Sexually biased case law

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Sexually biased case law. A biological perspective.

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Introduction

'Judges are not moral or intellectual giants, prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers,' Richard Posner states in the introduction of *How Judges Think* (2009, p. 7). Yet all too often judges are put on a pedestal of rationality, and as a result, we lose the opportunity to discover and understand what human factors affect judicial decisions. And there are many such potential influences. Dijksterhuis and Nordgren (2006) show that our conscious decisions are largely determined by unconscious processes. Emotions and biological urges also play an important role in our decisions. Even if one accepts the positivist position and holds that the law is as it is written, distinct and separate from entities such as morality, the fact remains that the law is written, interpreted and applied by human hands and human minds very much affected by morals and emotions. And people cannot make moral decisions only with reason. As Frans de Waal puts it, "If human morality could truly be reduced to calculation and reasoning, we would come close to being psychopaths."[1] With reason alone we can make even bad acts sound good. In addition, the human conscious mind has a limited capacity. This makes it difficult for the conscious to balance and evaluate several different pieces of information at once.[2] The consequence is that judges and legislators, whether they know it or not, will draw upon their unconscious reservoirs of experience, social norms, morals, emotions and urges when making their decisions.[3] In this article we will examine how biological urges can be recognized in juridical verdicts. We hypothesize that biological mechanisms will become most clear in cases that concern reproduction and survival, as these are the ultimate aims of human genetics and it is

[1] Waal, F.B.M. de, *The Age of Empathy*, New York: Harmony Books 2009, p. 52.
[2] Ap Dijksterhuis & Loran F Nordgren, 'A Theory of Unconscious Thought', *Perspectives on Psychological Science* 2006, p. 95-109.
[3] Gommer, H. *A Biological Theory of Law*, Seattle: Amazon 2011, p. 68.

likely that their importance will stimulate more emotional and unconscious reactions in the presiding judges, as well as more reliance on social norms that are predicated on biological mechanisms. We will therefore turn to an examination of the biological influences on judges and the law in two cases: *R v Brown* [1994] 1 AC 212 and *R v The Queen* (1981) 28 SASR 321. The first case concerns homosexuality and sadomasochism. The second case concerns a murder, which took place against the background of a history of serious domestic violence and sexual abuse. But first let us elaborate upon some aspects of biological law theory that are important to analyze these cases from a biological perspective.

Introduction to the biological theory of law

Probably the most basic biological urges are the urge to survive, the urge to reproduce and the urge to search for food (molecules). These three properties distinguish the DNA or genes from other molecules. Without survival, additional molecules and reproduction, the spreading of genes is impossible,[4] and it is the survival and reproduction of genes that dictates the behaviour of organisms.[5] Behavioural dispositions have evolved to aid us in fulfilling these urges, such as the urge towards human co-operation,[6] the punishment of free riders[7] and others who threaten group co-operation,[8] and the propensity of humans to form groups and be negatively inclined towards those outside them.[9] As groups get bigger or join, rules are necessary to maintain order and cooperation.[10] In this way, these

[4] Dawkins, R., *The Selfish Gene*, Oxford: Oxford University Press 2006 (first published 1976); Hamilton, W.D., The Genetical Evolution of Social Behavior, *Journal of Theoretical Biology* 1964, no. 7, p. 1-52...

[5] Salmon, C. and C. Crawford, Evolutionary Psychology: The Historical Context, in: Crawford, C. and D. Krebs (eds.), *Foundations of Evolutionary Psychology*, New York: Lawrence Erlbaum Associates 2009.

[6] Alexander, R.A., *The Biology of Moral Systems*, New York: Aldine de Gruyter 1987, p. 111;

[7] E.g. Hart, H.L.A., *The Concept of Law*, Oxford: Oxford University Press 1997 (orig. 1961); Fehr, E. and S. Gächter, Altruistic Punishment in Humans, *Nature* 2002, 137-140; Fehr, E. and U. Fischbacher, 'Social Norms and Human Cooperation', *Trends Cognitive Science* 2004, p. 185-190.

[8] Waal, F.B.M. de, *Good Natured*, Cambridge: Harvard University Press 1996, p. 157-159

[9] Ibid., 31, 45-48; Ruse, R. and E.O. Wilson, Moral Philosophy as Applied Science, *Philosophy* 1986, p. 173-192, 177-178; Alexander 1987, supra note 6, p. 174; Waal, F.B.M. de, *Primates and Philosopers*, Princeton: Princeton University Press 2006, p. 56; Green, J. and J. Haidt, 'How (and Where) Does Moral Judgment Work?', *Trans. Cogn. Sci.* 2002, p. 517-523.

[10] Dunbar, R.I.M., Brains on Two Legs, in: F.B.M. de Waal, *Tree of Origin*, Cambridge: Harvard University Press 2001

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rules are the translation of morals in smaller groups.[11] Law thus seems to be a reflection of group morals and indeed biological urges.[12] This is in short biological law theory as is described in 'A Biological Theory of Law'.

It has been objected, that normative rules cannot be derived from biological mechanisms.[13] In most objections Hume is cited:

> For as this ought, or ought not, expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. […] that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason.[14]

Although objects in themselves are neither good nor bad, they can be valued as good or bad by our passions, as Hume concludes later on.[15] Therefore Hume would probably not object to the derivation of norms from biological mechanisms. He warned that emotions are necessary to value objects. Water, for example, is in itself neither good nor bad, but if it flooded our home we would emotionally value it as bad. However, if we were in the desert and found water, we would value it as good. Emotion is therefore an evolutionary calculator that reacts according to our chances of survival and reproduction in any given situation, or more precisely, the chances of the survival and reproduction of our genes. As a result, we judge objects and events in the light of their contribution to the spreading of our genes, and our ethical and legal systems can be seen as what Dawkins called a kind of 'extended phenotype'.[16]

[11] Gommer 2011, supra note 3, p. 60-65
[12] Ibid., p. 131-132.
[13] Gommer, H., From the 'is' to the 'ought': a biological theory, *ARSP* 2010.
[14] Hume, D. *A Treatise of Human Nature* 1739, III.1.1.27.
[15] Ibid., III.3.1.27
[16] Dawkins, R., *The Extended Phenotype*, Oxford: Oxford University Press 1983.

As genetics are entrenched deeply within these emotions, social norms and morals,[17] it is important to understand their influence so that legal decisions can keep in step with the needs of modern society. This is not to say that humans are devoid of the ability to reason and to influence their decisions in a rational way[18] however; it is to recognise that there are factors that influence our decisions without our consciously being aware of them, and that these factors should be studied in order to have a greater awareness of their effect.[19]

Biological principles in modern law

Rules create general standards. Individuals can use these standards to know how they ought to behave within a group, and/or within society. But as Hart (1961, 128) points out, "fact-situations do not await us labeled as instances of the general rule." Although straightforward cases do exist, in many instances, it will not be clear whether a rule applies or not. This, according to Hart, can be referred to as an open texture. Facts have to be valued and rules have to be interpreted to make a fit between the law and the everyday conflicts it must be applied to.

In quite a number of legal cases, however, there is a considerable degree of concurrence among judges, as well as among laypersons. In a famous Dutch case, which bears some resemblance to *Riggs v. Palmer*, a poor young man married an old and ailing but rich widow.[20] Five weeks after the wedding, the widow was found poisoned. Her husband was charged with and convicted for her murder. When asked, about 90% of judges and laypersons thought that it would be unfair to let the young man keep his money. Although the law was clear on this point and prescribed that the convicted husband was entitled to his share in the matrimonial property, all assets he acquired when he married the widow were confiscated. Most judges arrived at this outcome, but their reasons diverged. Some invoked unwritten legal principles, others relied on written rules,

[17] Ibid., p. 69-71.
[18] Baumeister et al
[19] Ibid p. 72-73; Hart, H.L.A., 'Positivism and the separation of law and morals' (1958) 71 *Harvard Law Review* 593, p. 593-631.
[20] Supreme Court Netherlands 7-12-1990.

and the Dutch Supreme Court simply referred to "reasonability and justice." As for laypersons, why did 90% of them find this decision reasonable and justified?

Dworkin believed that laws are founded in underlying principles, and that discretion is narrowed by principles.[21] However, where Dworkin rejected the idea of objective morals, biological law theory could probably deliver a more fundamental theory on morals and principles. Dworkin illustrated his idea of political principles with the case of *Riggs v. Palmer*. "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong".[22] This common law principle is also a biological or economical principle. If we let free riders prosper, if we did not punish them, it would be the cooperators who would suffer. This is the fundamental principle of reciprocity, which is necessary to keep organisms working together. Indeed, we can see that the notions of "property" and "theft" refer to situations in which the law protects the means for individuals to survive and reproduce. In animals, these notions are not clearly formulated norms (let alone rules) – they are merely vague feelings, based on emotions. A dog would probably not classify the theft of its food as "bad," but it would certainly *sense* that it is not to its benefit when its food is taken away. It would then react immediately, because if it did not, it might die. As we can see, certain conditions such as the availability of food and stability are crucial to the spreading of genes, and natural selection favors the genes that strive for these conditions because organisms that happen to react in the right way and survive will spread.

One of the ways this genetic connection is expressed is through emotion. Emotion, which is linked to chemical processes in the limbic system, is a way to help an organism react quickly; even fish use it. With the evolution of the brain, these emotions can be refined into feelings, but like all successful biological mechanisms, emotions that have endured have done so because they help the organism to spread its genes. Emotions thus in turn affect the way we evaluate cases, develop morals to help our survival and reproduction, and form rules. Jonathan Haidt showed the importance of emotions in moral decisions by

[21] Dworkin, R., *Taking Rights Seriously*, 1978, p. 39-44.
[22] 23; 115 NY 506, 22 NE 188, 1889

"moral dumbfounding."[23] Suppose an adult brother and sister had sexual intercourse because they felt that this would create a strong bond. Most people would disapprove of this behavior and might rationalise their disapproval by stating that it is likely to produce genetically impaired and abnormal offspring. However, this argument becomes invalid if the siblings have used contraceptives. In what sense then is sex or marriage between siblings unnatural? According to Haidt's social intuitionist model, feelings of resentment are rarely supported by rational arguments. When the first argument is shown to be faulty, people will merely search for another. When all are discredited, they can only say: "Well, I don't know, but it's still wrong." According to Haidt, "reason is used to persuade someone to share our beliefs." These beliefs are mostly unconscious and emotional. I did the same experiment with my students and asked a little further: "How do you 'just know?'" Students reacted with some irritation: "It feels 'yag.' It's disgusting! I think everyone feels that way."

This reaction can be explained through the biological theory of law. It is a simple fact that it is not to the benefit of underlying genes when siblings mate. Not only does it ultimately limit the gene pool, it also increases the chances of producing abnormal/handicapped offspring, which will both burden the group and decrease the reproductive chances of the siblings' genes. Thus, for both the siblings *and* for the group, it would be better if siblings did not mate.

It is arguable that evolution has "solved" this problem by arousing disgust at the thought of incest, or when we hear of incest. Statistically, incest therefore will be a fairly rare occurrence among humans. This evolution-driven feeling of disgust can be translated into a morally-inspired prohibition: "If a man takes his sister […] and they see one another naked, it is a scandalous disgrace. They shall be cut off in the presence of their people." (Leviticus 20:17). The biblical motivation for this rule is charged emotionally. Incest is

[23] Haidt, J., The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment, *Psychological Review* 2001, p. 814-834; Haidt, J., Comfortably Dumbfounded, in: Sommers, T., *A Very Bad Wizard*, Believer Books 2009.

forbidden because it is a disgrace. In some countries, the rule remains in force to this day (e.g., Sexual Offences Act 2003 in the UK). In the Netherlands, mating between siblings is not forbidden, but marriage between siblings is (Art. 1:141 Dutch Civil Code). Ultimately, this norm derives from the fact that if siblings mate, it is neither to the evolutionary advantage of the siblings, nor to the benefit of the group.

Yet this example also shows the conflict between instinctive biological urges and individual societies. Throughout the ages, several groups have practiced incest, including the pharaohs of Egypt and some religious cults today. Such disparity can similarly be seen in the rationalisation of judicial reasoning.

Sociological changes that contradict tribal emotions

Judges have little knowledge of biological mechanisms, so they unconsciously will search for principles in common law that they find "fundamental". Judges probably consider these principles fundamental because they are rationalizations of basic biological mechanisms and emotions they can feel. As Dworkin did not take these psychological processes into account, he himself was duped into rationalizing unconscious convictions. For example, he qualified the decision of the Supreme Court in *Boumediene v. Bush* as a great victory.[24] In this case, the court held that aliens detained as enemy combatants in Guantánamo have a constitutional right to challenge their detention in American courts. John Mackie justly claims that Dworkin's constructive model effectively makes it impossible to decide whether certain rights uniquely apply to American citizens or to Americans and aliens alike. "People's prejudices, training, and social position strongly influence their consciences and their speculations".[25] According to Dworkin, "America owes its duty to respect fundamental human rights […] to all people who come under its authority."[26] However, why is that? Jefferson himself owned slaves. The individual freedom that the Constitution presupposes never was intended to

[24] Dworkin, R., Why It Was a Great Victory, *New York Review of Books* 2008.
[25] Mackie, J., The Third Theory of Law, 7 *Philosophy and Public Affairs* 1977..
[26] Dworking 2008, supra note 24.

apply to aliens.[27] Dworkin probably valued this new direction of American law as a victory because today we value all people as "world citizens." Our group moral has expanded from tribes to the global society, from nations to the United Nations. Yet in both the past and the present, outsiders have been and are treated far worse than group members. The lynching of African Americans in the 20th century was a demonstration of fear of out-group people and as such it is a biological phenomenon. Throughout history humans have been the main threat to other humans. Therefore, the fear of strangers is a deep-seated emotion (Berryby 2005). White Americans were proud of their lynching. Their conscious thinking approved their action. To them, it was "reasonable" to kill out-group people seen as destabilizing their society. Thus, the lynching of African Americans can be seen as an attack on non-group members; the African American victims were perceived as a threat. The punishment did not fit the crime, but was that severe simply because they were not considered group members. Moreover, the killing of outsiders enhanced in-group solidarity (Wrangham and Peterson 1996). By contrast, why does "reason" today tell us we should not lynch people with different racial characteristics? Because historical and sociological changes have meant that most groups now recognise the humanity in all races, and with nationalism many racial groups have become blurred. Thus they have become members of the in-group. We not only reason that they belong to the same group, it also *feels* that way when we see people of other races act (and speak?) like us.

From this point of view, Dworkin's choice is dictated by biological mechanisms whose impact is the result of sociological changes. We have to defend our fellow group members, but since our group has grown to include a worldwide group of people, we have to defend all people in the world in equal measure. Mainstream morals and societal values dictate that we have to feel sympathy, compassion and empathy for them, in the same way that we do for our own family, even though racism still abounds. This cannot be a common law principle, because in earlier times the sociological situation was different. Biology and sociology dictated a change in law, and Dworkin *felt* it.

It is not only the color of our skin that can cause feelings of fear. All kinds of differences can lead to the feeling that we have encountered out-groupers. The Universal Declaration

[27] Mackie, J., The Third Theory of Law, 7 *Philosophy and Public Affairs* 1977.

of Human Rights anticipates this. The second article states that we have to approach our fellow world citizens "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." In a world where all kinds of tribes and people have to live together, there is no alternative. If we neglected this article, the world would turn into one big tribal war. We therefore can reason that we have to suppress our tribal urges and try to feel that these distinctions should play no role in our judgement. Yet this suppression has also meant a general ignorance of the effects of the unconscious biological drives underneath our emotions and morals, particularly in respect to the application of law. This can become problematic in legal situations where emotional reactions based in instinctive biological mechanisms may not necessarily be appropriate in dealing with the issues that crop up in our increasingly complex and diverse modern society, and is something that will be examined in the cases below.

Feelings of disgust

The appellants in *R v Brown* were a group of men who had participated in sadomasochistic homosexual acts in private with men who willingly consented to painful acts such as genital torture but suffered no permanent harm.[28] The appellants had been charged with inflicting bodily injury, with or without weapons, and assault occasioning bodily harm.[29] The appeal centred on the question of whether a person could be guilty of these charges where the 'victim' had consented.

The case reached the House of Lords in the United Kingdom, where five judges presided over it. The appeal was dismissed by a majority of three to two. The most influential majority judgement was given by Lord Templeman, who, after considering the facts and history of the charges, decided that it was the Court's duty to intervene as 'Society is

[28] [1994] 1 AC 212.
[29] *Offences against the Person Act 1861* (UK) ss 27, 40.

entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.'[30]

In contrast, Lord Mustill and Lord Slynn of Hadley both took the view that it was not the place of the court to be paternalistic. Lord Mustill's own words are particularly telling of his position:

> (I don't) suggest that ethical pronouncements are meaningless, that there is no difference between right and wrong… What I do say is that these are questions of private morality; that the standards by which they fall to be judged are not those of the criminal law; and that if these standards are to be upheld the individual must enforce them upon himself according to his own moral standards, or have them enforced against him by moral pressures exerted by whatever religious or other community to whose ethical ideals he responds.[31]

Interestingly enough, all of the judges agreed that the decision was ultimately a matter of policy rather than resulting from a strict and reasoned interpretation of the law.[32] The appellants appealed to the European Court of Justice, which upheld the conviction based on the policy that the state was entitled to intervene in order to protect its citizens.[33]

The dynamics between the different majority and minority position can be arguably understood through the lens of two concepts of evolutionary biology: the urge to survive and reproduce, as well as the dynamics of in-group and out-group behaviour.

The urge to survive and reproduce is a biological drive found in all living organisms, from single cell entities such as bacteria to complex multicellular organisms such as humans.[34] It is hardly surprising, then, that one of the fundamental principles of law is the

[30] *R v Brown* [1994] 1 AC 212, 237.
[31] *R v Brown* [1994] 1 AC 212, 273.
[32] *R v Brown* [1994] 1 AC 212.
[33] *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39, [40]-[46].
[34] Sober, E., 'Preface' in Elliot Sober (ed), *Conceptual issues in evolutionary biology:* MIT Press 1994, viii, x.

protection of human life, survival, and reproduction through the stable government of society.[35] It is this principle that can be seen unequivocally in the judgement of the European Court of Justice, delivered by President Rudolf Bernhard who stated that "The Court considers that one of the roles which the State is unquestionably entitled to undertake is to seek to regulate… activities which involve the infliction of physical harm."[36] Viewed in biological terms, the power of humans to inflict physical harm on one another must be regulated as it threatens both societal stability and the reproduction of our genes, rendering us less likely to survive long enough to reproduce and increasing our chances of being injured and thus potentially becoming physically incapable of raising children or defending the group. Indeed, Lord Templeman in the House of Lords noted that the reason maiming is illegal is because it was seen to have deprived the King of an able-bodied soldier to defend the land.[37]

Lord Templeman's stronger language is also very revealing. His naming of sadomasochism as "an evil thing" and part of a "cult of violence"[38] shows a powerful emotional and visceral reaction of disgust regarding the appellants' acts. This is notable because, as mentioned above, the biological theory of law argues that our genetics influence our morals through emotion by triggering strong positive or negative reactions according to whether actions are good or bad for the reproduction of our genes.[39]

It is perhaps because of this mechanism that Lord Templeman was far more concerned about the possible results of allowing consent to be made a defence to sadomasochism. In between a long and graphic description of the appellant's acts making reference to "genital torture and violence to the buttocks, anus, penis, testicles and nipples"[40], Lord Templeman stated his concerns for the "obvious dangers of serious personal injury and

[35] Gommer 2011, supra note 3, p. 45-48, 71, 120; Ruse and Wilson 1986, supra note 9, 187.
[36] *Laskey, Jaggard and Brown v United Kingdom*, (1997) 24 EHRR 39, [43].
[37] *R v Brown* [1994] 1 AC 212, 231.
[38] *R v Brown* [1994] 1 AC 212, 237 (Lord Templeman).
[39] Gommer 2011, supra note 3, p. 54-55; Ruse and Wilson 1986, supra note 9, 186.
[40] *R v Brown* [1994] 1 AC 212, 236.

blood infection"[41] and ended that part of his judgement by stating that "such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty."[42] This juxtaposition of his emotionally-worded judgement with his description of the acts that had triggered his horror shows a clear link between the two. Thus, one could analyse the judgements in both the European Court of Justice and the majority in the House of Lords as resulting from a very strong desire to uphold the biological imperative to be free from harm and to reproduce in an 'effective' manner, even over the individual right to autonomy. Indeed, even Lord Mustill in the minority was not immune to this biologically-triggered, emotional effect:

> It is sufficient to say that whatever the outsider might feel about the subject matter of the prosecutions - perhaps horror, amazement or incomprehension, perhaps sadness, very few could read even a summary of the other activities without disgust. The House has been spared the video tapes, which must have been horrible.[43]

Yet the point of divergence for Lord Mustill, as well as Lord Slynn of Hadley, is that although he felt a similar level of moral revulsion towards the acts of the appellants, he consciously did not allow it to intrude upon his interpretation of the law: "Leaving aside repugnance and moral objection, both of which are entirely natural but neither of which are in my opinion grounds upon which the court could properly create a new crime…"[44] With this consciousness, Lord Mustill analysed the same policy issues that the majority judges reviewed – the medical risks, the risk of serious injury or death, and the potential for the corruption of youth – and decided that sadomasochism was enough of a private matter that the criminal law was unsuited to regulating it.[45] This difference in reasoning can be best understood by the different ways in which the judges dealt with their unconscious and conscious thoughts. While the majority judges were heavily influenced

[41] *R v Brown* [1994] 1 AC 212, 236.
[42] *R v Brown* [1994] 1 AC 212, 236.
[43] *R v Brown* [1994] 1 AC 212, 256-257.
[44] *R v Brown* [1994] 1 AC 212, 274.
[45] *R v Brown* [1994] 1 AC 212, 274-275.

by their emotional reactions of disgust, Lord Mustill examined the history of the statue and found it had been wrongly applied to the appellants' case, took the different approach that the risks were greatly minimised in light of modern science and society, and recognised that the harm of BDSM (bondage, domination, sadism, masochism) was not one that essentially destabilised society as it was a private matter.[46] The biological imperative to avoid harm and to enhance reproduction can thus be seen as having greatly influenced the judgements in this case.

Nevertheless, this does not entirely explain the discrepancy between the Court's approach in *R v Brown* and the case of *R v Wilson* [1997] QB 47. In *R v Wilson*, the appellant burnt his initials into his wife with a hot knife upon her request and with her full consent. The injury and scarring resulting from the brand, which required medical treatment, was considered permanent injury by the court.[47] Yet the court decided the case in terms of personal adornment, and was "abundantly satisfied" that there was no factual comparison with *R v Brown* which only related to "a sadomasochistic encounter".[48] They overturned the appellant's conviction on this basis, even though the harm was arguably greater in this case as permanent injury was caused and the wound had required medical treatment, neither of which occurred in *R v Brown*.[49] Furthermore, the concerns of the judges in *R v Brown* about the extent of potential harm and medical risk are also highly applicable in *R v Wilson.* So why was there such a difference in decision? The answers arguably lie in yet another aspect of human biology: the fear of out-group people and their behaviour.

Fear of out-group people

Once humans have formed into groups for better chances at survival, they begin to exhibit the phenomenon of group behaviour.[50] Indeed, researchers such as Tajfel have shown that simple identification with a group (the 'in-group'), however meaningless, is enough to arouse hostility towards and cause actions to be taken against an 'out-group' –

[46] *R v Brown* [1994] 1 AC 212, 257-275.
[47] [1997] QB 47.
[48] *R v Wilson* [1997] QB 47, 50.
[49] *R v Wilson* [1997] QB 47; [1994] 1 AC 212.
[50] Sober 1994, supra note 34, xii; also Gommer 2011, supra note 3, p. 32-33;

people who are not in the 'in-group' and classified as such.[51] At the highest extent, this can mean dehumanising out-group members in order to justify aggression towards them, often by perceiving their structure of values as different and wrongly so.[52] This then, might explain Lord Templeman's strong and horrified language declaiming sadomasochism as "evil" [53] and "breed[ing] and glorify[ing] cruelty"[54], a position that is contrasted by BDSM practitioners who view sadomasochism as not only sexually arousing, but also as a path towards self healing, personal growth, and political awareness.[55] Furthermore, there is evidence that key elements of sadomasochism including the eroticisation of power are firmly implanted within 'normal', non-sadomasochistic relationships.[56] Yet mainstream society clearly sees sadomasochism as a behaviour of out-group people; even those who are part of the sadomasochistic community have been found to have internalised the feelings of it being transgressive and against the norm.[57] Moreover, homosexuals have also traditionally been considered an 'out-group' in the courts, and thusly discriminated against.[58] And where members of the in-group (in this case the presumably heterosexual, non-sadomasochistic judges) feel threatened by the out-group in some manner, Tajfel believes that they can react in a number of ways, including intensifying discrimination and hostile attitudes, as well as maintaining increased differentiation with the out-group.[59]

This group behaviour can be seen in the different ways in which *R v Wilson* and *R v Brown* were treated by the majority. Laying aside the fact that allowing tattooing and branding at home arguably has the same policy issues in terms of risk of infection and

[51] Tajfel, H., 'Social identity and intergroup', *Social Science Information* 1974, p. 65, 66-68.
[52] Struch, N. and Schwarz, S.H. 'Interpersonal Aggression: Its Predictors and Distinction From In-Group Bias', *Journal of Personality and Social Psychology* 1989, p. 364, p. 365-366.
[53] *R v Brown* [1994] 1 AC 212, 237.
[54] *R v Brown* [1994] 1 AC 212, 236.
[55] Bauer, R., 'Transgressive and Transformative Gendered Sexual Practices and White Privileges: The Case of the Dyke/Trans BDSM Communities', *Women's Studies Quarterly* 2008, p. 233, 235-236.
[56] Langdridge, D. and Butt, T. 'The Erotic Construction of Power Exchange' , *Journal of Constructivist Psychology* 2005, p. 70-71.
[57] Ibid., p. 68; Bauer, supra note 55, p. 233-234; Stockwell, F.M.J., D.J. Walker, and J.W. Eshleman, 'Measures of Impact and Explicit Attitudes Toward Mainstream and BDSM Sexual Terms Using the IRAP And Questionnaire with BDSM/Fetish and Student Participants' , *The Psychological Record* 2010, p. 307, 318-319.
[58] Simone, C.J., 'Kill(er) man was a Battered Wife' the application of Battered Women Syndrome to Homosexual Defendants: *The Queen v* McEwen' *Sydney Law Review* 1997, p. 230, 231.
[59] Tajfel, supra note 51, p. 80.

serious harm, the court also treated the role of the law very differently: 'Consensual activity between husband and wife, in the privacy of the matrimonial home, is not… normally a proper matter for criminal investigation, let alone criminal prosecution.'[60] Given that the majority in both *R v Brown* and *Laskey, Jaggard and Brown v United Kingdom* believed that consensual activity between sadomasochistic homosexuals *was* a matter for criminal law,[61] it is arguable that the Court was showing an in-group bias towards 'normal' heterosexual relations in the form of 'husband and wife'. Furthermore, although there is no factual evidence in the case of *R v Wilson* that the relationship between husband and wife was sadomasochistic, the wife's initial request that her husband tattoo his name across her breasts does suggest an element of submission and masochism that the Court appeared to ignore, perhaps because it was considered to be within societal norms surrounding general heterosexual relationships.[62] While it is true that the permanent injury of the brand was arguably not commensurate to the piercings and genital torture in *R v Brown,* the fact remains that the judges were able to consider the question without resorting to strong moral language and with recognition of the heterogeneity of heterosexual relationships, neither of which they were able to do with the homosexual relationships in *R v Brown*.

This bias is also arguably shown in Lord Templeman's quote of Lord Lane, the Chief Justice of the Appeal Court, who noted that the appellants:

> were responsible in some part for the corruption of a youth K… It is some comfort to be told, as we were, that K has now settled into a normal heterosexual relationship… [the appellant]… found out that the boy was interested in homosexual activities. He introduced and encouraged K in 'bondage affairs.' He was interested in viewing and recording on videotape K. and other teenage boys in homosexual scenes…[63]

[60] *R v Wilson* [1997] QB 47, 50.
[61] [1994] 1 AC 212; (1997) 24 EHRR 39.
[62] *R v Wilson* [1997] QB 47, 49.
[63] *R v Brown* [1994] 1 AC 212, 235.

Viewed in its entirety, this quote suggests that to Lord Lane, the primary 'corruption' of K was the introduction into homosexual relations rather than the bondage. This is also seen in the case of *R v Donovan*, where the appellant beat a girl with her consent to fulfil his heterosexual desires.[64] Although the appellant was convicted, the girl was never referred to as a 'victim' in the judgement, and nor was she arrested for her consent as the victims in *R v Brown* were for aiding and abetting the 'crime.'[65]

Further evidence can be found in the unanimous judgement in the European Court of Human Rights, where the President Rudolf Bernhardt felt it appropriate to quote Lord Jauncey of Tullichettle's identification of the behaviour specifically as "homosexual sadomasochism", presumably distinguishing it from 'heterosexual sadomasochism' or sadomasochism in general.[66] It is true that in the same judgement, it was firmly stated that the decision had not been made on the basis of sexuality.[67] Nevertheless, the discrepancy between the language and tone used in heterosexual cases and those used in *R v Brown* and *Laskey, Jaggard and Brown v United Kingdom* suggests that even judges who consciously hold egalitarian values may unconsciously act out in-group and out-group conflicts. This is of great consequence. Studies have suggested that homosexuality evolved to help care for their heterosexual relatives and increase the overall reproduction and security of the group.[68] Furthermore, it is arguable that the 10% of the population who are homosexuals,[69] the 25% of those who fantasise about BDSM, and the 10% who actively practice it all represent a large enough segment of our society that the law should include them and their protection .[70] It should however be questioned if interfering in these matters is in the interest of a liberal democratic society.[71] Alexander (1987) reports a constant tension between individuals that strive for maximum benefit within their

[64] (1934) 2 KB 498.
[65] *R v Donovan* (1934) 2 KB 498; [1994] 1 AC 212.
[66] *Laskey, Jaggard and Brown v United Kingdom*, (1997) 24 EHRR 39, [21].
[67] *Laskey, Jaggard and Brown v United Kingdom*, (1997) 24 EHRR 39, [11], [47].
[68] Zietsch, B.P., K.I. Morley, S.N. Shekar, K.J.H. Verweij, M.C. Keller, S. Macgregor, M.J. Wright, J.M. Mailey and N.G. Martin, 'Genetic factors predisposing to homosexuality may increase mating success in heterosexuals' *Evolution and Human Behaviour* 2008, p. 424, 425.
[69] Ibid, p. 424.
[70] Stockwell, Walker, and Eshleman 2010, supra note 57, p. 309.
[71] Giles, M., 'R v Brown: consensual harm and the public interest' (United Kingdom), *Modern Law Review* 1994: p. 101-111.

group. Membership yields safety and extra resources, but "Group living cannot be expected to last and be elaborated unless it leads to increased reproductive success among all participants" (79-81). In a liberal society freedom of choice seems to be necessary to balance the sacrifices individuals have to make to the society and the benefits they will get from it.[72] Chan adds that in a modern society where science enables us to understand complex emotional and psychological issues, the fact that human sexuality is multifaceted should be accepted by society.[73]

'Repulsive' sexual acts that justify killing

The facts of *R v The Queen* similarly bear within them a need for awareness of biological mechanisms. The appellant killed her husband by attacking him with an axe while he was sleeping. The murder took place against the background of a history of serious domestic violence and psychological and sexual abuse committed by the husband against the appellant. On the day before the murder, two of the daughters had sought to leave home that day (Denice and Annette), and the appellant's husband had taken Denice away in his car, inflicted knife wounds upon her, and then raped her. After seeing the wounds, the appellant learnt for the first time from Denice that her husband had been sexually abusing and then raping all five daughters since the age of 6. In this context, when he told the appellant "We are going to be one big happy family. There isn't going to be no more talk about the girls leaving home"[74] and then later in bed "We are going to be happy Jean. I love you"[75] the appellant could not stop thinking about his hypocrisy and the way he had violated their children.[76] It was in this frame of mind that she killed him, and pleaded the partial defence of provocation based on his comments and their context.

Three judges presided over the case in the South Australian Supreme Court. The matter on appeal was whether the trial judge had been correct in not leaving the defence of

[72] See also Hill, J.L., 'Mill, Freud, and Skinner: The Concept of the Self and the Moral Psychology of Liberty', *Seton Law Review* 1995 p. 92.
[73]Chan, P.C.W., 'Sado-mashochism and the rule of law: Brown re-examined', *International Journal of Punishment and Sentencing* 2006, p.195.
[74] *R v The Queen* (1981) 28 SASR 321, 343.
[75] *R v The Queen* (1981) 28 SASR 321, 344.
[76] *R v The Queen* (1981) 28 SASR 321, 323-334.

provocation open to the jury. Chief Justice King and Justice Jacobs formed the majority. Both went through the legal formula for the defence of provocation and concluded that, although there was plenty of evidence of the appellant having premeditated the killing, there was enough brutal history in the relationship to leave provocation open to the jury. Both tested the limits of the provocation defence by favouring the more liberal interpretations of the formula and adapting them to the appellant's story. They allowed the appeal.

In contrast, Justice Zelling took a very strict approach to the provocation formula and narrowly applied tests to the appellant's case. He did note, however, that "this woman has had a very hard life and she is a proper subject of executive clemency."[77] The appellant was ultimately acquitted.[78]

The genetic conflict can be read very easily from the facts of *R v The Queen*. On the one hand, killing is wrong because it violates the biological imperative to survive by destabilising society. On the other hand, the appellant did so to prevent her husband from incestuously raping his five children again, as well as to protect her entire family from his physical, sexual, and emotional abuse – thus upholding the reproductive and survival rights of the rest of her family.

The struggle between the two can be seen in the reasoning of the judges. As a starting point, they all took the view that "The law of a well-ordered and civilized society cannot countenance deliberate killing, even to the extent of treating it as extenuated, as a response to the conduct of another however abhorrent that conduct might be."[79] Yet it is clear the judges were also heavily influenced by the genetic crimes of the appellant's husband; Chief Justice King implied that the situation was a "horror"[80] and Justice Jacobs' denounced the deceased's actions as "callous and selfish, even repulsive".[81] Even

[77] *R v The Queen* (1981) 28 SASR 321, 342.
[78] Easteal, P. 'Battered woman syndrome: What is 'reasonable'?' *Alternative Law Journal* 1992, p. 220, 222.
[79] *R v The Queen* (1981) 28 SASR 321, 325, (King CJ).
[80] *R v The Queen* (1981) 28 SASR 321, 326.
[81] *R v The Queen* (1981) 28 SASR 321, 344.

Justice Zelling, whose interpretation of the law was unfavourable towards the appellant, commented that "The man's behaviour towards the accused and towards his family was about as repulsive as it is possible to imagine."[82]

What is most interesting about this last comment is that, like Lord Templeman in *R v Brown*, it followed a description of emotion-provoking behaviour. "As far as Annette and Denice were concerned they were sexually interfered with by their father from about the age of six years and intercourse took place with them from about the age of nine years."[83] Although 'sexually interfered' and 'intercourse' take the place of the much more emotional 'sexual abuse' and 'rape', Justice Zelling followed by describing the behaviour as 'repulsive'. This choice of wording is made even more significant by the mostly dry and understated tone he adopted for the majority of his judgement.[84] This suggests that Justice Zelling struggled between his moral and genetic feelings of revulsion and his commitment to reason and rationalism in this case. Furthermore, all three judges were operating under a significant amount of public pressure in favour of the appellant's release at the time.[85] Thus, it is possible that Justice Zelling in particular analysed the appellant's case very narrowly due to his mistrust of his own emotions. This is, admittedly, mere speculation, yet the possibility that this affected Justice Zelling's reasoning is important. Biological law theory links emotions and morals to rationality and reason; instead of treating them as two separate realms. EEmotions, which are rooted in our genetic interests, influence our norms and thus the way we reason.[86] In some instances, then, struggling against our emotions instead of incorporating them into our reasoning might actually impair our rationality, a proposal that is supported in the light of the two majority judgements, the appellant eventually being acquitted, and the law of provocation being changed.[87] So how should we distinguish a case such as *R v the Queen*, where greater attention to emotions should have arguably been paid, from *R v Brown*, where emotions arguably ruled? The answer is through an understanding of the biological

[82] *R v The Queen* (1981) 28 SASR 321, 329.
[83] *R v The Queen* (1981) 28 SASR 321, 329.
[84] *R v The Queen* (1981) 28 SASR 321, 328-343.
[85] Easteal 1992, supra note 78, p. 222.
[86] Gommer, H, supra note 3, p. 27-28.
[87] Easteal 1992, supra note 78, 222.

drives underneath those emotions, and where they fit in the current society. This is not the only insight that either psychology or the biological theory of law has to offer, however. The ways in which the judges treated the appellant's story in relation to the law and other provocation cases are exceptionally telling, and brings into account yet another biological factor that must be considered.

The Gendered Law of Provocation

The law of provocation was originally designed to allow men, who had killed 'in hot blood' due to some insult to their honour or dignity, to escape from the then mandatory death penalty for murder.[88] As a result, elements of the provocation test included requirements such as a discernible provocative statement or act and an immediate retaliation.[89] It is these tests, strictly interpreted, that made Justice Zelling decide in favour of dismissing the appeal. Yet what is also clear is that these tests are heavily gender-biased towards the male experience of provocation in terms of honour duels and impassioned fights between men.[90] This is problematic when it comes to *R v The Queen*, as the appellant was in a markedly different situation that required a more nuanced understanding of gender and society.

There is evidence, however, that both Chief Justice King and Justice Jacobs appreciated this difference to some extent. The wording of Chief Justice King shows this point, when he considered the deceased's proclamations that they were going to be a "happy family"[91] and that "There isn't going to be no more talk about the girls leaving home"[92] in the context of the history of abuse, concluding that the statements were "highly provocative and quite capable of producing in an *ordinary mother* endowed with the natural instincts

[88] Riley, M., 'Provocation: Getting Away With Murder?' *Queensland Law Student Review* 2008,p. 55, 57.
[89] Tarrant, S. 'The 'Specific Triggering Incident' in Provocation: Is the Law Gender Biased?' *Western Australian Law Review* 1996, p. 190, 190, 193.
[90] Ibid., p. 194; Easteal 1992, supra note 78, p. 221.
[91] *R v The Queen* (1981) 28 SASR 321, 324-325.
[92] *R v The Queen* (1981) 28 SASR 321, 324-325.

of love and protection of her daughters, such a loss of self-control as might lead to the killing."[93] Similarly, Justice Jacobs opined:

> it seems to me… that to take such a fragmented view of the evidence might well be to underestimate the possibility that some aspect of the conduct or words, when viewed in the setting in which it occurred, might… be such as would provoke an *ordinary person* such as the accused, both to lose *her* self-control to such an extent and to act as the killer has acted.[94]

Notably however, Justice Zelling did not display this conscious change of language "I have not dealt with the question of whether the ordinary *man* would be provoked in this situation even if the accused was."[95] Nor did he take the holistic view of the appellant's history, gender and situation when it came to deciding whether he could find an isolated act of provocation or whether the appellant passed the test of immediacy. This was problematic on a number of levels. Justice Zelling judged the deceased's words to be simply "manipulative" at worst by refusing to consider the context of the appellant's child Denice having told her just a few hours previously that the deceased had been raping all of her female children for years.[96] Similarly, Justice Zelling stated that since the appellant had smoked and thought for half an hour before killing the deceased, she had failed the test of immediacy.[97] However, this requirement of immediacy is also gender-biased, as there is evidence that women are more likely to lose control after the provoking act, whereas men are more likely to lose control at the time.[98] Furthermore, Justice Zelling referenced and implicitly accepted the ruling in the case of *Parker v The Queen*, where the appellant killed the deceased over twenty minutes after the alleged provocation of the deceased leaving with the appellant's wife.[99] In that case, Justice Windeyer added that the "passion and emotion of the deceased were mounting not

[93] *R v The Queen* (1981) 28 SASR 321, 326 (emphasis added).
[94] *R v The Queen* (1981) 28 SASR 321, 343 (emphases added).
[95] *R v The Queen* (1981) 28 SASR 321, 340 (emphases added).
[96] *R v The Queen* (1981) 28 SASR 321, 337.
[97] *R v The Queen* (1981) 28 SASR 321, 338.
[98] Tarant 1996, supra note 89, p. 194, 196; Easteal 1992, supra note 78, p. 221.
[99] *R v The Queen* (1981) 28 SASR 321, 336-337; (1963) 111 CLR 610.

declining"[100] during that time and thus decided that immediacy was served – an interpretation that also fits with the appellant's behaviour in *R v The Queen*.[101]

This gender discrepancy in Justice Zelling's reasoning is not alone. In the case of *R v Ramage*, decided only seven years ago, the killer's sentence was reduced due to the jury accepting provocation on incredibly flimsy grounds.[102] The killer claimed that his estranged wife had said that having sex with him repulsed her and that her new lover was much better, words that apparently provoked him to her murder despite there being substantial evidence that his wife was so petrified of him she would have never said those words.[103] It is also important to note that during the widely publicised trial of *R v Ramage*, the jury quickly and readily accepted the defence of provocation, in contrast to all of the judges' relatively agonised reasoning in *R v The Queen.*[104] Arguably, the only explanation for this and a host of other troubling provocation cases[105] is that the legal and social attitudes at the time protected men from being spurned and humiliated over women protecting themselves or their children from death or physical and sexual violence.[106] Furthermore there is evidence in the famous sexual double standard and many rape cases that these attitudes still prevail.[107]

From a biological perspective, as well as a moral and emotional one, this is a legal situation that is damaging to our society. A conservative estimation of the number of men who kill out of jealousy is that they form 0.04% of people who go through a relationship

[100] *Parker v The Queen* (1963) 111 CLR 610, 663.
[101] Tarrant 1996, supra note 1989, p. 193-194.
[102] [2004] VSC 508.
[103] *R v Ramage* [2004] VSC 508, [22].
[104] [2004] VSC 508; *R v The Queen* (1981) 28 SASR 321.
[105] See *Moffa v R* (1977) 138 CLR 601; *Parker v The Queen* (1963) 111 CLR 610; *R v Sebo* [2007] Supreme Court of Queensland (Unreported, Byrne J, 30 June 2007); *R v Yasso* (No 2) (2004) 10 VR 466; *R v Hunter* [2002] VSC 162; *R v Abebe* [2000] VSC 562; *R v Farfalla* [2001] VSC 99; *R v Teeken* [2000] VSC 295; *R v Davies* [1975] 1 QB 691; *R v Ahluwalia* [1992] 4 All ER 889; *R v Richens* [1993] 4 All ER 877, etc.
[106] Coss, G., 'Provocation's Victorian Nadir: The Obscenity of Ramage', *Criminal Law Journal* 2005, p. 133.
[107] Carter, M. and B. Wilson, 'Rape: good and bad women and judges', *Alternative Law Journal* 1992, p. 6, 9; Gracia, E., 'Unreported cases of domestic violence against women: towards an epidemiology of social silence, tolerance, and inhibition', *Journal of Epidemiology & Community Health* 2004, p. 536; *R v Ahluwalia* [1992] 4 All ER 889.

breakdown,[108] a far cry from the 25% of women estimated to experience intimate partner violence over their lifetimes and the unknown many who suffer from non-consensual incest.[109] This could be an indication that the law has socially evolved to meet men's genetic urges over the reproductive and survival interests of women. As most legalists were men in the foregoing centuries this does not seem implausible. If law is a reflection of our morals that in turn are derived from our emotions, law probably is also for an important part a reflection of masculine emotions. Indeed, the appellant in *R v The Queen* actually stated that she had resorted to the killing because she felt that the law would not protect her or her children: "he would only get a few years' imprisonment and then he would be out and he would get them no matter where they went.[110] This is problematic, as it suggests that on several levels, not least the biological one of ensuring societal stability and prosperity, that the law is failing the many people in the appellant's situation.

An indication that this situation is slowly changing by the influence of women that are becoming a majority in the practice of law is a case in the Netherlands, which was decided by the female judge misses A.E.B. ter Heide.[111] A man and his ex-wife came to court in 2009. The man had discovered that the child they had raised together was not his child. A DNA test proved the child to be the son of an ex-lover. The man demanded a large sum of money, because he had paid all those years for another man's son. From a biological point of view, he was totally right. Adultery has to be punished, because it is not to the evolutionary benefit of husbands. However, the judge decided that this was a matter of personal morals. Dutch law does not forbid adultery since 1971. Therefore, the ex-wife did not need to compensate the (evolutionary) harm done. Male emotions tell us the wife was wrong. If she knew it was not the child of her husband, she at least should have told him and accepted the consequences. She was taking a free ride on her ignorant

[108] Coss 2005, supra note 106, p. 134.
[109] Gracia 2004, supra note 107, p. 536.
[110] (1981) 28 SASR 321, 330.
[111] Arnhem Court, 15-04-2009, *LJN*: BI2224

husband. This is why adultery was forbidden till 1971. However, circumstances changed. Women are more independent, and the harm done to society when it comes to a divorce is small. Accordingly, the influence of government on private matters has diminished. Although the ex-husband still will feel deceived, norms have changed according the circumstances. Private matters influence the stability of society probably less than they did, say, 50 years ago. In addition, we can arguably speculate that these social changes influenced the female judge's decision, whether consciously or unconsciously, through her emotions and morals.

A similar development in the law is that since the case of *R v The Queen*, the partial defence of provocation has been removed in places such as Victoria, Australia.[112] This shows that with conscious thinking and an understanding of the biological and social factors at play, the law can evolve to better suit modern non-tribal society.[113] Nevertheless, both the law and social attitudes still have a way to go before equality is reached and out-group members such as homosexuals and women are appropriately protected.[114]

CONCLUSION

The law is often seen as a bulwark of indomitable reason and authority, or even simply as an entity that should be analysed in a manner which divorces it from morals and emotion.[115] However, an analysis of the biological influences in the cases of *R v Brown* and *R v The Queen* arguably shows that the law is heavily influenced by many evolutionary, social, and psychological factors. After all, as Elliot Sober so aptly puts it, "The human mind, like the human heart, is an organ that has evolved."[116] The biological theory of law thus has an important role in helping to increase our understanding of and

[112] Coss 2005, supra note 106, p. 137.
[113] Gommer 2011, supra note 3, p. 86.
[114] Simone 1997, supra note 58, p. 231.
[115] Hart 1958, supra note 19, p. 605-606, 628.
[116] Sober 1994, supra note 34, xvii.

ability to deal with complex cases, ultimately offering valuable insights into every level of the law.