SUPERSTITION-BASED INJUSTICE IN AFRICA AND THE UNITED STATES: THE USE OF PROVOCATION AS A DEFENSE FOR KILLING WITCHES AND HOMOSEXUALS

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I. INTRODUCTION.

On February 26, 2005, *The New York Times* reported that 90 youths were arrested in South Africa in the northeastern Limpopo Province "after a rampage in which 39 homes were burned to the ground, apparently in a fruitless hunt for a witch."[1] The police superintendent, Moatshe Ngoepe, said he "thought this kind of thing was in the past."[2] Tucked away in a section titled "World in Brief," the blurb would no doubt cause many readers to shake their heads in disbelief. In this day and age, how could people still believe in witchcraft? It would also reinforce persistent Western stereotypes regarding African culture as primitive and uncivilized; stereotypes that have been used through the ages to justify both colonialism and slavery.[3]

Sadly, the event described in the article is not an anomaly. Many African cultures embrace traditional healers and a concomitant belief in witchcraft.[4] Witchcraft-inspired

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[1] Michael Wines, *South Africa: Homes Burned In Witch Hunt*, N.Y. TIMES, Feb. 26, 2005, at A7

[2] *Id.*

[3] Adam Ashforth notes: "Throughout the history of colonialism, not only were European attitudes to African spirituality derogatory, but the colonial fascination with African witchcraft served to perpetuate stereotypes of African irrationality and grounded colonial claims that Africans were incapable of governing themselves without white overlords." ADAM ASHFORTH, WITCHCRAFT, VIOLENCE, AND DEMOCRACY IN SOUTH AFRICA 264 (2005).

[4] In September 2000, a Committee of the South African Parliament issued a report that included an explanation from healers as to the distinction between "traditional medicine" and "witchcraft": "Often, their patients consult them for health reasons, and during the consultation and diagnosis, it transpires that there is involvement of evil forces. It is then their duty to protect their patient in this regard. The manner applied for protection purposes then distinguishes witches from healers. Witches intentionally harm and kill people or cause harm or death to

violence, such as that described in the *New York Times* article, stems from the belief that illness and misfortune is the result of witchcraft. This type of violence is so prevalent that "witch-killings" and "witch-hunts" are recognized as a pervasive social problem in many African nations.[5] Legislative attempts designed to combat this phenomenon have been largely ineffective.[6]

Prior to these more recent legislative initiatives, the transplanted common law approached the matter somewhat differently. Whereas remedial legislation recognizes the widespread violence and seeks to curtail it, the common law recognized the widespread belief that gave rise to the violence and accepted a bewitched-provocation defense, or what today would be called a "cultural defense."[7] Under the bewitched-provocation defense, a defendant can seek a reduction in the crime and the punishment by asserting that his belief that he was the target of witchcraft caused him to temporarily lose self-control.[8]

To the contemporary American legal mind, the existence of a provocation defense based on the powers of witchcraft seems terribly misguided – indeed absurd to enshrine such nonsense in legal doctrine. United States criminal law only allows provocation defenses based upon

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people. Healers heal by protecting people from harm and death through the spirit and ancestors" (Portfolio Committee on Arts 2000, para. 24.2)." ASHFORTH, *supra* note 3, at 7 (2005).

[5] For example, in 1996 the Minister of Safety and Security of the Limpopo Province in South Africa, also known as the Northern Province, "declared witch-killings the number one social problem[.]" Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary* Law, 21 BERKELEY J. INT'L L. 62 at 102 (2003). *See also, World: Africa Villagers Burn 'Witches' in South Africa*, BBC NEWS, Apr. 27, 1999, *available at* http://news.bbc.co.uk/1/hi/world/africa/329600.stm (last visited Feb. 24, 2005).

[6] *See infra* text accompanying footnotes 62 - 79 (describing legislative initiatives designed to combat witchcraft-related violence).

[7] Ludsin, *supra* note 5, at 93.

[8] *Id.*

actions of a victim that are sufficiently infuriating that a reasonable person might experience a loss of self-control,[9] such as when a perpetrator is physical assaulted by the victim.[10] Indeed, no *reasonable person* would feel justified in killing a presumed witch because no reasonable person would believe in witchcraft or in its ability to harm.

This smug Western response to the prevalence of witch violence conjures a picture of a backward populous bound by superstition and displaced rage, but it has recently been challenged by an alternative view born of multi-culturalism that would explain and condone the existence of a bewitched-provocation defense in cultural terms.[11] According to this view, in some contexts a reasonable person may feel that his life or family is threatened by a presumed witch, given the widespread belief in witchcraft.[12] Commentators who advance the validity of cultural defenses argue that the law should take widespread beliefs into account when constructing the reasonable person.[13] When seen through the sympathetic lens of multi-culturalism, the witchcraft-

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[9] MODEL PENAL CODE § 210.2 states that criminal homicide constitutes murder when "it is committed purposely or knowingly; or it is committed recklessly under circumstances manifesting extreme indifference to the value of human life." MODEL PENAL CODE § 210.3 states that criminal homicide constitutes the lesser offense of manslaughter where "a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." MODEL PENAL CODE § 210.2 and § 210.3.

[10] Christina Pei-Lin Chen, *Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 Cornell J. L. & Pub. Pol'y 195 (2000) at 205.

[11] Pieter A. Carstens, *The Cultural Defence in Criminal: South African Perspectives* 13*, available at* http://www.isrcl.org/Papers/Carstens.pdf (last visited Dec. 17, 2005) (explaining a cultural defense in connection with witchcraft-inspired violence).

[12] *Id.*

[13] Ludsin, *supra* note 5, at 93.

provocation defense becomes an adjustment for the conflict between imported positive law and longstanding cultural practices.[14]

Under these contradictory yet related views, the defendant's sincere belief that the victim was a witch is either simply deluded or arguably relevant to the severity of the punishment and the gravity of the initial charge. Of course, the belief in witchcraft is no less empirically false under the cultural defense, but the widespread nature of the belief provides an explanation, and perhaps an excuse, for the actions it provokes. Largely the product of Western legal thought, the concept of a cultural defense walks a difficult line where it must balance the desire to recognize cultural practices and beliefs with the risk that the defense could legally privilege certain forms of traditional violence directed at unpopular and powerless minorities.

The "bewitched-provocation defense" has a strong but unacknowledged analogy in United States criminal law – the "non-violent homosexual advance provocation defense."[15] This provocation defense also rests on pervasive cultural beliefs, namely the dangerous and undesirable nature of homosexuality. According to this defense, a homosexual advance itself provokes a loss of self-control and "incites uncontrollable homicidal rage in any reasonable person, regardless of homosexual tendencies" and "the reasonable and ordinary person provoked by a homosexual advance kills because the solicitation itself causes an understandable loss of normal self-control."[16]

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[14] Carstens, *supra* note 11, at 11. "In context of the possible recognition of the *cultural defence*, much has been made in South Africa of the differences between Western and African systems of thought, partly as a way for Africans to reclaim the beauty of their heritage in the wake of brutalities, distortions and diminishments of apartheid." *Id.*

[15] Chen, *supra* note 10. at 201.

[16] *Id.* at 203.

Focusing primarily on South Africa and the United States, this Article argues that the rationale used to defend those who kill suspected witches and those who kill suspected homosexuals is the same – merely because a criminal holds a belief that the victim was evil, the criminal is somehow entitled to a lesser punishment. In the United States, those who readily recognize the absurdity of the witchcraft defense may have some difficulty in reading the same level of absurdity in the homosexual provocation defense. Moreover, progressive commentators who advocate so passionately in favor of cultural defenses may also favor hate crimes legislation and sentence enhancement for crimes directed at homosexuals, thereby ignoring a homegrown cultural defense. These paradoxical pairings and conflicting positions obscure the essential question: Should individuals who voluntarily kill innocents be entitled to a defense based upon an empirically unfounded superstitious, religious or cultural belief? If the answer is "no," then surely that answer must pertain to killing presumed witches as well as to the senseless killing of presumed homosexuals. If, as the advocates of cultural defenses argue, the answer is "sometimes," then such advocates must explain why bewitched provocation is a valid mitigating factor or excuse for murder, but homosexual provocation is not.

When legal norms and cultural norms conflict, the law must ultimately resolve the conflict. This Article examines two different instances where strong cultural and religious beliefs suggest that an individual is justified in taking another's life. Part II of this Article describes the persistent belief in witchcraft, the incidence of witchcraft-related violence, and the legislative response to such violence. Part III charts the development of the witchcraft-provocation defense, beginning with colonial courts. Part IV offers a comparative view of violence against presumed homosexuals, hate crimes, and the homosexual provocation defense. A brief conclusion suggests that although Americans can easily identify cultural ignorance in

other peoples, they are not as adept at recognizing it at home. Whereas legal scholars initially dismissed the notion that a reasonable person could believe in witchcraft, some now assert that certain reasonable persons cannot help but believe in witchcraft. Whether we choose to ignore or excuse the cultural belief in witchcraft, we miss the systemic nature of the violence it produces and the horror inflicted on its victims. The same can be said of the homosexual-provocation defense.

II. WITCHCRAFT BELIEF, RELATED VIOLENCE, AND GOVERNMENT RESPONSE.

Many cultures across Africa embrace traditional healers and a persistent belief in witchcraft. This Article focuses primarily on South Africa where the government has identified witchcraft-related violence as a serious social and legal problem.[17] In South Africa, there are an estimated 500,000 traditional healers who purport to deal with witchcraft.[18] It is thought that 60% of all South Africans consult traditional healers at some point during their lives.[19] As one healer, Mbula Habuku, explained, the reliance on traditional healers reinforces "deeply held cultural beliefs in the power of witchcraft and the superstition that an illness is the result of a misdeed rather than a medical problem."[20] For individuals who believe disease and misfortune are the result of witchcraft, the presumed witch becomes the embodiment of evil and, often, the

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[17] *See* Ludsin *supra* note 5 (discussing statement by Minister from Northern Province).

[18] "A rough estimate would be that at least half a million African healers [who purport to deal with witchcraft] are at work outside the formal biomedical system in South Africa. ASHFORTH, *supra* note 3, at 8. *See* Carstens *supra* note 11.

[19] *Id.* at 13. Traditional healers employ *muti,* meaning herbs or medicine, to address ailments. *Id.* The continued demand for human *muti* (i.e., mixtures containing human body parts) has led to the term *muti* murders to refer to ritualistic killings. *Id.* Such murders are outside the scope of this paper.

[20] Daniel Dickinson, *Tackling 'Witch' Murders in Tanzania*, BBC NEWS, Oct. 29, 2002, *available at* http://news.bbc.co.uk/1/hi/world/africa/2372907.stm (last visited Feb. 24, 2005).

object of violence.[21] As Mr. Habuku readily admits, "there are many traditional healers who have suggested murder as a remedy."[22]

This section describes the incidence of witchcraft-related violence and the legislative and social responses thereto. The victims of witch killings and witch attacks are most often elderly women. In addition, the endemic nature of HIV/AIDS infection in sub-Saharan Africa has fueled recent witchcraft-related violence. The instrumental use of the violence to police gender boundaries and its link to HIV/AIDS has an eerie parallel in the violence directed at homosexuals described in Part IV below.

A. Witchcraft-Related Violence.

In South Africa, the incidence of witch-related violence increased dramatically in the 1980s during the period of political turmoil occasioned by the dismantling of apartheid and the creation of a constitutional democracy.[23] Prior to that time, banishment was a more frequent form of "witch purging."[24] When an accused witch was killed, it was more often by a group acting as the community *en masse*.[25] The 1980s saw a shift to violent witch-killings perpetrated by young men typically aged 14 to 38 years old.[26] The incidence of witch-related violence was particularly high in South Africa's Limpopo Province, also known as the Northern Province,

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[21] *Id.*

[22] *Id.*

[23] Carstens, *supra* note 11, at 3.

[24] *Id.* at 4.

[25] *Id.* at 6.

[26] *Id.*

which borders Botswana, Zimbabwe, and Mozambique.[27] For example, in 1996 there were over 1100 witchcraft-related incidents of violence.[28] As explained more fully in Section B below, a provincial commission was appointed in 1994 to study the problem and make recommendations.

Although African terminology with regard to witches is gender neutral, women are twice as likely to be accused of witchcraft as men.[29] In addition, the African concept of witch does not encompass the potentially benign Wiccan or Pagan, which in some Western countries enjoy the status of an alternative religion.[30] To the contrary, there is little redeeming about African witches who "through sheer malice, either consciously or unconsciously, employ magical means to inflict all manner of evil on their fellow human beings."[31] People are either born a witch or can obtain witchcraft from a traditional healer.[32]

The traditional method of killing a witch is by burning, which is thought necessary in order to kill the soul of the witch.[33] This is most often accomplished by locking the accused

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[27] WIKEPEDIA, *Limpopo Province, at* http://en.wikipedia.org/wiki/Limpopo_Province (last visited Dec. 17, 2005).

[28] Carstens, *supra* note 11, at 6.

[29] *Id*. at 5.

[30] The tax authorities in the Netherlands decided to allow a woman to claim as a deduction 2,210 euros for a course in witchcraft, where she learned "to cast spells, prepare herbs and potions and use crystal balls as well as other aspects of witchcraft." *See Dutch 'Witch' Attracts Tax Break*, BBC NEWS, Sept. 28, 2005, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4290768.stm (last visited Dec. 18, 2005). In the United Kingdom, Stonehenge is reopened during the solstice for Pagans to celebrate. *See* Sean Percival, *Solstice at Stonehenge*, BBC, http://www.bbc.co.uk/birmingham/features/2003/06/solstice/stonehenge_solstice.shtml (last visited Dec. 17, 2005).

[31] Carstens, *supra* note 11, at 4.

[32] *Id.*

[33] *Id.*

witch in her house at night and setting the house afire, slowly roasting the victim over an open fire, or "necklacing."[34] The last method refers to a practice whereby the victim's hands are either cut off or tied together and a tire filled with gasoline-soaked rags is placed around the victim's neck and set on fire.[35] Since 1959, all deaths in South Africa associated with burns are subject to a mandatory autopsy.[36]

B. Elderly Women, HIV/AIDS, and Witch-Related Violence.

As noted above, women are much more likely than men to be accused of witchcraft. Commentators have suggested a number of reasons for this gender disparity, including the assumption of traditional male gender roles by women and superstitious beliefs related to women's reproductive powers.[37] In addition, for many elderly African women, "conditions of old age such as senility and frailty are so little understood that they are confused with witchcraft."[38] Writing for the BBC, Ruth Evans attempted to explain an outbreak of violence against elderly women:

> Though they lack the capacity for physical violence, their age lends plausibility to the supposition that older women have greater access to the knowledge of how to

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[34] *Id.* at 7.

[35] *Id.* at 16-17. Carstens reports that this method of killing was popularized in South Africa during the period of political unrest that preceded the creation of the constitutional democracy. *Id.* It was the preferred way to dispense vigilante justice on accused police informants. *Id.* For a discussion of necklacing prepared for the Centre for the Study of Violence and Reconciliation see Joanna Ball, *The Ritual of the Necklace, at* http://www.csvr.org.za/papers/papball.htm (last visited Dec. 17, 2005).

[36] *Id.* at 13, (citing The Inquest Act of 1959).

[37] *Id.* at 6.

[38] Ruth Evans, *World: Africa Eyewitness: Suspected Witches Murdered in Tanzania*, BBC NEWS, Jul. 5, 1999, *available at* http://news.bbc.co.uk/1/hi/world/africa/386550.stm (last visited Feb. 24, 2005).

> deploy evil forces. The fact that older women predominate in the ranks of healers and prophets, adept[] in the use of mysterious forces, also lends substance to the imputation of unusual spiritual capacities to them as a class.[39]

One eighty year-old woman, Magdale Ndila, was a victim of attempted murder in 1992.[40] A man broke into her house in the middle of the night, and when she awakened she "felt a terrible pain" and realized that her right hand had been cut off.[41] "The attacker wanted to kill me," she explained, "because [he] thought I was a witch."[42] A boy in her neighborhood had become ill and died, and it was believed that she had "bewitched" him.[43] In 2002, the BBC News reported on a series of brutal murders of accused witches in Tanzania, noting, "[m]any of the murdered are elderly women, often widows, brutally hacked to death with pangas or machetes by people who suspect them of practicing witchcraft."[44] Representing the community approach to witch-purging *en masse*, over forty people were arrested in South Africa in 1999 in a single incident.[45] They were charged with killing three elderly women whom they forced into a

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[39] ASHFORTH, *supra* note 3, at 75-6. In Soweto, South Africa, "[W]hen collective action is taken against the perpetrators of witchcraft, it usually takes the form of violence committed by young men against older women." *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Daniel Dickinson, *Tackling 'Witch' Murders in Tanzania*, BBC NEWS, Oct. 29, 2002, *available at* http://news.bbc.co.uk/1/hi/world/africa/2372907.stm (last visited Feb. 24, 2005).

[45] *World: Africa Villagers Burn 'Witches' in South Africa*, BBC NEWS, Apr. 27, 1999, *available at* http://news.bbc.co.uk/1/hi/world/africa/329600.stm (last visited Feb. 24, 2005).

hut which they then set on fire.[46] The women had been blamed for causing the earlier shooting death of a young man.[47]

The staggering rate of HIV infection in certain African countries has also increased attacks against putative witches, as they provide a ready scapegoat for the spread of the deadly disease.[48] According to the World Health Organization (WHO), "Sub-Saharan Africa has just over 10% of the world's population, but is home to more than 60% of all people living with HIV – 25.8 million."[49] WHO estimates that in 2005 alone, 3.2 million people in Sub-Saharan Africa became newly infected with HIV, and 2.4 million died of AIDS.[50] In South Africa specifically, national adult HIV prevalence has increased from around 1% in 1990 to around 25% in 2000, and "29.5% of women attending antenatal clinics tested HIV-positive in 2004."[51] WHO reports that the "[s]ymptoms of illness associated with the onset of AIDS, such as persistent coughing, diarrhea, abdominal pains, and wasting, have long been associated [in Africa] with the malicious assaults of witches."[52]

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[46] *Id.*

[47] *Id.*

[48] Ashforth reports that in South Africa "most of the people infected with HIV and dying of AIDS are young adults in what should be their most fertile and productive years. The death of such persons has long been associated with witchcraft [there]." ASHFORTH, *supra* note 3, at 9.

[49] World Health Organization, *Fact Sheet: Sub-Saharan Africa*, November 2005, http://www.who.int/hiv/FS_SubSaharanAfrica_Nov05_en.pdf (last visited Nov. 27, 2005).

[50] *Id.*

[51] *Id.*

[52] *Id.*

In 2002 in Mozambique, Zeca Chicusse, a program officer in Tete for Help Age International explained that if a family member falls sick, "the first thing [the family does] is go to the traditional healer [who will] never say it is malaria or tuberculosis, [or HIV/AIDS, and instead will] always accuse an elder."[53] For example, when Daina Pedro's grandchildren died, a traditional healer blamed her for "bewitch[ing] them."[54] After she was accused, Mrs. Pedro's entire family abandoned her, leaving her vulnerable in an area that has been hit by famine.[55] Although this treatment seems harsh, abandonment may be preferable when the alternative is a brutal death by burning, roasting, or necklacing. Personally, Mrs. Pedro believes in witchcraft, but maintains that she was accused falsely.[56]

C. The Governmental Response to a Pervasive Social Problem.

As Tim Judah writes, "belie[f] in the existence of witchcraft . . . is part and parcel of local tradition and belief."[57] This belief necessarily includes the conviction that witches are real and wish to inflict harm, thereby leading to prophylactic witch-inspired violence or retributive violence such as the case of the three elderly women chased into the hut by the members of their community, described above. The scope and prevalence of this problem has led many African

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[53] Tim Judah, *Elderly 'Witches' Persecuted in Mozambique*, BBC NEWS, Jul. 3, 2002, *available at* http://news.bbc.co.uk/1/hi/world/africa/2089875.stm (last visited Feb. 24, 2005).

[54] *Id.*

[55] *Id.*

[56] Referring to the traditional healer who accused her, Mrs. Pedro explained, "He lied a lot and used to call up the spirits to earn money. My son told his brothers. They all left and went far away." *Id.*

[57] Judah, *supra* note 53.

countries to identify "witch-purging" as a serious social problem.[58] In addition, immigration patterns have transplanted witch-related violence to Western countries.[59]

Joanna Ball, writing for the Centre on Violence and Reconciliation, suggests that witch-related violence decreased during periods of colonial control and domination.[60] For example, Ball notes "the meting out of this violent punishment [i.e. burning] to alleged witches was curtailed as colonial ideas about the inappropriateness of witch beliefs became concrete in the form of laws."[61] In South Africa, legislative attempts to outlaw witchcraft date back to 1886.[62] The current Witchcraft Suppression Act (WSA) was enacted in 1957 and has been twice amended, most recently in 1999.[63] The WSA generally outlaws the practice of witchcraft, accusations of witchcraft, and consultations with witchdoctors who are employed to identify witches.[64] In addition to the WSA, anti-witchcraft laws exist on the Provincial and local level.[65]

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[58] *See* Ludsin, *supra* note 5 (discussing statement by Minister from Northern Province).

[59] For example, in Great Britain, the 2001 so-called "Thames Torso" case has focused national attention on *muti* killing. BBC NEWS, *Thames Torso was Human Sacrifice,* Jan. 29, 2002, *at http://news.bbc.co.uk/1/hi/england/1788452.stm* (last visited dec. 17, 2005). A 2005 report prepared by the Metropolitan Police stated that children accused of witchcraft were being killed in so-called "faith crimes." BBC News, *Boys Used for Human Sacrifice,* July 16, 2005, *at* http://news.bbc.co.uk/2/hi/uk_news/4098172.stm (last visited Dc. 17, 2005)

[60] Ball, *supra* note 35. Ball notes the low level of witch killings during colonial control: "From the 1950s and up until the end of 1976 the killing of witches appears to have been a rare event." *Id.*

[61] *Id.*

[62] Ludsin, *supra* note 5, at 89.

[63] *Id.*

[64] Ball, *supra* note 35.

[65] Carstens, *supra* note 11, at 7.

More specifically, the WSA creates offences for, among other things, any person who i) "names or indicates any other person as a wizard," ii) "employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard," or iii) "on the advice of any witchdoctor, witch-finder or other person or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operation any means or process which, in accordance with such advice or his own belief, is calculated to injure or damage any person or thing."[66] Despite its strong language, the anti-witch violence legislation has done little to dim the ferocity of attacks against perceived witches, and some argue that the legislation has only increased the violence.[67] In particular, Hallie Ludsin makes the argument that the WSA left individuals who sincerely believed in the clear and present danger presented by witchcraft without legal recourse.[68] As a result, these individuals turned to vigilante justice.[69]

The sharp increase in witch-related violence during the politically tumultuous period of the 1980s and 1990s led to renewed concern. This was particularly true in South Africa's Limpopo or Northern Province where the Commission of Inquiry into Witchcraft and Ritual Murders, known as the Ralushai Commssion, was appointed in 1995.[70] Its final report found that "the overwhelming majority of people interviewed" believed in witchcraft.[71] There was no

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[66] *Id.*

[67] Ludsin, *supra* note 5, at 91.

[68] *Id.*

[69] *Id.*

[70] Carstens, *supra* note 11, at 3.

[71] *Id.* at 5.

discernable difference between urban and rural interviewees.[72] Moreover, the results included members of the South African Police services, whose beliefs were consistent with that of the general population.[73]

In 1998, the Commission on Gender Equality hosted a national conference on witchcraft violence in the Northern Province town of Thohoyandou, drawing "participation from national and international stakeholders toward ending the scourge of violence associated with witchcraft accusations[.]"[74] The participants expressed that they were "SHOCKED AND HORRIFIED [sic] by the misery suffered by survivors of witchcraft violence" and "DEEPLY CONCERNED [sic] by the escalation in witchcraft violence and the flagrant violation of human rights which it represents."[75]

In light of the findings of the Ralushai Commission and other Commissions such as the Commission on Gender Equality, the South African government has undertaken a broad based program to combat witch-related violence and the pervasive and persistent cultural belief in witchcraft. These efforts include the formation of a special South African Police Services unit in the Northern Province.[76] This would seem to be an important innovation given that the Ralushai Commission reported that the "overwhelming majority" of the police forces in the Northern

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[72] *Id.*

[73] *Id.*

[74] ASHFORTH, *supra* note 3, at 264.

[75] *Id.*

[76] A. Minnaar, Institute for Human Rights and Criminal Justice Studies, *Selected Conference Paper/Workshop & Seminar Presentation, at* http://www.crimeinstitute.ac.za/abstract.htm#7 (last visited Dec. 17, 2005).

Province believe in witchcraft.[77] In addition, the government has established special resettlement villages for accused witches.[78] Perhaps most importantly, the government has also established a public education initiative that consists of programs "in schools and the holding of public rallies by chiefs, churches and politicians to educate people about the issue."[79]

III. THE WITCHCRAFT-PROVOCATION DEFENSE.

The attempts of the common law courts to address witchcraft-inspired violence differed markedly from the suppression tactics of the various legislative initiatives. Whereas legislation recognizes the widespread violence and seeks to curtail it, the criminal law often recognized the widespread belief that gave rise to the violence and carved out a bewitched-provocation defense that could be offered as a mitigating factor in cases of witchcraft-related violence.[80] Under this theory, the defendant could reduce his crime and/or punishment upon proof that he believed he was being bewitched and that this belief caused him to temporarily lose self-control.[81] In some ways, this theory provides tacit recognition that, in certain communities, killing a "witch" is not merely explainable or excusable, it is "praiseworthy."[82]

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[77] Carstens, *supra* note 11, at 5

[78] Minnaar, *supra* note 76.

[79] *Id.*

[80] Ludsin, *supra* note 5, at 93.

[81] *Id.*

[82] For example, Onesmus Diwan explains, "According to Kenyan legal scholar Onesmus K. Mutungi, killing a witch 'is not only approved but… is also a praiseworthy service in the eyes of' many communities. Thus, the judicial practice of punishing individuals who kill alleged witches creates a conflict between state legal norms and norms underlying popular beliefs." Mohammed A. Diwan, *Conflict Between State Legal Norms and Norms Underlying Popular Beliefs: Witchcraft in Africa as a Case Study*, 14 DUKE J. COMP. & INT'L L. 354 (2004) *quoting*

This Part describes the modern evolution of the witchcraft-provocation defense in several African countries. With a particular focus on South Africa, it discusses the construction of a reasonable person standard and the defense of non-pathological criminal incapacity. It also considers the wider implications of the establishment of a cultural defense for witchcraft-related violence.

A. Background.

In *Witch Murder and Mens Rea*, Robert Seidman provides the classic description of the witchcraft provocation defense.[83] He describes a colonial case that arose in Uganda in 1941, *Rex v. Fabiano Kinese & Another*, where the defendants believed that a witch had killed members of their families through witchcraft.[84] The defendants found the accused witch one night "naked, crawling about their compound," and believing that he was actually practicing witchcraft on them at that moment, they killed him.[85] The court allowed a partial defense of provocation in this case, stating:

> We think that if the facts proved establish some act which the accused did genuinely believe, and which an ordinary person of the community did genuinely believe, to be an act of witchcraft against him or another person under his immediate care… he might be angered to such an extent as to be deprived of the power of self-control and induced to assault the person doing the act of witchcraft. And if this is to be the case a defen[s]e of grave and sudden provocation is open to him.[86]

ONESMUS K. MUTUNGI, THE LEGAL ASPECTS OF WITCHCRAFT IN EAST AFRICA WITH PARTICULAR REFERENCE TO KENYA 104 (1977).

[83] Robert Seidman, *Witch Murder and Mens Rea: A Problem of Society Under Radical Social Change*, THE MODERN LAW REVIEW 28, Jan. (1965).

[84] *Id.*

[85] *Id.*

[86] *Id.*

The defendants in the case were a group of villagers who had suspected a village headman of practicing witchcraft.[87] When the villagers found him, they killed him by a particularly gruesome and seemingly lengthy process. They inserted "about twenty raw green bananas into his anus."[88] According to the court, the victim's act of crawling naked in another's compound constituted "grave and sudden provocation."[89] This case "finds the villagers' provocation by an apparent act of witchcraft to be reasonable, provided an ordinary and reasonable person from the villagers' community would share the same belief."[90]

Ten years later, the same court more fully addressed the question of witchcraft provocation. In *Eria Galikuwa v. Rex*, 1951 (18) E. Afr. Ct. App. 175 (appeal taken from Uganda), the court set out the elements required for a successful defense of provocation:

1. [T]he act causing the death must be proved to have been done in the heat of passion, that is in anger: fear alone, even fear of immediate death is not enough.
2. [T]he victim [must have been]… performing in the actual presence of the accused some act which the accused did genuinely believe, and which an ordinary person of the community to which the accused belongs would genuinely believe, to be an act of witchcraft against him or another person under his immediate care.
3. A belief in witchcraft *per se* does not constitute a circumstance of excuse or mitigation for killing a person believed to be a witch or wizard when there is no immediate provocation act.
4. The provocation act must amount to a criminal offence under [c]riminal [l]aw.
5. The provocation must be not only grave but sudden and the killing have been done in the heat of passion.[91]

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[87] Diwan, *supra* note 82, at 372-373.

[88] *Id.* (quoting *Rex v. Fabiano Kinese & Another*, 1941 (8) E. Afr. Ct. App. 96 (appeal taken from Uganda),

[89] *Id.*

[90] *Id*. at 373.

[91] Diwan, *supra* note 82 at 374 (quoting *Eria Galikuwa v. Rex*, 1951 (18) E. Afr. Ct. App. 175 (appeal taken from Uganda). Diwan notes that post-colonial courts continued to follow

Similar witchcraft-provocation defenses have been entertained by courts in Tanzania. Mohammed Diwan notes that defendants have argued in several cases that "the deceased's threats or actions allegedly involving witchcraft are argued to constitute such provocation that the defendant killed the deceased in the heat of passion."[92] As recently as 1991, an appellate court reduced a capital murder conviction to manslaughter with a twelve-year prison sentence after considering a mitigation claim based on the defendant's belief in witchcraft.[93] In *John N. Rudowiki v. Republic*, 1991 TLR 102 (CA), the defendant was convicted for the ax murder of his grandfather who had allegedly threatened to kill the defendant through witchcraft.[94]

B. South Africa.

A discussion of the reported cases dealing with witch killings will necessarily only represent a fraction of the incidents of witchcraft-inspired violence. For example, studies suggest that in South Africa episodes of witchcraft-related violence are often not reported.[95]

Eria Galikuwa. *Id.* at 377 (stating "In the postcolonial era, judges seem to have followed the colonial case *Eria Galikuwa* by allowing the alleged appearance of witchcraft to count as provocation as long as the killing is not premeditated, is sudden and is not based solely on fear").

[92] *Id*. at 375. Diwan notes that "Judges consider the reasonableness of the defendants' perceptions by asking whether a reasonable person would have perceived the context of the action as the defendant did. As such, 'reasonableness' becomes a window into the way judges balance norms underlying popular beliefs and state legal norms." *Id.* at 369. *See also,* Daniel D. N. Nsereko, *Witchcraft as a Criminal Defence, From Uganda to Canada and Back*, 24 Manitoba L.J. 38, 55 (1996) (stating "provided that there is an overt physical act of witchcraft, the courts are at least willing to accept an ordinary person of the community and background of the accused as the standard for determining whether or not an act of witchcraft would be sufficient to deprive a reasonable person of self-control and induce him to commit the offence in question").

[93] *Id.* at 375.

[94] *Id.*

[95] Carstens, *supra* note 11, at 11.

Particularly where tribal chiefs or family members of the victim are involved, individuals are reluctant to come forward because of the popular belief that the perpetrator will not be charged and that reprisals are possible.[96] When the police actually do pursue an investigation, it is often hampered by the fact that few members of the community are willing to give testimony on behalf of a witch.[97]

Assuming that charges are actually brought, South African courts have been forced to reconcile the official denunciation and denial of witchcraft with the widespread belief in witchcraft. As early as 1911, the Natal Native High Court expressed disappointment and frustration over the continued belief in witchcraft and its dangers.[98] In *Rex v. Magebeni*, 1911 Native High Court 107 (Natal), the court asked, "When is it to come that these Natives are to learn that consulting diviners and committing murders will not be tolerated by the British Government? As I have already said, these men lived under a Magistrate for ten or twelve years. Is this sort of thing to continue for ever?"[99]

In the case of South Africa, the witchcraft-provocation defense is really a misnomer. South African criminal law represents a unique hybrid system of Roman Dutch law and English common law influences.[100] There is no jury system.[101] Case law establishes binding precedent

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[96] *Id.*

[97] *Id.*

[98] Ludsin, *supra* note 5, at 106.

[99] *Id.*

[100] Amanda Barratt and Pamela Snyman, *Researching South African Law, available at* http://www.nyulawglobal.org/globalex/south_africa.htm#_INTRODUCTION (last visited Dec. 17, 2005) (describing the hybrid system). In addition to the hybrid nature of the formal

and there is a system of appellate review.[102] All criminal laws are codified and the standard of proof required in criminal cases is beyond a reasonable doubt.[103] Traditionally, under Roman-Dutch law, provocation was only relevant in terms of mitigation of sentence.[104] However, provocation also may be a factor in determining the complete defenses of justified self-defense or lack of criminal capacity. Accordingly, under South African law, a belief in witchcraft may mitigate the charge and sentence or, in rare cases, may excuse the crime completely and result in acquittal.

Under South African law, a reasonable person does not believe in witchcraft. This is clear from both case law and the existence of the WSA. This means that a belief in witchcraft would not support a claim of self-defense, given that the defendant must establish that a reasonable person would not have acted in the same manner.[105] For example, in 1971 the court rejected a plea of self-defense where the defendant alleged that the victim had threatened him with death through witchcraft.[106] In *S. v. Mokonto*, the court found that the elderly female victim posed no immediate threat to the defendant and noted that the defendant's belief in witchcraft

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law, South Africa also has what is referred to as a "plural system" where individuals can choose to be subject to customary law in many instances. *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] Deborah, Quenet, Women's Legal Centre, *Introducing Expert Evidence on Battery During Trial on a Charge of Murder: Do We Apply the Battered Women's Syndrome? available at* http://www.wlce.co.za/advocacy/seminar2.php (last visited Dec. 17, 2005).

[105] *Id.*

[106] Ludsin, *supra* note 5, at 91.

was not reasonable.[107] The court stated: "the beknighted belief in the blight of witchcraft cannot be regarded as reasonable. To hold otherwise would be to plunge the law backward into the Dark Ages."[108] As discussed below, a subjective belief in witchcraft may, however, serve as a mitigating factor in terms of sentencing.[109] In addition, some commentators contend that a subjective belief in witchcraft should serve as part of a larger "cultural defense."[110]

It is more likely that a belief in witchcraft could be used to support a defense of non-pathological criminal incapacity.[111] Under section 78 of the Criminal Procedure Act, an individual is not criminally responsible if he is incapable "a) of appreciating the wrongfulness of his act; or (b) of acting in accordance with an appreciation of the wrongfulness of his act."[112] Courts have interpreted Section 78 to not require an independent finding of mental illness, but merely that the defendant's actions were the result of extreme emotional stress. First recognized in the 1980s, Courts have allowed the defense of non-pathological criminal incapacity to proceed in cases involving domestic violence, "road rage," and intoxication.[113] The defense requires the defendant to plead that he had no control over his actions although he understood the

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[107] *Id.*

[108] *Id.* at 91-92.

[109] Carstens, *supra* note 11, at 8.

[110] *Id.*

[111] In *Eadie v. State*, the Supreme Court of Appeal of South Africa provides a lengthy and detailed explanation of the development of this defense. *Eadie v. S*, 2002 (1) SACR 633 (SCA), *available at* http://supremecourtofappeal.gov.za/judgements/sca_jdg/sca_2002/19601.pdf (last visited Dec. 17, 2005).

[112] Karrisha Pillay, *Battered Women Who Kill: Legal/Politic Avenues for Recourse, available at* http://www.csvr.org.za/papers/papillay.htm#defences (last visited Dec. 17, 2005).

[113] *See Eadie, supra* note 106.

wrongfulness of them.[114] It has been confused with the related defense of "sane automatism" where a defendant's actions are involuntary and reflexive.[115] The defense has led to acquittals in a number of murder cases.[116] Although none of the reported cases involved allegations of witchcraft, Carstens contends that non-pathological criminal incapacity could have been persuasive *in S. v. Mokonto*, had it been available at the time.[117]

A 1960 case provides an example of the type of involuntariness that can negate criminal capacity, constituting what is now referred to as the automatism defense. In *R v. Ngang*, the defendant testified that he had a nightmare that an evil spirit, known as a tokoloshe, was in his bedroom.[118] In response to the dream, the defendant hid a knife under his bed to protect him from the spirit.[119] Unfortunately, the defendant later thought that his friend was the evil spirit and killed him with the knife.[120] In the absence of any other motive, the court found that the defendant's action was reflexive and lacked the voluntariness necessary for criminal capacity.[121]

In a very high profile case involving "road rage," the Supreme Court of Appeals of South Africa has tried to narrow the scope of the non-pathological defenses available under section

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[114] *Id.*

[115] *Id.*

[116] Pillay, *supra* note 107.

[117] Carstens, *supra* note 11, at 20.

[118] Ludsin, *supra* note 5, at 94.

[119] *Id.*

[120] *Id.*

[121] *Id.*

78.[122] In *S. v. Eadie*, the court stressed that non-pathological criminal incapacity, although "notionally possible," was a relatively rare occurrence, despite the frequency with which it was alleged.[123] In a passage that could very well cover witchcraft-inspired violence, the court stated:

> The time has come to face up to the fact that in some instances our courts, in dealing with accused persons with whom they have sympathy, either because of the circumstances in which an offence has been committed, or because the deceased or victim of a violent attack was a particularly vile human being, have resorted to reasoning that is not consistent with [precedent].[124]

In rejecting the defense, the court concluded, "The message that must reach society is that consciously giving in to one's anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law."[125]

Notwithstanding judicial attempts to narrow the application of the non-pathological defenses, provocation based on a belief in witchcraft remains a mitigating factor that can reduce a charge of murder to "culpable homicide." [126] For example, in *S. v. Mokonto*, the defendant was found guilty of what at the time was referred to as "murder with extenuating circumstances."[127] In 1990, a court explained the continued use of a belief in witchcraft as a form of mitigation as follows:

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[122] *See Eadie, supra* note 106.

[123] *Id.* at 54.

[124] *Id.* at 55.

[125] *Id.* at 63.

[126] Carstens, *supra* note 11, at 8.

[127] *Id*.

> Objectively speaking, the reasonable man does not believe in witchcraft. However, a subjective belief in witchcraft may be a factor which may, depending on the circumstances, have a material bearing upon the accused's blameworthiness … as such it may be a relevant mitigating factor to be taken into account in the determination of an appropriate sentence."[128]

Instances of necklacing raise a slightly different set of defenses. Although necklacing is most often carried out by a group of perpetrators, the legal theory of "common purpose" will hold all persons in the group responsible for the killing.[129] In some prosecutions, cultural evidence has been used successfully to mitigate the charge and secure reduced prison sentences. This evidence includes expert testimony regarding "conformity, obedience . . . and bystander apathy."[130] Carstens notes that given "the mindless cruelty and the resort to torture" involved with necklacing, "one would expect the courts to impose the maximum sentence in every instance."[131] However, he describes a 1990 retrial where the court reduced six death sentences to 20 months in prison.[132]

This brief discussion of South African case law illustrates the difficulty facing the courts as they try to accommodate the continued belief in witchcraft while at the same time deny its reasonableness. The continued willingness of the courts to consider a subjective belief in witchcraft, if only for purposes of mitigation, represents how far the country is from the ideal expressed in the WSA. South Africa is caught between recognizing that the traditional belief in

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[128] *Id.* (quoting *S v. Netshiavha* 1990 (2) SACR 331 (A) at 333).

[129] *Id.* at 18.

[130] *Id.*

[131] *Id*. at 17-18.

[132] *Id*. at 18.

the evil of witchcraft is still prevalent and the contemporary Western understanding of the absurdity of the defense and a desire to deter anti-witch violence.

Advocates of "cultural defenses" seek to bridge this divide. For example, Carstens endorses the recognition of cultural defenses as a "way for Africans to reclaim the beauty of their heritage in the wake of the brutalities, distortions, and diminishments of apartheid."[133] For Carstens this means taking account of a "reasonable traditional African standard" in a variety of instances, including self-defense, criminal incapacity, and mitigation.[134] With respect to mitigation, Carstens argues "that the defendant could have his or her conviction reduced from murder to manslaughter if the judge takes into account that a reasonable person from the defendant's community would have acted in the same manner."[135] Carstens intends his proposal to be liberating. However, from the perspective of the United States, where premeditated murders committed during the Civil Rights movements have languished unprosecuted for decades, and where lynchings were once commemorated on postcards, the community standard seems a little bit like a license to kill. Indeed, depending on the definition of "community," if a similar standard were adopted in the United States, it could provide a blanket reduction from murder to manslaughter in hate-inspired killings of gay men and lesbians.

.IV. HOMOSEXUALITY: VIOLENCE, HATE CRIMES, AND THE PROVOCATION DEFENSE.

[133] *Id.* at 11.

[134] *Id.*

[135] Diwan, *supra* note 82, at 370-71.

The United States is one of the most religious of the industrialized nations.[136] Many Americans embrace Christianity and a concomitant belief that homosexuality is wrong.[137] Violence against homosexuals stems from a belief that homosexuality is evil, and that social problems such as HIV/AIDS and the disintegration of the traditional family are the result of homosexuality.[138] This type of violence is so prevalent that "gay-bashing" is recognized as a pervasive social problem in many areas of the United States.[139] There have been statewide legislative initiatives designed to combat this phenomenon, along with a recent attempt to revise national hate crimes legislation to include sexual orientation.[140]

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[136] Frank Newport, *Third of Americans Say Evidence Has Supported Darwin's Evolutionary Theory*, THE GALLOP ORGANIZATION, Nov. 19, 2004, *available at* http://www.gallup.com/poll/content/login.aspx?ci=14107 (last visited Feb. 27, 2005). "Only about a third of Americans believe that Charles Darwin's theory of evolution is a scientific theory that has been well supported by the evidence, while just as many say that it is just one of many theories and has not been supported by the evidence. The rest say they don't know enough to say. Forty-five percent of Americans also believe that God created human beings pretty much in their present form about 10,000 years ago. A third of Americans are biblical literalists who believe that the Bible is the actual word of God and is to be taken literally, word for word." *Id.*

[137] A recent report by the Pew Research Center concludes that "religious beliefs factors are a major factor" in opposition towards homosexuality. Pew Research Center, *Religious Beliefs Underpin Opposition to Homosexuality: Republicans Unified, Democrats Split on Gay Marriage*, Nov. 18, 2003, *available at* http://people-press.org/reports/display.php3?PageID=763 (last visited Dec. 18, 2005).

[138] Seventy-six percent of "regular churchgoers" report that the information they receive about homosexuality from their church is negative. *Id.* White Evangelicals are much more likely than other denominations to report that their clergy discusses homosexuality. *Id.* For example, sixty-six percent of white Evangelicals report that their clergy talk homosexuality, as compared with thirty-six percent of "mainline Protestants." *Id.*

[139] For a discussion of hate crimes from a progressive religious perspective see *Hate Crimes in the U.S.: Definition, Information, Ethics, and Legislation*, *at* http://www.religioustolerance.org/hom_hat1.htm (last visited Dec. 17, 2005).

[140] Human Rights Campaign, *Statewide Hate Crimes Laws*, May 2004, *at* http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=8471 (last visited Feb. 27, 2005).

A. Cultural-Religious Belief that Homosexuality is Sinful and Evil.

Nearly 80 percent of the population of the United States professes a belief in God,[141] and only one third believes in evolution.[142] Fifty-five percent of those surveyed believe that homosexuality is a "sin."[143] Throughout this pervasive religiosity runs a strong evangelical fundamentalist strain that demonizes homosexuality.[144] Extreme examples would include the Reverend Fred Phelps whose website, godhatesfags.com, contains links to documents with titles such as "All Nations Must Outlaw Sodomy and Impose the Death Penalty" and the "Matthew Shepard Memorial" that shows Matthew's head being licked by the flames of Hell with a counter showing the number of days his soul has been consigned there.[145] Even more mainstream Evangelicals, such as the Reverend Jerry Falwell, openly accuse homosexuals of undermining the traditional family, demeaning the social fabric, and spreading HIV to the general population.[146] After the September 11 attacks, Reverend Falwell blamed homosexuals for causing "God . . . to lift the curtain and allow the enemies of America to give us probably what

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[141] Humphrey Taylor, *While Most Americans Believe in God, Only 36% Attend a Religious Service Once a Month or More Often,* THE HARRIS POLL 59, Oct. 15, 2003.

[142] Newport, *supra* note 136.

[143] *See* Pew *supra* note 138.

[144] *See* Newport, *supra* note 136.

[145] Reverend Fred Phelps pickets the funerals of gay and lesbian individuals. His website says, "Fags shamelessly use the deaths of fags to promote their sodomite agenda, but ignore cases when a fag is the murderer." Westboro Baptist Church, http://www.godhatesfags.com (last visited Feb. 27, 2005).

[146] For example, the website of the Traditional Values Coalition, headed by the Reverend Louis P. Sheldon, contains numerous references to homosexuality and its associated perils. The Traditional Values Coalition, *at* http://traditionalvalues.org (last visited Dec. 19, 2005)

we deserve."[147] The parallel to using witchcraft as a scapegoat is compelling. As Diwan points out, "[b]y attributing 'inexplicable eventualities' and misfortunes to supernatural forces, the belief in witchcraft does not appear strikingly different from many of the world's major religions."[148]

B. Religiously-Informed Violence Against Homosexuals.

In "License to Kill," a documentary on men who killed because of their beliefs about homosexuality, Jay Johnson, convicted of killing three gay men, explained his motivation as follows: "I would think to myself, 'This is a constructive, moral thing to be doing.' And I certainly didn't just come up with that idea. I watched The 700 Club sometimes with Pat Robertson -- they're constantly talking about gays."[149] This sentiment is very similar to that voiced by Sixbert Mbaya, the project co-ordinator of an organization called "Help Age" who explains that in many areas of Africa "if you kill a witch it is not really considered a crime. It's like you are doing something for the community. It's a culturally acceptable thing to do."[150]

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[147] The full quote of what the Reverend Jerry Falwell said to Pat Robertson on the Christian television program, *The 700 Club*, on Sept. 13, 2001:

> What we saw on Tuesday, as terrible as it is, could be minuscule if, in fact, God continues to lift the curtain and allow the enemies of America to give us probably what we deserve…. The abortionists have got to bear some burden for this because God will not be mocked. And when we destroy 40 million little innocent babies, we make God mad. I really believe that the pagans, and the abortionists, and the feminists, and *the gays and the lesbians who are actively trying to make that an alternative lifestyle*, the ACLU, People for the American Way, all of them who have tried to secularize America, I point the finger in their face and say, "You helped this happen."

Laurie Goodstein, *After the Attacks: Finding Fault; Falwell's Finger-pointing Inappropriate Bush Says*, N.Y. TIMES, Sept. 15, 2001, at A15 (quoting Falwell)(emphasis added).

[148] Diwan, *supra* note 82, at 355.

[149] License to Kill, Deep Focus Productions, *at* http://www.deepfocusproductions.com/page_html/film_LTK0.html, (last visited Feb. 27, 2005).

[150] Dickinson, *supra* note 20.

Religious condemnation of homosexuality rests on a passage in Leviticus that prescribes death as the sanction for male homosexuality.[151] Only the more extreme evangelicals actively advocate a death penalty for homosexuality, such as the Reverend Fred Phelps and an Orange County radio talk show host who urged his listeners to ask their legislators to punish homosexuality by death in accordance with Biblical law.[152] A more traditional position would be to categorize homosexuality as behavior distinct from the individual, thereby rejecting any claim to a biological cause of homosexuality.[153] This allows evangelicals to condemn the behavior while exhorting the individual to repent and leave the so-called gay lifestyle.[154] Again, this approach bears a striking resemblance to the views on witchcraft expressed by Mboto Milando, a former diplomat and senior civil servant.[155] He explained that "killing is bad and taking the law into your hands is bad," but also that "witchcraft is bad."[156] However, he also believes in the existence of witchcraft, and advises that people should "love the witch, but hate the

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[151] Chen, *supra* note 10, at 198.

[152] R. Scott Moxley, *"Blow Their Butts to Hell,"* ORANGE COUNTY WEEKLY, Feb. 8-14, 2002, *available at* http://www.ocweekly.com/ink/02/23/press-moxley.php (last visited Feb. 27, 2005) (noting radio talk show host, Rich Agozino, "advocated public executions of California's gay and lesbian citizens").

[153] According to the Pew Research Center, only fourteen percent of white Evangelicals believe that homosexuality is innate and seventy-three percent believe that homosexuals can change. Pew Research Center, *supra* note 137.

[154] For example, earlier this year, Reverend Falwell spoke at a conference for the "ex-gay" movement to "encourage people to get out [of homosexuality]." Julie Ball, *Falwell Encourages Ex-Gays at Ridgecrest,* CITIZEN-TIMES (ASHEVILLE, N.C.), JJuly 22, 2005, *available at* http://www.citizen-times.com/apps/pbcs.dll/article?AID=/20050722/NEWS01/50721039 (last visited Dec. 20, 2005).

[155] Evans, *supra* note 38.

[156] *Id.*

witchcraft."[157] Apparently, Milando would agree with the popular Christian catchphrase "love the sinner, but hate the sin."

C. Governmental Response to a Pervasive Social Problem.

Anti-gay violence has been belatedly recognized as a pervasive social problem in the United States. In 2003, 19 percent of all reported hate crimes were based on sexual orientation, with 61 percent of those crimes being directed against male homosexuals.[158] Currently, only twenty-nine states and the District of Columbia include sexual orientation in hate crimes statutes. Fifteen states have hate crimes laws that do not cover sexual orientation or gender identity, and five states have no hate crimes laws.[159] Current federal hate crime law, which was passed by Congress in 1968, "allows federal investigation and prosecution of hate crimes based on race, religion, and national origin," but does not include sexual orientation, gender, gender identity or disability.[160] New federal hate crimes legislation including these categories was introduced in May 2005 in the House of Representatives, and passed on September 14, 2005 by a "strong

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[157] *Id.*

[158] FBI Hate Crimes Statistics Report, 2003, *available at* http://www.fbi.gov/ucr/ucr.htm, (last visited Dec. 18, 2005).

[159] Human Rights Campaign, *Statewide Hate Crimes Laws*, May 2004, *at* http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=8471 (last visited Feb. 27, 2005).

[160] Human Rights Campaign, *Local Law Enforcement Enhancement Act*, *at* http://www.hrc.org/Template.cfm?Section=Local_Law__Enhancement_Act (last visited Dec. 18, 2005).

bipartisan vote of 223-199.[161] The Senate version of the bill has been referred to the Senate Judiciary Committee.[162]

However, even in jurisdictions that have inclusive hate crimes legislation, some juries are reluctant "to classify an offense as a hate crime meriting enhanced punishment."[163] In one such case, a man shouted "faggot" before delivering a serious blow to a fellow Morehouse College student's skull with a baseball bat.[164] The jurors convicted the man of aggravated assault and aggravated battery, but did not rule the attack a hate crime, which would have increased his sentence.[165]

In addition to the possibility of jury nullification, some prosecutors may be reluctant to prosecute murders of homosexuals as hate crimes. For example, on June 29, 2001, in Wichita, Kansas, an openly gay hairdresser named Marcell Eads was beaten and died from burns and smoke inhalation after Zachary Steward and Brandon Boone set fire to his home.[166] At a preliminary hearing, Boone's girlfriend testified that the night of the murder she heard Steward said he was angry that Eads had propositioned him, use an anti-gay slur to describe him, and ask

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[161] *Id.*

[162] *Id.*

[163] Beth Warren, *Seminar to Take on 'Gay Panic' Defense; Police, FBI and Hate-Crime Researchers Will Offer Advice to Prosecutors*, THE ATLANTA JOURNAL-CONSTITUTION, Feb. 24, 2005 at 6C.

[164] *Id.*

[165] *Id.*

[166] Human Rights Campaign, *A Chronology of Hate Crimes: 1998-2002*, *at* http://www.hrc.org/Template.cfm?Section=Hate_Crimes1 (last visited Nov. 27, 2005).

Boone to go with him to beat Eads up and steal from his home.[167] During trial, "Steward and Boone both blamed the violence on Eads' supposed unwanted sexual advances."[168] While both were charged with first-degree murder, aggravated arson, aggravated burglary, and aggravated robbery, neither were charged with a hate crime, which would have enhanced their sentences under Kansas law.[169]

D. The Non-Violent Homosexual Advance Provocation Defense.

In the United States, criminal law is traditionally an issue of state law. Generally, a provocation defense is available when the actions of the victim are sufficiently infuriating that a reasonable person might experience a loss of self-control,[170] such as when the victim physically assaulted the defendant.[171] However, U.S. criminal law has also allowed a provocation defense to be based on a "non-violent homosexual advance."[172] This defense is based on unsubstantiated

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[167] Southern Poverty Law Center, *The Forgotten*, *at* http://www.splcenter.org/intel/intelreport/article.jsp?aid=133&printable=1 (last visited Nov. 27, 2005).

[168] *Id.*

[169] *Id.*

[170] Model Penal Code § 210.2 provides that criminal homicide constitutes murder when "it is committed purposely or knowingly; or it is committed recklessly under circumstances manifesting extreme indifference to the value of human life." MODEL PENAL CODE § 210.2 Model Penal Code § 210.3 states that criminal homicide constitutes the lesser offense of manslaughter where "a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." MODEL PENAL CODE § 210.3.

[171] Chen, *supra* note 10, at 205.

[172] *Id.* at 201.

beliefs about the harmful nature of a particular group of people and, as such, bears a striking similar to the "bewitched-provocation defense."

Historically, the non-violent homosexual advance was preceded by the "homosexual panic" defense that was a form of insanity defense leading to acquittal.[173] A typical argument was that the victim triggered a "violent, uncontrollable psychotic reaction in the latently gay defendant."[174] It was said that the defendant was "intensely anxious about his repressed homosexual orientation," and that a non-violent verbal homosexual advance "started a psychological chain reaction which ultimately caused the defendant to temporarily lose the capacity to distinguish moral or legal right from wrong, and thus kill."[175] This lack of capacity is similar to the South African defense of non-pathological criminal incapacity in that it excuses the crime. However, it differs in that it is a *pathological* incapacity where the defendant must allege an inability to discern the unlawfulness of his actions, not merely to conform his actions to the law.

Today, homosexuality has been erased from the list of diagnosed psychological illnesses, and, therefore, the "homosexual panic" insanity defense has become less common.[176] Instead, a defense of "non-violent homosexual advance" is used today, frequently mislabeled under the old

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[173] *Id.*

[174] *Id.*

[175] *Id.* It is important to note that this lack of capacity defense differs from that of the non-pathological criminal incapacity defense utilized in South Africa. There, the defendant understands the unlawfulness of his actions, but is unable to conform his actions to such understanding. Here, the defendant does not have an understanding of the unlawfulness of his action.

[176] *See generally,* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1987) (discussing declassification of homosexuality as mental illness).

name of "homosexual panic" or "gay panic" defense.[177] This is a provocation defense rather than an insanity defense. As such, this defense will act to mitigate a crime and sentence, but will not result in acquittal. Under the homosexual panic/insanity defense, "the [advance] merely precipitated the homosexual panic that triggered the acute psychotic reaction and temporary insanity that caused the latent homosexual to kill."[178] As Chen explains, it was "the mental disorder of homosexual panic" that actually "caused the killing."[179] The contemporary provocation defense considers "the external stimulus - the homosexual advance – [to be] the trigger or 'adequate provocation' for heat-of-passion killing."[180]

The Commentary to Section 210.3 of the Model Penal Code explains the circumstances under which a murder charge should be reduced to manslaughter.[181] The Commentary clarifies that the provocation defense "does not require that the actor's emotional distress arise from some injury, affront, or other provocative act perpetrated upon him by the deceased."[182] To the contrary, "mitigation may be appropriate where the actor believes that the deceased is responsible for some injustice to another or even where he strikes out in a blinding rage and kills an innocent bystander."[183] The question of "whether there exists a reasonable explanation or

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[177] Chen, *supra* note 10, at 201.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] American Law Institute Comment to Section 210.3, *available at* http://myweb.wvnet.edu/~jelkins/crimlaw/note/provocation.html (last visited on Dec. 20, 2005).

[182] *Id.*

[183] *Id.*

excuse for the actor's mental condition" is a question for the trier of fact."[184] When viewed against a backdrop of persistent homophobic violence and hatred, a legal framework that takes into account emotional distress caused by a perceived "injury, affront, or other provocative act" seems perfectly fitted for a non-violent homosexual advance defense. This provocation defense raises the same questions faced by courts in South Africa. How can the law maintain that a violent hatred of homosexuals is not reasonable, yet continue to acknowledge the "reasonableness" of the actions precipitated by that very same hatred? Robert Mison attempts to explain this apparent dissonance as follows:

> As the law now stands, a nonviolent homosexual advance may constitute sufficient provocation to incite that legal fiction, the reasonable man, to lose his self-control and kill in the heat of passion, thus mitigating murder to manslaughter. [T]his homosexual-advance defense is a misguided application of provocation theory and a judicial institutionalization of homophobia. Provocation defenses have their origin and rationale in tangled theories of justification and excuse, both of which divert attention away from the killer and onto the behavior of the deceased victim. The homosexual-advance defense appeals to irrational fears, revulsion, and hatred prevalent in heterocentric society, focusing blame on the victim's real or imagined sexuality. In allowing the defense, the judiciary reinforces and institutionalizes violent prejudices at the expense of norms of self-control, tolerance, and compassion that ought to reign in society. The defense affirms homophobia and undermines the ability of courts to produce fair verdicts by creating a lower standard of protection against violence afforded to an identifiable class of victims. [Instead,] judges should hold as a matter of law that a homosexual advance is not sufficient provocation to incite a reasonable man to kill. Murderous homophobia should be considered an irrational and idiosyncratic characteristic of the killer rather than a normative social aspiration incorporated as the homosexual-advance defense into the standards that govern jury decisionmaking.[185]

People v. Schmitz is one of the most famous cases in which a defendant asserted the non-violent homosexual advance defense, because the apparent trigger, that is the homosexual

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[184] *Id.*

[185] Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 Cal. L. Rev. 133 (1992).

advance, unfolded on daytime television.[186] Scott Amedure revealed to Jonathan Schmitz on the Jenny Jones talk show that he had a secret crush on Schmitz. Schmitz was "embarrassed" and "humiliated."[187] Three days after the taping, he purchased a shotgun, drove to Amedure's trailer, and shot Amedure twice, killing him. Schmitz did not deny killing Amedure, but "[i]n defense of his actions, Schmitz argued that the humiliation of being objectified by Amedure's homosexual affections drove him to kill."[188] Schmitz appealed to the jury to sympathize with his reaction to this homosexual crush, and it ultimately worked to his advantage when "the jury found Schmitz guilty of the lesser offense of second-degree murder, despite the fact that the prosecution tried him for first-degree murder."[189]

The alleged turmoil created by an alleged non-violent homosexual advance was successfully used as a mitigation defense in the case of *State v. Thornton*. The defendant testified that "queers and freaks upset [him] a lot" and that he tried "to stay away from them as much as possible."[190] When the victim put his hands around the defendant's waist, the defendant explained that he lost his temper and stabbed the victim to death. Thornton stated in his confession: "I know that he was trying to queer me" and "[I] went out of my mind completely insane."[191] The jury proved sympathetic. It rejected the second-degree murder charge and

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[186] *People v. Schmitz*, 586 N.W.2d 766 (Mich. Ct. App. 1998).

[187] Kara S. Suffredini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279-280 (2001).

[188] *Id.*

[189] *Id.*

[190] *State v. Thornton*, 532 S.W.2d 37 (Mo. Ct. App. 1975).

[191] Suffredini explains the scene as follows: "In October of 1998, two cyclists on a Wyoming road came across what they thought was a scarecrow tied to a fence. What they found

convicted Thornton of manslaughter, without any evidence of Thornton's latent homosexuality as would have been required under the old homosexual panic defense.[192]

The signal case of Matthew Shepard, the 21-year old college student who was savagely beaten, burned, strung up on a fence and left to die, renewed interest in hate crimes legislation and focused national attention on the non-violent homosexual advance. Pictures of the fence where Shepard's body had been lashed like a scarecrow become a symbol of the brutality of anti-gay violence.[193] When Matthew was found, eighteen hours after the attack, he was still alive, but unconscious.[194] He died several days later without regaining consciousness.[195] The first officer on the scene testified that Matthew's entire face was covered in blood, "except for two streaks where his tears washed away the blood."[196] The public defender in the case against Aaron McKinney admitted in his opening argument that McKinney killed Matthew, and stated that his motive was homosexual panic.[197] The attorney "told the jury that 'Shepard made an unwanted advance towards McKinney by putting his hand on the defendant's groin and sticking his tongue

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was the badly beaten body of Matthew Shepard. The 21-year-old body of Matthew Shepard had been beaten with the butt of a pistol and burned." Suffredini, *supra* note 191, at 279-280.

[192] *Id.*

[193] C. Ray Cliett, *How a Note or a Grope Can be Justification for the Killing of a Homosexual. An Analysis of the Effects of the Supreme Court's Views on Homosexuals, African-Americans and Women*, 29 N.E. J. ON CRIM. & CIV. CON. 219, 229-230 (2003).

[194] *Id.* at 229.

[195] *Id.*

[196] *McKinney's Defense Says Unwanted Advance Spurred Shepard's Fatal Beating, available at* http://www.courttv.com/archive/trials/mckinney/102599_ctv.html (last visited on Dec. 21, 2005).

[197] *Id.*

in McKinney's ear.'"[198] The attorney went on to claim that this sexual advance brought back traumatic childhood memories for McKinney, who had apparently been the subject of homosexual abuse by a neighborhood bully.[199] The defense attorney claimed that the advance triggered a rage during which McKinney blacked out for five-minutes, during which he perpetrated the acts that killed Shepherd.[200]

The judge disallowed the offered defense, reasoning that the homosexual panic described by McKinney was more appropriately classified as a form of temporary insanity or diminished capacity, neither of which are allowed under Wyoming law.[201] The judge noted that the argument could be considered at the sentencing phase and could serve to mitigate a death penalty.[202] The introduction of this evidence did not occur at sentencing because Matthew's parents appealed to the court and requested that McKinney receive life in prison without parole, instead of the death penalty.[203]

In response to cases where defendants put forward a non-violent homosexual advance defense, last year police and the FBI sponsored our nation's first symposium to inform prosecutors of ways to defeat these "ongoing and inexcusable attempts by defense attorneys to

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[198] Cliett, *supra* note 193, at 231.

[199] *Id.*

[200] *Id.*

[201] The judge issued a separate order explaining his reasoning. For the text of that Order see *Text of the "Gay Panic" Ruling in the Matthew Shepard Case, available at* http://www.courttv.com/archive/trials/mckinney/gay_panic_ruling_ctv.html (last visited Dec. 20, 2005).

[202] Cliett, *supra* note 193, at 231.

[203] *Id.* at 231-232.

play upon jurors' potential [homophobia-based] bias."[204] The continued viability of this tactic means that those accused of murder have a tailor-made defense to utilize when their victim happens to be gay. For example, in Trevose, Pennsylvania, in 1996, a man was "stabbed to death at his residence" and the murderer claimed that he made a pass at a him in a bar.[205] In El Dorado, Arkansas, in 1998, a man was stabbed to death in his home and the murderer "claimed that [he] had made two sexual advances toward him."[206] In West Palm Beach, Florida, in 1999, "two teenagers admitted they beat a homosexual man to death [and] alleg[ed] the attack was provoked when the 118-pound victim called one of the young men 'beautiful.'"[207] In Sylacauga, Alabama, in 1999, a man was "abducted, beaten to death with an ax handle, and set afire on burning tires in a remote area," and in his defense, one of the murderers explained the victim had made "a pass at him."[208]

V. CONCLUSION.

As is the case in South Africa with respect to witchcraft, the United States is deeply conflicted about homosexuality. Despite an increasing acceptance of same-sex relationships, the non-violent homosexual advance defense continues to strike a chord with juries who sympathize with killers and with prosecutors who charge lesser offenses or fail to seek hate crimes

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[204] *Id.*

[205] Human Rights Campaign, *A Decade of Violence: Hate Crimes Based on Sexual Orientation*, *at* http://www.hrc.org/Template.cfm?Section=Hate_Crimes1 (last visited Feb. 27, 2005).

[206] *Id.*

[207] *Id.*

[208] *Id.*

enhancement when the victim is gay.[209] Sometimes even the family of the victim cannot escape the "you-got-what-you-deserved" mentality of the provocation defense. In response to the arguably light sentence imposed on his brother's killer, Greg Phillips said on February 4, 2005, "I think [the jurors] were looking at my brother being a homosexual when they made their decision. Maybe homosexuals will hear this message and see that their lifestyles are wrong, and that they need to change their lives."[210]

The parallels between the witchcraft-provocation defense and the non-violent homosexual advance defense should be sobering to Western eyes. Both defenses resonate with strong cultural and religious beliefs that are empirically unfounded. These beliefs are used to justify violence against the powerless; violence that is often designed to police gender boundaries or provide a scapegoat for misfortune. Officially, South Africa holds that a reasonable person does not believe in witchcraft, and the WSA criminalizes accusations of witchcraft. Increasingly, the official policy of the United States condemns anti-gay violence. Although sexual orientation is not yet a protected category under federal hate crimes legislation, over one-half of states now include such protection, and even Reverend Falwell eventually apologized for blaming the September 11 attacks on homosexuals.

The continued viability of the defenses represents two societies on the cusp, where official denunciations of violence collide with contrary, and strongly held, cultural and religious beliefs. The provocation defense makes allowances for human frailty and takes into account the reasonable, and therefore understandable, consequences that might arise from an "injury, affront,

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[209] Warren, *supra* note 163.

[210] Michael Lindenberger, *30-year Term Urged for Cottrell; But State Law Sets 20-year Maximum*, THE COURIER-JOURNAL, Feb. 3, 2005, at 1B.

or other provocative act."[211] For this reason, killing under extreme emotional distress is less morally culpable than premeditated murder. It is here that sentence-enhancing hate crimes legislation and cultural defenses collide. Under a hate crimes regime, certain crimes are indeed *more* morally culpable *because* they are based on widespread unfounded beliefs about a powerless or unpopular minority. A cultural defense, however, would *mitigate* the same crime *because* it is based on widespread cultural or religious beliefs.

This collision illustrates a conflict between the aspirational goals of the WSA and hate crimes legislation on one hand, and an attempt to make allowances for the reality of day-to-day life experiences of the defendants. When a society embraces a cultural defense, whether it is based on a pervasive belief in witchcraft or the conviction that homosexuals are evil sinners, it empathizes with the perpetrator and places his crime in a larger context. However, it also risks institutionalizing the violence. From a normative standpoint, it is not tenable to excuse violence against powerless and unpopular minorities simply because the violence is the result of widespread cultural and religious beliefs. There has to be a tipping point where the law moves ahead of popular prejudice and declares that violence fueled by such beliefs is not less morally culpable than other violence. Until that time, the willingness of the law to empathize with the "reasonable man" who kills as a result of prejudice and superstition leaves a slew of potential victims – elderly women who may be accused of witchcraft and gay men who may or may not make a pass at the wrong, yet "reasonable," man – without the comfort of knowing that in their country, killers are brought to justice.

[211] American Law Institute, *supra* note 181.