, where sexuality was just another site of power. As noted by Robert Hughes:

> If this carceral society of the 1830s was anything like prisons today, we must recognize that many of the sexual episodes [described in contemporaneous accounts] were not lovemaking but acts of sadistic humiliation, in which sexuality was merely the instrument of a deeper violence — the strong breaking the weak down.[120]

Whatever might be said about the voluntariness of homosexuality in early Australia (and there is much to be said),[121] the respectable citizenry of the colonies were

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113 Hughes, above n 111, 494.

114 Michael Sturma, *Vice in a Vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales* (University of Queensland Press, 1983) 1, 9 n 3; John Hirst, *Convict Society and its Enemies* (Allen & Unwin, 1983) 26–7.

115 Hirst, above n 114, 200; Babette Smith, *Australia's Birthstain: The Startling Legacy of the Convict Era* (Allen & Unwin, 2008) 212; Kirsty Reid, *Gender, Crime and Empire: Convicts, Settlers and the State in Early Colonial Australia* (Manchester University Press, 2012) 174–5. On the sensationalist use of homosexuality by abolitionists generally, see Reid, above n 115, ch 6.

116 See, eg, *R v Fitzpatrick and Fitzgerald* (Unreported, Maitland Circuit Court, Dickinson J, 11 September 1845), reported in 'Maitland Circuit Court: Murder', *Maitland Mercury*, 13 September 1845, 2; 'Assize Intelligence: Murder', *Sydney Morning Herald*, 15 September 1845, 2. See also Smith, above n 115, 241–3.

117 Thomas Cook, *The Exile's Lamentations* (Library of Australian History, written 1840–1844, first published 1978) 19–20, 68–9.

118 Despatch from CJ La Trobe to Earl Grey, 31 May 1847, enclosure 5, reproduced in Ian Brand, *The Convict Probation System: Van Diemen's Land 1839–1854* (Blubber Head Press, 1990) 159.

119 Hughes, above n 111, 264.

120 Ibid 269.

121 See, eg, Garry Wotherspoon, 'A Sodom in the South Pacific — Male Homosexuality in Sydney 1788–1809' in Graeme Aplin (ed), *A Difficult Infant: Sydney before Macquarie* (University of Sydney Press, 1988) 91; Bob Hay, 'A Charge of Something

mortified to be tarred with the same brush. As rumours spread of the evidence given before the Molesworth Committee, 500 men petitioned the New South Wales Legislative Council 'to do something to counteract the talk about Sodom, Gomorrah and the rising crime rate'.[122] In July 1838, the Council issued a resolution complaining

> that the character of this Colony, in as far as the social and moral condition of its Inhabitants is concerned, has unjustly suffered by the misrepresentations put forth in certain recent publications in the Mother Country; and especially in portions of the Evidence taken before a Committee of the House of Commons.[123]

The report of the Molesworth Committee was received in the colonies as a rebuke by the motherland, which only served to heighten the colonial ambition 'to be more English than the English'.[124] At the time, that meant being more Victorian than the Victorian in the pursuit of moral puritanism. As Babette Smith points out, '[t]he formation of Australian masculinity … gain[s] an extra dimension with [the] knowledge of the extreme homophobic pressure that was brought to bear on men in the mid-nineteenth century'.[125]

Inevitably, the purging of convict shame led to a paradox for the nascent nation: amnesia of its homosexual past and fierce repression of homosexuality long after it forgot its reasons for holding such attitudes. In the words of Robert Hughes:

> There could have been no better breeding ground for the ferocious bigotry with which Australians of all classes, long after the abandonment of [the transportation of convicts], perceived the homosexual. And this in turn seemed like an act of cleansing — for homosexuality was one of the mute, stark, subliminal elements of the 'convict stain' whose removal, from 1840 onward, so preoccupied Australian nationalists.[126]

The cruel irony of Bishop Ullathorne's account of lovemaking between convicts and Indigenous men is that convicts were in fact at the battlefront of a war against Indigenous peoples. As the Molesworth Committee reported, convicts were engaged in '[t]he extirpation of a great proportion of these Aborigines'.[127] In the same year that the Molesworth Committee handed down its report, 11 stockmen — all

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Unnatural: A Brief History from the Records of Australia's Earliest Known "Homosexual" Convict' in Robert Aldrich (ed), *Gay Perspectives II* (University of Sydney Press, 1993) 63; Clive Moore, 'That Abominable Crime: First Steps Towards a Social History of Male Homosexuals in Colonial Queensland, 1859–1900' in Robert Aldrich (ed), *Gay Perspectives II* (University of Sydney Press, 1993) 115.

122 Hughes, above n 111, 496. See also Sturma, above n 114, 27.

123 New South Wales, *Parliamentary Debates*, Legislative Council, 17 July 1838, 38.

124 Hughes, above n 111, 497.

125 Smith, above n 115, 327.

126 Hughes, above n 111, 272.

127 *Molesworth Committee Report*, above n 4, 50.

convicts or ex-convicts, and all white save for one of African descent — slaughtered 28 unarmed Aboriginal men, women and children in what would become known as the Myall Creek Massacre.[128] The stockmen 'chopped some up and mutilated others, and burned the corpses on a pyre'.[129] The Myall Creek Massacre was exceptional in the sense that some of the perpetrators were brought to justice and it caused 'a passing revulsion of public conscience',[130] but otherwise it was utterly 'ordinary' in the frontier wars. As Fison and Howitt, two pioneer ethnologists, pointed out in 1880, the advance of white settlement was 'marked by a line of blood'.[131] In recent decades, historians have rediscovered this forgotten war, 'the war for Australia itself'.[132] Foremost among these historians is Henry Reynolds, who notes that '[c]onflict broke out between invading settlers and resident Aborigines within a few weeks of the foundation of Sydney and was apparent on every frontier for the next 140 years'.[133] Indigenous Australians 'died in disproportionate numbers and the balance of terror tipped decisively in favour of the Europeans as the century progressed'.[134] The settlers' stated goal time and time again was 'extermination'.[135]

Nicholas Clements has recently explored the role of sex in one of the first frontier wars, Tasmania's Black War between 1824 and 1831. He emphasises the severe gender imbalance among the convicts and how it led not only to homosexuality, but also to a practice of 'gin raiding', whereby convicts would ambush Indigenous campsites in order to acquire women for sex.[136] Often the women were chained up for a day, a week, or longer, raped repeatedly, 'and then had their throats cut or [were] shot'.[137] Aboriginal men 'felt emasculated' and sought retribution, in response to which convicts formed vigilante groups, and the escalating cycle of violence spiralled into the Black War.[138] Similar patterns played out across Australia. At the close of the century, a government representative reported widespread kidnapping of Aboriginal women on the new frontier in the Northern Territory.[139] Long after the frontier wars settled into the more insidious violence of post-war colonisation, sex

128 Connor, above n 3, 102–103. See, generally, the collection of articles to mark the 180th anniversary of the Myall Creek Massacre in the 2018 issue of *law&history*: Diane Kirkby, 'Editor's Comments' (2018) 5 *law&history* vii.

129 Hughes, above n 111, 277.

130 Ibid 278.

131 Henry Reynolds, *Forgotten War* (New South Publishing, 2013) 231.

132 Ibid 249.

133 Ibid 49.

134 Ibid 134.

135 Ibid 139–48.

136 Nicholas Clements, *The Black War: Fear, Sex and Resistance in Tasmania* (University of Queensland Press, 2014) 20–1, 68–71.

137 'Aborigines', *Colonial Times*, 5 April 1836, 117.

138 Clements, above n 136, 38.

139 *Government Resident's Report on the Northern Territory for the Year 1898* (Government of South Australia, 1899) 3 <https://aiatsis.gov.au/sites/default/files/catalogue_resources/58826.pdf>.

and reproduction endured as key sites of white oppression. As the experiences of the Stolen Generation make plain, sexual relations between white men and Indigenous women were 'often [though not always] abusive and exploitative' and carried the risk of further white interventions into Indigenous family life to claim the mixed-race child in the name of an official policy of 'absorption'.[140]

As with its homosexual past, Australians appear to have been gripped by a collective shame over the frontier wars so 'unutterable'[141] that they entered into 'a cult of forgetfulness practised on a national scale'.[142] Recovering the suppressed national memory is important for present purposes because the nature of the frontier wars reveals something about the 'ordinary' person at the very beginning of the Australian legal system. Assuming Sun Sun's ancestors were within the territorial limits of South Australia when it was proclaimed on 28 December 1836, they were, by the same stroke of the pen, declared to be British subjects 'who [we]re to be considered as much under the safeguard of the law as the Colonists themselves'.[143] Yet, within four years, Governor Gawler — operating 'on the principles of martial law' — sent police to carry out summary executions of Aboriginal men in retaliation for crimes.[144] Gawler considered that Indigenous peoples beyond the settled districts belonged to 'a separate state or nation, not acknowledging, but acting independently of, and in opposition to, British interests and authority'.[145] Their crimes were 'beyond the reach of the ordinary British law'.[146] His stance echoed Governor Arthur's imposition of martial law in Tasmania 20 years earlier. According to Arthur's Solicitor-General, Alfred Stephen, the declaration of martial law placed Indigenous peoples 'on the footing of open enemies of the King, in a state of actual warfare against him'.[147] In reality, this belligerent status meant that any settlers could kill Indigenous people without fear of prosecution. The attacks and counter-attacks were not treated as crimes among British subjects, equally entitled to protection of life and property. Rather, they were treated as acts of war, where the battle lines were drawn between 'them' and 'us'. 'We' were white and 'they' were an inferior race destined for extinction according to the laws of social Darwinism. Indigenous people stood outside of the nascent Australian legal system and were not constituent units of it. They were inherently extra-ordinary

140 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (April 1997) 32, 272.

141 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 104 (Deane and Gaudron JJ).

142 W E H Stanner, *After the Dreaming: Black and White Australians — An Anthropologist's View, Boyer Lecture Series* (Australian Broadcasting Commission, 1969) 25.

143 'Proclamation', *South Australian Gazette and Colonial Register*, 3 June 1837, 1. See also Robert Foster and Amanda Nettelbeck, *Out of the Silence: The History and Memory of South Australia's Frontier Wars* (Wakefield Press, 2012) 21.

144 'Proceedings of the Council. Tuesday, September 15', *South Australian Register*, 19 September 1840, 4 (Governor George Lawler).

145 Ibid (Advocate-General William Smillie).

146 Ibid (Governor George Lawler).

147 Despatch from Alfred Stephen to George Arthur, 3 February 1830, quoted in Reynolds, above n 131, 61.

rather than ordinary. Indeed, in 1837, the Western Australian Advocate-General, George Moore, described Indigenous people as 'an extraordinary race', by which he meant 'beyond the possibility of understanding'.[148]

It can be seen then that, from the outset, the 'ordinary' Australian was white. The Australian project was one of 'extermination' and later 'absorption', until not only the ordinary but even the average person was white. This legacy of the ordinary person persisted even after Aboriginal people were brought within the reach of settler law, at first only 'when the aggression was made on a white man'[149] and later over inter se violence as settler law completed its claims over territory.[150] Even as settler law made the Aboriginal person a legitimate subject of prosecution, it denied other aspects of juristic personality such as the capacity to give evidence or sit on a jury.[151] In 1836, as the New South Wales Supreme Court ruled that it had jurisdiction over Aboriginal defendants, the colonists asked rhetorically, 'will black Natives be allowed to sit on the jury',[152] that bastion of the ordinary person.[153]

Before moving on, a third thread should be picked up from Bishop Ullathorne's recount of the horrors of the antipodes. It should be noted that the sexual innocence the Bishop attributed to the 'naked savage' wiped away their sexuality. Under the colonial gaze, the 'naked savage' became 'pure' and untainted by the sexual perversions of Europe.[154] Not only that, the colonial gaze came to be internalised by Indigenous people themselves. Indeed, '[o]ne of the most significant powers of

148 Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire* (Palgrave Macmillan, 2012) 22, 34.

149 *R v Murrell and Bummaree* (Unreported, Supreme Court of New South Wales, Dowling ACJ, 13 May 1836), reported in 'Law Intelligence: Supreme Court — Criminal Side: Friday, May 13', *The Sydney Herald*, 16 May 1836, 3.

150 Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788–1836* (Harvard University Press, 2010) 2, 12, 183, 210.

151 On Aboriginal witnesses, see Douglas and Finnane, above n 148, 55–9. On the whiteness of juries, see at 75–6. In that connection, for the absence of a right of Indigenous defendants to be judged by a jury of their Indigenous peers, see *R v Walker* [1989] 2 Qd R 79, 85–6 (McPherson J, Andrews CJ and Demack J agreeing).

152 'Jack Congo Murrel — The Black Native', *The Sydney Herald*, 5 May 1836, 2.

153 *Lindsay* (2015) 255 CLR 272, 300–1 [83] (Nettle J).

154 Andrea Smith, 'Queer Theory and Native Studies: The Heteronormativity of Settler Colonialism' in Qwo-Li Driskill et al (eds), *Queer Indigenous Studies: Critical Interventions in Theory, Politics and Literature* (University of Arizona Press, 2011) 43. For a contemporaneous example, see Cornelius Moynihan, *The Feast of the Bunya* (Gordon and Gotch, first published 1901, 1985 ed) 100 n 62 ('In their ignorance Europeans have mistaken the meaning of the Booballai, which in reality is a moral lesson to the novices, meant particularly to deter them from those unnatural offences, all too prevalent among civilised races'). Cf the anthropological findings of homoerotic practices collected in Dunn/Holland et al, above n 61, 31–41.

colonisation is that it replicates itself within the culture it colonises'.[155] In Australia, that phenomenon has been 'so pervasive that Aboriginal people participate in the coloniser's work, refuting the possibility that non-heterosexuality is culturally authentic'.[156] This is not to deny that there may have been continuities between some Indigenous sexual norms and the norms of their colonisers, nor to claim that Indigenous people lacked agency in the process. It is simply to point out the possibility that for Indigenous people, heteronormativity and homophobia may have colonial, not pre-colonial, origins.

It can be seen that from the inception of the present political and legal structure of Australia, the ordinary Australian was overwhelmingly male, white and defensively heterosexual. Received ideas of ordinariness in Australia today are the product of this history. As *Lindsay* reveals, a little over 175 years since the Molesworth Committee and the Myall Creek Massacre, these phantoms of history continue to haunt the law.

V The Future of the Ordinary Person

Just as ordinariness has a history, so too does the test designed to capture it: the ordinary person test. Even though provocation has been deployed as a partial defence since the Middle Ages,[157] it was not until the mid-19th century that the ordinary person first graced courtrooms. A related construct, 'the reasonable man … was born during the reign of Victoria',[158] and appeared in a provocation case in *R v Kirkham*[159] in 1837, the year before the Molesworth Committee Report and the Myall Creek Massacre. In summing up, Coleridge J told the jury that the law 'considers man to be a rational being and requires that he should exercise a reasonable control over his passions'.[160] In 1869, Keating J incorporated that direction into a test in *R v Welsh*, telling the jury that the provocative conduct must be such that the 'violence of passion' it caused would be 'likely to be aroused … in the breast of a reasonable man'.[161] Although Keating J's test had not yet been embraced as a definitive statement of the law, when a draft English Code was produced in 1879, provocation was included with an objective element. In the process, the 'reasonable man' was transcribed as

155 Troy-Anthony Baylis, 'I Can See Queerly Now' in Meg Hale (ed), *Blak Wave* (Next Wave Festival, 2014) 31, 32.

156 Ibid.

157 See *Watts v Brains* (1600) Cro Eliz 779; 78 ER 1009; *Royley's Case* (1611) Cro Jac 296; 79 ER 254; *Maddy's Case* (1672) T Raym 212; 83 ER 112; 1 Vent 158; 86 ER 108; *R v Mawgridge* (1707) Kelyng J 119; 84 ER 1107.

158 *Healthcare at Home Ltd v Common Services Agency for the Scottish Health Service* [2014] PTSR 1081, 1083 [1] (Lord Reed JSC).

159 (1837) 7 C & P 115.

160 Ibid 119 (Coleridge J). As to this being the first appearance of the reasonable man test in provocation, see Williams, above n 82, 741; Bernard Brown, 'The "Ordinary Man" in Provocation: Anglo-Saxon Attitudes and "Unreasonable Non-Englishmen"' (1964) 13 *International and Comparative Law Quarterly* 203, 203.

161 *R v Welsh* (1869) 11 Cox CC 336, 338 (Keating J).

the 'ordinary person'.[162] While the Code was never enacted in England, it served as inspiration for legislation in the colonies. The ordinary person arrived in New South Wales in 1883, Queensland in 1899, Western Australia in 1902 and Tasmania in 1924.[163] At common law, a reasonable man test was finally adopted as the law of England in 1914 in *R v Lesbini*.[164]

Ultimately, the ordinary person was invented by judges and is constantly being reinvented every time a judge or juror conjures it up as an 'anthropomorphic image' of the objective standard.[165] The ordinary person is a legal fiction and like all social constructs, it is not created and recreated in a vacuum.[166] The ordinary person is constructed by a society, a society with a history and one with a relationship to that history. But as a construct, the ordinary person is not immutable or predetermined by historical forces. It can be changed, if not by judges, then by Parliament, and if not by Parliament, then by jurors.

In Australia, South Australia is now the only jurisdiction not to have reformed the law of provocation. It retains provocation courtesy of the common law.[167] The only fetter imposed by legislation is that the defendant may be required to give notice that he or she intends to adduce evidence of provocation.[168] Attempts at reform have, however, been made. In 2013, Tammy Franks MLC of the Greens introduced a Bill in the Legislative Council which provided that 'conduct of a sexual nature by a person does not constitute provocation merely because the person was the same sex as the defendant'.[169] The Legislative Review Committee reviewed the Bill and found there was no need for it on the basis that the decision of the Full Court of the Supreme

162 Criminal Code Bill Commission, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, C 2345 (1879) 100–101, cl 176.

163 *Criminal Law Amendment Act 1883* (NSW) s 370; *Criminal Code Act 1899* (Qld) sch 1, s 268; *Criminal Code Act 1924* (Tas) sch 1, s 160; *Criminal Code Act 1902* (WA) sch 1, s 243.

164 *R v Lesbini* [1914] 3 KB 1116–20 (Lord Reading CJ).

165 *R v Smith* [2001] 1 AC 146, 172 (Lord Hoffman).

166 *R v Jeffrey* [1967] VR 467, 478 (Barry J) ('a mythical ordinary person'); *Masciantonio v The Queen* (1995) 183 CLR 58, 73 (McHugh J) ('notion of an ordinary person is a pure fiction'); *Green* (1997) 191 CLR 334, 407 (Kirby J) ('[t]he ordinary person is a fiction'); *R v Smith* [2001] 1 AC 146, 157 (Lord Hoffman), speaking of the effect of *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119; *Healthcare at Home Ltd v Common Services Agency for the Scottish Health Service* [2014] PTSR 1081, 1084 [2] (Lord Reed).

167 *R v R* (1981) 28 SASR 321, 340 (Zelling J).

168 *Criminal Procedure Act 1921* (SA) s 134(1)(c).

169 *Criminal Law Consolidation (Provocation) Amendment Bill 2013* (SA) cl 3. See also South Australia, *Parliamentary Debates*, Legislative Council, 1 May 2013, 3804–7 (Tammy Franks); Kellie Toole, 'South Australia and the Defence of Provocation' (2013) 38 *Alternative Law Journal* 270, 270–1.

Court in *R v Lindsay* had solved the problem.[170] When the High Court resurrected the homosexual advance defence in *Lindsay*, Tammy Franks reintroduced her Bill,[171] only for the Legislative Review Committee to again recommend against change, this time on the basis that the High Court had revealed that there was no problem in the first place.[172] Running in parallel, the South Australian Law Reform Institute came to the opposite conclusion in the first stage of its review of provocation released in April 2017. It concluded that the homosexual advance defence is clearly discriminatory and warrants reform, but declined to give the details of the changes it will recommend until it has conducted a wider review of all aspects of the law of provocation in the second stage of its inquiry.[173] The stage two report is expected imminently and, in anticipation of its recommendations, former premier Jay Weatherill publicly committed to abolishing the homosexual advance defence.[174] In the lead up to the 2018 State election, candidates from both sides of politics matched his commitment.[175] If South Australia does opt to reform provocation, it has a number of options open to it. Even if law reform efforts pick up speed and overtake the publication

170 Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee into the Partial Defence of Provocation* (December 2014) 40 [8.1]. See also South Australia, *Parliamentary Debates*, Legislative Council, 3 December 2014, 1920–2 (Gerry Kandelaars); South Australia, *Parliamentary Debates*, Legislative Assembly, 3 December 2014, 3157–8 (Annabel Digance). These abortive efforts to reform provocation were noted by the High Court in *Lindsay* (2015) 255 CLR 272, 282–3 n 66.

171 *Criminal Law Consolidation (Provocation) Amendment Bill 2015* (SA) cl 3. See also South Australia, *Parliamentary Debates*, Legislative Council, 13 May 2015, 705–6 (Tammy Franks).

172 Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee on its Review of the Report of the Legislative Review Committee into the Partial Defence of Provocation* (2017) 7–8, 10. See also the interim report and related Hansard, in which the Committee resolved to await the outcome of Sun Sun's retrial: Legislative Review Committee, Parliament of South Australia, *Interim Report of the Review of the Report of the Legislative Review Committee into the Partial Defence of Provocation* (2016) 17. See also South Australia, *Parliamentary Debates*, Legislative Council, 13 May 2015, 703–5 (Gerry Kandelaars), 9 March 2016, 3302–3 (Gerry Kandelaars); South Australia, *Parliamentary Debates*, Legislative Assembly, 13 April 2016, 5124–5 (Lee Odenwalder).

173 South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 1* (2017) 8 (recommendation 1), 38 [5.5.3], 40 [5.5.11], 43 [5.6.10] (recommendation 3). See also the South Australian Law Reform Institute's review of discriminatory laws that led to the review of provocation: South Australian Law Reform Institute, *Audit Paper: Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (September 2015) 107–114 [342]–[358].

174 Legislative Review Committee (2017), above n 172, 8, 21.

175 Bension Siebert, 'Adelaide Candidates Unite Against "Gay Panic" Defence', *In Daily* (online), 9 January 2018 <https://indaily.com.au/news/2018/01/09/adelaide-candidates-unite-gay-panic-defence/>.

of this article, the full breadth of options discussed below will remain relevant in assessing the effectiveness of any reform adopted.

The first option is to do nothing and simply rely on the march of progress and the inevitable dissipation of racism and homophobia in the community that is sure to come with it. According to this logic, eventually the ordinary person will no longer be homophobic or white, not as a matter of law but as a matter of fact. Indeed, when it comes to homophobia, it might be argued that the South Australian community has already reached that point. At Sun Sun's retrial in 2016, the jury did consider provocation but again found him guilty of murder,[176] suggesting the jurors were impervious to any homophobic narratives that may have been run. However, it is impossible to unscramble the jury's verdict to see how the ordinariness of being white interacted with the ordinariness of being homophobic. The larger point is that the law continued to allow a space for narratives to be run in defence of homophobia, holding out the potential of success in another case before another jury. It is worth remembering that the defence strategy has succeeded in relatively recent years in other jurisdictions before they reformed their provocation laws.[177] Moreover, there is nothing inevitable about the demise of homophobia or racism.[178]

Rather than do nothing, the problems associated with holding killers to the standard of a white and homophobic person — who retains that kernel of whiteness and homophobia even after being contextualised — might be met by doing away with the ordinary person altogether, leaving only a subjective test to govern the law of provocation. According to early critical law theorists, this would allow full consideration of 'the social reality which surrounds the defendant's act', unmediated by the standards of heterosexual, white men that inhere in the ordinary person.[179] That was the solution advanced by law reform commissions in South Australia and Victoria in the 1970s and 1980s respectively.[180] It was also the solution offered by Murphy J in his dissent in *Moffa v The Queen*. His Honour reasoned that

176 *R v Lindsay* (2016) 126 SASR 362, 362–3 [1], 364 [9] (Vanstone J, Kelly and Blue JJ agreeing). Note that special leave to appeal to the High Court a second time was refused: *Lindsay v The Queen* [2017] HCATrans 131 (16 June 2017) 543–78 (Nettle J, Gordon J agreeing).

177 *R v Meerdink* [2010] QSC 158 (13 May 2010) (Applegarth J); *R v Petersen* (Unreported, Supreme Court of Queensland, Atkinson J, 13 October 2011).

178 Cai Wilkinson, 'Are We Winning? A Strategic Analysis of Queer Wars' (2017) *Australian Journal of International Affairs* 1, 5–6; Kent Blore, 'Sexuality Law Reform and the Language of Progress: What Lies Behind Statements that Equality for Lesbian and Gay People is Inevitable?' (2013) 18 *Deakin Law Review* 391, 391–2.

179 Dolores A Donovan and Stephanie M Wildman, 'Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation' (1981) 14 *Loyola of Los Angeles Law Review* 435, 467.

180 Criminal Law and Penal Methods Reform Committee of South Australia, *Fourth Report: The Substantive Criminal Law* (1977) 21–2 [11.1], 27–8 [11.6]; Law Reform Commissioner Victoria, *Provocation and Diminished Responsibility as Defences to Murder*, Report No 12 (1982) 17–18 [1.24], 20 [1.30(a)].

> [t]he objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian.[181]

However, as Moran notes, 'abandoning the ideal of reasonableness to a realm of purely subjective standards is even more corrosive of equality' than the existing shortcomings of the ordinary person.[182] Abandoning an external standard because it serves dominant interests can only work to validate subjectivities that internalise those dominant interests.[183] Sun Sun may no longer be held to a white standard, but the corollary is that he will no longer be held to any standard except his own, giving rise to a deficit of moral judgment. As Norrie points out, 'the factual issue whether the accused was in control is insufficient to answer the question of moral-legal judgment: should the accused be permitted the defence of provocation?'[184] Not only would provocation's role of determining moral blameworthiness be undermined, but so too would the potential of using the law to hold homophobia to account. The homosexual advance defence would be given free rein.

Instead of deserting the ordinary person altogether, we may address its whiteness by making the ordinary person more subjective. This is what McHugh J attempted to do in dissent in *Masciantonio v The Queen*:

> In a multicultural society such as Australia, the notion of an ordinary person is pure fiction. Worse still, its invocation in cases heard by juries of predominantly Anglo-Saxon-Celtic origin almost certainly results in the accused being judged by the standard of self-control attributed to a middle class Australian of Anglo-Saxon-Celtic heritage, that being the stereotype of the ordinary person with which the jurors are most familiar … [U]nless the ethnic or cultural background of the accused is attributed to the ordinary person, the objective test of self-control results in inequality before the law. Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities.[185]

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181 *Moffa v The Queen* (1977) 138 CLR 601, 626 (Murphy J).

182 Moran, above n 27, 16.

183 Ibid 206, 215.

184 Norrie, above n 68, 127–8. See also *R v Smith* [2001] AC 146, 208 (Lord Millet in dissent).

185 *Masciantonio v The Queen* (1995) 183 CLR 58, 73–4 (McHugh J) (reference omitted), relying heavily on Yeo, above n 92, 12–3. Though Yeo later reversed his position: Stanley Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation' (1996) 18 *Sydney Law Review* 304, 305.

On this approach, Sun Sun would be subject to an 'ordinary Aboriginal person' standard. Whereas the current approach treats Sun Sun's Aboriginality as only relevant to assessing the gravity of the provocative conduct (provocativeness), an ordinary Aboriginal person standard would also take into account his Aboriginality in assessing the power of self-control expected of him (provocability). Such a test, however, would not be new. An ordinary Aboriginal person test applied in the Northern Territory from the 1950s, when it was developed by Kriewaldt J,[186] until 2006 when the Territory reformulated its provocation provision to fall in line with other jurisdictions.[187] That experience in the Northern Territory reveals that an ordinary Aboriginal person test does not solve white hegemony.

One problem with the test is that it implied that Aboriginal people have less self-control.[188] Indeed, Kriewaldt J perceived that a lack of civilisation caused Aboriginal people to resort to violent responses. For his Honour, civilisation was also a marker of humanity, so that a person with less self-control was also less human. In one case, Kriewaldt J directed a presumably all-white jury:

> You may draw a distinction between the amount of provocation which is needed before *the ordinary reasonable human being, such as you are*, would lose his self-control, and the lesser, if you think it applies, the lesser degree of provocation needed before an Aboriginal of Australia loses his self-control.[189]

For his Honour, the ordinary Aboriginal person test served the assimilation policy; the test's purpose was to track Aborigines as they were civilised and assimilated.[190]

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186 See *R v Patipatu* [1951] NTJ 18; *R v Muddarubba* [1956] NTJ 317; *R v Nelson* [1956] NTJ 327; *R v Balir Balir* [1959] NTJ 633. This test was preserved in the idea of 'an ordinary person similarly circumstanced' in s 34 of sch 1 of the *Criminal Code Act 1983* (NT). See *Jabarula v Poore* (1989) 68 NTR 26, 28 (Kearney J); *Mungatopi v The Queen* (1991) 2 NTLR 1, 6–7 (Martin, Angel and Mildren JJ).

187 *Criminal Reform Amendment Act (No 2) 2006* (NT) ss 8, 17.

188 *R v Miller* [2009] 2 Qd R 86, 97–8 [52] (Chesterman JA, McMurdo P and Fraser JA agreeing) ('Underlying, and implicit in, the ground is that Aboriginal persons, or Aboriginal men, differ from others outside the group in their capacity for exercising self-control in the face of insults and provocation not referable to their race or Aboriginality. It is a large assertion that all members of one group differ from others outside the group in the extent to which they exercise self-control, and one that cannot be accepted in the absence of compelling evidence'). More broadly on the issue of inadvertently applying racist stereotypes in attempting to avoid applying dominant norms, see *Videski v Australian Iron and Steel Pty Ltd* (Unreported, New South Wales Court of Appeal, 17 June 1993) 6 (Kirby P), 9 (Meagher JA).

189 *R v MacDonald* [1953] NTJ 186, 189 (Kriewaldt J), quoted in Colin Howard, 'What Colour is the "Reasonable Man"?' (1961) *Criminal Law Review* 41, 44 (emphasis added).

190 Heather Douglas, 'Assimilation and Authenticity: The "Ordinary Aboriginal Person" and the Provocation Defence' (2006) 27 *Adelaide Law Review* 199, 203; Martin Kriewaldt, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5(1) *University of Western Australia Law Review* 1, 4-5. See also Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation', above n 185, 316.

Yet lurking beneath the assimilation logic was the idea that Indigenous people are genetically incapable of being civilised because their 'psychology is very different from that of their English conquerors'.[191] Reduced to stereotypes about lack of self-control, the ordinary Aboriginal person test did not so much liberate Indigenous people from white standards as 'other' them, even dehumanise them.

A second problem with an ordinary Aboriginal person test is that the idea of an ordinary Aborigine in the hands of white judges and jurors becomes bound up in the idea of an 'authentic' Aborigine. Heather Douglas has shown that the demand for Aboriginal authenticity led defence counsel to peddle a narrative that their client was unassimilated and uncivilised, and prosecutors to emphasise the ways in which the defendant had tainted their cultural purity through exposure to the effects of colonisation.[192] Both problems with the ordinary Aboriginal person test point to a deeper problem about who has the authority to construct the ordinary Aborigine. Without addressing the underlying dominance of whiteness — including its ordinariness — assigning a race to the ordinary person will not eliminate the power of whites to speak for it.

Rather than investing the ordinary person with more characteristics, reformists may instead seek to remove its undesirable qualities. This has been the approach taken in some jurisdictions to deal with the homosexual advance defence. The provocation provision in the Australian Capital Territory, the Northern Territory and Queensland are all now subject to the proviso that a non-violent sexual advance cannot, by itself, constitute provocation.[193] New South Wales has replaced provocation with a new defence of 'extreme provocation', under which only a serious indictable offence will qualify as provocative conduct. Out of caution, New South Wales also carved out non-violent sexual advances from the ambit of what can amount to extreme provocation.[194] Given that a non-violent sexual advance would only very rarely amount to a serious indictable offence, the carve out in New South Wales appears to be almost entirely symbolic.[195] In effect the legislatures in these jurisdictions intervened to raise the bar and expect a higher measure of self-control after the High Court refused to do so in *Green v The Queen*.[196] That is, the legislature has decreed that violent homophobia is not normal or ordinary, or to the same effect, that homophobia is not a morally defensible reason for killing. Thus, an ordinary person in those jurisdictions

191 Howard, above n 189, 41.

192 Douglas, above n 190, 219–20.

193 *Crimes Act 1900* (ACT) s 13(3), introduced by *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) sch 2, pt 2.1; *Criminal Code Act 1983* (NT) sch 1, s 158(5), introduced by *Criminal Reform Amendment Act (No 2) 2006* (NT) s 17; *Criminal Code Act 1899* (Qld) sch 1, s 304(4), (8), introduced by *Criminal Law Amendment Act 2017* (Qld) s 10.

194 *Crimes Act 1900* (NSW) s 23(3)(a), introduced by *Crimes Amendment (Provocation) Act 2014* (NSW) sch 1.

195 Thomas Crofts and Arlie Loughnan, 'Provocation, NSW Style: Reform of the Defence of Provocation in NSW' [2014] *Criminal Law Review* 109, 123.

196 See Blore, above n 83, 41–2.

is no longer capable of killing simply because they were faced with a non-violent sexual advance. It should be noted, especially in the context of *Lindsay v The Queen*, and unlike the Bill introduced by Tammy Franks, that these reforms are truly queer; they did not '[codify] categories of sexuality in the process' of addressing the homosexual advance defence.[197] So the queerness of prostitution is no more of an excuse than the queerness of homosexuality. Had Andrew made his offer to Sun Sun in Queensland, the High Court's efforts to split queer sexualities would have been in vain.

Reformists might instead seek to raise the standard of ordinariness to undermine the defence of provocation altogether. They might insist that ordinary people today do not kill. Whatever may have been the case in former times, far from being ordinary, it is now considered extraordinary to form an intention to kill or cause grievous bodily harm (the objective limb of provocation).[198] This is an appeal to common sense about what is normal in contemporary society. The rhetoric is synonymous with a moral judgment that a person is never justified in taking life (unless, perhaps, they do so in self-defence); in Moran's language, that killing is inconsistent with being attentive to the interests of others. As Murphy J said in *Moffa*:

> It degrades our standards of civilization to construct a model of a reasonable or ordinary man and then to impute to him the characteristic that, under provocation (which does not call for defence of himself or others), he would kill the person responsible for the provocation.[199]

Acceptance of the claim that killing is extraordinary, as well as other intractable problems with provocation, especially its gendered application, led to its abolition in Tasmania, Victoria, Western Australia, and New Zealand in the 2000s.[200] In its wake, Victoria experimented with a new offence of defensive homicide, but the new offence fared no better in addressing the problems with provocation and was itself abolished in 2014.[201]

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197 Ibid 64. See also Aleardo Zanghellini, 'Queer, Antinormativity, Counter-Normativity and Abjection' (2009) 18 *Griffith Law Review* 1, 2.

198 Williams, above n 82, 742 ('there are in this orderly age hardly any circumstances in which it can be asserted that an ordinary man would kill another person merely out of passion'). See also *Attorney-General (Jersey) v Holley* [2005] 2 AC 580, 589 [7] (Lord Nicholls).

199 *Moffa v The Queen* (1977) 138 CLR 601, 627 (Murphy J).

200 *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas) s 4, repealing *Criminal Code Act 1924* (Tas) sch 1, s 160; *Crimes (Homicide) Act 2005* (Vic) s 3, inserting *Crimes Act 1958* (Vic) s 3B; *Criminal Law Amendment (Homicide) Act 2008* (WA) s 12, replacing *Criminal Code 1902* (WA) sch 1, s 281; *Crimes (Provocation Repeal) Amendment Act 2009* (NZ) ss 4, 5, repealing *Crimes Act 1961* (NZ) ss 169, 170.

201 *Crimes (Homicide) Act 2005* (Vic) ss 4, 6, inserting *Crimes Act 1958* (Vic) ss 4, 9AD, repealed by *Crimes Amendment (Abolition of Defensive Homicide) Act* 2014 (Vic) s 3.

However, it would be beguilingly simple to think that the homophobia of the ordinary person can be solved neatly by abolishing provocation or carving out the homosexual advance defence from its ambit. As with all law reform, either solution may raise unintended consequences or prove ineffective to delegitimise homophobic violence once and for all. One unintended consequence is that limiting or eliminating any defence carries the risk of accentuating the disproportionate impact of the criminal justice system on Indigenous Australians. For this reason, the Aboriginal Legal Rights Movement has expressed its 'oppos[ition] to the abolition of the provocation defence' in South Australia.[202] This presents the classic problem that confronts intersectionality: the pursuit of 'conflicting political agendas'.[203] No doubt the High Court appreciated these conflicting agendas in choosing to emphasise a narrative of race over sexuality in *Lindsay*. On the one hand, the law should not legitimise homophobic violence. Provocation should be abolished or restricted on this basis. On the other hand, given that Indigenous people are more likely to be arrested and convicted, any law that operates to increase the sentencing range will have a greater impact on Indigenous people and contribute to their over-representation in prison populations.[204] Even if the availability of any one defence has only a minimal impact on incarceration rates, from an Indigenous perspective, we must guard against *any* increase in the burden of the criminal justice system on Indigenous people. Provocation should be retained without amendment on this basis. Queer law reform advocates faced a similar dilemma in campaigning to exclude the homosexual advance defence from provocation in other jurisdictions which have mandatory sentencing for murder.[205] Success meant subjecting people to 'an extreme breach of accepted standards' that punishment should be tailored to fit the crime in the particular circumstances of the case.[206]

Three things should be said about the seeming impossibility of this choice between queer victims and Aboriginal defendants. First, although the short-term political outcome advocated by each sectional group is mutually exclusive — either provocation is retained intact or it is not — the political agenda and the desired long-term political outcome of each need not be. There is no reason why we should not dare to imagine a legal system which is neither racist nor heteronormative.

Second, until we reach that legal Utopia, intersectionality requires difficult decisions to be made. But those decisions should be made with that ultimate aim of Utopia

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202 Legislative Review Committee (2017), above n 172, 27 [8.10].

203 Kimberle Williams Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 *Stanford Law Review* 1241, 1252.

204 Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4th ed, 2009) 557 [10.790].

205 See, eg, Blore, above n 83, 53.

206 Marcia Langton, 'A Tragedy of Dumb Politics: Does Mandatory Sentencing Cause Fundamental Damage to the Legal System?' in Hossein Esmaeili, Gus Worby and Simone Ulalka Tur (eds), *Indigenous Australians, Social Justice and Legal Reform: Honouring Elliott Johnston* (Federation Press, 2016) 63, 63.

in mind, directed to untangling the racist and heteronormative aspects of the law and isolating them for removal, rather than entrenching law reform compromises. If some political objectives are to be pursued at the expense of others, we should at least privilege those that deal with the underlying causes of the problem rather than those that merely mask it. The causes of Indigenous over-representation in prison are multifaceted and no doubt the availability of defences has its role to play in attenuating or accentuating the problem. However, the underlying causes are bound up in a history of subjugation by colonial authorities, in the ongoing effects of colonisation such as disempowerment and socio-economic disadvantage, and in the ongoing experiences of colonisation through overpolicing and overcharging, all of 'which bring Aboriginal people into conflict with the criminal justice system in the first place'.[207] The presence or absence of provocation as a defence will not address those deeper underlying causes. By contrast, legally endorsed homophobia persists so long as the law deems it ordinary to react to a homosexual advance with lethal violence. The presence or absence of provocation in its present form in South Australia has a direct bearing on the problem — the law's excuse of violent homophobia. For this reason, provocation must be reformed or abolished as a step towards a legal system cured of its worst colonial vestiges, both racist and homophobic.

However, the third point to note about intersectionality is that the gaze of law reform cannot be narrowed to provocation alone, so that the problems raised by queer advocates are addressed while those of Indigenous advocates are not. Engaging in such a limited and narcissistic politics risks charges of homonationalism: 'the tendency among some white gays to privilege their racial and religious identity'.[208] Depending on how the law of provocation is framed by law reform advocates, there is also a risk that they will contribute to narratives about 'other' races and cultures condoning homophobia, in contrast to the progress made by white civilisation in accepting gays and lesbians. There is one aspect of provocation in particular which is vulnerable to being exploited for criticism by homonationalism in this way: that it treats the defendant's non-white race and culture as relevant to how the ordinary person would react to a homosexual advance. Simplified for the purposes of opposition, cases like *Lindsay* may be re-read as authority that Indigenous people are more likely to exhibit violent homophobia. Even though the High Court was careful to avoid racialising homophobia in *Lindsay*, such reductive politics should be anticipated and guarded against in the age of homonationalism, 'marked by the entrance of (some)

207 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, 15 [1.7.1].

208 Sarah Schulman, 'Israel and "Pinkwashing"', *New York Times* (online), 22 November 2011 <http://www.nytimes.com/2011/11/23/opinion/pinkwashing-and-israels-use-of-gays-as-a-messaging-tool.html?mcubz=1>. Note that Jasbir Puar, who first coined the term 'homonationalism', would likely disavow Schulman's formulation as reductive: see Jasbir Puar, 'Rethinking Homonationalism' (2013) 45 *International Journal of Middle East Studies* 336, 336–7. Cf Jason Ritchie, 'Pinkwashing, Homonationalism, and Israel-Palestine: The Conceits of Queer Theory and the Politics of the Ordinary' (2015) 47 *Antipode* 616, 631.

homosexual bodies as worthy of protection by nation-states'[209] and the simultaneous exclusion of racial others who are 'castigate[d] … as homophobic and perverse'.[210] If white queer advocates fall into the trap of privileging their whiteness by dealing exclusively with the homosexual advance defence or by othering Indigenous people as homophobic, they risk becoming agents of the existing normative order, not the liberators from regimes of knowledge that queer theory promises.

There is also the prospect that the problems associated with provocation might outlive its abolition or reform. That is not to discount the value of law reform, but simply to rein in expectations of what it can achieve. When it comes to the exclusionary model of carving out homosexual advances, Thomas Crofts and Arlie Loughnan have pointed to the prospect that Australian courts will follow the decision of the Court of Appeal of England and Wales in *R v Clinton*.[211] In England, for the rebadged partial defence of 'loss of control', there is now an express statutory carve out where the killing is triggered by sexual infidelity.[212] Yet in *Clinton*, the Court held that the carve out does not apply where the 'sexual infidelity is integral to and forms an essential part of the context' of the killing.[213] The Court eviscerated the carve out due to its concern that compartmentalising sexual infidelity would be unrealistic and carry the potential for injustice.[214] The High Court was animated by similar concerns about preserving the 'larger dimension' in both *Green* and *Lindsay*, suggesting that home grown carve outs for homosexual advances are liable to suffer the same fate as in *Clinton*.[215]

Abolishing provocation altogether may fare no better. Even after the abolition of provocation in Victoria, Kate Fitz-Gibbon and Sharon Pickering found that provocation-style cases were still being run with 'the same narratives dominating the courtroom'.[216] According to an anonymous Supreme Court judge in her study, 'juries will still acquit of murder if they think there is serious provocation. They'll use some other concept'.[217] The reason is that '[o]ld norms do not die; they are

209 Puar, above n 208, 337.

210 Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2007) xii.

211 Crofts and Loughnan, above n 195, 123–4.

212 *Coroners and Justice Act 2009* (UK) c 25, s 55(6)(c).

213 *R v Clinton* [2013] QB 1, 17 [39] (Lord Judge CJ, Henriques and Gloster JJ agreeing).

214 Ibid. For anticipation of the problem of compartmentalisation, see Norrie, above n 25, 289.

215 *Lindsay* (2015) 255 CLR 272, 300 [81] (Nettle J); South Australian Law Reform Institute, *The Provoking Operation of Provocation*, above n 173, 40–2 [5.6.3]–[5.6.8].

216 Kate Fitz-Gibbon and Sharon Pickering, 'Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2012) 52 *British Journal of Criminology* 159, 169, quoting an anonymous Victorian policy advisor. See also Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan, 2014) 190.

217 Fitz-Gibbon and Pickering, above n 216, 170.

resurrected in empty spaces, deliberate ambiguities, and new rhetorics. Indeed, old norms not only do not die, but also live alongside, and are perpetuated by, the denial that they still live'.[218] On a deeper level, Michel Foucault would say that the reason is that norms have grown more powerful than the law. For him, a consequence of the rising power of discourses centred around reproduction in the 18th and 19th centuries 'was the growing importance assumed by the action of the norm, at the expense of the juridical system of the law'.[219]

As an example of norms outliving legal change, the defence ran a classic homosexual advance defence strategy in the Victorian case of *R v Johnstone*,[220] even though provocation had been abolished. The strategy was an attempt to provide the jury with one of those 'other concepts' hinted at by the anonymous Supreme Court judge: manslaughter due to lack of intent or the new alternative verdict of defensive homicide. Aaron Johnstone claimed he 'lost it' when his gay housemate, Phillip Higgins made a sexually provocative remark.[221] Aaron punched Phillip three or four times until he fell to the ground, kicked him until he was unconscious and then dropped a platypus statue over his head.[222] Ultimately the strategy failed. The jury found Aaron guilty of murder both at first instance and at retrial following an appeal.[223] The point, however, is that the law continued to allow a space for homophobic narratives. Of course, much of provocation's reach beyond the grave in Victoria can be put down to the experiment with defensive homicide which came to its own end in 2014. However, the New Zealand case of *R v Ahsee*[224] shows that the homosexual advance defence can work effectively even if provocation is abolished and not replaced. Sold the usual story about a homosexual advance from a predatory older man, the jury found that Willie Ahsee did not intend to kill or cause grievous bodily harm when he repeatedly stabbed Denis Phillips so violently that the blade broke in two.[225] Even if homophobic narratives are eliminated from murder trials, Rebecca McGeary and Kate Fitz-Gibbon have raised the possibility that the same problems will simply play out at the sentencing stage before the sentencing judge, which is borne out by the sentences they reviewed from 2000 to 2011.[226]

218 Victoria Nourse, 'The "Normal" Successes and Failures of Feminism and the Criminal Law' (2000) 75 *Chicago-Kent Law Review* 951, 952.

219 Foucault, above n 11, 144.

220 [2008] VSC 584 (19 December 2008); [2011] VSC 300 (30 June 2011).

221 *Johnstone v The Queen* (2011) 31 VR 320, 323 [18] (Neave JA, Tate JA agreeing).

222 Ibid 323 [19] (Neave JA, Tate JA agreeing).

223 *R v Johnstone* [2008] VSC 584 (19 December 2008) [3] (Coghlan J); *R v Johnstone* [2011] VSC 300 (30 June 2011) [1] (Osborne J).

224 [2011] NZHC 2009 (15 December 2011).

225 Ibid [27]–[29], [43] (Asher J).

226 Rebecca McGeary and Kate Fitz-Gibbon, 'The Homosexual Advance Defence in Australia: An Examination of Sentencing Practices and Provocation Law Reform' (2018) *Australian and New Zealand Journal of Criminology* (forthcoming, prepublished 11 January 2018). A possible solution to this further problem is guideline

These shortcomings of law reform arise because it is being called upon to address something that transcends legal categories. Theorists have shown how moral questions about whether the killing was justified continue to animate the law of provocation even though justificatory logic no longer has a foothold in the structure of provocation. In the same way, the spectre of ordinariness threatens to lurk as an unarticulated normative basis of the law, whether or not the law explicitly recognises the relevance of ordinariness. Ultimately, the ordinary person will remain violently homophobic so long as juries and judges can be convinced that homophobia is ordinary. Unless heteronormativity in the community is addressed, ordinariness is liable to manifest even in the absence of an ordinary person test.

Having said that, law reform would not be an exercise in futility. Even if abolition or reform is not effective in each and every individual case, it would nonetheless send a message that homophobia should not justify lethal violence.[227] The reason it would send a message, according to Foucault, is that 'the law operates more and more as a norm'.[228] As laws and norms operate on the same plane, the twin forces of legal change and cultural change are mutually reinforcing.[229] On this view, increasing acceptance of homosexuality leads to less homophobia among jurors as well as calls for changes to be made to the law of provocation. This in turn further delegitimises homophobia, and eventually immunises juries from narratives about heterosexual male honour. Thus, law reform cannot directly solve all the problems associated with provocation, but neither can it be dismissed entirely as a hollow gesture.

It can be seen that, from an Indigenous perspective, it is equally unsatisfactory to attempt to widen the reach of provocation through an ordinary Aboriginal person test as it is to attempt to narrow provocation's scope by removing non-violent sexual advances from the circumstances in which the defence arises. The reason is that whichever way the law moves, white hegemony is preserved. The ordinariness of whiteness manifests in narratives of barbarism and inauthenticity in the first reform and in cementing high Indigenous prison rates in the second. From a queer perspective, juries may continue to condone lethal homophobia, whether the ordinary person is subjectivised or inoculated to non-violent sexual advances, or even

sentencing: Kate Fitz-Gibbon, 'Homicide Law Reform in New South Wales: Examining the Merits of the Partial Defence of "Extreme" Provocation' (2017) 40 *Melbourne University Law Review* 769, 804, 814.

227 Crofts and Loughnan, above n 195, 124; Kerstin Braun and Anthony Gray, '*Green* and *Lindsay*: Two Steps Forward — Five Steps Back: Homosexual Advance Defence — *Quo Vadis*?' (2016) 41 *University of Western Australia Law Review* 91, 117.

228 Foucault, above n 11, 144.

229 See Gerald Torres, 'Some Observations on the Role of Social Change on the Courts' (2006) 54 *Drake Law Review* 895; Gerald Torres, 'Legal Change' (2007) 55 *Cleveland State Law Review* 135; Lani Guinier, 'Demosprudence through Dissent' (2008) 122 *Harvard Law Review* 6; Lani Guinier, 'Courting the People: Demosprudence and the Law/Politics Divide' (2009) 89 *Boston University Law Review* 539; Adiva Sifris, 'Lesbian Parenting in Australia: Demosprudence and Legal Change' (2011) 28(1) *Law in Context* 8.

whether provocation as a partial-defence is removed altogether. The ordinariness of homophobia can survive any of these changes and manifest in new and unexpected ways in courtrooms. It follows that Indigenous and queer law reform advocates are driven to address ordinariness itself; we must colour and queer the ordinary.

VI Queering the Ordinary

Queer theory offers one way to destabilise the self-evident ordinariness of being white and homophobic. For queer theorists, norms about what it means to be a man or a heterosexual are not ingrained in nature; rather, these norms are constructed by society. For example, Foucault revealed that the 'homosexual' only emerged as a sexual identity in the 19th century, and the 'heterosexual' only later in response.[230] In fact, if one looks to Ancient Greek sources, entirely different sexual classifications existed, such as a person's passive or active role during sex.[231] The crucial insight queer theory offers is that if the idea of being homosexual or heterosexual has not always existed, then there is nothing intrinsic or immutable about these ways of being today. Race and the naturalness of being white can be deconstructed in the same way.[232]

The present challenge is to use queer theory to undermine what it means to be ordinary without destroying the regulative standard altogether. The moral dimension of provocation impels us to retain some standard by which to cast judgments about the blameworthiness of killing. Thus, in order to queer the ordinary, we must first overcome a paradox. On the dominant account of queer theory, queer is deviant, perverse, abnormal and the other; it is at its core antinormative, the antithesis of ordinary, the counterpoint to the ordinary that gives both ends of the binary meaning. To queer is to deconstruct categories and norms. Yet ordinariness requires some bedrock of norms lest it be emptied of all content. As Lord Simonds LC said in respect of the ordinary person test, if 'the normal man [is] endowed with abnormal characteristics, the test ceases to have any value'.[233] Likewise, if ordinariness admits extraordinary qualities, it would mean everything and therefore nothing. Thus, an attempt to reconfigure ordinariness to fit queerness seems doomed to fail. Attempts to do the reverse, to tame queerness to fit some notion of the ordinary have been criticised as homonormative, as engaging in:

230 Foucault, above n 11, 43.

231 Michel Foucault, *The Use of Pleasure: The History of Sexuality Volume 2* (Robert Hurley trans, Penguin Books, 1992) 35, 44–7 [trans of: *L'Usage des plaisirs* (first published (1984)].

232 See, eg, Ruth Frankenberg, *White Women, Race Matters: The Social Construction of Whiteness* (University of Minnesota Press, 1993); Siobhan B Somerville, *Queering the Color Line: Race and the Invention of Homosexuality in America* (Duke University Press, 2000).

233 *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119, 1123.

> a politics that does not contest dominant heteronormative assumptions and institutions — such as marriage, and its call for monogamy and reproduction — but upholds and sustains them while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption.[234]

But, need any attempt to queer the ordinary suffer the pitfalls of homonormativity?

Queer theory traditionally answers that question in the affirmative.[235] Part of the reason for that is the lure of antinormativity, in that it embraces exclusion from the norm as a site from which to subvert the norm. It reclaims otherness and gives being excluded a sense of political purpose. Not only that, strategically 'we tend to assume that when power fails to maintain itself, then in its absence we might find the agential space for contestation and intervention'.[236] It seems difficult to imagine a capacity to subvert a norm while still subject to its power. However, as some queer theorists are beginning to suggest, queer theory might also benefit from a theoretical frame that allows queer subversion of the norm from *within*.[237] Conceived in this way, rather than standing *outside* of the ordinary, queer is *part of* the ordinary.

One such theoretical frame is provided by François Ewald, who contends that from the early 19th century the norm shifted from a measurement against the rule — conceived as an absolute, much like the carpenter's T-square — to a measurement against the average — a dispersed calculation that collates and gathers up everyone without exclusion.[238] In this way:

> the measurements, comparisons, adjudications, and regulations that generate the *average man* do so not in relation to a compulsory, uniform standard, but

234 Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Russ Castranovo and Dana D Nelson (eds), *Materializing Democracy: Toward a Revitalized Cultural Politics* (Duke University Press, 2002) 175, 179.

235 See, eg, Judith Butler, 'Against Proper Objects' (1994) 6 *differences* 1, 21 ('normalizing the queer would be, after all, its sad finish'); David Halperin, *Saint Foucault: Towards a Gay Hagiography* (Oxford University Press, 1995) 113 ('the more it verges on becoming a normative academic discipline, the less queer "queer theory" can plausibly claim to be').

236 Vicki Kirby, 'Transgression: Normativity's Self-Inversion' (2015) 26 *differences* 96, 114.

237 In 2015, *differences* devoted a special issue to the question of whether 'queer theorizing [can] proceed without a primary commitment to antinormativity', and in 2016, the *Journal for Early Modern Cultural Studies* devoted a special issue to the topic of queer early modernity beyond the antinormative, conceiving of the topic as being 'deeply in touch with this present moment': see Robyn Wiegman and Elizabeth A Wilson, 'Introduction: Antinormativity's Queer Conventions' (2015) 26 *differences* 1, 1; Sarah Nicolazzo, 'Introduction: Queer Early Modernity Beyond the Antinormative' (2016) 16(4) *Journal for Early Modern Cultural Studies* 1, 4.

238 Ewald, above n 101, 140.

> through an expansive relationality among and within individuals, across and within groups.[239]

This relationality renders the outlier subject to the standard measure at the centre of the norm, but equally it also embeds the outlier in the very heart of the norm. Stowed within heteronormativity are the seeds of the queer and stowed within whiteness are the seeds of colour. The norm then is 'the reciprocal presence to one another of all the elements it unites';[240] the reciprocal presence of homosexuality in the face of heterosexuality and of Aboriginality in the face of whiteness. It is this relationality that holds out the hope that the ordinary can be queered.

Of course, to recognise that the queer inheres in the ordinary is not to say that heteronormativity provides a legitimate space for being queer. The periphery of the norm remains subject to the dictates of its centre. The reason why queerness inheres in the ordinary but not in heteronormativity is that we are speaking about two different orders of norms. There is a higher order norm — a kind of norm of norms — that the queer goes into the creation of a norm. However, the norm that is produced as a result of that process — the instantiation of that norm of norms — need not inherit that queer potential. That heteronormativity calls for the killing of queers bears this out.

Norms are, of course, human creations, so we can engineer a norm that reflects that higher order queer potential if we so choose. Such a norm would allow for 'a zone of possibilities' within the ordinary.[241] It would '[pluralize] the normal', revealing that a 'number of things can be normal'[242] or, as the courts would say, that ordinariness 'lie[s] within a range'.[243] It would give rise to an ordinary man who recognises his *potential* for homosexual desire, 'free[ing] him to find and enjoy a sexuality of whatever sort emerged', gay, straight or otherwise.[244] The ordinary man bestowed with that queer potentiality would be liberated from the closet built around 'his

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239 Wiegman and Wilson, above n 237, 15 (emphasis added). The High Court has criticised equating the 'average person' with the 'ordinary person', but only because of the risk that jurors would perceive of the 'average' with too much precision: *Stingel v The Queen* (1990) 171 CLR 312, 331–2 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). However, Ewald, Wiegman and Wilson do not use 'average' as connoting any sense of a precise meaning.

240 Pierre Macherey, 'Towards a Natural History of Norms' in Timothy J Armstrong (ed), *Michel Foucault Philosopher: Essays* (Harvester Wheatsheaf, 1992) 176, 186.

241 Lee Edelman, *Homographesis: Essays in Gay Literature and Cultural Theory* (Routledge, 2013) 114.

242 Keja L Valens, *Desire Between Women in Caribbean Literature* (Palgrave Macmillan, 2013) 90. See also Heather Love, 'Doing Being Deviant: Deviance Studies, Description, and the Queer Ordinary' (2015) 26 *differences* 74, 91.

243 *R v Lindsay* (2014) 119 SASR 320, 364 [160] (Peek J). See also *Stingel v The Queen* (1990) 171 CLR 312, 331–2 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

244 Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, 1990) 207.

totalizing, basilisk fascination with and terror of homosexual possibility', even if in giving into that possibility it never materialises.[245] Being same-sex attracted or being Aboriginal could be reinscribed as just another way of being ordinary.

The pursuit of such a norm centred around queer potentiality is a far larger political project than any law reform agenda. It would involve marshalling all of society — not just legally empowered individuals like legislators, judges or jurors — to engage in cultural change through an endless series of quotidian events — not a single event like delivering a verdict or amending a piece of legislation.[246] One way to unlock the queer potential of the ordinary is to engage in a politics of empathy, in a widespread practice of being available[247] to the other in face-to-face encounters,[248] real and imagined. This may come close to Moran's norm of being attentive to the interests of others. As the construction of individuals is intersubjective, the individual is left with traces of the other simply by imagining being the other.[249] Generalised across a population, such a practice of imagining otherness would aggregate into a norm similarly marked with traces of the other.[250]

Recourse to history can also help to normalise other ways of being. Remembering that '"mateship" found its expression in homosexuality' on the frontier can help to normalise the queer potential of homosocial bonds today.[251] Likewise, even remembering something as basic as the presence of Indigenous people at the birth of the Australian normative order can help to normalise being Indigenous today. Consider, for example, the debate about whether to correct plaques on statues in public squares and parks that tell history as though Indigenous people never existed, or at least as though the message is not intended for Indigenous people. This is consistent with the declarations of martial law by Governors Arthur and Lawler that placed Indigenous people firmly outside of the demarked limits of Australian society from

245 Ibid 206.

246 Cf Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 216, 269; Peter Papathanasiou and Patricia Easteal, 'The "Ordinary Person" In Provocation Law: Is The "Objective" Standard Objective?' (1999) 11 *Current Issues in Criminal Justice* 53, 64, 65. Fitz-Gibbon, Papathanasiou and Easteal have in mind a more limited cultural change confined to the courtroom.

247 Availability in the sense of disponibilité: see Gabriel Marcel, *The Philosophy of Existentialism* (Manya Harari trans, Citadel Press, 1962) 39–40.

248 In the sense of the encounter with the face of the other that founds Emmanuel Levinas' ethics of responsibility for the other as the other-in-the-same. See, eg, Emmanuel Levinas, *Otherwise Than Being or Beyond Essence* (Alphonso Lingis trans, Martinus Nijhoff Publishers, 1981) 11–12, 180–1 [trans of: *Autrement qu'être ou au-delà de l'essence* (2nd ed, 1978)].

249 See Kirby, above n 236, 102–3.

250 Bettina Bergo, *Emmanuel Levinas* (3 August 2011) Stanford Encyclopedia of Philosophy <https://plato.standford.edu/entries/levinas/> ('The responsibility and fraternity expressed now as the abyssal subject or other-in-the-same leaves a trace in social relations').

251 Smith, above n 115, 320.

the beginning.[252] A corrected plaque would readdress its statement of history to an audience that includes Indigenous people, thereby affirming that they form part of the group. True it is, this would be a sign that the colonial state's claims to sovereignty over Indigenous people has succeeded, but it would also be a recognition that, as constituent elements of the group, Indigenous people are to be gathered up into the calculation of its norms. At the same time, the corrected plaque would be addressed to the public square, to the entire group — not just its Indigenous components — meaning that the norms society is communicating to itself would be a synecdochal reflection of the Indigenous voice within it. Yet this simple measure of correcting obvious errors of history is only one among innumerable measures required to normalise the other, and even it has faced considerable opposition.[253] This only goes to show the enormity of what is required to queer and colour the ordinary.

VII Conclusion

When Andrew and Sun Sun walked into the Hallett Cove Tavern in 2011 the stage had been set nearly two centuries earlier. Like his cultural forebears who engaged in 'gin raiding' on the frontier, perhaps Andrew felt a sense of white entitlement to use Aboriginal bodies for sexual exploitation. He certainly does not appear to have felt any compunction in offering to pay Sun Sun for sex in front of his friends and family. Sun Sun too, no doubt, felt the ongoing impact of the colonisation first imposed on his ancestors, even if his disadvantage could not be attributed solely to colonisation in light of his acquired brain injury. Perhaps one of the impacts of colonisation felt by Sun Sun was a violent fear of homosexual possibility, a fear that can be traced not to anything intrinsic in the precolonial culture of Sun Sun's ancestors, but to Victorian moralism which was only heightened from the mid-19th century by the shame brought to bear by Sir William Molesworth. Sun Sun certainly reacted to Andrew's proposition according to the dictates of that heteronormativity. In defence of his heterosexual male honour, Sun Sun punched Andrew in the face, slammed his head into the ground, and then repeatedly stabbed him in the chest with a knife, severing his aorta.

When it came time two years later to judge Sun Sun's actions — to label what he did as murder or manslaughter — history also dictated the standard of ordinariness against which those actions were to be measured. Two vestiges of Australia's frontier society continue to inform notions of ordinariness today. First, because colonisers and Indigenous people were at war with each other, Indigenous people stood outside the nascent Australian legal system. Their gradual inclusion over time to serve white

252 Stan Grant, 'It is a "Damaging Myth" that Captain Cook Discovered Australia', *ABC News* (online), 23 August 2017 <http://www.abc.net.au/news/2017-08-23/stan-grant:-damaging-myth-captain-cook-discovered-australia/8833536>.

253 See, eg, Keith Windschuttle, 'Let Cook and Macquarie Stand: Grant and Taylor are Wrong', *The Weekend Australian* (online), 23 August 2017 <http://www.theaustralian.com.au/news/inquirer/let-cook-and-macquarie-stand-grant-and-taylor-are-wrong/news-story/40b157aac543734a6e0417b1397c3ec7>.

interests has never fully displaced their original extraordinariness and conversely the ordinariness of being white. Second, the hyper-masculinity of white settler society meant more opportunities for more intense homosocial bonds — for the Australian ideal of 'mateship' — but equally heightened vigilance for and repulsion by the possibility of homosexual desire. The Molesworth Committee's outing of that homosexual desire on the international stage was repressed on a societal scale and from that repression violent homophobia emerged as ordinary.

Those discourses of ordinariness have a very real impact on the law today. They feed directly into the objective limb of the test for provocation: was Andrew's proposition capable of causing an ordinary person — infused with that history of normalised whiteness and violent homophobia — to lose self-control and form an intention to kill or cause grievous bodily harm? The ordinary person is, of course, a legal fiction and subsists in its current form for only so long as society maintains it. The law can be changed in the way it captures ordinariness. This is what a majority of the Full Court of the South Australian Supreme Court sought to do in *R v Lindsay*. Justice Peek in the lead judgment held that, as a matter of law, the ordinary person cannot be provoked into a homicidal rage by a non-violent homosexual advance. In effect, his Honour said, even if violent homophobia is still considered ordinary in some segments of society, it will not be considered ordinary for the purposes of the law. On appeal, the High Court refused to place any fetter on the law's reception of societal norms about ordinariness. Their Honours refused to raise the bar of what the law expects from its subjects. If violent homophobia is ordinary, their Honours reasoned, then the jury should be entitled to construct an ordinary man who would kill in defence of his heterosexual masculinity.

Part of the reason their Honours declined to lay the homosexual advance defence to rest was that the case had a racial dimension. This brings intersectionality to the fore. Indigenous perspectives on why Sun Sun did what he did and Indigenous interests in maintaining the law of provocation as it stands come into direct conflict with queer perspectives about Andrew's victimhood and queer interests in removing the homosexual advance defence from the ambit of provocation. Ultimately, maintaining the homophobia of the ordinary person will not address white entitlement nor address the underlying causes of over-representation of Indigenous people in the criminal justice system. By contrast, removing the homosexual advance defence will deal with the legal system's endorsement of homophobia. For that reason, queer interests should be prioritised in this instance, but not at the expense of addressing those root causes of Indigenous over-representation as though it were a zero-sum game.

Given that the High Court has again refused to remove the homosexual advance defence, it now falls to the South Australian Parliament to do so. However, experience elsewhere has shown that tinkering with provocation or even abolishing it altogether may not solve the problem. Even in the wake of law reform, the ordinariness of whiteness and violent homophobia can manifest in courtroom narratives and verdicts tainted with racism or homophobia. Law reform advocates must not only address the ordinary person but ordinariness itself. A conservative option is simply to redefine the limits of the ordinary, thereby extending the protection of the law to a new category of privileged gays and lesbians, who are likely white, monogamous

and unwitting agents of the normative order that privileges heterosexuality. A more ambitious project is to attempt to draw out the inherent potentiality of the other in the ordinary, not only the privileged other who enjoys the rising status of acceptance, but the other who remains on the periphery of the norm. Empathy and history are two ways of revealing the possibility of other ways of being, and therefore of normalising the other. By remembering that there was an 'other' side of the frontier, the ordinary person becomes always potentially Indigenous. By reclaiming the findings of the Molesworth Committee as a source of pride rather than shame, we remember that the potential of homosexuality was always ordinary in colonial Australia.