TESTIMONY OF WESLEY D. BIZZELL, ESQ.
PRESIDENT, NATIONAL LGBT BAR ASSOCIATION
BEFORE COURTS OF JUSTICE CRIMINAL SUBCOMMITTEE
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Chairman Mullin, Members of the Criminal Subcommittee, Delegate Roem, I am Wesley Bizzell. My pronouns are he, him, and his. I am privileged to serve as President of the National LGBT Bar Association, which represents tens of thousands of LGBTQ+ attorneys, judges, law students, activists, and other legal professionals across the U.S. We have over 40 state and local affiliated bar organizations, including the Virginia Equality Bar. Additionally, we also have almost 100 affiliated law school student groups, including six student organizations in the Commonwealth.

I'm here to convey the National LGBT Bar's strong support of HB 2132. I'm pleased to join Judy Shepard and so many others in urging you to advance this bill to the full Committee. Some may wonder why this bill is necessary today. Unfortunately, panic defenses are not a relic of the past. This bill is necessary because even today violent preparators go free or have their charges reduced when they kill or violently assault LGBTQ+ victims, simply because of an archaic and prejudiced argument that claims that the sudden revelation or realization of the victim's sexual orientation or gender identity provoked or excused the violence.

In many instances, these are particularly brutal crimes. In one case where the panic defense was used, the victim was stabbed and slashed more than five dozen times. In another, the victim was choked with a wallet chain, drowned and then his body was doused in gasoline and set on fire. In yet another, the victim was bludgeoned with a fire extinguisher, leaving her for dead as the defendant ransacked her apartment. When he later heard her gasping for breath as she regained consciousness he beat her again with the fire extinguisher until he "killed it" as he later told the police. And, many of us are familiar with the horrific and senseless murder of Matthew Shepard, who was brutally pistol-whipped, tortured, and tied to a fence post, where he was left to die. More

than 20 blows rained down on him so hard that they fractured his skull a half-dozen times. Reports described how Matthew was beaten so severely that when he was found his face was completely covered in blood, except where his tears had left tracks down his cheeks. As horrific these descriptions are, they do not even begin to describe the brutality of each of these assaults.

All of these defendants raised the LGBTQ panic defense in their cases and several of them were successful. So, why is this bill necessary? This bill is necessary because these and so many other horrific cases haunt our judicial system. This bill is necessary for the preservation of justice for these and other victims. It is as simple and complicated as this: LGBTQ+ people are being violently harmed and viciously murdered simply because of who they are, and the noxious LGBTQ panic defense allows their attackers to escape the criminal sentences that would otherwise be imposed on them but for the sexual orientation or gender identity of their victims. This is why the American Bar Association's House of Delegates, at the National LGBT Bar's urging, voted unanimously in 2013 to endorse a ban on the LGBTQ panic defense. This is why 12 other jurisdictions have enacted such a ban.

Violence directed towards LGBTQ+ victims should not be justified simply because of who we are. Our identity should not be a defensible reason for assault or murder. To justify and excuse violence and murder as a result of the victim's status as a lesbian, gay, bisexual, transgender or queer person is to deem LGBTQ lives as inherently less worthy, less human, and less deserving of justice as compared to those who do not identify as LGBTQ.

The National LGBT Bar hopes this subcommittee and the Virginia General Assembly will join other legislatures that have passed similar bills on strong bipartisan votes, some of them even unanimously. We urge you to support enactment of this important legislation which will prevent violent criminals from escaping the punishment they deserve and will make equal justice under the law a living, breathing reality for LGBTQ victims of violence. Thank you.

ARTICLES

THE TRANS PANIC DEFENSE REVISITED

Cynthia Lee*

ABSTRACT

Violence against transgender individuals in general, and trans women of color in particular, is a significant problem in the United States today. When a man is charged with murdering a transgender woman, a common defense strategy is to assert what is called the trans panic defense. The trans panic defense is not a traditional criminal law defense. Nor, despite its name, is it recognized as a stand-alone defense. Rather, trans panic is a defense strategy associated with the provocation or heat of passion defense. A murder defendant asserting trans panic will claim that the discovery that the victim was a transgender female—an individual who identifies as a woman but was thought to be male when born—provoked him into a heat of passion, causing him to lose his self-control. If the jury finds that the defendant was actually provoked into a heat of passion and that the ordinary man in the defendant's shoes would have been so provoked, it can acquit him of murder and find him guilty of a lesser offense.

This Article starts by discussing the problem of violence against transgender individuals in the United States today. It then focuses upon a particular manifestation of this violence—cases in which a man kills a transgender woman with whom he was intimate or to whom he was attracted, is arrested and charged with a criminal homicide, and then asserts a trans panic defense.

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Next, this Article offers several reasons why the trans panic defense strategy is deeply problematic. First, the trans panic defense appeals to negative stereotypes about transgender individuals. Second, it legitimizes the enforcement of norms of masculinity and heterosexuality through violence. Third, it inappropriately validates bias against transgender individuals when we live in a pluralistic society that should be tolerant and accepting of all individuals.

The Article then addresses the normative question of what should be done to rectify the harms rendered when a defendant charged with murder asserts a trans panic defense. In the past, the Author was reluctant to support proposals to legislatively ban the trans panic defense. She felt that the best way to defeat the trans panic defense was not to ban it, but to allow it to be aired and then have a strong prosecutor explain to the jury why it should be rejected. She also argued that it was critically important to eradicate the underlying structures of masculinity that encourage violence against transgender women to reduce the risk of such violence taking place and to undermine the effectiveness of the trans panic defense. She opined that the best way to achieve these goals was to educate both the public and the jury about the difficulties transgender individuals face just trying to exist in society and make the existence of bias against transgender individuals salient to the jury.

While the Author still believes in the importance of education, she now feels education alone is insufficient to ensure that juries reject the trans panic defense. The Article explains the Author's shift in position and concludes by examining recently enacted legislative bans on the trans panic defense and offering concrete suggestions on how legislative reform in this arena could be strengthened.

INTRODUCTION

On August 17, 2013, James Dixon was walking on Frederick Douglass Boulevard in Harlem with some friends when he spotted Islan Nettles, an attractive transgender woman.[1] Dixon crossed the street and began chatting with Nettles, asking her for her name and where she was from.[2] Soon he heard his friends

1. James C. McKinley, Jr., *Man's Confession in Transgender Woman's Death is Admissible, Judge Rules*, N.Y. TIMES (Apr. 2, 2018), https://www.nytimes.com/2016/04/02/nyregion/mans-confession-in-transgender-womans-death-is-admissible-judge-rules.html [https://perma.cc/KJF6-8QRB]; James C. McKinley Jr., *Manslaughter Charges in Beating Death of Transgender Woman in 2013*, N.Y. TIMES (Mar. 3, 2015), https://www.nytimes.com/2015/03/04/nyregion/manslaughter-charges-in-beating-death-of-transgender-woman-in-2013.html?module=inline [https://perma.cc/946R-NY5X]; Kenrya Rankin, *James Dixon to Serve 12 Years for Killing Islan Nettles*, COLORLINES (Apr. 20, 2016), https://www.colorlines.com/articles/james-dixon-serve-12-years-killing-islan-nettles [https://perma.cc/WX3G-U4TF].

2. Yanan Wang, *The Islan Nettles Killing: What the Trial Means to a Transgender Community Anxious for a Reckoning*, WASH. POST (Apr. 4, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/04/04/the-islan-nettles-killing-what-the-trial-means-to-a-transgender-community-anxious-for-a-reckoning/?utm_term=.4022685c4e96 [https://perma.cc/74TB-S3BZ].

mocking him for flirting with Nettles, saying, "that's a guy."[3] Dixon's demeanor suddenly changed. Angrily, Dixon demanded to know if Nettles "was a man" before punching and knocking her to the ground.[4] Dixon's attack "left the 21-year-old African American comatose, her face battered beyond recognition."[5] Nettles died five days later from head injuries she suffered after hitting the concrete.[6]

Initially, Dixon admitted that he was the person who had attacked Nettles.[7] In explaining why he punched Nettles, Dixon told police, "I just didn't want to be fooled," suggesting that Nettles' misrepresentation of her sex had provoked him.[8] His explanation echoes a familiar theme of trans panic that suggests that by holding herself out as female, the transgender woman culpably tries to trick straight men into having sex with her. It reinforces the trope of the transgender female as a deceitful interloper, trying to pass as female in order to capture unwitting heterosexual men. Dixon's comments also suggested Nettles was at fault for her own death, even though Dixon was the one who initiated the conversation, and it appears that she did nothing to provoke the attack except for being a transgender woman.[9]

After he was arrested, Dixon changed his story and told the media he was not the person responsible for Nettles' death, saying, "I'm really sorry for the family's loss, but they got the wrong guy. . . . I didn't kill anyone."[10] He also stated, "I can tell the difference between a man and a woman. . . . I don't have anything against gay people or transgender people. . . . I don't just go pick fights with random people I don't know. That's not me."[11]

In March 2015, Dixon was charged with first-degree manslaughter.[12] Initially, he pleaded not guilty to all the charges, intending to go to trial.[13] Later, Dixon pled guilty to second-degree manslaughter and first-degree assault. [14] He was sentenced to twelve years in prison.[15]

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3. *Id.*
4. Rankin, *supra* note 1.
5. Wang, *supra* note 2.
6. Rankin, *supra* note 1.
7. Wang, *supra* note 2.
8. *See* Shayna Jacobs, *Murder Suspect Said His 'Manhood' Was Threatened When He Found Out He Was Hitting on Transgender Woman*, N.Y. DAILY NEWS (Apr. 1, 2016), https://www.nydailynews.com/new-york/nyc-crime/transgender-slay-suspect-manhood-threatened-article-1.2585915 [https://perma.cc/4J7H-TJBB] (quoting Dixon's confession to the police).
9. According to her friends and family, Nettles had just started being open about her transgender identity before she was killed. Wang, *supra* note 2. Her death was particularly tragic because after years of living in poverty, Nettles had finally gotten a job in retail, was starting her own fashion line, and had moved into her own apartment. *Id.*
10. Wang, *supra* note 2.
11. *Id.*
12. *Id.*
13. *Id.*
14. Rankin, *supra* note 1.
15. *Id.*

The underlying impetus for Dixon's loss of self-control seems to have been Dixon's fear of being seen as gay.[16] Recall that just before he attacked Nettles, Dixon heard his friends mocking him for hitting on a guy. Dixon's friends obviously considered Nettles, a transgender woman, to be a man. By attacking Nettles, Dixon could demonstrate that he was not attracted to her—at least not once he realized that she was a transgender female. Dixon may have felt it especially important to prove that he was not attracted to Nettles because just a few days earlier, he had hit on two other transgender women, and his friends had mocked him for doing so.[17]

Violence against transgender individuals—particularly transgender women of color—is a significant problem today.[18] In 2018, at least twenty-six transgender individuals were killed in the United States.[19] This statistic suggests that two or more transgender individuals were killed each month. The vast majority—twenty-five of these twenty-six homicide victims (96%)—were transgender women.[20] Twenty-three of the twenty-six transgender homicide victims in 2018 (approximately 85%) were trans women of color.[21] The actual number of transgender victims of homicide was probably higher than the number reported because many

16. Dixon admitted "that he felt his 'manhood' was threatened by his streak of unknowingly hitting on gals who were born men." Jacobs, *supra* note 8.

17. *Id.*

18. *See* Michelle Chen, *Transgender Rights are Under Siege in Trump's America*, THE NATION (Dec. 19, 2019), https://www.thenation.com/article/transgender-rights-trump-supreme-court [https://perma.cc/LH2N-Z4PQ]. Hate motivated violence against transgender individuals is on the rise. *Id.* (citing CTR. FOR THE STUDY OF HATE & EXTREMISM, CALI. STATE UNIV., SAN BERNARDINO, REPORT TO THE NATION: HATE CRIMES RISE IN U.S. CITIES AND COUNTIES IN TIME OF DIVISION & FOREIGN INTERFERENCE 31 (May 2018), https://www.csusb.edu/sites/default/files/2018%20Hate%20Final%20Report%205-14.pdf (reporting that "[t]he 2017 increase in hate crime from 229 to 254, was driven in part by the 23 crimes targeting the transgender community, which increased by 187 percent")). Some have even said that transgender individuals, particularly trans women of color, "experience rates of violence much higher than any other population in the United States." *See* Aimee Wodda & Vanessa R. Panfil, "*Don't Talk to Me About Deception" : The Necessary Erosion of the Trans* Panic Defense*, 78 ALB. L. REV. 927, 930 (2015) (citing JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 36–37 (2011), https://www.thetaskforce.org/injustice-every-turn-report-national-transgender-discrimination-survey/ [https://perma.cc/T3PF-YRFJ]).

19. *See Doubly Victimized: Reporting on Transgender Victims of Crime*, GLAAD, https://www.glaad.org/blog/glaad-calls-increased-and-accurate-media-coverage-transgender-murders-0 [https://perma.cc/7BY6-UCB3] (last visited June 26, 2019) (listing the names of twenty-six transgender homicide victims in 2018, including Roxana Hernandez, a thirty-three year-old trans woman of color, who reportedly died while in the custody of U.S. Immigration and Customs Enforcement (ICE) after fleeing violence in Honduras); *see also* HUMAN RIGHTS CAMPAIGN, A NATIONAL EPIDEMIC: FATAL ANTI-TRANSGENDER VIOLENCE IN AMERICA IN 2018 (2018) [hereinafter HUMAN RIGHTS CAMPAIGN, A NATIONAL EPIDEMIC] ("At the end of 2017, we mourned the loss of 29 [transgender and gender-expansive] people—the highest number ever recorded."); HUMAN RIGHTS CAMPAIGN, VIOLENCE AGAINST THE TRANSGENDER COMMUNITY IN 2019, https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019 [https://perma.cc/9PCG-NSTQ] (reporting that there were twenty-six transgender homicide victims in 2018) (last visited June 25, 2019).

20. *Doubly Victimized*, *supra* note 19 (providing that of the twenty-six transgender victims of homicide in 2018 listed, twenty-five were trans women).

21. *Id.* (providing that of the twenty-six transgender victims of homicide listed on GLAAD's webpage, twenty-three were trans women of color).

police officers often record the victim's biological sex, rather than their gender identity, on the police report, especially when the victim has not fully transitioned or the victim's driver's license includes only their biological sex.[22] And fatal attacks—those that end in death—tell just part of the story. Each year, many transgender individuals are violently attacked in assaults that do not end in death.[23]

This Article shines a spotlight on a particular manifestation of violence against transgender women: when a cisgender[24] man kills a transgender woman and asserts a trans panic defense. Part I discusses the widespread discrimination, harassment, and violence faced by transgender men and women in the United States today. This is not a new phenomenon. Transgender individuals have faced discrimination, harassment, and violence for many years, but verbal and physical attacks on transgender individuals seem to have become much more frequent since the election of President Donald Trump.[25]

Part II describes and critiques a criminal defense strategy that is commonly known as the "trans panic" defense. It shows how this strategy, invoked primarily by male defendants charged with murdering transgender women, seeks to capitalize on stereotypes about transgender individuals as sexual deviants and sexual predators. The use of this defense strategy is also problematic because of the message it sends about transgender lives.

Part III addresses the normative question of what should be done to deal with the problems identified in Part II. In the past, I did not support legislative bans on gay or trans panic defense strategies. As a former criminal defense attorney, I was reluctant to place limitations on an accused's right to present a defense. Given our adversarial system of justice, I also felt, despite my personal belief that trans panic is a reprehensible defense strategy and should be rejected by jurors, that it was best to allow defense attorneys to argue trans panic and have prosecutors combat the defense in open court.

I now believe legislative bans on the trans panic defense strategy are a necessary step in the fight against violence against transgender individuals. Part III explains my shift in position and why I now believe education as well as legislative bans on the trans panic defense strategy are imperative. It then considers potential objections to legislatively banning the trans panic defense.

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22. Andrea L. Wirtz et al., *Gender-Based Violence Against Transgender People in the United States: A Call for Research and Programming*, 19 TRAUMA, VIOLENCE & ABUSE 1, 1, 4 (2018) (noting that because "there are no national surveillance systems that track murders of trans people and . . . trans victims of violence are often misgendered by police and news media," statistics on homicides of transgender individuals likely underestimate the true rate of homicide).

23. *See infra* Part I.B.

24. The word "cisgender" ("cis" for short) is used in this Article to describe individuals whose gender identity matches their biological sex. *See* Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77, 90 (2014).

25. *See infra* Part III.A.

Part IV examines recent efforts to legislatively ban gay and trans panic defense strategies.[26] It discusses the ten legislative bans on gay and trans panic defenses that have been enacted to date—in California in 2014, Illinois and Rhode Island in 2018, Nevada, New York, Hawaii, Connecticut, and Maine in 2019, and most recently, New Jersey and the state of Washington in early 2020. I also examine three pending bills, two introduced in the District of Columbia and another introduced in the U.S. Congress by Senator Edward Markey (D-MA) and Representative Joe Kennedy (D-MA). While most of the statutory prohibitions follow the California legislation, there are several significant differences amongst the various proposals. Part IV discusses these differences and offers concrete suggestions as to how legislative reform in this arena can be strengthened.

I. VIOLENCE AGAINST TRANSGENDER INDIVIDUALS

An estimated 1.4 million people identify as transgender in the United States.[27] According to the National Center for Transgender Equality, "transgender" is a term for "people whose gender identity is different from the gender they were thought to be at birth."[28] The 2015 U.S. Transgender Survey similarly notes that "the term 'transgender' is often used to describe people whose gender identity or expression differs from what is associated with the gender they were thought to be at birth."[29] A transgender woman, for example, lives as a woman, but was thought

26. AM. BAR ASS'N H.D. RES. 113A, at 1, 9, 13–14 (AM. BAR ASS'N 2013), https://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf [https://perma.cc/9XWX-5MLU].

27. Bill Chappel, *1.4 Million Adults Identify as Transgender in America*, NPR (June 30, 2016), https://www.npr.org/sections/thetwo-way/2016/06/30/484253324/1-4-million-adults-identify-as-transgender-in-america-study-says [https://perma.cc/89K9-KWP2]; ANDREW FLORES ET AL., WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (June 2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf (noting that "[a]n estimated 0.6% of adults, about 1.4 million, identify as transgender in the United States"); Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016), https://www.nytimes.com/2016/07/01/health/transgender-population.html [https://perma.cc/S4Z7-PSTP]. This is significantly higher than the estimated transgender population in the United States five years earlier. *See* Lisa Langenderfer-Magruder et al., *Experiences of Intimate Partner Violence and Subsequent Police Reporting Among Lesbian, Gay, Bisexual, Transgender, and Queer Adults in Colorado: Comparing Rates of Cisgender and Transgender Victimization*, 31 J. INTERPERSONAL VIOLENCE 855, 856–57 (2016) (noting that nearly 700,000 or 8% of the approximately nine million LGBTQ Americans in the United States identify as transgender (citing GARY J. GATES, WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL AND TRANSGENDER? 6 (April 2011), https://escholarship.org/uc/item/09h684x2 [https://perma.cc/2CWQ-7REF])). A Harris Poll conducted on behalf of GLAAD in 2017 found that 12% of millennials identify as transgender or gender nonconforming. *See* GLAAD, ACCELERATING ACCEPTANCE 2017: A HARRIS POLL SURVEY OF AMERICANS' ACCEPTANCE OF LGBTQ PEOPLE 3 (2017), https://www.glaad.org/files/aa/2017_GLAAD_Accelerating_Acceptance.pdf.

28. NAT'L CTR. FOR TRANSGENDER EQUAL., FREQUENTLY ASKED QUESTIONS ABOUT TRANSGENDER PEOPLE 1 (July 9, 2016), https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people [https://perma.cc/A8S2-QQXH].

29. NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 TRANSGENDER SURVEY 40 (2015), http://www.ustranssurvey.org [https://perma.cc/Z6RK-LL6X]; *see also* HUMAN RIGHTS CAMPAIGN, A TIME TO ACT: FATAL VIOLENCE AGAINST TRANSGENDER PEOPLE IN AMERICA IN 2017 5 (2017), https://assets2.hrc.org/files/assets/resources/A_Time_To_Act_2017_REV3.pdf (noting that the term "transgender" is a term commonly used "to describe people whose gender identity is different from what is typically associated with the sex

to be male at birth. A transgender man lives as a man, but was thought to be female when he was born. Some people do not have an exclusively male or female gender, including those who identify as having no gender or more than one gender, and may use a variety of terms to describe themselves, such as non-binary.[30]

While the terms "sex" and "gender" are often used interchangeably, in some contexts they are treated as distinct concepts, with "sex" referring to an individual's physical attributes[31] and "gender" referring to the way an individual presents himself or herself to the world.[32] As Frank Valdes has noted, "sex" refers to the "physical attribute[s] of humans" while "gender" refers to the "cultural dimensions derived from and determined by sex."[33] Along these lines, a transgender individual's gender identity differs from their biological sex.

Gender identity "should not be confused with sexual orientation."[34] Sexual orientation refers to whether one is sexually attracted to members of the opposite sex (heterosexual orientation), members of the same sex (gay or lesbian), or members

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assigned to them at birth (i.e., the sex listed on their birth certificate)"); Jessica A. Clarke, *They, Them, and Theirs*, 32 HARV. L. REV. 894, 897–98 (2019) (noting that the term "transgender" is commonly used as "[a]n umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth"). Some have defined the term "transgender" more broadly. *See, e.g.*, Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 16 n.2 (2003) (explaining that "[t]ransgender and trans are both political terms that have emerged in recent years to indicate a wide variety of people whose gender identity or expression transgress the rules of binary gender"); Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAV. 170, 171 (2009) (noting that the term "transgender" is an umbrella term that includes "cross-dressers, transsexuals, genderqueer youth, drag queens" and "anyone who bends the common societal constructions of gender"). The terms "binary gender" and "gender binary" are used to describe the fact that most people tend to think of sex and gender in binary terms—one is either a man or a woman or one is female or male—with nothing in between. *See* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 275 (1999). Janet Dolgin observes that a binary approach to gender is "deeply embedded in Western culture." Janet Dolgin, *Discriminating Gender: Legal, Medical, and Social Presumptions About Transgender and Intersex People*, 45 SW. L. REV. 61, 62, 66 (2017) (noting that in contrast to this presumption that one is either male or female, "more than one percent of people are born intersex," "a condition in which a person's biological sex markers are not all clearly male or female" (quoting Julie A. Greenberg, *Health Care Issues Affecting People with an Intersex Condition or DSD: Sex or Disability Discrimination?*, 45 LOY. L.A. L. REV. 849, 855 (2012) (citing *GLAAD Media Reference Guide—Transgender Glossary of Terms*, GLAAD, http://www.glaad.org/reference/transgender [https://perma.cc/AMU3-NFVT]))). Clarke notes that "not all nonbinary people identify as transgender[.]" Clarke, *They, Them, and Theirs*, *supra* note 29, at 897–98 (2019). Terry Kogan has characterized transgender individuals as people who feel "trapped or imprisoned" in a body that does not reflect their true gender identity. Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other"*, 48 HASTINGS L.J. 1223, 1225 (1997). Some trans people might resist this characterization, claiming that they feel trapped in a society that treats gender as binary. I thank my colleague, Jeremy Bearer-Friend, for sharing this insight with me.

30. THE REPORT OF THE 2015 TRANSGENDER SURVEY, *supra* note 29, at 40.

31. Lee & Kwan, *supra* note 24, at 87.

32. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 204 (1995).

33. *Id.* at 6 n.5–6.

34. Lee & Kwan, *supra* note 24, at 88.

of the opposite sex and members of the same sex (bisexual).[35] A transgender individual can be heterosexual, gay or lesbian, or bisexual.[36]

Violence against trans individuals in general, and trans women in particular, is more widespread than most people realize. This Part provides an overview of the extent to which trans individuals experience both fatal and non-fatal violence.

A. *Transgender Individuals as Victims of Homicide*

Statistics on homicides of transgender individuals across the United States are not readily available because the federal government did not start collecting data based on gender identity until recently.[37] Moreover, the statistics that do exist likely do not reflect the true numbers of transgender homicide victims. Police reports often describe transgender homicide victims by their biological sex, rather than their gender identity, which leads to underreporting of the actual number of crimes of violence committed against transgender individuals.[38] Indeed, the practice of calling a person by the name they were given at birth and refusing to recognize the transgender individual's gender identity is so commonplace that the transgender community has a name for it: "deadnaming," a name with a double meaning when a transgender individual is the victim of a criminal homicide.[39]

Given the lack of data collection on homicides involving transgender victims by the federal government, a number of private organizations concerned about the rights of transgender individuals have stepped up to fill the void. The Human Rights Campaign, for example, has been monitoring the killings of transgender people since 2013. It reports that between January 2013 and November 2018, at least 128 transgender individuals were the victims of fatal violence.[40] One hundred and ten of these homicide victims (approximately 86%) were transgender persons of color, including ninety-five black individuals and fourteen Latinos or Latinas.[41]

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35. *Id.*

36. *Id.* at 88 n.33.

37. *See* Stotzer, *supra* note 29, at 176 (noting in 2009 that "[t]he federal government currently does not include gender identity in legislation covering hate crimes—neither in sentence-enhancements nor in mandated tracking of hate crimes in the Uniform Crime Reports"); Christine Hauser, *Transgender Woman Shot Dead in Motel is 7th Killed in U.S. This Year, Rights Advocates Say*, N.Y. TIMES (Mar. 30, 2018), https://www.nytimes.com/2018/03/30/us/transgender-woman-killed-baton-rouge.html [https://perma.cc/EH82-GAB2]. The FBI did add gender identity to its annual Hate Crimes Incident Report in 2012. *See* Jordan Blair Woods & Jody L. Herman, *Anti-transgender Hate Crime*, *in* THE ROUTLEDGE INT'L HANDBOOK ON HATE CRIME 280 (Nathan Hall et al. eds., 2015). This report, however, covers all hate crime incidents, not just those resulting in death.

38. Hauser, *supra* note 37 ("[T]ransgender homicide victims are often identified by the police using the names and genders they were assigned at birth, a practice known as misgendering.").

39. As Lucas Waldron and Ken Schencke explain: "The transgender community has a word for calling a trans person by the name they no longer use, one that conveys a double meaning when it involves murder. It's known as 'deadnaming.'" Lucas Waldron & Ken Schwencke, *Deadnamed*, PROPUBLICA (Aug. 10, 2018), http://www.propublica.org/article/deadnamed-transgender-black-women-murders-jacksonville-police-investigation [https://perma.cc/8N6D-DLTU].

40. HUMAN RIGHTS CAMPAIGN, A NATIONAL EPIDEMIC, *supra* note 19, at 61–62.

41. *Id.* at 62.

One hundred fifteen of these transgender homicide victims were transgender women.[42] In other words, nearly nine in every ten of the transgender homicide victims between January 2013 and November 2018 were transgender women.[43]

As reflected below, transgender women and transgender persons of color constitute the vast majority of transgender individuals who are killed in the United States each year. Since their very being rests at the intersection of race and gender identity, transgender women of color appear to be at greatest risk of being the victims of fatal violence aimed at the transgender community.

1. Homicides Involving Transgender Victims in 2018

According to two sources, at least twenty-six transgender or gender non-conforming individuals were killed in 2018.[44] These statistics suggest that in each month in 2018, two or more transgender individuals were killed somewhere in the United States. The vast majority—twenty-five of these twenty-six homicide victims (96%)—were transgender women.[45] Twenty-three of these twenty-six transgender homicide victims in 2018 (approximately 85%) were trans women of color.[46]

2. Homicides Involving Transgender Victims in 2017

In 2017, the last year for which complete statistics were available at the time this Article was written, more transgender people were killed than in any year in at least a decade.[47] At least twenty-nine transgender individuals were killed in the United States in 2017, the highest number ever recorded up until that time.[48] These statistics suggest that in each month in 2017, at least two transgender individuals were killed somewhere in the United States. As noted above, many more transgender individuals were probably killed than reported, but their deaths may not be reflected in these figures because the police officer on the scene of the homicide may not have realized that the victim was a transgender individual or may have

42. *Id*.

43. *Id*. At least twenty-one of these transgender homicide victims were killed by intimate partners. *Id*. at 63.

44. *See* HUMAN RIGHTS CAMPAIGN, VIOLENCE AGAINST THE TRANSGENDER COMMUNITY IN 2019, *supra* note 19 (reporting that there were at least twenty-six transgender or gender non-conforming homicide victims in 2018); *Doubly Victimized*, *supra* note 19 (listing the names of twenty-six transgender homicide victims in 2018, including Roxana Hernandez, a thirty-three year-old trans woman of color, who reportedly died while in the custody of U.S. Immigration and Customs Enforcement (ICE) after fleeing violence in Honduras).

45. *Doubly Victimized*, *supra* note 19 (indicating that of the twenty-six transgender victims of homicide in 2018 listed, twenty-five were trans women).

46. *Id*. (noting that of the twenty-six transgender victims of homicide listed on GLAAD's webpage, twenty-three were trans women of color).

47. HUMAN RIGHTS CAMPAIGN, A TIME TO ACT, *supra* note 29, at 3.

48. HUMAN RIGHTS CAMPAIGN, A NATIONAL EPIDEMIC, *supra* note 19, at i ("At the end of 2017, we mourned the loss of 29 [transgender and gender-expansive] people—the highest number ever recorded.").

simply refused to acknowledge the victim's chosen gender identity by recording the victim's biological sex, rather than their chosen gender identity, as their gender on the police report.[49]

3. Homicides Involving Transgender Victims in 2016

According to the National Coalition of Anti-Violence Programs (NCAVP), aside from the forty-nine lives lost at the Pulse Nightclub in June 2016, there were twenty-eight anti-LGBTQ homicides in 2016.[50] Nineteen of these twenty-eight homicides (68%) involved transgender or gender nonconforming victims.[51] As in other years, the vast majority of these homicides, seventeen of the nineteen killings (89%) of transgender individuals in 2016, involved transgender women of color. [52]

The Human Rights Campaign, which also compiles statistics on violence against transgender individuals, more conservatively reported that there were at least twenty-three homicides involving transgender victims in 2016 and that the vast majority of these victims—nineteen of the twenty-three—were transgender women.[53]

4. Homicides Involving Transgender Victims in 2015

In 2015, there were at least twenty-two homicides involving transgender victims.[54] Almost every single one of these homicides—twenty-one of the twenty-two—involved a transgender female victim.[55]

5. Homicides Involving Transgender Victims in 2014

In 2014, there were at least thirteen homicides involving a transgender victim.[56] All of these homicides involved a transgender female victim.[57]

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49. Andrea L. Wirtz et al., *Gender-Based Violence Against Transgender People in the United States: A Call for Research and Programming*, 19 TRAUMA, VIOLENCE & ABUSE 1, 1, 4 (2018) (noting that because "there are no national surveillance systems that track murders of trans people and . . . trans victims of violence are often misgendered by police and news media," statistics on homicides of transgender individuals likely underestimate the true rate of homicide).

50. NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, A CRISIS OF HATE: A REPORT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER HATE VIOLENCE HOMICIDES IN 2017 6 (2017) (reporting seventy-seven hate-inspired homicides involving LGBTQ victims in 2016, including the forty-nine lives lost in the shooting at the Pulse nightclub in Orlando, Florida in June 2016).

51. *Id*. at 7.

52. *Id*. at 8.

53. HUMAN RIGHTS CAMPAIGN, A NATIONAL EPIDEMIC, *supra* note 19, at 64.

54. *Id*.

55. *Id*.

56. *Id*.

57. *Id*.

6. Homicides Involving Transgender Victims in 2013

In 2013, there were at least nineteen homicides involving a transgender victim.[58] The overwhelming majority of these homicides—seventeen of the nineteen—involved a transgender female.[59]

The information discussed above has been summarized in the table below.

Table 1: Homicides in the United States Involving Transgender Victims (2013–2018)[60]

Year	Total # of Transgender Homicide Victims	# of Female Transgender Homicide Victims	# of Transgender Homicide Victims of Color
2013	19	17	17
2014	13	13	11
2015	22	21	19
2016	23	19	20 (17 transgender women of color)
2017	29	24	24
2018	26	25	23 (23 transgender women of color)

B. *Transgender Individuals as Victims of Other Forms of Violence*

Information about other forms of violence against transgender individuals is also limited. Just as with homicides, the limited information available may not be accurate due to misgendering and underreporting. Additionally, transgender victims are often reluctant to report their victimization to the police out of fear of

58. *Id.*

59. *Id.*

60. *Id.* For the 2017 statistics, see *id.* at i, 64 ("At the end of 2017, we mourned the loss of 29 [transgender and gender-expansive] people—the highest number ever recorded."). For the 2018 statistics, see HUMAN RIGHTS CAMPAIGN, VIOLENCE AGAINST THE TRANSGENDER COMMUNITY IN 2019, *supra* note 19 (reporting that there were twenty-six transgender or gender non-conforming homicide victims in 2018); *Doubly Victimized, supra* note 19 (listing the names of twenty-six transgender homicide victims in 2018, including Roxana Hernandez, a thirty-three year old trans woman of color, who reportedly died while in the custody of U.S. Immigration and Customs Enforcement (ICE) after fleeing violence in Honduras; and noting that of the twenty-six transgender victims of homicide in 2018 listed, twenty-five were trans women, twenty-three were transgender persons of color, including twenty-two trans women of color).

being revictimized.[61] As Stephen Rushin and Jenny Carroll note, there is a "long and well-documented history of police officers in the United States mistreating the trans community."[62]

The information that is available suggests that transgender individuals experience a great deal of discrimination, harassment, and physical violence.[63] In 2011, the National Center for Transgender Equality and the National Gay and Lesbian Task Force published the National Transgender Discrimination Survey, then considered the most comprehensive survey on discrimination against the trans community in the United States.[64] 6,450 transgender and gender non-conforming adults across the United States participated in this survey.[65] Ninety percent of the participants reported experiencing harassment, mistreatment, or discrimination at work for being transgender.[66] Fifty-seven percent of the participants had experienced serious family rejection for being transgender.[67] Twenty-six percent reported suffering physical assaults and ten percent reported suffering sexual assaults for being transgender or gender nonconforming.[68]

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61. As Jordan Blair Woods and Jody Herman observe, transgender and gender non-conforming individuals may not report hate crimes to police because: (1) "they may fear that law enforcement officers and departments will mishandle or ignore their reports," (2) "they may fear that law enforcement officers will only further victimize them for being transgender or gender non-conforming," (3) they "may fear that reporting will cause the perpetrators to retaliate against them," and (4) they may not report "to avoid drawing attention to their gender identities." Woods & Herman, *supra* note 37, at 280–81; *see also* Jan S. Redfern, *Nationwide Survey of Attitudes of Law Enforcement Personnel Towards Transgender Individuals*, 4 J.L. ENFORCEMENT 1, 2 (2014) (citing TALIA BETTCHER ET AL., CITY OF LOS ANGELES HUMAN REL. COMM'N'S TRANSGENDER WORKING GROUP, RECOMMENDED MODEL POLICIES AND STANDARDS FOR THE L.A. POLICE DEPARTMENT'S INTERACTIONS WITH TRANSGENDER INDIVIDUALS 11, 14 (2010), and JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 162 (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf) (noting that the results of two surveys "reveal a general lack of trust of law enforcement by the transgender community")); *see also* ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017) (examining ways in which black women, indigenous women, and other women of color, including trans women of color, experience racial profiling, police violence, and immigration enforcement).

62. Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1, 20–24 (2017) (discussing thirteen studies that surveyed trans individuals about their experiences with law enforcement abuse outside of the custodial setting).

63. The absence of laws banning gender identity discrimination in many jurisdictions contributes to the difficulties transgender individuals encounter in employment, public housing, and interactions with police. *See* David B. Cruz, *Transgender Rights After* Obergefell, 84 UMKC L. REV. 693, 695 (2016) (noting that many people in the United States live in jurisdictions that do not ban gender identity discrimination, which "can make it especially challenging for transgender persons to secure employment, receive equal treatment in a range of public accommodations, and avoid police harassment").

64. Jordan Blair Woods et al., *Latina Transgender Women's Interactions with Law Enforcement in Los Angeles County*, 7 POLICING 379, 381 (2013).

65. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

66. *Id*. at 56.

67. *Id*. at 88.

68. *Id*. at 80.

In 2015, the National Center for Transgender Equality published an updated survey. The 2015 U.S. Transgender Survey is "the largest survey examining the experiences of transgender people in the United States."[69] 27,715 transgender individuals (both adults and youth) participated.[70] Thirteen percent reported that they had been subjected to a physical attack just within the past year.[71] When asked about the probable reason for being attacked and who attacked them, nine percent responded that they were physically attacked specifically because of their transgender status.[72] Among transgender individuals who came out to their families, ten percent of respondents reported that a family member acted violently towards them because of their transgender status.[73] Five percent reported being physically attacked by strangers in public because of their transgender status.[74]

When asked how many times they were physically attacked within the past year, forty-five percent reported they were attacked once, twenty-five percent were attacked twice, thirteen percent were attacked three times, and sixteen percent were attacked four or more times.[75]

Respondents were also asked to specify how they were attacked.[76] Approximately three-quarters of the transgender individuals who had been physically attacked within the year "reported that someone had grabbed, punched, or choked them."[77] Twenty-nine percent reported that someone "threw an object at them, like a rock or a bottle."[78] Three percent reported being attacked with a gun.[79] Transgender women of color, particularly black and Latina women, "were nearly four times as likely to report that they were attacked with a gun."[80]

Sexual violence against transgender individuals is also a pervasive problem. Nearly half of the respondents reported having been sexually assaulted at some point in their lifetime.[81] When asked who committed the sexual assault against them, nearly one-third reported that they had been sexually assaulted by a

69. THE REPORT OF THE 2015 TRANSGENDER SURVEY, *supra* note 29, at 4.

70. *Id*. at 18.

71. *Id*. at 202. It appears respondents were only asked whether they had experienced a physical attack during the past year, not whether they had experienced a physical attack at any time during their lifetime.

72. *Id*. at 203.

73. *Id*. at 71.

74. *Id*. at 203.

75. *Id*. at 204.

76. *Id*.

77. *Id*.

78. *Id*.

79. *Id*.

80. *Id*.

81. *Id*. at 205 (noting "[n]early half (47%) of respondents have been sexually assaulted at some point in their lifetime"). This included "unwanted sexual contact, such as oral, genital, or anal contact, penetration, forced fondling, [and] rape." *Id*. The 2015 Transgender Survey also found that "transgender men (51%) and non-binary people with female on their original birth certificate (58%) [were] more likely to have been sexually assaulted, in contrast to transgender women (37%) and non-binary people with male on their original birth certificate (41%)." *Id*. The term "non-binary" is "used by some to describe people whose gender is not exclusively male or female,

stranger.[82] More than a third reported "that a current or former partner had sexually assaulted them."[83] One-quarter reported they had been sexually assaulted by a relative.[84]

The 2015 survey also found a significant amount of discrimination, harassment, and physical violence directed against transgender youth. The vast majority (77%) of trans youth who were either open about their gender identity or were perceived as transgender while in elementary, middle, or high school (K-12) experienced one or more negative experiences, such as verbal harassment, physical or sexual violence, or prohibitions against dressing according to their gender identity.[85] The survey also found that transgender students in higher education experience a significant amount of verbal, physical, or sexual harassment. Of those surveyed, approximately one in every four transgender students in higher education reported some form of verbal, physical, or sexual harassment in college or vocational school because of their status as a transgender individual.[86]

II. THE TRANS PANIC DEFENSE

The term "trans panic defense" describes a criminal defense strategy in which a male defendant charged with murdering a transgender female victim will claim that the discovery that the victim was biologically male was so upsetting that he panicked and lost his self-control.[87] The defendant will further claim he should be acquitted of murder and instead convicted of a lesser offense, such as voluntary manslaughter.[88] Trans panic arguments typically are used to bolster a provocation defense, but have also been used to support mental defect defenses, such as temporary insanity or diminished capacity.[89] In rare cases, a defendant may attempt to

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including those who identify as having no gender, [as] a gender other than male or female, or [as] more than one gender." *Id*. at 40.

82. *Id*. at 206.

83. *Id*.

84. *Id*.

85. *Id*. at 131–32.

86. *Id*. at 136.

87. *See* Lee & Kwan, *supra* note 24, at 77.

88. *Id*.

89. The defendant might argue that he temporarily became insane upon learning that the victim was born male or he might claim that he lacked the specific intent to kill required for murder because learning that the victim was born male diminished his mental capacity. For example, in one case out of Fresno, California, a twenty-three-year-old man named Estanislao Martinez stabbed the victim, a Latina transgender female, twenty times with a pair of scissors after discovering the victim was biologically male. RIKI WILCHINS & TANEIKA TAYLOR, GENDER PUB. ADVOC. COAL., 50 UNDER 30: MASCULINITY AND THE WAR ON AMERICA'S YOUTH, A HUMAN RIGHTS REPORT 11 (2006). Apparently, Martinez met Joel Robles, whom Martinez thought was born female, on a blind date and went back to Martinez's apartment to engage in sexual activity. *Man Gets Four Years in Prison for Transgender Slaying*, FOX NEWS (Oct. 1, 2005), https://www.foxnews.com/story/man-gets-four-years-in-prison-for-transgender-slaying [https://perma.cc/GSP3-YU7V]. In court, Martinez's lawyer argued that his client realized Robles was a man after they engaged in some sexual activity. *Id*. His client then flew into a rage, and "the panic (his client) felt was a sort of temporary insanity brought on by the shock of realizing he had been duped by a transgender man." *Id*. Martinez's attorney argued that this rage meant that what his client did was not

use a trans panic argument in connection with a self-defense claim.[90] Because the most common way trans panic arguments operate is within the structure of the defense of provocation, I focus on how trans panic fits within the doctrinal site of the provocation defense. I start by providing an overview of the defense of provocation.

A. *The Defense of Provocation*

The defense of provocation, also known as the heat of passion defense, is a partial defense to murder.[91] If the jury finds that the defendant was provoked into a heat of passion by legally adequate provocation, it can acquit the defendant of murder and instead convict him of voluntary manslaughter, a lesser crime with a correspondingly lighter sentence than the sentence for murder.[92]

"Legally adequate provocation" is a legal term of art. At early common law, legally adequate provocation existed if and only if the defendant fell within one of the following categories: "(1) an aggravated assault or battery, (2) the observation of a serious crime against a close relative, (3) an illegal arrest, (4) mutual combat, or (5) catching one's wife in the act of adultery."[93] Only these categories of provocative acts were recognized at early common law as legally adequate provocation.[94]

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murder. *Id*. Martinez was allowed to plead guilty to voluntary manslaughter, and while he could have been sentenced to eleven years, he was instead sentenced to four years in prison. *Id*. Three years were for the voluntary manslaughter charge and an additional year was added for using scissors as a weapon. *See* Wodda & Panfil, *supra* note 18, at 954–55.

90. In *State v*. *Camacho*, No. A-5189-07T4, 2010 WL 3218888 (N.J. Super. Ct. App. Div. Aug. 16, 2010), for example, according to the defendant's statement to police, the victim was dressed in feminine attire and offered the defendant twenty dollars to have sex. *See* JORDAN BLAIR WOODS ET AL., WILLIAMS INST., MODEL LEGISLATION FOR ELIMINATING THE GAY AND TRANS PANIC DEFENSES 12 (2016), https://williamsinstitute.law.ucla.edu/research/transgender-issues/model-legislation-for-eliminating-the-gay-and-trans-panic-defenses/. After entering the victim's apartment, the victim undressed. *Id*. The defendant claimed he got angry when he saw the victim's genitals and thought the victim was going to grab a knife the defendant had in his jacket, so he stabbed and killed the victim. *Id*. The defendant was found guilty of first-degree murder. *Id*. On appeal, the defendant argued that his trial attorney was ineffective for, among other things, failing to request an instruction on self-defense and imperfect self-defense. *Id*. The appellate court rejected the defendant's ineffective assistance of counsel claim. *Id*.

91. CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 25 (NYU Press 2003). A partial defense is one in which the defendant is acquitted of the charged offense but found guilty of a lesser offense. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 16.01, at 193 n.2 (Carolina Academic Press, 8th ed. 2018) (noting that "[s]ome defenses result in the defendant's conviction of a lesser offense [and] are . . . described as 'partial defenses'").

92. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 91, § 31.07[A], at 501 (noting that "[a]t common law, an intentional homicide committed in 'sudden heat of passion' as the result of 'adequate provocation' mitigates the offense to voluntary manslaughter").

93. CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS 343 (4th ed. 2019) (explaining the circumstances under which one could claim the provocation mitigation under the early common law's categorical approach); *see also* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 91, § 31.07[B][2][a], at 502.

94. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 91, §31.07[B][2][a], at 502 (noting that "[c]ommon law courts developed a small and fixed list of categories that met this standard [of constituting

The early common law's rigid categorical approach to provocation came under increasing criticism at least in part because it was thought unfair to male murder defendants who could not meet its stringent requirements.[95] In the late 1800s, many jurisdictions began to abandon the early common law approach to provocation, replacing it with an approach that employed a reasonableness requirement to determine which types of provocation were legally adequate.[96] In most jurisdictions today, legally adequate provocation exists if the hypothetical reasonable person in the defendant's shoes would have been[97] provoked into a heat of passion.[98]

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adequate provocation]"); LEE & HARRIS, CRIMINAL LAW: CASES AND MATERIALS, *supra* note 93, at 343 ("Only these categories of provocative acts were recognized at early common law as adequate provocation[.]").

95. LEE, MURDER AND THE REASONABLE MAN, *supra* note 91, at 24 ("Not only was the early categorical approach seen as unfair to *unmarried men* who claimed they were provoked into killing their unfaithful fiancées or girlfriends, it was also thought to be unfair to *married men* who learned of their wives' adultery through third parties or through their wives' own confessions."). The early categorical approach was also very unfair to wives charged with murdering their unfaithful husbands after catching them in the act of adultery, since the last category only applied to husbands who killed their unfaithful wives after catching them in the act of adultery. But this unfairness to female defendants did not move courts to abandon the categorical approach. *Id*. ("Eventually, the early common law's highly rigid categorical approach to provocation came under increasing criticism, not because it was seen as unfair to women who killed their unfaithful husbands, but because it was thought unfair to male murder defendants who could not meet the early common law's stringent requirements.").

96. LEE, MURDER AND THE REASONABLE MAN, *supra* note 91, at 25 (noting that "[f]or a defendant to receive the provocation mitigation, the jury must find that (1) the defendant was actually provoked into a heat of passion, (2) the reasonable person in the defendant's shoes would have been so provoked, (3) the defendant did not cool off, and (4) the reasonable person in the defendant's shoes would not have cooled off"); *see also* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 91, § 31.07[B][2][b][i], at 503 (noting that adequate provocation under modern law may be found if the provocation "would render any ordinarily prudent person for the time being incapable of that cool reflection that otherwise makes it murder" or "might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment") (internal quotations and citations omitted).

97. There appears to be some debate over whether the modern test focuses on whether the reasonable person "would have" been provoked into a heat of passion or whether it simply requires that the reasonable person "could have" been provoked into a heat of passion. Most of the available sources suggest the question is whether the reasonable person "would have" been provoked. *Id*.; *see also In re* Standard Jury Instructions In Criminal Cases—Report No. 2013-02, 137 So.3d 995, 997–98 (Fla. 2014) (authorizing changes to Florida's standard jury instructions, which state that adequate provocation requires that "a reasonable person *would* have lost normal self-control and *would have* been driven by a blind and unreasoning fury") (emphasis added); State v. Herrick, 30 A.3d 1285, 1291 (Vt. 2011) (affirming jury instructions that "'[a]dequate provocation' refers to the degree of provocation that *would* cause a reasonable person to lose self-control and to act without thinking") (emphasis added); People v. Pouncey, 471 N.W.2d 346, 389 (Mich. 1991) ("In addition, the provocation must be adequate, namely, that which *would* cause the reasonable person to lose control.") (emphasis added). A few courts have used the word "might" to describe the test, supporting the view that the test is whether the reasonable person "could have" been provoked. *See, e.g*., Dandova v. State, 72 P.3d 325, 332 (Alaska Ct. App. 2003) ("Loosely speaking, a provocation was adequate if it was 'such as *might* naturally induce a reasonable [person] in the passion of the moment to lose self-control and commit the act on impulse and without reflection.'") (emphasis added) (citation omitted); State v. Tucker, No. W2000-02220-CCA-R3CD, 2002 WL 31624933, at *14 (Tenn. Crim. App. Nov. 20, 2002) (affirming jury instruction where the judge instructed that "[a]dequate provocation is one that excites such anger as *might* obscure the reason or dominate the volition of an ordinary reasonable man") (emphasis added).

98. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 91, § 31.07[B][2][b][i], at 503. This test is often called the modern reasonable person test, although it is sometimes referred to as the modern common law test to

The critical question in provocation cases is whether the provocation was legally adequate or reasonable.[99] However, as Jonathan Witmer-Rich notes, legal scholars have struggled for years to articulate principled standards to assess the reasonableness or adequacy of the provocation.[100]

An alternative formulation of the provocation defense was proposed in 1962 by the American Law Institute ("ALI"). Under the ALI's Model Penal Code ("MPC"), a killing that would otherwise be murder constitutes manslaughter if the killing "is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[101] Unlike the modern reasonable person test for provocation, the MPC's extreme mental or emotional disturbance defense does not assess the adequacy of the provocation by asking whether an objectively reasonable person would have been provoked into a heat of passion. Rather, the MPC specifies that "reasonableness . . . shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."[102] In other words, the MPC expressly adopts a subjective approach to the reasonableness inquiry.[103] Only ten to twelve states have adopted the MPC's approach to provocation.[104]

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differentiate it from the early common law test or simply the common law test to differentiate it from the MPC approach to provocation.

99. ROGER M. GOLDMAN ET AL., 4 CRIMINAL LAW ADVOCACY §68.03 (2019) (noting that "[the] provocation must be recognized as adequate by law").

100. Jonathan Witmer-Rich, *The Heat of Passion and Blameworthy Reasons to Be Angry*, 55 AM. CRIM. L. REV. 409, 422–37 (2018). Witmer-Rich suggests that the correct standard is one in which courts would ask whether the defendant's reason for becoming extremely angry is itself blameworthy. *Id*. at 461.

101. MODEL PENAL CODE § 210.3(1)(b) (AM. LAW INST. 1962).

102. *Id*.

103. The Model Penal Code's subjective approach makes it easier for defendants claiming the mitigation to obtain favorable results than if they were in jurisdictions applying the modern reasonable person test for provocation. *See* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1354–55 (1997).

104. Michal Buchhandler-Raphael, *Fear-Based Provocation*, 67 AM. U. L. REV. 1719, 1728 (2018) (noting that only twelve jurisdictions have adopted the MPC's extreme emotional disturbance defense) (citing Paul H. Robinson, *Murder Mitigation in the Fifty-Two American Jurisdictions: A Case Study in Doctrinal Interrelation Analysis*, 47 TEX. TECH. L. REV. 19, 25 (2014) (listing Hawaii, Montana, Nevada, New Hampshire, Arkansas, Connecticut, Delaware, Kentucky, New York, North Dakota, Oregon and Utah as the twelve states that have adopted something like the MPC's extreme mental or emotional disturbance defense)). The number of states that utilize the MPC's extreme emotional disturbance defense may be even fewer than twelve. It appears Nevada and Connecticut have switched to the modern test for provocation since legislation in these states banning the gay and trans panic defenses do not use the words "extreme mental or emotional disturbance" but instead use the words "provocation" or "heat of passion." *See* NEV. REV. STAT. ANN. § 193.225(1) (2019) (providing that an alleged heat of passion or provocation is not objectively reasonable "if it resulted from the discovery of, knowledge about or potential disclosure of the actual or perceived sexual orientation or gender identity or expression of the victim"); CONN. GEN. STAT. § 53a-16 (2019) (noting that "[j]ustification . . . does not include provocation that resulted solely from the discovery of, knowledge about or potential disclosure of the victim's actual or perceived sex, sexual orientation or gender identity or expression").

B. *The "Gay Panic Defense"*

In the late 1960s and early 1970s, male defendants charged with murdering gay men began to utilize the concept of "homosexual panic" in connection with claims of insanity or diminished capacity.[105] These defendants would argue that the gay male victim's unwanted, nonviolent sexual advance triggered in them a violent psychotic reaction, causing them to lose control over their mental abilities.[106] Most of these early claims of gay panic to support a mental defect defense like insanity were not successful.[107]

As time went on, male murder defendants charged with killing gay men started using the idea of homosexual panic as part of a provocation defense with more success.[108] These defendants would argue that a nonviolent sexual advance by their male victim provoked them into a heat of passion, causing them to lose control over their actions.[109]

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105. State v. Thornton, 532 S.W.2d 37, 44 (Mo. 1975) (noting that defense was arguing defendant was in a state of "homosexual panic" at the time of the stabbing); People v. Parisie, 287 N.E.2d 310, 313 (Ill. App. Ct. 1972) (noting that defense was arguing insanity based on "homosexual panic"); People v. Rodriguez, 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967) (noting that psychiatrist for the defense testified that defendant was acting as a result of acute homosexual panic brought on by his fear that the victim was molesting him).

106. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 491 (2008) (citing Duncan Osborne, *The Homosexual Panic Defense: Are Juries Really Buying It?*, LGNY NEWS (Nov. 4, 1999)).

107. *Id.* at 492 (citing Robert G. Bagnall et al., Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 501 (1984)).

108. *Id.* at 500–05. The actual number of cases in which gay panic has been asserted is uncertain since most criminal cases end in a guilty plea. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) (noting that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas" and plea negotiations are shrouded in secrecy). The gay panic cases that are known are those that have received extensive press coverage and those that are published in court opinions. Most successful gay panic cases, however, are not likely to be in published court opinions. If the defendant gets the voluntary manslaughter verdict that he was seeking, he is not likely to appeal his conviction. The government is also unlikely to appeal because the double jeopardy clause prohibits the government from retrying a defendant for the same offense. Nonetheless, one researcher found 189 appellate criminal cases between 1952 and 2005 in which the defense referenced unwanted gay sexual advances—either as part of a formal trial strategy or in their description of the facts—and was successful in gaining the defendant a reduced sentence in 13% of these cases. *See* Jessica M. Salerno et al., *Excusing Murder? Conservative Jurors' Acceptance of The Gay-Panic Defense*, 21 PSYCHOL. PUB. POL'Y & L. 24, 25 (2015) (citing E. Harrington, Poster, American Psychology-Law Society Conference, San Antonio, TX, Provocation as a Murder Defense: An Analysis of Appellate Cases Involving Homosexual or "Gay Panic" (March 2009)). According to another source, gay panic strategies have been asserted in at least forty-five cases nationwide between 2002 and 2016. *See* James Nichols, *American Bar Association Votes to Curtail Use of 'Gay Panic,' 'Trans Panic' Defense*, HUFF. POST (Aug. 16, 2013), https://www.huffpost.com/entry/american-bar-association-gay-panic_n_3769149?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAIDWMDyf_caD1ecojUG4vRAHbwqan-WoVLXMnhk65qBXXRpe1Z2VoWmrSRObaPAetc33eticfznXj7W9YEHCilKSAM4LxAwjaoey5XrNaQoaCQjoeLbocqnfL41i3WKuyRzY3lO5c2qUtS1_9p65UOondmGvMBt3T3k0_fmWSgMJ [https://perma.cc/F33N-86DG].

109. Lee, *The Gay Panic Defense*, *supra* note 106, at 500–04 (discussing *Schick v. Indiana*, 570 N.E.2d 918 (Ind. Ct. App. 1991), in which a male defendant successfully argued he was provoked into a heat of passion by his male victim's unwanted sexual overture; and *Mills v. Shepard*, 445 F. Supp. 1231 (W.D.N.C. 1978), in which a male defendant successfully argued that he was provoked into a heat of passion by his male victim's attempt to have sex with him).

The defendant-friendly verdicts in these early gay panic provocation cases were likely the product of a culture that privileged male violence over other forms of violence.[110] A man who responded to a gay man's nonviolent sexual advance with deadly violence was thought to be acting the way an ordinary man would react.[111] If, however, a woman had killed a man who groped her breasts and tried make a similar claim (i.e., "I was reasonably provoked into a heat of passion by the victim's unwanted nonviolent sexual advance"), her claim of reasonableness would not have been likely to succeed given the prevailing social norms at that time. As I have argued in my previous scholarship, women in society were "supposed to accept a certain amount of unwanted male attention, and while they might frown, struggle, or protest, they [were] not supposed to use violence to dissuade or thwart men who suggest[ed] sexual interest" in these inappropriate ways.[112] "[W]omen [were] taught to believe that a man who aggressively expresses his sexual attraction for a woman [was] merely behaving the way a man is supposed to behave"[113] and were supposed to be flattered if they were the target of unwanted male attention.[114] It is not clear that this would still be the case in today's #MeToo culture.

Defendant-friendly verdicts were also the product of a culture that privileged heterosexual men over gay men. At least back then, and perhaps still today in some places in America, if a heterosexual man responded violently to a gay man's sexual advance, he enjoyed a presumption of reasonableness.[115] A heterosexual man was expected to become outraged if another man attempted to make a sexual advance upon him. If, however, a gay man were to respond violently to an unwanted nonviolent sexual advance by a woman, given societal norms privileging heterosexuality, most people would probably say that he was not acting as an ordinary man would have acted, even if the woman's nonviolent sexual advance was just as offensive to him as a gay man's sexual advance might be to a heterosexual man.[116]

Since I have previously written at great length about the "gay panic defense,"[117] I will now turn to the trans panic defense, a close cousin of the gay panic defense. Trans panic is typically asserted by a male defendant charged with murdering a transgender female. As explained below, the defendant in a trans panic case claims that the discovery that the victim was a transgender person provoked him into a heat of passion.

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110. *Id.* at 510.
111. *Id.* at 505.
112. *Id.* at 510.
113. *Id.*
114. *Id.* at 510–11.
115. *Id.* at 511.
116. *Id.*
117. Lee, *The Gay Panic Defense*, *supra* note 106; *see also* Cynthia Lee, *Masculinity on Trial: Gay Panic in the Criminal Courtroom*, 42 SW. L. REV. 817 (2013).

C. *The Trans Panic Defense*

A murder defendant claiming trans panic typically will allege that he became upset and lost his ability to control his actions upon discovering that the victim was a transgender female. In states that follow the modern formulation of the provocation defense, the defendant must also show that a reasonable person would have been provoked into a heat of passion in order to receive the mitigation from murder to voluntary manslaughter.[118] For years, courts have equated reasonableness with typicality, construing the reasonable person as the ordinary or typical person.[119] Consequently, the defendant claiming trans panic will argue that the ordinary man in his shoes would have been provoked into a heat of passion, and therefore he should be found not guilty of murder, but instead guilty of voluntary manslaughter.

It is not difficult for the defendant asserting a trans panic defense to satisfy the requirement that he was actually provoked into a heat of passion. All the defendant has to do is testify that he became so upset upon discovering the victim was a transgender female that he lost his self-control. If the jury believes the defendant, the defendant can satisfy the "actually provoked" requirement.

It may also not be too difficult for a defendant who claims trans panic to satisfy the reasonableness requirement. The defendant need only convince the jury that the average or ordinary man would become very upset if he discovered that an individual he had been dating or courting was not born female.

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118. *See* LEE, MURDER AND THE REASONABLE MAN, *supra* note 91, at 25 (noting that one of the requirements for the provocation defense is a finding that the reasonable person in the defendant's shoes would have been provoked); DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 91, § 31.07[B][2][b][i], at 503 (noting that adequate provocation under modern law may be found if the provocation "might render ordinary men, of fair average disposition, liable to act rashly . . . and from passion, rather than judgment") (internal quotations and citations omitted); 2 WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW §15.2(b) (3d ed. 2019) ("What is really meant by 'reasonable provocation' is provocation which causes a reasonable man to lose his normal self-control.").

119. Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 753 (1995) (noting that "[t]he Reasonable Man in the context of provocation law . . . is more appropriately described as the *Ordinary* Man (i.e., a person who possesses ordinary human weaknesses)" as opposed to an idealized human being); *see also* People v. Beltran, 56 Cal. 4th 935, 957 (2013) (noting "[p]rovocation is adequate only when it would render an *ordinary* person of average disposition 'liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment'") (emphasis added) (quoting People v. Logan, 175 Cal. 45, 49 (1917)); Commonwealth v. Glover, 459 Mass. 836, 841 (2011) (noting that "[r]easonable provocation is provocation that 'would have been likely to produce in an *ordinary* person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint'") (emphasis added) (quoting Commonwealth v. Walden, 380 Mass. 724, 728 (1980)). Courts tend to equate reasonableness with typicality not just in provocation cases, but also in self-defense cases. *See* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 495 (1996) (noting that in self-defense cases, legal decisionmakers tend to "evaluate the reasonableness of the defendant's beliefs and actions by trying to determine whether the ordinary reasonable person would have believed and acted the way the defendant did").

While such an argument might seem absurd to many people, it would likely resonate with many others.[120] Aimee Wodda and Vanessa Panfil recount a familiar scene playing out on the Jerry Springer show that supports the suggestion that the average cisgender heterosexual man would react with physical violence if he found out that the woman to whom he was attracted was a transgender female:

> A woman sits on a stage and tells a talk show host that a man who has "liked" many of her pictures on Instagram has wanted to meet her for a month, but it had not yet happened because they live in different parts of the country. He called the talk show in order to facilitate their meeting, and she obliged. However, she tells the talk show host: "But he don't know my secret." When the host asks her what it is, she replies that she is transgender, to which the audience makes loud "oooooh" noises. . . .
>
> The talk show host brings out her admirer. The man comes out onto the stage, greets the host, hugs his crush, and sits down next to her. After a brief exchange of hellos, she says, "Well, before we go any further, I need to letchu know something. Umm, I haven't really taken it seriously because we've only been talking for a month, and we live so far, I never planned on meetin' you, but I'm lettin' you know, I was born a man." Her admirer asks the host, "Is she serious, Jerry?" Before even receiving an answer, he jumps onto the woman, his arms swinging at her, and the show's security guards spring into action as the audience erupts in cheers, hoots, laughter, and applause. . . . The security guards pry the combatants apart and separate them to opposite sides of the stage. . . .
>
> The woman [asks]: "Why are you so mad? We didn't sleep together."
>
> He yells, " . . . Cuz you deceived me!"[121]

Wodda and Panfil note that "segments featuring a woman who was 'born a man' and is there to reveal this to a sexual or romantic partner have been popular on the show"[122] and that "the majority of transgender guests [on the show] are met with scorn, derision, disgust, anger, and violence."[123] Wodda and Panfil also point out that this audience reaction is not that surprising given that transgender and gender nonconforming individuals are often "portrayed in the media as curiosities or

120. Americans today have more negative feelings toward trans people than other groups. *See* German Lopez, *We Asked US Voters About Their Views on Transgender People. Here's What They Said*, Vox (May 24, 2016), https://www.vox.com/2016/5/24/11746086/transgender-bathrooms-poll-survey [https://perma.cc/6NFD-FBFP]. One in five Americans believe that transgender individuals have a mental illness. *See* Samantha Allen, *Why A Lot of Americans Don't Want To Befriend a Transgender Person*, DAILY BEAST (May 19, 2017), https://www.thedailybeast.com/why-a-lot-of-americans-dont-want-to-befriend-a-transgender-person?ref=scroll [https://perma.cc/6TFM-VXFG].

121. Wodda & Panfil, *supra* note 18, at 927–28.

122. *Id*. at 928.

123. *Id*. at 929. Even though some aspects of the Jerry Springer show appear to be staged, such as the on stage fighting between guests on the show, the show appears to be tapping into an anti-trans sentiment that a large proportion of the audience seems to share. *Id*.

oddities, as mentally unstable persons, and/or as predators."[124] They note that "a general feeling of disgust or revulsion towards gender nonconforming persons may be . . . a contributing factor in cases of transphobic acts of violence."[125]

While trans panic arguments are usually seen in cases in which a cisgender man has been charged with *murder* and seeks mitigation of the murder charge to voluntary manslaughter, a cisgender man charged with *manslaughter* in the death of a transgender woman will sometimes make a similar argument in the hopes of getting mitigation to an even lesser charge. For example, in the case discussed in the Introduction, Dixon, the man who killed Islan Nettles, a twenty-one-year-old African American transgender woman,[126] was charged with first-degree man slaughter.[127] As a result of a plea agreement with the prosecution, Dixon entered a plea of guilty to second-degree manslaughter and first-degree assault and was sentenced to twelve years in prison.[128]

1. Problems with the Trans Panic Defense Strategy

Trans panic arguments are problematic for many reasons. I briefly outline some of those reasons here.[129]

a. The Trans Panic Defense Suggests Transgender Individuals are Sexually Deviant

First, trans panic arguments reinforce negative stereotypes about trans people. Implicit in the trans panic argument is the idea that transgender individuals are sexually deviant. A homicide case involving a gender-nonconforming victim from Oxnard, California reflects this view.[130] Brandon McInerney was a fourteen-year-old male who shot and killed his fifteen-year-old classmate Larry King on February 13, 2008.[131] King was described in news reports about the case as a gay

124. *Id*. at 932; *see also id*. at 932 n.26 (listing films in which transgender or gender nonconforming individuals were portrayed as predators, including Dressed to Kill, In Dreams, Psycho, The Silence of the Lambs, Sleepaway Camp, etc.).

125. *Id*. at 931.

126. Rankin, *supra* note 1.

127. Wang, *supra* note 2.

128. Rankin, *supra* note 1 (noting that the judge sentenced Dixon to twelve years even though the original plea agreement was for a seventeen-year sentence); *see also* Wang, *supra* note 2. It is difficult to know what motivated the government to agree to these lesser charges. Perhaps the prosecutor feared Dixon's trans panic argument might convince jurors to be lenient on him. Rather than risk a complete acquittal, the prosecutor may have thought it better to secure a conviction on these lesser charges.

129. For examples and explanation of these arguments in greater depth, see Lee & Kwan, *supra* note 24, at 108–19.

130. For an insightful and comprehensive examination of the trial in the Brandon McInerney case, see J. Kelly Strader et al., *Gay Panic, Gay Victims, and the Case for Gay Shield Laws*, 36 CARDOZO L. REV. 1473 (2015).

131. Catherine Saillant, *Mistrial Declared in Slaying of Gay Oxnard Teen*, L.A. TIMES, Sept. 2, 2011, at AA1; Catherine Saillant, *Trial in Killing of Gay Teen Will Test New Law*, L.A. TIMES, July 21, 2011, at AA1.

male teenager,[132] and even described himself as gay,[133] but appears to have been a gender-nonconforming teenager or a transgender female.[134] King began wearing makeup and high heels to school in January 2008.[135] He was also planning to change his name from Larry to Leticia.[136]

McInerney claimed that he was provoked into a heat of passion by King's sexually provocative actions, including asking McInerney to be his Valentine a few days before the shooting and blowing a kiss at McInerney the day before the shooting.[137]

McInerney told one of King's friends that she should say goodbye to King because she would never see him again.[138] The next day, McInerney brought a loaded .22 caliber handgun to school, hiding it in his backpack.[139] He went into a classroom where King was working on a paper, walked up behind King, then shot King twice in the back of the head.[140]

Despite the strong evidence of premeditation and deliberation that supported a first-degree murder conviction, the jury could not come to an agreement.[141] A

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132. Catherine Saillant & Richard Winton, *Retrial in Gay Youth's Shooting to Omit Hate Allegation*, L.A. TIMES, Oct. 6, 2011, at A1.

133. Rebecca Cathcart, *Boy's Killing, Labeled a Hate Crime, Stuns a Town*, N.Y. TIMES (Feb. 23, 2008), https://www.nytimes.com/2008/02/23/us/23oxnard.html?mtrref=www.google.com&assetType=REGIWALL [https://perma.cc/8YLE-C335]. As a young teenager, King may not have understood the difference between sexual orientation and sexual identity. *See* JANET MOCK, REDEFINING REALNESS: MY PATH TO WOMANHOOD, IDENTITY, LOVE & SO MUCH MORE 80 (2014) (noting that "a trans girl who is assigned male at birth and attracted to boys may call herself gay for a short time—a transitional identity on her road to self-discovery").

134. In this documentary film about the death of Larry King, King's friend Aliyah says, "I don't think that Larry is gay. He's transgendered. It's a big difference." VALENTINE ROAD 35:24 (Bunim-Murray Production & Eddie Schmidt Productions 2013).

135. Ramin Setoodeh, *Young, Gay and Murdered in Junior High*, NEWSWEEK, July 28, 2008, at 41.

136. *Id.*

137. *Id.*; Jim Dubreuil & Alice Gomstyn, *Was Teen Shooter Victim of Bullying, Sexual Harassment?*, ABC NEWS (Oct. 4, 2011), https://abcnews.go.com/US/teen-shooter-victim-sexual-harassment/story?id=14663570 [https://perma.cc/7XVL-RA8N].

138. Setoodeh, *supra* note 135.

139. *Calif. Teen Brandon McInerney Sentenced to 21 Years for Point-Blank Murder of Gay Classmate*, CBS NEWS (Dec. 19, 2011), http://www.cbsnews.com/news/calif-teen-brandon-mcinerney-sentenced-to-21-years-for-point-blank-murder-of-gay-classmate [https://perma.cc/3GE8-Y4M4]; Jim Dubreuil & Denise Martinez-Ramundo, *Boy Who Shot Classmate at Age 14 Will Be Retried as Adult*, ABC NEWS (Oct. 5, 2011), https://abcnews.go.com/US/eighth-grade-shooting-larry-king-brandon-mcinerney-boys/story?id=14666577 [https://perma.cc/G5Z4-WXG9].

140. Setoodeh, *supra* note 135, at 45–46; Rebecca Cathcart, *Boy's Killing, Labeled a Hate Crime, Stuns a Town*, N.Y. TIMES (Feb. 23, 2008), https://www.nytimes.com/2008/02/23/us/23oxnard.html [https://perma.cc/2GH5-WLWJ] (reporting that on the morning of February 12, Lawrence was in the school's computer lab when Brandon walked into the room with a gun and shot Lawrence in the head); Ken Corbett, *A Murder Over a Girl*, HUFF. POST (Apr. 4, 2016), https://www.huffpost.com/entry/a-murder-over-a-girl_b_9595260 [https://perma.cc/S92P-A6P6] (reporting that McInerney shot King twice in the back of the head); Dubreuil & Martinez-Ramundo, *supra* note 139 (reporting that teacher Dawn Boldrin reported she was in the computer lab on the day of the shooting when she heard a pop, saw Brandon holding a handgun, asked him what he was doing, and Brandon looked at her and pulled the trigger again).

141. Catherine Saillant, *Gay Teen's Killer Takes 21-Year Deal*, L.A. TIMES, Nov. 22, 2011, at AA1 ("McInerney's first trial ended in a hung jury in early September, with jurors torn between murder and manslaughter.").

majority of the jurors were persuaded by the defense's argument that McInerney was reasonably provoked into a heat of passion by King's behavior and felt manslaughter was more appropriate than murder.[142] Apparently, these jurors blamed King for his own death and felt King had provoked McInerney into killing him.

One juror felt so strongly that King was at fault for his own death that she took the time to write to the District Attorney after the trial was over. Juror No. 11 told the District Attorney that she felt the prosecution of McInerney was a "witch hunt," writing:

> You all know this was not a hate crime. You all know the victim had a long history of deviant behavior. Yes, I said deviant . . . deviant behavior. . . . [The defendant] reacted to being bullied and being the target of Larry King's sexual harassment. There was provocation.[143]

The association between transgender people and the notion of sexual deviance is so strong that many transgender individuals are stopped by police on suspicion of soliciting prostitution. In fact, this happens so frequently that those in the transgender community have a name for the practice: "Walking While Trans,"[144] an analogy to "Driving While Black," the phrase used to refer to the commonplace practice of police pulling over law-abiding black people on suspicion of criminal activity while driving.[145]

b. The Trans Panic Defense Suggests the Victim Deserved to Die

Trans panic arguments also suggest the transgender victim deserves to die. While the defense of provocation is usually understood to be a partial excuse,

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142. *See* Strader et al., *supra* note 130, at 1493; Catherine Saillant, *Mistrial Declared in Slaying of Gay Oxnard Teen*, L.A. TIMES (Sept. 2, 2011), https://www.latimes.com/local/la-xpm-2011-sep-02-la-me-0902-gay-student-20110902-story.html ("Jurors deadlocked 7 to 5 in favor of voluntary manslaughter in the emotional two-month trial[.]"); *Mistrial Declared in Killing of Gay California Student*, CNN (Sept. 8, 2011), [https://perma.cc/R5CB-C9CW] ("The nine-woman, three-man jury panel said its last vote resulted in seven in favor of finding the defendant guilty of voluntary manslaughter[.]").

143. Letter from Juror No. 11 to District Attorney Gregory D. Totten (Sept. 28, 2011) (on file with author). The author thanks Professor Kelly Strader of the Southwestern Law School in Los Angeles, California for sharing this letter.

144. Kate Greenberg, *Still Hidden in the Closet: Trans Women and Domestic Violence*, 27 BERKELEY J. GENDER L. & JUST. 198, 214 (2012) (noting that "[m]any trans women, especially trans women of color, are profiled as sex workers and picked up for 'walking while trans' in moral sweeps by the police"); Pooja Gehi, *Gendered (In)Security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 368–69 (2012) (noting that transgender people are often profiled by the police as criminals even when they are not committing any crimes and that this is commonly described as "walking while trans").

145. David Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997) (noting that "the stopping of black drivers [by police officers], just to see what [they] can find, has become so common in some places that this practice has its own name: . . . 'driving while black'"). Some black people have even experienced being profiled while walking. *See* Paul Butler, *"Walking While Black": Encounters with the Police on My Street*, LEGAL TIMES, Nov. 10, 1997, at 23.

rather than a partial justification,[146] the way it is deployed in trans panic cases often sounds in justification.[147]

A justification defense is a criminal law defense in which the defendant argues that he did the right thing.[148] The justified defendant claims he acted the way that society would have wanted him to act.[149] Self-defense, for example, is typically considered a justification defense.[150] An individual who kills a person who is attacking him and about to kill or seriously injure him acts the way society would expect him to act.

An excuse defense, in contrast, is a criminal law defense in which the defendant admits what he did was wrong but argues he should be excused because he is not morally blameworthy for his wrongful conduct.[151] Duress, for example, is an excuse defense.[152] When a person commits a crime under duress, he admits that what he did was wrong but claims that he did it only because someone threatened to seriously harm him or another innocent person.[153]

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146. *See* Mitchell Berman & Ian Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1027–28 (2011) ("[T]he dominant scholarly view holds that provocation is best explained and defended as a partial excuse."); Reid Griffith Fontaine, *Adequate (Non)provocation and Heat of Passion As Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27, 32 (2009) (noting "the social cognitive argument presumes that heat of passion is a partial excuse defense"); DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 91, §§ 31.07(C)(1)-(2)(a), (b), at 508–09.

147. Lee & Kwan, *supra* note 24, at 99–100 (arguing that the provocation defense "is better viewed as one that includes features of both excuse and justification"); *id*. at 113 (noting that defendants alleging trans panic seek to blame the victim for her alleged deceit).

148. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 91, § 17.02, at 198 (noting that "justified conduct is conduct that under ordinary circumstances is criminal, but which under the special circumstances encompassed by the justification defense is not wrongful and is even, perhaps, affirmatively desirable").

149. *Id*. ("A justified act is one that 'the law does not condemn, [but] welcomes.'") (citation omitted).

150. Christopher W. Behan, *When Turnabout Is Fair Play: Character Evidence and Self-Defense in Homicide and Assault Cases*, 86 OR. L. REV. 733, 739 (2007) ("Self-defense is a classic justification defense."); Stephanie Spies, *Malice Aforethought and Self-Defense: Mutually Exclusive Mental States?*, 91 N.Y.U. L. Rev. 1027, 1028 (2016) (noting that "self-defense has been an available justification to criminal defendants since the early ages of the common law").

151. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 91, § 16.04, at 195 (noting that "an excuse centers upon the actor (i.e., [the defendant]), and tries to show that the actor is not morally culpable for his wrongful conduct").

152. Steven J. Mulroy, *The Duress Defense's Uncharted Terrain: Applying It to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159, 167 (2006) (noting that duress is considered an "excuse" defense); Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—and Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 834–35 (2003) (stating that "[v]irtually no one argues that modern defenses of duress . . . can be rationalized as a defense of justification").

153. As Wayne LaFave explains:

> A person's unlawful threat (1) which causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law, and (2) which causes the defendant to engage in that conduct, gives the defendant the defense of duress (sometimes called compulsion or coercion) to the crime in question unless that crime consists of intentionally killing an innocent third person.

Provocation is usually considered an excuse defense.[154] When a defendant asserts a trans panic argument in support of a provocation defense, however, the provocation defense reflects elements of both justification and excuse.[155] Instead of admitting that what he did was wrong, a murder defendant claiming trans panic blames the victim for his actions, arguing that the transgender victim's deceit caused him to lose self-control.[156] In arguing that the average man would lose his self-control if he discovered that the person he was attracted to was a transgender female, the defendant suggests that he acted the way society expected him to act. The defendant also tries to excuse his actions, suggesting that he was simply acting under extreme circumstances, but otherwise is not a bad person.

A blame-the-victim approach was used at the trial of two men charged with murdering a transgender female teenager, Gwen (also known as Lida) Araujo, in California.[157] Araujo, who was seventeen years old,[158] had been sexually intimate with Jose Merel and Michael Magidson, engaging in oral and anal sex with each of them separately.[159] Merel and Magidson began to suspect that Araujo was not born female when she repeatedly refused their attempts to have vaginal intercourse.[160]

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2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.7 (3d ed. 2019). The "rationale of the defense of duress is that the defendant ought to be excused when he 'is the victim of a threat that a person of reasonable moral strength could not fairly be expected to resist.'" *Id.* (citation omitted); *see also* 1 NINTH CIRCUIT CRIMINAL HANDBOOK § 8.04 (2019) ("In general, a duress defense asserts that while the defendant committed the act that constitutes the offense, it should be excused because his will was overborne by threats from another person. . . . [A] duress defense requires the defendant to show: (1) an immediate threat of death or serious bodily [harm]; (2) a well-founded fear that the threat would be carried out; and (3) that there was no reasonable opportunity to escape the threatened harm.").

154. Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467, 469 (1987) (noting that the defense of provocation is usually viewed as a partial excuse).

155. LEE, MURDER AND THE REASONABLE MAN, *supra* note 91, at 227–29 (arguing that the defense of provocation contains elements of both justification and excuse); A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 307 (1976) (arguing that the provocation defense has elements of both justification and excuse).

156. Lee & Kwan, *supra* note 24, at 113–14.

157. People v. Merel, No. A113056, 2009 WL 1314822, at *6–8 (Cal. Ct. App. May 12, 2009); *see also Man Given 11 Years in Gwen Araujo's Death*, L.A. TIMES (Aug. 26, 2006), https://www.latimes.com/archives/la-xpm-2006-aug-26-me-sentence26-story.html [https://perma.cc/ZCE5-DJN3].

158. Carolyn Marshall, *Two Guilty of Murder in Death of a Transgender Teenager*, N.Y. TIMES (Sept. 13, 2005), https://www.nytimes.com/2005/09/13/us/two-guilty-of-murder-in-death-of-a-transgender-teenager.html [https://perma.cc/S7Z9-KQ22]; Malaika Fraley, *Gwen Araujo's Murder 14 Years Later: Transgender Teen's Killers Face Parole*, EAST BAY TIMES (Oct. 14, 2016), https://www.eastbaytimes.com/2016/10/14/the-murder-of-gwen-araujo/ [https://perma.cc/24LV-QZUB] ("Sylvia Guerrero had never even heard the word 'transgender' until her 17-year-old daughter Gwen Araujo, born a son named Eddie, was brutally murdered."); *Man Given 11 Years in Gwen Araujo's Death*, *supra* note 157 (noting that Araujo was seventeen years-old when she was killed).

159. *Merel*, 2009 WL 1314822, at *1.

160. *Id.* The teens had noticed Araujo had very large hands and what appeared to be an Adam's apple. They became even more suspicious that Araujo was not biologically female when they spoke with each other and found out Araujo had told one of them that she was menstruating to avoid having sexual intercourse with him, and told the other she was menstruating just two weeks later, *id.*, even though a menstrual period usually lasts less than seven days.

One night during a party at Merel's house,[161] Magidson took Araujo into the bathroom to try to confirm Araujo's biological sex.[162] When Araujo told Magidson not to touch her, Magidson left the bathroom and asked a friend, Nicole Brown, to find out whether Araujo was a man or a woman.[163] Brown went into the bathroom where she felt Araujo's groin area, then ran from the bathroom screaming that Araujo was a man.[164] When Araujo emerged from the bathroom, Magidson put his arm around her throat and choked her.[165] Merel grabbed a can of food and hit Araujo's head repeatedly with the can so hard that he dented it.[166] According to the prosecution, he then left the room, came back with a frying pan, and hit Araujo again on the crown of her head.[167] Magidson followed by punching and kneeing Araujo in the face; she died later that night.[168]

Merel and Magidson were arrested and charged with first-degree murder.[169] They admitted to killing Araujo, but argued that the discovery that Araujo was biologically male provoked them into a heat of passion.[170] At trial, Magidson's attorney, Michael Thorman, argued that Magidson's discovery that Araujo was biologically male and that he had unknowingly engaged in homosexual sex incited his revulsion and rage.[171] Placing the blame for his client's violence on Araujo and using the name Eddie, which was the name given to Araujo at birth, rather than Araujo's preferred name, Thorman told the jury, "This crime didn't occur because Mike had a bias. It happened because of the discovery of what Eddie had done."[172] Suggesting that Araujo had deceived Magidson about her sex and thus betrayed him, Thorman concluded: "This is a case . . . about . . . the tragic results when that deception and betrayal were discovered."[173] The jury could not agree on a verdict, with some jurors favoring first-degree murder and others favoring second-degree

161. *Id*. at *2.

162. John M. Glionna, *Keeping Focus on Victim in Retrial*, L.A. TIMES, July 5, 2005, at B1.

163. *Id*.

164. *Id*. (reporting that Brown felt Araujo's genitals and ran from the bathroom screaming); *Merel*, 2009 WL 1314822, at *3 (stating that Brown claimed she had felt Araujo and yelled that she was a man).

165. *Merel*, 2009 WL 1314822, at *3; *see also* Daisy Hernández, *"She Wanted to be Normal. We Both Did": Why Gender, Sexuality, and Desire Matter*, SALON (Oct. 18, 2014), https://www.salon.com/2014/10/18/she_wanted_to_be_normal_we_both_did_why_gender_sexuality_and_desire_matter/ [https://perma.cc/4WTQ-6KJK] (reporting that Magidson dragged Araujo into the living room).

166. *Merel*, 2009 WL 1314822, at *3.

167. *Id*. At trial, Merel testified that he did not hit Araujo with a frying pan. Telephone Conversation with William DuBois, Merel's attorney (Nov. 2, 2019).

168. *Merel*, 2009 WL 1314822, at *4, *8.

169. *Id*. at *9. The information in the first case brought against Merel and Magidson included a hate crime allegation as well. *Id*. The jury, however, rejected the hate crime allegation "because some panelists believed that the defendants killed Araujo not necessarily because of her gender orientation, but simply to 'cover up a situation that had gotten out of control.'" Henry K. Lee, *Manslaughter Ruled Out, Araujo Juror Says*, S.F. CHRON., Sept 14, 2005, at B1.

170. Yomi S. Wronge, *Mistrial in Killing of Transgender Teen*: *Jury Deadlocks on Issue of Premeditation*, SAN JOSE MERCURY NEWS, June 23, 2004, at A1.

171. Vicki Haddock, *'Gay Panic' Defense in Araujo Case*, S.F. CHRON., May 16, 2004, at E1.

172. *Id*.

173. *Id*.

murder, so the judge declared a mistrial.[174] On retrial before a different jury, Merel and Magidson were found guilty of second-degree murder.[175]

2. Motivations for the Defendant's Violence in Trans Panic Cases

a. The Defendant's Fear of Being Seen as Gay

In a trans panic case, there are several possible motivations for the defendant's violent reaction, none of which should be seen as legally adequate to support a provocation defense.[176] First, the defendant's violence may be motivated by his fear of being seen as gay.[177] Angela Harris, Frank Rudy Cooper, Ann McGinley, and others in the field of masculinity studies have observed that men in our society are socialized to believe that being a man means not being a woman and not being gay.[178] Since the defendant thinks the transgender woman is a man masquerading as a woman, he may feel that his being attracted to a transgender female threatens his masculine identity by exposing him as a man who likes other men and is therefore gay.[179]

As I have noted in the past, killing the transgender woman affirms the defendant's sense of masculinity, at least in his mind, in at least two ways. First, the defendant shows others that he is disgusted with the thought of being attracted to another man, and therefore he cannot be gay.[180] Second, the defendant demonstrates his masculinity by acting with aggression and physical force, traits typically associated with masculine identity.[181]

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174. Wronge, *Mistrial in Killing of Transgender Teen*, *supra* note 170 (noting that in Merel's case, two jurors voted in favor of first-degree murder while ten jurors voted against first-degree murder, and in Magidson's case, seven jurors voted in favor of first-degree murder and five jurors voted against first-degree murder).

175. Yomi S. Wronge, *Two Found Guilty in Slaying of Teen—Mistrial Declared for Other Defendant in Transgender Case*, SAN JOSE MERCURY NEWS, Sept. 13, 2005, at 1A.

176. Lee & Kwan, *supra* note 24, at 108–19.

177. *Id*. at 109–11.

178. Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 786–87 (2000) (recognizing the argument of some queer theorists that in forming masculine identity, "not being a 'faggot' is as important to being a man as not being a woman"); Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama's Feminine Side*, 86 DENV. U. L. REV. 633, 647–48 (2009) (observing that a central feature of masculinity is the need to denigrate those who are not considered masculine, i.e., women, gays, and racial minorities); Ann C. McGinley, *Work, Caregiving, and Masculinities*, 34 SEATTLE U. L. REV. 703, 707 (2011) (noting that for many men, being a man requires proving that "one is not feminine or a girl, and that one is not gay").

179. For example, in the Dixon (Islan Nettles) case discussed above, Dixon admitted that he lashed out at Nettles only after his friends started mocking him for flirting with a transgender person. Dixon's fear of being seen as gay by his friends appears to be what provoked him to punch and kick Nettles. *See supra* text accompanying notes 7–8, 16–17.

180. Lee & Kwan, *supra* note 24, at 110; *see also* Martha C. Nussbaum, *"Secret Sewers of Vice," Disgust, Bodies, and the Law*, *in* THE PASSIONS OF LAW 19, 35–38 (Susan Bandes ed. 1999) (questioning whether "disgust at an attempted homosexual seduction provide(s) a legally adequate basis for mitigation" from murder to manslaughter).

181. Lee & Kwan, *supra* note 24, at 110 (noting that some men demonstrate their masculinity by exhibiting physical strength and aggression).

The Islan Nettles case discussed in the Introduction illustrates this "fear of being seen as gay" motivation. Recall that James Dixon was initially attracted to Nettles, crossing the street to ask her for her name.[182] Only after he heard his friends mocking him for flirting with a "guy" did Dixon attack Nettles, beating her with such force that her face was battered beyond recognition.[183]

The "fear of being gay" motivation was also present in the Gwen Araujo case discussed above.[184] Jose Merel's attorney presented testimony at trial suggesting that Merel became upset when he first started suspecting Araujo might have been born male and thought his sexual attraction to this person who might be biologically male meant he was gay.[185] When his suspicions were confirmed at the party, Merel's initial reaction was to vomit and then cry.[186] When his brother and a friend tried to console him, Merel kept saying that he couldn't believe he was gay.[187] According to Merel's attorney, Merel was quite fond of Araujo and had developed a romantic attachment to her.[188] When he discovered that Araujo was biologically male, Merel experienced a "crisis of self-conception."[189] Finding out that his love interest had a penis made him doubt his own masculinity and heterosexuality.[190]

In another case, a man named Paul Moore killed a seventeen-year-old transgender woman named Nireah Johnson after discovering that she was born male.[191] Johnson and her friend, Brandie Coleman, met Moore and his friend, Curtis Ward, at a gas station parking lot.[192] Johnson and Moore spoke briefly and exchanged phone numbers.[193] Moore allowed Johnson to hug and kiss him on the cheek during this encounter.[194]

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182. *See supra* text accompanying note 2.

183. *See supra* text accompanying notes 4–5.

184. *See supra* text accompanying notes 157–75.

185. People v. Merel, No. A113056, 2009 WL 1314822, at *2, *6 (Cal. Ct. App. May 12, 2009).

186. *Id*. at *7.

187. *Id*. at *6.

188. William H. DuBois, Criminal Defense Att'y, Remarks at University of California-Hastings College of the Law Symposium on Hate Crimes: Combating Gay & Transgender "Panic" Strategies (July 20–21, 2006). The author was a speaker at this Symposium and attended the panel at which Bill DuBois, Merel's attorney, and Michael Thorman, Magidson's attorney, spoke; *see also* Zak Szymanski, *DA Convenes 'Panic' Conference*, BAY AREA REP. (July 26, 2006), https://www.ebar.com/news///237163.

189. *Id*.; *see also* Telephone Conversation with William DuBois, Criminal Defense Att'y, November (Nov. 2, 2019) (confirming that, at Merel's second trial, DuBois argued that Merel experienced a "crisis of self-conception" when he realized Araujo was born male); Szymanski, *supra* note 188 (DuBois stating that his client "experienced a personal crisis"). In his motion for a new trial on behalf of Merel, DuBois argued that his client "acted rashly, from passion and not from reason" and that "Merel was caused by that passion to question his entire self-concept. His passion was provoked by the deceased's fraudulent and felonious conduct in sexually deceiving him into committing sodomy." *See* Notice of Motion and Motion for New Trial, People v. Merel, No. 134583 (Cal. App. Dep't Super. Ct. Jan. 5, 2006) (on file with author).

190. Lee & Kwan, *supra* note 24, at 111.

191. *See* Moore v. State, 827 N.E.2d 631 (Ind. Ct. App. 2005).

192. *Id*. at 634.

193. *Id*.

194. *Id*.

Three days later, around 12:51 a.m., Johnson and Coleman visited the men at Moore's home.[195] It is not clear why, but Moore had begun to suspect that Johnson was not born female.[196] Before going out to meet Johnson and Coleman in the living room, Moore, irate, upset, and holding a handgun, asked Ward whether "Nireah (Johnson) [was] a man or a female."[197] Ward told Moore that Johnson "looked like a woman to him."[198] This response did not satisfy Moore, who went out to the living room and proceeded to interrogate Johnson about her biological sex for forty minutes.[199]

When Johnson went to use the bathroom, Moore followed her and discovered that she was biologically male.[200] Remarking "[m]an, this is a boy," Moore told his friend Ward that his manhood had been violated because Johnson had kissed him.[201] Moore then asked Johnson, "What did you think, I was a faggot?"[202]

Moore and Ward tied Johnson's and her friend Coleman's hands behind their backs with some wire.[203] Moore put Johnson and Coleman in the back of his Jeep and drove to a small park where he shot and killed them.[204] He then set fire to the Jeep with the two women inside to try to "cover his tracks."[205]

Moore's comment, "What did you think, I was a faggot?," shows that he feared others, including Ward, might think he was gay. By killing Johnson, Moore could demonstrate his masculinity and show Ward not only that he was not gay but also that he was disgusted with the thought of having been attracted to Johnson once he discovered that she was biologically male. Acting with brutal physical force was another way Moore could demonstrate his masculine identity.

b. Enforcement of Gender Norms

The defendant who kills a transgender woman after discovering that she is biologically male may also be motivated by an extreme discomfort with gender nonconformity.[206] His act of killing may reflect his desire to enforce prevailing gender norms that align sex with gender and masculine identity with heterosexual

195. *Id*. at 635.
196. *Id*.
197. *Id*.
198. *Id*.
199. *Id*.
200. *Id*.
201. *Id*.
202. *Id*.
203. *Id*.
204. *Id*.
205. *Id*. Moore was charged with two counts of murder, two counts of felony criminal confinement, and one count of felony arson. *Id*. at 636. After a jury trial, he was found guilty as charged and sentenced to 120 years in prison. *Id*. He appealed his conviction and sentence, but the Court of Appeals affirmed both his conviction and sentence. *Id*. at 641, 643 (concluding that "the State presented sufficient evidence from which a jury could find Moore guilty beyond a reasonable doubt" and that the 120-year sentence was not inappropriate "given his cold-blooded execution and subsequent burning of the victims").
206. Lee & Kwan, *supra* note 24, at 111.

orientation.[207] As Aaron Norton and Gregory Herek explain, "[T]ransgender identities pose a challenge to the widespread assumptions that gender and biological sex are binary categories[.]"[208] "Most people assume that a person born with male genitalia is a man and a person born with female genitalia is a woman."[209] Norton and Herek note that transgender individuals disrupt the "stability of both gender and sexual orientation categories[.]"[210] Even though the transgender woman who enjoys sex with men is heterosexual, the defendant sees her as a gay man because she is biologically male.

A number of studies suggest that men who self-identify as heterosexual are less positive towards gay men and homosexuality in general when they feel their masculine identity is under threat. For example, in one study, heterosexual men who were falsely informed that their personality test scores were more typical to those of women than those of other men expressed more negative views of homosexuality than men who had not been so informed.[211] In another study, heterosexual men who were told that their personalities were significantly less masculine than the average man's personality exhibited higher levels of aggression toward a gay work partner than heterosexual men who were told their personalities were about the same as the average man's personality.[212]

Given these studies, it is likely that men who self-identify as heterosexual and kill trans women with whom they have been sexually intimate do so in part to restore their sense of masculinity. For example, in one case, a thirty-two-year-old man named Allen Andrade killed an eighteen-year-old transgender woman named Angie Zapata and claimed he was provoked into a heat of passion after learning that Zapata was biologically male.[213] Andrade met Zapata on an online dating

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207. *Id.*

208. *Id.* (quoting Aaron T. Norton & Gregory M. Herek, *Heterosexuals' Attitudes Toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, 68 SEX ROLES 738, 740 (2012)).

209. Lee & Kwan, *supra* note 24, at 111; *see also* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 20 (1995) (noting that "[t]he first common (mis)understanding . . . is the equation of sex . . . with 'penis' or 'vagina'").

210. Aaron T. Norton & Gregory M. Herek, *Heterosexuals' Attitudes Toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, 68 SEX ROLES 738, 741 (2012).

211. Robb Willer, *Overdoing Gender: A Test of the Masculine Overcompensation Thesis*, 118 AM. J. SOC. 980, 993 (2013). Similarly, in another study, men who were falsely told that their personalities were more feminine than average expressed less positive attitudes towards feminine gay men than men who were told their personalities were in line with the average male personality. *See* Peter Glick et al., *Defensive Reactions to Masculinity Threat: More Negative Affect Toward Effeminate (But Not Masculine) Gay Men*, 57 SEX ROLES 55, 57 (2007).

212. *See* Amelia Talley & B. Ann Bettencourt, *Evaluations and Aggression Directed at a Gay Male Target: The Role of Threat and Antigay Prejudice*, 38 J. APPLIED SOC. PSYCHOL. 647, 674 (2008).

213. Valerie Richardson, *Man Gets Life in Transgender Teen's Death*, WASH. TIMES (Apr. 23, 2009), https://m.washingtontimes.com/news/2009/apr/23/man-gets-life-in-transgender-teens-death/ [https://perma.cc/QN47-NSKX].

site.[214] Zapata invited Andrade to her apartment where they spent a few days together.[215] When Zapata left the apartment, Andrade began looking at her photographs, which made him question whether Zapata was a woman.[216] When Zapata returned, Andrade confronted her, asking if she was really a woman.[217]

Andrade claimed that upon discovering that Zapata, with whom he had engaged in oral sex the night before, was biologically male, he flew into a rage.[218] Andrade hit Zapata several times with a fire extinguisher, killing her.[219] Andrade later told his girlfriend that Zapata was gay and "all gay things need to die," demonstrating that he saw Zapata as a gay man.[220]

Referencing the male first name Zapata had been given at birth, Andrade's attorney told the jury during opening statements, "When [Allen] learned Angie was in fact Justin and was a male, he immediately reacted to that."[221] Echoing the trope of the deceitful transgender individual, Andrade's attorney continued, "[Allen] had been deceived and he reacted."[222]

Invoking the notion of trans panic, Andrade's attorney told the jury that only after grabbing Zapata's crotch did Andrade discover the truth about Zapata's biological sex.[223] Then, he continued, when Zapata smiled at Andrade and said, "I'm all woman," this caused Andrade to snap and commit murder.[224] Andrade's attorney further argued that any reasonable man in Andrade's shoes would have been provoked into a heat of passion, arguing that "[w]hen (Zapata) smiled at him, this was a highly provoking act, and it would cause someone to have an aggressive reaction."[225] Because Andrade was provoked into a heat of passion by the discovery that Zapata was biologically male, Andrade's attorney implored the jury to reduce the charge from first-degree to second-degree murder.[226]

The jury, however, was not persuaded by the defense claim of trans panic, and found Andrade guilty of first-degree murder and a hate crime.[227] Because the case

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214. Jim Spellman, *Transgender Murder, Hate Crime Conviction a First*, CNN (Apr. 23, 2009), http://www.cnn.com/2009/CRIME/04/22/transgender.slaying.trial/index.html [https://perma.cc/S3TT-LUSD].

215. *Id.*

216. *Id.*

217. *Id.*

218. *See* Monte Whaley, *Smile Called "Provoking Act" in Transgender Case*, DENVER POST (Sept. 28, 2008) ("Allen Andrade told his girlfriend that he 'snapped' when he learned the woman he had oral sex with the night before was biologically a man."), https://www.denverpost.com/2008/09/18/smile-called-provoking-act-in-transgender-case/ [https://perma.cc/YG23-CNLF].

219. *Id.*

220. *Id.*

221. Richardson, *supra* note 213.

222. *Id.*

223. Whaley, *supra* note 218. Prosecutor Robb Miller, however, argued that Andrade knew Zapata was biologically male and planned to kill her shortly after meeting her on a dating site frequented by gay, bisexual, and transgender singles. Richardson, *supra* note 213.

224. Whaley, *supra* note 218.

225. *Id.*

226. Spellman, *supra* note 214; Whaley, *supra* note 218.

227. Richardson, *supra* note 213.

was the first time a hate crime statute was successfully applied to a murder case involving a transgender victim, it was seen as a landmark decision.[228] While all fifty states have enacted hate crime statutes, only twenty-one states plus the District of Columbia include gender identity, gender expression, transgender identity, or perceived sex or gender as protected categories.[229] In jurisdictions that consider transgender identity a protected class, recognizing the trans panic defense arguably "runs afoul of the premise and purpose of hate crimes statutes that seek to enhance punishment for just such a motivation."[230]

The transgender woman transgresses norms of gender by claiming a female identity when she was considered male at birth.[231] The defendant punishes this transgression by killing her.[232] The law, however, generally disapproves of acts of violence, such as bullying, that are motivated by a desire to enforce gender norms.[233] Likewise, the law of provocation should not approve the use of violence to enforce gender norms by allowing a defendant to claim trans panic as legally adequate provocation.[234]

c. The Defendant's Belief that the Transgender Victim was Being Deceitful

Finally, the defendant's violence may be motivated by a belief that in not disclosing her biological sex, the transgender female victim was being deceitful about her "true" gender identity.[235] The belief that transgender individuals are deceitful is widespread. As Dean Spade[236] notes, "[t]he myth that birth-assigned gender is the only gender identity that can be recognized . . . motivates judicial decisions in

228. Commenting on the fact that Andrade was found guilty of both first-degree murder and a hate crime for killing a transgender person, Mindy Barton, Legal Director for the Gay, Lesbian, Bisexual and Transgender Community Center of Colorado, noted, "This is a landmark decision." Spellman, *supra* note 214.

229. *See infra* Appendix (listing the states that include gender identity or expression, transgender identity, or perceived sex or gender as protected categories in their hate crime statutes). As noted in the Appendix, while use of "perceived gender" language in a hate crime statute arguably covers transgender individuals who are targeted because their perceived gender does not match their biological sex, it is unclear whether courts in three of these states (Louisiana, Mississippi, and Rhode Island) would interpret this "perceived gender" language to cover transgender victims.

230. Scott D. McCoy, Note, *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 634 (2001) ("In the case of the homosexual-advance defense, where the motivation behind the criminal act is inseparable from and grounded in the actor's homophobia, allowing the actor's homophobia to excuse his conduct partially and thereby mitigate punishment runs afoul of the premise and purpose of hate crimes statutes that seek to enhance punishment for just such a motivation.").

231. Lee & Kwan, *supra* note 24, at 112.

232. *Id*.

233. *Id*. at 112–13.

234. *Id*. at 113.

235. *Id*. at 113 n.206.

236. Dean Spade, who founded the Sylvia Rivera Law Project, a non-profit law collective that provides free legal services to transgender, intersex, and gender non-conforming people who are low-income and/or people of color, is an Associate Professor of Law at Seattle University School of Law. He may be the first transgender person to get a tenure-track law professor job. Dean Spade, *Be Professional!*, 33 HARV. J.L. & GENDER 71, 71 (2010) ("I am perhaps the first transgender person to get a tenure-track law professor job, or at least no one seems to know of any others[.]").

which courts deny legal name changes to transgender people based on the assertion that such a name change may allow the [transgender individual] to engage in fraud."[237] Spade observes that "[t]his belief that transgender people's gender identities are fraudulent or false . . . is based in a fundamental notion that birth-assigned gender is the only 'true' gender an individual can have and that transgender identity is not recognizable or legitimate."[238]

Implicit in the trans panic defense strategy is the idea that the transgender victim was culpably deceitful and wrongfully misled the defendant into thinking she was a woman when she was really a man, thus provoking him into a heat of passion.[239] For example, in the Allen Andrade (Angie Zapata) case discussed above,[240] Andrade's attorney argued that Andrade "had been deceived."[241] Similarly, in the Gwen Araujo case, Magidson's attorney argued that the case was about "the tragic results when [Araujo's] deception and betrayal were discovered."[242]

Jurors should reject the idea that a transgender woman is being deceitful by not disclosing her biological sex. In cases involving transgender female victims who had not yet undertaken sex-reassignment surgery, the defendant should have seen signs that the victim was transitioning from male to female, so any claim that the victim was trying to hide her biological sex should be viewed with skepticism.[243] Even a transgender woman who has fully transitioned may have legitimate reasons for not disclosing her biological sex to others. For instance, she may fear that revealing her biological sex will lead to violence.[244]

Morgan Tilleman explains another reason why the suggestion that a transgender woman who fails to disclose her biological sex is engaging in sexual deception is problematic. Tilleman notes that "[t]he claim of fraud presupposes the existence of

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237. Dean Spade, *Trans Formation: Three Myths Regarding Transgender Identity Have Led to Conflicting Laws and Policies that Adversely Affect Transgender People*, 31 L.A. LAWYER 34, 36 (Oct. 2008).

238. *Id*.

239. Kate Greenberg provides examples of how trans women and gender-nonconforming women are depicted as fraudulent and deceitful in film and television. Greenberg, *supra* note 144, at 210–11; *see also* JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 73, 76 (2011) (discussing the trope of the deceptive transgender individual reflected in past criminal statutes that prohibited cross-dressing as well as comments by judges and prosecutors in criminal cases). For additional examples, see Lee & Kwan, *supra* note 24, at 113 n.206.

240. *See supra* text accompanying notes 213–26.

241. *See supra* text accompanying note 221–22.

242. *See supra* text accompanying note 173.

243. Lee & Kwan, *supra* note 24, at 114. In the Allen Andrade (Angie Zapata) case discussed above, the prosecutor told jurors Andrade knew in advance that Zapata was a transgender woman because he accompanied her to a court hearing where she was called by her birth name, Justin. *See* Ernest Luning, *Prosecutor: Accused Zapata Killer Didn't 'Snap' At Transgender 'Deception'*, COLO. INDEP. (Apr. 17, 2009), https://www.coloradoindependent.com/2009/04/17/prosecutor-accused-zapata-killer-didnt-snap-at-transgender-deception/ [https://perma.cc/4T3C-6BE4].

244. *See* JANET MOCK, REDEFINING REALNESS: MY PATH TO WOMANHOOD, IDENTITY, LOVE & SO MUCH MORE 159–61 (2014).

a 'material fact that one has a duty to reveal.'"[245] Tilleman continues, "A person's anatomical sex is not a material fact capable of being misrepresented in most sexual relationships, including those which give rise to assertions of the trans panic defense."[246] This is because "[e]ither the transgender person's genitals are irrelevant to the sexual act or acts that do occur, or the transgender person's genitals are exposed to his or her sexual partner in the course of sex acts."[247]

III. WHY LEGISLATIVE ACTION LIMITING THE TRANS PANIC DEFENSE STRATEGY IS NEEDED

Not long ago, I was reluctant to support legislation banning gay and trans panic defense strategies. In previous scholarship, I wrote about how gay and trans panic defense strategies are reprehensible attempts to capitalize on stereotypes about LGBTQ[248] (lesbian, gay, bisexual, transgender, and queer) individuals as sexual deviants.[249] However, as a former criminal defense attorney concerned about placing restrictions on a defendant's right to present a defense, I expressed reasons to be cautious before embracing legislative bans on the use of gay or trans panic defense strategies.[250]

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245. Morgan Tilleman, *(Trans)forming the Provocation Defense*, 100 J. CRIM. L. & CRIMINOLOGY 1659, 1678 (2010) (citation omitted).

246. *Id*. at 1678–79.

247. *Id*. (noting that "[i]n neither the Zapata nor the Araujo case was there genital-to-genital contact or even exposure of the transgender [victim's] genitals"). Tilleman notes that "the anatomical sex of an oral sex partner, for example, is immaterial to the contemplated sex act." *Id*. at 1679.

248. Some prefer the acronym LGBTQIAP+, which stands for lesbian, gay, bisexual, transgender, queer, intersex, asexual, polysexual or pansexual, and others. *See* LUCA PAX, QUEER ASTERIK, LGBTQIAP+ ETIQUETTE GUIDE AND GLOSSARY OF TERMS (2016, 2017), www.queerasterisk.com.

249. *See* Lee, *The Gay Panic Defense*, *supra* note 106, at 476 (arguing that gay panic defense strategies "are problematic because they reinforce and promote negative stereotypes about gay men as sexual deviants and sexual predators"); Lee, *Masculinity on Trial*, *supra* note 117, at 817–18 (noting that gay and trans panic defenses "seek to capitalize on conscious and unconscious bias against gay and trans individuals" and "reinforce negative stereotypes about gay men and other gender-nonconforming individuals"); Lee & Kwan, *supra* note 24, at 119 (noting that the "trans panic defense strategy is problematic because it reifies structures of masculinity and reinforces negative[] stereotypes about transgender individuals as sexual deviants").

250. Lee, *The Gay Panic Defense*, *supra* note 106, at 522–57 (articulating three broad frameworks to "illustrate why allowing defendants to argue gay panic better serves the dual purposes of ensuring a fair trial to the defendant and achieving the ends of justice that the State seeks" than precluding such arguments through a legislative ban); Lee & Kwan, *supra* note 24, at 123 (arguing "it is critical to combat the underlying structures of masculinity that encourage violence against transgender females in the first place to both reduce the risk of such violence taking place and undermine the effectiveness of the trans panic defense strategy"). Some have mischaracterized my work. For example, in 2013, David Allan Perkiss suggested that I think gay panic is a "legitimate" defense. *See, e.g*., David Alan Perkiss, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons from the Lawrence King Case*, 60 UCLA L. REV. 778, 812 (2013) (stating that "[i]mplicitly, Lee recognizes that gay panic may arguably be a legitimate source of adequate provocation[,]" and arguing that "[t]he general position . . . that gay panic is legitimate as a legal defense has three major flaws"). I have always been clear that I believe the use of gay and trans panic defense strategies is problematic and that the discovery that one's intimate partner is a transgender female should not be recognized as legally adequate provocation). *See* Lee, *The Gay Panic Defense*, *supra* note 106, at 476 (arguing that gay panic defense strategies are "problematic because they reinforce and promote negative stereotypes about gay men as sexual deviants and sexual

Instead of banning these defense strategies, I proposed a tool kit of strategies for prosecutors to combat gay and trans panic arguments.[251] In large part, my resistance to legislative bans on the gay and trans panic defenses was based on the assumption that if the prosecutor simply educated jurors about what it means to be a transgender person, humanized the transgender female victim, and made the bias against transgender individuals that is so deeply rooted in our society salient, jurors would do the right thing and reject the trans panic defense.[252] I now realize that education is necessary but not sufficient to change attitudes and behavior.[253] In this Part, I first explain my shift in position. I then examine possible objections to legislatively banning the trans panic defense.

A. *Explaining the Shift in My Position*

My past position was influenced in large part by empirical research showing that when attorneys ignore the role of racial stereotypes and fail to make race salient in cases involving a risk of racial bias, jurors tend to be more punitive towards black defendants than white defendants, all else being equal.[254] This empirical research also demonstrates that if attorneys concerned about racial bias make the operation of racial stereotypes salient to jurors, jurors tend to treat similarly situated black and white defendants the same.[255] Given this extensive research on race salience, I believed that if prosecutors concerned about bias against transgender individuals made the existence of such bias salient to jurors, jurors would treat the transgender

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predators"); *id*. at 555 (opining that gay panic arguments are "reprehensible"); Lee & Kwan, *supra* note 24, at 108–19 (providing reasons why jurors should reject the trans panic defense).

251. *See* Lee, *The Gay Panic Defense*, *supra* note 106, at 559–66 (suggesting questions that a prosecutor can ask during jury selection to ferret out bias on the basis of sexual orientation and suggesting that prosecutors make sexual orientation bias salient through gender and sexual orientation switching); Lee & Kwan, *supra* note 24, at 123 (arguing that "[t]he prosecutor should try to educate jurors about what it means to be a transgender woman and why disclosure may have been difficult for the victim"); *id*. at 126–27 (arguing that "the prosecutor can seek to proffer expert witness testimony about the cultural structures of masculinity that may have contributed to the defendant's violent acts"); *id*. at 127 (suggesting that prosecutors relabel the defense strategy by calling it "trans rage," which suggests the defendant was acting out of anger and rage, rather than "trans panic," which suggests the defendant panicked and lost his self-control).

252. Lee & Kwan, *supra* note 24, at 123–25. We also argued that instead of equating reasonableness with typicality, the reasonableness requirement "should be understood as a normative limitation on the provocation doctrine." *Id*. at 125.

253. Here, I borrow from Amitha Kalaichandran who, in arguing for legislation requiring all cars to be equipped with a child safety alert system to prevent the deaths of children in hot cars, stated, "[o]ne of the biggest lessons I learned a decade ago in public-health graduate school was that education was rarely enough, on its own, to fundamentally change behavior. Educating the public about health was 'necessary but not sufficient[.]'" Amitha Kalaichandran, *Preventing Deaths in Hot Cars*, WASH. POST, Aug. 15, 2019, at A17.

254. Lee, *The Gay Panic Defense*, *supra* note 106, at 543–49.

255. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 217 (2001); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1373–74 (2000).

victim the same as they would a non-transgender victim and would reject the trans panic defense.

Making race salient, however, works to reduce discrimination against black people by jurors who endorse racially egalitarian principles.[256] When race is made salient, jurors are reminded of their egalitarian principles and may then consciously try not to let racial stereotypes influence their decision making, leading to fairer treatment of black and white defendants.[257] When race is ignored, implicit racial bias leads these jurors to act in racially discriminatory ways without realizing that they are doing so.

In contrast to individuals with implicit racial bias who embrace racially egalitarian principles, many individuals with bias against transgender individuals are not just *implicitly* biased against transgender individuals. These individuals are often conscious of their negative views of transgender individuals and embrace those views.[258] In other words, they are *explicitly* biased against transgender individuals.

The Trump Administration's embrace of trans-hostile policies,[259] including but not limited to Trump's ban on allowing transgender individuals to serve in the

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256. Patricia Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 14 (1989) (finding that when racial stereotypes about black people were made salient, low-prejudice individuals tried to align their thoughts about black people with their egalitarian beliefs about black people). While most Americans today are implicitly biased in favor of white people and against black people, they embrace egalitarian principles when it comes to race, sincerely believing that black people and white people should be treated equally. *See* MARIA KRYSAN & SARAH MOBERG, UNIV. OF ILL. INSTIT. GOV'T & PUB. AFFAIRS, TRENDS IN RACIAL ATTITUDES (Aug. 25, 2016), https://igpa.uillinois.edu/programs/racial-attitudes [https://perma.cc/RQ7C-JRUV] (noting that "survey questions that tap attitudes toward the principle of equality are no longer included on major national surveys [because] they have become essentially universally accepted by white people and therefore not deemed as worth asking on surveys"); IPSOS PUB. AFF., REUTERS/IPSOS/UVA CENTER FOR POLITICS RACE POLL (Sept. 11, 2017), http://www.centerforpolitics.org/crystalball/wp-content/uploads/2017/09/2017-Reuters-UVA-Ipsos-Race-Poll-9-11-2017.pdf (estimating that 80% of Americans polled strongly agreed that all races should be treated equally); *see also* Rachel D. Godsil, *Answering the Diversity Mandate*, 286 N.J. LAW. 44, 45 (2014) (noting that most Americans, and undoubtedly most lawyers, subscribe consciously to the norm that people deserve equal treatment regardless of race, and that racial integration is a desirable goal); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1557, 1570 (2013) ("By and large, Americans embrace the egalitarian race norms that are enunciated in the Equal Protection Clause of the Fourteenth Amendment."); Dayna Bowen Matthew, *Health Care, Title VI, and Racism's New Normal*, 6 GEO. J.L. & MOD. CRITICAL RACE PERSP. 3, 37 (2014) (noting that most Americans act in accord with their implicit biases, even if these attitudes are directly contrary to their expressly egalitarian views on race).

257. Devine, *supra* note 256, at 14.

258. For example, many Americans believe men shouldn't wear makeup or dress in women's clothing. Paul Hiebert, *America Isn't Ready For Men in Makeup*, YOUGOV (Nov. 1, 2016), https://today.yougov.com/topics/lifestyle/articles-reports/2016/11/01/males-wear-makeup [https://perma.cc/M2BQ-3Q5R] (noting that most Americans are not comfortable with men wearing mascara or nail polish); Terri Lee Ryan, *The Cross-Dresser's Challenge for Acceptance*, HUFFPOST (July 7, 2015), https://www.huffpost.com/entry/the-crossdressers-challen_b_7715416 [https://perma.cc/93GR-WYEN] (noting that many cross-dressers fear they will lose their jobs if their employers or clients find out they wear women's clothing).

259. During the 2016 presidential campaign, candidate Donald Trump spoke and acted as if he would be a friend to the transgender community if elected to office. For example, in April 2016, Trump said he supported the right of transgender people to "use the bathroom that they feel is appropriate," and added that Caitlyn Jenner, a transgender female celebrity, could use whichever bathroom she wanted to use at Trump Tower. *See* Helena

military[260] and his rollback of Obama-era protections for transgender students

Andrews-Dyer, *Donald Trump says Caitlyn Jenner Can Use Whatever Bathroom She Wants at Trump Tower*, WASH. POST (Apr. 21, 2016), https://www.washingtonpost.com/news/reliable-source/wp/2016/04/21/donald-trump-says-caitlyn-jenner-can-use-whatever-bathroom-she-wants-at-trump-tower/ [https://perma.cc/XE2Z-MXRM]. After becoming President, however, Trump and his Administration made several moves to roll back many of the civil rights protections that transgender individuals had achieved under the Obama Administration. In October 2017, then U.S. Attorney General Jeff Sessions announced the Department of Justice's decision to end an Obama-era policy that had protected transgender workers from employment discrimination through Title VII. *See* Sari Horwitz & Spencer S. Hsu, *Sessions Ends Transgender Protection*, WASH. POST, Oct. 6, 2017, at A3. In June 2019, the U.S. State Department instructed U.S. embassies across the world not to display the rainbow flag on any public-facing flagpole. *See* Frida Ghitis, *How Trump is Abandoning LGBTQ People Over Pride flags*, CNN (June 11, 2019), https://www.cnn.com/2019/06/11/opinions/trump-pride-month-flag-opinion-ghitis/index.html [https://perma.cc/YVZ4-QC89]; Ernesto Londono, *Pride Flags and Foreign Policy: U.S. Diplomats See Shift on Gay Rights*, N.Y. TIMES (June 9, 2019), https://www.nytimes.com/2019/06/09/world/americas/pride-flags-us-embassies.html [https://perma.cc/RCX6-HL8P].

The Trump Administration has also attempted to reverse Obama-era policies prohibiting discrimination on the basis of gender identity under the Affordable Care Act ("ACA"). *See* Michael Ollove, *States are All Over the Map When it Comes to Transgender Reassignment Care*, WASH. POST, July 23, 2019, at E6. Under the Obama Administration, "[s]ervices deemed medically necessary for some patients, such as mastectomies for women with breast cancer, [could not] be denied to others, such as transitioning transgender patients with gender dysphoria." *Id*. The ACA was also interpreted to mean that medical providers could not "deny medical services to [an individual] just because that individual [was] transgender." *Id*. In May 2019, the Trump Administration issued regulations enhancing protections for medical providers that refuse to provide care for transgender individuals for religious reasons. *Id*. In June 2019, the Trump Administration proposed overturning the above-described Obama-era policies prohibiting discrimination on the basis of gender identity under the Affordable Care Act. *Id*. Additionally, in the spring of 2017, the U.S. Department of Health & Human Services (HHS) issued a memorandum that indicated it was considering a proposal to redefine "sex" under Title IX as "a person's status as male or female based on immutable biological traits identifiable by or before birth." *See* Erica L. Green et al., '*Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html [https://perma.cc/AR2X-XBG9].

260. Trump first announced his intention to ban transgender individuals from the military in three consecutive tweets on July 26, 2017, writing, "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . . [t]ransgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender (sic) in the military would entail. Thank you[.]" *See* Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:55–9:08 AM), https://twitter.com/realDonaldTrump/status/890193981585444864?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E890193981585444864&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F [https://perma.cc/8ZVG-TL8L]; Matt Thompson, *How to Spark Panic and Confusion in Three Tweets: Do Impulsive Twitter Messages from the President Count as Formal Policy Action?*, ATLANTIC (Jan. 13, 2019), https://www.theatlantic.com/politics/archive/2019/01/donald-trump-tweets-transgender-military-service-ban/579655/ [https://perma.cc/7F9B-ZTJF]; *see also* Steven Petrow, *An Attack by Trump on LGBT Community*, WASH. POST, July 27, 2017, at C1. Later, Trump issued an updated order banning most transgender individuals from serving in the military. *See* Memorandum from President Donald J. Trump to Sec'y of Def. James Mattis and Sec'y of Homeland Sec. Kirstjen Nielsen Regarding Military Service by Transgender Individuals (Mar. 23, 2018), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security-regarding-military-service-transgender-individuals/ [https://perma.cc/2H2B-KYR9].

In contrast to the absolute ban on all transgender individuals serving in the military that he had announced earlier by tweet, Trump's revised policy allows transgender service members who have not undergone gender reassignment surgery to stay in the military, as long as they have been stable for thirty-six consecutive months in their biological sex before joining the military. *See* Dan Lamothe, *Trump Eases Transgender Service Ban*

seeking to use the bathroom corresponding to their gender identity,[261] has revealed an ugly truth about American society. A significant number of Americans today do not see trans people as normal human beings deserving of equal treatment, and many of these Americans feel some degree of hostility towards trans people.[262] Many of those who are explicitly biased against transgender persons have become emboldened by the current Administration's trans-hostile policies to express their hostility openly and without fear of societal repercussion. There is some evidence of this in the recent spike in hate violence against transgender individuals,[263] but it

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Slightly: Order Revokes Full Prohibition but Bars Many From Serving, WASH. POST, Mar. 24, 2018, at A1. In other words, transgender individuals may serve as long as they give up their gender identity and embrace their biological sex with one exception: transgender service members who were diagnosed with gender dysphoria after the Obama Administration ended the ban on transgender troops in 2016, but before implementation of the Trump ban in 2018, may continue to serve in the military in their chosen gender identity. *Id.* In January 2019, the U.S. Supreme Court decided to allow Trump's restrictions on transgender individuals serving in the military to go into effect while the lawsuits against these restrictions continue in the lower courts. *See* Robert Barnes & Dan Lamothe, *Supreme Court Lets Trump's Restrictions on Transgender Troops Take Effect*, WASH. POST, Jan. 23, 2019, at A4. Two months later, the Pentagon announced that the military would begin enforcing President Trump's restrictions on transgender troops in the military on April 12, 2019. *See* Paul Sonne & Ann E. Marimow, *Transgender Troop Policy to be Enforced April 12*, WASH. POST, Mar. 14, 2019, at A2.

261. Less than two months after taking office, the Trump Administration rescinded Obama-era protections for transgender students seeking to use the bathroom corresponding to their gender identity. *See* Erica L. Green, *L.G. B.T.Q. Students' Rights Cases Stall Under DeVos, Report Finds*, N.Y. TIMES (July 30, 2019), https://www.nytimes.com/2019/07/29/us/politics/gay-transgender-rights-devos.html [https://perma.cc/Z2QR-2SPR] (noting that "[i]n 2017, just weeks after the new administration took office, the Education and Justice Departments rescinded an Obama-era guidance document that informed schools that denying students access to bathrooms that correspond with their gender identity was a violation under Title IX, the federal law that prohibits discrimination in institutions that receive federal funding"); Jeremy W. Peters et al, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html [https://perma.cc/8C9U-SRYJ].

262. *See* German Lopez, *We Asked US Voters About their Views on Transgender People. Here's What they Said.*, VOX (May 24, 2016), https://www.vox.com/2016/5/24/11746086/transgender-bathrooms-poll-survey [https://perma.cc/6NFD-FBFP] (noting that Americans hold more unfavorable views toward transgender people than other groups). A significant number of Americans think trans people are mentally ill. *See* Samantha Allen, *Why A Lot of Americans Don't Want To Befriend a Transgender Person*, DAILY BEAST (May 22, 2017), https://www.thedailybeast.com/why-a-lot-of-americans-dont-want-to-befriend-a-transgender-person?ref=scroll [https://perma.cc/6TFM-VXFG] (noting that one in five Americans believe that transgender individuals have a mental illness); JULIA CLARK & CHRIS JACKSON, IPSOS, GLOBAL ATTITUDES TOWARD TRANSGENDER PEOPLE (2018), https://www.ipsos.com/en-us/news-polls/global-attitudes-toward-transgender-people [https://perma.cc/9DLZ-QAAY] (noting that among all the western countries, people in the United States are the most likely to believe that transgender people have a mental illness (32%) and the most likely to believe that transgender people are committing a sin (32%)); Yael Bame, *21% of Americans Believe That Being Transgender is a Mental Illness*, YOUGOV (May 17, 2017), https://today.yougov.com/topics/relationships/articles-reports/2017/05/17/21-americans-believe-identifying-transgender-menta [https://perma.cc/2UDP-K493] (noting that 21% of Americans think that identifying as transgender is a form of mental illness); J. Lester Feder et al., *This Is How 23 Countries Feel About Transgender Rights*, BUZZFEEDNEWS (Dec. 29, 2016), https://www.buzzfeednews.com/article/lesterfeder/this-is-how-23-countries-feel-about-transgender-rights [https://perma.cc/NP7A-8N9C] (noting that 32% of Americans agree that one who identifies as a transgender person has a form of mental illness).

263. CTR. FOR THE STUDY OF HATE & EXTREMISM, CAL. STATE UNIV., SAN BERNARDINO, REPORT TO THE NATION: HATE CRIMES RISE IN U.S. CITIES AND COUNTIES IN TIME OF DIVISION & FOREIGN INTERFERENCE (2018) (reporting that "[t]he 2017 increase in hate crime from 229 to 254, was driven in part by the 23 crimes targeting the transgender community, which increased by 187 percent"); Dawn Ennis, *American Medical*

is not merely fringe elements who are openly expressing hostility towards transgender individuals. Hostility toward the transgender community is also reflected in the remarks of suburban parents opposing policies that would allow transgender youth to use the bathroom that corresponds to their gender identity.[264]

When the President endorses policies that discriminate against transgender individuals,[265] individuals who are biased against transgender individuals are assured that their anti-trans bias is normal and nothing to be ashamed about. As Professor Dean Spade notes, "When transphobia gets bolstered by signals from the federal government, low-level enforcers of gender norms feel even more license to humiliate and exclude trans people."[266]

Even before Trump became President of the United States, explicit anti-trans bias was manifested by those invoking the safety of women and girls as a reason to prohibit transgender females from using women's restrooms.[267] The bathroom safety argument perpetuates the stereotype of the transgender individual as a sexual predator, suggesting that an individual who was thought to be male when born but self-identifies as a girl, and wants to use the girls' restroom or locker room, is really just a man (or boy) wanting to sexually assault women (or girls).[268]

Association Responds To 'Epidemic' Of Violence Against Transgender Community, FORBES (June 15, 2019), https://www.forbes.com/sites/dawnstaceyennis/2019/06/15/american-medical-association-responds-to-epidemic-of-violence-against-transgender-community/#346970aa510b [https://perma.cc/U3DZ-S2SC] (noting that "[t]he American Medical Association is taking a public stand to stem what it calls 'the epidemic of violence against the transgender community, especially the amplified physical dangers faced by transgender people of color'").

264. *See* G.G. *ex rel*. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716 (4th Cir. 2016).

265. Not everyone agrees that the Trump Administration is hostile to the trans community. In August 2019, Robert Kabel, the chairman, and Jill Homan, the vice chairwoman, of the Log Cabin Republicans—the nation's original and largest organization representing LGBT conservatives—published an op-ed in the Washington Post, in which they claimed President Trump defends LGBTQ rights. Robert Kabel & Jill Homan, *Trump Defends LGBTQ Rights. He Has Our Endorsement*, WASH. POST, Aug. 16, 2019, at A19. This op-ed prompted several members of the Log Cabin Republicans to leave the group. Colby Itkowitz, *Top Official Resigns After LGBTQ Groups's Trump Endorsement*, WASH. POST, Aug. 28, 2019, at A18.

266. Dean Spade, *Right-Wing Fantasies About Gender are Killing Trans People*, TRUTHOUT (Oct. 22, 2018), https://truthout.org/articles/right-wing-fantasies-about-gender-are-killing-trans-people/ [https://perma.cc/X7KH-M56V].

267. *See* Shayna Medley, *Not in the Name of Women's Safety: Whole Woman's Health as a Model for Transgender Rights*, 40 HARV. J.L. & GENDER 441, 443 (2017) (noting that anti-trans bills "almost universally claim to serve an interest in women's health and safety" and often "come in the form of fear-mongering campaigns about sexual assault in bathrooms, suggesting that transgender people are sexual predators and that cisgender men will abuse non-discrimination laws to assault women in the bathroom"); *see also* Rushin & Carroll, *supra* note 62, at 42 (arguing that some proposed bathroom laws, prohibiting transgender individuals from using the bathroom that corresponds with their gender identity, effectively criminalize noncriminal conduct inextricably linked to the status of being trans and thus violate the Eighth Amendment's prohibition against cruel and unusual punishment).

268. Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 YALE J.L. & FEMINISM 465, 492 (2018) (noting that "[i]nvocations of women's safety as a justification for sex-segregated bathrooms feature prominently in briefs and complaints in the transgender litigation context"). Portuondo notes that in one lawsuit "challenging the Obama Administration's trans-inclusive Title IX guidance, . . . a group of self-described 'radical feminists' asserted that allowing transgender women into women's bathrooms would undermine the 'safety offered by restrooms' and would lead to an 'increased risk of sexual assault.'" *Id*. (citing Complaint ¶¶ 30, 32, Women's Liberation Front v. U.S. Dep't of Justice, No. 1:16-cv-00915 (D.N.M. Aug. 11, 2016)).

Members of the Trump Administration have reinforced the stereotype of the transgender individual as sexual predator by invoking the risk-of-sexual-assault-in-the-bathroom argument despite the lack of evidence that bathroom use by trans individuals increases the risk of assault.[269] For example, during the 2016 Trump presidential campaign, Vice President Mike Pence argued that in deciding whether to allow transgender students to use the bathroom that corresponds to their gender identity, states should protect the "safety and privacy of children,"[270] terms often used by those who seek to prevent transgender students from using the restrooms consistent with their identity."[271] Steve Bannon, who would soon become President Trump's Chief Strategist,[272] spoke out against Target when the company announced in April 2016 its decision to allow trans individuals to use the bathroom corresponding to their gender identity.[273] In May 2016, Bannon opined on his Breitbart News Daily show that Target was "trying to exclude people who are

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Portuondo also notes that "North Carolina Governor McCrory asserted the 'safety of women and children' as a primary motivation for the state's Bathroom Bill in *Carcaňo*." *Id.* (citing Carcaňo v. McCrory, 203 F. Supp. 3d 615, 645 (M.D.N.C. 2016)); *see also* Tim Madigan, *What Happened When a Room Full of Texas Parents Took on Transgender Bathrooms*, WASH. POST (May 11, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/05/11/transgender-students-rights-the-debate-becomes-loud-and-heated-in-texas/ [https://perma.cc/MCR5-GACQ] (noting that hundreds came to a meeting in Fort Worth, Texas to express their views on school district guidelines intended to accommodate the needs of transgender students, with many expressing their opposition to allowing transgender students to use the bathroom corresponding with their gender identity). For an examination of the history behind sex segregation in public restrooms that emphasizes the risk of sexual assault and need for privacy perspective, see W. Burlette Carter, *Sexism in the 'Bathroom Debates': How Bathrooms Really Became Separated by Sex*, 37 YALE L. & POL'Y REV. 227, 227 (2018) (challenging two "widely-embraced theories about how public intimate spaces . . . first became separated by sex" and arguing that these theories "offer a narrative that oppresses women" and ignores women's struggles with sexual assault and sexual harassment).

269. Rushin & Carroll, *supra* note 62, at 41 ("Even if one adopts the position . . . that states may seek to regulate conduct linked to a status that produces social harm, there is no evidence that bathroom use by trans individuals actually produces such harm) (citing Bryan Tannehill, *Debunking Bathroom Myths*, HUFF. POST (Nov. 28, 2016), https://www.huffpost.com/entry/debunking-bathroom-myths_b_8670438).

270. Sam Williamson, Note, G.G. *ex rel*. Grimm v. Gloucester County School Board: *Broadening Title IX's Protections for Transgender Students*, 76 MD. L. REV. 1102, 1125 (2017) (citing Anugrah Kumar, *Mike Pence to James Dobson: Trump Will Resolve Birth Control Mandate, Transgender Bathroom Issues*, CHRISTIAN POST (Oct. 5, 2016), http://www.christianpost.com/news/mike-pence-james-dobson-trump-birth-control-mandatetrans-gender-bathroom-170485/ [https://perma.cc/S36G-SJFS].

271. *Id.*

272. Meghan Keneally, *A Timeline of Trump and Bannon's Turbulent Relationship*, ABC NEWS (Jan. 5, 2018), https://abcnews.go.com/Politics/timeline-trump-bannons-turbulent-relationship/story?id=52137016 (noting that "Trump announced that Bannon had joined the campaign as the new CEO" on August 16, 2016 and that Bannon was forced to resign from his position with the White House on August 18, 2017).

273. *Continuing to Stand for Inclusivity*, TARGET (Apr. 19, 2016), https://corporate.target.com/article/2016/04/target-stands-inclusivity [https://perma.cc/UFB7-YFF8] (announcing that they "welcome transgender team members and guests to use the restroom or fitting room facility that corresponds with their gender identity"); *see also* Williamson, *supra* note 270, at 1125 (citing HUMAN RIGHTS CAMPAIGN, DONALD TRUMP: OPPOSES NATIONWIDE MARRIAGE EQUALITY (2016), http://www.hrc.org/2016RepublicanFacts/donald-trump-opposes-nationwide-marriage-equality [https://perma.cc/T2R9-BR98] (noting that Steve Bannon "publicly advocated against allowing transgender people to use bathrooms consistent with their gender identity by preying on fears about daughters using the same bathroom as men")).

decent, hard-working people who don't want their four-year-old daughter to have to go into a bathroom with a guy with a beard in a dress."[274] In September 2019, Ben Carson, Trump's Secretary of Housing and Urban Development (HUD), expressed concern at a meeting with HUD staff about transgender women "trying to infiltrate homeless women's shelters," referring to them as "big, hairy men" and lamenting that "society no longer seems to know the difference between men and women."[275]

Just as President Trump's racist rhetoric[276] has emboldened many with similar views to say racist things and to act out in racially violent ways,[277] his trans-hostile

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274. Miranda Blue, *Anti-LGBT Activists 'Testing' Target By Sending Men Into Women's Rooms*, RIGHT WING WATCH (May 2, 2016) https://www.rightwingwatch.org/post/anti-lgbt-activists-testing-target-by-sending-men-into-womens-rooms/ [https://perma.cc/4TRC-TFDJ]; Rhuaridh Marr, *Trump: Steve Bannon has "Lost his Mind"*, METRO WEEKLY (Jan. 3, 2018) https://www.metroweekly.com/2018/01/trump-steve-bannon-lost-mind/ [https://perma.cc/S2KE-7QBZ].

275. Tracy Jan & Jef Stein, *Carson's Remarks on Gender at Meeting Rankle Staffers*, WASH. POST (Sept. 20, 2019), https://www.washingtonpost.com/business/2019/09/19/hud-secretary-ben-carson-makes-dismissive-comments-about-transgender-people-angering-agency-staff/ [https://perma.cc/VP44-2U5R] (noting also that when he was running for President, Ben Carson referred to transgender people as "abnormal"); Tracy Jan, *As Democrats Call for His Resignation, HUD Secretary Ben Carson Defends His Controversial Comments About Transgender People*, WASH. POST (Sept. 20, 2019), https://www.washingtonpost.com/business/2019/09/20/democrats-call-his-resignation-hud-secretary-ben-carson-defends-his-controversial-comments-about-transgender-people/ [https://perma.cc/SJ9Q-WTXJ].

276. Unlike previous Presidents, Donald Trump has regularly engaged in what many have called racist rhetoric targeting immigrants and racial and ethnic minorities, from suggesting that most immigrants from Mexico are criminals and rapists, *see* Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 2016), https://time.com/4473972/donald-trump-mexico-meeting-insult/ [https://perma.cc/BKF8-DCWR], and that a judge of Mexican descent could not fairly adjudicate a case involving Trump, *see* Z. Byron Wolf, *Read this: How Trump Defended Criticism of Judge for Being 'Mexican'*, CNN (Apr. 20, 2017), https://www.cnn.com/2017/04/20/politics/donald-trump-gonzalo-curiel-jake-tapper-transcript/index.html [https://perma.cc/US77-7TJV], to telling four progressive Congresswomen of color to go back to where they came from, suggesting that they were foreigners from other countries when three of the Congresswomen were born in the United States and all four were American citizens. *See* Allan Smith, *Trump Says Congresswomen of Color Should 'Go Back' and Fix the Places They 'Originally Came From'*, NBC NEWS (July 14, 2019), https://www.nbcnews.com/politics/donald-trump/trump-says-progressive-congresswomen-should-go-back-where-they-came-n1029676. In July 2019, Trump attacked then Congressman Elijah Cummings, a vocal critic of Trump, tweeting that the African American's district—which includes Baltimore—was "disgusting" and a "rat and rodent infested mess." Ledyard King, *'Don't Just Come and Criticize': Elijah Cummings Defends Baltimore in Face of Trump's insults*, USA TODAY (Aug. 3, 2019), https://www.usatoday.com/story/news/politics/2019/08/03/elijah-cummings-defends-baltimore-trump-attacks-during-park-event/1909733001/; P.R. Lockhart, *How Trump Used a Centuries-Old Racist Trope to Attack Baltimore*, VOX (July 29, 2019), https://www.vox.com/identities/2019/7/29/20746188/donald-trump-elijah-cummings-baltimore-rat-infested-racism [https://perma.cc/58AH-F3DJ]. Trump has embraced harsh immigration policies, aimed at stopping Mexicans and others from Central and South America from coming across the border. *See* Andy J. Semotiuk, *Immigrants Troubled By Trump's New Immigration Policy Restrictions*, FORBES (Aug. 23, 2019), https://www.forbes.com/sites/andyjsemotiuk/2019/08/23/immigrants-troubled-by-trumps-new-immigration-policy-restrictions/#5b3bc0013b34 [https://perma.cc/364J-PA69]; Michael D. Shear et al., *Trump's Policy Could Alter the Face of the American Immigrant*, N.Y. TIMES (Aug. 14 2019), https://www.nytimes.com/2019/08/14/us/immigration-public-charge-welfare.html [https://perma.cc/PFT8-8SH8]. Not everyone sees Trump's rhetoric as racist. *See* Meredith Dost et al., *Is President Trump's Rhetoric Racist? It Depends on Whom You Ask*, WASH. POST (Aug. 12, 2019), https://beta.washingtonpost.com/politics/2019/08/12/is-president-trumps-rhetoric-racist-it-depends-whom-you-ask/ [https://perma.cc/32MK-QK5Y] (noting that Americans disagree on whether Trump's rhetoric is racist).

policies have emboldened individuals with negative views about trans people to say trans-hostile things and to act out in trans-hostile ways.

For example, in May 2018, Jazmina Saavedra, a Republican running for Congress, posted a live Facebook video of a confrontation she had with a transgender female at a Denny's restaurant in Los Angeles.[278] Saavedra told reporters that the incident "started when a waitress told her there was a man who said he was a woman using the women's restroom."[279] Saavedra went into the restroom with her cellphone and confronted the transgender woman who was inside one of the bathroom's stalls, asking (while videotaping herself), "Why you use the ladies' room?"[280] The transgender woman responded by saying, "You're invading my privacy."[281] Saavedra confronted the transgender woman again when she left the restroom.[282] Showing her lack of understanding regarding the difference between gender identity and sexual orientation, Saavedra justified her actions as representative of not just her views but of the views of the other customers as well, telling reporters, "This is so stupid . . . this [has] nothing to do about gay or nothing. This is about how myself [sic] and the other customers feel in danger by hearing a voice of a man inside."[283] She added that she did

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Trump's supporters apparently like his inflammatory rhetoric. *See* Astead W. Herndon, *With the Faithful at Trump's North Carolina Rally: 'He Speaks Like Me*,' N.Y. TIMES (Sept. 11, 2019), https://www.nytimes.com/2019/09/10/us/politics/trump-voters-supporters-policies.html [perma.cc/382Y-ARGQ] (noting that "[i]n conversations with more than a dozen attendees before and after [Trump's September 9, 2019 North Carolina] rally, they made clear that their support for the president was not in spite of his inflammatory rhetoric, but because his chosen targets often match their own").

277. As Bobbi Strang, President of the District of Columbia's Gay and Lesbian Activists Alliance, observed "[e]verywhere people are feeling empowered to say and act according to their worst impulses." *See* Michael E. Miller, *In 2018, They All Became the Victims of a Record Year of Hatred in D.C.*, WASH. POST, Aug. 26, 2019, at Al, A12 ("Many people who track hate crimes see a connection between Trump's ugly political rhetoric aimed at immigrants and people of color and what has been unleashed in communities across the country."); *see also* Tessa Berenson, *Donald Trump's Own Words Undermine His Case After El Paso Shooting*, TIME (Aug. 5, 2019), https://time.com/5644433/donald-trump-el-paso-shooting-words/ [https://perma.cc/2SLD-KY68] (noting that many Democrats blamed Trump's racist rhetoric for the El Paso shooting); Libby Nelson, *"Why We Voted for Donald Trump": David Duke Explains the White Supremacist Charlottesville Protests*, VOX (Aug. 12, 2017) https://www.vox.com/2017/8/12/16138358/charlottesville-protests-david-duke-kkk [https://perma.cc/NPT2-W9GA] (noting that former KKK Grand Wizard David Duke proclaimed, "We are going to fulfill the promises of Donald Trump" at the neo-Nazi and alt-right rally in Charlottesville, Virginia in August 2017); Richard Parker, *When Hate Came to El Paso*, N.Y. TIMES (Aug. 4, 2019), https://www.nytimes.com/2019/08/04/opinion/el-paso-shooting.html [https://perma.cc/A4JY-SL3V] (opining that "the El Paso massacre . . . was the inevitable byproduct of the Trump era's anti-immigrant, and anti-Latino invective, which with its pervasive, vile racism has poisoned our nation").

278. *LA Congressional Candidate Posts Video of Denny's Bathroom Confrontation*, ABC7 NEWS (May 18, 2018), https://abc7.com/politics/la-congressional-candidate-posts-video-of-dennys-bathroom-confrontation/3489200/ [https://perma.cc/DP2T-PAKE].

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

not regret anything she said in her video.[284]

It is rare for an individual to videotape themselves confronting a transgender person in the bathroom as Saavedra did. Indeed, many harassing incidents trans people experience are not even reported in the mainstream news media, but this does not mean that they are not occurring.[285] I happened to find out about another such incident from a fellow female law professor colleague when I told her that I was writing this Article. In February 2018, my colleague took a transgender woman friend out for a bachelorette pub crawl two nights before her friend's wedding. When they got to a lesbian bar in New York City, the bouncer refused to let the transgender bride-to-be in. "She can't come in," the bouncer said, pointing to the bride-to-be. Astounded that this would happen at a lesbian bar, the law professor asked the bouncer, "Why not?" Looking at the bride-to-be's driver's license, which had been legally changed to show her sex as female, the bouncer responded, "It says she's female and she's not." Incredulous, the law professor asked, "What do you mean?" Oddly (or perhaps not so oddly), the bouncer replied, "Just blame Trump because I voted for him."[286]

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284. *Id.*; *see also* Michelle Gant, *Congressional Candidate Confronts Transgender Woman at Denny's for Using Women's Bathroom*, FOX NEWS (May 18, 2018), https://www.foxnews.com/food-drink/congressional-candidate-confronts-transgender-woman-at-dennys-for-using-womens-bathroom [https://perma.cc/C3LP-R273]; Diana Stancy Correll, *GOP House Candidate Live Streams Herself Challenging Transgender Woman for Using Women's Restroom*, WASH. EXAMINER (May 17, 2018), https://www.washingtonexaminer.com/news/gop-house-candidate-live-streams-herself-challenging-transgender-woman-for-using-womens-restroom [https://perma.cc/JNF3-W7EY]. Fortunately, Saavedra did not succeed in her attempt to be elected to the U.S. Congress. *See California Election Results: 44th House District*, N.Y. TIMES (June 11, 2018), https://www.nytimes.com/elections/results/california-house-district-44-primary-election [https://perma.cc/4FKF-B83A]. Nanette Barragan, a Democrat, won that election with 65.9% of the votes. *Id.* Saavedra captured 10.1% of the votes. *Id.*

285. As Kendra Johnson, the Executive Director of NC Equality, noted after two women mocked and groped a transgender female who was trying to use the women's restroom, "Incidents like this are really common, but unfortunately, many transgender and non-gender-conforming folks don't have the resources or the ability to actually pursue any sort of support through law enforcement." Robert Richardson, *After Incident at Raleigh Bar, LGBTQ Advocates Say Assaults Too Common*, CBS17 (Jan. 9, 2019), https://www.cbs17.com/news/local-news/wake-county-news/after-incident-at-raleigh-bar-lgbtq-advocates-say-assaults-too-common/1694626461 [https://perma.cc/86P9-JPVA].

286. Conversation with a colleague at 2019 SEALS Annual Meeting, Boca Raton, Florida (July 29, 2019). That this incident took place at a lesbian bar is surprising but reflects a sad reality. Not all within the LGBTQ community welcome transgender individuals into that community. Some radical feminists believe that "transgender activism . . . harms women, and lesbians in particular" by contributing to "lesbian erasure"—the notion that "lesbians are systematically 'erased' and ignored within male-dominated LGBTQ activism and mainstream media[.]" Julie Compton, *'Pro-lesbian' or 'Trans-exclusionary'? Old Animosities Boil into Public View*, NBC NEWS (Jan. 14, 2019), https://www.nbcnews.com/feature/nbc-out/pro-lesbian-or-trans-exclusionary-old-animosities-boil-public-view-n958456 [https://perma.cc/M5K8-TYT6]; *see also* Phaylen Fairchild, *A Letter to the Lesbians Who Hate Me*, MEDIUM (July 17, 2019), https://medium.com/@Phaylen/a-letter-to-the-lesbians-who-hate-me-32dcafc0893 [https://perma.cc/6HJK-7JPP]. Some radical feminists reject the existence of transgender identity and believe "advancements in transgender rights will come at the expense of women's rights and threaten the safety and sanctity of women-only spaces." Samantha Schmidt, *Conservatives Find Unlikely Ally in Fighting Transgender Rights: Radical Feminists*, WASH. POST (Feb. 7, 2020), https://www.washingtonpost.com/dc-md-va/2020/02/07/radical-feminists-conservatives-transgender-rights/ [https://perma.cc/W35H-72ZW].

Some individuals who are explicitly biased against trans people have felt emboldened to go beyond mere words, expressing their hostility in actions. For example, on December 9, 2018, two women in their thirties "taunted, groped, and exposed themselves" to a twenty-nine-year-old transgender woman in the bathroom of a North Carolina bar.[287] The two women continued to harass the transgender woman at the bar, despite the bartender's repeated requests to stop.[288] One of the women asked the transgender woman whether she had a penis.[289]

A skeptic might say these incidents are isolated and just anecdotal evidence of anti-trans bias, but when considered along with the statistics discussed in Part I, it is hard to see these as anything other than a larger pattern of harassment, discrimination, and violence against the trans community. If a juror thinks that trans people are abnormal, that juror is not likely to be persuaded by prosecutorial appeals to see the trans victim as a vulnerable person who had good reasons to be reluctant to disclose that she was born with male genitalia. All the education in the world will not encourage an individual who is explicitly biased against transgender individuals to see the victim in a trans panic case as an ordinary human being who did nothing to provoke the defendant other than being a transgender person.[290]

B. *Possible Objections to Legislatively Banning the Trans Panic Defense*

Before examining the legislative bans that been enacted thus far, I will address potential objections to legislatively banning the trans panic defense. Many of these potential objections are arguments I raised in my previous scholarship.

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287. Michael Brice-Saddler, *Two Women Charged with Sexually Assaulting a Transgender Woman in a North Carolina Bar Bathroom*, WASH. POST (Jan. 9, 2019), https://www.washingtonpost.com/nation/2019/01/09/two-north-carolinians-charged-with-sexually-assaulting-transgender-woman-bar-bathroom [https://perma.cc/LM98-XPK8].

288. *Id.*

289. *Id.* The two women were arrested and charged with sexual battery and second-degree kidnapping. *Id.* This incident occurred in the wake of highly controversial legislative action. In 2016, the North Carolina legislature passed legislation requiring people to use the public restroom that corresponds with the sex listed on their birth certificate rather than their gender identity. *Id.* North Carolina's bathroom bill adversely affected the transgender community because North Carolina only permits individuals who have undergone sex-reassignment surgery to change the sex listed on their birth certificate. N.C. GEN. STAT. § 130A-118(b)(4) (2019). North Carolina's controversial bathroom bill ("H.B. 2") led many to boycott North Carolina. *See 'Bathroom Bill' to Cost North Carolina $3.76 Billion*, CNBC (Mar. 27, 2017), https://www.cnbc.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html [https://perma.cc/3MWB-9WEG]. After losing a lot of business because of H.B. 2, the North Carolina legislature repealed H.B. 2 in 2017 and replaced it with legislation preventing local governments from passing ordinances to protect LGBT individuals. *See* Brice-Saddler, *supra* note 287; Jason Hanna et al., *North Carolina Repeals 'Bathroom Bill'*, CNN (Mar. 30, 2017), https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html [https://perma.cc/72BM-FZ4Y].

290. Making bias salient didn't work in the Brandon McInerney case. *See* Mallory M. Craig-Harim, *Subverting the Perverted Practice of Provocation: Eliminating Modern Day Uses of LGBT Panic Defenses*, 27 TUL. J.L. & SEXUALITY 33, 34 n.2, 45 (2018) (coining the term "LGBT panic defenses" to encompass both gay panic and trans panic and pointing out that making LGBT biases salient did not help in the Brandon McInerney case); *see also supra* text accompanying notes 130–43.

1. Objection One: Even with a Legislative Ban, the Defendant Can Still Take the Stand and Get the Trans Panic Argument Before the Jury

One potential objection to a legislative ban on the trans panic defense is that the defendant in a criminal case has a constitutional right to testify in his defense[291] and thus get the trans panic argument before the jury. Even in a jurisdiction where the trans panic defense strategy has been legislatively banned, a defendant claiming trans panic can take the stand and tell the jury that he was so upset when he found out that the victim was a transgender individual that he lost his self-control.[292] Even though the defendant would be barred from arguing that it was objectively reasonable for him to be provoked by this discovery, the defendant would still be able to tell the jury that he was in fact provoked into a heat of passion by the discovery that the victim was a transgender woman. Male jurors who would themselves be upset if they found out that they had been sexually intimate with or romantically attracted to a transgender woman, and female jurors who think transgender people are deviant and abnormal might sympathize with the defendant and feel he should not be punished for murder. As I have previously noted, "[j]urors who are not already sensitive to the violence and discrimination leveled against the transgender community may be reluctant to condemn the defendant who claims he was provoked into a heat of passion by the discovery that the individual with whom he was intimate was biologically male."[293]

It is true that even with a legislative ban on the trans panic defense, a defendant could present the idea that he acted out of "trans panic" before the jury.[294] However, while such testimony would help the defendant satisfy the first element of a provocation defense—that the defendant was actually provoked into a heat of passion—it would not satisfy the second element—that there was legally adequate provocation in a jurisdiction with a legislative ban on the trans panic defense.[295] To receive the provocation mitigation to voluntary manslaughter, a defendant would also have to convince the jury that the reasonable person in his shoes would have been provoked into a heat of passion.[296] If a legislative ban were in place stating

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291. Rock v. Arkansas, 483 U.S. 44, 49 (1987).

292. Lee & Kwan, *supra* note 24, at 122 ("Fourth, the defendant has a constitutional right to testify, so even if the legislature were to enact a ban on trans panic defense arguments, the defendant would still have a constitutional right to tell his side of the story, and his story could include mention that he got tremendously upset upon discovering that his intimate partner was biologically male.").

293. *Id.*

294. While criminal defendants have a right to testify in their own defense, many do not exercise this right because if they take the stand and testify, the government has a right to admit evidence of prior convictions that otherwise would be inadmissible. *See* FED. R. EVID. 609.

295. *See supra* text accompanying notes 96–98.

296. *See supra* text accompanying note 98. Which party bears the ultimate burden of proving (or disproving) the elements of the provocation defense depends on how legislators in the State in question drafted the provocation statute. *Compare* Mullaney v. Wilbur, 421 U.S. 684, 691–92, 703–04 (1975) (finding that Maine law violated Due Process in placing the burden of establishing the provocation defense by a preponderance of the evidence on the defendant), *with* Patterson v. New York, 432 U.S. 197, 206–07 (1997) (holding that New York

that an alleged provocation is not reasonable if it resulted from the discovery of the victim's gender identity, the jury would not be able to lawfully return a voluntary manslaughter verdict. The only way a jury could return a voluntary manslaughter verdict for a defendant in such a jurisdiction would be by engaging in jury nullification.[297]

A legislative ban prohibiting the trans panic defense would remove the jury's ability to lawfully return a voluntary manslaughter conviction. The jury would have to engage in jury nullification if it wanted to give the defendant claiming trans panic a break. Since existing research suggests most juries try to follow the law and do not engage in jury nullification, the likelihood that a jury in a trans panic case would flout the law and acquit defendants who claim trans panic is small.[298]

2. Objection Two: A Legislative Ban Would Violate the Defendant's Due Process Right to Present a Defense

Another potential objection to a legislative ban on the trans panic defense is that such a ban would infringe upon the defendant's due process right to present a

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law, which placed the burden of proving extreme emotional disturbance on the defendant, comported with Due Process because such a showing would not "serve to negative any facts of the crime which the State is to prove in order to convict of murder"). To suggest, as the U.S. Supreme Court has done, that the provocation defense is a case-in-chief defense under which the provoked defendant is asserting that he lacked the *mens rea* for murder, and therefore the prosecution should bear the burden of disproving the elements of provocation, is not persuasive. In many provocation cases, the provoked killer fully intended to kill the victim and is simply arguing that his actions are understandable and should be partially excused given the circumstances, *not* that he lacked the *mens rea* required for murder.

297. Jury nullification refers to the jury's power to acquit a defendant even in the face of overwhelming evidence of guilt. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995) (explaining the concept of jury nullification). There is little recent research on how often juries engage in jury nullification. This is probably because as a general matter, juries cannot be forced to talk about or explain their verdicts. *See* FED. R. EVID. 606(b) (subject to few exceptions, "[d]uring an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment"); Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 864–67 (2017) (discussing Rule 606(b) and explaining that recognized exceptions to this "no-impeachment rule" are narrow). The available research, however, suggests that jury nullification probably occurs in only 4% of the few criminal cases that go to trial. *See* Jack Boeglin & Zachary Shapiro, *A Theory of Differential Punishment*, 70 VAND. L. REV. 1499, 1511 (2017) (noting that "while the frequency with which jury nullification occurs is notoriously difficult to calculate, the best estimates are that nullification occurs in only about four percent of criminal cases, and less than ten percent of criminal cases come in front of a jury in the first place" (citing Aaron McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 B.Y.U. L. REV. 1103, 1109 (2014))).

298. Since the very first ban on gay and trans panic defenses was enacted in 2014 and several of the existing bans were enacted the year this Article was being written, it is unclear whether juries in these jurisdictions are engaging in jury nullification in gay panic and trans panic cases. Most likely, the legislative bans that have been enacted thus far are encouraging defendants who might otherwise assert a gay or trans panic defense to plead guilty since their chances of success at trial are substantially diminished in a jurisdiction with a legislative ban in place.

defense.[299] The U.S. Supreme Court has addressed whether limiting a defendant's right to present a defense in other contexts violates due process, and its answer is a resounding no.[300]

For example, in *Montana v. Egelhoff*,[301] the Court considered a due process challenge to a Montana statute that barred the consideration of voluntary intoxication by jurors "in determining the existence of a mental state that is an element of the offense."[302] The defendant argued that the Montana statute violated his due process right to present evidence in his defense.[303]

A plurality of the Court, in an opinion written by Justice Antonin Scalia, rejected the Montana Supreme Court's conclusion that the statute violated due process.[304] Justice Scalia started by noting that the Montana Supreme Court based its decision on "the proposition that the Due Process Clause guarantees a defendant the right to present and have considered by the jury 'all relevant evidence to rebut the State's evidence on all elements of the offense charge.'"[305] This proposition, Justice Scalia explained, was not correct because a defendant's right to present evidence is not absolute.[306]

The plurality acknowledged that the Due Process Clause does place some limits on states attempting to restrict a defendant's right to present a defense,[307] but

299. In *Chambers v. Mississippi*, the Supreme Court stated that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." 410 U.S. 284, 294 (1973).

300. *See* Montana v. Egelhoff, 518 U.S. 37, 56 (1996); Clark v. Arizona, 548 U.S. 735, 779 (2006). I find these cases troubling because I think a defendant should have a nearly absolute right to present a defense, particularly if the defendant is asserting a case-in-chief defense, i.e. one in which the defendant alleges that the government has failed to prove an element of the charged offense. *See* Lee & Kwan, *supra* note 24, at 84 (arguing that banning a case-in-chief defense is "problematic since the prosecution bears the burden of proving every essential element of the charged offense"). Case-in-chief defenses are commonly called failure-of-proof defenses. *See* 2 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW. § 9.1(a)(1) (3d ed. 2018) (defining a "failure of proof" defense as "one in which the defendant has introduced evidence at his criminal trial showing that some essential element of the crime charged has not been proved beyond a reasonable doubt"). A defendant asserting a gay or trans panic defense tied to the doctrine of provocation, however, is not asserting a case-in-chief defense. The defendant is not alleging that he lacked the *mens rea* or any other element of the charged offense. Provocation is usually considered an affirmative defense, as opposed to a case-in-chief defense. *See* Reid G. Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27, 29 (2009) (noting that "[a] majority of United States jurisdictions recognize . . . heat of passion as an affirmative, partial defense to murder"); 21 AM. JURIS. 2D CRIM. L. § 177 (2019) (describing an affirmative defense as "one that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it," and distinguishing "simple defenses," which attempt to negate an element of the offense).

301. 518 U.S. 37 (1996).

302. MONT. CODE ANN. § 45-2-203 (2019).

303. *Egelhoff*, 518 U.S. at 39–40 ("We consider in this case whether the Due Process Clause is violated by Montana Code Annotated § 45-2-203, which provides, in relevant part, that voluntary intoxication 'may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense.'").

304. *Id*. at 56.

305. *Id*. at 41–42 (citation omitted).

306. *Id*. at 42.

307. *Id*. at 42–43.

observed that "the defendant asserting such a limit must sustain the usual heavy burden that a due process claim entails[.]"[308] Justice Scalia explained:

> Preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and . . . we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. . . . [I]t is normally within the power of the State to regulate procedures under which its laws are carried out, . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.[309]

In other words, a defendant alleging a due process violation must show that the state has offended a "fundamental principle of justice."[310] The plurality found that the defendant failed to show that the rule prohibiting defendants from introducing evidence of voluntary intoxication offended a principle of justice "so rooted in the tradition and conscience of our people as to be ranked as fundamental."[311]

Important to the plurality's conclusion was this country's long common law tradition of disallowing defendants from offering evidence of voluntary intoxication in their defense.[312] Even though courts in the nineteenth century "carve[d] out an exception to the common law's traditional across-the-board condemnation of the drunken offender, allowing a jury to consider a defendant's intoxication when assessing whether he possessed the mental state needed to commit the crime charged, where the crime was one requiring a 'specific intent,'"[313] the plurality noted that "one-fifth of the States either never adopted [this] 'new common-law' rule . . . or [later] abandoned it."[314] The fact that many states retained or reinstated the original common law rule prohibiting defendants from offering evidence of voluntary intoxication in their defense convinced the plurality that the more recent common law rule that allowed defendants to present such evidence to negate the *mens rea* was not a fundamental principle of justice.[315]

The plurality also rejected the Montana Supreme Court's interpretation of a statement in *Chambers v. Misssissippi* that "the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against

308. *Id.* at 43.

309. *Id.* (quoting Patterson v. New York, 432 U.S. 197, 201–02 (1977)) (internal quotations and citations omitted).

310. *Id.*

311. *Id.* at 47–48 ("It is not the State which bears the burden of demonstrating that its rule is 'deeply rooted,' but rather respondent who must show that the principle of procedure *violated* by the rule (and allegedly required by due process) is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' . . . [t]hat showing has not been made.").

312. *Id.* at 44–45 (noting extensive evidence of a lengthy common law tradition of rejecting intoxication as a defense).

313. *Id.* at 46.

314. *Id.* at 48.

315. *Id.* at 49.

the State's accusations."[316] The plurality confined the *Chambers* decision to the facts and circumstances of that case and found that it did not establish a new principle of due process.[317]

Ten years later, in 2006, the U.S. Supreme Court rejected another defendant's argument that a rule precluding him from offering evidence of mental illness to negate the *mens rea* of the charged offense violated his due process right to present evidence in his defense. In *Clark v. Arizona*, a defendant charged with first-degree murder for shooting and killing a police officer conducting a traffic stop challenged the constitutionality of an amendment to Arizona's insanity rule, disallowing defense evidence of mental illness to negate the *mens rea*.[318] Echoing its reasoning in *Egelhoff*, the Court rejected the defendant's due process challenge, holding "there is no violation of due process under *Chambers* and its progeny, and no cause to claim that channeling evidence on mental disease and capacity offends any 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[319]

If a defendant charged with murdering a transgender woman were to challenge the constitutionality of a legislative ban on the trans panic defense, he would bear the burden of showing that the right to present evidence supporting a trans panic defense "was so deeply rooted at the time of the Fourteenth Amendment (or perhaps has become so deeply rooted since) as to be a fundamental principle which that Amendment enshrined."[320] It is unlikely that a defendant would be able to meet that burden. As Jordan Blair Woods notes, the trans panic defense, a relatively new concept, is much less deeply rooted in this nation's traditions and conscience than the voluntary intoxication defense, which dates back to the 1800s.[321]

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316. 410 U.S. 284, 294 (1973).

317. *Egelhoff*, 518 U.S. at 51–52. To support this interpretation, the plurality quoted the following language from *Chambers v. Mississippi*:

> In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that *under the facts and circumstances of this case* the rulings of the trial court deprived Chambers of a fair trial.

Id. at 52 (quoting *Chambers*, 410 U.S. at 302–03) (emphasis added).

318. 548 U.S. 735, 743–46 (2006).

319. *Id*. at 779 (citation omitted). On March 23, 2020, the Supreme Court held that the Due Process Clause does not require states to provide a specific test for insanity. *See* Kahler v. Kansas, 589 U.S. ___ (2020) (rejecting due process challenge to Kansas rule prohibiting criminal defendants from asserting insanity defense).

320. *Egelhoff*, 518 U.S. at 48 ("The burden remains upon respondent to show that the 'new common-law' rule—that intoxication may be considered on the question of intent—was so deeply rooted at the time of the Fourteenth Amendment (or perhaps has become so deeply rooted since) as to be a fundamental principle which that Amendment enshrined.").

321. *See* WOODS ET AL., MODEL LEGISLATION FOR ELIMINATING THE GAY AND TRANS PANIC DEFENSES, *supra* note 90, at 1, 19–20 (explaining why the gay and trans panic defenses are not fundamental principles of justice protected by the Due Process Clause).

Therefore, it is unlikely that the Supreme Court would find that a legislative ban on the trans panic defense violates a defendant's due process rights.

3. Objection Three: A Legislative Ban is an Improper Attempt to Legislate Social Attitudes

A third potential objection is that a legislative ban on the trans panic defense strategy is an attempt to legislate social attitudes. Underlying this argument is the assumption that the law should follow rather than lead social attitudes.[322]

While the law often follows social attitudes,[323] it is not uncommon for the law to lead rather than follow. For example, in the 1970s and 1980s, feminists successfully pushed for reform of rape laws.[324] Even though social attitudes at that time about the way women should behave in matters involving sex differed significantly from social attitudes today,[325] many legislatures eliminated the resistance requirement, which required proof that the victim resisted the sexual assault to her utmost.[326] Some legislatures also eliminated the corroboration requirement, which required corroborating evidence such as torn clothing, bruises, and scratches.[327] The law of rape changed well before social attitudes changed and these changes had a profound influence on social attitudes about appropriate sexual behavior.[328] Indeed, changes in the law of rape over forty years ago probably helped pave the way to today's #MeToo movement.[329]

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322. Cynthia Kwei Yung Lee, *Race and Self Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 381–83, 90 (1996) (discussing debate over whether the criminal law should adhere to a non-instrumentalist approach that focuses on the defendant's culpability or an instrumentalist approach that utilizes the criminal law to achieve broader social ends).

323. For example, some have argued that the U.S. Supreme Court's rulings in the recent marriage equality cases were the result of changes in social attitudes about heterosexuality and homosexuality. *See* Marco Morini, *Same-Sex Marriage and Other Moral Taboos: Cultural Acceptances, Change in American Public Opinion and the Evidence from the Opinion Polls*, 11 EUR. J. AM. STUD. 1, 10 (2017) (arguing that *Obergefell* "was the product of the decades of activism that made the idea of gay marriage seem plausible and right").

324. *See* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 591–92 (2009) (describing the work of second-wave feminists in the 1970s and 80s to "reform rape law and educate the public about sexual assault stereotypes"); Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335, 337 (2017) (noting that in the 1970s "[s]trong feminist organizations and rape-survivor advocacy groups joined with the general tough-on-crime movement" to push for reform of rape law).

325. For an excellent examination of social attitudes and expectations regarding sexual activity between men and women at that time, see Jeannie Suk, *"The Look in His Eyes": The Story of* Rusk *and Rape Reform*, *in* CRIMINAL LAW STORIES 171–211 (Foundation Press 2013); *see also* Gruber, *supra* note 324, at 630–34 (describing how gender norms have shifted under third-wave feminism).

326. *See* Gruber, *supra* note 324, at 593; Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 799 (1988) (explaining that the "requirement that the victim prove actual physical resistance in order to negate consent has been modified or rejected in most jurisdictions").

327. *See* Gruber, *supra* note 324, at 593; Chamallas, *supra* note 326, at 799 n.101 (explaining that eliminating the requirement that the victim's testimony be corroborated was another significant feminist reform).

328. Chamallas, *supra* note 326, at 799 (noting that feminist reform of rape laws "generated a deeper understanding" around issues such as consent).

329. *See* Alison Gash & Ryan Harding, *#MeToo? Legal Discourse and Everyday Responses to Sexual Violence*, 7 LAWS 1 (2018) (arguing that changes in rape law brought rape out of the private realm); *see also*

A related objection is that a legislative ban on the trans panic defense strategy is an attempt to use the criminal law to legislate morality. Such attempts are problematic, especially in light of the constantly shifting and culturally contingent nature of morality.[330] While I agree with the sentiment underlying this objection—that the criminal law should not be used to legislate morality—a legislative ban on the trans panic defense is not an attempt to legislate morality. Such a ban is not trying to tell the defendant what he should or should not be doing in his private life. Rather, it is telling the jury that *as a matter of law*, it is not objectively reasonable to be provoked into a heat of passion by the discovery that another person is a transgender individual.

Rather than an attempt to legislate morality, a ban on the trans panic defense is better understood as an attempt by the legislature to use the power of the law to express condemnation for certain behaviors. This is an accepted and traditional function of the criminal law.[331] When a legislature chooses to ban the trans panic defense, it is simply making a normative judgment about what constitutes legally adequate provocation, as other legislatures have done before.[332]

A legislative ban would send a clear message to the jury that in the legislature's eyes, it is not reasonable to get so upset that one uses physical violence against a transgender woman upon discovering that her biological sex does not match her gender identity. A legislative ban would also ensure that jurors reject trans panic arguments far more effectively than a prosecutor's appeals to the jury's sense of fairness.

4. Objection Four: If a Legislature Bans Trans Panic, It May Ban Other Equally Reprehensible Uses of the Provocation Defense

A fourth possible objection might be called the slippery slope objection. The concern here is that if a legislature bans the trans panic defense, then it may ban

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Amanda Chatel, *Should We Forgive Men Who Are Accused Of Sexual Assault If They Apologize*, YOURTANGO (Jan. 26, 2018), https://www.yourtango.com/2018310185/should-we-forgive-men-who-are-accused-sexual-assault-if-they-apologize [https://perma.cc/2WAS-52FM] (suggesting that society should not forgive men who have engaged in sexual assault even if they apologize); Debra Soh, *Do the Men of #MeToo Deserve to be Forgiven*, THE GLOBE & MAIL (Sept. 6, 2018), https://www.theglobeandmail.com/opinion/article-do-the-men-of-metoo-deserve-to-be-forgiven/ [https://perma.cc/XLG8-36G2] (noting that while most people say men guilty of a #MeToo moment do not deserve forgiveness or a second chance, there is a double standard at work under which celebrities tend to be forgiven and are given a second chance).

330. Indeed, I raised this concern in my prior scholarship. *See* Lee & Kwan, *supra* note 24, at 121 ("Using the criminal law to dictate morality is deeply problematic given the constantly shifting and culturally contingent nature of morality.").

331. *See* Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404–05 (1958) (explaining that "judgment of community condemnation . . . accompanies and justifies" imposition of criminal sanctions). *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2044 (1996) (noting that "criminal law is a prime arena for the expressive function of law").

332. *See infra* text accompanying notes 335–36 (discussing Maryland's legislative ban on defendants arguing that the discovering of a spouse having sexual intercourse with another person constitutes legally adequate provocation and Minnesota's legislative ban on defendants arguing that hearing a crying baby constitutes legally adequate provocation).

other reprehensible arguments linked to the provocation defense.[333] For example, a legislature that bans the trans panic defense might feel as a matter of principle that it must also pass legislation barring male defendants from arguing that they were reasonably provoked into a heat of passion by the discovery of their spouse having sexual intercourse with another person. Arguably, just as the defendant asserting a trans panic defense seeks to reinforce negative stereotypes about trans individuals, a defendant asserting a provocation defense under these circumstances is trying to reinforce stereotypes about the proper role of women.

My response to this argument is that even before legislatures started banning the gay and trans panic defenses, some legislatures had already categorically banned other uses of the provocation defense. For example, Maryland amended its criminal code in 1997 to bar defendants from arguing that the discovery of their spouse engaged in sexual intercourse with another constituted legally adequate provocation.[334] Similarly, Minnesota amended its criminal code in 1988 to bar defendants from arguing that a crying baby constitutes legally adequate provocation.[335]

Indeed, we have a long history in the United States of cabining the types of arguments that defendants claiming provocation can make. As explained above, at early common law, courts recognized only five categories of legally adequate provocation.[336] A defendant who did not fit within one of these five categories could not assert a provocation defense.[337] Even after states abandoned the early common law approach to provocation, most retained the mere words rule, which

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333. In my prior scholarship, I expressed the concern that "if a legislature can categorically ban defendants from making trans panic arguments because it believes such arguments are morally reprehensible, it could categorically ban other defense arguments on moral grounds as well." Lee & Kwan, *supra* note 24, at 121.

334. *See* H.R. 754, 1997 Reg. Sess. (Md. 1997) (amending the Maryland criminal code to add a section establishing that spousal adultery does not constitute provocation); Kimberly Wilmot-Weidman, *After a 3-Year Fight, Murder is Finally Murder in Maryland*, CHI. TRIB. (Nov. 23, 1997), https://www.chicagotribune.com/news/ct-xpm-1997-11-23-9711230114-story.html [https://perma.cc/7Z4L-PM9F] (reporting that Maryland passed a revised law in May 1997 to remove spousal adultery as a mitigating factor to lessen a murder charge to a manslaughter charge); *see also* MD. CODE ANN. CRIM. LAW § 2-207(b) (2019) (providing that "[t]he discovery of one's spouse engaged in sexual intercourse with another does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter even though the killing was provoked by that discovery").

335. *See* 1988 Minn. Laws 670–71, ch. 604, H.F. no. 10 (amending the Minnesota criminal code to "provide[] that the crying of a child does not constitute provocation"); *see also* MINN. STAT. ANN. § 609.20(1) (2019) (providing that "[w]hoever . . . intentionally causes the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances" is guilty of manslaughter in the first-degree "provided that the crying of a child does not constitute provocation").

336. *See supra* notes 93–94 and accompanying text (noting that at early common law, one could only receive the mitigation from murder to voluntary manslaughter if one fell within one of the following categories: "(1) an aggravated assault or battery, (2) the observation of a serious crime against a close relative, (3) an illegal arrest, (4) mutual combat, or (5) catching one's wife in the act of adultery.").

337. *See* 2 WHARTON'S CRIMINAL LAW § 157 (15th ed. 2019) ("In order to reduce a homicide from murder to voluntary manslaughter, there must be provocation, and such provocation must be recognized by the law as adequate."); Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 428, 430 (1982) (giving examples of what would and would not constitute legally adequate provocation).

prevents defendants from arguing that mere words provoked them into a heat of passion.[338] In most jurisdictions today, mere words do not constitute legally adequate provocation.[339]

Legislative limitations on the provocation defense did not start with the recent legislative bans on gay and trans panic defenses. The history of the provocation defense reveals that the doctrine has always been a site for categorical inclusion and exclusion.

5. Objection Five: A Legislative Ban on the Trans Panic Defense Would Force the Jury to Make an All-or-Nothing Choice and Lead to More Acquittals or Hung Juries

A fifth possible objection to legislatively banning the trans panic defense is that taking away the voluntary manslaughter option would force the jury to make an all-or-nothing choice.[340] If members of the jury are biased against trans people and therefore inclined to sympathize with the defendant claiming trans panic, they might choose to acquit the defendant rather than convict him of murder.[341]

While it is true that jurors who sympathize with the defendant might want to find him not guilty of murder, the jury would have no legal basis to acquit the defendant if the legislature has banned the trans panic defense. The jury would have to ignore the law and engage in jury nullification if it wanted to find the defendant not guilty of murder. The available research, however, suggests that juries nullify in only about four percent of all criminal cases, suggesting that most jurors take their duty to follow the law seriously and would not acquit if the law precluded such a verdict.[342]

A related concern is that a legislative ban on the trans panic defense might lead to more hung juries if jurors cannot agree on whether to convict the defendant of murder.[343] In jurisdictions without a ban, juries can at least compromise and return

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338. 40 AM. JURIS. 2D HOMICIDE § 51 (2019) ("Mere words . . ., no matter how insulting or abusive, will not provide such provocation so as to reduce a homicide from murder to manslaughter."); Buchhandler-Raphael, *Fear-Based Provocation*, *supra* note 104, at 1730–31 ("Most jurisdictions, however, exclude the [provocation] defense in cases involving words alone, without the deceased's additional provocative action, no matter how offensive or insulting these words might have been to the specific defendant.").

339. *See* Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L. A. L. REV. 435, 447 (1981) (explaining that "[a]uthorities agree that mere angry words" do not constitute legally adequate provocation). *Cf.* People v. Berry, 556 P.2d 777, 782 (Cal. 1976) (finding that the trial court erred in refusing to give the jury an instruction on heat of passion provocation even though the defendant was largely provoked by his wife's verbal admission that she had engaged in sexual relations with another man).

340. Lee & Kwan, *supra* note 24, at 121 ("[A] legislative ban on trans panic arguments would force the jury to make an all-or-nothing choice.").

341. *Id.* (noting that "[i]n a jurisdiction where jurors are likely to sympathize with the defendant claiming gay or trans panic, a ban could result in more victories for defendants claiming trans panic, since jurors who believe murder is too harsh would not be permitted to find the defendant guilty of the lesser offense of manslaughter").

342. *Id.* at 120 (discussing jury nullification).

343. *Id.* at 122 (noting that "[a]n all-or-nothing choice may also result in more hung juries since there is less room for compromise when the only choices are a murder conviction or a complete walk for the defendant").

a verdict of guilty on voluntary manslaughter, but in a jurisdiction where the only option is a murder conviction or an acquittal, juries are less likely to come to agreement. Jurors who sympathize with the defendant might be unwilling to convict the defendant of murder and jurors who think the defendant was not reasonably provoked likely might be unwilling to acquit the defendant.

As for the possibility of more hung juries, juries in trans panic cases might fail to reach agreement and hang even without a legislative ban. Even though there was no legislative ban on the trans panic defense in California at the time, the first jury in the Gwen Araujo case discussed above hung because some jurors felt the defendants should be convicted of murder while others sympathized with the defendants and felt voluntary manslaughter was the more appropriate charge.[344] Similarly, the jury in the Larry King case hung even though there was no legislative ban in place at the time because some jurors felt a guilty verdict on murder was appropriate while others felt murder was too harsh and that voluntary manslaughter was more appropriate.[345]

6. Objection Six: A Legislative Ban Would Drive the Trans Panic Defense Underground, Enabling It to Be More Effective

Another possible objection to a legislative ban is that it would push the conversation about trans panic underground and allow jurors implicitly biased against trans individuals to simply act on their biases. This is a legitimate concern but is not ultimately persuasive because I am not arguing in favor of a legislative ban to the exclusion of education and vigilance on the part of prosecutors. I am arguing for both education and legislative action. Prosecutors still need to make the jury aware of the defense's attempt to appeal to implicit and explicit anti-trans bias even if a legislative ban on trans panic is in place.

7. Objection Seven: A Legislative Ban Is Not Needed Since Most Juries Reject the Trans Panic Defense

Another possible objection is that a legislative ban on the trans panic defense is not needed because in most of the recent cases where it was asserted, the jury rejected the defense.[346] While it may be true that juries rejected the trans panic defense in most of the recent trans panic cases that we know about, there are probably many more trans panic cases that are not known or publicly reported. Not only is it the case that most criminal trials take place in courtrooms throughout the country without any press coverage, most criminal cases are not even tried in open

344. *See* Glionna, *supra* note 162 (explaining that jurors were "deadlocked over whether the slaying was premeditated and therefore first-degree murder").

345. *See supra* text accompanying notes 141–42 (discussing the fact that the jury hung in this case).

346. *See* Wodda & Panfil, *supra* note 18, at 942–57, 968 (acknowledging that "most attempts to use the trans* panic defense have been defeated in court").

court. The vast majority of criminal cases end in a guilty plea before a trial even takes place.[347]

Moreover, we know that at least some jurors will find the trans panic defense persuasive, and all it takes is one juror to hang a jury. A juror is likely to find the trans panic defense persuasive if that juror feels a sense of moral outrage when transgender individuals express their gender identity.

A recent study found that conservative jurors are significantly less punitive in cases where the defendant claimed to have acted out of "gay panic" compared to cases where the defendant did not assert a gay panic defense.[348] The authors of this study theorized that conservative jurors feel less moral outrage towards a defendant who kills a gay man who makes a sexual advance because the gay male victim's behavior violates their moral values.[349] If this type of leniency by conservative jurors occurs in gay panic cases, it is also likely to occur in trans panic cases where the sense of moral outrage might be even greater since gays and lesbians have achieved a higher degree of acceptance in today's society than trans people.[350]

8. Objection Eight: A Legislative Ban is Only Effective at Banning the Trans Panic Defense if the Case Goes to Trial

Finally, one might argue that a legislative ban on the trans panic defense is unlikely to be effective since upwards of ninety-four percent of all criminal cases are resolved by plea bargain as opposed to a trial.[351] Under this objection, a

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347. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) (observing that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas").

348. *See* Salerno et al., *supra* note 108 (finding that conservative jurors were significantly less punitive when a male murder defendant charged with killing a gay man claimed he acted out of gay panic as compared to when the defendant did not claim gay panic).

349. *Id*. at 27.

350. *See* Samantha Schmidt, *Americans' Views Flipped on Gay Rights. How Did Minds Change so Quickly?*, WASH. POST (June 7, 2019), https://beta.washingtonpost.com/local/social-issues/americans-views-flipped-on-gay-rights-how-did-minds-change-so-quickly/2019/06/07/ae256016-8720-11e9-98c1-e945ae5db8fb_story.html [https://perma.cc/734U-82AU] (noting that "[a]s recently as 2004, polls showed that the majority of Americans—60 percent—opposed same-sex marriage, while only 31 percent were in favor, according to the Pew Research Center" and that "[t]oday, those numbers are reversed: 61 percent support same-sex marriage, while 31 oppose it"). In contrast, recent polls show that Americans have more negative views about trans people than other groups. *See supra* note 120 (discussing societal attitudes toward trans people). Despite these changes in social attitudes, being a gay man married to another man is still viewed with disfavor in some parts of the country. *See* Trip Gabriel, *As Buttigieg Courts Black Voters, His Sexuality is a Hurdle*, N.Y. TIMES, Oct. 28, 2019, at A22, https://www.nytimes.com/2019/10/27/us/politics/pete-buttigieg-south-carolina.html [https://perma.cc/R2CL-S67C] (pointing out that Pete Buttigieg's being a man married to another man is not well favored in the South). Jordan Blair Woods observes that prior to the mid-1970's, when many states had sodomy laws on the books that were primarily enforced against gays, LGBT people involved in the criminal justice system were largely seen as deviant sexual offenders. Today, in contrast, LGBT individuals are largely viewed as innocent victims of hate crimes. Jordan Blair Woods, *LGBT Identity and Crime*, 105 CAL. L. REV. 667, 705 (2017).

351. Missouri v. Frye, 566 U.S. 134, 143 (2012) (observing that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas").

legislative ban is a prohibition on a particular trial strategy, and therefore would only work if the case goes to trial.

While it is true that a legislative ban on the trans panic defense aims to limit a particular defense strategy at trial, a ban would also likely encourage defendants to plead guilty and thus help prosecutors secure convictions. Indeed, if the legislative ban recently passed in New York had been in effect in 2013, James Dixon, the man who killed Islan Nettles upon discovering her transgender status, may have been charged with murder rather than first-degree manslaughter in the first place, and may have then agreed to plead guilty to first-degree manslaughter rather than second-degree manslaughter.

Despite these objections, many legislatures have begun the process of enacting legislative bans on gay and trans panic defense strategies. The next Part outlines several of these bans.

IV. LEGISLATIVE BANS ON GAY AND TRANS PANIC DEFENSES

This Part starts with the American Bar Association's 2013 resolution asking the federal government and state governments to ban the use of gay and trans panic defense strategies. It then provides an overview of the existing legislative bans on gay and trans panic defenses. Next, it analyzes two proposed legislative bans that are significantly different from the bans that have been enacted and those pending in other states. Finally, this Part concludes by proposing model legislation that borrows the best features from the existing bans.

In August 2013, the American Bar Association ("ABA") passed a resolution urging all states and the federal government to legislatively ban the use of gay and trans panic defenses.[352] The ABA explained that legislatures should mandate two things: (1) jury instructions on bias and prejudice, and (2) a statement that neither a non-violent sexual advance nor the discovery of a person's sex or gender identity constitutes legally adequate provocation sufficient to mitigate the crime of murder to manslaughter.[353] Specifically, ABA Resolution 113A urged legislatures to pass legislation:

> (a) Requiring courts in any criminal trial or proceeding, upon the request of a party, to instruct the jury not to let bias, sympathy, prejudice, or public opinion influence its decision about the victims, witnesses, or defendants based upon sexual orientation or gender identity; and
> (b) Specifying that neither a non-violent sexual advance, nor the discovery of the person's sex or gender identity, constitutes legally adequate

352. The ABA called upon "federal, tribal, state, local and territorial governments to take legislative action to curtail the availability and effectiveness of the 'gay panic' and 'trans panic' defenses." AM. BAR ASS'N H.D. RES. 113A (AM. BAR ASS'N 2013), https://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf.

353. *Id.*

> provocation to mitigate the crime of murder to manslaughter, or to mitigate the severity of any non-capital crime.[354]

A. *Existing Legislative Bans on Gay or Trans Panic Defenses*

Following passage of the ABA's 2013 resolution, California became the first state to ban gay and trans panic defenses in 2014. Illinois followed in 2017. Rhode Island was the next state to ban gay and trans panic defenses in 2018. Nevada, New York, Hawaii, Connecticut, and Maine passed similar legislation in 2019. In early 2020, New Jersey and the state of Washington became the latest states to enact bans on gay and trans panic defenses. Similar legislation is pending in several states and in the U.S. Congress.

While all of these legislative bans share the goal of prohibiting criminal defendants from using a gay or trans panic defense strategy to justify, excuse, or mitigate a murder charge, and many of the bills utilize language similar to what is in the California legislation, the bills differ in nuanced and important ways. I discuss these differences below and offer concrete suggestions to strengthen legislative reform in this area.

1. California (2014)

In 2014, California became the first state to pass a legislative ban on gay and trans panic defenses.[355] Assembly Bill 2501 amended California Penal Code Section 192 by adding Subsection (f), specifying:

> (1) For purposes of determining sudden quarrel or heat of passion pursuant to subdivision (a), the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and the victim dated or had a romantic or sexual relationship. Nothing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation.
> (2) For purposes of this subdivision, 'gender' includes a person's gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person's gender as determined at birth.[356]

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354. *Id.*

355. *See* Parker Marie Molloy, *California Becomes First State to Ban Gay, Trans 'Panic' Defenses*, ADVOCATE (Sept. 29, 2014), https://www.advocate.com/crime/2014/09/29/california-becomes-first-state-ban-gay-trans-panic-defenses [https://perma.cc/Z2YA-66GN].

356. CAL. PENAL CODE §§ 192(f)(1), (2) (2019).

In stating that provocation is not objectively reasonable if it is the result of the discovery of, knowledge about, or potential disclosure of the victim's gender, gender identity, or sexual orientation, Subsection (f)(1) makes a normative assessment about whether what the defendant claims provoked him constitutes "legal adequate provocation." Such determinations are usually left to the jury in jurisdictions that follow the modern approach. Some might argue, as I once did, that this kind of assessment should be left to the jury, rather than the legislature, because reasonable minds can disagree as to whether it is reasonable for a defendant to be provoked into a heat of passion by a non-violent sexual advance or the discovery that the victim's sex does not align with her gender identity.

As discussed above, however, the law has always played a role in defining what counts as legally adequate provocation. At early common law, for example, the law specified a limited number of categories of actions that constituted legally adequate provocation.[357] If one was provoked into a heat of passion by a person, act, or event that fell outside one of these categories, one could not receive the provocation mitigation.

Even today, most jurisdictions abide by the mere words rule, which is that words alone, no matter how offensive or provocative, can never constitute legally adequate provocation.[358] In putting mere words outside the scope of what constitutes legally adequate provocation, the law makes a statement that it is not normatively reasonable to be provoked by mere words.

Other examples of the law defining what constitutes legally adequate provocation exist. In Minnesota, for example, a defendant may not claim the provocation mitigation if what provoked him was a crying baby because the legislature has banned such arguments.[359] Similarly, in Maryland, a defendant may not claim the provocation mitigation by claiming that the discovery of his or her spouse in the act of adultery provoked the defendant into a heat of passion because the Maryland legislature has decided that this does not constitute legally adequate provocation.[360]

California's law banning gay and trans panic defense arguments is just another example of the law defining the contours of what constitutes legally adequate

357. *See supra* text accompanying notes 93–94.

358. *See* United States v. Slager, 912 F.3d 224, 236 (4th Cir. 2019) (noting that "mere words" generally constitute inadequate provocation to negate a finding of malice) (internal quotations and citation omitted); Stevens v. McBride, 489 F.3d 883, 892 (7th Cir. 2007) (noting that "words alone cannot constitute sufficient provocation to give rise to a finding of sudden heat warranting an instruction on voluntary manslaughter") (internal quotation and citation omitted).

359. MINN. STAT. § 609.20(1) (2019) ("Whoever . . . intentionally causes the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances" is guilty of manslaughter in the first-degree "provided that the crying of a child does not constitute provocation").

360. MD. CODE ANN., CRIM. LAW § 2-207(b) (2019) (providing that "[t]he discovery of one's spouse engaged in sexual intercourse with another does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter even though the killing was provoked by that discovery").

provocation. Subsection (f)(1) correctly focuses the factfinder's attention on whether the provocation resulted from the discovery of, knowledge about, or disclosure of the victim's gender, gender identity, gender expression, or sexual orientation. It makes sense to preclude the provocation defense in these cases since it is clearly unreasonable to lose one's self-control after learning that another person is gay or a transgender individual. One should not be excused for physical violence against another person due to their sexual orientation or gender identity.

Subsection (f)(1) acknowledges that a defendant might have discovered that the victim was gay if the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant. Likewise, the defendant might have discovered that the victim was a transgender woman in the course of a romantic or sexual relationship. The prohibition, however, only applies if the alleged provocation resulted from the *discovery of, knowledge about, or disclosure of* the victim's gender identity or sexual orientation. Thus, even though most people assume the opposite when they hear that a legislative ban on gay and trans panic defenses has been enacted, California's legislation does not bar a defendant from arguing that he was provoked into a heat of passion by a non-violent homosexual advance. Subsection (f)(1) simply says that a defendant's claimed provocation is not objectively reasonable and therefore is not legally adequate if it stemmed from the defendant's discovery of, knowledge about, or potential disclosure of the victim's gender identity or sexual orientation.

Subsection (f)(1) also makes clear that the jury may consider all relevant facts in assessing whether the defendant was in fact provoked, providing that "[n]othing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation."[361] In other words, if the defendant claims he was provoked into a heat of passion by the discovery that the victim was a transgender woman, the jury can consider this as part of the inquiry into whether the defendant was *actually* provoked into a heat of passion, one of the requirements for a heat of passion claim. This kind of information, however, cannot be used to show the defendant was *reasonably* provoked into a heat of provocation because Subsection (f)(1) explicitly states that it is not reasonable to be provoked into a heat of passion by the discovery of or knowledge of an individual's gender identity or sexual orientation.[362] Even if the jury believes the defendant was actually provoked into a heat of passion, it may not return a verdict of voluntary manslaughter unless it disregards the law because what the defendant claims provoked him is not legally adequate provocation under the new law.

The jury may, however, use the fact that the defendant was actually provoked to reduce a first-degree murder charge to second-degree murder. The "[n]othing in this section shall preclude the jury" language in Subsection (f)(1) enables a

361. CAL. PENAL CODE § 192(f)(1) (2019).
362. *Id.*

defendant charged with first-degree murder to use the fact that he was actually provoked to support a second-degree murder conviction. The defendant can argue that because he was actually provoked into a heat of passion, he could not have engaged in the thoughtful premeditation and deliberation needed for a first-degree murder conviction.[363]

2. Illinois (2017)

In May 2017, Illinois became the second state to legislatively ban gay and trans panic defenses when the Illinois legislature amended its Criminal Code to disallow the discovery, knowledge, or disclosure of the victim's sexual orientation as a mitigating factor for first-degree murder.[364] At first glance, it appears that Illinois does not prohibit murder defendants from asserting a trans panic defense since the legislation references only sexual orientation, not gender identity.[365] In fact, however, the legislation does prohibit the trans panic defense strategy since it incorporates by reference the Illinois Human Rights Act, which provides:

> "Sexual orientation" means actual or perceived heterosexuality, homosexuality, bisexuality, *or gender-related identity*, whether or not traditionally associated with the person's designated sex at birth. "Sexual orientation" does not include a physical or sexual attraction to a minor by an adult.[366]

Unlike in most jurisdictions where the provocation defense mitigates a murder charge down to voluntary manslaughter, in Illinois, legally adequate provocation

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363. Apparently, the California Attorneys for Criminal Justice, a group that represents the interests of the criminal defense bar in California, lobbied to get this language added to the California legislation so it would be clear that subjective provocation could help a first-degree murder defendant trying to show he lacked the specific intent required for conviction. Telephone Conversation with William DuBois, attorney for Jose Merel (November 2, 2019).

364. 720 ILL. COMP. STAT. 5/9-1(c) (2020). The Illinois ban passed unanimously. *See* Sophia Tareen, *Activists to Copy Illinois 'Gay Panic Defense' Ban Elsewhere*, ASSOC. PRESS (Dec. 28, 2017), https://apnews.com/9dc24f2031c8465081d790152f6efbd8 [https://perma.cc/V9QH-CMEF] (noting that "[a]fter a lackluster attempt in 2016, the Illinois ban sailed through the Legislature in May with no opposition and Republican Gov. Bruce Rauner signed it into law without comment"); Richard Gonzales, *Illinois to Ban 'Gay Panic Defense' In New Year*, NPR (Dec. 28, 2017), https://www.npr.org/sections/thetwo-way/2017/12/28/574453009/illinois-to-ban-gay-panic-defense-in-new-year [https://perma.cc/CF52-377L] (reporting that "[o]n Monday, Illinois will become the second state to ban the so-called gay panic defense in cases in which a murder defendant tries to justify his violence as a reaction to learning that the victim was gay"); *see also 2017 LGBTQ Legislative Agenda*, EQUAL. ILLINOIS, https://www.equalityillinois.us/2017-legis [https://perma.cc/NUT6-UXQR]; Press Release, Equality Illinois, Governor Rauner Approves Ban on Use of LGBTQ Panic Defense, https://www.equalityillinois.us/about-us/press-releases/panic-defense-ban [https://perma.cc/7W25-T7QL].

365. 720 ILL. COMP. STAT. 5/9-1(c).

366. Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/1-103 (2020) (emphasis added), http://ilga.gov/legislation/ilcs/ilcs4.asp?DocName=077500050HArt%2E+1&ActID=2266&ChapterID=64&SeqStart=100000&SeqEnd=600000. I thank Anthony Kreis, Visiting Assistant Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology, for assisting me with the interpretation of the Illinois ban. Professor Kreis was instrumental in getting the Illinois legislation enacted.

mitigates a first-degree murder charge to second-degree murder.[367] Under the Illinois Criminal Code, a person commits second-degree murder when he or she commits first-degree murder and certain mitigating factors are present.[368] Relevant to the trans panic defense, one mitigating factor is "acting under a sudden and intense passion resulting from serious provocation[.]"[369]

Before 2017, Illinois defined "serious provocation," i.e., legally adequate provocation, as "conduct sufficient to excite an intense passion in a reasonable person[.]"[370] In 2017, the legislature amended its Criminal Code to ban gay and trans panic defenses by adding the following language to Section 9-2(b):

> [P]rovided, however, that an action that does not otherwise constitute serious provocation cannot qualify as serious provocation because of the discovery, knowledge, or disclosure of the victim's sexual orientation as defined in Section 1-103 of the Illinois Human Rights Act.[371]

What this means is that in Illinois, in contrast to California, neither a gay nor a trans panic argument can be used to mitigate a first-degree murder charge down to second-degree murder.

Confusingly, while Section 9-2(a) follows the modern reasonable person test for provocation for defendants charged with first-degree murder seeking a mitigation to second-degree murder,[372] another section of the Illinois Criminal Code adopts language from the MPC's extreme mental or emotional disturbance defense for defendants charged with first-degree murder who are facing a possible death sentence. Section 9-1(c)(2) lists as a mitigating factor for not elevating first-degree murder to capital murder the fact that "the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution[.]"[373] In 2017, Illinois added language to Section 9-1(c) barring "the discovery, knowledge, or disclosure of the victim's sexual orientation" as a mitigating factor.[374] Because the Illinois statute incorporates by reference the Illinois Human Rights Act's definition of

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367. *See* 720 ILL. COMP. STAT. 5/9-2(a)(1) (2018). In 1986, the Illinois state legislature enacted Public Act 84-1450, amending Section 9-2 of the Illinois Criminal Code of 1961, changing the offense of murder to first-degree murder and abolishing the offense of voluntary manslaughter, replacing it with the offense of second-degree murder. *See* People v. Jeffries, 646 N.E.2d 587, 590–91 (Ill. 1995).

368. *See* 720 ILL. COMP. STAT. 5/9-2(a)(1).

369. *Id.*

370. *See* 720 ILL. COMP. STAT. 5/9-2(b) (2017). Confusingly, the Illinois courts still apply the early common law approach under which legally adequate provocation was limited to a handful of specified categories. *See* People v. McDonald, 77 N.E.3d 26, 42 (Ill. 2016) ("The only categories recognized by this court to constitute serious provocation are substantial physical injury or substantial physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse.").

371. 720 ILL. COMP. STAT. 5/9-2(b) (2018).

372. 720 ILL. COMP. STAT. 5/9-2(a).

373. 720 ILL. COMP. STAT. 5/9-1(c)(2) (2020).

374. *Id.* § 5/9-1(c).

sexual orientation, which includes gender identity,[375] a defendant charged with capital murder in Illinois may not assert a gay or trans panic argument as a reason for the jury to recommend life rather than imposition of the death penalty.

3. Rhode Island (2018)

In 2018, Rhode Island passed legislation similar to California's, amending Chapter 12-17 of the Rhode Island General Laws entitled "Trials" by adding a new Section 12-17-17.[376] The new Section explains that provocation is not objectively reasonable if:

> . . . it resulted *solely* from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.[377]

Notably, Rhode Island goes further than California since it does not simply prohibit the use of gay and trans panic arguments to support claims of provocation, but also prohibits the use of gay and trans panic arguments to support claims of diminished capacity and self-defense. Newly added Section 12-17-18, entitled "Restrictions on the defense of diminished capacity," provides:

> A defendant does not suffer from reduced mental capacity based *solely* on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.[378]

Newly added Section 12-17-19, entitled "Restrictions on the defense of self-defense," provides:

> A person is not justified in using force against another based *solely* on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.[379]

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375. *See* text accompanying note 368.
376. 12 R.I. GEN. LAWS § 12-17-17 (2018).
377. *Id.* (emphasis added).
378. 12 R.I. GEN. LAWS § 12-17-18 (2018) (emphasis added).
379. 12 R.I. GEN. LAWS § 12-17-19 (2018) (emphasis added).

The Rhode Island legislature explained that its purpose in enacting these provisions was not only to "restrict the use of a victim's gender or sexual orientation as a defense by any defendant claiming provocation, diminished capacity or self-defense," but also to "prohibit the court from allowing such information into evidence."[380] In specifying that courts are prohibited from allowing such information into evidence, the Rhode Island legislation goes further to protect against defendants trying to utilize gay and trans panic arguments than either California or Illinois.[381]

While Rhode Island significantly limits a defendant's ability to mount a gay or trans panic defense strategy, it is more helpful to defendants than the California legislation in one respect. In including the term "solely" in all three newly added provisions, Rhode Island permits a defendant to argue provocation, mental incapacity, or self-defense based upon the discovery of the victim's actual or perceived gender, gender identity, gender expression, or sexual expression as long as the defendant can point to some other reason for his being provoked into a heat of passion (or his loss of mental capacity, or his use of force in self-defense) in addition to the discovery of the victim's gender, gender identity, gender expression or sexual expression.[382] It is unclear whether this was simply an oversight or whether the Rhode Island legislature purposely included the word "solely" to counter criminal defense bar objections and ensure passage of the legislation.

4. Nevada (2019)

In May 2019, Nevada became the fourth state in the United States to pass legislation banning gay and trans panic defenses.[383] Section 193.225 provides that, in the context of a defendant asserting a provocation defense, the alleged heat of passion or provocation is not objectively reasonable if:

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380. *Id.* (Explanation by the Legislative Council of an Act Relating to Criminal Procedure—Trials).

381. In limiting the evidence that may be admitted at trial, the Rhode Island legislature may have been responding to calls for reform in this area. In 2015, for example, Kelly Strader and others proposed a "gay shield" rule of evidence that would limit the trial court's ability to admit evidence designed to provoke homophobic and transphobic responses in jurors. *See* Strader et al., *supra* note 130, at 1474, 1526.

382. It is unclear whether this was simply an oversight by the legislature or whether the legislature purposely included the word "solely" to give murder defendants the ability to make a gay or trans panic argument to the jury. There is very little legislative history on this question. *See* Omar T. Russo, *How to Get Away with Murder: The "Gay Panic" Defense*, 35 TOURO L. REV. 811, 835 (2019) (noting that one legislator, "Justin Price, expressed concerns that such a ban would be harmful because it permits the withholding of information (the victim's sexual orientation or gender identity) from the jury and, thus, prevents them from making a sound decision"); Katherine Gregg, *R.I. House Votes to End 'Gay or Trans' Panic Defense*, PROVIDENCE J. (May 22, 2018), https://www.providencejournal.com/news/20180522/ri-house-votes-to-end-gay-or-trans-panic-defense [https://perma.cc/2USR-L86E] (reporting that Rep. Justin Price was quoted as indicating his concern about withholding from jurors "all the information as far as what happened during an altercation, I don't think that they [can] make a sound decision," during the brief floor discussion).

383. *Nevada Just Banned Gay and Trans 'Panic' Defenses—Which State Will Be Next?*, LGBT BAR (May 17, 2019), https://lgbtbar.org/bar-news/nevada-just-banned-gay-and-trans-panic-defenses-which-state-will-be-next [https://perma.cc/VH73-MSFR] (noting that SB 97 "passed in both houses, and on May 16, [2019], Governor Sisolak signed the bill into law").

> [I]t resulted from the discovery of, knowledge about or potential disclosure of the actual or perceived sexual orientation or gender identity or expression of the victim, including, without limitation, under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.[384]

Like Rhode Island, Nevada also prohibits a defendant from using trans panic to support a claim of self-defense, stating:

> A person is not justified in using force against another person based on the discovery of, knowledge about or potential disclosure of the actual or perceived sexual orientation or gender identity or expression of the victim, including, without limitation, under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.[385]

Nevada, however, does not bar a defendant from basing a diminished capacity or temporary insanity defense on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived sexual orientation or gender identity as does Rhode Island.[386]

Also unlike Rhode Island, Nevada does not include the word "solely" in any of its new provisions, and thus prevents a defendant from making a gay or trans panic argument by alleging that something in addition to the discovery that the victim was a gay man or a transgender woman, such as an allegedly provocative sexual advance, provoked him into a heat of passion or caused him to reasonably believe he needed to use deadly force in self-defense. In this way, Nevada is not as defendant-friendly as Rhode Island.

5. New York (2019)

On June 19, 2019, New York became the fifth state to ban gay and trans panic defense strategies when the New York Assembly voted to enact State Assembly Bill A8375.[387] Governor Cuomo had a huge influence on the passage of this legislative ban, publicly urging the New York legislature to pass this legislation.[388]

384. NEV. REV. STAT. § 193.225(1) (2019).

385. *Id.* § 193.225(2).

386. *See* 12 R.I. GEN. LAWS § 12-17-18 (2018).

387. Assemb. 8375, 2019-2020 Reg. Sess. (N.Y. 2019); N.Y. PENAL LAW § 125.25 (2019).

388. *See NY Gov. Cuomo: Eliminate 'Gay Panic' Defense*, U.S. NEWS (June 2, 2019), https://www.usnews.com/news/best-states/new-york/articles/2019-06-02/ny-gov-cuomo-eliminate-gay-panic-defense [https://perma.cc/6BLK-VP86]; Denis Slattery, *Gov. Cuomo Makes Progressive Push for LGBTQ Bills Allowing Surrogacy and Ending "Gay Panic" Defense as End of Legislative Session Nears*, N.Y. DAILY NEWS (May 31, 2019), https://www.nydailynews.com/news/politics/ny-cuomo-progressive-lgbtq-surrogacy-gay-panic-20190531-vtjnii2y25by7ija5iskv5ajti-story.html [https://perma.cc/EDS5-8SWZ].

The bill had stalled for years prior to this point.[389]

New York follows the MPC's extreme mental or emotional disturbance approach to provocation. Under New York law, any defendant charged with murder in the second degree who acts under the influence of an extreme emotional disturbance for which there is a reasonable explanation or excuse may be convicted of the lesser offense of manslaughter.[390] The reasonableness of the defendant's explanation or excuse is "to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be."[391]

Assembly Bill 8375 amended Section 125.25 of the New York Penal Code by dividing Section 125.25(a) into two parts and adding a new Subsection (ii) to Subsection (a), providing:

> It shall not be a "reasonable explanation or excuse" pursuant to subparagraph (i) of this paragraph when the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth[.][392]

In passing this legislation, New York follows the language of the preceding bans, focusing on whether the defendant's claim of extreme emotional disturbance stemmed from the discovery, knowledge, or disclosure of the victim's sexual orientation, gender identity, or sex assigned at birth. Notable is the absence of the "[n]othing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation" language found in California's legislation.[393] This is probably due to the fact that the extreme emotional disturbance defense utilizes a subjective standard of reasonableness, whereas the modern test for provocation requires a showing that the defendant was actually provoked and the reasonable person in the defendant's shoes would have been provoked as well.

6. Hawaii (2019)

On June 21, 2019, Hawaii enacted a ban on the gay and trans panic defenses. Like New York, Hawaii follows the MPC's approach to provocation, allowing defendants charged with either murder or attempted murder to assert as an affirmative defense that at the time of the crime, the defendant was "under the influence of an extreme mental or emotional disturbance for which there is a reasonable

389. *See* Dan M. Clark, *Deal Is Reached to End 'Gay Panic' Defense in NY, Cuomo Says*, N.Y. L.J. ONLINE (June 17, 2019), https://www.law.com/newyorklawjournal/2019/06/17/deal-is-reached-to-end-gay-panic-defense-in-ny-cuomo-says/?slreturn=20190815182031 [https://perma.cc/H4SG-VYW2].

390. N.Y. PENAL LAW §§ 125.20(2), 125.25(1)(a)(i) (2019).

391. N.Y. PENAL LAW § 125.25(1)(a)(i).

392. N.Y. PENAL LAW § 125.25(1)(a)(ii). Assembly Bill 8375 also amended Sections 125.26 and 125.27 of the New York Penal Code by adding the same language to these provisions. N.Y. PENAL LAW §§ 125.26(3)(a)(ii), 125.27(2)(a)(ii) (2019).

393. CAL. PENAL CODE § 192(f)(1) (2019).

explanation."[394] As in most jurisdictions that follow the MPC approach to provocation, Hawaii provides that "[t]he reasonableness of the explanation shall be determined from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be[.]"[395]

House Bill 711 added the following language to Hawaii's extreme mental or emotional disturbance defense:

> [A]n explanation that is not otherwise reasonable shall not be determined to be reasonable because of the defendant's discovery, defendant's knowledge, or the disclosure of the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the other person made an unwanted nonforcible romantic or sexual advance toward the defendant, or in which the defendant and the other person dated or had a romantic relationship. If the defendant's explanation includes the discovery, knowledge, or disclosure of the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation, the court shall instruct the jury to disregard biases or prejudices regarding the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation in reaching a verdict.[396]

In prohibiting the defendant from arguing that the discovery, knowledge, or disclosure of the victim's gender, gender identity, gender expression, or sexual orientation constitutes a reasonable explanation, the Hawaii legislation tracks the language used in California, Rhode Island, Nevada, and New York. Hawaii, however, goes further than these states in requiring the judge to instruct the jury to disregard biases or prejudices regarding the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation in reaching a verdict if the defendant's explanation for his extreme mental or emotional disturbance includes the discovery, knowledge or disclosure of any of the above.[397]

7. Connecticut (2019)

Also on June 21, 2019, Connecticut enacted its own legislation banning gay and trans panic defenses. New Section 53a-13(b)(2) provides:

> No defendant may claim as a defense under this section that such mental disease or defect was based *solely* on the discovery of, knowledge about or potential disclosure of the victim's actual or perceived sex, sexual orientation or gender identity or expression, including under circumstances in which the victim made an unwanted, nonforcible, romantic or sexual advance toward the defendant, or if the defendant and victim had dated or had a romantic relationship.[398]

394. HAW. REV. STAT. § 707-702(2) (2019).
395. *Id.*
396. *Id.*
397. *Id.*
398. *See* CONN. GEN. STAT. § 53a-13(b)(2) (2019) (emphasis added).

Section 53a-16 now includes the following language:

> Justification as a defense does not include provocation that resulted *solely* from the discovery of, knowledge about or potential disclosure of the victim's actual or perceived sex, sexual orientation or gender identity or expression, including under circumstances in which the victim made an unwanted, nonforcible, romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.[399]

New Section 53a-18(b) provides:

> No person is justified in using force upon another person which would otherwise constitute an offense based *solely* on the discovery of, knowledge about or potential disclosure of the victim's actual or perceived sex, sexual orientation or gender identity or expression, including under circumstances in which the victim made an unwanted, nonforcible, romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.[400]

In prohibiting defendants from relying on "the discovery of, knowledge about or potential disclosure of the victim's actual or perceived sex, sexual orientation or gender identity or expression"[401] as the basis for a mental defect defense, provocation, or self-defense, Connecticut follows the other states that have passed legislative bans on gay and trans panic. Connecticut follows Rhode Island in extending the ban beyond the defense of provocation to mental disease or defect defenses and the defense of self-defense.[402] Connecticut also follows Rhode Island in including the word "solely" in each provision.[403] This means that a defendant may argue provocation, mental disease or defect, or self-defense even if the discovery of the victim's gender identity or sexual orientation was part of what motivated him as long as he can point to something else that provoked him, caused his mental disease or defect, or caused him to use physical force against the victim.

8. Maine (2019)

On June 21, 2019, Maine enacted a ban on gay and trans panic defenses, amending its insanity statute to include the following language:

> An actor does not suffer from an abnormal condition of the mind based *solely* on the discovery of, knowledge about or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression or sexual orientation, including under circumstances in which the victim made an unwanted

399. CONN. GEN. STAT. § 53a-16 (2019) (emphasis added).
400. CONN. GEN. STAT. § 53a-18(b) (2019) (emphasis added).
401. *Id.*
402. *See* CONN. GEN. STAT. § 53a-13.
403. *See* CONN. GEN. STAT. §§ 53a-13(b)(2), 53a-16, 53a-18(b).

> nonforcible romantic or sexual advance toward the actor or in which the actor and victim dated or had a romantic or sexual relationship.[404]

Maine also enacted the following as Section 17-A MRSA §108(3):

> A person is not justified in using force against another based *solely* on the discovery of common knowledge about or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the person or in which the person and victim dated or had a romantic or sexual relationship.[405]

Additionally, Maine amended its provocation statute to include the following language:

> For purposes of determining whether extreme anger or extreme fear was brought about by adequate provocation, the prosecution was not adequate if it resulted *solely* from the discovery of, knowledge about or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression or sexual orientation, including under circumstances in which the victim made an unwanted non-forcible romantic or sexual advance toward the person or in which the person and victim dated or had a romantic or sexual relationship.[406]

In disallowing defendants from arguing that "the discovery of, knowledge about or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression or sexual orientation" constitutes adequate provocation, Maine follows the other states with legislative bans on the gay and trans panic defense.[407] Like Rhode Island and Connecticut, Maine's ban extends to defendants asserting a mental defect defense or self-defense.[408] Maine also follows Rhode Island and Connecticut in using the word "solely" in its ban, which means that a defendant may still make a gay or trans panic argument as long as it is not the sole basis for his claim of provocation, mental defect, or self-defense.[409]

9. New Jersey (2020)

In January 2020, New Jersey became the ninth state to pass legislation banning the gay and trans panic defenses.[410] This legislation added the following provision to N.J.S. 2C:11-4:

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404. ME. REV. STAT. tit. 17-A, § 38 (2019) (emphasis added).
405. ME. REV. STAT. tit. 17-A, § 108(3) (2019) (emphasis added).
406. ME. REV. STAT. tit. 17-A, § 201(4) (2019) (emphasis added).
407. *Id.* §§ 38, 108, 201.
408. *Id.* §§ 38, 201.
409. *Id.* §§ 38, 108, 201.
410. *See* Cassandra Maas, *New Jersey Passes Law Banning 'Gay Panic' Murder Defense*, JURIST (Jan. 21, 2020), https://www.jurist.org/news/2020/01/new-jersey-passes-law-banning-gay-panic-murder-defense/# [https://perma.cc/XP4T-UUDT]. The bill was signed into law on January 21, 2020. *See* Tim Fitzsimons. *N.J. Bans Gay and*

> The discovery of, knowledge about, or potential disclosure of the homicide victim's actual or perceived gender identity or expression, or affectional or sexual orientation, which occurred under any circumstances, including but not limited to circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the actor, or if the victim and actor dated or had a romantic or sexual relationship, shall not be reasonable provocation pursuant to this paragraph.[411]

The New Jersey legislation is similar to language in California's ban, except it does not provide, as California does, that "[n]othing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation."[412] Like California, New Jersey's ban is limited to the heat of passion/provocation defense and does not extend to diminished capacity and self-defense.

10. Washington (2020)

On February 26, 2020, lawmakers in the state of Washington passed "[a] measure prohibiting homicide defendants from claiming a defense based on panic over a victim's sexual orientation or gender identity[.]"[413] The following sections were added to chapters 9A.08 and 9A.16 RCW, respectively:

> Sec. 1. A defendant does not suffer from diminished capacity based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or in which the defendant and victim dated or had a romantic or sexual relationship.
>
> Sec. 2. A person is not justified in using force against another based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant, or in which the defendant and victim dated or had a romantic or sexual relationship.[414]

This bill was signed into law by Governor Jay Inslee on March 5, 2020.[415] In applying its ban to diminished capacity and self-defense (justified force),

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Transgender 'Panic Defenses', NBC NEWS (Jan. 22, 2020), https://www.nbcnews.com/feature/nbc-out/n-j-bans-gay-transgender-panic-defenses-n1120416 [https://perma.cc/9EWV-Y939].

411. N.J. REV. STAT. § 2C:11-4(b)(2) (2020).

412. CAL. PENAL CODE § 192(f)(1) (2019).

413. *Washington Passes Ban on Gay and Trans Panic Defenses for Homicide*, NBC NEWS (Feb. 28, 2020), https://www.nbcnews.com/feature/nbc-out/washington-passes-ban-gay-trans-panic-defenses-homicide-n1144931 [https://perma.cc/37DG-3V92].

414. Nikki Kuhnhausen Act, H.R. 1687, 66th Leg., Reg. Sess. (Wash. 2020) (effective June 11, 2020).

415. OFFICE OF SEC'Y OF STATE OF WASH., CERTIFICATION OF ENROLLMENT FOR ENGROSSED HOUSE BILL 1687 (2020).

Washington follows Rhode Island, Connecticut, and Maine. Strangely, the express language of the statute does not appear to apply to the defense of provocation.[416]

B. *Pending Legislation*

In addition to the legislative bans discussed above, bills proposing to ban gay and trans panic defenses have been introduced but not yet passed in Colorado,[417] the District of Columbia,[418] Georgia,[419] Iowa,[420] Maryland,[421] Massachusetts,[422] Minnesota,[423]New Mexico,[424] Pennsylvania,[425] Texas,[426] Wisconsin,[427] and the U.S. Congress[428] at least as of March 1, 2020.[429] A discussion of the ways in which two of these bills differ significantly from the already enacted bills, rather than a detailed analysis of each additional bill, is below.

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416. Section 2 of the bill bars a defendant from claiming he was justified in using force against the victim. The provocation defense, however, is usually considered a partial excuse, rather than a justification. *See supra* note 146.

417. H.R. 1307, 72nd Gen. Assemb., 2nd Reg. Sess. (Colo. 2020).

418. Legis. Summary, D.C. Council B22-0102, 22d Council, 2017–2018 Sess. (D.C. 2017).

419. H.R. 931, 2017–2018 Gen. Assemb., Reg. Sess. (Ga. 2018) (seeking to "amend Code Section 16-5-2 of the Official Code of Georgia Annotated, relating to voluntary manslaughter, so as to exclude the discovery or disclosure of an individual's sexual orientation or gender identity as being serious provocation in the context of voluntary manslaughter").

420. H.R. 693, 88th Gen. Assemb. (Iowa 2020).

421. H.R. 488, 2020 Gen. Assemb., 441st Sess. (Md. 2020); S. 554, 2020 Gen. Assemb., 441st Sess. (Md. 2020).

422. S. 870, 191st Gen. Court. (Mass. 2019) (proposing to add the following language to Section 13 of Chapter 265: "For the purposes of determining the presence of mitigating circumstances in the context of a homicide, the discovery of, knowledge about, or potential disclosure of an individual's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted non-forcible romantic or sexual advance towards the defendant, or the defendant dated or had a romantic or sexual relationship, shall not be considered reasonable provocation").

423. S. 233, 2017–2018 Leg., 90th Sess. (Minn. 2018) (attempting to amend Minnesota's provisions on self-defense, intoxication and manslaughter in the first-degree to provide, inter alia, that "[i]t is not a defense to a crime that the defendant acted based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived sexual orientation, including gender identity and expression").

424. S. 159, 54th Leg., Reg. Sess. (N.M. 2019).

425. S. 1244, 2017–2018 Gen. Assemb., Reg. Sess. (Pa. 2018) (attempting to amend the Pennsylvania criminal code to state that conduct sufficient to excite an intense passion in a reasonable person "does not include the discovery, knowledge or potential disclosure of a victim's actual or perceived gender identity or expression or sexual orientation").

426. H.R. 3281, 86th Leg., Reg. Sess. (Tex. 2019) (seeking to amend Chapter 10 of Title 2 of the Texas Penal Code to state, inter alia, that "[t]he use of force against another is not justified and an actor does not reasonably believe that the use of force is immediately necessary if the use of force occurs in response to: (1) the actor's discovery or knowledge of, or the victim's disclosure or potential disclosure of, the gender identity or sexual orientation of the victim; or (2) a nonviolent romantic or sexual advance made by the victim towards the actor").

427. Assemb. 436, 104th Leg., 2019–2020 Reg. Sess. (Wis. 2019); S. 393, 104th Leg., 2019–2020 Reg. Sess. (Wis. 2019).

428. The Gay and Trans Panic Defense Prohibition Act of 2018, H.R. 6358 & S. 3188, 115th Cong. (2018).

429. This should not be taken as an exhaustive list. There may be other pending bills not listed above.

1. Washington, DC (pending)

On February 7, 2017, D.C. Councilman David Grosso introduced legislation that would establish limits on defense arguments that seek to excuse violence on the basis of a victim's identity and require the giving of jury instructions on bias and prejudice upon the request of either the prosecution or defense.[430] Under the proposed legislation, initially entitled the "Secure a Fair and Equitable Trial Act of 2017," and reintroduced in September 2019 as the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act," Chapter 1 of Title 23 would be amended with the purpose of:

> curtail[ing] the availability and effectiveness of defenses that seek to partially or completely excuse crimes such as murder and assault on the grounds that the victim's sexual orientation, gender identity, or other inherent identity, is to blame for the defendant's violent action and to require an anti-bias jury instruction in criminal trials if requested by the prosecutor or the defendant.[431]

Two new sections, 23-115 and 23-116, would be added to the D.C. Code. Section 23-115, entitled "Limit on defenses that seek to excuse violence on the basis of a victim's identity," would provide that "[f]or any crime of violence, sufficient or adequate provocation for a defense premised on 'heat of passion' shall not exist if the defendant's actions are related to the discovery of, knowledge about, or the potential disclosure of" a number of characteristics or perceived characteristics of the victim.[432] The bill lists "gender identity or expression" and "sexual orientation" as two of these characteristics.[433]

Section 23-116 would also require the court, upon the request of either the defendant or the government in a criminal proceeding, to instruct the jury not to "let bias, sympathy, prejudice, or public opinion influence your decision."[434] "Bias" includes bias against "the victim or victims, witnesses, or defendant based upon his or her disability, sex, national origin, race, color, religion, gender identity or expression, or sexual orientation."[435]

The Grosso bill would go further than any of the existing bans by expanding the list of protected categories beyond sexual orientation, gender, gender identity, and gender expression to include disability, national origin, race, color, religion, and sex. One risk of expanding the list of protected categories as broadly as Grosso's bill does is that such extension may dilute the expressive power of the legislation.[436]

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430. Legis. Summary, D.C. Council B22-0102, 22d Council, 2017–2018 Sess. (D.C. 2017).
431. *Id.*
432. *Id.*
433. *Id.*
434. *Id.*
435. *Id.*
436. *See, e.g.*, Rob Kuznia, *In Hate Crimes, Defining "Victim"*, WASH. POST., Sept. 11, 2019, at A3 (noting that law professor Kami Chavis "says the continuing expansions [of who is protected under hate crime statutes] run the risk of diluting such statutes' original intention: to protect historically marginalized or persecuted groups").

A bill that specifically targets the use of gay and trans panic defense arguments sends a much clearer normative message that it is not okay to kill a gay man or a transgender woman and then use the victim's sexual orientation or gender identity to try to avoid liability for that killing.

In requiring D.C. courts to give an anti-bias jury instruction, the proposed legislation follows California[437] and Hawaii.[438] The Grosso bill would thus go further than several of the recently enacted laws, which do not mandate anti-bias jury instructions upon the request of either party.

In September 2019, D.C. Council Chair Phil Mendelson introduced another bill entitled, the "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019," which also attempts to ban gay and trans panic arguments.[439] Under Mendelson's bill, criminal defendants charged with homicide would be barred from claiming they acted in a heat of passion, in self-defense, or as a result of reduced mental capacity based upon the discovery that the victim was gay or transgender.[440] More specifically, subsection (a) of the legislation would provide:

> For a crime of violence, adequate provocation for a defense premised on "heat of passion" shall not exist if the defendant's actions are related to the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender identity or expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.[441]

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437. While the legislation passed by the California legislature in 2014 does not include a provision mandating anti-bias jury instructions, California passed anti-bias jury legislation in 2006 when it enacted the Gwen Araujo Justice for Victims Act. That Act provides:

> (d) It is against public policy for juries to render decisions tainted by bias based upon the victim's actual or perceived disability, gender, nationality, race or ethnicity, religion or sexual orientation, or his or her association with a person or group with one or more of these characteristics.
> (e) "Panic strategies" are those strategies that try to explain a defendant's actions or emotional reactions based upon the knowledge or discovery of the fact that the victim possesses one or more of the characteristics listed above or associates with a person or group with one or more of these characteristics.
> (f) The Legislature is concerned about the use of societal bias in criminal proceedings and the susceptibility of juries to such bias. The use of so-called "panic strategies" by defendants in criminal trials opens the door for bias against victims based on one or more of the characteristics listed above or an association with a person or group with one or more of those characteristics.
> (g) It is against public policy for a defendant to be acquitted of a charged offense or convicted of a lesser included offense based upon an appeal to the societal bias that may be possessed by members of a jury.

Gwen Araujo Justice for Victims Act, CAL. PENAL CODE § 1127h (2014).

438. HAW. REV. STAT. § 707-702 (2019).

439. Matt Baume, *D.C. Moves to Ban 'Gay Panic' Defense Legal in 42 States*, OUT (Sept. 18, 2019), https://www.out.com/news/2019/9/18/DC-Moves-Ban-Gay-Panic-Defense-Legal-States [https://perma.cc/LA8L-WPFD].

440. *Id.*

441. Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019, D.C. Council B23-0409, 23d Council (D.C. 2019).

Subsection (b) would provide:

> A defendant does not suffer from reduced mental capacity based solely on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender identity or expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.[442]

Subsection (c) would provide:

> A person is not justified in using force against another based solely on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender identity or expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.[443]

The Mendelson bill follows Rhode Island, Connecticut, and Maine in barring defendants from claiming that the discovery that the victim was gay or a transgender individual either provoked them into a heat of passion, caused them some mental incapacity, or somehow justified their use of force in self-defense. Like the existing bans, it focuses specifically on prohibiting defendants from arguing that the discovery of the victim's sexual orientation or gender identity was what provoked the defendant into a heat of passion, caused mental incapacity, or justified their use of force in self-defense.

2. U.S. Congress (pending)

In July 2018, Senator Edward Markey (D-MA) and Representative Joe Kennedy (D-MA) introduced the Gay and Trans Panic Defense Prohibition Act of 2018.[444] This legislation would amend Chapter 1 or title 18 of the United States Code, Section 28, by adding the following provisions to the end of the chapter:

> (a) Prohibition. No nonviolent sexual advance or perception or belief, even if inaccurate, of the gender, gender identity or expression, or sexual orientation of an individual may be used to excuse or justify the conduct of an individual or mitigate the severity of an offense.
>
> (b) Past Trauma. Notwithstanding the prohibition in subsection (a), a court may admit evidence, in accordance with the Federal Rules of Evidence, of prior trauma to the defendant for the purpose of excusing or justifying the conduct of the defendant or mitigating the severity of an offense.[445]

442. *Id.*
443. *Id.*
444. The Gay and Trans Panic Defense Prohibition Act of 2018, H.R. 6358 & S. 3188, 115th Cong. (2018).
445. *Id.*

The proposed federal legislation is well-intentioned. At first glance, it even seems progressive in using the sexual orientation-neutral term "sexual" rather than "homosexual" in referring to a "nonviolent sexual advance."[446] In providing that "[n]o nonviolent sexual advance . . . may be used to excuse or justify the conduct of an individual or mitigate the severity of an offense,"[447] however, the federal legislation could have several unintended consequences. For example, it would prohibit a female defendant from arguing that she was provoked into a heat of passion by a man groping her breasts or pinching her buttocks because the man's "non-violent"[448] sexual advance could not be used to excuse the female defendant's conduct or mitigate a murder charge to voluntary manslaughter.

The federal legislation would also prohibit some male defendants from arguing provocation in cases in which many of us would probably want to allow the defendant to argue provocation. Think about the male teenager who was allegedly groped by actor Kevin Spacey at a bar where the teenager worked as a busboy in 2016.[449] Imagine that the teenager had reacted differently. Instead of trying to shift his body and move Spacey's hands away,[450] let's say our hypothetical teenage boy had grabbed a sharp knife from the counter and flailed about, trying to stab Spacey to try to avoid the unwanted groping. Imagine further that upon being stabbed in the arm, Spacey fell back, hit his head on the sharp bar counter, and died. Imagine further that this incident occurred at a restaurant bar in a national park, so the federal government had jurisdiction over the case. If our hypothetical teenage boy

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446. *Id.*

447. *Id.*

448. Even though the average layperson might think that having one's breasts groped or buttocks pinched constitutes a "violent" sexual advance, the law generally views such actions as "non-violent." *See*, *e.g.*, United States v. Watts, 798 F.3d 650, 652 (7th Cir. 2015) (describing "groping" a woman or child as "sexually offensive but not violent physical contact"); United States v. Bayes, 210 F.3d 64, 69 (1st Cir. 2000) (noting that "defendant groped a minor in a nonviolent but sexually offensive manner").

449. For details about the actual case, see *Man Sues Kevin Spacey Over Alleged Groping Incident at Nantucket Bar*, CBS NEWS (June 27, 2019), https://www.cbsnews.com/news/kevin-spacey-nantucket-trial-man-sues-over-alleged-groping-club-car-nantucket-bar-2019-06-27 [https://perma.cc/QBH6-8AB7]. In July 2019, prosecutors dismissed the criminal charges they had filed against Spacey after his accuser refused to testify about a missing cellphone that Spacey's lawyers claimed had evidence supporting the actor's claim of innocence. *See Kevin Spacey: Prosecutors Drop Case Accusing Actor of Groping Teen*, GUARDIAN (July 17, 2019), https://www.theguardian.com/culture/2019/jul/17/kevin-spacey-charges-dropped-sexual-assault-case-groping-teen-nantucket [https://perma.cc/B9DE-RS72] (noting that the two time Oscar winner was charged with battery and indecent assault in 2018 after a young man alleged that in 2016, when he was a teenager working as a busboy at a bar in Nantucket, Spacey bought him several drinks after his shift and tried to persuade him to come home with him before unzipping the young man's pants and groping him for about three minutes); Joey Garrison & Maria Puente, *Judge: Kevin Spacey Groping Case 'May Well Be Dismissed' As Accuser Pleads the 5th*, USA TODAY (July 8, 2019), https://www.usatoday.com/story/entertainment/celebrities/2019/07/08/kevin-spacey-accuser-appears-groping-hearing-his-missing-cellphone/1671779001 [https://perma.cc/LM2L-9VVG].

450. *See* Phil Helsel, *Man Who Accused Kevin Spacey of Sexual Assault May Have Filmed Alleged Groping*, NBC NEWS (Dec. 26, 2018), https://www.nbcnews.com/pop-culture/pop-culture-news/alleged-victim-kevin-spacey-sexual-assault-may-have-filmed-groping-n952176 [https://perma.cc/KTC5-9JPK] (noting that "police documents say the alleged victim 'tried to shift away with his body' and move Spacey's hands away, 'but Spacey kept reaching down his pants'").

were to be charged with murder in federal court with legislation like the proposed federal legislation, he would be prohibited from using the fact that Spacey had tried to grope him to try to mitigate the charge from murder to manslaughter.[451]

Although reasonable minds might disagree about whether our hypothetical teenage boy reacted reasonably, most of us would agree that he should at least be permitted to make the argument that he was reasonably provoked into a heat of passion. The federal legislation, however, would bar him from even posing such an argument because a nonviolent sexual advance cannot be used to excuse or justify the conduct of a defendant or mitigate the severity of an offense.

The focus should be on prohibiting defendants from trying to excuse or justify their behavior by claiming that discovery of the sexual orientation or gender identity of the victim caused them to behave violently, as is the case with the existing bans.[452] Instead, the proposed federal legislation bars defendants from arguing that a nonviolent sexual advance provoked the defendant into a heat of passion. While the existing bans include qualifying language such as "including under circumstances in which the victim made an unwanted non-forcible romantic or sexual advance toward the defendant,"[453] these bans focus—as they should—on whether the defendant is claiming that his discovery or knowledge about the victim's identity as a transgender person or a gay individual was what provoked him. If the federal legislation were to delete the words "non-violent sexual advance or" and simply state, "No perception or belief, even if inaccurate, of the gender, gender identity or expression, or sexual orientation of an individual may be used to excuse

451. A layperson might wonder whether our hypothetical teenager would have a legitimate claim of self-defense. A court would probably answer this question in the negative if it found that the teen used deadly force in response to nondeadly force. *See Force*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "deadly force" as "violent action known to create a substantial risk of causing death or serious bodily harm"); 2 SUBST. CRIM. L. § 10.4(a) (3d ed. 2018) (defining "deadly force" as force "which its user uses with the intent to cause death or serious bodily injury to another or . . . which he knows creates a substantial risk of death or serious bodily injury to the other"); MODEL PENAL CODE § 3.11 (2018) (defining "deadly force" as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury"). The defendant may use deadly force only if he honestly and reasonably believed he was being threatened with deadly force. *See* 2 SUBST. CRIM. L. § 10.4(b) (3d ed. 2018) (stating that self-defense doctrine "recognizes that the amount of force which [one] may justifiably use must be reasonably related to the threatened harm which [one] seeks to avoid," and explaining that a person may only use deadly force "if he reasonably believes that the other is about to inflict unlawful death or serious bodily harm upon him"); 2 WHARTON'S CRIMINAL LAW § 127 (15th ed. 2019) ("A defendant may kill in self-defense when he reasonably believes that he is in imminent danger of losing his life or suffering great bodily harm."); Aya Gruber, *Leniency as a Miscarriage of Race and Gender Justice*, 76 ALB. L. REV. 1571, 1596 (2013) (noting that self-defense usually "allows the defendant to use deadly force upon reasonable fear of imminent death, serious bodily injury, or a violent felony"); *see also* Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 5 (1999) (describing the idea that "the force used must be proportional to the harm threatened" as a "basic principle of self-defense"). Even if the teen in this hypothetical case could assert a claim of self-defense, he might want to argue provocation in the alternative in case the jury rejects his self-defense claim.

452. *See supra* text accompanying notes 355–416.

453. *See supra* text accompanying notes 356 (California), 380–381 (Rhode Island), 383–86 (Nevada), 394 (Hawaii), 398–403 (Connecticut), 404–09 (Maine), 410 (New Jersey), 413 (Washington).

or justify the conduct of an individual or mitigate the severity of an offense," it would better limit a defendant's ability to use the discovery of or knowledge about victim's sexual orientation or gender identity to excuse violent conduct.

C. *Model Legislation*

If a legislature wants to enact legislation curtailing the use of gay and trans panic defense strategies, it has many good examples to follow. Borrowing language from the existing legislative bans, I propose the following model legislation:

> 1. For the purpose of determining the legal adequacy of an alleged provocation by a defendant charged with a criminal homicide, the alleged provocation or heat of passion shall be deemed not objectively reasonable and not legally adequate if based upon the discovery of, knowledge about, or potential disclosure of the actual or perceived sexual orientation or gender identity or expression of the victim. Nothing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation.
> 2. The discovery of, knowledge about, or potential disclosure of the actual or perceived sexual orientation or gender identity or expression of the victim may not be used to support a claim that the defendant was suffering from insanity, temporary or otherwise, or diminished capacity.
> 3. A person is not justified in using physical force against another person based solely upon the discovery of, knowledge about, or potential disclosure of the actual or perceived sexual orientation or gender identity or expression of the victim.[454]

I do not claim to be inventing completely new language with this model legislation. Rather, the model legislation takes the best from each of the existing bans and eliminates the unnecessary or unhelpful. No state has adopted the precise language in this model legislation. In this respect, the model legislation adds value to the existing landscape.

Like most of the existing bans, Section 1 of the model legislation provides that the discovery of or knowledge about the actual or perceived sexual orientation or gender identity or expression of the victim does not constitute legally adequate provocation. It thus would bar most defendants claiming gay panic or trans panic from satisfying the requirements necessary to mitigate a murder charge down to voluntary manslaughter through the provocation defense.

Moreover, like the legislative bans in Rhode Island, Connecticut, and Maine, the model legislation would apply not just to claims of provocation, but also to mental incapacity defenses like temporary insanity and diminished capacity and claims of

454. I include the word "solely" in the third subsection because I think a defendant should be allowed to argue self-defense if the victim did something to make the defendant reasonably believe it was necessary to use deadly force to protect against an imminent threat of death or serious bodily injury.

self-defense. Sections 2 and 3 make clear that the discovery of or knowledge about another person's actual or perceived sexual orientation or gender identity or expression cannot be the basis for a claim of insanity, diminished capacity, or self-defense.

Unlike most of the existing legislative bans, the model legislation does not have the "including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship" language for two reasons. First, this language is unnecessary. The model legislation, like the existing bans, precludes the defendant from arguing that the discovery, knowledge, or disclosure that the victim was gay or transgender constitutes legally adequate provocation. In other words, a defendant cannot base his provocation argument on the discovery of, knowledge about, or disclosure of the victim's sexual orientation or transgender identity. It is not necessary that the defendant learned of the victim's status as a gay male or transgender female through an unwanted sexual advance. It is also not necessary that the defendant and the victim dated or had a romantic or sexual relationship. The discovery of or knowledge about the victim's status as a sexual minority is just not legally adequate provocation.

Second, the "including under circumstances" language suggests that a defendant would be precluded from arguing that an unwanted nonviolent sexual advance provoked him into a heat of passion when this is not actually the case. None of the existing legislative bans preclude defendants from arguing they were reasonably provoked into a heat of passion by a nonviolent sexual advance by the victim. The only thing the existing bans preclude is the argument that the discovery of, knowledge about, or potential disclosure of the victim's sexual orientation or gender identity or expression constituted objectively reasonable or legally adequate provocation.

As is the case with all of the existing bans, a defendant who is able to show that he was provoked not by the discovery of or knowledge about the victim's heterosexual orientation or transgender identity, but by something the victim said or did, would be allowed to assert the provocation defense. Section 1 of the model legislation, however, would go further than several of the existing bans. It purposely does not include the word "solely" before "based upon the discovery of, knowledge about, or potential disclosure of the actual or perceived sexual orientation or gender identity or expression of the victim" to preclude the defendant from arguing he was provoked both by the discovery that the victim's gender identity did not match her biological sex *and* by something else the victim said or did. If even part of the defendant's argument is that the discovery that the victim was a transgender woman provoked him, the model legislation would bar him from asserting a provocation defense. If the word "solely" were inserted after the word "if" and before the words "based upon" in Section 1, this would allow a defendant to come up with some other reason besides the discovery that his victim was a trans woman in order to escape the legislative ban. By including the word "solely" in their bans, Rhode

Island, Connecticut, and Maine provide weaker protection to gay and transgender victims than the model legislation.[455]

The model legislation, however, does include the word "solely" in Section 3, providing that "[a] person is not justified in using physical force against another person based solely upon the discovery of, knowledge about, or potential disclosure of the actual or perceived sexual orientation or gender identity or expression of the victim." If the victim did something to make the defendant reasonably believe it was necessary to use deadly force to protect against an imminent threat of death or serious bodily injury, the defendant should be allowed to argue self-defense. Under such circumstances, the model legislation would allow the defendant to assert a claim of self-defense even if the defendant were also to claim that the discovery of or knowledge about the victim's sexual orientation or transgender status somehow also supported his claim of self-defense.

CONCLUSION

Violence against the transgender community is a serious problem today. When a man kills a transgender woman and claims that his discovery that the victim was biologically male was so upsetting to him that it provoked him into a heat of passion, his trans panic argument should be rejected. Educating the jury about the stereotypes that make a trans panic argument persuasive is a necessary first step towards encouraging the jury to reject the trans panic defense, but education alone is not sufficient. A legislative ban on the trans panic defense is a better way to ensure that jurors reject the argument that it is objectively reasonable for a man who discovers that his romantic interest is a transgender woman to respond with physical violence.

455. Section 2 of the model legislation, which covers mental defect defenses, also omits the word "solely," whereas Rhode Island, Connecticut, and Maine include the word "solely" in their sections on mental defect defenses. Rhode Island, for example, provides that "[a] defendant does not suffer from reduced mental capacity based *solely* on the discovery of, or knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation[.]" 12 R.I. GEN. LAWS § 12-17-18 (2019) (emphasis added). Similarly, Connecticut provides, "No defendant may claim as a defense under this section that such mental disease or defect was based *solely* on the discovery of, knowledge about or potential disclosure of the victim's actual or perceived sex, sexual orientation or gender identity or expression[.]" CONN. GEN. STAT. § 53a-13(b)(2) (2019) (emphasis added). Maine, too, provides, "An actor does not suffer from an abnormal condition of the mind based *solely* on the discovery of, knowledge about or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression or sexual orientation[.]" ME. STAT. tit. 17-A, § 38 (2019) (emphasis added). The model legislation omits the word "solely" in Section 2 for the same reason it omits the word "solely" in Section 1. This omission precludes a defendant from coming up with some other reason to explain his mental disease or defect and thus being able to also use the discovery that the victim was a trans woman or gay man to support his mental defect defense.

APPENDIX

State	Portion of Hate Crime Statute Relating to Gender Identity	Statutory Provision
California[456]	defining a hate crime as one "committed, in whole or in part, because of one or more of the following actual *or perceived* characteristics of the victim: (1) Disability, (2) *Gender*, (3) Nationality, (4) Race or ethnicity, (5) Religion, (6) Sexual orientation, (7) Association with a person or group with one or more of these actual or perceived characteristics." (emphasis added)	CAL. PENAL CODE § 422.55(a) (2019)
Colorado	defining bias motivated crimes as those in which the defendant acts "with the intent to intimidate or harass another person because of that person's actual or perceived race, color, religion, ancestry, national origin, physical or mental disability, or sexual orientation" and defining "sexual orientation" as "a person's actual or perceived orientation toward heterosexuality, homosexuality, bisexuality, *or transgender status*." (emphasis added)	COLO. REV. STAT. §§ 18-9-121(2) & (5)(b) (2019)
Connecticut	providing that "[i]t shall be a discriminatory practice in violation of this section for any person to subject . . . any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this State or of the United States, on account of religion, national origin, alienage, color, race, sex, *gender identity or expression*, sexual orientation, blindness, mental disability, physical disability or status as a veteran." (emphasis added)	CONN. GEN. STAT. § 46a-58(a) (2019)

456. California defines gender as "sex, [which] includes a person's gender identity and gender expression. 'Gender expression' means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." CAL. PENAL CODE § 422.56(c) (2019).

Continued

State	Portion of Hate Crime Statute Relating to Gender Identity	Statutory Provision
Delaware	providing for enhanced penalties when a defendant intentionally "[s]elects the victim because of the victim's race, religion, color, disability, sexual orientation, *gender identity*, national origin or ancestry." (emphasis added)	DEL. CODE ANN. tit. 11 § 1304 (a)(2) (2019)
District of Columbia	noting that a "'[b]ias-related crime' means a designated act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, *gender identity or expression*, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim." (emphasis added)	D.C. CODE § 22-3701 (1) (2019)
Hawaii	defining a hate crime as "any criminal act in which the perpetrator intentionally selected a victim, or in the case of a property crime, the property that was the object of a crime, because of hostility toward the actual or perceived race, religion, disability, ethnicity, national origin, *gender identity or expression*, or sexual orientation of any person." (emphasis added)	HAW. REV. STAT. § 846-51 (2019)
Illinois[457]	providing that a person commits a hate crime if "by reason of the actual *or perceived* race, color, creed, religion, ancestry, *gender*, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals . . . he or she commits assault, battery, intimidation, stalking." (emphasis added)	720 ILL. COMP. STAT. § 5/12-7.1(a) (2019)

457. While Illinois does not explicitly state that the words "perceived . . . gender" in its hate crime statute would protect transgender individuals, there is case law in Illinois that could be used to support such an interpretation. *See In re* B.C., 680 N.E.2d 1355, 1360–61 (Ill. 1997) (applying the hate crime enhancement in a case where the victim was not an African American or perceived by the defendant to be an African American on the ground that the "primary focus of the [hate crime] statute was intended to be directed towards the biased motivation of the perpetrator, rather than towards the status of the victim" and "the victim of a hate crime need not be a member of one of the statute's enumerated classes providing reason for the offense").

Continued

State	Portion of Hate Crime Statute Relating to Gender Identity	Statutory Provision
Louisiana[458]	making it unlawful to "select the victim of [certain] offenses against person and property because of actual or *perceived* race, age, *gender*, religion, color, creed, disability, sexual orientation, national origin, or ancestry of that person." (emphasis added)	LA. REV. STAT. ANN. § 14:107.2(A) (2019)
Maryland	including in its hate crime statute "sexual orientation" defined as "the identification of an individual as to male or female homosexuality, heterosexuality, bisexuality, or *gender-related identity*." (emphasis added)	MD. CODE ANN., CRIM. LAW § 10-301 (c) (2019)
Massachusetts	making it a crime to "commi[t] an assault or a battery upon a person or damage[] the real or personal property of a person with the intent to intimidate such person because of such person's race, color, religion, national origin, sexual orientation, *gender identity*, or disability." (emphasis added)	MASS. GEN. LAWS ch. 265 § 39 (2019)

458. Louisiana does not state that the words "perceived . . . gender" in its hate crime statute provides protection to transgender individuals who are perceived by their assailants to be of a different sex than their chosen gender identity, and it does not appear that there are any Louisiana cases interpreting this language to date. The question whether the Louisiana hate crime statute covers transgender individuals became pertinent in March 2017, when two transgender women, Chyna Gibson and Ciara McElveen, were killed in apparently unrelated incidents within a three-day period in New Orleans. Initially, the police suggested that if the women were killed because of their transgender identity, they would proceed as if these homicides were hate crimes. *See* Julia O'Donoghue, *Do Louisiana Hate Crime Laws Cover Transgender People?*, NOLA.COM (Mar. 4, 2017), https://www.nola.com/news/politics/article_23b5ab06-ff2c-5146-bbf3-383f5f86fc96.html [https://perma.cc/R6J8-X6VU]. Upon further investigation, however, police were unable to find evidence that the women were targeted because of their status as transgender women. Emily Lane, *In Recent Murders of Transgender Women, No Evidence of Hate Crimes: NOPD*, NOLA.COM (Mar. 2, 2017), https://www.nola.com/news/crime_police/article_1ba2d3d9-a9a2-5f1b-b82f-01f4e398c756.html [https://perma.cc/M69P-VF39]. It thus remains an open question whether Louisiana's hate crime statute covers transgender victims.

Continued

State	Portion of Hate Crime Statute Relating to Gender Identity	Statutory Provision
Minnesota[459]	providing that "[w]hoever assaults another because of the victim's . . . actual or *perceived* race, color, religion, *sex*, sexual orientation, disability. . ., age, or national origin may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000 or both." (emphasis added)	MINN. STAT. § 609.2231(4)(a) (2019)
Mississippi[460]	providing that "[i]n order to impose an enhanced penalty under the provisions of Sections 99-19-301 through 99-19-307, the jury must find beyond a reasonable doubt: (a) That the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated; and (b) That the defendant maliciously and with specific intent committed the offense because the victim was within the class delineated" and "(3) That the victim was within the class delineated means that the reason the underlying crime was committed was the victim's actual or *perceived* race, color, religion, ethnicity, ancestry, national origin or *gender*." (emphasis added)	MISS. CODE ANN. §§ 99-19-305(2), (3) (2019)

459. The Human Rights Campaign has argued that Minnesota's hate crime statute covers transgender individuals, pointing to language in another part of the Code. *See Minnesota Hate Crimes Law*, HUMAN RIGHTS CAMPAIGN, https://web.archive.org/web/20110524081415/http://www.hrc.org/1068.htm [https://perma.cc/EZX9-BYYW]; *see also* MINN. STAT. ANN. § 363A.03(44) (2019) (defining "sexual orientation" as including, "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness").

460. It is unclear whether Mississippi's hate crime statute covers transgender individuals. Arguably the inclusion of "perceived . . . gender" means the statute provides protection for transgender individuals who are perceived by the defendant to be a different sex or gender than their chosen gender identity, but in February 2019, Mississippi lawmakers introduced Senate Bill 2163, which sought to add "sexual orientation, *gender identity*, or disability" to Section 99-19-305, Mississippi's hate crime statute. *See* S.B. 2163, 2019 Leg., Reg. Sess. (Miss. 2019). This bill died in committee, suggesting that lawmakers did not intend to protect gays and lesbians, transgender individuals, or disabled individuals in its hate crime statute.

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State	Portion of Hate Crime Statute Relating to Gender Identity	Statutory Provision
Nevada	providing enhanced penalties for certain crimes committed "because the actual or perceived race, color, religion, national origin, physical or mental disability, sexual orientation or *gender identity or expression* of the victim was different from that characteristic of the perpetrator." (emphasis added)	NEV. REV. STAT. § 193.1675(1) (2019)
New Hampshire	expanding the law against discrimination based on gender identity to crimes where the defendant "[w]as substantially motivated to commit the crime because of hostility towards the victim's religion, race, creed, sexual orientation as defined in RSA 21:49, national origin, sex, *or gender identity* as defined in RSA 21:53." (emphasis added)	N.H. REV. STAT. ANN. § 651:6(I)(f) (2019)
New Jersey	providing that "[a] person is guilty of the crime of bias intimidation if he commits, attempts to commit, conspires with another to commit, or threatens the immediate commission of an offense specified in chapters 11 through 18 of Title 2C of the New Jersey statutes . . . (1) with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, *gender identity or expression*, national origin, or ethnicity." (emphasis added)	N.J. REV. STAT. § 2C:16-1(a) (2019)
New Mexico	providing enhanced penalties for crimes committed "because of the victim's actual or perceived race, religion, color, national origin, ancestry, age, disability, gender, sexual orientation or *gender identity*." (emphasis added)	N.M. STAT. ANN. § 31-18B-3 (2019)
New York	defining a hate crime as the commission of certain crimes when the defendant "intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, *gender identity or expression*, religion, religious practice, age, disability or	N.Y. PENAL LAW § 485.05(1)(a) (2019)

Continued

State	Portion of Hate Crime Statute Relating to Gender Identity	Statutory Provision
	sexual orientation of a person, regardless of whether the belief or perception is correct." (emphasis added)	
Oregon	providing that "[a] person commits a bias crime in the second-degree if the person . . . (b) intentionally subjects another person to offensive physical contact because of the person's perception of the other person's race, color, religion, *gender identity*, sexual orientation, disability or national origin." (emphasis added)	OR. REV. STAT. § 166.155(1)(b) (2019)
Rhode Island[461]	providing for enhanced penalties when a defendant "intentionally selected the person against whom the offense is committed . . . because of the actor's hatred or animus toward the actual *or perceived* disability, religion, color, race, national origin or ancestry, sexual orientation, or *gender* of that person." (emphasis added)	12 R.I. GEN. LAWS § 12-19-38(a) (2019)

461. It is unclear whether Rhode Island's use of "perceived . . . gender" language in its hate crime statute protects transgender individuals. In 2012, the Rhode Island governor signed the Transgender Hate Crimes Monitoring Bill into law, which defines a "hate crime" as "any crime motivated by bigotry and bias, including, but not limited to threatened, attempted, or completed acts that appear after investigation to have been motivated by . . . sexual orientation, gender, [or] *gender identity or expression*[.]" 42 R.I. GEN. LAWS § 42-28-46 (2019) (emphasis added). Under another provision:

> "Gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender- related self image, gender-related appearance, or gender-related expression, whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.

11 R.I. GEN. LAWS ANN. § 11-24-2.1(i) (2009). Section 42-28-46 does not enhance penalties for those who commit hate crimes, but imposes on police additional monitoring and reporting requirements for incident reports involving hate crimes. *See id.* § 42-28-46. Until Rhode Island revises its hate crime statute to include "gender identity or expression" language, defendants can argue that the hate crime statute does not protect transgender individuals since the Rhode Island legislature could have but did not explicitly provide such protection for transgender individuals as it did in its Transgender Hate Crimes Monitoring Bill.

Continued

State	Portion of Hate Crime Statute Relating to Gender Identity	Statutory Provision
Tennessee[462]	providing enhanced penalties if "[t]he defendant intentionally selected the person against whom the crime was committed . . . in whole or in part, because of the defendant's *belief or perception* regarding the race, religion, color, disability, sexual orientation, national origin, ancestry or *gender* of that person or the owner or occupant of that property." (emphasis added)	TENN. CODE ANN. § 40-35-114(17) (2019)
Vermont	providing enhanced penalties for "[a] person who commits, causes to be committed, or attempts to commit any crime and whose conduct is maliciously motivated by the victim's actual or perceived race, color, religion, national origin, sex, ancestry, age, service in the U.S. Armed Forces, disability. . ., sexual orientation, or *gender identity*." (emphasis added)	VT. STAT. ANN. tit 13 § 1455 (2019)
Washington	providing that "[a] person is guilty of a hate crime offense if he or she maliciously and intentionally commits one of the following acts because of his or her perception of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, *gender expression or identity*, or mental, physical, or sensory disability." (emphasis added)	WASH. REV. CODE § 9A.36.080(1) (2019)

462. Even though the Tennessee hate crime statute does not explicitly state that it protects transgender individuals, on February 8, 2019, Tennessee Attorney General Herbert Slattery issued an opinion expressly stating, "A defendant who targets a person for a crime because that person is transgender has targeted the person because of his or her gender within the meaning of § 40-35-114(17)." Herbert Slattery, Tenn. Att'y Gen., Op. No. 19-01, Sentence Enhancement for Hate Crimes Against Transgender Individuals (Feb. 8, 2019), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2019/op19-01.pdf.

Pennsylvania is not included in the Appendix, which lists the jurisdictions with hate crime statutes that include gender identity, because Pennsylvania no longer includes gender identity in its hate crime statute. In 2002, the Pennsylvania legislature initially amended their hate crime statute to include gender identity.[463] In 2007, however, a Pennsylvania court ruled that this amendment was unconstitutional.[464] As of the time of this writing, two bills attempting to amend the ethnic intimidation statute to include gender identity were pending before the Pennsylvania legislature.[465]

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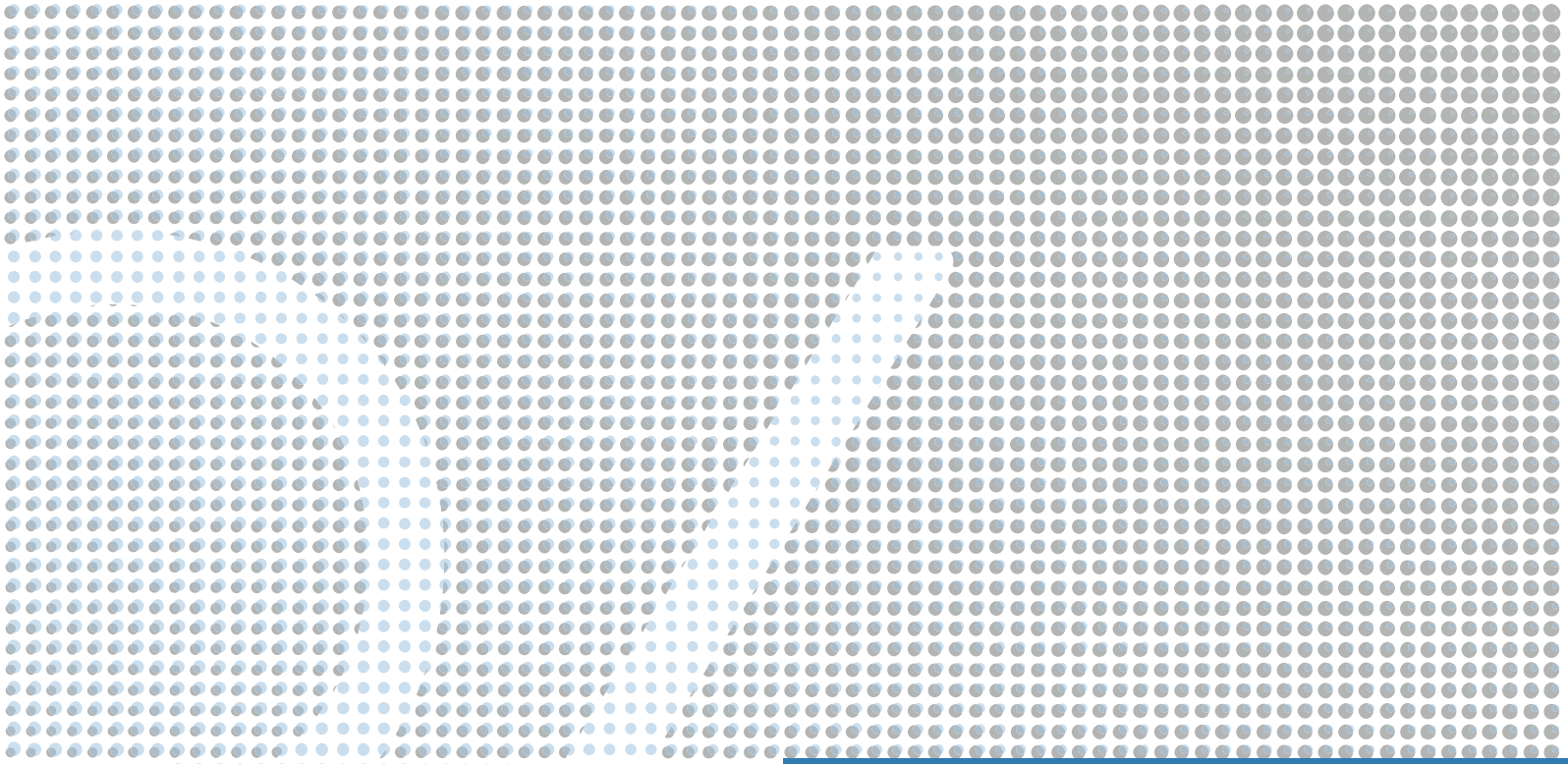
463. The amended provision provided the following:

> A person commits the offense of ethnic intimidation if, with malicious intention toward the actual or perceived race, color, religion, or national origin, ancestry, mental or physical disability, sexual orientation, gender or *gender identity* of another individual or group of individuals, he commits an offense under any other provision of this article[.]

See Marcavage v. Rendell, 936 A.2d 188, 190 n.3 (Pa. Cmwlth. 2007) (quoting amended 18 PA. C.S.A. § 2710(a) (emphasis added)).

464. *Marcavage*, 936 A.2d at 193–94 (holding that the enactment of the act amending the ethnic intimidation statute to include intimidation of persons based on ancestry, mental or physical disability, sexual orientation, gender or gender identity violated the state constitution's prohibition against alteration or amendment that changes the original purpose of the bill).

465. *See* 2019 PA. H.B. 635; 2019 PA S.B. 96.



RESEARCH THAT MATTERS

BANNING THE USE OF GAY AND TRANS PANIC DEFENSES

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EXECUTIVE SUMMARY

When LGBTQ people are killed and the gay and trans panic defense is invoked, those fatal acts of violence need to be understood within the broader context of widespread violence that LGBTQ people face in general—starting from an early age—and often from people they know including romantic and dating partners.

LGBTQ people in the U.S. face widespread stigma, discrimination, and violence. Recent media accounts detail an epidemic of violence against transgender women, particularly transgender women of color; federal data show that a substantial percentage of hate crimes are related to anti-LGBTQ bias; and decades of research establish that LGBTQ people are at increased risk of violent victimization. Much of this violence is hate-based or occurs within the context of a dating or romantic relationship. Often, violence against LGBTQ people starts early in their lives, at the hands of family members or other students at school. Violence against LGBTQ people can result in death, and even when victims survive, has lasting effects on their physical, mental, and emotional health and well-being.

LGBTQ people face several barriers to addressing violence. LGBTQ people may be reluctant to seek help due to experiences of, or fear of, discrimination and harassment by law enforcement. LGBTQ survivors may also be reluctant to seek help from health care and service providers out of fear of being mistreated or turned away. Moreover, in many states, laws do not adequately protect LGBTQ survivors of intimate partner violence and hate violence.

One way states can combat the epidemic of violence against LGBTQ people is by passing laws that bar defendants from asserting gay and trans panic defenses in court. Gay and trans panic defenses are rooted in antiquated ideas that being LGBTQ is a mental illness, and rely on the assumption that it is reasonable for a perpetrator to react violently to discovering the victim's sexual orientation or gender identity or to a romantic advance by an LGBTQ victim. Since the 1960s, the gay and trans panic defenses have appeared in publicly reported court opinions in approximately one-half of the states. To date, 12 states and the District of Columbia have passed legislation eliminating the use of gay and trans panic defenses, but the defenses remain available in most states.

This report presents evidence of violence against LGBTQ people in the U.S., provides an overview of how the gay and trans panic defenses have been used in court, and presents model legislation to eliminate use of the gay and trans panic defenses.

VIOLENCE AGAINST LGBTQ PEOPLE

LGBTQ PEOPLE EXPERIENCE HIGH RATES OF VIOLENCE

LGBTQ people have historically faced—and are still subject to—widespread stigma, discrimination, and violence. Recent media accounts detail an epidemic of violence against transgender women in the U.S., particularly transgender women of color; federal data show that a substantial percentage of hate crimes are related to anti-LGBTQ bias; and decades of research establish that LGBTQ people are at increased risk of violent victimization. Much of this violence is at the hands of someone well-known to the victim, including those with whom they have dating and romantic relationships. This violence can result in death, and even when victims survive, often has lasting effects on their physical, mental, and emotional health and well-being.

Violence against LGBTQ people generally

Over the last decade, a number of studies have shown that many LGBTQ people experience violence because of their sexual orientation or gender identity. Several of these studies indicate that violence disproportionately impacts transgender people—particularly transgender women—and LGBTQ people of color. Research has also found that many LGBTQ survivors knew the person who victimized them; and often times the offender was a neighbor, coworker, or family member.

A recent Williams Institute study examined rates of violent victimization among sexual and gender minorities[1] using data collected through the National Crime Victimization Survey conducted by the federal Bureau of Justice Statistics—the only nationally representative survey to collect data about the sexual orientation and gender identity of crime survivors. The analysis found that LGBTQ people were more likely to be victimized than non-LGBTQ people across a range of crimes.[2] Comparing per capita rates of serious violence (including rape or sexual assault, robbery, and aggravated or simple assault), the analysis found 71.1 incidents of violent victimization per 1,000 people among LGBTQ people compared to 19.2 instances of violent victimization among non-LGBTQ people.[3] In addition, the study found that LGBTQ people were more likely than non-LGBTQ people to experience violence at the hands of someone well-known to them.[4] A separate Williams Institute study analyzed victimization of gender minority people only and found that per capita rates of violent victimization were even higher: 86.2 victimizations per 1,000 people compared to 21.7 victimizations per 1,000 people among cisgender people.[5]

Data on hate crimes collected and published by the FBI also show high rates of victimization based on sexual orientation and gender identity. The most recent data available, collected in 2019, indicate that 16.7% of all hate crime victims were targeted because of their sexual orientation and

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[1] Andrew R. Flores et al., *Victimization Rates and Traits of Sexual and Gender Minorities in the United States: Results from the National Crime Victimization Survey, 2017*, 6 Sci. Advances (2020).

[2] *Id.*

[3] *Id.* at 5.

[4] *Id.*

[5] Andrew R. Flores, *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey*, 2017-2018, e1 Am. J. Pub. Health (Feb. 18, 2021).

2.7% were targeted because of their gender identity.[6] Data collected in previous years (2011–2018) consistently show that between 15.8% to 20.4% of all hate crimes victims were targeted because of their sexual orientation, and between 0.5% to 2.2% were targeted because of their gender identity.[7] The percentage of hate crimes victims who are LGBT is about three to four times higher than the percentage of LGBT people in the US adult population: 4.5% of adults identify as LGBT, including 0.6% who identify as transgender.[8]

Other studies have further documented pervasive violent victimization among LGBTQ people. For example, reports on hate violence against LGBTQ people and people living with HIV conducted by the National Coalition of Anti-Violence Programs (NCAVP) documented over 3,000 incidents of violence over a three-year period (2015–2017).[9] The reports are based on data collected by local member organizations across the nation that provide programs and services for survivors of hate violence. While this data does not represent the total number of violent incidents against LGBTQ people over this time period, the reports provide insight into the demographics of LGBTQ victims and the types of violence they commonly face. Findings from the most recent NCAVP reports (2015, 2016, and 2017) include:

- In 2017, the NCAVP collected 825 incidents of hate violence against LGBTQ survivors and survivors living with HIV.[10] Ten local NCAVP member organizations in 10 states provided these accounts.[11]
    - Of all survivors, 41% were cisgender men, 15% were cisgender women, 22% were transgender women, 8% were transgender men, and the remaining 14% selected other gender identities.[12]
    - The majority (57%) of survivors were people of color, including 22% who were Black and 21% who were Latino/a.[13]
    - The most common types of violence reported by survivors were verbal harassment (17%), threats or intimidation (13%), and physical violence (10%).[14]
    - Of the 775 survivors who reported information about their relationship to the offender, the majority (57%) reported that they knew the person; most commonly employers or

[6] *2019 Hate Crime Statistics – Victims*, FBI, https://www.justice.gov/hatecrimes/hate-crime-statistics (last visited Mar. 25, 2021).

[7] *See generally Hate Crimes*, FBI, https://www.fbi.gov/investigate/civil-rights/hate-crimes (last visited Mar. 25, 2021).

[8] Williams Inst., *LGBT Data & Demographics*, https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density (last visited Mar. 23, 2021); Andrew. R. Flores et al., Williams Inst., How Many Adults Identify as Transgender in the United States? (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf.

[9] *See generally Reports*, NYC Anti-Violence Project, https://avp.org/reports (last visited Jan. 12, 2021).

[10] Beverly Tillery et al., Nat'l Coal. of Anti-Violence Programs, Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate and Intimate Partner Violence in 2017, at 6 (2018), http://avp.org/wp-content/uploads/2019/01/NCAVP-HV-IPV-2017-report.pdf.

[11] *Id.* at 33.

[12] *Id.* at 31.

[13] *Id.* at 32.

[14] *Id.* at 17.

coworkers (22%), relatives or family members (21%), and landlords or neighbors (20%).[15]

- Nearly half (46%) of survivors reported being injured as a result of the violence they experienced and 45% sought medical attention.[16]

- In 2016, the NCAVP collected 1,036 incidents of hate violence against LGBTQ survivors and survivors living with HIV.[17] Twelve local NCAVP member organizations in 11 states provided these accounts.[18]
  - Of all survivors, 44% were cisgender men, 21% were cisgender women, 21% were transgender women, 5% were transgender men, and the remaining 9% selected other gender identities.[19]
  - The majority (61%) of survivors were people of color, including 29% who were Latinx and 21% who were Black/African American.[20]
  - The most common types of violence reported by survivors were verbal harassment (20%), threats or intimidation (17%), and physical violence (11%).[21]
  - Of the 981 survivors who reported information about their relationship to the offender, the majority (58%) reported that they knew the person; most commonly landlords or neighbors (22%), relatives or family members (17%), employers or coworkers (16%), and former romantic partners (10%).[22]
  - Nearly one-third (31%) of survivors reported being injured as a result of the violence they experienced.[23]
- In 2015, the NCAVP collected 1,253 incidents of hate violence against LGBTQ survivors and survivors living with HIV.[24] Thirteen local NCAVP member organizations in 12 states provided these accounts.[25]
  - Of all survivors, 30% were cisgender men, 25% were cisgender women, 22% were transgender, and the remaining 23% selected other gender identities.[26]
  - The majority (60%) of survivors were people of color.[27]

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[15] *Id.* at 21.

[16] *Id.* at 20.

[17] Emily Waters et al., Nat'l Coal. of Anti-Violence Programs, Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2016, at 25 (2017), http://avp.org/wp-content/uploads/2017/06/NCAVP_2016HateViolence_REPORT.pdf.

[18] *Id.*

[19] *Id.* at 9.

[20] *Id.* at 9–10.

[21] *Id.* at 12.

[22] *Id.* at 32.

[23] *Id.* at 13.

[24] Emily Waters et al., Nat'l Coal. of Anti-Violence Programs, Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2015, at 14 (2016), http://avp.org/wp-content/uploads/2017/04/ncavp_hvreport_2015_final.pdf.

[25] *Id.*

[26] *Id.* at 9.

[27] *Id.*

- The most common types of violence reported by survivors were verbal harassment (15%), discrimination (14%), physical violence (12%), and threats or intimidation (11%).[28] Survivors of color were twice as likely to experience physical violence as white survivors.[29]
- Of the 1,024 survivors who reported information about their relationship to the offender, the majority (62%) reported that they knew the person; most commonly landlords or neighbors (25%), employers or co-workers (16%), relatives or family members (11%), and former romantic partners (10%).[30]

Other studies conducted over the past decade have found similar patterns of violence against LGBTQ people, including higher rates of violent victimization among transgender people and LGBTQ people of color. Key findings from these studies include:

- A 2010 study by the National Center for Injury Prevention and Control based on data from the National Intimate Partner and Sexual Violence Survey found that bisexual women experienced significantly higher rates of sexual victimization over their lifetimes than men or women of other sexual orientations.[31] Nearly half (46.1%) of bisexual women experienced rape in their lifetimes compared to 13.1% of lesbian women and 17.4% of heterosexual women; and 74.9% of bisexual women experienced sexual violence other than rape compared to 46.4% of lesbian women and 43.3% of heterosexual women.[32] In addition, more than one-third of bisexual women (36.6%) had experienced stalking victimization compared to 1 in 6 (15.5%) heterosexual women.[33] Gay and bisexual men were also more likely than heterosexual men to experience sexual violence other than rape (47.4% of bisexual men, 40.2% of gay men, and 20.8% of heterosexual men).[34]
- A 2019 report by the Transgender Law Center based on a survey of transgender people in 13 Southern states found that 47% of transgender respondents—including 58% of trans women and femme respondents—reported experiencing high-intensity violence from strangers.[35]
- A 2019 report by the Human Rights Campaign and the Transgender People of Color Coalition documented 157 homicides of transgender people between 2013–2019.[36] At least 87% of the victims were transgender women, and 81% of them were transgender women of color.[37] Of the 139 victims who were people of color, 122 were Black.[38] At least 49% of the transgender people killed by violence in 2019 were killed by someone they knew, including an

[28] *Id.* at 10.

[29] *Id.*

[30] *Id.* at 23.

[31] M.L. Walters et al., Nat'l Ctr. for Injury Prevention & Control, Ctrs. for Disease Control & Prevention, The National Intimate Partner and Sexual Violence Survey: 2010 Findings on Victimization by Sexual Orientation 1 (2013), https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf.

[32] *Id.*

[33] *Id.* at 2.

[34] *Id.* at 1.

[35] Transgender L. Ctr., The Grapevine: A Southern Trans Report 6 (2019), http://transgenderlawcenter.org/wp-content/uploads/2019/05/grapevine_report_eng-FINAL.pdf.

[36] Human Rights Campaign Found., A National Epidemic: Fatal Anti-Transgender Violence in the United States in 2019, at 12 (2019), https://www.washingtonblade.com/content/files/2019/11/Anti-TransViolenceReport_111519final.pdf.

[37] *Id.*

[38] *Id.* at 13.

acquaintance, friend, family member, or intimate partner.[39] In about one-third of the deaths (32%), the relationship between the victim and the killer is unknown.[40]

- The 2015 U.S. Transgender Survey—the largest survey of transgender people in the U.S. to date—[41] found high rates of violence against transgender respondents:
  - 47% of transgender respondents reported that they had been sexually assaulted at some point in their lives; one in ten had been sexually assaulted in the prior year.[42]
  - 13% of transgender respondents reported that they had been physically attacked within the past year; 5% of respondents were attacked by a stranger because of their gender identity.[43] When asked how they were attacked, respondents most commonly reported that they were grabbed, punched, or choked (73%); had an object thrown at them (29%); or were sexually assaulted (29%).[44]
  - Among transgender respondents who were out to their families, 10% reported that a family member was violent toward them because they were transgender.[45]
- A 2011 study based on data collected through the Behavioral Risk Factor Surveillance System survey in Massachusetts found that lesbian and bisexual women were more likely to report sexual victimization in their lifetimes than heterosexual women.[46]

These findings consistently demonstrate that LGBTQ people experience high rates of violence and that while often this violence is from strangers, it is just as likely, if not more likely, to be perpetrated by people that they know, as further discussed below.

Intimate partner violence against LGBTQ people

Research shows that, in addition to violence more generally, LGBTQ people are also at increased risk of experiencing violence within intimate relationships.

For example, reports on intimate partner violence (IPV) against LGBTQ people and people living with HIV conducted by the NCAVP documented over 6,000 incidents of IPV over a three-year period (2015–2017).[47] Like the NCAVP's reports on hate violence, the reports on intimate partner violence are based on data collected by local member organizations across the nation that provide programs and services for survivors. While these data do not represent the total number of incidents of IPV against LGBTQ people over this time period, the reports illustrate the impact of such violence on LGBTQ communities. Findings from the most recent NCAVP reports (2015, 2016, and 2017) include:

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[39] *Id.* at 21.

[40] *Id.*

[41] Sandy E. James et al., Nat'l Ctr. for Transgender Equality, The Report of the 2015 U.S. Transgender Survey 2 (2016), http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf.

[42] *Id.* at 3.

[43] *Id.* at 203.

[44] *Id.* at 204.

[45] *Id.* at 71.

[46] Kerith J. Conron et al., *A Population-Based Study of Sexual Orientation and Identity and Gender Differences in Adult Health*, 100 Am. J. of Pub. Health 1953 (2010).

[47] *See generally* NYC Anti-Violence Project, *supra* note 9.

- In 2017, the NCAVP collected information about 2,144 incidents of IPV against LGBTQ survivors and survivors living with HIV.[48] Fourteen local NCAVP member organizations in 11 states provided these accounts.[49]
    - Of all survivors, 45% were cisgender men, 35% were cisgender women, 11% were transgender women, 4% were transgender men, and the remaining 5% selected other gender identities.[50]
    - The majority (59%) of survivors were people of color, including 21% who were Black and 27% who were Latino/a.[51]
    - The most common types of violence reported by survivors were verbal harassment (19%), physical violence (16%), and threats or intimidation (11%).[52] Transgender women were nearly 2.5 times more likely to experience IPV that included sexual violence than other LGBTQ survivors.[53]
    - Nearly half (48%) of survivors reported being injured as a result of the violence they experienced and 45% sought medical attention.[54]
- In 2016, the NCAVP collected information about 2,032 incidents of IPV against LGBTQ survivors and survivors living with HIV.[55] Fourteen local NCAVP member organizations in nine states provided these accounts.[56]
    - Of all survivors, 43% were cisgender men, 38% were cisgender women, 11% were transgender women, 3% were transgender men, and the remaining 5% selected other gender identities.[57]
    - The majority (59%) of survivors were people of color, including 30% who were Latino/a and 18% who were Black/African American.[58]
    - The most common types of IPV reported by survivors were physical violence (19%), verbal harassment (18%), and threats or intimidation (11%).[59]
    - Twenty-eight percent of survivors reported being injured as a result of the violence they experienced and 20% sought medical attention.[60]

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[48] Tillery et al., *supra* note 10.

[49] *Id.* at 33.

[50] *Id.* at 31.

[51] *Id.* at 32.

[52] *Id.* at 18.

[53] *Id.* at 17.

[54] *Id.* at 20.

[55] Emily Waters, Nat'l Coal. of Anti-Violence Programs, Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2016, at 11 (2017), http://avp.org/wp-content/uploads/2017/11/NCAVP-IPV-Report-2016.pdf.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 12.

[60] *Id.* at 20.

- In 2015, the NCAVP collected information about 1,976 incidents of IPV against LGBTQ survivors and survivors living with HIV.[61] Seventeen local NCAVP member organizations in 14 states provided these accounts.[62]
    - Of all survivors, 32% were cisgender men, 31% were cisgender women, 10% were transgender, and the remaining 27% selected other gender identities.[63]
    - The majority (54%) of survivors were people of color, including 24% who were Latino/a and 21% who were Black/African American.[64]
    - The most common types of IPV reported by survivors were physical violence (20%), verbal harassment (18%), and threats or intimidation (13%).[65] Transgender women were three times more likely to report IPV that included sexual violence than other LGBTQ survivors.[66]

In addition to the NCAVP reports, a number of other studies have documented IPV against LGBTQ people over the past decade. Many of these studies show that LGBTQ people are at elevated risk of IPV compared to non-LGBTQ people, and reveal particular vulnerability among marginalized communities within the LGBTQ population, including transgender women, bisexual women, and LGBTQ youth. Key findings from some of these studies include:

- The 2010 National Center for Injury Prevention and Control study—based on data from the National Intimate Partner and Sexual Violence Survey—indicated that bisexual men and women were more likely to experience IPV in their lifetimes than men or women of other sexual orientations.[67] Sixty-one percent of bisexual women and 37.3% of bisexual men experienced IPV, including rape, physical violence, and/or stalking by an intimate partner, compared to 43.8% of lesbian women, 26.0% of gay men, 35.0% of heterosexual women, and 29.0% of heterosexual men.[68] Rates of IPV involving severe physical violence were also higher among bisexual women (49.3%) compared to lesbian (29.4%) and heterosexual (23.6%) women.[69] Gay men and heterosexual men experienced similar rates of IPV involving severe physical violence (16.4% and 13.9%; no data on bisexual men).[70] Many survivors of IPV reported that the experience had negative impacts on their lives, including necessitating missing work or school, causing them to be fearful, and their exhibiting post-traumatic stress symptoms.[71]

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[61] Emily Waters, Nat'l Coal. of Anti-Violence Programs, Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2015, at 14 (2016), http://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf.

[62] *Id.*

[63] *Id.* at 17.

[64] *Id.* at 9, 17.

[65] *Id.* at 9.

[66] *Id.* at 10.

[67] Nat'l Ctr. for Injury Prevention & Control, Ctrs. for Disease Control & Prevention, National Intimate Partner and Sexual Violence Survey: 2010 Findings on Victimization by Sexual Orientation, at 2 (2014), https://www.acesdv.org/wp-content/uploads/2014/06/NISVS_FactSheet_LBG-a.pdf.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

- A 2018 study based on a survey of young transgender women in Chicago and Boston found that 42% had experienced IPV in their lifetime.[72]
- A 2017 study analyzing data on IPV collected from patients seeking primary care at an urban community health center found that 12.1% of transgender or gender non-conforming women, 6.6% of transgender or gender non-conforming men, and 8.2% of non-binary individuals experienced IPV within the prior year, compared to 2.7% of cisgender women.[73]
- The 2011 analysis of Behavioral Risk Factor Surveillance System survey data in Massachusetts found that bisexual women were more likely to report IPV in their lifetime than heterosexual women.[74]
- Similarly, a 2013 analysis of health survey data from California found that bisexual women had more than three times the odds of experiencing lifetime IPV, and four times the odds of experiencing IPV within the past year, compared to heterosexual women.[75] In comparison to heterosexual men, gay men had two and half times the odds of both lifetime and past-year IPV.[76]
- A 2014 study based on a survey of youth across three states found that LGB youth experienced higher levels of dating victimization than non-LGB youth: 43% of LGB youth reported physical dating violence (compared to 29% of non-LGB youth), 59% reported psychological dating abuse (compared to 46% of non-LGB youth), 37% reported cyber dating abuse (compared to 26% of non-LGB youth), and 23% reported sexual coercion (compared to 12% of non-LGB youth).[77]
- An analysis of data from the nationwide 2019 Youth Risk Behavior Survey (YRBS) found that LGB high school students were more likely to experience IPV than heterosexual students.[78] LGB students were more likely to report physical and sexual dating violence than heterosexual students: 13.1% of LGB students reported physical dating violence within the past year compared to 7.2% of the heterosexual students, and 16.4% of LGB students reported sexual dating violence within the past year compared to 6.7% of heterosexual students.[79] In addition, 19.4% of LGB students had been forced to have sexual intercourse when they did not want to, compared to 5.5% of heterosexual students.[80]
- Rates of dating violence were also higher among transgender students compared to cisgender students. An analysis of YRBS data collected in 2017 from 19 states and localities found

[72] Rachel C. Garthe et al., *Prevalence and Risk Correlates of Intimate Partner Violence Among a Multisite Cohort of Young Transgender Women*, 5 LGBT Health 333, 337 (2018).

[73] Sarah E. Valentine et al., *Disparities in Exposure to Intimate Partner Violence Among Transgender/Gender Nonconforming and Sexual Minority Primary Care Patients*, 4 LGBT Health 260, 264 (2017).

[74] Conron et al., *supra* note 46.

[75] Naomi G. Goldberg & Ilan H. Meyer, *Sexual Orientation Disparities in History of Intimate Partner Violence: Results from the California Health Interview Survey*, 28 J. of Interpersonal Violence 1109 (2013).

[76] *Id.* at 1113.

[77] Meredith Dank et al., *Dating Violence Experiences of Lesbian, Gay, Bisexual, and Transgender Youth*, 43 J. of Youth & Adolescence 846, 851 (2014).

[78] J. Michael Underwood et al., Ctrs. for Disease Control & Prevention, *Overview and Methods for the Youth Risk Behavior Surveillance System – United States, 2019*, 69 Morbidity & Mortality Wkly. Rep. 1, 22 (2020).

[79] *Id.* at 23.

[80] *Id.*

that 26.4% of transgender students had experienced physical dating violence, 22.9% had experienced sexual dating violence, and 23.8% were forced to have sexual intercourse.[81] Cisgender male and female students were less likely to have experienced all three types of IPV: 8.7% of cisgender female and 5.8% of cisgender male students had experienced physical dating violence; 12% of cisgender female and 3.5% of cisgender male students had experienced sexual dating violence; and 10.5% of cisgender female and 4.2% of cisgender male students were forced to have sexual intercourse.[82]

- The 2015 U.S. Transgender Survey found that more than half (54%) of transgender respondents experienced some form of IPV.[83] Over 40% of respondents (42%) reported experiencing at least one type of physical IPV and 24% reported severe physical violence by an intimate partner.[84] In addition, about one-third (34%) of respondents who had been sexually assaulted in their lives (47%) said that they were assaulted by a current or former partner.[85]

Violence against LGBTQ people begins when they are young

Violence against LGBTQ people often starts early in their lives, either by family members at home or by other students at school. Many non-LGBTQ youth observe this mistreatment and the ways in which adults and institutions respond, or fail to respond. Some non-LGBTQ youth, of course, are also the ones harassing and bullying LGBTQ youth.

Research shows that many LGBTQ youth have strained relationships with their families because of their sexual orientation and gender identity.[86] For example, in one study about the challenges that youth face, LGBT youth ranked non-accepting families as the most important problem in their lives (26%), followed by school and bullying problems (21%) and fear of being open about being LGBT (18%).[87] In contrast, non-LGBT youth ranked classes/exams/grades (25%), college/career (14%), and financial pressures related to college or job (11%) as the most important problems in

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[81] Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, *Transgender Identity and Experiences of Violence Victimization, Substance Abuse, Suicide Risk, and Sexual Risk Behaviors Among High School Students – 19 States and Large Urban School Districts, 2017*, 68 Morbidity & Mortality Wkly. Rep. 67, 69 (2019).

[82] *Id.*

[83] James et al., *supra* note 41, at 207.

[84] *Id.* at 208.

[85] *Id.* at 205–06.

[86] *See, e.g.*, Bryan N. Cochran et al., *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with Their Heterosexual Counterparts*, 92 Am. J. Pub. Health 733 (2002); Anthony R. D'Augelli et al., *Parents' Awareness of Lesbian, Gay, and Bisexual Youths' Sexual Orientation*, 67 J. Marriage & Fam. 474 (2005); Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 Nev. L.J. 774, 788 (2006); Darrel Higa et al., *Negative and Positive Factors Associated with the Well-Being of Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning (LGBTQ) Youth*, 46 Youth & Soc'y 663, 669 (2012); Les B. Whitbeck et al., *Mental Disorder, Subsistence Strategies, and Victimization Among Gay, Lesbian, and Bisexual Homeless and Runaway Adolescents*, 41 J. Sex Res. 329 (2004); Christy Mallory et al., Williams Inst., Ensuring Access to Mentoring Programs for LGBTQ Youth (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Access-to-Youth-Mentoring-Programs.pdf.

[87] Human Rights Campaign, Growing Up LGBT in America: HRC Youth Survey Report Key Findings 2 (2012), http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf.

their lives.[88] In some cases, these strained family relationships include physical, emotional, and other types of childhood abuse.[89] For example, a 2002 analysis of data from the National Survey of Midlife Development in the United States found that LGB men and women reported higher rates of physical and emotional childhood maltreatment than non-LGB men and women.[90] The differences in treatment were most pronounced for major physical abuse, with LGB men being about three times as likely to report these experiences, and LGB women about eight times as likely, as their non-LGB counterparts.[91] In addition, the 2015 U.S. Transgender Survey found that 10% of respondents who were out as transgender when they were children experienced violence at the hands of a family member because of their gender identity.[92]

Research also indicates that LGBTQ youth face high rates of bullying and victimization at school. An analysis of data collected through the 2019 national YRBS found that LGB high school students were more likely than their non-LGB peers to report being bullied at school (32% LGB students v. 17.1% heterosexual students), being threatened or injured with a weapon on school property (11.9% v. 6.3%), and feeling unsafe at school (13.5% v. 7.5%).[93] Prior reports based on YRBS data have documented similar patterns of bullying and harassment against LGB students.[94] Transgender students also face elevated levels of violence at school compared to cisgender students. An analysis of YRBS data collected in 2017 from 19 states and localities found that among transgender students, 34.6% reported being bullied at school, 23.8% reported being threatened or injured with a weapon at school, and 26.9% reported feeling unsafe at or on the way to school.[95] By comparison, 20.7% of cisgender female and 14.7% of cisgender male students reported being bullied; 4.1% of cisgender female students and 6.4% of cisgender male students reported being threatened or injured with a weapon; and 7.1% of cisgender female students and 4.6% of cisgender male students reported feeling unsafe at or on the way to school.[96]

Community-based surveys have documented similar levels of violence against LGBTQ students. For example, the GLSEN 2019 National School Climate Survey found that more than 80% of LGBTQ

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[88] *Id.*

[89] *See, e.g.*, S. Bryn Austin et al., Disparities in Child Abuse Victimization in Lesbian, Bisexual, and Heterosexual Women in the Nurses' Health Study II, 17 J. Womens Health 597 (2008); Andrea L. Roberts et al., *Childhood Gender Nonconformity: A Risk Indicator for Childhood Abuse and Posttraumatic Stress in Youth*, 129 Pediatrics 410 (2012); Elizabeth M. Saewyc et al., *Hazards of Stigma: The Sexual and Physical Abuse of Gay, Lesbian, and Bisexual Adolescents in the United States and Canada*, 85 Child Welfare 195 (2006); Joel P. Stoddard et al., *Sexual and Physical Abuse: A Comparison Between Lesbians and Their Heterosexual Sisters*, 56 J. Homosexuality 406 (2009); Christopher Zou and Judith P. Andersen, *Comparing the Rates of Early Childhood Victimization across Sexual Orientations: Heterosexual, Lesbian, Gay, Bisexual, and Mostly Heterosexual*, 10 PLoS ONE (2015).

[90] Heather L. Corliss et al., *Reports of Parental Maltreatment During Childhood in a United States Population-Based Survey of Homosexual, Bisexual, and Heterosexual Adults*, 26 Child Abuse & Neglect 1165 (2002).

[91] *Id.* at 1171–73.

[92] James et al., *supra* note 41, at 65.

[93] Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students – Youth Risk Behavior Survey, United States, 2015–2019*, 69 Morbidity & Mortality Wkly. Rep. 19, 23 (2019).

[94] *Id.* at 22.

[95] Johns et al., *supra* note 81.

[96] *Id.*

students reported that they experienced some type of harassment or assault at school.[97] More specifically, 34.2% experienced physical harassment, 14.8% experienced physical assault, and 58.3% experienced sexual harassment.[98] Similarly, in response to the 2015 U.S. Transgender Survey, many respondents who were out as transgender reported experiencing bullying and harassment at school: 54% reported experiencing verbal harassment, 24% reported physical assault, and 13% reported sexual assault.[99]

VIOLENCE AGAINST LGBTQ PEOPLE CAN RESULT IN DEATH

It is not possible to reliably estimate the number of LGBTQ deaths attributable to violence due to limitations in the way data on violent deaths are collected and reported. The National Violent Death Reporting System, which pools data on violent deaths from multiple sources (e.g., death certificates, law enforcement reports, etc.) across states, provides a structure for collecting data on sexual orientation and gender identity, but this information is generally incomplete and unreliable due to the challenges of collecting information about LGBTQ status after death and the inconsistency in data collection and recording methods across states.[100] Other surveillance systems that track violent deaths, such as the National Incident-Based Reporting System and the Uniform Crime Reports, similarly do not collect reliable information about victims' LGBTQ status.[101] As a result, the extent to which violence results in death among LGBTQ people cannot be accurately assessed.

Nonetheless, the NCAVP reports, based on reports from community organizations, provide some insight into homicides of LGBTQ people and people living with HIV. The three most recent reports produced by the NCAVP gathered information about nearly 200 homicides related to hate violence and IPV between 2015 and 2017. Key findings include:

- In 2017, the NCAVP collected information about 67 homicides of LGBTQ people and people living with HIV.[102]
    - Fifty-two homicides were related to hate violence.[103] The majority of victims were people of color (71%) and/or transgender or gender non-conforming (52%).[104] Forty percent of the homicide victims were transgender women of color.[105]
    - Almost one fourth (22.3%) were homicides related to IPV.[106] Nine of these victims were cisgender men, five were cisgender women, and one was a transgender man.[107]

[97] Joseph G. Kosciw et al., GLSEN, The 2019 National School Climate Survey xix (2020), https://www.glsen.org/sites/default/files/2020-11/NSCS19-111820.pdf.

[98] *Id.* at 28–39.

[99] James et al., *supra* note 41, at 132.

[100] Vickie M. Mays & Susan D. Cochran, *Challenges and Opportunities for Modernizing the National Violent Death Reporting System*, 109 Am. J. Pub. Health 192 (2019).

[101] *See generally UCR Technical Specifications, User Manuals, and Data Tools*, FBI, https://www.fbi.gov/services/cjis/ucr/data-documentation (last visited Jan. 14, 2021).

[102] Tillery et al., *supra* note 10, at 13.

[103] *Id.* at 7.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 13.

[107] *Id.* at 14.

- In 2016, the NCAVP collected information about 92 homicides of LGBTQ people and people living with HIV.[108]
    - Seventy-seven incidents were homicides related to hate violence, including the 49 victims of the Pulse Nightclub shooting in June 2016.[109]
    - Excluding the Pulse Nightclub shooting, over one-third (32.6%) were homicides related to IPV.[110] Sixty percent of these 15 victims were people of color.[111] Nine of these victims were cisgender men, three were cisgender women, two were transgender women, and one was non-binary.[112]
- In 2015, the NCAVP collected information about 37 homicides of LGBTQ people and people living with HIV.[113]
    - Twenty-four incidents were homicides related to hate violence.[114] Two-thirds (67%) of the victims were transgender or gender non-conforming.[115] Over half (54%) of the homicide victims were transgender women of color.[116]
    - Over one third (35.2%) were homicides related to IPV.[117] Three-quarters (77%) of these victims were people of color.[118] Six of the victims were transgender women—all of whom were transgender women of color; four of the victims were cisgender men and three were cisgender women.[119]

Prior NCAVP reports show similar patterns of homicides of LGBTQ people and people living with HIV. Between 1998 and 2014, NCAVP documented 429 homicides related to hate violence and 151 homicides related to HIV.[120]

In addition to the NCAVP reports, a 2019 report by the Human Rights Campaign and the Transgender People of Color Coalition documented 157 homicides of transgender people between 2013–2019.[121] At least 87% of the victims were transgender women, and 81% of them were transgender women of color.[122] Of the 139 victims who were people of color, 122 were Black.[123]

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[108] Waters et al., *supra* note 17, at 9; Waters, *supra* note 55, at 10.

[109] Waters et al., *supra* note 17, at 9.

[110] Waters, *supra* note 55, at 10.

[111] *Id.*

[112] *Id.*

[113] Waters et al., *supra* note 24, at 9; Waters, *supra* note 61, at 8.

[114] Waters et al., *supra* note 24, at 9.

[115] *Id.*

[116] *Id.*

[117] Waters, *supra* note 61, at 8.

[118] *Id.*

[119] *Id.* at 9.

[120] Osman Ahmed & Chai Jindasurat, Nat'l Coal. of Anti-Violence Programs, Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2014, at 24 (2015), http://avp.org/wp-content/uploads/2017/04/2014_HV_Report-Final.pdf.

[121] Human Rights Campaign Found., *supra* note 36, at 12.

[122] *Id.*

[123] *Id.* at 13.

LGBTQ PEOPLE FACE BARRIERS TO ADDRESSING VIOLENCE, INCLUDING IPV

Discrimination and harassment by law enforcement

Discrimination and harassment by law enforcement can create barriers to addressing crimes against LGBTQ people and providing help to LGBTQ victims. For decades, LGBTQ communities—particularly LGBTQ people of color, youth, and transgender and gender non-conforming people—have been subject to various forms of mistreatment by law enforcement, including profiling, entrapment, discrimination, harassment, and violence.[124] These incidents have been well-documented in surveys, court cases, media reports, academic scholarship and other sources.[125] Recent research indicates that these longstanding issues have not been resolved despite expanding legal rights and growing public acceptance of LGBTQ people, and continue to create tension between law enforcement and LGBTQ communities.[126] Research conducted over the past decade documenting discrimination and harassment by law enforcement against LGBTQ communities include:

- The 2015–2017 NCAVP reports documented homicides caused by police and rates of police misconduct among LGBTQ people and people living with HIV who were affected by hate violence and IPV.[127] Over the three year period, seven homicides were caused by police, and 5% to 14% of survivors who interacted with police reported police misconduct.[128]
- A 2019 report by the Transgender Law Center based on a survey of transgender people in the South found that 41% of all respondents, including 52% of respondents of color, reported experiencing high-intensity violence by law enforcement.[129]
- The 2015 U.S. Transgender Survey found that a significant number of respondents who had interacted with the police in the past year had negative experiences.[130] The majority (58%) of respondents who interacted with police that knew or thought they were transgender said that they had experienced at least one form of disrespect or mistreatment.[131] In terms of harassment and assault, 20% reported that they were verbally harassed by officers, 4% said they were physically attacked by officers, and 3% said they were sexually assaulted by officers.[132] American Indian, multiracial, Latino/a, and Black respondents were more likely to report that they experienced one or more forms of police mistreatment.[133]

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[124] *See* Christy Mallory et al., Williams Inst., Discrimination and Harassment by Law Enforcement Officers in the LGBT Community 6 (2015), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf; Ari Shaw, Williams Inst., Violence and Law Enforcement Interactions with LGBT People in the US (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Violence-Law-Enforce-Mar-2020.pdf.

[125] *See supra* note 124.

[126] *Id.*

[127] *See* reports cited *supra* notes 10, 17, 24, 55, and 61.

[128] Information was not included in all reports. For specific references to available data, see reports cited *supra* note 10, at 8; *supra* note 17, at 15, 83, 75; *supra* note 24, at 24; *supra* note 55, at 10.

[129] Transgender L. Ctr., *supra* note 35, at 6.

[130] James et al., *supra* note 41, at 14.

[131] *Id.* at 185.

[132] *Id.* at 186.

[133] *Id.*

- A 2015 report by Lambda Legal based on a national survey of LGBTQ people and people living with HIV found that 73% of respondents had face-to-face contact with the police in the past five years.[134] Of those respondents, 21% reported encountering hostile attitudes from officers, 14% reported verbal assault by the police, 3% reported sexual harassment, and 2% reported physical assault at the hands of law enforcement officers.[135] Police abuse, neglect, and misconduct were consistently reported at higher frequencies by respondents of color and transgender and gender nonconforming respondents.[136]
- A 2012 report by the Center for Constitutional Rights on the New York City Police Department's stop and frisk practices found that "LGBTQ/GNC [Gender Nonconforming] communities are heavily impacted by stops and frisks. Several people interviewed for this report described stops where police treated them in a cruel or degrading manner because of their actual or perceived sexual orientation, or gender identity, or expression, or because they were gender non-conforming."[137] Transgender women in particular were found to be "'a huge target for NYPD discrimination.'"[138]
- A 2012 report by Make the Road New York found that members of LGBTQ communities of color in Queens reported high rates of abuse from law enforcement.[139] The report surveyed more than 300 Queens residents about their interactions with police officers.[140] Fifty-four percent of LGBTQ respondents reported that they had been stopped by police, compared to 28% of non-LGBTQ respondents.[141] Among those who reported being stopped, 51% of all LGBTQ respondents—including 61% of all transgender respondents—reported that they had been physically or verbally harassed by the police during the stop, compared with 33% of non-LGBTQ respondents.[142]
- A 2012 report by Bienestar that examined interactions between law enforcement and Latina transgender women in Los Angeles County found that respondents reported experiencing high rates of discrimination and mistreatment.[143] Two-thirds reported that they had been verbally harassed by law enforcement, 21% reported that they had been physically assaulted by law enforcement, and 24% reported that they had been sexually assaulted by law enforcement.[144]

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[134] Lambda Legal, Protected and Served? 6 (2015), https://www.lambdalegal.org/sites/default/files/publications/downloads/ps_executive-summary.pdf.

[135] *Id.*

[136] *Id.* at 8.

[137] Ctr. for Const. Rights, Stop and Frisk: The Human Impact Report 11 (2012), https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf.

[138] *Id.* at 12.

[139] Make the Road N.Y., Transgressive Policing: Police Abuse of LGBT Communities of Color in Jackson Heights (2012), https://maketheroadny.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf.

[140] *Id.* at 4.

[141] *Id.*

[142] *Id.* at 5.

[143] Frank H. Galvan & Mohzen Bazargan, Bienestar, Interactions of Transgender Latina Women with Law Enforcement 1 (2012), https://escholarship.org/uc/item/62p795s3.

[144] *Id.*

- In 2011, the U.S. Department of Justice's Civil Rights Division released a report finding that LGBTQ people were often the victims of "discriminatory policing" by the New Orleans Police Department (NOPD).[145] LGBT citizens—as well as NOPD officers—agreed that LGBT community members in particular were subject to "harassment and disrespectful treatment, and unfairly target[ed] for stops, searches, and arrests."[146] More specifically, LGBT community members reported "harassment and even sexual and physical abuse by law enforcement," as well as a "long-standing failure by NOPD to take complaints by LGBT individuals seriously."[147] The LGBT community additionally reported that these tactics "serve to drive a wedge between the police and the public, antagonizing and alienating members of the community."[148]
- A 2011 report based on a survey of New York City youth found that LGBQ youth reported experiencing negative police contact more often than their straight counterparts (61% versus 47%, respectively).[149] This was especially true for negative verbal experiences with the police, where 54% of LGBQ youth and 39% of non-LGBQ youth reported having such an experience, and negative sexual experiences with police (28% versus 10%, respectively).[150] Additionally, more than half of LGBQ youth reported feeling stressed or worried to some extent by police.[151]

Negative interactions between LGBTQ people and law enforcement can create barriers to reporting and addressing crime. Several recent studies show that LGBTQ survivors often do not report crimes against them because they fear hostility or inaction from police, and that many LGBTQ people who have reported crimes do not feel like they were adequately addressed. For example:

- The 2015–2017 NCAVP reports collected information about whether respondents reported violence to police and, if so, how law enforcement responded.[152] Over the three year period, 39% to 60% of hate violence and IPV survivors said that they reported the crime or interacted with police as a result of the violence they experienced.[153] Across reports, 35% to 55% of hate violence survivors who interacted with police said that police were indifferent and 7% to 39% of survivors said police were hostile.[154] Among IPV survivors across reports, 12% to 47% said that police were indifferent and 7% to 12% said that police were hostile.[155]
- The 2015 U.S. Transgender Survey found that the majority of respondents (57%) would feel uncomfortable asking for help from the police, including 70% of Middle Eastern, 67% of Black, and 67% of multiracial respondents.[156]

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[145] U.S. Dep't of Justice, Civil Rights Division, Investigation of the New Orleans Police Department 31 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf.

[146] *Id.* at ix.

[147] *Id.* at 37.

[148] *Id.* at 35.

[149] Brett G. Stoudt et al., *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. Sch. L. Rev. 1331, 1351 (2011).

[150] *Id.*

[151] *Id.* at 1354.

[152] *See* reports cited *supra* notes 10, 17, 24, 55, and 61.

[153] *Id.*

[154] *See* reports cited *supra* note 10, at 8; *supra* note 17, at 12; *supra* note 24, at 24.

[155] *See* reports cited *supra* note 10, at 8; *supra* note 55, at 15; *supra* note 61, at 10.

[156] James et al., *supra* note 41, at 188–89.

- The 2014 Lambda Legal report found that many survivors received inadequate responses from police when reporting crimes committed against them.[157] The majority of those who were physically assaulted (62%), along with 41% of those who were IPV survivors and 39% of those who were sexually assaulted, said that police did not fully address their complaints.[158]

Discrimination by health care and service providers

Discrimination, and fear of discrimination, by health care and service providers can also create barriers to survivors accessing the services they need. Many LGBTQ people, particularly transgender people, report experiencing discrimination in health care or when accessing services. This discrimination takes many forms, including the outright denial of care or services and the provision of substandard care. For example, a 2010 Lambda Legal report based on a national survey of LGBTQ people and people living with HIV found that 56% of LGB respondents and 70% of transgender respondents reported experiencing at least one form of health care discrimination.[159] Another analysis of a nationally representative survey by the Center for American Progress found that 8% of LGB respondents and 29% of transgender respondents reported being refused care entirely in the preceding twelve months because of their sexual orientation or gender identity.[160] In terms of discrimination by service providers, among U.S. Transgender Survey respondents who experienced homelessness and stayed in a shelter in the previous year, 70% reported some form of mistreatment, including being harassed, assaulted, or kicked out because of their gender identity.[161] And, a 2017 qualitative analysis of LGBTQ youths' experiences in homeless shelters included examples of outright denials of service and harassment and discrimination by staff.[162]

Some studies have specifically documented discrimination against LGBTQ violence survivors by health care and other service providers. For example, the 2017 NCAVP report found that 43% of IPV survivors who sought shelter services reported that they were turned away. Nearly one-third (32%) of those who were denied services reported that they were turned away because of their gender identity.[163] A 2015 analysis of data collected through the National Transgender Discrimination Survey found that 5.8% of transgender respondents who tried to access IPV services and 4.8% of those who tried to

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[157] Lambda Legal, *supra* note 134, at 7.

[158] *Id.*

[159] Lambda Legal, When Health Care Isn't Caring 5 (2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf; *see also* Jennifer Kates et al., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S.*, Kaiser Family Found. (May 3, 2018), https://www.kff.org/racial-equity-and-health-policy/issue-brief/health-and-access-to-care-and-coverage-for-lesbian-gay-bisexual-and-transgender-individuals-in-the-u-s.

[160] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, Ctr. for Am. Progress (Jan. 18, 2018), https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care.

[161] *See* James et al., *supra* note 41, at 176.

[162] Deborah Coolhart & Maria T. Brown, *The Need for Safe Spaces: Exploring the Experiences of Homeless LGBTQ Youth in Shelters*, 82 Child & Youth Servs. Rev. 230 (2017).

[163] Tillery et al., *supra* note 10, at 8.

access a rape crisis center experienced discrimination.[164] Transgender people of color and those with disabilities were more likely to experience unequal treatment when accessing IPV services than white and non-disabled transgender respondents.[165]

In addition, LGBTQ people may be reluctant to seek out services because they fear discrimination or substandard care by health care and other service providers. Scholars have found that LGBTQ people may perceive service providers as unwelcoming toward LGBTQ survivors, unable to provide competent care to LGBTQ survivors, and only available to support heterosexual, cisgender women.[166] Research also shows that some LGBTQ people are concerned about experiencing health care discrimination and have delayed needed care for this reason.[167] As a result, LGBTQ survivors may encounter additional barriers to accessing services, even if they are available to them.

Inadequate laws to protect LGBTQ survivors of hate violence and IPV

In many states, existing laws do not adequately protect survivors of IPV and hate violence. Currently, forty-five states have hate crimes laws, but many of them do not include sex, sexual orientation, and/or gender identity as protected characteristics. Of the forty-five states with hate crimes laws, 18 do not include sex as a motivating factor, 12 do not include sexual orientation as a motivating factor, and 28 do not include gender identity as a motivating factor.[168] As a result, perpetrators of crimes

[164] Kristie L. Seelman, *Unequal Treatment of Transgender Individuals in Domestic Violence and Rape Crisis Programs*, 59 SW Publications 1, 20 (2015).

[165] *Id.* at 21.

[166] *See, e.g.*, Taylor N.T. Brown & Jody L. Herman, Williams Inst., Intimate Partner Violence and Sexual Abuse Among LGBT People: A Review of Existing Research (2015), https://williamsinstitute.law.ucla.edu/wp-content/uploads/IPV-Sexual-Abuse-Among-LGBT-Nov-2015.pdf (literature review); *see generally* James et al., *supra* note 41.

[167] James et al., *supra* note 41, at 98; Lambda Legal, *supra* note 159, at 13; Mizra & Rooney, *supra* note 160; U.S. Department of Health and Human Services, Office of Disease Prevention and Health Promotion, *Lesbian, Gay, Bisexual, and Transgender Health*, HealthyPeople.Gov http://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health?topicid=25 (last visited Jan. 14, 2021); Inst. of Med., The Health of Lesbian, Gay, Bisexual, and Transgender People 222–25 (2011); Jody L. Herman et al., UCLA Ctr. Health Pol'y Res., Demographic and Health Characteristics of Transgender Adults in California 7 (2017), https://pubmed.ncbi.nlm.nih.gov/29091375/.

[168] *See State Hate Crimes Statutes*, Brennan Ctr. for Justice (July 2, 2020), https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-statutes. Arkansas, Indiana, North Dakota, South Carolina, and Wyoming do not have hate crimes laws. *Id.* The District of Columbia and Puerto Rico maintain hate crimes laws which expressly provide for sex, sexual orientation, and gender identity as motivating factors, while the remainder of the U.S. territories maintain no hate crimes laws at all. *Id.* Among the states with hate crimes laws, nine (Alabama, Idaho, Montana, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, and Virginia) do not include sex, sexual orientation, or gender identity as motivating factors. *Id.*; S.B. 209, 2019–2020 Gen. Assemb., Reg. Sess. (N.C. 2019), https://webservices.ncleg.gov/ViewBillDocument/2019/1163/0/DRS45078-MLa-67A (proposing amending North Carolina's hate crimes law to add sex (as "gender"), sexual orientation, and gender identity as motivating factors). The laws of three states—Alaska, Mississippi (as "gender"), and West Virginia—include sex, but not sexual orientation or gender identity. Brennan Ctr. for Justice, *supra*. The Supreme Court of Appeals of West Virginia previously assessed its state's law and determined that "sex" is not inclusive of sexual orientation. State v. Butler, 239 W. Va. 168 (2017). However, the court did not reach the question of whether that is the case for gender identity as well, and it remains to be seen whether the court will ultimately reverse itself in light of *Bostock*. Twelve states—Arizona, Georgia, Iowa, Louisiana, Maine, Michigan, Minnesota, Missouri, Nebraska, Rhode Island, Tennessee, and Texas—include sex and sexual orientation, but not gender identity. Brennan Ctr. for Justice, *supra*. Among these states, Arizona, Louisiana, Michigan, Nebraska, Rhode Island, Tennessee,

motivated by bias against LGBTQ victims cannot be charged under standalone hate crimes provisions or receive penalty enhancements for targeting victims because of their sex, sexual orientation, or gender identity in these states.[169]

In addition, IPV laws in several states fail to adequately protect individuals regardless of whether they have faced violence at the hands of a same-sex or different-sex partner. Although laws that criminalize IPV expressly apply to individuals in both same-sex and different-sex relationships in all states but North Carolina (discussed *infra*), there is considerable variation in these laws that leaves many survivors without protection. For example, while all laws apply to people in unmarried relationships, 11 states require that such unmarried couples cohabitated in the present or past to receive protection.[170] In other words, these laws would not apply to people in unmarried relationships who have never lived together. Additionally, a number of state laws give courts the discretion to determine whether IPV survivors and their abusers were in a dating relationship, instructing them to consider a number of factors such as the type of relationship, the length of the relationship, the frequency of interaction between the couple, declarations of romantic interest, and attendance at

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and Texas specifically protect against discrimination on the bases of "gender" and sexual orientation, but appear to interpret the former term consistent with other states' use of "sex," rather than as shorthand for gender *identity*. *Id.* While Georgia's recently enacted statute contains both "sex and gender" as separate motivating factors, it does not specifically note gender identity. *Id.* This is unlike all other states who expressly provide distinct coverage for gender identity-motivated acts in addition to coverage for acts motivated by either sex or sexual orientation, and so we also include Georgia as being among the states who do not allow for gender identity as a motivating factor. *See also* Nick Morrow, *Human Rights Campaign on Hate Crimes Legislation Enacted in Georgia*, Hum. Rights Campaign (June 30, 2020), https://www.hrc.org/news/human-rights-campaign-on-hate-crimes-legislation-enacted-in-georgia. The Supreme Court's reasoning in the *Bostock* case may impact courts' interpretations of the terms "sex," "gender," and "sexual orientation" within these statutes; for example, the Michigan Supreme Court recently remanded a court of appeals decision—finding that the state's hate crimes law's covering of "gender" does not include crimes motivated by gender identity—for "reconsideration in light of *Bostock*." People v. Rogers, 950 N.W.2d 48 (Mich. 2020). Four states—Florida, Kansas, Kentucky, and Wisconsin—include only sexual orientation, and not sex or gender identity. Brennan Ctr. for Justice, *supra*. Five states—Colorado, Delaware, Massachusetts, Nevada, and Oregon—include both sexual orientation and gender identity, but not sex. *Id.*; S.B. 577, 80th Leg. Assemb., 2019 Reg. Sess. (Or. 2019) (amending Oregon's statute to include gender identity). Notably, while Colorado's statute only specifically lists "sexual orientation," the term is defined inclusive of "transgender status." Colo. Rev. Stat. Ann. § 18-9-121 (West 2013). Finally, California, Connecticut, Hawaii, Illinois, Maryland, New Hampshire, New Jersey, New Mexico, New York, Utah, Vermont, and Washington all include sex, sexual orientation, and gender identity as distinct motivating factors. Brennan Ctr. for Justice, *supra*; H.B. 608, H.R., 2019 Reg. Sess. (N.H. 2019) (amending the state's hate crimes law, among others, to include gender identity); S.B. 1047, 242nd Leg., 2019 Sess. (N.Y. 2019) (same); S.H.B. 1732, 66th Leg., 2019 Reg. Sess. (Wa. 2019) (same). While Maryland's law specifically lists just "sexual orientation [and] gender," the former term is defined inclusive of "gender-related identity." Md. Code Ann., Crim. Law § 10-301 (West 2020).

[169] *See id.*; *see also* Movement Advancement Project, Hate Crime Laws (2020), https://www.lgbtmap.org/img/maps/citations-hate-crime.pdf (providing citations and brief analysis on each state's laws, or lack thereof).

[170] *See Domestic Violence/Domestic Abuse Definitions and Relationships*, Nat'l Conference of State Legislatures (June 13, 2019), https://www.ncsl.org/research/human-services/domestic-violence-domestic-abuse-definitions-and-relationships.aspx.

social outings as a couple, among others.[171] Allowing judges to decide whether relationships qualify under these criteria could result in same-sex couples being afforded less protection. Research indicates that some judges lack cultural competence around LGBTQ issues and may be biased against LGBTQ victims and litigants.[172]

On its face, North Carolina's IPV law uniquely excludes violence occurring within a same-sex dating relationship. More specifically, the law protects same-sex and different-sex spouses equally, but offers protection to unmarried couples only if they consist of "persons of the opposite sex."[173] However, in December 2020, the North Carolina Court of Appeals held that this law's failure to protect unmarried same-sex couples while nonetheless providing protection for similarly situated different-sex couples is a violation of due process and equal protection under both the North Carolina and U.S. Constitutions.[174] While it remains to be seen if the state will appeal and obtain a reversal of this result, the Court of Appeal's ruling currently requires that the same- or different-sex nature of a relationship "not be a factor in the [state's] decision to grant or deny [a claim for protection under the law]."[175]

[171] *See*, *e.g.*, Ariz. Rev. Stat. Ann. §13-3601 (West, Westlaw through 2d. Reg. Sess., 2020 Leg.) (providing "factors" meant to determine whether individuals were in a romantic or sexual relationship, including the "type" and length of the relationship).

[172] *See* Lambda Legal, *supra* note 134, at 7 (providing survey data suggesting anti-LGBT bias by a number of actors within the judicial system); Todd Brower, *Twelve Angry—and Sometimes Alienated—Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 Drake L. Rev. 669 (2011); *see also* Robert G. Bagnall et al., *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 Harv. C.R.-C.L. L. Rev. 497 (1984); Heather C. Brunelli, *The Double Bind: Unequal Treatment for Homosexuals within the American Legal Framework*, 20 B.C. Third World L.J. 201 (2000); Aaron M. Clemens, *Executing Homosexuality: Removing Anti-Gay Bias from Capital Trials*, 6 Geo. J. Gender & L. 71 (2005); Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard*, 39 J. Homosexuality 93 (2000); Sally Kohn, *Greasing the Wheel: How the Criminal Justice System Hurts Gay, Lesbian, Bisexual, and Transgendered People and Why Hate Crime Laws Won't Save Them*, 27 N.Y.U. Rev. L. & Soc. Change 257 (2001); Sheila M. Seelau & Eric P. Seelau, *Gender-Role Stereotypes and Perceptions of Heterosexual, Gay and Lesbian Domestic Violence*, 20 J. Fam. Violence 363 (2005). *Cf.* Chan Tov McNamarah, *Sexuality on Trial: Expanding Pena-Rodriguez to Combat Juror Queerphobia*, 17 Dukeminier Awards J. 393 (2018).

[173] N.C. Gen. Stat. Ann. § 50B-1(b)(2) (West, Westlaw through 2020 Reg. Sess.).

[174] M.E. v. T.J., No. COA18-1045, 2020 WL 7906672, at *7 (N.C. Ct. App. Dec. 31, 2020).

[175] *Id.*

THE GAY AND TRANS PANIC DEFENSES

In recent decades, there have been advances in law and policy attempting to address anti-LGBTQ violence, including hate crime legislation at the federal, state, and local levels.[176] In spite of these developments, however, the so-called "gay and trans panic" defenses remain available as valid defenses in many states today. When invoked successfully, the gay and trans panic defenses allow perpetrators of LGBTQ murders to receive lesser sentences, and in some cases, avoid being convicted and sentenced altogether, by placing the blame for homicide on the victim's actual or perceived sexual orientation or gender identity.

Instead of considering the current context of violence against LGBTQ people, including hate crimes and IPV, the gay and trans panic defenses are rooted in the antiquated ideas that being LGBTQ is a mental illness and rely on the assumption that it is reasonable for a perpetrator to react violently to discovering the victim's sexual orientation or gender identity, or to a romantic advance by an LGBTQ victim. Additionally, some scholars have noted the defenses' roots in "prejudicial stereotypes of 'bad' homosexuals as sexual predators."[177] In line with these views, criminal defense attorneys began invoking the gay and trans panic defenses in the 1960s, arguing that an LGBTQ victim's unwanted sexual advance caused perpetrators to enter a state of "homosexual panic."[178] Although these ideas have since been discredited, their widespread historical acceptance is illustrated by the fact that homosexuality was included in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders until 1973, and that "gender identity disorders" remained in that Manual for 30 additional years.[179]

The gay and trans panic defenses wrongly send the message that violence against LGBTQ people is acceptable. In 2013, the American Bar Association unanimously approved a resolution calling for state legislatures to eliminate the gay and trans panic defenses through legislation.[180] At that point, no state legislature had yet passed legislation to ban the gay and trans panic defenses, although some courts had rejected the defenses under state law.[181] In 2014, California passed legislation amending its

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[176] *See* The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2014); *Hate Crime Laws*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/hate_crime_laws (last visited Jan. 22, 2021) (noting that the hate crime laws of 23 states, two territories, and the District of Columbia expressly cover both sexual orientation and gender identity, while the hate crime laws of 11 other states expressly cover sexual orientation only).

[177] Matthew T. Helmers, *Death and Discourse: The History of Arguing Against the Homosexual Panic Defense*, 17 L. Culture & Humanities 285 (2017).

[178] *See generally* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. Davis L. Rev. 471, 477 (2008); Jordan Blair Woods, *Framing Legislation Banning the Gay/Trans Panic Defenses*, 54 U. Rich. L. Rev. 833 (2020).

[179] Gordene Olga Mackinzie, Transgender Nation 69 (1994). This remained the case until 2013, when the APA changed "gender identity disorders" to "gender dysphoria." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (DSM-5) 451–60 (5th Ed. 2013). This change reflected the APA's intent to avoid stigmatizing transgender people who sought gender reaffirming medical care and to "better characterize the experiences of affected children, adolescents, and adults." Am. Psychiatric Ass'n, Gender Dysphoria (2013), http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf.

[180] *Id*. at 2.

[181] Those states are Florida, Illinois, and Kansas.

statutory definition of voluntary manslaughter,[182] simultaneously becoming the first state to eliminate the gay and trans panic defenses through legislation.[183] Since then, Illinois, Rhode Island, Nevada, Connecticut, Maine, Hawaii, New York, New Jersey, Washington, Colorado, Virginia, and the District of Columbia have eliminated the gay and trans panic defenses legislatively, and Maryland's legislature passed a ban in 2021, but it has not yet been signed by the governor.[184] Legislation banning the gay and trans panic defenses has been introduced—but not yet enacted—in Minnesota, Pennsylvania, Texas, Massachusetts, New Mexico, Wisconsin, Iowa, Nebraska, Florida, and Oregon.[185] While legislation banning the use of gay and trans panic defense has also been introduced in the U.S. Senate and House of Representatives,[186] it has also yet to be enacted, leaving individuals across the U.S. (including in states which have enacted their own reforms) free to assert the defense in federal cases.

DOCUMENTED USE OF THE GAY AND TRANS PANIC DEFENSES

No state recognizes the gay and trans panic defenses as free-standing defenses under their respective penal codes.[187] Rather, defendants have used concepts of gay and trans panic in three different ways in order to reduce a murder charge to manslaughter or to justifiable homicide.[188]

First, defendants have relied on gay and trans panic defenses to support a defense theory of provocation. Specifically, defendants argue that the discovery, knowledge, or potential disclosure of a victim's sexual orientation or gender identity was a sufficiently provocative act that drove them to kill in the heat of passion. Second, defendants have used the gay and trans panic defenses to support a defense theory of diminished capacity (and in fewer cases, to support a defense theory of insanity). Under the more common diminished capacity approach, defendants argue that the discovery,

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[182] Assembly Bill 2501 amended the statutory definition of voluntary manslaughter under the California Penal Code to include the following language:

> (f)(1) For purposes of determining sudden quarrel or heat of passion pursuant to subdivision (a), the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship. Nothing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation.
> (2) For purposes of this subdivision, "gender" includes a person's gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person's gender as determined at birth.

Cal. Penal Code § 192(f) (2015).

[183] Parker Marie Molloy, *California Becomes First State to Ban Gay, Trans "Panic" Defenses*, The Advocate (Sept. 29, 2014), http://www.advocate.com/crime/2014/09/29/california-becomes-first-state- ban-gay-trans-panic-defenses.

[184] *See LGBTQ+ "Panic" Defense*, Nat'l LGBT Bar Ass'n, https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/gay-trans-panic-defense-legislation/ (last visited Feb. 1, 2021) (documenting each state's legislation).

[185] *Id.*

[186] *See, e.g.*, Gay and Trans Panic Defense Prohibition Act of 2018, S. 3188, 115th Cong. (2018).

[187] *See* references cited *supra* note 178.

[188] Am. Bar Ass'n, Res. 113A, at 1 (2013), https://lgbtbar.org/wp-content/uploads/sites/6/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf.

knowledge, or potential disclosure of a victim's sexual orientation or gender identity caused them to have a temporary mental breakdown, driving them to kill—in other words, a "homosexual panic." Third and finally, defendants have used the gay and trans panic defenses to support a theory of self-defense. Here, defendants argue that they had a reasonable belief that they were in immediate danger of serious bodily harm based on the discovery, knowledge, or potential disclosure of a victim's sexual orientation or gender identity.

Since the 1960s, the gay and trans panic defenses have appeared in publicly reported court opinions in approximately one-half of the states.[189] The reasoning behind a jury's verdict is not published, and cases in which defendants successfully raised the gay and trans panic defenses generally never result in a court opinion. Additionally, most of the publicly available court decisions on this topic specifically involve the gay panic defense, with several cases of defendants raising the trans panic defense in court instead being reported through the media.[190] For these reasons, the examples from court cases below are skewed toward cases involving defendants who were convicted of murder after not successfully raising a gay or trans panic defense, and who are challenging their convictions in an appeal or habeas corpus proceeding.

In spite of these limitations, these examples show a variety of ways that defendants have raised the gay and trans panic defenses based on theories of provocation, insanity/diminished capacity, and self-defense. These examples also show a mix of outcomes in cases in which defendants have raised the gay and trans panic defenses. In some cases, defendants have successfully raised the gay and trans panic defenses, resulting in those defendants avoiding a murder conviction and receiving reduced sentences for a lesser manslaughter offense. In other cases, courts have rejected that the gay and trans panic defenses are valid defenses under state law. In some cases where defendants have raised the gay and trans panic defenses, judges have allowed an instruction on a lesser included manslaughter offense to go to a jury, though juries have often rejected these defenses and convicted the defendants of murder. In other cases, judges have refused to give the jury an instruction on a lesser included manslaughter offense based on the specific facts of the case, but it is unclear whether the judges would give the jury instruction in another case with different facts involving defendants who raise the gay and trans panic defenses.

Prior Research on Use of the Gay and Trans Panic Defenses

In 2020, Professor W. Carsten Andresen published research analyzing use of the gay and trans panic

[189] These states include Arizona (2010), California (1967, 1988, 1989, 2002), Florida (2012), Georgia (2001), Kansas (2000, 2006), Illinois (1972, 1977, 1993, 2000, 2004), Indiana (2001), Iowa (2015), Louisiana (1990), Maryland (1992), Massachusetts (1978, 2005), Michigan (2000), Missouri (1975, 1990, 2000), New Jersey (2004), New York (2012), North Carolina (1978), Nebraska (1994), New Jersey (1988), Ohio (1988, 2011), Pennsylvania (1989, 2010), Tennessee (1998, 2009), Texas (2007), Wisconsin (2001), and Wyoming (1979, 1999).

[190] For a list and discussion of pre-2015 cases reported in the media in which perpetrators have used the trans panic defense, see Aimee Wodda & Vanessa R. Panfil, *"Don't Talk To Me About Deception": The Necessary Erosion of the Trans Panic Defense*, 78 Albany L. Rev. 927, 942–57 (2014/2015); *see also* Cynthia Lee & Peter Kar Yu Kwan, *The Trans Panic Defense: Heteronormativity, and the Murder of Transgender Women*, 66 Hastings L.J. 77 (2014).

defenses in the United States.[191] He found at least 104 cases across 35 states, the District of Columbia, and Puerto Rico where defendants attempted to raise the defenses between 1970 and 2020.[192] Texas had the highest concentration of cases (16), followed by California (11) and Pennsylvania (10). Other states with at least 3 instances of the defenses included Florida (5), Georgia (5), Michigan (4), Mississippi (4), Illinois (3), Louisiana (3), Massachusetts (3), and New York (3), as well as the District of Columbia (3).

Andresen analyzed the outcomes of cases in which the gay and trans panic defenses were used. He found that charges were reduced for defendants who used the gay and trans panic defenses about one-third of the time (32.7% of cases), "even though the majority of these homicides include incredible violence."[193] Overall, defendants were found guilty of homicide in 82.7% of cases and acquitted in 4.8% of cases. For the remaining cases, charges were pending, not indicated, or unknown.[194]

The study also presented information about the circumstances of the crime and age of the victim. In the vast majority of cases (86.5%), the victim was older than the defendant.[195] In terms of weapons use, knives were most commonly used (45.2% of cases), followed by firearms (26.0%) and other objects (20%).[196] In over one-fifth of cases (22.1%) the defendant used multiple weapons.[197] Finally, over half of the murders (53.8%) were committed in the course of a theft or robbery.[198]

Additionally, in response to the authors' request, Andresen provided details about the relationships between the victims and the defendants where this information was known in the cases he collected (80 cases).[199] Out of the 80 cases, Andresen found that in about 30 of them, the victim and defendant had a preexisting relationship prior to the homicide. The nature of these relationships ranged from friendships, to coworker or employee/employer relationships, to sexual or dating relationships. In several more cases, the violence arose as the victim and defendant became acquainted with each other through sex work or a pick up.

Andresen concluded that while he has identified 104 cases in his study, he was "certain that there are hundreds of cases I have yet to identify." The examples provided below were identified through our research and may or may not overlap with those identified by Andresen.

Gay and Trans Panic Defenses in Court Opinions

Cases alleging provocation

Defendants in several states have used the gay and trans panic defenses to support a defense theory

[191] W. Carsten Andresen, *I Track Murder Cases That Use the 'Gay Panic Defense,' A Controversial Practice Banned in 9 States*, The Conversation (Jan. 29, 2020), https://theconversation.com/i-track-murder-cases-that-use-the-gay-panic-defense-a-controversial-practice-banned-in-9-states-129973.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] Email from Warren C. Andresen, Asst. Prof., St. Edwards Univ., to author (Apr. 6, 2021, 12:32 PDT).

of provocation, which reduces a murder charge to a lesser voluntary manslaughter offense. Generally, when raising a provocation defense, defendants argue that they intentionally killed "another while under the influence of a reasonably-induced emotional disturbance . . . causing a temporary loss of normal self-control."[200] In cases involving the gay and trans panic defenses, defendants allege that the discovery, knowledge, or potential disclosure of a victim's sexual orientation or gender identity was a sufficiently provocative act that drove them to kill in the heat of passion.

Arizona

In *Greene v. Ryan*,[201] the defendant alleged that the victim offered to pay to perform oral sex on the defendant after meeting him in a park. The defendant accepted, but later changed his mind. In response, the victim purportedly smiled and touched defendant's leg. The defendant alleged that he "freaked out," and impulsively struck the victim several times, killing him. The jury rejected the defendant's version of the events and convicted him, with the appeals court finding that a reasonable factfinder could have determined that the prosecution's theory of the case—that the defendant murdered the victim in order to gain access to the victim's property, rather than due to his advances—was correct.

California

In *People v. Chavez*,[202] the defendant alleged that the victim made a sexual advance towards him after getting into the victim's car, following their meeting on the street that same evening. The defendant purportedly tried to get away from the victim by exiting and walking away from the car, after which the victim grabbed the defendant's arm. The defendant then stabbed the victim, killing him. At trial, the defendant argued that he killed the victim in a heat of passion triggered by the victim's unwanted homosexual advance. The defendant also claimed that he acted unconsciously, based on the theory that he stabbed the victim during the midst of an epileptic seizure, and produced experts who testified regarding his epilepsy. The jury found the defendant guilty of voluntary manslaughter, not murder.

In *People v. Merel*,[203] the defendants, two men, met a transgender woman after she joined their social circle in the summer of 2002. The men both had separate sexual encounters with her in the following weeks, as did another member of their circle. The men began to discuss their suspicions that the transgender woman "was a man," and during a night of drinking with that group of friends in October, forcefully coerced her into the bathroom to find out.[204] Upon finding out that she was a transgender woman, one of the men cried and stated that "I can't be fuckin' gay."[205] The two men, along with two other friends who were present, then brutally killed the victim by striking her with their fists and heavy objects such as a frying pan. While, as later described by the court, there was "ample evidence that [one of the defendants] was upset," the jury ultimately rejected a provocation defense and convicted both men of second-degree murder.[206] The court sentenced both men to 15 years to life in prison in 2005.

[200] Wayne R. LaFave, Subst. Crim. L. § 15.2 (2d ed. 2015).

[201] No. CV-03-605, 2010 WL 1335490 (D. Ariz. Mar. 31, 2010).

[202] No. F038767, 2002 WL 31863441 (Cal. Ct. App. Dec. 23, 2002).

[203] No. A113056, 2009 WL 1314822 (Cal. Ct. App. May 12, 2009).

[204] *Id.* at *3.

[205] *Id.*

[206] *Id.* at *14.

Florida

In *Patrick v. State*,[207] the defendant met the victim at a public park and later beat the victim to death. The defendant, who had recently been released from prison, met the victim at the park while the two were taking refuge from the rain. The victim invited the defendant to his home for lunch and to give him a place to stay "until [he] was back on his feet."[208] The defendant alleged that the victim tried to have sex with him multiple times while the two were lying in bed at the victim's apartment. The defendant further alleged that after refusing each advance, he lost control and eventually "cut loose" on the victim.[209] After the murder, the defendant "withdrew approximately $900 from [the victim's] bank account using his ATM card in three separate transactions."[210] The trial court excluded evidence regarding the victim's inclination to pick up men at the public park and bring them home. In upholding the trial court's ruling, the Supreme Court of Florida stressed, "[t]he State of Florida does not recognize a nonviolent homosexual advance as sufficient provocation to incite an individual to lose self-control and commit acts in the heat of passion."[211]

Illinois

In *U.S. ex rel. Page v. Mote*,[212] the defendant stabbed the victim to death at the victim's house, initially claiming he did so to carry out a "grudge" against the victim. It appears that the grudge was on behalf of another person, as the record reflects that the victim was stabbed after refusing to turn over photos showing him (the victim) engaged in sexual relations with the defendant's male accomplice. The defendant and his accomplice stole the victim's credit cards and car immediately after the murder, and later returned to steal his television. After being convicted for murder and losing his direct and post-conviction appeals in state court, the defendant filed a habeas corpus motion in federal district court. In his motion, the defendant argued that his trial counsel were constitutionally ineffective because they failed to present sufficient evidence to support a lesser voluntary manslaughter charge. One of the alleged pieces of evidence was that the victim made unwanted sexual advances towards the defendant immediately before the killing. In rejecting the defendant's claim, the federal district court held that, "[u]nder Illinois law, an unwanted homosexual advance is not one of the recognized categories of provocation under the voluntary manslaughter offense."[213]

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[207] 104 So.3d 1046, 1057 (Fla. 2012).

[208] *Id.* at 1053.

[209] *Id.*

[210] *Id.*

[211] *Id*. at 1057. (*citing* Davis v. State, 928 So.2d 1089, 1120 (Fla. 2005)).

[212] Nos. 02C 232, 01 C 233, 2004 WL 2632935 (N.D. Ill. Nov. 17, 2004).

[213] *Mote*, 2004 WL 2632935, at *9. In reaching this conclusion, the federal district court cited to a line of Illinois Supreme Court precedent dating at least as far back as a 1926 case, *People v. Russell*, 322 Ill. 295 (Ill. 1926). This authority stands for the proposition that under Illinois law, there are only certain categories of provocation adequate to support a heat of passion theory: "substantial physical injury or substantial physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse." People v. Garcia, 165 Ill. 2d 409, 429 (Ill. 1995). As a corollary, "[n]o words or gestures, however opprobrious, provoking, or insulting, can amount to the considerable provocation which will so mitigate intentional killing as to reduce the homicide to manslaughter." *Russell*, 322 Ill. at 301. Under this constricted definition of adequate provocation, the district court concluded that an apparently nonviolent yet unwanted homosexual advance was inherently insufficient. *Mote*, 2004 WL 2632935, at *9.

Indiana

In *Dearman v. State*,[214] the defendant met the victim while working to track down distant relatives. The victim claimed to know two of them and offered the defendant a ride in his car to discuss. The defendant claimed that the victim began biting on the defendant's neck and grabbing his thigh. When the defendant resisted, the victim then allegedly threw him to the ground. The defendant subsequently crushed the victim's skull with a concrete block, and fled the scene in the victim's car. He later returned with a friend, stole money, jewelry, and a credit card from the victim's body, and ultimately abandoned the victim's car after taking the jewelry to a pawn shop. At trial, the defendant claimed that he was entitled to a voluntary manslaughter instruction. The trial court declined to instruct the jury on manslaughter, and the jury convicted the defendant of murder. On appeal, the Supreme Court of Indiana concluded that the trial court properly refused to submit a manslaughter instruction to the jury because the record did not show the defendant to be, "in such a state of terror or rage that he was rendered incapable of cool reflection."[215] Further, the court observed, "[l]ifting and striking a person in the head twice with such a large object in a claimed attempt to thwart sexual advances does not indicate that the killing was done in the sudden heat and without reflection."[216]

Kansas

In *State v. Harris*,[217] police officers found the victim dead in an alley, shot several times. Media reports confirm that the defendant met the victim several months before the murder,[218] which he argued in court occurred as part of an effort with his girlfriend to "rob a white man and burglarize his house."[219] The defendant and his accomplice stole the victim's car, and were found by police after attempting to cash a $672 check from the victim that they wrote out to the defendant. At trial, the defendant tried to raise a provocation defense, claiming he stated to the police that he shot the victim after the victim made an unwanted sexual advance, and the defendant became angry. The trial court refused to give a voluntary manslaughter instruction to the jury based on a theory of provocation, and the defendant was convicted of second-degree murder. On appeal, the defendant claimed that it was error for the trial court to refuse to give the instruction on the lesser voluntary manslaughter offense. The court rejected the defendant's claim, concluding that, "an unwanted homosexual advance is insufficient provocation to justify an instruction on the lesser included offense of voluntary manslaughter."[220]

New York

In *People v. Cass*,[221] the defendant admitted to strangling his roommate to death, but claimed he "just lost it" and "snapped" when the victim grabbed his genitals and made other sexual advances towards him during an argument. At trial, the defendant raised a "defense of extreme emotional disturbance,

[214] 743 N.E.2d 757 (Ind. 2001).

[215] *Id*. at 762.

[216] *Id*.

[217] 130 P.3d 1247 (Table) (Kan. Ct. App. 2006).

[218] Dawn Bormann, *KC Man Sentenced in Wheatland Native's Death*, Quad-City Times (Nov. 26, 2002), https://qctimes.com/news/local/kc-man-sentenced-in-wheatland-natives-death/article_a4076287-666e-5b45-b1f9-0f5a8d8e2f68.html.

[219] *Harris*, 130 P.3d at *2.

[220] *Id*. at *5.

[221] 942 N.Y.S.2d 416 (2012).

claiming his violent response to [the victim's] unexpected sexual advances was due to mental illness caused by protracted sexual abuse he suffered as a child."[222] However, the prosecution raised that the defendant had strangled another person he met in a bar one year earlier when, after falling asleep at the person's home, he found that person on top of him, kissing and grabbing him. The jury rejected the defendant's arguments and convicted him of second-degree murder.

Tennessee

In *State v. Wilson*,[223] the defendant alleged that he met the victim for the first time at a restaurant, and invited the victim back to his place for a few drinks. The victim then purportedly made a sexual pass at the defendant, which the defendant rejected. The victim allegedly picked up a handgun, pointed it at the defendant, and told the defendant, "you are going to be my boy tonight." The defendant asked to use the restroom and returned with a shotgun. Both men put their weapons down and began to talk; the victim then reached for the handgun, a struggle ensued, and the defendant obtained possession of the gun and fired it, killing the victim. The defendant argued he responded with violence only in response to threats and homosexual advances from the victim, but was convicted of second-degree murder. The defendant argued on appeal that the evidence was insufficient to convict him for second-degree murder and that it supported only a voluntary manslaughter verdict. However, the court held that it was within the prerogative of the jury to reject the defendant's "heat of passion" argument.

Wisconsin

In *State v. Bodoh*,[224] the victim allegedly made sexual advances toward a friend of several months. That friend, believing that the victim had molested him months earlier while he was passed out from drinking, left and met with another acquaintance to get a gun. The defendant then returned and shot the victim while they were riding in a car with their shared acquaintance. At trial, the defendant raised a provocation defense on the grounds that when he shot the victim, he was flashing back to the alleged prior sexual assault. The jury convicted the defendant of first-degree murder. On appeal, the defendant claimed that his counsel was constitutionally ineffective for not pursuing a psychosexual evaluation for the defendant, which, had it been pursued, would have enabled the defendant to more adequately present a homosexual panic defense. The court rejected the defendant's claim and upheld his conviction.

Cases alleging insanity or diminished capacity

Several defendants have used the gay and trans panic defenses to support a defense theory of diminished capacity. Under this theory, defendants argue that they were incapable of having the required mental state for a specific crime because of a temporary mental impairment or mental disease.[225] Diminished capacity is not a full defense to a crime, but merely results in the defendant being convicted of a lesser offense.[226] In cases involving the gay and trans panic defenses, defendants often raise a diminished capacity defense in order to avoid a murder conviction and

[222] *Id*. at 421.

[223] No. M2007-01854, 2009 WL 2567863 (Tenn. Ct. App. Aug. 20, 2009).

[224] No. 00-2370, 2001 WL 1008151 (Wisc. Ct. App. Sept. 5, 2001).

[225] LaFave, *supra* note 200, at § 9.2.

[226] *Id.*

receive reduced sentences for a lesser manslaughter offense. To do this, defendants allege that the discovery, knowledge, or potential disclosure of a victim's sexual orientation or gender identity caused them to have a temporary mental breakdown, driving them to kill—or in other words, into a "homosexual panic."

In fewer cases, defendants have used the gay and trans panic defenses to support a defense theory of insanity. Unlike diminished capacity, the insanity defense is a full defense to a crime, and results in the defendant being found not guilty by reason of insanity.[227] In raising an insanity defense, defendants argue that they were legally insane[228] at the time of the crime, and therefore, could not have had the requisite mental state to be held criminally liable for that crime.[229] In cases involving the gay and trans panic defenses, defendants argue that they suffer from the purported syndrome of gay or trans panic, which prevented them from knowing what they were doing, or knowing that what they were doing was wrong, at the time they killed an LGBTQ victim.[230]

Louisiana

In *State v. Dietrich*,[231] the defendant killed the victim by stabbing him sixteen times in the victim's apartment. The defendant alleged that the victim, who he had met that night while out with friends, offered him $50 in return for sexual favors and that the victim threatened him with violence when he refused. The trial court excluded the defendant's evidence alleging "homosexual anxiety panic syndrome."[232] On appeal, the court affirmed the trial court's ruling on the grounds that the "State of Louisiana does not recognize the doctrine of diminished responsibility,"[233] and that the defendant's expert testifying as to his ability to distinguish right from wrong at the time of the offense proved fatal to an insanity defense.

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[227] *Id.* at § 7.1.

[228] Jurisdictions have adopted four different tests for determining legal insanity. As LaFave explains:

> As for insanity as a defense, under the prevailing M'Naghten rule (sometimes referred to as the right-wrong test) the defendant cannot be convicted if, at the time he committed the act, he was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, as not to know he was doing what was wrong. A few jurisdictions have supplemented M'Naghten with the unfortunately-named "irresistible impulse" test which, generally stated, recognizes insanity as a defense when the defendant had a mental disease which kept him from controlling his conduct. For several years (but no longer) the District of Columbia followed the so-called Durham rule (or product test), whereby the accused was not criminally responsible if his unlawful act was the product of mental disease or mental defect. And in recent years a substantial minority of states have adopted the Model Penal Code approach, which is that the defendant is not responsible if at the time of his conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

Id.

[229] *Id*.

[230] This iteration assumes that the majority M'Naghten rule applies in a given jurisdiction. If another legal test for insanity applies, then defendants might raise different gay and trans panic arguments to support an insanity defense.

[231] 567 So.2d 623 (La. Ct. App. 1990).

[232] *Id.* at 632.

[233] *Id*. at 633.

Massachusetts

In *Commonwealth v. Cutts*,[234] the defendant went to the victim's house as they were both part of a circle of friends who routinely gathered to play cards, watch pornographic films, and do drugs. After the victim went to bed, the defendant fractured the victim's skull, left a gearshift from a Jaguar automobile protruding from the victim's ear, and hung white rope around the victim's neck. The defendant then left the victim's home with his television and stereo, which he ultimately sold for "cash and several rocks of crack cocaine."[235] At trial, the defendant raised a diminished capacity defense, contending that his actions were the result of "homosexual panic." Multiple psychologists testified that the defendant's conduct was a frenzied and unanticipated response to a perceived sexual advance by the victim. The jury rejected the defendant's defense and convicted him of first-degree murder.

Michigan

In *People v. Harden*,[236] the defense counsel attempted to solicit testimony that the victim, a YMCA employee, was gay in order to bolster the defense's theory that the victim's death resulted from his unwanted homosexual advances towards the defendant. The defense counsel decided not to assert an insanity defense, however, and the jury convicted the defendant of second-degree murder. On appeal, the defendant claimed that the testimony suggested that he was legally insane at the time of the killing, in part because he could not "help one bit in terms of remembering what went on."[237] The court rejected the defendant's claim.

New Jersey

In *Affinito v. Hendricks*,[238] the defendant claimed that he attacked the victim only after the victim made unwanted homosexual advances towards him. The defendant and victim were both regular patrons of the same bar, though the record reflects that "they neither were good friends nor had they known each other very long."[239] The defendant argued he had diminished capacity at the time of the homicide as a result of a "convulsive disorder."[240] The jury convicted him of murder, which occurred after the defendant and his accomplice attacked the victim while driving in the victim's car; they had initially hoped to take the car and "drive around" while the victim was unconscious in the bar.[241] The defendant argued at appeal that his counsel was ineffective for, among other things, failing to provide relevant documents to a defense expert that may have aided in the defendant's diminished capacity defense. The court ultimately denied the defendant's ineffective assistance of counsel claim, noting that the defendant could not show "a reasonable likelihood that a different result would have been reached"[242] if that separate expert had testified.

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[234] 444 Mass. 821 (2005).

[235] *Id.* at 825.

[236] No. 199958, 2000 WL 33407197 (Mich. Ct. App. Sept. 1, 2000).

[237] *Id.* at *4.

[238] 366 F.3d 252 (3d Cir. 2004).

[239] *Id.* at 253.

[240] *Id.* at 259.

[241] *Id.* at 253–54.

[242] *Id.* at 261.

Ohio

In *State v. Van Hook*,[243] the defendant met the victim at a bar, and the two went back to the victim's apartment. At the apartment, the defendant killed the victim by stabbing him multiple times. The defendant then stole various items of jewelry from the victim's apartment. At trial, a psychologist testified and prepared a written testimony addendum suggesting that the killing may have occurred as a result of a "homophobic panic."[244] The defendant pled not guilty by reason of insanity for the offenses of aggravated murder and aggravated robbery. Waiving his right to a trial by jury, a three-judge panel found him guilty on both charges and the specified aggravated circumstances.[245] The defendant appealed in 2011, arguing that evidence on his "homophobic panic" was wrongfully excluded at trial and would have supported his insanity claim if admitted. However, the appeals court rejected this argument, noting that, "[n]o expert testified that Van Hook met the standard for insanity, nor did any expert testify that the murder was the result of a mental disease. Moreover, neither of the [excluded documents] state that Van Hook met the standard for insanity or suffered from a mental disease or defect."[246]

Cases alleging self-defense

Several defendants have also used the gay and trans panic defenses to support a theory of self-defense. To prove self-defense, defendants must demonstrate their reasonable belief that a victim put them in immediate danger of death or serious bodily harm when they used deadly force against that victim.[247] In cases involving the gay and trans panic defenses, defendants have primarily argued that an LGBTQ victim's unwanted sexual advance, or the discovery that the victim was LGBTQ, resulted in a reasonable belief that they were in immediate danger of serious bodily harm.

California

In *People v. Hurst*,[248] the defendant claimed that he killed the victim, his step-father, in self-defense after an alleged attempted sexual assault. The defendant stated the victim attempted "sexual stuff" with him while in their shared home and he "flipped out," kicking victim in the head, hitting him with a five-pound dumbbell, and stabbing victim multiple times with a kitchen knife.[249] At trial, the defendant added allegations that the victim had sexually assaulted him numerous times before the day in the question. Ultimately, the trial court convicted the defendant of first-degree murder. The defendant's appeal, claiming in part that the court erred by denying him the right to present expert witnesses who could explain his theories of "overkill" and "defense rage killing," was later denied.[250]

[243] 39 Ohio St.3d 256 (Ohio 1988).

[244] *Van Hook v. Bobby*, 661 F.3d 264, 267 (6th Cir. 2011).

[245] *Van Hook*, 39 Ohio St.3d at 257.

[246] *Van Hook*, 661 F.3d at 268.

[247] LaFave, *supra* note 200, at § 10.4.

[248] No. B206915, 2009 WL 3531967 (Cal. Ct. App. Nov. 2, 2009).

[249] *Id.* at *2.

[250] Hurst v. Lopez, No. CV 10-9859-JGB (SP), 2015 WL 4748841 (C.D. Cal. Aug. 7, 2015).

Georgia

In *Harris v. State*,[251] the defendant met the victim and accepted an invitation to spend the night with him, though they did not engage in sexual acts. A few nights later, the defendant asked the victim for additional lodging and he obliged, picking up the defendant and a friend of his. After the friend left, the two engaged in sexual acts before the victim left momentarily himself to procure drugs for the defendant. When the victim returned and purportedly continued to make sexually suggestive remarks, the defendant became angry and went to another room, but the victim followed. The defendant then picked up a knife and stabbed and killed the victim. The defendant argued self-defense and decided after discussion with counsel not to request a manslaughter instruction out of fear that he would likely be convicted of manslaughter and have no issues to raise on appeal. The defendant was convicted of murder, with his ineffective assistance of counsel claim later denied.

Iowa

In *State v. Pollard*,[252] the defendant used a crowbar to strike the manager of an adult movie theater in the head and strangle him, resulting in his death. Soon after, the defendant left the theater with a black bag of merchandise and $30, which he later claimed to have taken to "make it look like a robbery."[253] The defendant admitted to killing the manager, but argued that he acted in self-defense. The defendant claimed that he panicked after the manager allegedly sat down next to him during a movie, and touched his leg. The jury rejected the gay panic defense used to support the defendant's theory of self-defense, and convicted him of first-degree murder and first-degree robbery.

New Jersey

In *State v. Camacho*,[254] the victim regularly dressed in feminine attire (a wig, makeup, jewelry, brown skirt, brown blouse, and high heels) during the evenings. After leaving a gay bar one night, the victim met the defendant while dressed in feminine attire on a street known to be a gay pick-up area. The victim offered the defendant $20 to have sex. After entering the victim's apartment, the victim got undressed. Upon seeing the victim's genitals, the defendant alleged that he became angry. The defendant further alleged that he had a knife in his jacket that was visible to the victim, and he believed that the victim was going to grab the knife and use it against him. The defendant then stabbed, beat, and killed the victim. The jury convicted the defendant of first-degree murder. On appeal, the defendant claimed that his counsel was ineffective for failing to request, among other things, an instruction for self-defense and/or imperfect self-defense. The court rejected the defendant's claim.

Pennsylvania

In *Commonwealth v. Benton*,[255] the defendant entered a hotel to look for a friend. The hotel clerk confirmed that the friend had left, but that he (the hotel clerk) had a room. The defendant viewed this

[251] 554 S.E.2d 458 (Ga. 2001).

[252] 862 N.W.2d 414 (Table), 2015 WL 405835 (Iowa Ct. App. 2015).

[253] *Id.* at *2.

[254] No. 01-06-0660, 2010 WL 3218888 (N.J. Ct. App. 2010).

[255] No. 0797, 2006 WL 5430175 (Pa. Com. Pl. July 19, 2006).

as an unwanted homosexual invitation, and a verbal altercation followed. The defendant claimed that the hotel clerk spit on him and appeared to be reaching for something, and so he pulled out a gun and shot the hotel clerk, killing him. The court found that the appellant did not act in self-defense and had the requisite malice to support a conviction for third-degree murder.

Texas

In *Cutsinger v. State*,[256] the defendant argued on appeal that the evidence was insufficient to sustain a conviction for capital murder because, among other things, the defendant killed the victim in self-defense after what he perceived to be homosexual advances. However, the appeals court concluded that the evidence was sufficient to allow a rational jury to reject that the defendant killed the victim in self-defense and instead conclude that the defendant killed the victim to rob him. In doing so, the court relied on the fact that the defendant, who met the victim while hitchhiking, stole $1,000 in cash from the victim's wallet after the murder.

Cases Invoking the Defenses for Post-Conviction Relief

In many cases, defendants invoke the gay and trans panic defenses at trial in order to avoid a murder conviction and receive a reduced sentence based on a lesser charge, or avoid conviction and sentencing entirely. However, some who have been convicted of murder have then raised the gay and trans panic defenses for the first time during post-conviction proceedings in attempts to overturn their sentences and/or receive a retrial.

Missouri

In *Jones v. Delo*,[257] the defendant shot and killed the victim, and was sentenced to death for first-degree murder. The two met in the months leading to the murder, with reports suggesting that the defendant feigned a relationship with the victim—who was several decades his senior—in order to have him buy the defendant a new Camaro.[258] In his motion for post-conviction relief, the defendant argued that trial counsel was ineffective for failing to prepare and present an affirmative mitigating case at the penalty phase of the trial. At the defendant's post-conviction hearing, a psychologist testified that the defendant had described that he experienced panic after the victim made a direct sexual advance. The psychologist further testified that the defendant described that he remembered shooting a gun, but experienced intermittent memory loss in the process of the actual killing. While the court noted that the expert's diagnosis of "ego dystonic homosexuality"[259] would have enabled defense counsel to argue defendant was incapable of cool deliberation at trial, it ultimately concluded that the facts of the case would likely have led the jury to come to the same decision, affirming the lower court's verdict.

[256] No. 14-06-00893, 2007 WL 4442609 (Tex. Ct. App. 2007).

[257] 258 F.3d 893 (8th Cir. 2000), *cert. denied*, Jones v. Luebbers, 535 U.S. 1066 (2002).

[258] *Id.* at 895; *see also William Robert Jones, Jr.*, ClarkProsecutor.org, http://www.clarkprosecutor.org/html/death/US/jones809.htm (last visited Feb 10, 2021).

[259] *Jones*, 258 F.3d at 897.

Pennsylvania

In *Commonwealth v. Martin*,[260] the defendant killed the victim while on a two-hour temporary release from prison, the two having been corresponding while the defendant was incarcerated. The defendant was driven to the victim by his girlfriend and then asked the victim for money, who responded that he would give money in exchange for sex. In response to the victim's purported homosexual advance, the defendant hit the victim over the head, bound his wrists and ankles, and suffocated the victim with a plastic bag. The defendant and his girlfriend then stole the victim's checkbook, credit cards, and car, using them to "fund their westward travel" until being apprehended in Arizona.[261] On habeas, the defendant alleged that trial counsel was ineffective for failing to present a provocation defense to the jury. He argued that the victim's sexual advances triggered post-traumatic stress disorder (PTSD) flashbacks of sexual abuse he suffered as a child, thereby making him incapable of cool reflection. The defendant argued he was prejudiced by his counsel's omission because the presentation of a provocation defense would have reduced his crime from murder to manslaughter by effectively negating the defendant's specific intent to kill. The Court held that the defendant's ineffective assistance of counsel claim lacked merit, accepting a lower court's factual finding that even if the victim's advance triggered PTSD flashbacks, such an event did not, "render [the defendant] incapable of cool reflection so as to support a provocation defense."[262]

Examples Documented in the Media

Cases in which defendants successfully raise the gay and trans panic defense do not often result in published court opinions for the reasons explained above. However, the media has reported on a number of high-profile cases involving LGBTQ victims in which defendants have asserted the gay and trans panic defenses. As with the published opinions, these examples should not be understood as a complete record of the use of gay and trans panic defenses, but rather as illustrative of how the defenses have relied upon by defendants.

California

In 2008, a middle school student pulled out a gun in his computer lab and shot his classmate twice in the back of his head.[263] Weeks before the shooting, the victim told friends he was gay and came to school wearing high heels and makeup.[264] Additionally, two weeks before the shooting, the school's administration had sent an email to all teachers asking for their support of the student and his desired forms of presentation.[265] A day or two before his death, the victim asked the defendant to be

[260] 5 A.3d 177 (Pa. 2010), *cert. denied*, Martin v. Pennsylvania, 563 U.S. 1035 (2011).

[261] *Id.* at 181.

[262] *Id*. at 186.

[263] Jim Dubreuil & Denise Martinez-Ramundo, *Boy Who Shot Classmate at Age 14 Will be Retried as Adult*, ABC News (Oct. 5, 2011), https://abcnews.go.com/US/eighth-grade-shooting-larry-king-brandon-mcinerney-boys/story?id=14666577.

[264] Alexa D'Angelo, *10 Years After Larry King Killing, E.O. Green Junior High Sees Shift in School Culture*, VC Star (June 7, 2018, 11:00 AM), *available at* https://www.vcstar.com/story/news/education/2018/06/07/larry-king-shooting-10-years-later-e-o-green-junior-high-school-sees-change/630855002.

[265] Ramin Setoodeh, *Young, Gay and Murdered*, Newsweek (July 19, 2008), https://web.archive.org/web/20080723000641/http://www.newsweek.com/id/147790/page/4.

his valentine.[266] This comment allegedly made the defendant so uncomfortable that he killed the victim on Valentine's Day.[267] The first murder trial ended in a hung jury in 2011.[268] The defendant later pleaded guilty to second-degree murder and voluntary manslaughter and was sentenced to 21 years in prison.[269] In later interviews, some jury members revealed they did not want to give a life sentence to a teenager and shared that the victim had contributed to his own death while sexually harassing the defendant.[270] Another juror stated that the defendant was "solving a problem" by killing the victim.[271]

Illinois

In 2008, a man in Illinois stabbed his male neighbor 61 times after going back to his apartment following a night of drinking.[272] The defendant reported that he passed out on the victim's couch, and awoke to the victim brandishing a 14-inch sword and threatening to sexually assault him.[273] This allegedly started a fight, in which the defendant grabbed a dagger and stabbed the victim repeatedly while trying to escape.[274] The jury acquitted the defendant on first-degree murder charges and was not allowed to consider second-degree murder charges.[275] By acquitting, the jury accepted as reasonable the premise that the defendant needed to stab the victim 61 times to fend off the alleged sexual advance.[276]

In 2009, a 23-year-old man beat his 53-year-old co-worker to death with a heavy tool at the auto repair shop where they worked.[277] The defendant stated that the victim made sexual advances towards him while they were sleeping in a bed at the repair shop.[278] The defendant told investigators that he then left the bed, put on gloves, grabbed the tool, and beat the victim in the head until his arm was tired.[279] He told them he would do it again if the opportunity arose. [280] In 2010, a court sentenced the defendant to 25 years in prison as part of a plea deal.[281]

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[266] *Id.*

[267] Chase Strangio, *Remembering Larry King*, ACLU (Feb. 12, 2014, 11:16 AM), https://www.aclu.org/blog/lgbt-rights/transgender-rights/remembering-larry-king.

[268] Dubreuil & Martinez-Ramundo, *supra* note 263.

[269] Mary McNamara, *Review: 'Valentine Road' Offers Clear-Eyed View of Larry King Murder*, L.A. Times (Oct. 6, 2013, 12:00 AM), https://www.latimes.com/entertainment/tv/la-xpm-2013-oct-06-la-et-st-valentine-road-20131007-story.html.

[270] *Id.*

[271] *Id.*

[272] Zach Christman, *Gay Panic Defense Gets Murder Defendant Off*, NBC Chicago (July 17, 2009, 8:56 AM), https://www.nbcchicago.com/news/local/Gay-Panic-Defense-Gets-Murder-Defendant-Off.html.

[273] Michael Rowe, *"Gay Panic Defense" Used to Acquit Illinois Man Who Stabbed Neighbor 61 Times*, HuffPost (Aug. 14, 2009, 5:12 AM), https://www.huffpost.com/entry/man-acquitted-of-murder-a_b_231748.

[274] Christman, *supra* note 272.

[275] *Id.*

[276] Rowe, *supra* note 273.

[277] Jake Griffin, *Plea Deal Reached in Bloomingdale Mechanic's Murder*, Daily Hearld (Jan. 19, 2010, 10:48 AM), http://prev.dailyherald.com/story/?id=352026.

[278] *Id.*

[279] Pam Spaulding, *IL: Another Murder Suspect Cites 'Gay Panic' Defense*, ShadowProof (Mar. 7, 2009), https://shadowproof.com/2009/03/07/il-another-murder-suspect-cites-gay-panic-defense.

[280] *Id.*

[281] Griffin, *supra* note 277.

New York

In 2013, a group of men punched a transgender woman to the ground after passing her on the street.[282] The victim was knocked unconscious, but one man continued to assault her as she lay on the street.[283] She was taken to a hospital and declared brain dead as a result of the injuries.[284] The man turned himself in and testified that he started flirting with the victim, unaware she was transgender.[285] When his friends began to mock him for flirting with a transgender woman, he attacked her.[286] The defendant was sentenced to 12 years in prison in 2016, a penalty the victim's family said was too light.[287]

Tennessee

In 2020, a firefighter was shot and killed by a man after having propositioned the man and his girlfriend have sex at a park "well-known [as a] gay cruising area."[288] In statements given to the police, the male defendant noted that he felt "uncomfortable" after being offered sex by the victim and immediately shot him multiple times, killing him.[289] The man and his girlfriend were indicted on felony charges related to the murder in October 2020.[290]

Texas

In 2015, the victim invited his neighbor, the defendant, to his house for a night of music and drinking.[291] The defendant allegedly told police that he was not gay, and rejected the victim when he made an advance.[292] The rejection allegedly caused the defendant to lunge towards him with a glass.[293] He then stabbed the victim twice in the back, killing him, claiming that he felt he going to be

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[282] Irene Plagianos, *Man Pleads Guilty to Beating Transgender Woman Islan Nettles to Death*, DNA Info (Apr 4, 2016, 12:37 PM), https://www.dnainfo.com/new-york/20160404/central-harlem/man-pleads-guilty-beating-transgender-woman-islan-nettles-death.

[283] *Id.*

[284] *Id.*

[285] James C. McKinley Jr., *Man Sentenced to 12 Years in Beating Death of Transgender Woman*, N.Y. Times (Apr 19, 2016), https://www.nytimes.com/2016/04/20/nyregion/man-sentenced-to-12-years-in-beating-death-of-transgender-woman.html.

[286] *Id.*

[287] *Id.*

[288] Donald Padgett, *Gay Firefighter Killed After Flirting with Straight Couple*, Out.com (July 22, 2020), https://www.out.com/crime/2020/7/22/gay-firefighter-killed-after-flirting-straight-couple.

[289] *Arrests Made in the Shooting Death of a Memphis Firefighter, Police Say*, Fox13Memphis.com (July 18, 2020), https://www.fox13memphis.com/news/local/arrests-made-shooting-death-memphis-firefighter-police-say/ZP44BTO545DXPEJ6SV2NOHBPHM.

[290] *Couple Indicted in Death of Off-Duty Firefighter*, Shelby Cty. Dist. Att'y (Oct. 8, 2020), https://www.scdag.com/news-releases/couple-indicted-in-death-of-off-duty-firefighter.

[291] Julie Compton, *Alleged 'Gay Panic Defense' in Texas Murder Trial Stuns Advocates*, NBC (May 2, 2018, 11:12 AM), https://www.nbcnews.com/feature/nbc-out/alleged-gay-panic-defense-texas-murder-trial-stuns-advocates-n870571.

[292] Curtis M. Wong, *Texas Man who Killed Neighbor Uses 'Gay Panic' Defense and Avoids Murder Charge*, HuffPost (Apr. 28, 2018, 3:30 PM), https://www.huffpost.com/entry/texas-james-miller-gay-panic_n_5ae35296e4b04aa23f22efe8.

[293] Compton, *supra* note 291.

hurt and his actions were self-defense.[294] The jury convicted the defendant of criminally negligent homicide, which carries a lighter sentence than murder or manslaughter.[295] The judge sentenced the defendant to maximum six months jail time, 100 hours of community service, and ordered $11,000 in restitution to the victim's family, along with 10 years of probation as recommended by the jury.[296]

CHALLENGES TO BANS ON THE GAY AND TRANS PANIC DEFENSES

Critics of state legislation eliminating the gay and trans panic defenses have argued that such legislation violates defendants' rights,[297] specifically those protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[298] However, as of this writing, no constitutional challenges have been brought against laws banning the availability of these defenses. Additionally, controlling Supreme Court precedent suggests that, should a court ever consider such a challenge, it would be highly unlikely to conclude that a statute eliminating the gay and trans panic defenses violates the Due Process Clause.

In *Montana v. Egelhoff*,[299] the U.S. Supreme Court considered whether the Due Process Clause was violated by a state law which declared that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense."[300] In other words, the Supreme Court was asked to determine whether states violate the Due Process Clause by using legislation to prohibit the availability of certain defenses in criminal trials. A plurality of the Court held that they do not, and "rejected the view that anything in the Due Process Clause bars States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions."[301]

The *Egelhoff* plurality concluded that the defendant did not meet the heavy burden imposed under traditional due process: that the new statute offended a "fundamental principle of justice" and should therefore be struck down.[302] The plurality based its decision on historical practice, and found that the defense being displaced by that statute was not fundamental as it was too new, had not received sufficiently uniform and permanent allegiance across the states, and had itself displaced a lengthy

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[294] *Id.*; Lucas Grindley, *Why this Texas Man got Probation for Murdering Gay Neighbor*, The Advocate (Apr. 29, 2018, 1:16 PM), https://www.advocate.com/crime/2018/4/29/why-texas-man-got-probation-murdering-gay-neighbor.

[295] Compton, *supra* note 291.

[296] *Id.*

[297] *See, e.g.*, Ben Brachfeld, *Albany Lawmakers Weigh A Ban on the Gay and Trans Panic Defense*, Gothamist (May 30, 2019, 2:54 PM), https://gothamist.com/2019/05/30/albany_gay_panic_defense.php.

[298] The Due Process Clause of the Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. Amend. XIV.

[299] 518 U.S. 37 (1996).

[300] Mont. Code Ann. § 45-2-2-3.

[301] *Egelhoff*, 518 U.S. at 54. (Ginsburg, J., concurring); *id.* at 50 n.4. (noting the plurality's "complete agreement" with the rationale of Justice Ginsburg's concurrence: that the statute could be upheld as being within the traditional broad discretion given to state legislatures to define the elements of criminal defenses). On their face, bans on the gay and trans panic defenses would likely be seen as an exercise of that particular form of state power. *See id.* (concluding that the law in *Egelhoff* appeared constitutional both as an evidentiary rule or as a modification of a definition of an element of a crime).

[302] *Id.* at 43 (internal quotations omitted).

common law tradition (supported by legitimate state policy justifications) rejecting inebriation as a criminal defense.[303] The plurality opinion also rejected the state supreme court's reasoning that the statute was unconstitutional because it made it easier for the State to meet the requirement of proving *mens rea* beyond a reasonable doubt. The Court reasoned that *any* evidentiary rule could have that effect, and that "reducing" the State's burden in this manner is not unconstitutional unless the rule of evidence itself violates a fundamental principle of fairness.[304]

The holding in *Egelhoff* was recently reaffirmed in *Kahler v. Kansas*, a Supreme Court case examining whether states may restrict the impact of an insanity defense in criminal trials.[305] In *Kahler*, the defendant argued that Kansas's insanity defense violated the Due Process Clause because it did not allow for the exoneration of defendants who lacked the ability to distinguish right from wrong, as some other states do. Rather, Kansas law provided that defendants could establish an insanity defense only by proving that as a result of mental disease or defect, they lacked the "culpable mental state" required to commit the crime—essentially, that they were unable to comprehend what they were doing when they committed the crime.[306]

A majority of the Court upheld the Kansas law, holding that "well-settled precedent" establishes that states enjoy broad discretion in creating rules on criminal liability, including "laying out either the elements of or the defenses to a crime . . . ."[307] While the Court acknowledged that this principle is limited by the Due Process Clause, it also made clear that a violation occurs only when a state's rule "offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental."[308] Additionally, the *Kahler* Court confirmed that the *Egelhoff* "historical practice" test is the "primary guide in applying that standard."[309]

Notably, the Court in *Kahler* held that this standard will always weigh in favor of the state in the insanity defense context, finding that "[n]o insanity rule in this country's heritage or history was ever so settled as to tie a State's hands centuries later."[310] The Court explained its reasoning further, noting that, "[d]efining the precise relationship between criminal culpability and mental illness . . . . is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve. Which is all to say that it is a project for state governance, not constitutional law."[311]

After *Kahler*, state legislation restricting the availability of the gay and trans panic defenses as forms of the insanity defense would be presumed constitutional by courts considering challenges on due process grounds. Bans on the use of the gay and trans panic defenses in other circumstances, including to support a theory of provocation or self-defense, would most likely also survive judicial scrutiny under the *Egelhoff* analysis.

[303] *Id.* at 51.

[304] *Id.* at 55.

[305] 589 U.S. ___ (2020).

[306] Kan. Stat. Ann. § 22-3220.

[307] *Kahler*, 589 U.S. at 6.

[308] *Id.* (internal citations omitted); *see also Egelhoff*, 518 U.S. at 43 (*quoting* Patterson v. New York, 432 U.S. 197, 202 (1977)).

[309] *Kahler*, 589 U.S. at 6.

[310] *Id.* at 24.

[311] *Id.*

First, if a rule applied by courts in the 19th century is "of too recent vintage" to be deemed fundamental,[312] then it is extremely unlikely that any court would find that the gay and trans panic defenses are fundamental—particularly given that the first judicial mention of the gay panic defense in the United States was in a case before the California Court of Appeal in 1961.[313] Second, if the Supreme Court held that the adoption of the displaced rule in *Egelhoff*—adopted by 80% of the states in the U.S. at the time—was insufficient to be considered a "fundamental principle of justice,"[314] then it is unlikely any court will hold that the gay and trans panic defenses have seen the requisite level of adoption. Defenders of these bans would likely be able to point to the defenses' lack of codification in any state's penal code, the limited number of opinions discussing them across several decades, and the flurry of activity by states in recent years to ban the defenses as support for a finding these bans have not and do not enjoy the type of uniform adoption that would raise constitutional concerns under *Egelhoff*.

Defenders of any bans on the defenses would, similar to the case in *Egelhoff*, also be able to demonstrate that state policy justifications for eliminating the defenses exist. In *Egelhoff*, the Court noted that excluding evidence of voluntary intoxication was supported by the following state policy justifications: (1) preventing a large number of violent crimes, (2) increasing the punishment for all unlawful acts committed in that state – thereby deterring irresponsible behavior while drunk, (3) serving as a specific deterrent by ensuring that those who prove incapable of controlling violent impulses while voluntarily intoxicated go to prison, (4) implementing society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences, (5) interrupting the perpetuation of harmful cultural norms that validate drunken violence as a learned behavior, and (6) excluding misleading evidence because juries, "who possess the same learned belief . . . may be too quick to accept the claim that the defendant was biologically incapable of forming the requisite *mens rea.*"[315]

Likewise, elimination of the gay panic and trans panic defenses serve multiple legitimate state policy justifications, some of which directly echo the policy considerations in *Egelhoff*. Elimination of gay and trans panic defenses are supported by the legitimate policy justifications of: (1) increasing punishment for acts made unlawful by the state, (2) specifically deterring further criminal actions by those who kill due to alleged gay or trans panic, (3) reinforcing society's moral conception of personal responsibility, (4) interrupting the perpetuation of harmful cultural norms that validate violence against LGBTQ people, (5) furthering the policies expressed in state hate crime laws and anti-discrimination legislation, (6) preventing defendants from exploiting any potential homophobic and transphobic biases among the members of a jury, and (7) precluding unnecessary and invasive testimony about a victim's sexuality, sex, and/or gender identity/expression in state criminal trials.

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[312] *Egelhoff*, 518 U.S. at 51.

[313] People v. Stoltz, 16 Cal. Rptr. 285 (Cal. Ct. App. 1961). In *Stoltz*, the defendant was convicted of second-degree murder and grand theft. The defendant alleged that he killed the victim after the victim made unwanted sexual advances towards him, which frightened him. A psychiatrist and neurologist testified for the defense that the defendant killed the victim in a homosexual panic, a "panic reaction to a homosexual situation [that was] recognized in the field of psychiatry." *Id*. at 287.

[314] *Egelhoff*, 518 U.S. at 48.

[315] *Id.* at 50–51.

In *Egelhoff*, the plurality spoke at length on the broad discretion of states to determine the evidentiary rules for state criminal trials and to define the elements of state crimes and defenses, holding that defendants do not have an absolute right to present relevant evidence in their defense.[316] And, in *Kahler*, the majority reaffirmed that principle by noting that even under the guarantees of the Due Process Clause, defendants are not entitled to "the particular insanity defense [they] would like."[317] For these reasons, it is therefore unlikely that any due process challenges to state legislation eliminating the gay and trans panic defenses would be successful.

[316] *See id.* at 43 (*quoting* Patterson v. New York, 432 U.S. at 201–02) ("preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and . . . we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out.'"). *See also* Cooper v. Oklahoma, 517 U.S. 348, 355 (1996) (applying *Patterson* test); Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) ("The Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules").

[317] Kahler v. Kansas, 589 U.S. ___, 24 (2020).

RECOMMENDATIONS FOR PROTECTING LGBTQ PEOPLE FROM VIOLENCE

In order to protect LGBTQ people from violence, we recommend that state legislatures adopt legislation to 1) prohibit use of the gay and trans panic defenses; 2) add sexual orientation and gender identity as protected characteristics in hate crimes laws; and 3) strengthen protections for survivors of intimate partner violence. We provide recommendations below that states may use to shape their legislation in these three areas.

In addition, states could further strengthen anti-violence protections for LGBTQ people by prohibiting bullying and harassment of LGBTQ youth,[318] improving relationships between law enforcement and LGBTQ communities,[319] and ensuring that service providers are willing and able to competently serve LGBTQ people.[320]

MODEL LANGUAGE TO ELIMINATE USE OF THE GAY AND TRANS PANIC DEFENSES

We recommend that state legislatures adopt legislation to prohibit use of the gay and transgender panic defenses. Currently, 39 states do not have such laws.[321]

The model legislation below provides language and guidance that states may use in developing their own bills. Each state's bill should be tailored to the underlying defenses available in the state. For example, if the state does not recognize a diminished capacity defense, Section 103 of the recommended language should not be included in the bill.

AN ACT CONCERNING THE ELIMINATION OF THE GAY AND TRANS PANIC DEFENSES

Be it enacted by the Legislature of the State of ABC that Title XXX is amended to include a new Article 123, which reads as follows:

Section 101. Findings

(a) The Legislature finds the following:

1. LGBTQ people have historically been subjected to and continue to face widespread and persistent discrimination, stigma, and violence across the United States.

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[318] Stuart Biegel & Sheila James Kuehl, Safe at School: Addressing the School Environment and LGBT Safety through Policy and Legislation (2010), https://nepc.colorado.edu/publication/safe-at-school.

[319] *See* Christy Mallory, Amira Hasenbush, & Brad Sears, Williams Inst., Discrimination and Harassment by Law Enforcement Officers in the LGBT Community (2015), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf.

[320] *See Supporting LGBTQ Survivors*, vawnet.org, https://vawnet.org/sc/improving-services-lgbtq-individuals (last visited Mar. 24, 2021).

[321] *See supra* notes 182–185 and accompanying text.

2. Thousands of instances of hate violence and intimate partner violence against LGBTQ people have been documented by community organizations, state and federal law enforcement agencies, and the media.
3. LGBTQ people are three to four times more likely to experience violent victimization than non-LGBTQ people, including instances of rape, sexual assault, robbery, and aggravated or simple assault.
4. Transgender women of color face particularly high rates of violence. A 2019 report documented 157 homicides of transgender people between 2013–2019. Over 80% of the victims were transgender women of color.
5. Federal hate crimes data collected between 2011–2018 show that between 16% and 20% of all hate crimes victims were targeted because of their sexual orientation and between 0.5% to 2% were targeted because of their gender identity.
6. Existing data suggest that over half of LGBTQ victims and survivors knew their assailant prior to the attack.
7. Many LGBTQ people experience intimate partner violence and rates are elevated for marginalized communities within the LGBTQ population, including transgender people and lesbian or bisexual women. Sixty-one percent of bisexual women and 44% of lesbian women have experienced rape, physical violence, or stalking by an intimate partner. Over half (54%) of transgender people have experienced some form of intimate partner violence.
8. Existing laws are inadequate to protect LGBTQ people from violence.
9. Gay and transgender panic defenses are rooted in antiquated ideas that being LGBTQ is a mental illness and rely on the assumption that it is reasonable for an assailant to react violently to discovering the victim's sexual orientation or gender identity or to a romantic advance by an LGBTQ victim.
10. Continued use of gay and transgender panic defenses reinforce stereotypes and bias against LGBTQ people, and puts them at increased risk of violence.
11. As the Legislature has a compelling interest in prohibiting all forms of violence, including violence against LGBTQ people, it brings forth this legislation to end use of the gay and transgender panic defenses.

Section 102. Restrictions on the Defense of Provocation

For purposes of determining sudden quarrel or heat of passion, the provocation was not objectively reasonable if it resulted from the discovery of, knowledge or belief about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.

Section 103. Restrictions on the Defense of Diminished Capacity

A defendant does not suffer from reduced mental capacity based on the discovery of, knowledge or belief about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an

unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.

Section 104. Restrictions on the Defense of Self-Defense

A person is not justified in using force against another based on the discovery of, knowledge or belief about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.

ADDING SEX, SEXUAL ORIENTATION, AND GENDER IDENTITY TO HATE CRIMES LAWS

We recommend that state legislatures adopt legislation adding sex, sexual orientation, and gender identity to existing hate crimes laws, or pass new hate crimes laws that include these characteristics, plus other characteristics generally included in hate crimes laws (such as race, national origin, religion, disability, political affiliation, and age).

Of the 45 states with hate crimes laws, 18 do not include sex as a motivating factor, 12 do not include sexual orientation as a motivating factor, and 28 do not include gender identity as a motivating factor.[322]

Inclusion of sex, sexual orientation, and gender identity in state hate crimes laws

STATE/TERRITORY	SEX INCLUDED?	SEXUAL ORIENTATION INCLUDED?	GENDER IDENTITY INCLUDED?
Alabama	No	No	No
Alaska	Yes	No	No
Arizona	Yes	Yes	No
Arkansas	No hate crimes law	No hate crimes law	No hate crimes law
California	Yes	Yes	Yes
Colorado	No	Yes	Yes
Connecticut	Yes	Yes	Yes
Delaware	No	Yes	Yes
Florida	No	Yes	No
Georgia	Yes	Yes	No
Hawaii	Yes	Yes	Yes
Idaho	No	No	No
Illinois	Yes	Yes	Yes
Indiana	No hate crimes law	No hate crimes law	No hate crimes law
Iowa	Yes	Yes	No
STATE/TERRITORY	SEX INCLUDED?	SEXUAL ORIENTATION INCLUDED?	GENDER IDENTITY INCLUDED?

[322] *See* discussion *supra* note 168. The hate crimes laws of the District of Columbia and Puerto Rico include sex, sexual orientation, and gender identity as motivating factors. *Id.*

Kansas	No	Yes	No
Kentucky	No	Yes	No
Louisiana	Yes	Yes	No
Maine	Yes	Yes	No
Maryland	Yes	Yes	Yes
Massachusetts	No	Yes	Yes
Michigan	Yes	Yes	No
Minnesota	Yes	Yes	No
Mississippi	Yes	No	No
Missouri	Yes	Yes	No
Montana	No	No	No
Nebraska	Yes	Yes	No
Nevada	No	Yes	Yes
New Hampshire	Yes	Yes	Yes
New Jersey	Yes	Yes	Yes
New Mexico	Yes	Yes	Yes
New York	Yes	Yes	Yes
North Carolina	No	No	No
North Dakota	No hate crimes law	No hate crimes law	No hate crimes law
Ohio	No	No	No
Oklahoma	No	No	No
Oregon	No	Yes	Yes
Pennsylvania	No	No	No
Rhode Island	Yes	Yes	No
South Carolina	No hate crimes law	No hate crimes law	No hate crimes law
South Dakota	No	No	No
Tennessee	Yes	Yes	No
Texas	Yes	Yes	No
Utah	Yes	Yes	Yes
Vermont	Yes	Yes	Yes
Virginia	No	No	No
Washington	Yes	Yes	Yes
West Virginia	Yes	No	No
Wisconsin	No	Yes	No
Wyoming	No hate crimes law	No hate crimes law	No hate crimes law
District of Columbia	Yes	Yes	Yes
American Samoa	No hate crimes law	No hate crimes law	No hate crimes law
Guam	No hate crimes law	No hate crimes law	No hate crimes law
Northern Mariana Islands	No hate crimes law	No hate crimes law	No hate crimes law
Puerto Rico	Yes	Yes	Yes
U.S. Virgin Islands	No hate crimes law	No hate crimes law	No hate crimes law

The five states that do not have hate crimes laws are Arkansas, Indiana, North Dakota, South Carolina, and Wyoming.[323]

STRENGTHENING LAWS THAT ADDRESS INTIMATE PARTNER VIOLENCE

We recommend that states consider strengthening and broadening their intimate partner violence laws. Specifically, we recommend that North Carolina revise its intimate partner violence law to cover unmarried same-sex couples (consistent with the court's decision in *M.E. v. T.J.*) by amending N.C. Gen. Stat. § 50B-1(b)(2) to read that a covered "personal relationship" exists when the parties "Are persons of the opposite sex or same sex who live together or have lived together."

We further recommend that the 12 states that currently require unmarried current or former partners to live together or have lived together in the past revise their laws to omit that cohabitation requirement and instead apply to all dating or romantic partners (current and former), regardless of living situation. These states are: Florida, Georgia, Idaho, Indiana, Maryland, North Carolina, Ohio, South Carolina, Texas, Utah, Virginia, and Wisconsin.[324]

Finally, we recommend that all states amend their intimate partner laws to include language clarifying that the victim's and perpetrator's sex, sexual orientation, and gender identity must not be factors in the decision to grant or deny a claim for protection under the law.

[323] *Id.* Similarly, the territories of American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands do not have hate crimes laws. *Id.*

[324] *See Domestic Violence/Domestic Abuse Definitions and Relationships*, Nat'l Conference of State Legislatures (June 13, 2019), https://www.ncsl.org/research/human-services/domestic-violence-domestic-abuse-definitions-and-relationships.aspx. Although by its text, South Carolina's intimate partner violence law applies only different-sex unmarried partners, the South Carolina Supreme Court has ruled that same-sex unmarried partners are entitled to the same protections. Doe v. State, 421 S.C. 490 (S.C. 2017).

CONCLUSION

LGBTQ people have historically faced—and are still subject to—widespread stigma, discrimination, and violence. Violence against LGBTQ people has been documented in a variety of sources including the media, hate crimes data, court cases, academic research, and reports by community-based organizations. Much of this violence is at the hands of someone well-known to the victim, including those with whom they have dating and romantic relationships. This violence can result in death, and even when victims survive, often has lasting effects on their physical, mental, and emotional health and well-being. One way states can combat the epidemic of violence against LGBTQ people is by passing laws that bar defendants from asserting the gay and trans panic defenses in court.

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FRAMING LEGISLATION BANNING THE "GAY AND TRANS PANIC" DEFENSES

Jordan Blair Woods *

INTRODUCTION

Since the 1960s, criminal defendants who have attacked (and in most cases killed) lesbian, gay, bisexual, transgender, and queer ("LGBTQ") victims have relied on the "gay and trans panic" defenses in order to avoid conviction or to receive lesser punishment.[1] Contrary to what the name suggests, the gay and trans panic defenses are not freestanding legal defenses.[2] Rather, over time, defendants have invoked gay and trans panic concepts to support one

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1. For simplicity, this Article often uses the phrase "gay and trans panic," even though different terms (for instance, "acute homosexual panic" or "homosexual panic") have been used to describe the concept over time. As discussed in *infra* Part III, scholars date the first explicit mention of the gay and trans panic defenses in a published court decision to the 1967 California case of *People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967). *See* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 491 & n.81, 494–95 (2008). Cases in which the gay and trans panic defenses are raised typically involve a defendant who kills an LGBTQ victim. *Id.* at 475.

2. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1279 (2011) (stating that "the 'gay panic' defense is not an independently recognized defense"); Lee, *supra* note 1, at 490.

of three well-established legal defenses:[3] (1) provocation,[4] (2) insanity[5] (or diminished capacity,[6]) and (3) self-defense[7] (or imperfect self-defense).[8] Depending on which of these defenses gay and trans panic concepts are being used to support, if successfully raised, a defendant who attacked or killed a LGBTQ victim could receive a lesser charge or sentence, or avoid conviction and punishment altogether.[9]

This Article, prepared for the *University of Richmond Law Review* symposium commemorating the fiftieth anniversary of the

3. Lee, *supra* note 1, at 475. Since first recorded in 1967, cases in over half of the states have been documented in which defendants have used gay and trans panic ideas to support one of these three freestanding defenses. JORDAN BLAIR WOODS, BRAD SEARS & CHRISTY MALLORY, MODEL LEGISLATION FOR ELIMINATING THE GAY AND TRANS PANIC DEFENSES 2 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/2016-Model-GayTransPanic-Ban-Laws-final.pdf [https://perma.cc/U5WT-WL2Y].

4. Although specific formulations of the provocation defense differ across jurisdictions, the general idea is that the defendant intentionally killed another person "pursuant to provocation sufficient to cause both the defendant and a hypothetical reasonable person to act in the heat of passion." Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated*, 66 N.C. L. REV. 283, 302 (1988). In jurisdictions that follow the Model Penal Code, manslaughter is the proper charge for heat of passion killings when "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." MODEL PENAL CODE § 210.3(1)(b) (1985). For an in-depth discussion of feminist critiques of the provocation defense see generally Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273 (2015).

5. One common formulation of the insanity defense focuses on whether defendants, by virtue of their mental illness, lacked the capacity to understand the nature or wrongfulness of their acts at the time of the offense. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 341 (1996). Another common formulation of the insanity defense focuses on whether defendants, by virtue of their mental illness, lacked the ability to control their behavior at the time of the offense. *Id.*

6. Unlike insanity, diminished capacity is a partial defense recognized in some jurisdictions which permits "the fact-finder to consider a sane defendant's mental abnormality when it assesses his degree of criminal liability." *See* Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 828 (1977).

7. Under the traditional approach to self-defense, a non-aggressor is justified in using "a reasonable amount of force against another person if she honestly and reasonably believes that: (1) she is in imminent or immediate danger of unlawful bodily harm from her adversary, and (2) the use of such force is necessary to avoid such danger." Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Narrative Conception of Reasonableness*, 81 MINN. L. REV. 367, 377 (1996). Jurisdictions differ on whether the definition of reasonableness for self-defense is based on an objective, subjective, or a hybrid objective-subjective standard of reasonableness. *Id.* at 381.

8. Unlike self-defense, imperfect self-defense is a partial defense recognized in some jurisdictions "under which a defendant who makes an honest, but unreasonable, mistake about the need for deadly force has a defense to murder but not to manslaughter." Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1660–61 (2019).

9. WOODS, SEARS & MALLORY, *supra* note 3, at 2.

Stonewall Riots of 1969, uses the Stonewall Riots as an opportunity to analyze and theorize the political dimensions of legislation banning the gay and trans panic defenses.[10] As a moment of resistance to state violence against LGBTQ people, the Stonewall Riots are a useful platform to examine the historical and current relationship between the state[11] and the gay and trans panic defenses.[12] Drawing on original readings of medical literature, this Article brings the historical role of the state in the growth of gay and trans panic to the surface and discusses how gay and trans panic ideas blur the distinction between state and private violence.[13] As explained below, prominent psychiatrists who created and honed gay and trans panic ideas over time worked for and conducted research in state-run hospitals and prisons.[14]

Since 2014, nine states have enacted legislation banning the gay and trans panic defenses, and more states are considering similar

10. This Article focuses on legislation banning the gay and trans panic defenses. Judicial bans on the gay and trans panic defenses are beyond the scope of this Article.

11. This Article often uses "the state" as a general phrase to refer to government and its branches.

12. The Stonewall Riots of 1969 were most obviously an immediate act of resistance to police officers who raided a bar that was a place of belonging for New York City's LGBTQ community, especially those at the margins (for instance, LGBTQ people of color, transgender people, and LGBTQ street kids). *See* DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION (2004); Terence Kissack, *Freaking Fag Revolutionaries: New York's Gay Liberation Front, 1969–1971*, 62 RADICAL HIST. REV. 104, 109 (1995). Although the Stonewall Riots are remembered as a major moment of LGBTQ resistance to the police, it is important to recognize literature documenting earlier moments of LGBTQ resistance to the police. *See* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970, at 49–50 (2d ed. 1998); MARTIN DUBERMAN, STONEWALL, THE DEFINITIVE STORY OF THE LGBTQ RIGHTS UPRISING THAT CHANGED AMERICA 121 (1993); MARC STEIN, THE STONEWALL RIOTS: A DOCUMENTARY HISTORY 8 (2019); Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City 1960–1980*, 12 COLUM. HUM. RTS. L. REV. 159, 160 (1980) ("In the early sixties, [police] harassment of homosexual citizens was quite common."); David Alan Sklansky, *"One Train May Hide Another"*: Katz, *Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 878 (2008) ("There is widespread awareness that the police systematically harassed gay men and lesbians in the 1950s and 1960s."). Importantly, scholars have also discussed how judges played a key role in justifying police surveillance and crackdowns against homosexuality based on stereotypes of gay men as sexual predators in the mid-twentieth century. *See generally* GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 153–56 (1991); Anna Lvovsky, *Cruising in Plain View: Surveillance and the Unique Insights of Antihomosexual Policing*, J. URB. HIST. 2 (2017).

13. Scholars have criticized sodomy laws on similar grounds. *See, e.g.*, Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1435 (1992) (arguing that "the law against homosexual sodomy has been vexed from its inception by a persistent and pervasive practice of homophobic violence on the part of public officials and private citizens alike").

14. *See infra* Part I and Section II.B.

legislation.[15] Advocates who oppose these bans have largely centered their critiques on the view that eliminating the gay and trans panic defenses violates the due process rights of defendants who kill LGBTQ victims.[16] Although it is important to take due process arguments seriously, these considerations do not fully capture the stakes of recognizing the gay and trans panic defenses under the substantive criminal law.[17] Because of its individualized focus, the due process lens treats gay and trans panic cases as incidents involving private violence perpetrated by one individual against another, and in so doing, neglects the historical role of the state in the growth of gay and trans panic as a concept and defense strategy.[18]

First introduced as a medical concept in 1920 by Edward J. Kempf—a prominent psychiatrist at federally created and federally run St. Elizabeths Hospital in Washington, D.C.[19]—gay and

15. *See Gay/Trans Panic Defense Bans*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/img/maps/citations-panic-defense-bans.pdf (showing that California, Connecticut, Hawaii, Illinois, Maine, Nevada, New Jersey, New York, and Rhode Island have eliminated the gay and trans panic defenses through legislation) [https://perma.cc/RQ8S-P4VN]; Alexandra Holden, *The Gay/Trans Panic Defense: What It Is, and How To End It*, A.B.A. (July 10, 2019), https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/ (discussing legislative efforts to ban the gay and trans panic defense in Washington, New Mexico, Texas, Minnesota, Pennsylvania, Massachusetts, and the District of Columbia) [https://perma.cc/JMY5-3B2M]. At the federal level, the Equality Act, which has been introduced in Congress, also bans the gay and trans panic defense. *Id.*

16. *See* WOODS, SEARS & MALLORY, *supra* note 3, at 15; *see also* Phillip Van Slooten, *D.C. Council Holds Hearing on Hate Crime Prosecution, Panic Defense Bills*, WASH. BLADE (Oct. 24, 2019), https://www.washingtonblade.com/2019/10/24/dc-council-holds-hearing-on-hate-crimes-prosecution-panic-defense-bills/ (noting that the president of the National Association of Criminal Defense Lawyers recently testified on due process grounds against a bill before the D.C. Council that would ban the gay and trans panic defenses) [https://perma.cc/8U6D-29QE].

17. A more thorough discussion of due process arguments against banning the gay and trans panic defenses will be provided in *infra* Part IV.

18. This historical role of the state in the growth of gay and trans panic as a medical concept and defense strategy is discussed in *infra* Part I and Section II.B. Related to the point involving the individualized focus of the due process legal framework, Elizabeth Stanko has argued that "in using the legal framework to define criminal violence, criminologists usually embrace the tacit assumption that the law's violence (the use of legitimate violence by the state) is not as problematical and subject to scrutiny as the use of violence by individuals." Elizabeth A. Stanko, *Challenging the Problem of Men's Individual Violence*, *in* JUST BOYS DOING BUSINESS? MEN, MASCULINITIES, AND CRIME 32, 33 (Tim Newburn & Elizabeth A. Stanko eds., 1994); *see also*, Rosemary Cairns Way, *Incorporating Equality into the Substantive Criminal Law: Inevitable or Impossible?*, 4 J.L. & EQUALITY 203, 239 (2005) ("The criminal law functions by narrowing its focus on particular acts, particular actors and particular moments in time.").

19. *See infra* Part I.

trans panic ideas operated within a broader state agenda to regulate and control "sexual deviance." This agenda enabled and legitimized state violence against LGBTQ people, including draconian medical treatments that the state forced or pressured LGBTQ people to undergo (for instance, electric shock therapy, hydrotherapy,[20] and drug therapy).[21] This Article examines how in the 1940s and 1950s, prominent psychiatrists who worked for and conducted research in state-run hospitals and prisons advanced new definitions of "gay and trans panic" that more aggressively blamed LGBTQ victims for the violence they experienced and demonized them as sexual aggressors.[22] These new definitions fell in line with a then-growing consensus in the United States psychiatric profession that homosexuality (which was then generally understood to include gender nonconformity)[23] was a mental disease.[24] In the 1960s, defendants who killed LGBTQ victims started to take advantage of these stigmatizing definitions of gay and trans panic in order to support legal defenses of insanity, self-defense, and provocation.[25] In this regard, gay and trans panic ideas not only legitimized state violence against LGBTQ people, but also excused and justified[26] violence in ways that blurred the distinction between state and private violence.[27]

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20. SARAH A. LEAVITT, ST. ELIZABETHS IN WASHINGTON, D.C.: ARCHITECTURE OF AN ASYLUM 108–09 (2019) ("Hydrotherapy used specifically designed baths to submerge patients in either hot or cold water for several hours to either shock or calm them.").

21. *See infra* Section II.B.

22. *See id.*

23. The idea that "gender identity" was distinct from biological sex assigned at birth did not emerge until researchers advanced this idea in the 1950s. *See* Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 82 (2006).

24. *See infra* Section II.A.

25. *See infra* Part III.

26. Because gay and trans panic concepts have been used over time to support the free-standing defenses of provocation, insanity, and self-defense, it is difficult to classify these strategies as either justifications or excuses. Lee, *supra* note 1, at 489.

27. *See infra* Part III. Instructive on this point, Mark Ungar has advanced a typology that recognizes three categories of state violence against LGBTQ people: (1) "legal" violence, (2) "semilegal" violence, and (3) extrajudicial violence. Mark Ungar, *State Violence and LGBTQ Rights*, *in* VIOLENCE AND GLOBALIZATION'S PARADOX POLITICS 48, 48 (Kenton Worchester et al. eds., 2002). For "legal" violence, "[t]he courts, the prisons, and other government institutions allow discriminatory and violent practices against individuals in their charge." *Id.* For "semi-legal" violence, police agencies are armed with laws that "encourage and allow them to carry out unaccountable" violence against LGBTQ people. *Id.* at 48–49. For extrajudicial violence, LGBTQ people are a primary target of "killings, torture, hate crimes, and harassment" by non-state actors. *Id.* For this third category, Ungar explains that "[t]hough rarely sponsored by the state, such activities are often directed by off-duty

The position of the state in the historical growth of gay and trans panic as a concept has not been a central focus in legal scholarship.[28] Bringing this history to the surface is important because it shows how deeply rooted forms of state violence against LGBTQ civilians can arise from state-run institutions and evolve into continued state-condoned and state-legitimized violence.[29] This history also demonstrates why the gay and trans panic defenses do much more damage than simply legitimize bad and discredited science.[30] Rather, allowing criminal defendants to rely on gay and

officials and either ignored or tacitly encouraged by a government with a constitutional responsibility to do the opposite." *Id.*

28. There is a robust body of legal scholarship that discusses the gay and trans panic defenses more generally. *See, e.g.*, Robert G. Bagnall et al., *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984); Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY 81 (1992); Joshua Dressler, *When Heterosexual Men Kill Homosexual Men: Reflections on Provocation Law, Sexual Advances, and the Reasonable Man Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995); Lee; *supra* note 1; Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77 (2014); Robert B. Mison, *Homophobia in Manslaughter; The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133 (1992); J. Kelly Strader et al., *Gay Panic, Gay Victims, and the Case for Gay Shield Laws*, 36 CARDOZO L. REV. 1473 (2015); Aimee Wodda & Vanessa R. Panfil, *"Don't Talk to Me About Deception": The Necessary Erosion of the Trans* Panic Defense*, 78 ALB. L. REV. 927 (2015); David Alan Perkiss, Comment, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons from the Lawrence King Case*, 60 UCLA L. REV. 778 (2013).

29. Ungar, *supra* note 27, at 50. On this point, it is important to recognize literature that makes parallel arguments that connect contemporary racialized violence in state institutions (i.e., mass incarceration) to historical systems of subordination that include slavery and debt peonage. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (2010) ("Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure that the subordinate status of a group defined largely by race."); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 43 (2003) (discussing connections between the rise of incarceration as "the primary mode of state-inflicted punishment" and "new conditions [that] reflected the rise of the bourgeoisie as the social class whose interests and aspirations furthered new scientific, philosophical, cultural, and popular ideas"); Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 844 (1997) (stressing that "but for the fruits of slavery and entrenched racism, African Americans would not find themselves disproportionately represented in the criminal justice system"); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1449 (2012) (noting "the multiple ways that women of color were situated within a variety of overlapping structures that singularly and jointly constituted the contours through which surveillance and social punishment take place"); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 19 (2019) ("Prison abolitionists look back to history to trace the roots of today's carceral state to the racial order established by slavery and look forward to imagine a society without carceral punishment."); *see also* Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. (forthcoming 2020), (manuscript at 6–11) (on file with author) (providing an overview of abolition theory).

30. Lee, *supra* note 1, at 484–85 ("The idea that homosexuality, latent or otherwise, is a mental illness has long been discredited.").

trans panic strategies leaves space for antiquated ideas of sexual deviance to thrive in the criminal justice system today.

In spite of the recent wave of legislative bans, the gay and trans panic defenses are still available defense strategies in federal court and in most state courts today. This result is worrisome given the widespread inequalities that LGBTQ people, and especially the most marginalized segments of the LGBTQ population (those who are people of color, transgender or gender nonconforming, homeless, undocumented, and living with HIV), experience in the criminal justice system.[31] LGBTQ people, and especially intersectionally marginalized LGBTQ people, are disproportionately victims of violence perpetrated by civilians, law enforcement, and correctional staff and inmates.[32] Research further shows that anti-LGBTQ juror biases influence jury deliberation and outcomes in criminal cases,[33] including cases in which defendants raise gay and trans panic defenses.[34]

In light of the state's historical role in the growth of gay and trans panic ideas as well as the ongoing inequalities that the gay and trans panic defenses continue to present for LGBTQ people today, this Article lays an early theoretical foundation for a politi-

31. *See generally* JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2011); Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667 (2017).

32. *See* ALLEN J. BECK ET AL., U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 18 (2013) ("Inmates who identified their sexual orientation as gay, lesbian, bisexual, or other reported high rates of inmate-on inmate sexual victimization and staff sexual misconduct."); SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, NAT'L CTR. FOR TRANSGENDER EQUAL. 12–13 (Dec. 2016), https://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf [https://perma.cc/N33V-9UPC]. *See generally* DOUG MEYER, VIOLENCE AGAINST QUEER PEOPLE: RACE, CLASS, GENDER, AND THE PERSISTENCE OF ANTI-LGBT DISCRIMINATION (2015); CHRISTY MALLORY ET AL., WILLIAMS INST., DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY (2015), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf [https://perma.cc/C8B7-FDLU].

33. *See generally* Jordan Blair Woods, *LGBTQ in the Courtroom: How Sexuality and Gender Identity Impact the Jury System*, *in* CRIMINAL JURIES IN THE 21ST CENTURY: CONTEMPORARY ISSUES, PSYCHOLOGICAL SCIENCE, AND THE LAW 61, 61–83 (Cynthia J. Najdowski & Margaret C. Stevenson eds., 2019) (providing an overview of research on the relevant challenges linked to sexuality and gender identity in criminal cases).

34. *See, e.g.*, Sarah E. Malik & Jessica Salerno, *Moral Outrage Drives Biases Against Gay and Lesbian Individuals in Legal Judgments*, JURY EXPERT, Nov. 2014, at 1, 3; Jessica Salerno et al., *Excusing Murder? Conservative Jurors' Acceptance of the Gay-Panic Defense*, 21 PSYCHOL. PUB. POL'Y & L. 24, 24, 26, 30 (2015). This point will be discussed in greater detail *infra* Part III.

cal framework that justifies banning the gay and trans panic defenses through legislation.[35] This political framework balances the traditional justifications for punishment (retribution, deterrence, incapacitation, and rehabilitation)[36] with two cornerstone values: (1) state accountability towards LGBTQ people and communities (as well as other marginalized populations), and (2) equality[37] under the substantive criminal law.[38] As this Article discusses, upholding these values requires an analysis of how the state has treated LGBTQ people in the past and what that treatment says about whether the state is fulfilling what ought to be a baseline normative commitment to respect LGBTQ civilians, and not sponsor, excuse, justify, or condone violence against them.[39] In the context of the gay and trans panic defenses, maintaining this normative commitment recognizes that it is necessary to prioritize the demands of state accountability and equality for LGBTQ people under the substantive criminal law over defendants' due process interest in presenting every legal strategy that might benefit their case.

Two caveats are in order. First, this Article is not asserting a causal claim between the violence that LGBTQ victims in gay and trans panic cases experience and the role of the state in the growth

35. *See infra* Part IV.

36. *See* Stephanos Bibas, *Small Crimes, Big Injustices*, 117 MICH. L. REV. 1025, 1036 (2019) (identifying "retribution, deterrence, incapacitation, and rehabilitation/reform" as "four traditional justifications for punishment"); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 69–76 (2005) (providing an overview of contemporary sentencing purposes).

37. As discussed in further detail *infra* Part IV, the conception of equality that this Article envisions for this political framework is consistent with the substantive principle of equality rather than the formal principle of equality. *See* Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 750 (2002) ("On the formal view, inequality consists of treating people differently across an irrelevant criterion; on the substantive view, the injury is subordinating one group to another.").

38. It is beyond the scope of this Article to explain how penal codes would change in contexts that do not involve the gay and trans panic defenses when equality is prioritized as a value under the criminal law. As discussed further in *infra* Part IV, however, theoretical perspectives on criminal law tend to neglect equality as an underlying value of the substantive criminal law and place primacy on the traditional justifications for punishment. Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1452 (2016) (noting that "[c]riminal law theorists often aim to promote one or another justification for punishment . . . [b]ut equality *per se* is all but invisible in much substantive criminal law scholarship"). *But see* Butler, *supra* note 29 (making the case for affirmative action in criminal law).

39. Thomas, *supra* note 13, at 1477 (recognizing "that one of the first duties of the state is to protect citizens from whom its powers derive against random, unchecked violence by other citizens, or by government officials").

of gay and trans panic as a concept and criminal defense. This Article is also not asserting a one-dimensional, causal claim that medical definitions of gay and trans panic historically shaped and continue to mold stigmatizing attitudes towards LGBTQ people in the public, legal, and political spheres.[40] It is difficult to create this directional story and these causal arguments are unnecessary to establish the claims presented in this Article. Rather, the main goal of this Article is to bring the historical connections between the state and gay and trans panic to the surface in order to show why the state has a distinct responsibility today to ban criminal defenses that rely on those stigmatizing concepts.

Second, this Article does not argue that the state is the only actor to blame for the growth of gay and trans panic as a medical concept and criminal defense. Instead, this Article demonstrates that the state is a key player in this story. As explained below, the state had a central role in supporting several prominent doctors who advanced stigmatizing definitions of gay and trans panic as part of a broader state and social agenda to regulate and control "sexual deviance."[41] It is important not to lose sight of these historical connections when considering how the state should respond to the gay and trans panic defenses today.[42]

This Article proceeds in four parts. Part I begins by discussing the origins of gay and trans panic as a medical concept in 1920. Part II describes how prominent psychiatrists who worked in state-run hospitals and prisons advanced new meanings of "gay and trans panic" between the 1940s and 1950s that placed the blame on LGBTQ victims for the violence they experienced and stigmatized LGBTQ people as sexual aggressors. These alternative definitions were consistent with a then-growing consensus in the

40. This relationship is likely symbiotic in the sense that prevailing medical attitudes towards LGBTQ people at the time both embodied and shaped how LGBTQ people were treated and viewed in other domains, including the legal, public, and political domains. Foucault's position on the symbiotic relationship between knowledge and power is instructive on this point. *See* Michel Foucault, *Two Lectures, in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS BY MICHEL FOUCAULT 1972–1977, at 78–108 (Colin Gordon ed., Colin Gordon et al., trans., 1972). Legal scholars have made similar arguments in the context of reproduction. *See, e.g.*, Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 267 (1992) ("In each culture, norms and practices of the community, including those of family, market, medicine, church, and state, combine to shape the social relations of reproduction.").

41. *See infra* Part II.

42. *See infra* Part IV.

United States psychiatric profession that homosexuality was a mental disease. Part III then discusses how criminal defendants, starting in the 1960s, relied on these shifting conceptions of gay and trans panic as an ideological hook to legally justify and excuse acts of violence against LGBTQ people. Finally, Part IV explains why it is misguided to distance this history from defendants' reliance on gay and trans panic strategies today. Based on this idea, the analysis lays the groundwork for a normative political framework that justifies legislation banning the gay and trans panic defenses.

I. THE ORIGINS OF "GAY AND TRANS PANIC" (1920)

In 1920, Edward J. Kempf coined the term "acute homosexual panic"[43] as a psychosis based on case histories of nineteen World War I veterans who had been admitted to St. Elizabeths Hospital in Washington, D.C.[44] The fact that Kempf worked as a clinical psychologist at St. Elizabeths Hospital[45] is an important link between the origins of gay and trans panic and the state.

In 1855, Congress established St. Elizabeths Hospital (initially called the Government Hospital for the Insane[46]) as a psychiatric hospital that was federally run and administered.[47] The hospital's initial mandate was to house individuals, most of whom were active members of the military and veterans,[48] under the jurisdiction of the federal government and judged to be mentally ill.[49] By 1925, the hospital had approximately four thousand patients and fifty physicians.[50] Illustrating the influence of the hospital, each of the

43. Burton S. Glick, *Homosexual Panic: Clinical and Theoretical Considerations*, 129 J. NERVOUS & MENTAL DISEASE 20, 21 (1959) (noting that Kempf was "apparently the originator of the term *acute homosexual panic*").

44. *See generally* EDWARD J. KEMPF, PSYCHOPATHOLOGY 477–515 (1920).

45. *Id.* at vii.

46. Surya Kanhouwa & Kenneth Gorelick, *A Century of Pathology at Saint Elizabeths Hospital, Washington, DC*, 121 ARCHIVES OF PATHOLOGY & LABORATORY MED. 84, 84 (1997).

47. Arthur D. Hill, Book Note, *Insanity and the Criminal Law*, 37 HARV. L. REV. 167, 167 (1923). St. Elizabeths Hospital remained federally run until its hospital function was transferred to the District of Columbia government in 1987. LEAVITT, *supra* note 20, at 16.

48. LEAVITT, *supra* note 20, at 56 ("Over the century-long association with the military, usually more than half of St. Elizabeths patients at any given time were veterans."); Martin Summers, *"Suitable Care of the African When Afflicted with Insanity": Race, Madness, and Social Order in Comparative Perspective*, 84 BULL. HIST. MED. 58, 62 (2010).

49. LEAVITT, *supra* note 20, at 56.

50. W.A. White, *The New Saint Elizabeths Hospital*, 80 AM. J. PSYCHIATRY 503, 504 (1924).

five superintendents during the hospital's first century in operation were leaders in the mental health field and were elected to serve as president of the American Psychiatric Association ("APA").[51]

Scholars have explored historical connections between scientific research conducted in St. Elizabeths Hospital and the use of medicine to control and mistreat racial, ethnic, sexual, and gender minorities who were perceived as threatening to the social order in the United States.[52] Published studies reveal that as early as the 1920s, doctors at St. Elizabeths Hospital characterized homosexuality as a biological "deficiency" and identified homosexuality as a cause for delusions and hallucinations of male veteran patients who did not conform to traditional masculine norms.[53] As discussed later in more detail, over the course of decades, hundreds if not thousands of LGBTQ patients at St. Elizabeths Hospital were subjected to draconian medical treatments intended to "cure" their "deviant" sexualities and gender identities, including electric shock, hydrotherapy, and insulin therapy.[54]

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51. LEAVITT, *supra* note 20, at 94; MATTHEW GAMBINO, HASTINGS CTR. REPORT, FEVERED DECISIONS: RACE, ETHICS, AND CLINICAL VULNERABILITY IN THE MALARIAL TREATMENT OF NEUROSYPHILIS, 1922–1953, at 40 (July–Aug. 2015), https://onlinelibrary.wiley.com/doi/epdf/10.1002/hast.451 [https://perma.cc/59BR-GCZ4]. Moreover, due to its top reputation, many leading medical practitioners and scholars conducted research while working at or visiting St. Elizabeths Hospital. LEAVITT, *supra* note 20, at 118.

52. LEAVITT, *supra* note 20, at 108 ("Race, gender and sexual orientation prejudices on the part of the staff . . . informed the treatment plans"). With regard to race, scholars have called attention to how the misguided ideology of St. Elizabeths Hospital doctors who equated mental abnormality in white individuals with normality in black individuals influenced the management of black bodies at the hospital in its early decades. Summers, *supra* note 48, at 86. Since opening in 1855, St. Elizabeths Hospital did not exclude African Americans from being admitted, although the hospital remained segregated by race until 1954. LEAVITT, *supra* note 20, at 83. Scholars and commentators have described how racism among doctors and staff shaped the treatment of African American patients in St. Elizabeths Hospital. LEAVITT, *supra* note 20, at 83; GAMBINO, *supra* note 51, at 40. In addition, the available historical evidence suggests that for much of its history, African American patients were more often assigned to manual labor within the hospital whereas white patients had opportunities to work as carpenters, tailors, and seamstresses. LEAVITT, *supra* note 20, at 89. *See also, e.g.*, John E. Lind, *Phylogenetic Elements in the Psychoses of the Negro*, 4 PSYCHOANALYTIC REV. 303 (1917) ("The Negro, studied judiciously by those who are competent, appears to be at a much lower cultural level than the Caucasian."). John Lind worked a psychiatrist at St. Elizabeths Hospital. Matthew Gambino, "*The Savage Heart Beneath the Civilized Exterior": Race, Citizenship, and Mental Illness in Washington D.C., 1900–1940*, DISABILITY STUD. Q. (Summer 2008).

53. *See, e.g.*, S.A. Silk, *The Compensatory Mechanism of Delusions and Hallucinations*, 77 AM. J. INSANITY 523, 530 (1921).

54. LEAVITT, *supra* note 20, at 20, 110; Andrew Giambrone, *LGBTQ People Suffered Traumatic Treatments at St. Elizabeths Hospital for the Mentally Ill*, WASH. CITY PAPER (May 31, 2018, 6:00 AM), https://www.washingtoncitypaper.com/news/article/21007233/ind

It is noteworthy that gay and trans panic has its origins in psychological research from the 1920s. The 1920s were a distinct period in which psychological theories emerged as a significant paradigm to explain crime, including then-criminalized homosexuality.[55] After World War I, physicians documented many cases in which returning soldiers had developed neurotic disorders during combat as a result of psychological trauma (commonly known as "shell shock").[56] As then-prevailing theories of phrenology and anthropometry[57] were unable to explain these problems, medical experts in psychology, psychiatry, and psychoanalysis assumed a leading role in creating new theories and responses.[58] Illustrating connections to the state, thousands of veterans suffering from "shell shock" were admitted and treated by doctors at St. Elizabeths Hospital after World War I.[59]

In 1920, Kempf described "acute homosexual panic" in a way that differs in two significant respects from how gay and trans panic is typically understood in criminal cases today.[60] First, the driving impulse underlying Kempf's conception was distinct from the driving impulse of today's defendants who claim gay and trans panic to cause harm on LGBTQ people. Kempf characterized ho-

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ependent-scholars-uncover-the-traumatic-treatments-lgbtq-people-suffered-at-st-elizabeths [https://perma.cc/N5NJ-WAZG]. It is impossible to know the exact number of LGBTQ patients who were admitted to St. Elizabeths Hospital because of their sexual orientation and gender identities because many records have been destroyed. *Id.* Unlike African American patients, the available historical evidence does not suggest that LGBTQ patients were segregated in St. Elizabeths Hospital. LEAVITT, *supra* note 20, at 83.

55. Woods, *supra* note 31, at 685.

56. RUTH LEYS, TRAUMA: A GENEALOGY 2 (2000). *See generally* Otto Van der Hart et al., *Somatoform Disassociation in Traumatized World War I Combat Soldiers: A Neglected Clinical Heritage*, 1 J. TRAUMA & DISSOCIATION 33 (2000).

57. Phrenology is "the study of the shape of the skull and its relation to character traits." Cooper Ellenberg, *Lie Detection: A Changing of the Guard in the Quest for Truth in Court?*, 33 LAW & PSYCHOL. REV. 139, 140 (2009). Anthropometry is "the measurement of body parts for the purpose of understanding human variation." Cary Federman, *A "Morphological Sphinx": On the Silence of the Assassin Leon Czolgosz*, 2 J. THEORETICAL & PHIL. CRIMINOLOGY 100, 125 (2010).

58. Eli Zaretsky, *Psychoanalysis, Vulnerability, and War*, *in* FIRST DO NO HARM: THE PARADOXICAL ENCOUNTERS OF PSYCHOANALYSIS, WARMAKING, AND RESISTANCE 177, 180 (Adrienne Harris & Steven Botticelli eds., 2010) (noting that after the start of World War I, "psychiatrists increasingly turned toward psychological explanations" to explain shell shock); Woods, *supra* note 31, at 685 & n.100.

59. LEAVITT, *supra* note 20, at 56.

60. Lee, *supra* note 1, at 475–76, 483, 488; Peter Nicolas, *"They Say He's Gay": The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793, 810 (2003) (noting that there are several ways in which the concept of gay panic as used in criminal cases today differs from how Edward Kempf described the term).

mosexual panic as a psychosis "due to the pressure of uncontrollable perverse sexual cravings."[61] He described that this condition affected "latent homosexuals," which was a Freudian concept that posited that for some individuals who thought of themselves as heterosexual, homosexual desires remained in their repressed unconscious and were capable of shaping human behavior under certain conditions.[62] Kempf was especially concerned about the alleged prevalence of homosexual panic in environments where men and women were segregated for long periods of time, such as military camps and ships, prisons, schools, and asylums.[63]

Second, the potential for violence in Kempf's conception of acute homosexual panic was largely inward—namely, self-harm—rather than outward harm in the form of unwanted sexual advances towards others. In Kempf's view, acute homosexual panic was rooted in a person's co-existing fear of their own homosexuality coupled with a fear of heterosexuality.[64] Kempf argued that this tension did not necessarily trigger homicidal or violent reactions. In fact, none of the case histories in his scientific research involved such violence.[65] Rather, typical symptoms included depression, anxiety, and suicidal impulses.[66]

Nonetheless, Kempf still defined heterosexuality as the norm and placed primacy on traditional norms of sex, sexuality, and gender.[67] Kempf's treatment recommendations for "acute homosexual panic" illustrate these points. He stressed that the future of a soldier or sailor diagnosed with "acute homosexual panic" is the "most insecure"[68] without "fortunate sexual adjustment,"[69] which in Kempf's view "require[d] controls and reenforcement [sic] to overcome dangers and become refined."[70] Kempf further emphasized that society should "encouage [sic] and promote the development of heterosexual potency in order to prevent biological abortions

61. KEMPF, *supra* note 44, at 477.

62. *See* Leon Salzman, *The Concept of Latent Homosexuality*, 17 AM. J. PSYCHOANALYSIS 161, 162, 164 (1957).

63. KEMPF, *supra* note 44, at 477.

64. *Id.* at 511.

65. Nicolas, *supra* note 60, at 810.

66. KEMPF, *supra* note 44, at 511.

67. STEPHEN TOMSEN, VIOLENCE, PREJUDICE, AND SEXUALITY 107 (2009).

68. KEMPF, *supra* note 44, at 515.

69. *Id.*

70. *Id.* at 719.

through fear of the responsibilities of heterosexuality—pregnancy, labor, parenthood."[71]

The scientific community did not pay much attention to "acute homosexual panic" in the decades after Kempf introduced the term in 1920.[72] As the next Part explores, this left space for medical experts to advance alternative meanings of the concept that stigmatized LGBTQ people as sexual aggressors and placed the blame on them for the violence that they experienced.

II. THE STATE AGENDA TO REGULATE "SEXUAL DEVIANCE" AND NEW DEFINITIONS OF GAY AND TRANS PANIC (1940S–1950S)

This Part looks to medical literature in the 1940s and 1950s to advance two key points. First, the analysis shows that several prominent psychiatrists at state-run hospitals and prisons in the 1940s and 1950s advanced new definitions of gay and trans panic consistent with how the concept is largely understood in criminal cases today—namely, as violent situations triggered by the unwanted sexual advances of LGBTQ people.[73] These stigmatizing conceptions of gay and trans panic fell in line with a then-growing consensus in the United States psychiatric profession that homosexuality (which was then generally understood to include gender nonconformity)[74] was a mental illness. Second, supported by this pathological model of homosexuality, these newly emerging and stigmatizing definitions of gay and trans panic offered legal and social justifications for prominent psychiatrists at state-run hospitals and prisons to apply brutal and dangerous medical interventions on LGBTQ patients. In this regard, gay and trans panic ideas

71. *Id.* at 719–20.

72. Glick, *supra* note 43, at 27; *id.* at 20 (recognizing that only one paper had been dedicated to the topic of homosexual panic since 1939 and 1959); Ben Karpman, *Mediate Psychotherapy and the Acute Homosexual Panic (Kempf's Disease)*, 98 J. NERVOUS & MENTAL DISEASE 493, 494 (1943) (noting that "no one, so far as I know, has taken up the problem of acute homosexual panic since Kempf first formulated it in 1920").

73. Lee, *supra* note 1, at 476 ("More recently, the term 'gay panic' has been deployed to refer to the alleged loss of self-control provoked in a heterosexual man by a gay man's unwanted sexual advance."); *see also* Christina Pei-Lin Chen, Note, *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, 200 (2000) ("In short, homosexual panic evolved from an internally induced psychological disorder with external symptoms to become predominantly characterized as an immediate and irrational reaction to real, external stimuli.").

74. *See* Ben-Asher, *supra* note 23, at 82 (noting that the idea that "gender identity" was distinct from biological sex assigned at birth did not emerge until the 1950s).

provided an ideological justification for state violence against LGBTQ people.

A. *Growing Pathologization of Homosexuality*

Before developing both of these points, for contextual purposes this section summarizes important developments regarding the treatment of LGBTQ people in medicine and law during the 1940s and 1950s. In 1941, Hervey Cleckley released groundbreaking research that offered the first clinical profile of the "psychopath."[75] "Forensic psychologists soon applied and honed this profile to [examine] connections between psychopathology and crime."[76]

Many prominent psychiatrists applied new ideas of psychopathy to redefine then-criminalized homosexuality as a mental disease that could not be cured.[77] Their views soon became the dominant way of understanding homosexuality in the United States psychiatric profession,[78] reflected by the inclusion of homosexuality as a mental disorder in the APA's Diagnostic and Statistical Manual of Mental Disorders ("DSM") between 1952 and 1973.[79] During this period, several prominent psychiatrists who specialized in homosexuality released published works that advanced this pathological view.[80]

There were significant parallels between the increasing hostility towards LGBTQ people in the psychiatric profession and the law.[81] In the 1940s and 1950s, every state criminalized same-sex sex, and many localities prohibited certain gender nonconforming expression, such as cross-dressing.[82] "Between 1946 and 1959 . . . twenty-

75. HERVEY M. CLECKLEY, THE MASK OF SANITY: AN ATTEMPT TO REINTERPRET THE SO-CALLED PSYCHOPATHIC PERSONALITY 238–55 (1941) (introducing and describing a clinical profile of the psychopath).

76. Woods, *supra* note 31, at 687–88.

77. *Id.* at 688.

78. RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 28 (1981).

79. *Id.* at 39, 40.

80. *See, e.g.*, EDMUND BERGLER, HOMOSEXUALITY: DISEASE OR WAY OF LIFE? (1956); IRVING BIEBER, HOMOSEXUALITY: A PSYCHOANALYTHIC STUDY OF HOMOSEXUALS (1962); CHARLES W. SOCARIDES, THE OVERT HOMOSEXUAL (1968).

81. Woods, *supra* note 31, at 689.

82. *See* William N. Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 660–63.

nine states enacted sexual psychopath laws."[83] These laws generally took two forms. First, any person who was charged with a crime and found by a jury to be a "sexual psychopath" could be handed over to a state's department of public health, perhaps indefinitely, until that person was "cured."[84] Second, a civil variation allowed for the "psychiatric commitment of sexual psychopaths, perhaps indefinitely, regardless of whether they were charged with a crime."[85] Although broadly written to apply to many different types of crimes, sexual psychopath laws were most heavily enforced against gay men.[86] Medical experts who adopted the view that homosexuality was a mental illness commonly testified as expert witnesses in these cases.[87]

There were also important parallels in the 1940s and 1950s between the growing psychiatric consensus that homosexuality was a mental disease, public attitudes towards homosexuality, and the rise of early lesbian and gay social movements. Many scholars describe World War II as a catalyst for the growth of visible lesbian and gay communities in United States cities,[88] although several neighborhoods like Greenwich Village in New York City (where the Stonewall Inn is located) had a strong lesbian and gay presence even before the war.[89] Migration brought about by the war, as well as industrialization, opened new possibilities for lesbians and gays to congregate in city neighborhoods.[90] By the 1950s, relocation to city neighborhoods was a common phenomenon.[91] Many LGBTQ

83. *Id.*

84. Estelle B. Freedman, *Uncontrolled Desires: The Response to the Sexual Psychopath, 1920–1960*, *in* FEMINISM, SEXUALITY, AND POLITICS: ESSAYS BY ESTELLE B. FREEDMAN 121, 132 (2006).

85. *Id.*

86. *See id.* at 132; Bernard C. Glueck, Jr., *An Evaluation of the Homosexual Offender*, 41 MINN. L. REV. 187, 195 (1957) ("The practical fact of the matter would seem to be that most of the sodomy laws, and the special sex psychopath laws, are designed primarily for the control of the persistent homosexual offender.").

87. J. PAUL DE RIVER, THE SEXUAL CRIMINAL: A PSYCHOANALYTICAL STUDY 245–54 (1949) (offering guidance to medical experts who are called as expert witnesses in cases involving sex crimes).

88. *See generally* ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II (1990).

89. GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890–1940, at 237 (1994).

90. BÉRUBÉ, *supra* note 88, at 245–46.

91. Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* CULTURE, SOCIETY AND SEXUALITY: A READER 143, 156 (Peter Aggleton & Richard Parker eds., 1999).

people embraced the freedom, anonymity, and safety in numbers that city life provided.[92]

At the same time, lesbian and gay mobilization also emerged with the formation of the Mattachine Society and the Daughters of Bilitis in the 1950s.[93] These early lesbian and gay social movement groups prioritized refuting the dominant psychiatric view that homosexuality was a mental disease and eliminating the stigma of disease attached to homosexuality.[94] In addition to creating public forums, these organizations released publications that allowed dissenting medical experts to present research that challenged the prevailing psychiatric view that homosexuality was a mental illness.[95]

Scholars have connected the strong public opinion during the mid-twentieth century that homosexuality was a mental disease to a wave of moral panic about sex crimes that swept across the United States immediately after World War II.[96] "Once the war concluded, Americans faced the challenge of returning to normalcy both inside and outside of the home."[97] Strengthening traditional family values was one means by which people attempted to return to normalcy.[98] The prioritization of family values fed anxieties about populations that were perceived to threaten those values, including gay men.[99]

Illustrating overlap between medicine and law enforcement, in the late 1930s prominent forensic psychiatrist J. Paul de River was hired by the Los Angeles Police Department ("LAPD") as the first official police psychiatrist in a United States police department.[100] De River created the LAPD's Sex Offense Bureau and consulted on

92. BÉRUBÉ, *supra* note 88, at 245.

93. D'EMILIO, *supra* note 12, at 2.

94. BAYER, *supra* note 78, at 67–100 (discussing challenges to the psychiatric profession in lesbian and gay social movements from the 1950s to the 1970s).

95. *Id.* at 73–75.

96. It is important to recognize that the medicalization of homosexuality at times also operated as a way for researchers and members of the public who held more favorable attitudes towards homosexuality to criticize its criminalization and incarceration of LGBTQ civilians. *See, e.g.*, Glueck, *supra* note 86, at 193; Julian L. Woodward, *Changing Ideas on Mental Illness and Its Treatment*, 16 AM. SOC. REV. 443, 445 (1951).

97. Woods, *supra* note 31, at 689.

98. *See* BÉRUBÉ, *supra* note 88, at 258.

99. *Id.*

100. Eugene D. Williams, *Introduction* to DE RIVER, *supra* note 87, at xiii; *Sex Crimes Clinic Opens: Chief David Starts Classification and Control Bureau*, L.A. TIMES, July 30, 1938.

thousands of crime scenes with a sexual component.[101] Illustrating the stigma attached to then-criminalized homosexuality, de River argued that any homosexual who refused treatment was "a criminal in the true sense as he has no regard or respect for existing laws, made or enforced by the majority of our society."[102]

The "Lavender Scare" of the 1950s is one of the most vivid examples of the overlap between increasing hostility towards LGBTQ people in medicine, law, and the state.[103] In the wake of anticommunism, there was an organized effort in the federal government and the military to remove and persecute lesbian and gay employees and active service members.[104] Several prominent psychiatrists consulted with federal investigators and testified during congressional hearings.[105] A 1950 Senate subcommittee report on "Employment of Homosexuals and Other Sex Perverts in the Government" noted a consensus among psychiatrists that homosexuality was evidence of a personality "flaw" and recommended that "overt homosexuals . . . be considered as proper cases for medical and psychiatric treatment."[106] As a result of heightened investigations and screens, more than 1000 federal employees either resigned or were terminated, and over 2000 active service members were discharged from the military during the early 1950s for allegations relating to homosexuality.[107]

Increasing hostility towards homosexuality in the medical, legal, political, and public spheres facilitated the same forms of state violence against LGBTQ people that triggered the Stonewall

101. Williams, *supra* note 100, at xiii.

102. J. PAUL DE RIVER, CRIME AND THE SEXUAL PSYCHOPATH 82 (1958).

103. D'EMILIO, *supra* note 12, at 52; Mary Ziegler, *What Is Sexual Orientation*, 106 KY. L.J. 61, 68 (2018) ("Because homosexuals were sick and morally weak, McCarthy argued that they were far more likely to endorse Communism or fall prey to blackmail schemes.").

104. *See generally* DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT (2004). It is important to note that efforts to remove lesbians and gays in the federal government and the military also occurred in the late 1940s, before the Lavender Scare in the 1950s. D'EMILIO, *supra* note 12, at 44–45.

105. *Employment of Homosexuals and Other Sex Perverts in Government*, Subcomm. on Investigations, S. Comm. on Expenditures in Exec. Dep'ts, S. DOC. NO. 241, at 2 (2d Sess. 1950) ("A number of eminent physicians and psychiatrists, who are recognized authorities on this subject, were consulted and some of these authorities testified before the subcommittee in executive session.").

106. *Id.* at 3.

107. JOHNSON, *supra* note 104, at 166. As scholars have discussed, it is impossible to know the exact number of lesbian and gay federal employees who were affected by this purge because many agencies did not keep records of the dismissals. *Id.*; *see also* D'EMILIO, *supra* note 12, at 44.

Riots—namely, police mistreatment and abuse. As the next section discusses, this overlap also enabled other forms of state violence in the form of brutal and dangerous medical treatments intended to change LGBTQ people's sexual orientation and gender identities.[108]

B. *New Definitions of Gay and Trans Panic*

With the growing pathological model of homosexuality in the 1940s and 1950s, medical experts advanced new definitions of gay and trans panic that demonized LGBTQ people as sexual aggressors and shifted the blame on them for the violence they experienced in state institutions and society more generally. Illustrating connections to the state, several prominent psychiatrists that advanced these alternative definitions worked at state-run hospitals and prisons. These psychiatrists subjected both involuntarily and voluntarily committed LGBTQ patients who were diagnosed with gay and trans panic, or blamed for the violent responses of others due to gay and trans panic, to various draconian medical treatments. Common examples included drugs and chemicals to induce vomiting, electric shock, hydrotherapy, castration, hysterectomy, clitoridectomy, and lobotomy.[109] Towing the line between state and private violence, pressure to undergo these treatments not only came from doctors in state institutions and judges, but also from family and community members after LGBTQ peoples' sexual orientations or gender identities became known to others.[110]

In 1943, Dr. Benjamin Karpman—an influential clinical psychologist who worked with Edward J. Kempf at federally run St. Elizabeths Hospital[111]—published one of the few articles dedicated

108. D'EMILIO, *supra* note 12, at 18; William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961*, 24 FLA. ST. U. L. REV. 703, 715 (1997); Freedman, *supra* note 84, at 130; Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 801–02 (2017).

109. Lori Messinger, *A Historical Perspective*, *in* SEXUAL ORIENTATION AND GENDER EXPRESSION IN SOCIAL WORK PRACTICE 25 (Deana F. Morrow & Lori Messinger eds., 2006); George, *supra* note 108, at 801–02.

110. *See* D'EMILIO, *supra* note 12, at 18 (noting that after the spread of sexual psychopath laws between the 1940s and 1960s, "some families committed their gay members to asylums"); Eskridge, *supra* note 108, at 715.

111. Benjamin Karpman, *From the Autobiography of a Bandit: Toward the Psychogenesis of So-Called Psychopathic Behavior*, 36 J. CRIM. L. & CRIMINOLOGY 305, 305 (1946) (noting that Karpman was associated with St. Elizabeths Hospital "for over twenty-five years as a Senior Medical Officer and Psychotherapist").

to "acute homosexual panic" between the 1920s and 1960s.[112] The timing of Karpman's publication is important because it connects shifting definitions of "gay and trans panic" to emerging concepts in psychopathy that stigmatized LGBTQ people as mentally ill "sexual deviants." In the 1940s and 1950s, Karpman emerged as a leader in applying new concepts of psychopathy to sex offenses, including then-criminalized homosexuality.[113] During this period, an increasing number of lesbians and gays were admitted and treated for homosexuality in St. Elizabeths Hospital (sometimes for indefinite periods), including under the District of Columbia's "sexual psychopath" law.[114]

Karpman's 1943 article focused on a case study of a thirty-four-year-old male who worked as an engineer and was married to a woman.[115] The case narrative described the man as depressed, unable to sleep, and worried about his financial condition and his family.[116] Eventually, he became introverted, talked to himself, could not perform sexually in his marriage, and expressed "pathological sex trends."[117] Those trends included saying that he was a woman and having hallucinations of seeing naked men dancing who, at times, did sexual things to him.[118] The patient tried to commit suicide after he was committed to St. Elizabeths Hospital.[119]

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112. *See generally* Karpman, *supra* note 72. Karpman noted that Kempf had only provided the "bare outlines" of "acute homosexual panic" and that "because the field is so promising, it seems desirable to take up the further study of it in detail." *Id.* at 494.

113. *See* BENJAMIN KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES 203–30 (1954) (discussing overt and latent homosexuality); *id.* at 609–13 (discussing homosexuality). *See generally* Benjamin Karpman, *The Sexual Psychopath*, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 194 (1951); Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 YALE J.L. & HUMAN. 163, 193–96 (2008) (describing Karpman as a leading figure in the study of psychopathy and its relationship to crime).

114. LILLIAN FADERMAN, THE GAY REVOLUTION: THE STORY OF THE STRUGGLE 4–5 (2015) (discussing how under the Miller Act, a "sexual psychopath . . . could be committed to the criminal ward of the District of Columbia's St. Elizabeth's psychiatric hospital"); LEAVITT, *supra* note 20, at 20; Winfred Overholser, *Some Problems of the "Criminal Insane" at Saint Elizabeth's Hospital*, 22 MED. ANNALS D.C. 347, 349 (1953) ("Congress in enacting the Miller Act denominated St. Elizabeths Hospital . . . as a place of treatment"); *see also, e.g.*, Charles Francis & Pate Felts, *Archive Activism: Vergangenheitsbewaltigunt!*, QED, Spring 2017, at 28, 29 (discussing the case of Thomas H. Tattersall, a "self-admitted homosexual" who was admitted to St. Elizabeths Hospital after being fired from his job at the Department of Commerce for the crime of homosexuality and administered repeated "insulin shock therapy" sessions).

115. Karpman, *supra* note 72, at 494.

116. *Id.*

117. *Id.*

118. *Id.* at 494, 502.

119. *Id.* at 494–95.

Karpman became involved in the case after the man's wife threatened to report the hospital ward physician to the superintendent if more was not done for her husband.[120]

Similar to Kempf, Karpman explained the patient's mental condition in terms of his latent homosexuality conflicting with feelings of guilt from his conscience.[121] Unlike Kempf, however, Karpman linked those feelings of guilt to not only the patient's same-sex fantasies, but also to the patient's alleged unwanted sexual advances towards others.[122] In his analysis of the patient's "[p]anic and [p]sychotic [t]rends,"[123] Karpman stressed that the patient's "homosexual trend" appeared not only in his same-sex fantasies, but also in his wife's statement that the patient had been accused of sexually approaching a male sailor.[124] Karpman further described that the patient would wander about at night and "hang around the beds of other patients."[125] On one occasion, another male patient knocked out two of the patient's teeth after assuming that he came to his bed for "homosexual purposes."[126]

It is important to acknowledge that the role of the unwanted sexual advance in Karpman's diagnosis of the patient was different from how unwanted sexual advances are used to support gay and trans panic defenses today. Karpman used the sexual advance as evidence of the patient's mental condition as opposed to the mental state of the person who reacted violently. Nonetheless, Karpman's research embodies an important shift to link the concept of homosexual panic with sexual advances towards others.

Later medical research went one step further to connect the meaning of gay and trans panic with the mental state of both latent homosexuals and heterosexuals who reacted violently to the alleged unwanted sexual advances of openly LGBTQ people. In 1951, Russell Dinerstein and Bernard Glueck, Jr.—forensic psychiatrists who worked at the psychiatric clinic at Sing Sing Prison operated by the State of New York—published an article that characterized

120. *Id.* at 495.
121. *Id.* at 493, 503.
122. *Id.* at 502–03.
123. *Id.* at 501.
124. *Id.* at 502–03.
125. *Id.* at 503.
126. *Id.*

"homosexual panic" as a male inmate's violent mental state triggered by the unwanted sexual advance of a gay man.[127] The fact that Dinerstein and Glueck worked at the psychiatric clinic at Sing Sing Prison is an important element that connects the state to these shifting conceptions of gay and trans panic that more aggressively demonized LGBTQ people.

Dinerstein and Glueck's association of "homosexual panic" with violent reactions triggered by the unwanted sexual advances of gay men stems from the specific institutional context in which their research focused—prison.[128] Dinerstein and Glueck stressed that "acute anxiety attacks" rooted in "homosexual conflicts" raised security concerns for the entire prison community.[129] Ironically, Glueck's later published work indicates that his concerns about housing gay men in prisons was actually part of his broader critique of using the criminal law to incarcerate gay men.[130] Nonetheless, his research accepted a pathological definition of homosexuality and advocated for applying invasive medical treatments on gay men, such as electroshock therapy.[131]

Unlike Kempf's research, Dinerstein and Glueck recognized that the prison community included both "overt homosexuals" and "latent homosexual[s]."[132] With regard to "homosexual panic," Dinerstein and Glueck described that it was a "common occurrence in prison for an overt homosexual to make a sexual approach" to a "latent homosexual."[133] In their view, this situation "produces a rather severe disturbance in the individual who is approached" and can often result in "violence and assaultiveness."[134] Dinerstein and Glueck further described that the propositioned men often asserted that they were "not homosexuals" and felt "completely justified in physically warding off such attacks."[135] Consistent with stereotypes of gay men as sexual predators, the researchers noted the

127. Russell H. Dinerstein & Bernard C. Glueck, Jr., *Sub-Coma Insulin Therapy in the Treatment of Homosexual Panic States*, 1951 PROC. AM. PRISON ASS'N 86, 87–89.

128. Glueck also makes this point in a separate publication. *See* Glueck, *supra* note 86, at 208–09.

129. Dinerstein & Glueck, *supra* note 127, at 86.

130. Glueck, *supra* note 86, at 205–07.

131. *Id.* at 209.

132. Dinerstein & Glueck, *supra* note 127, at 87, 89. Dinerstein and Glueck described "latent homosexuals" as people "who may have homosexuality as a problem but ha[ve] never been consciously aware of it." *Id.*

133. *Id.* at 87.

134. *Id.*

135. *Id.* at 88.

possibility that an "overt homosexual may have some awareness that another man might be a suitable partner" in prison based on "some intangible insight."[136]

Another important development in Dinerstein and Glueck's research is that it recognized an additional variation of homosexual panic—when "overt homosexual[s]" make an unwanted sexual advance "to an inmate who is not homosexual" (overt or latent).[137] The researchers noted that "[t]olerance and understanding" were "rare attributes" in prison and that the approached man "usually becomes extremely violent, and feels no hesitation in striking back."[138] They stressed that such fights are a serious security concern for prison management because they "can quickly flare up."[139]

Dinerstein and Glueck's recommendations for responding to "homosexual panic" in prison, which were informed by the results of their intervention program at Sing Sing Prison, reveal important connections between gay and trans panic ideas and state violence.[140] Consistent with the emerging psychiatric consensus that homosexuality was a mental illness, the researchers described overt homosexuality as a "type of disorder."[141] They further noted that because treatments for overt homosexuality were "notoriously unsuccessful," they "handle[d] the problem" by isolating openly gay men (especially effeminate ones) from the prison population.[142] The men were then referred for psychiatric evaluation.[143]

In two ways, this response placed the blame on openly gay men for the violence they experienced in prison and framed them as a security threat.[144] First, this response demonized gay men as suffering from an incurable mental illness. Second, this response accepted the idea that violence was an understandable response to "overt homosexuals" in prison given the lack of tolerance in prison towards those who had this incurable "disorder."

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136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *See id.* at 86, 89, 91.
141. *Id.* at 87.
142. *Id.*
143. *Id.* at 89.
144. Comstock, *supra* note 28, at 97 ("The justification for self-defense in these incidents is not the physical threat posed by the 'advance,' but the sexual identity of the victim.").

For latent homosexuals, Dinerstein and Glueck described that their therapeutic program involved "situational manipulation, physical therapy, and psychotherapy."[145] While participating in the program, inmates would be separated from the general population and put into a prison hospital ward for several weeks.[146] Treatment consisted of giving them small doses of insulin, three times a day, for one and one-half to two hours before meals as well as a sedative during the day and night.[147] While in the program, the inmates would undergo psychological therapy to "talk about the causes of their upset."[148] The researchers noted that over a course of a year, they treated approximately thirty inmates.[149]

In sum, as the psychiatric profession and the law became more hostile towards LGBTQ people in the 1940s and 1950s, medical experts in state-run institutions advanced stigmatizing definitions of gay and trans panic that demonized LGBTQ victims as sexual aggressors and shifted the blame on LGBTQ people for the violence they experienced. As the next Part discusses, these new definitions of gay and trans panic provided an ideological hook for criminal defendants in the 1960s to legally justify and excuse the violence they committed against LGBTQ victims.[150]

III. "GAY AND TRANS PANIC" AS LEGAL JUSTIFICATION AND EXCUSE FOR VIOLENCE AGAINST LGBTQ PEOPLE (1960S–PRESENT)

The lack of a cohesive scientific definition of gay and trans panic in the psychiatric profession made it easier for criminal defendants and defense attorneys in the 1960s to take advantage of more stigmatizing interpretations of the concept in order to legally justify and excuse violence against LGBTQ victims.[151] In this regard, gay

145. Dinerstein & Glueck, *supra* note 127, at 89.

146. *Id.* at 90.

147. *Id.*

148. *Id.*

149. *Id.* Dinerstein and Glueck discussed that many inmates were scared of being transferred to state hospitals because the inmates had heard stories of the hospitals' poor conditions. *Id.* at 89.

150. The analysis in this section focuses on cases involving the "gay and trans panic" defenses that emerged between the 1960s and 1970s. For more recent examples of cases involving gay and trans panic defenses, see Wodda and Panfil, *supra* note 28, at 943–56.

151. Bagnall et al., *supra* note 28, at 502 (noting that "there is no agreed-upon definition of homosexual panic as a legal defense in criminal trials"); Comstock, *supra* note 28, at 89 ("Attorneys have chosen . . . to lend their own interpretations to and shape homosexual

and trans panic ideas not only justified state violence against LGBTQ people in the form of draconian medical treatments. Rather, these stigmatizing ideas—advanced by doctors who worked for and conducted research in state-run hospitals and prisons—also blurred the distinction between state and private violence.

One caveat is necessary before developing these points. In general, discussions of the gay and trans panic defenses appear in appellate court opinions, and those cases usually involve defendants' unsuccessful uses of the defenses or cases in which defendants are challenging their convictions on other grounds. If the defendant is acquitted, the defendant will not appeal, and the government cannot appeal.[152] Given the limitations of available historical records, especially at the trial court level,[153] it is impossible to know how frequently the gay and trans panic defenses were used or successful in the past.[154] For these reasons, available appellate court opinions in which discussions of gay and trans panic defenses appear may not be entirely representative.[155] At the same time, this Article is not making any causal arguments that rely on those cases. The decisions still provide important insight into how defendants relied on medical expertise to support the defenses over time.

Most scholars date the first published court decision to explicitly mention gay and trans panic concepts to the 1967 California case of *People v. Rodriguez*.[156] As early as the 1950s, however, defendants charged with muder constructed legal defenses based on the

panic to the needs of their clients.").

152. Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 267 (1996) ("[W]hen a defendant is acquitted by a judge or jury, the prosecution may not appeal.").

153. WOODS, SEARS & MALLORY, *supra* note 3, at 5 (noting that "most cases in which defendants successfully raise gay and trans panic defenses never result in a court opinion").

154. Wodda & Panfil, *supra* note 28, at 943–56 (noting that "it is difficult to determine exactly how often the gay panic defense has been used and, when used, how 'successful' it has been").

155. Salerno et al., *supra* note 34, at 25 (noting that statistics from appellate court cases "might underrepresent the true number of jury trials in which the gay-panic defense is invoked successfully, because defendants who are successful at trial will not have convictions to appeal").

156. 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967); Bagnall et al., *supra* note 28, at 499 n.4 ("The first reported judicial mention of homosexual panic came in *People v. Rodriguez*."); Lee, *supra* note 1, at 491 ("Beginning in 1967, male defendants charged with murdering gay men began to utilize the concept of homosexual panic . . . ."); Perkiss, *supra* note 28, at 796 ("Commentators have identified *People v. Rodriguez* as the first reported judicial mention of homosexual panic.").

idea that LGBTQ victims made unwanted sexual advances towards them.[157] It does not appear, however, that defendants in these earlier decisions relied on newly emerging definitions of gay and trans panic that more aggressively stigmatized LGBTQ people or on mental health professionals as expert witnesses to support panic claims. Rather, defendants rooted their legal strategies in the law of assault and self-defense, specifically describing the alleged sexual advances as "homosexual assaults."[158]

As discussed previously, the idea that homosexuality was a mental disease became the dominant view in the United States psychiatric profession during the late 1950s and 1960s.[159] At the same time, lesbian and gay mobilization and lesbian and gay neighborhoods became more increasingly visible.[160] These developments had important connections to public opinion about homosexuality in the late 1960s. For instance, in 1967—only two years before the Stonewall Riots—CBS News aired a forty-five-minute special called *The Homosexuals*.[161] The special stressed within its first thirty seconds the "growing public concern about homosexuals in society [and] about their increasing visibility."[162] Based on the results of a commissioned survey into public attitudes towards homosexuality, the special reported that "2 out of 3 of Americans look upon homosexuals with disgust, discomfort or fear; 1 out of 10 says hatred; [and] a vast majority believe that homosexuality is an illness."[163] The special further reported that "Americans consider homosexuality more harmful to society than adultery, abortion, or prostitution."[164]

Paralleling these developments, published court decisions started to emerge in the 1960s in which defendants who killed

157. *See, e.g.*, People v. Nash, 338 P.2d 416, 417–18 (Cal. 1959) (en banc); Burns v. State, 87 So. 2d 681, 684–85 (Miss. 1956).

158. *See, e.g.*, Edmonds v. U.S., 260 F.2d 474, 475–76 (D.C. Cir. 1958) (per curiam) (involving a defendant who killed a gay male victim and argued self-defense based on the contention that the victim made a series of "homosexual advances" towards the defendant); *Burns*, 87 So. 2d at 685 (involving a defendant who killed a gay male victim and argued self-defense based on the contention that the victim attempted "homosexual assault upon him").

159. BAYER, *supra* note 78, at 29.

160. *See supra* Section II.A.

161. CBS NEWS REPORTS, *The Homosexuals*, 1967, https://www.youtube.com/watch?v=zWNEdoXo0Yg [https://perma.cc/4RU9-AUJJ].

162. *Id.* at 0:20–0:25.

163. *Id.* at 6:40–6:53.

164. *Id.* at 0:30–0:42.

LGBTQ victims turned to the law of insanity to construct legal defenses. Unlike earlier "homosexual assault" cases, defendants relied on more aggressive definitions of gay and trans panic that characterized LGBTQ people as sexual aggressors, in line with the ideas being advanced by prominent psychiatrists who worked for state-run institutions.[165] Illustrating the centrality of medical expertise in these cases, defendants relied on psychiatrists as expert witnesses to provide testimony in support of their gay and trans panic claims.[166]

For instance, in *People v. Stoltz*, a 1961 California appellate case, the victim had picked up the defendant and another man who were hitchhiking together.[167] According to the defendant, the three men then stopped at a point along the river to drink whisky, when the victim allegedly made a sexual advance on both men.[168] After allegedly rejecting the victim's advances, the defendant then picked up a piece of wood and repeatedly hit him in the head.[169] The defendant admitted that he knew the wood "was big enough to break [the victim's] head open."[170] The other man then struck the victim twice more on the head and took the victim's wallet and keys. The victim suffered a fractured skull from the blows and died soon after.[171]

The defendant claimed that he struck the victim because he was frightened by the victim's sexual advances.[172] The defense called a psychiatrist and neurologist as an expert witness, who testified that it was in his professional opinion that the defendant's violent conduct was "performed while in a state of panic or extreme fear."[173] Illustrating the overlap between stigmatizing attitudes towards LGBTQ people in the medical and legal domains, the wit-

165. *See supra* Section II.B.

166. *See, e.g.*, People v. Rodriguez, 64 Cal. Rptr. 253, 254–55 (Cal. Ct. App. 1967); People v. Parisie, 287 N.E.2d 310, 314 (Ill. App. Ct. 1972); Commonwealth v. Doucette, 462 N.E.2d 1084, 1097 (Mass. 1984); Commonwealth v. Shelley, 373 N.E.2d 951, 953 (Mass. 1978); State v. Thornton, 532 S.W.2d 37, 44 (Mo. Ct. App. 1975); Fitzgerald v. State, 601 P.2d 1015, 1021 (Wyo. 1979).

167. 16 Cal. Rptr. 285 (Cal. Ct. App. 1961).

168. *Id.* at 287.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* The appellate court decision does not explicitly mention whether the defendant argued self-defense or insanity at trial.

173. *Id.*

ness specifically testified that "panic reaction to a homosexual situation is recognized in the field of psychiatry."[174] The prosecution called another psychiatrist in rebuttal who refuted the defense expert witness's testimony.[175] Ultimately, the jury sided with the prosecution and convicted the defendant of murder, robbery, and grand theft.[176]

People v. Rodriguez, the 1967 case in which gay and trans panic concepts are first explicitly mentioned in a published court decision, also illustrates defendants' increasing reliance on stigmatizing medical norms to support gay and trans panic defenses.[177] In *Rodriguez*, the defendant relied on the concept of "acute homosexual panic" to raise the insanity defense.[178] The defendant, who was seventeen years old at the time of the crime, killed an elderly man by bludgeoning him in the head with a club, causing the victim to fall and hit his head.[179] The defendant testified he was urinating in an alley when the elderly victim grabbed him from behind.[180] The defendant claimed that he became frightened, picked up a nearby stick, and hit the man, thinking that he was "trying to engage in a homosexual act."[181]

Although the jury in *Rodriguez* rejected the insanity defense and convicted the defendant of murder,[182] the case illustrates the introduction of medical terminology ("acute homosexual panic") to reframe "homosexual assaults" in terms of the defendant's mental condition.[183] With the legitimacy of medical expertise, defendants could root their defense strategies in terms of insanity law. Lending support to this idea, *Rodriguez* embodies a turn to rely on medical professionals as expert witnesses to determine whether a defendant who killed an LGBTQ victim acted as a result of "acute

174. *Id.*
175. *Id.*
176. *Id.*
177. 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967); *see also* Lee, *supra* note 1, at 491 & n.81; Perkiss, *supra* note 28, at 796.
178. *Rodriguez*, 64 Cal. Rptr. at 255.
179. *Id.* at 254–55.
180. *Id.* at 255.
181. *Id.*
182. *Id.* at 254.
183. *Id.* at 255.

homosexual panic."[184] In *Rodriguez*, both the defense and prosecution called doctors to testify as expert witnesses who presented conflicting opinions about whether the defendant acted as a result of "acute homosexual panic."[185]

Later decisions reveal how medical experts at trial specifically defined "homosexual panic" in terms of a perpetrator's loss of self-control. Although these cases involved insanity defenses, the emphasis on the defendant's loss of self-control is consistent with how the gay and trans panic defenses are typically understood when used to support provocation defenses today.[186] For instance, in *People v. Parisie*, an Illinois appellate case from 1972, the defendant raised the insanity defense based on "homosexual panic."[187] The jury rejected the defense and found the defendant guilty of murder.[188] At trial, both the prosecution and the defense called doctors to testify as expert witnesses.[189] The experts for each side gave conflicting professional opinions on whether the defendant acted under "homosexual panic."[190]

Consistent with the Model Penal Code, Illinois law at the time recognized the insanity defense on two grounds.[191] First, if due to

184. *Id.* To be clear, this Article does not argue that reliance on medical experts in criminal cases involving LGBTQ defendants or victims was a new phenomenon. Medical professionals commonly testified as expert witnesses in cases involving the enforcement of "sexual psychopath" laws between the 1940s–1960s. *See* DE RIVER, *supra* note 87, at 245–54.

185. *Rodriguez*, 64 Cal. Rptr. at 255.

186. Chen, *supra* note 73, at 203 (noting that under the current provocation rubric, "the homosexual advance itself provokes the understandable loss of normal self-control that incites uncontrollable homicidal rage in any reasonable person, regardless of homosexual tendencies").

187. 287 N.E.2d 310, 313 (Ill. App. Ct. 1972). In *Parisie*, the defendant shot another man and left him on an isolated country road. *Id.* The victim died after being taken to the hospital. *Id.* The defendant testified that before the incident, the victim offered him a lift. *Id.* The victim then drove to a remote area out of town and parked on a gravel road. *Id.* According to the defendant, the victim then made a sexual advance, smiled, and said that "if the defendant refused he would have to walk." *Id.* at 313–14. The defendant testified that he "blew up, went crazy" and vaguely remembered struggling with the defendant and hearing gunshots. *Id.* at 314. The next thing that he remembered was being in the victim's car in a parking lot. *Id.* When the police found the defendant in the parking lot, he also had the victim's "driver's license and credit cards in his own wallet," and the victim's cigarette lighter, and wallet. *Id.* at 313.

188. *Id.* at 315.

189. *Id.* at 314–15.

190. *Id.*

191. MODEL PENAL CODE § 4.01(1) (outlining the elements of "mental disease or defect excluding responsibility" under the Model Penal Code).

a mental disease or mental defect, the defendant "lack[ed] substantial capacity . . . to appreciate the criminality of his conduct."[192] Second, if due to mental disease or defect, the defendant "lack[ed] substantial capacity . . . to conform his conduct to the requirements of law."[193]

One of the psychiatrists called by the defense offered general testimony on "homosexual panic" as a psychological concept.[194] In response to a hypothetical question based on the same facts as the defendant's personal background and the incident in question, the psychiatrist testified that it was possible that the "hypothetical individual suffered" from "acute 'homosexual panic.'"[195] The psychiatrist further testified that this "hypothetical individual" was "unable to conform, and unable to control the given impulse" to cause harm because of his "homosexual panic" at the time of the incident,[196] consistent with the second legal grounds for insanity mentioned above.

In more recent decades, claims of gay and trans panic to support insanity or diminished capacity defenses have become less common. Rather, defendants have found greater success in using gay and trans panic ideas to support provocation defenses.[197] Scholars posit that one likely reason for this change is the decline of the prevailing psychiatric view that homosexuality was a mental illness in the 1970s,[198] reflected by the deletion of homosexuality from the DSM in 1973.[199] Scholars have also surmised that jurors could be more sympathetic to the idea that a straight man would be provoked to react violently to an unwanted sexual advance by a gay man, and less sympathetic to the view that those defendants are legally insane.[200]

192. *Parisie*, 287 N.E.2d at 313–14 (citing ILL. REV. STAT. ch. 38, § 6-2 (1967)).

193. *Id.*

194. *Id.* at 314.

195. *Id.*

196. *Id.*

197. Chen, *supra* note 73, at 202 (noting that insanity and diminished capacity formulations of gay and trans panic strategies became problematic after homosexuality was deleted from the DSM in 1973); Lee, *supra* note 1, at 478, 498 ("Gay panic arguments linked to claims of mental defect have largely been unsuccessful, whereas gay panic arguments linked to claims of provocation have been relatively successful.").

198. *See, e.g.*, Lee, *supra* note 1, at 498.

199. *See* BAYER, *supra* note 78, at 40.

200. Lee, *supra* note 1, at 505. As discussed in the next Part, empirical research supports this idea. *See* Salerno et al., *supra* note 34, at 24.

Even after this shift away from insanity to provocation, published appellate court opinions show that defendants still rely on medical experts to support their claims of gay and trans panic. Consider the following three examples. In *State v. Ritchey*, the Supreme Court of Kansas in 1973 rejected a defendant's challenge that the trial court had abused its discretion in denying a motion requesting that the court appoint a psychiatrist to evaluate him for the purposes of preparing a provocation defense based on claims of gay and trans panic.[201] In 1989, a California appellate court rejected a defendant's challenge that the trial court had abused its discretion in denying expert testimony from a psychiatrist and psychologist claiming that because of the defendant's "particular background he was capable of reacting with abnormal rage and disgust to a homosexual advance."[202] In *State v. Bodoh*, a Wisconsin appellate court in 2001 rejected a defendant's challenge that his counsel was ineffective for not requesting a psychological evaluation that, in the defendant's view, would have supported his claim of gay panic to support his provocation defense.[203]

In sum, even if it is proper to initially characterize the violence involved in gay and trans panic cases as private acts of violence, these acts assume a different meaning in the criminal process when perpetrators are able to take advantage of stigmatizing medical ideas that characterize LGBTQ victims as sexual aggressors and place the blame on them for the violence. The historical roots of "gay and trans panic" do not lie in the substantive criminal law. Rather, these ideas are vestiges of a broader state and social agenda dating back to at least the early twentieth century that empowered medical experts to regulate and control "sexual deviance."[204] The state had a direct role in supporting doctors in its own institutions who not only embraced the pathological model of homosexuality, but also redefined gay and trans panic in ways that placed the blame on LGBTQ people for the violence they experienced in state institutions and society more broadly. Therefore, al-

201. 573 P.2d 973, 974–75 (Kan. 1977).

202. Ken Cody, *Last Gasp for Public Defense*, S.F. SENTINEL, Apr. 6, 1989, at 10, 10; Philip Hager, *Convicted Killer's 'Homosexual Panic' Defense Rejected*, L.A. TIMES (Oct. 14, 1989), https://www.latimes.com/archives/la-xpm-1989-10-14-mn-261-story.html [https://perma.cc/G5ZW-VF7R].

203. 2001 Wisc. App. LEXIS 890, at *2–3 (2001) (per curiam).

204. Wodda & Panfil, *supra* note 28, at 941 (noting that gay and trans panic defenses "employ[] a 'deviance' frame").

lowing gay and trans panic claims to be recognized under the substantive criminal law leaves space for outmoded ideas of sexual deviance to continue to thrive in the criminal justice system today. The remainder of this Article turns to discuss this point.

IV. TOWARDS A POLITICAL FRAMEWORK FOR LEGISLATION BANNING THE GAY AND TRANS PANIC DEFENSES

It is misguided to distance the history discussed above, and especially the role of the state in the growth of gay and trans panic in medicine and law, from how the gay and trans panic defenses are treated under the criminal law today. Based on this idea, this Part provides an early foundation for a political framework that justifies banning the gay and trans panic defenses through legislation. The analysis below connects the goals of this political framework to current radical and critical criminal justice perspectives that challenge the pervasive, structural criminal justice inequalities rooted in racial, class, gender, and sexual hierarchies. The analysis further discusses due process critiques of these legislative bans as well as the debate over whether these bans effectively combat anti-LGBTQ juror biases.

In federal court and in most state courts today, the gay and trans panic defenses are still available legal strategies for defendants who assault or kill LGBTQ victims. In recent decades, some lower courts have limited or prohibited the gay and trans panic defenses.[205] Improvements in public attitudes towards homosexuality and advancements in the legal treatment of LGBTQ people, and lesbians and gays in particular, are likely reasons for this judicial

205. Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375, 1392 (2010) (noting that the gay panic defense "is now received skeptically by many courts"); Am. Bar Ass'n, Res. 113A, at 9 (2013), http://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf ("Courts have increasingly been skeptical of gay panic arguments to support defense claims of insanity or provocation.") [https://perma.cc/MSM7-LTBX]; *see, e.g.*, Davis v. State, 928 So. 2d 1089 (Fla. 2005) (per curiam) ("This Court has not previously recognized that a nonviolent homosexual advance may constitute sufficient provocation to incite an individual to lose his self-control and commit acts in the heat of passion, thus reducing murder to manslaughter."); *Ritchey*, 573 P.2d 973 (affirming that the deceased victim's same-sex sexual advances were not legally sufficient provocation); State v. Lewis, 685 So. 2d 1130 (La. Ct. App. 1996) (rejecting provocation defense based on the victim's same-sex sexual advances); State v. Volk, 421 N.W.2d 360, 365 (Minn. Ct. App. 1988) (holding that a defendant's disgust towards a homosexual advance is not sufficient legal provocation); Commonwealth v. Carr, 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990) (holding that "the sight of naked women engaged in lesbian lovemaking is not adequate provocation").

pushback.[206] But even in states where individual trial and intermediate appellate courts have curbed them, the gay and trans panic defenses are still widely available.

The political framework that this Article envisions for legislation banning the gay and trans panic defenses balances the traditional justifications for punishment with two cornerstone values: (1) state accountability towards LGBTQ people and communities (as well as other marginalized populations), and (2) equality under the substantive criminal law. As discussed below, upholding these values requires an analysis of how the state has treated LGBTQ people in the past and what that treatment says about whether the state is currently fulfilling what ought to be a baseline normative commitment to respect LGBTQ civilians, and not sponsor, excuse, justify, or condone violence against them.[207] In the context of the gay and trans panic defenses, maintaining this normative commitment means that it is necessary to prioritize the demands of state accountability and equality for LGBTQ people under the substantive criminal law over defendants' due process interest in presenting every legal strategy that might benefit their case.

Theoretical perspectives on criminal law tend to overlook equality as an underlying value of the substantive criminal law and place primacy on the traditional justifications for punishment (i.e., retribution, deterrence, incapacitation, and rehabilitation).[208] The conception of equality that this Article envisions for this political framework is consistent with the principle of substantive equality, not formal equality.[209] In this regard, this Article is not arguing that lawmaking bodies should ban the gay and trans panic defenses in order to ensure that violence against LGBTQ people is punished in the same way as similar violence against non-LGBTQ people. In addition, this political framework is not motivated by a

206. *See* ALAN YANG, NAT'L GAY & LESBIAN TASK FORCE FOUND., FROM WRONGS TO RIGHTS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY, 1973–1999, at 23 (1999) ("The striking trend in public opinion during the 1990's is that all groups became more accepting of homosexuality."); Paul R. Brewer, *The Shifting Foundations of Public Opinion About Gay Rights*, 65 J. POL., 1208, 1208 (2003) (emphasizing that "public attitudes about homosexuality changed dramatically over the course of the 1990s").

207. Thomas, *supra* note 13, at 1477 (recognizing "that one of the first duties of the state is to protect citizens from whom its powers derive against random, unchecked violence by other citizens, or by government officials").

208. Bierschbach & Bibas, *supra* note 38, at 1452; Way, *supra* note 18, at 203–04.

209. Sullivan, *supra* note 37, at 750 ("On the formal view, inequality consists of treating people differently across an irrelevant criterion; on the substantive view, the injury is subordinating one group to another.").

desire for harsher punishment of defendants who perpetrate violence against LGBTQ victims. Rather, this Article's claim is that the gay and trans panic defenses embody and perpetrate unjust sexual and gender hierarchies that are rooted in outdated sexual deviance concepts that stigmatize and subjugate LGBTQ people. Maintaining equality for LGBTQ people under the substantive criminal law demands that the state reject these unjust sexual and gender hierarchies, which the state had a hand in creating, and are infused in the gay and trans panic defenses.[210]

Placing primacy on the cornerstone values of state accountability and substantive equality under the criminal law helps to align the goals of legislation banning the gay and trans panic defenses with current radical and critical criminal justice perspectives that challenge the pervasive, structural criminal justice inequalities rooted in racial, class, gender, and sexual hierarchies.[211] These important perspectives describe how mass incarceration has taken its harshest toll on people and communities of color and contextualize mass incarceration within a broader historical pattern of state subjugation of Black, poor, and other marginalized communities of color.[212] At the same time, these perspectives explain how the criminal justice system has provided little protection or redress for

210. Scholars have raised similar arguments about the tensions between principles of formal equality and racial and gender equality in the criminal justice system. *See, e.g.*, Butler, *supra* note 29, at 844 ("In the criminal justice system . . . there is tension between the ideal of formal equality and the reality of white supremacy, historic and present."); Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 406 (2015) (discussing how in the context of domestic violence, "[i]n contrast to liberal feminism, which targets differential treatment as the source of women's inequality and demands formal equality from the state, dominance feminism identifies women's powerlessness relative to men as the cause of their subordination and supports state interventions that correct this power imbalance").

211. *See, e.g.*, DAVIS, *supra* note 29; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13 (2011); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Roberts, *supra* note 29; *Manifesto for Abolition*, ABOLITION, https://abolitionjournal.org/frontpage [https://perma.cc/RZF4-YL9P].

212. *See, e.g.*, DAVIS, *supra* note 29, at 15 ("While a relatively small proportion of the population has ever directly experienced life inside prison, this is not true in poor black and Latino communities. Neither is it true for Native Americans or for certain Asian-American communities."); Akbar, *supra* note 211, at 412 ("Contemporary racial justice movements are not simply arguing the state has created a fundamentally unequal criminal legal system. They are identifying policing, jail, and prison as the primary mode of governing black, poor, and other communities of color in the United States, and pointing to law as the scaffolding."); McLeod, *supra* note 211, at 1185 ("Alongside imprisonment's general structural brutality, abolition merits further consideration as an ethical framework because of the racial subordination inherent in both historical and contemporary practices of incarceration and

crime victims from the most intersectionally marginalized communities.[213] They further critique the effectiveness of incarceration and advocate for restorative and transformative solutions that better address the needs of victims, offenders, communities, and broader society.[214]

Consistent with these ideas, the law and legal systems often fail to protect LGBTQ victims who are most vulnerable to being blamed for the violence they experience through the gay and trans panic defenses—namely, those who are transgender, people of color, poor, or marginalized in other ways.[215] For instance, in 2019 alone, advocates tracked twenty-six known killings of transgender and gender nonconforming people in the United States who were fatally shot or killed by other violent means.[216] Almost all of the victims were transgender women of color, and black transgender women in particular.[217]

The types of unjust hierarchies that current radical and critical criminal law perspectives seek to eliminate are infused in the gay and trans panic defenses. In prioritizing equality as a value of substantive criminal law, legislation banning the gay and trans panic defenses rejects the idea that convictions should be avoided and

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punitive policing.").

213. *See, e.g.*, Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 751 (2007) ("The domestic violence system treats victims with increasing amounts of paternalism and disdain."); Harris, *supra* note 211, at 17 ("[S]cholars and activists committed to ending domestic violence and violence against sexual minorities have become increasingly disenchanted with the criminal justice system, and increasingly aware of its insidious role in the decimation of poor black and brown communities.").

214. *See, e.g.*, DAVIS, *supra* note 29, at 20–21 ("Effective alternatives involve both transformation of the techniques for addressing 'crime' and of the social and economic conditions that track so many children from poor communities, and especially communities of color, into the juvenile system and then on to prison."); Roberts, *supra* note 29, at 46 ("Rejecting the carceral paradigm, black feminist abolitionists have proposed community-based transformative justice responses that address the social causes of violence and hold people accountable without exposing them to police violence and state incarceration.").

215. *See* sources cited *supra* note 31 and accompanying text.

216. *Violence Against the Transgender Community in 2019*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019 [https://perma.cc/8A9C-ML3A]. It is important to underscore that existing data sources distort our understanding of homicide trends involving transgender and gender nonconforming people in the United States because of the lack of formal data collection efforts. *See* Rebecca L. Stotzer, *Data Sources Hinder Our Understanding of Transgender Murders*, 107 AM. J. PUB. HEALTH 1362, 1362 (2017).

217. Elliot Kozuch, *HRC Mourns Yahira Nesby, Black Trans Woman Killed in Brooklyn*, HUMAN RIGHTS CAMPAIGN (Dec. 21, 2019), https://www.hrc.org/blog/hrc-mourns-yahira-nesby-black-trans-woman-kill(ed-in-brooklyn) ("[Yahira] Nesby's death is at least the 25th known transgender or gender non-conforming person killed this year.") [https://perma.cc/3J8A-XDNZ]; *Violence Against the Transgender Community in 2019*, *supra* note 216.

punishment should be reduced based on antiquated sexual deviance concepts that stigmatize LGBTQ victims. It is possible to reject these unjust hierarchies through legislation banning the gay and trans panic defenses while pursuing restorative and transformative strategies to respond to violence committed against LGBTQ victims. Illustrating these points, the National Coalition of Anti-Violence Programs advocates for restorative justice models as an alternative response to incarceration for anti-LGBTQ hate violence,[218] but also recommends prohibiting the gay and trans panic defenses on the grounds that they "shift the blame for . . . inexcusable attacks back to the victim."[219]

This political framework that stresses state accountability and substantive equality under the criminal law also demonstrates why due process concerns do not fully capture what is at stake in gay and trans panic cases. The individualized focus of existing due process critiques treats gay and trans panic cases as incidents that involve private violence perpetrated by one civilian against another, and in so doing, neglects the historical role of the state in the origins and growth of gay and trans panic in medicine and law.[220] Moreover, these due process critiques overlook the unjust structural hierarchies that the gay and trans panic defenses embody and perpetuate in criminal justice contexts.[221]

In spite of their limited scope, due process arguments are important to take seriously. With regard to constitutional due process protections, the United States Supreme Court is currently considering in *Kahler v. Kansas* whether the Eighth and Fourteenth

218. NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST THE LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER COMMUNITIES IN THE UNITED STATES IN 2009, at 44 (2010), https://avp.org/wp-content/uploads/2017/04/2011_NCAVP_HV_Reports.pdf [https://perma.cc/A54T-94LN].

219. *Id.* at 45.

220. Scholars advocating for a greater focus on equality in substantive criminal law have raised a similar critique about the individualized nature of the focus of criminal law more generally. *See, e.g.*, Way, *supra* note 18, at 239 ("The criminal law functions by narrowing its focus on particular acts, particular actors and particular moments in time.").

221. Canadian legal scholars have raised similar concerns about the tensions between due process and racial inequality in the Canadian criminal justice system. As Kent Roach has argued, "[n]ot all systems of systemic racism . . . invite more due process." Kent Roach, *Systemic Racism and Criminal Justice Policy*, 15 WINDSOR Y.B. ACCESS TO JUST. 236, 237 (1996). In raising this point, Roach stressed that "[a]boriginal women do not receive the equal protection of the law when they are victims of crime." *Id.* He further stressed the "[p]olice shootings of black men in Toronto and the failure of the criminal justice system to convict the shooters." *Id.*

Amendments permit states to abolish the insanity defense.[222] The Court's decision could affirm the broad authority of states to define the elements of crimes and defenses in their respective penal codes.[223] This reasoning would lend support to the idea that states could constitutionally prohibit the gay and trans panic defenses through legislation.

Alternatively, the Court in *Kahler* could constitutionally require states to recognize freestanding criminal defenses with deep historical roots in the substantive criminal law (for instance, provocation, insanity, and self-defense).[224] If the Court goes in this direction, the constitutional arguments for banning the gay and trans panic defenses through legislation could become more complicated. At the same time, legislation banning the gay and trans panic defenses is different from the insanity defense bans in *Kahler* in two significant ways.

First, legislation banning the gay and trans panic defenses does not eliminate any freestanding criminal defense. As explained previously, the gay and trans panic defenses are not freestanding defenses.[225] Rather, these legislative bans narrowly restrict the circumstances under which certain defendants are entitled, as a matter of law, to raise those freestanding defenses. Defining the circumstances under which defendants can raise established free-

222. 410 P.3d 105 (Kan. 2018) (per curiam), *cert. granted sub nom.*, Kahler v. Kansas, 139 S. Ct. 1318 (2019).

223. *See* State v. Casey, 71 P.3d 351, 355 (Ariz. 2003) (recognizing the "legislature's constitutional authority to define crimes and defenses"); Mont. Cannabis Indus. Ass'n v. State, 368 P.3d 1131, 1157 (Mont. 2016) ("The State, pursuant to its police powers, may define . . . what constitutes a defense . . . to a state prosecution."); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 502 (1989) ("The legislature's most direct way to control abuse of defenses derives from its power to define the substantive criminal law."). For a more thorough critique of the due process arguments against banning the gay and trans panic defenses, see WOODS, SEARS & MALLORY, *supra* note 3, at 16–20, and Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. (forthcoming 2020) (on file with author).

224. 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 11, at 63 n.1 (1984) ("Most of the defenses recognized today, and in some cases their precise formulation, have not changed in more than 300 years."); Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 967 (2019) (stressing that "the creation of self-defense and other affirmative defenses . . . all derive from the common law"). The first reported use of gay and trans panic by a criminal defendant, however, only dates back to 1967. Lee, *supra* note 1, at 491 & n.81.

225. *See supra* Part III.

standing defenses is something that lawmaking bodies have customarily done and continue to do when shaping their own penal codes.[226]

Second, legislation banning the gay and trans panic defenses does not eliminate criminal defenses with deep historical roots in the common law (for instance, provocation, insanity, or self-defense). Dating back to only the mid-twentieth century,[227] the gay and trans panic defenses are relatively recent in origin compared to the much longer history of the substantive criminal law. Constitutionally, the extent to which a criminal defense is deeply rooted in history and tradition is a key factor under one of the United States Supreme Court's methods for evaluating whether a criminal defense is "a fundamental principal of justice" under the Due Process Clause.[228]

Even if not constitutionally protected or required, legislation banning the gay and trans panic defenses still implicates important due process interests of criminal defendants. Specifically, these legislative bans prompt questions about whether, as a policy matter, the substantive criminal law should be structured in a way that allows defendants to present every legal strategy that could potentially strengthen their case. There are also important fairness considerations in allowing the state to benefit from legislation banning the gay and trans panic defenses when the state contributed to the growth of these defenses in the past. One might argue that it is unfair to encourage legislation that benefits the state in this fashion at the expense of disadvantaging future criminal defendants, who unlike the state, had no direct role in the growth of gay and trans panic as a concept.

Framing the stakes of legislation banning the gay and trans panic defenses in political terms helps to answer these questions by shifting the focus of the debate to core political questions about the relationship between the state and LGBTQ civilians. Specifically, this framing places primacy on whether the state is fulfilling what ought to be a baseline normative commitment to respect LGBTQ civilians, and more specifically, not sponsor, excuse, justify, or condone violence against them.[229] How LGBTQ people are

226. *See* sources cited *supra* note 223.
227. *See supra* Section II.B.
228. Montana v. Egelhoff, 518 U.S. 37, 42–44 (1996) (plurality opinion).
229. Thomas, *supra* note 13, at 1477.

recognized and treated as victims under the substantive criminal law exemplifies the relationship between the state and LGBTQ civilians. Therefore, even if the state benefits from legislation banning the gay and trans panic defenses when it was a "bad" actor in the past, those benefits are ultimately politically desirable. These legislative bans reconfigure the relationship between the state and LGBTQ people under the substantive criminal law in ways that further LGBTQ inclusion and equality.

Of course, the state is not the only actor responsible for the growth of gay and trans panic ideas in the medical and criminal justice domains. The historical analysis presented in this Article, however, shows that the state is a central player in this story and illustrates a need to hold the state accountable for its role in enabling gay and trans panic concepts to thrive. Legislation banning the gay and trans panic defenses holds the state accountable for how doctors and staff in public institutions treated members of the public, and LGBTQ patients in particular. In line with this notion of accountability, the United States Supreme Court and several lower courts have held that public hospitals, including public hospital doctors and staff, are state actors subject to constitutional requirements.[230]

Finally, the focus on state accountability and substantive equality under the criminal law informs the scholarly debate over whether formal bans against the gay and trans panic defenses can effectively combat anti-LGBTQ juror biases. Although research is sparse, the leading empirical study on the gay and trans panic defenses lends support to the notion that jurors could be more sympathetic to the idea that a straight man would react violently to an unwanted sexual advance by a gay man.[231] The study specifically

230. *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 70 (2001) (holding that state hospital employees are state actors subject to Fourth Amendment restrictions); Chudacoff v. Univ. Med. Cntr., 649 F.3d 1143, 1150 (9th Cir. 2011) (stressing that "there is no dispute that the operation of [a public] hospital is state action" (quoting Woodbury v. McKinnon, 447 F.2d 839, 842 (5th Cir. 1971))); Jones v. Nickens, 961 F. Supp. 2d 475, 486 (E.D.N.Y. 2013) (finding employees of a public hospital to be "state actors for the purposes of Section 1983"); Lewellen v. Schneck Med. Ctr., No. 4:05-cv-00083-JDT-WGH, 2007 U.S. Dist. LEXIS 60358, at *19 n.10 (S.D. Ind. 2007) ("A county-owned public hospital, like a public school or a municipal park, is a state actor."); Brandt v. Saint Vincent Infirmary, 701 S.W.2d 103 (Ark. 1985) ("Public hospitals are prohibited from acting arbitrarily and capriciously under the Equal Protection Clause and Due Process Clause of the 14th Amendment to the United States Constitution."); Feyz v. Mercy Mem'l Hosp., 719 N.W.2d 1, 8 (Mich. 2006) (stressing that "public hospitals are state actors implicating adherence to constitutional requirements").

231. *See* Salerno et al., *supra* note 34, at 24, 32. The study involved a multiethnic sample

examined the connection between gay and trans panic provocation defenses and jurors' political orientation.[232] It found that conservative participants were significantly less punitive when the defendant claimed to have acted out of gay and trans panic compared to the non-gay-and-trans-panic scenario.[233] Facts involving gay and trans panic, however, did not sway liberal jurors.[234] The researchers explained these differences in terms of the participants' moral outrage.[235] They hypothesized that conservative jurors were less morally outraged towards a defendant who killed in response to a same-sex sexual advance than in response to reasons that did not involve gay and trans panic.[236] Conversely, in their view, the same-sex sexual advance did not reduce liberal jurors' moral outrage towards that defendant.[237]

Scholars and advocates have argued that gay and trans panic defenses invite jurors to draw upon their own anti-LGBTQ biases when evaluating evidence and making decisions.[238] Simply put, jurors' own anti-LGBTQ biases could lead them to conclude that violence is a reasonable reaction to LGBTQ victims, and especially LGBTQ victims who allegedly make sexual advances towards the defendants.[239] Other scholars and commentators who are sympathetic to LGBTQ victims, however, have argued that formal legislative and judicial bans on the gay and trans panic defenses could make it more difficult to combat explicit and implicit anti-LGBTQ

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of seventy-four men and women who were eligible for jury service. *Id.* at 27. The researchers randomly assigned participants to evaluate either a gay panic scenario that involved a victim's same-sex sexual advance or a provocation scenario that did not have gay panic-related facts. *Id.* at 27–28.

232. *Id.* at 24.

233. *Id.* at 32.

234. *Id.*

235. *Id.*

236. *Id.* at 27.

237. *Id.*

238. *See, e.g.*, Am. Bar Ass'n, *supra* note 205, at 7 (stressing that the gay and trans panic defenses "seek to exploit jurors' bias and prejudice").

239. *See, e.g.*, *id.* at 7 ("The defense implicitly urges the jury to conclude that bias against gay or transgender individuals is reasonable, and that a violent reaction is therefore an understandable outcome of that bias."); Mison, *supra* note 28, at 158 (stressing that "the defendant hopes that the typical American juror—a product of homophobic and heterocentric American society—will evaluate the homosexual victim and homosexual overture with feelings of fear, revulsion, and hatred"); Strader et al., *supra* note 28, at 1517 ("[T]he most fundamental form of anti-gay bias that the gay panic defense elicits for the jury is the idea that the gay victim is to blame.").

juror bias.[240] From this perspective, the more effective way to combat anti-LGBTQ bias in gay and trans panic cases would be for prosecutors to force anti-LGBTQ biases to come out into the open in court and then aggressively reject those biases during both jury selection and in front of the judge and jury at trial.[241]

This debate over whether banning the gay and trans panic defenses can effectively combat anti-LGBTQ juror biases on the ground raises several issues that require future empirical study. For instance, it is uncertain whether these bans are more or less effective in combating anti-LGBTQ juror biases among certain jurors (for instance, from particular demographic or geographic backgrounds). It is also unclear whether allowing prosecutors to combat anti-LGBTQ juror biases in open court actually prevents jurors from relying on their own implicit or explicit anti-LGBTQ biases when evaluating evidence and making decisions in gay and trans panic cases. These issues prompt further questions about the importance of expanding protections to prohibit sexual orientation and gender identity discrimination during jury selection[242] as well

240. Lee, *supra* note 1, at 475 ("When gay panic arguments are forced to take a covert turn—when they are not explicit or out in the open—they may actually be more effective than they would be if out in the open."); Lee & Kwan, *supra* note 28, at 122 ("[A] legislative ban is a big hammer when a gentle nudge might be a more effective way to get jurors to do the right thing."). It is important to acknowledge that in more recent work, Cynthia Lee has argued in favor of formal prohibitions on the gay and trans panic defenses. *See generally*, Lee, *supra* note 223. These important critical arguments about the effectiveness of these formal prohibitions in combating anti-LGBTQ juror biases in gay and trans panic cases are included in Lee's earlier scholarship on the gay and trans panic defenses.

241. Lee, *supra* note 1, at 559 ("To limit the effectiveness of gay panic defense strategies, I offer two suggestions to prosecutors: (1) during voir dire, request questions designed to identify closet homophobes, and (2) make the possibility of sexual orientation bias salient throughout the trial."); Lee & Kwan, *supra* note 28, at 122 (discussing specific tactics for prosecutors to humanize transgender victims when the trans panic defense is raised in particular cases).

242. Peremptory strikes of jurors based on sexual orientation and gender identity are legal in most states. Julia C. Maddera, Note, Batson *in Transition: Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression*, 116 COLUM. L. REV. 195, 203, 206 (2016). In *Batson v. Kentucky*, the United States Supreme Court held that discrimination on the basis of race in jury selection is unconstitutional and violates the Equal Protection Clause. 476 U.S. 79, 100 (1986). The Ninth Circuit has extended *Batson* protections to peremptory strikes based on sexual orientation. *See, e.g.*, SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 484–86 (9th Cir. 2014). *See generally* Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407 (2014) (discussing anti-LGBT bias in voir dire); Kathryne M. Young, *Outing* Batson*: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 WILLAMETTE L. REV. 243 (2011) (discussing anti-LGBT bias in voir dire).

as designing best practices for questioning prospective jurors during voir dire to identify and strike jurors who may hold anti-LGBTQ biases.[243]

In spite of these uncertainties, the more important point is that issues of anti-LGBTQ juror bias in gay and trans panic cases involve problems in how the criminal law is applied as opposed to inequalities in the substantive criminal law itself.[244] Focusing on the political dimensions of legislation banning the gay and trans panic defenses broadens the inquiry to consider those equality issues and their relationship to state accountability. As discussed above, the historical roots of gay and trans panic do not lie in the substantive criminal law. Rather, these concepts are vestiges of a broader state and social agenda dating back to the late-nineteenth and early twentieth centuries that embraced medicine to regulate and control "sexual deviance" in ways that demeaned and stigmatized LGBTQ people.[245] Legislation banning the gay and trans panic defenses takes this history into account by rejecting antiquated notions of sexual deviance and their ability to shape when freestanding defenses are legally recognized under the substantive criminal law.

CONCLUSION

There are various ways that states could go about enacting legislation banning gay and trans panic defense strategies.[246] In 2016, the Williams Institute released the following comprehensive model legislation that rejects gay and trans panic strategies to support the freestanding defenses of provocation, insanity (or diminished capacity), and self-defense (or imperfect self-defense):

> *Section 101. Restrictions on the Defense of Provocation.* For purposes of determining sudden quarrel or heat of passion, the provocation was not objectively reasonable if it resulted from the discovery of,

243. Woods, *supra* note 33, at 69–70 (describing different questioning methods proposed by scholars and advocates to identify prospective jurors who hold anti-LGBTQ biases during voir dire).

244. *Cf.* Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1059 (2005) (noting in the context of juror biases on the basis of gender that "[i]t is not merely jurors applying the law who might favor male values; it is the law itself").

245. Wodda & Panfil, *supra* note 28, at 941 (noting that gay and trans panic defenses "employ[] a 'deviance' frame").

246. *See, e.g.*, Am. Bar Ass'n, *supra* note 205; WOODS, SEARS & MALLORY, *supra* note 3, at 22; Strader et al., *supra* note 28, at 1524–25.

> knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.
>
> *Section 102. Restrictions on the Defense of Diminished Capacity.* A defendant does not suffer from reduced mental capacity based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.[247]
>
> *Section 103. Restrictions on the Defense of Self-Defense.* A person is not justified in using force against another based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.[248]

Notably, language similar to this model legislation appears in recent legislation banning the gay and trans panic defenses in California,[249] Hawaii,[250] Illinois,[251] Maine,[252] Nevada,[253] New Jersey,[254] New York,[255] and Rhode Island.[256]

Putting aside the issue of specific statutory language, on a more fundamental level, this Article illustrated the importance of ana-

247. This language could be used to restrict either insanity or diminished capacity defenses.

248. WOODS, SEARS & MALLORY, *supra* note 3, at 22.

249. CAL. PENAL CODE § 192(f)(1).

250. HAW. REV. STAT. § 707-702(2).

251. 720 ILL. COMP. STAT. 5/9-1(c) (first degree murder); *id.* at 5/9-2(b) (second degree murder).

252. ME. STAT. tit. 17-A, § 38 (mental abnormality); *id.* § 108-3 (physical force in defense of a person); *id.* § 201-4 (murder).

253. S.B. 97 § 1-2, 2019 Leg., 80th Sess. (Nev. 2019) (to be codified at NEV. REV. STAT. § 193, __).

254. A1796, 218th Leg., 2d. Ann. Sess. (N.J. 2020) (to be codified at N.J. STAT. ANN. § 2C:11-4, __).

255. N.Y. PENAL LAW § 125.25(1)(a)(ii) (murder in the second degree); *id.* § 125.26(3)(a)(ii) (aggravated murder); *id.* § 125.27(2)(a)(i) (murder in the first degree).

256. 12 R.I. GEN. LAWS § 12-17-17 (restrictions on the defense of provocation); *id.* § 12-17-18 (restrictions on the defense of diminished capacity); *id.* § 12-17-19 (restrictions on the defense of self-defense).

lyzing and providing a theoretical account of the political dimensions of legislation banning the gay and trans panic defenses. The analysis of this Article brought to the surface how the state was a key player in the origin and growth of gay and trans panic as a medical concept and criminal defense. In light of this history and continued violence against LGBTQ people, a political framework that emphasizes values of state accountability and equality under the substantive criminal law illustrates why legislation banning the gay and trans panic defenses is both justified and necessary.

21102483D

HOUSE BILL NO. 2132

Offered January 13, 2021

Prefiled January 12, 2021

A BILL to amend the Code of Virginia by adding in Article 1 of Chapter 4 of Title 18.2 a section numbered 18.2-37.1 and by adding in Article 4 of Chapter 4 of Title 18.2 a section numbered 18.2-57.5, relating to homicides and assaults and bodily woundings; certain matters not to constitute defenses.

Patron—Roem

Committee Referral Pending

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Article 1 of Chapter 4 of Title 18.2 a section numbered 18.2-37.1 and by adding in Article 4 of Chapter 4 of Title 18.2 a section numbered 18.2-57.5 as follows:

§ 18.2-37.1. Certain matters not to constitute defenses.

A. Notwithstanding any other provision of law, the discovery of, perception of, or belief about another person's actual or perceived sex, gender, gender identity, or sexual orientation, whether or not accurate, is not a defense to any charge of capital murder, murder in the first degree, murder in the second degree, or voluntary manslaughter and is not provocation negating malice as an element of murder.

B. Nothing in this section shall preclude the admission of evidence of a victim or witness's conduct, behavior, or statements that is relevant and otherwise admissible.

§ 18.2-57.5. Certain matters not to constitute defenses.

A. Notwithstanding any other provision of law, the discovery of, perception of, or belief about another person's actual or perceived sex, gender, gender identity, or sexual orientation, whether or not accurate, is not a defense to any charge brought under this article.

B. Nothing in this section shall preclude admission of evidence of a victim or witness's conduct, behavior, or statements that is relevant and otherwise admissible.

2. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 1289 of the Acts of Assembly of 2020 requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of $50,000. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
COMMITTEE REPORT
1350 Pennsylvania Avenue, N.W., Washington, DC 20004

To: Members of the Council of the District of Columbia

From: Councilmember Charles Allen CA
Chairperson, Committee on the Judiciary and Public Safety

Date: November 23, 2020

Subject: Report on Bill 23-0409, the "Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020"

The Committee on the Judiciary and Public Safety, to which Bill 23-0409, the "Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020", was referred, reports favorably thereon and recommends approval by the Council of the District of Columbia.[1]

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[1] The short title of the bill as introduced was the "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019" and has been updated to reflect the inclusion of provisions from B23-0134, B23-0435, and B23-0513.

STATEMENT OF PURPOSE AND EFFECT

I. Purpose and Effect

a. *Introduction*

Bill 23-0409, the "Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020", was introduced on September 16, 2019, by Chairman Phil Mendelson and Committee Chairperson Charles Allen. The bill was referred to the Committee on the Judiciary and Public Safety the next day, and the Committee held a public hearing on the bill on October 23, 2019. B23-0409 is an omnibus measure that includes portions of B23-0134, the "Community Harassment Prevention Amendment Act of 2019"; B23-0435, the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019"; and B23-0513, the "Hate Crime Civil Enforcement Clarification Amendment Act of 2019". B23-0134 and B23-0513 deal with bias-motivated crimes and civil enforcement of the District's hate crimes law, and B23-0435 is substantively similar to B23-0409. Together, the bills respond to the perpetration of hate crimes using a variety of legislative tools.

While the commission of many crimes can undermine a victim's sense of security, bias-motivated crimes – often referred to as "hate crimes" – are especially destructive. According to the American Psychological Association, "victims of crimes that are bias-motivated are more likely to experience post-traumatic stress, safety concerns, depression, anxiety and anger than victims of crimes that are not motivated by bias."[2] Additionally, bias-motivated crimes affect not only the specific person victimized, but other individuals who share the same traits or characteristics for which the victim was targeted. These crimes "send messages to members of the victim's group that they are unwelcome and unsafe in the community, victimizing the entire group and decreasing feelings of safety and security."[3] Furthermore, in many cases, bias-motivated crimes are committed against communities that have historically faced significant discrimination.

In recognition of the unique harms posed by bias-motivated crimes, the federal government and states have enacted laws that treat these crimes differently than offenses committed without that same bias. Only a few jurisdictions have, however, addressed the continued availability of so-called "panic" defenses to defendants accused of bias-motivated crimes. "Panic" defenses are legal theories that ask the factfinder in a criminal case (i.e., the judge or jury) to find that the victim's traits or characteristics are effectively to blame for the defendant's conduct. Defendants asserting a panic defense generally argue that the victim made an unwanted sexual advance toward them, resulting in the defendant's use of force – sometimes fatal – against that victim. The panic defense is not its own general defense to criminal liability. Rather, it is a legal tactic that instead relies on the traditional defenses of diminished capacity or insanity, provocation, or self-defense. In the case of self-defense, for example, "[d]efendants claim they believed that the victim, because of their

[2] American Psychological Association, *The Psychology of Hate Crimes* (last visited October 22, 2020), https://www.apa.org/advocacy/interpersonal-violence/hate-crimes/.
[3] *Id.*

sexual orientation or gender identity or expression, was about to cause the defendant serious bodily harm."[4]

Panic defenses are often differentiated based on the specific trait of the victim at issue. When the defense is invoked to justify, excuse, or mitigate a defendant's conduct against a victim based on the victim's sexual orientation, the defense is colloquially referred to as the "gay panic" defense; when the defense is used for cases involving a transgender victim, it is referred to as the "trans panic" defense. To capture the full range of sexual and gender identities that can be implicated in a panic defense, the National LGBT Bar Association encourages the use of the term "LGBTQ+ panic defense."[5]

Perhaps the most well-known – though ultimately unsuccessful – use of the panic defense was in the prosecution of the two men who beat Matthew Shepard, a 21-year old college student at the University of Wyoming, to death.[6] Since then, the panic defense has been used to acquit dozens of defendants across the country.[7] The defense was purportedly used as recently as 2018 for the fatal stabbing of a man in Austin, Texas.[8] In the District, the panic defense was invoked in the 2003 slaying of Bella Evangelista, a transgender woman, and the 2008 slaying of Tony Hunter, a gay man.

The continued availability of the panic defense legitimizes prejudices held against LGBTQ+ residents by allowing those prejudices to excuse, justify, or mitigate a defendant's conduct. Panic defenses rely on long-disproved fears that LGBTQ+ persons are more dangerous or aggressive than their cisgender or straight counterparts. Panic defenses, in turn, deny LGBTQ+ persons full protection of the law, since they allow perpetrators of violence to escape criminal liability for their violent acts. The failure to hold perpetrators accountable for violence against LGBTQ+ persons is especially egregious in light of the historical and present-day discrimination these groups face. The Committee, accordingly, finds it necessary to bar the use of the defense in the District.

At the same time, the Committee does not wish to overstate what is being accomplished by elimination of the panic defense, the creation of new bias-motivated criminal offenses, and the establishment of a civil enforcement mechanism for hate crimes in the Committee Print. These legislative responses will not, alone, prevent acts of violence from being committed against LGBTQ+ persons, but they are important steps in a larger strategy. Prosecution of bias-motivated crime is, necessarily, responsive to a crime already committed. The individual victim and the community to which they belong have, therefore, already been harmed. Elimination of the panic defense will promote greater criminal accountability for acts of hate against vulnerable

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[4] THE LGBT BAR, *LGBTQ+ "Panic" Defense* (last visited October 12, 2020), https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Julie Compton, *Alleged 'gay panic defense' in Texas murder trial stuns advocates*, NBC News (May 2, 2018), https://www.nbcnews.com/feature/nbc-out/alleged-gay-panic-defense-texas-murder-trial-stuns-advocates-n870571. The lawyer for the defendant disputed the claim that his client asserted a "gay panic" defense. *Id.* Instead, he stated that his client "claimed to have acted purely in self-defense, though he acknowledged that there was no physical evidence to prove the victim had attacked his client." *Id.*

communities, but ensuring the safety of LGBTQ+ persons in the District will require significant work beyond the legislation at hand, including education and restorative justice.

That said, the Committee Print includes additional statutory reforms to help combat the commission of hate crimes in the District. The bill strengthens the prohibition against defacing certain symbols or displaying certain emblems with a discriminatory or threatening intent, found in D.C. Official Code § 22–3312.02. Rather than limiting the prohibition to "private premises or property in the District of Columbia primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed, religion" or other protected categories, the bill expands the prohibition to all private property of another (when done without the permission of the owner or their designee), in addition to public property in the District. As explained in greater detail elsewhere in the report, this change will help overcome challenges that limit enforcement of the current statute. The bill also clarifies the requisite intent and culpable mental states required to ensure the criminal offense comports with constitutional requirements.

The Committee Print also includes the provisions of B23-0513, the "Hate Crime Civil Enforcement Clarification Amendment Act of 2019", introduced by Attorney General Karl Racine. The Print amends the Bias-Related Crime Act of 1989, effective May 8, 1990 (D.C. Law 8-121; D.C. Official Code § 22-3701 et *seq*.), to provide the Office of the Attorney General ("OAG") with civil enforcement authority under the act against a person who (1) commits a bias-related crime, or (2) through any act of violence, force, fraud, intimidation, or discrimination, interferes with, or attempts to interfere with, an individual's exercise of any right secured by the Constitution or District law, or deprives an individual of equal protection under the Constitution or District law.

The District's bias-related crime statute operates as a sentencing enhancement for criminal acts "that demonstrat[e] an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim."[9] The act currently allows for criminal prosecution and civil enforcement, but the latter only by private parties.[10] The Committee Print provides subpoena power for OAG, as well as the ability to seek a range of civil relief, including injunctive relief, actual or nominal damages, including for emotional distress, punitive damages, and civil penalties of up to $10,000 per act. Further, the Print broadly defines a "person" subject to the act to include corporate and organizational defendants, and it expands the definition of "bias-related crime" to explicitly (1) include prejudice based on non-physical disabilities, and (2) provide that a designated act demonstrating an accused's prejudice based on a protected trait of the victim need not *solely* be *based on* or *because of* that prejudice.

Lastly, the Committee Print includes a small, but important, change to the District's Human Rights Act. The bill clarifies that the definition of "place of public accommodation" in the act (which prohibits discrimination based on eighteen traits) includes entities that provide goods or services to District residents, even if those entities do not maintain a physical location in the District or charge for those goods or services. This section of the bill is intended to overrule the

[9] D.C. Official Code § 22–3701.
[10] D.C. Official Code § 22-3704.

portion of the D.C. Circuit Court of Appeals' decision in *Freedom Watch, Inc. v. Google Inc.,* 816 F. App'x 497 (D.C. Cir. 2020), related to the Human Rights Act. In *Freedom Watch*, the D.C. Circuit concluded that to qualify as "place of public accommodation," an entity must "operate[] out of a particular place in D.C." *Id.* at 500.[11] The court's decision is contrary to the Council's intent to provide broad protections against discrimination for District residents and visitors that extend far beyond mere access to physical spaces. The goal of the Human Rights Act is to ensure "full and equal enjoyment" of "goods, services, . . . privileges, advantages, and accommodations."[12] In other words, under the Human Rights Act, it is not enough for a brick-and-mortar bank, for example, to allow people of color to come inside the building; it must allow them to open checking accounts, obtain credit cards, take out loans, and access the rest of the bank's services. Under the D.C. Circuit's logic, however, if a bank decides to close its physical branches and operates solely through a website, it could discriminate against District residents with respect to any or all of its services. This section of the bill clarifies the law to prevent that outcome.

This change recognizes that increasingly District residents purchase goods and services through internet-based retailers and providers, rather than from brick-and-mortar establishments. As a result, threats to fundamental civil rights, including being shut out of the economy, increasingly occur online. The Committee Print clarifies that the District's longstanding commitment to civil rights and inclusion extend equally to digital space as physical space. Moreover, even entities with physical locations may locate their brick-and-mortar facilities outside the District but nevertheless deliver goods or provide services to District residents. These entities must also comply with the Human Rights Act when operating in the District. Discrimination has no place in the District, regardless of whether that discrimination occurs at brick-and-mortar facilities, by out-of-state entities that operate in the District, or on the internet. The Committee Print brings District law in line with the laws of California, Colorado, New Mexico, New York, and Oregon—all of which have extended public-accommodations antidiscrimination provisions beyond entities with a physical location within their jurisdiction to online entities and other entities that lack such a brick-and-mortar location.

b. *Overview of the Measures Included in the Committee Print, <u>As Introduced</u>*

<u>B23-0409, the "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019", and B23-043, the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019"</u>

As introduced, B23-0409, the "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019", would preclude the use of adequate provocation, reduced mental capacity, and justification as defenses in prosecutions for crimes of violence if those defenses are based on the "discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender identity or expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship." The bill would

[11] Section 2 is also intended to overrule *U. S. Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981), to the extent that the Court there concluded that to qualify as a place of public accommodation, an entity must "operate from [a] particular place within the District of Columbia."
[12] D.C. Code § 2-1402.31(a)(1).

also require that judges, in criminal trials or proceedings, issue the following jury instruction upon request by either party:

> Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity or expression, or sexual orientation.

B23-0435, the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019", is substantially similar to B23-0409. As introduced, B23-0435 would eliminate the defense of adequate provocation when the defense is based on "the discovery of, knowledge about, or the potential disclosure of" a wide range of actual or perceived characteristics of the victim, including:

> [D]isability, gender identity or expression, national origin, race, color, religion, sex, or sexual orientation, regardless of whether the characteristic belongs to the victim or the defendant, even if the defendant and victim dated or participated in sexual relations, or if the defendant or victim romantically pursued the other.

B23-0409's proposed prohibition is broader in that it applies to two other defenses beyond adequate provocation: "reduced mental capacity" and "justification." The prohibition in B23-0435, on the other hand, applies to traits beyond sexual orientation and gender but is limited to the defense of adequate provocation.

B23-0134, the "Community Harassment Prevention Amendment Act of 2019"

As introduced, B23-0134 would amend the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982 to broaden the prohibition on burning, desecrating, marring, defacing, or damaging religious or secular symbols ("defacing symbols") and placing or displaying signs, marks, symbols, emblems, or other physical impressions ("displaying emblems"). Currently, the prohibition is limited to "private premises or property in the District of Columbia primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed, religion, or any other category listed in [D.C. Official Code] § 2-1401.01."[13] The bill, as introduced, would extend the prohibition to "any private property of another without the permission of the owner or the owner's designee."

The bill, as introduced, would also clarify that the prohibition against placing certain signs, marks, symbols, emblems or other physical impressions applies to cases where it is probable that a reasonable person would perceive that the intent is to threaten another person's property. Currently, that prohibition only applies to situations where it is probable that a reasonable person would perceive the intent is to threaten another person and does not contemplate threats to a person's property.

Finally, the bill would establish a new offense of harassing an entity. It defines an entity as "a group organized by association for any established common purpose, including, but not limited

[13] D.C. Official Code § 22–3312.02(a).

to a religious, social, educational, or recreational purpose." The bill would make it unlawful to purposefully engage in a course of conduct if the person intended, knew, or should have known that the course of conduct would cause members, participants, or employees of an entity to: fear for their safety; feel alarmed, disturbed, or frightened; or suffer emotional distress. Generally, the offense of harassing an entity would be punishable by up to 12 months' imprisonment, a $2,500 fine, or both. The maximum penalty increases to up to 4 years' imprisonment, a $12,500 fine, or both, if the person: (1) was subject to a court order or condition of release (either parole or supervised release) that prohibited contact with the entity's members, participants, or employees, (2) has been convicted of harassing an entity within the previous 10 years, or (3) caused more than $2,500 in financial injury.

B23-0513, the "Hate Crime Civil Enforcement Clarification Amendment Act of 2019"

B23-0513, as introduced, would grant OAG the ability to initiate civil actions against those who interfere with the exercise of another's rights or commit bias-related crimes against another person. Under current law, a private civil action is available to anyone who "incurs injury to his or her person or property as a result of an intentional act that demonstrates an accused's prejudice based on the actual or perceived" traits of the victim. This bill, as introduced, would expand the criteria for pursuing civil actions, including by the OAG acting on behalf of the District, in response to cases where:

> [A]ny person, whether or not acting under color of law, interferes or attempts to interfere by threats, intimidation, or coercion with the exercise or enjoyment by any other person or persons of rights secured by District or federal law, or commits a bias-related crime against the other person or persons.

The victim of the interference would have the ability to pursue a civil cause of action. The bill would also allow the OAG to "bring, in the name of the District of Columbia, a civil action for appropriate relief." In addition to the relief available under current law, the bill would also provide, for civil actions brought by the OAG, "a civil penalty of up to $10,000 per violation." Parents of minors would be liable for damages the minor is required to pay if their act or omission contributed to the minor's actions.

The Committee's amendments in the Print to the three bills as introduced are described elsewhere in this report.

II. Background and Committee Reasoning

a. *The LGBTQ+ Panic Defense*

Bella Evangelista, Tony Hunter, and "Bias-Motivated" Crimes

On September 7, 2008, Tony Randolph Hunter was found "lying supine on the ground" with a "laceration on the back of his head" in the District's Shaw neighborhood.[14] Police initially

[14] Amanda Hess, *The Death of Tony Hunter,* WASH. CITY PAPER (October 22, 2008), https://www.washingtoncitypaper.com/columns/the-sexist/blog/13117153/the-death-of-tony-hunter.

classified the attack as a potential hate crime based on the fact "that Hunter was gay and headed to a gay bar."[15] Lacking explicit evidence that the attack was motivated by bias – such as the use of an anti-gay slur or membership in an anti-gay group – police declassified the incident as a hate crime and "began referring to the beating as an apparent robbery, citing car keys and cash that appeared to be missing from Hunter's body."[16] Ten days after the attack, Hunter died from his injuries.[17] The following month, police arrested Robert Hannah, and prosecutors charged him with voluntary manslaughter for killing Hunter.[18]

Hannah and one other witness at the attack claimed that the "altercation" was incited when Hunter sexually assaulted Hannah.[19] Hannah and the other witness's account, taken together with the specific charge of voluntary manslaughter, drew criticism from members of the LGBTQ+ community that prosecutors were taking Hannah's "gay panic" defense seriously.[20] As noted above, the LGBTQ+ panic defense is a "legal strategy that asks a jury to find that a victim's sexual orientation or gender identity or expression is to blame for a defendant's violent reaction, including murder."[21] While the exact contours of the defense vary by jurisdiction, the defense can be used "to mitigate a case of murder to manslaughter or justified homicide."[22] Hannah was ultimately sentenced to 180 days in jail after pleading guilty to misdemeanor assault.[23]

Five years before the killing of Tony Hunter, the murder of Bella Evangelista – a transgender woman and local entertainer – rocked the transgender community in the District.[24] On August 16, 2003, Antoine Jacobs shot and killed Evangelista "after first paying her for oral sex, then later learning she [had male genitalia]."[25] Lisa Mottet, a member of the National Gay and Lesbian Task Force's Transgender Civil Rights Project, characterized the homicide as a "discovery crime," in which the motivation is the perpetrator's discovery of the victim's sexual orientation, gender identity, or biological sex.[26] In December of that year, it was reported that Jacobs was "reportedly considering a 'panic defense' when he goes to court."[27] Local transgender activist Earline Budd dismissed the idea that failing to disclose one's identity to a sexual partner excuses or justifies the use of violence.[28] Jacobs was ultimately sentenced to a term of imprisonment of 16

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[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* Todd Metrokin, a co-founder of D.C.'s then-named organization Gays and Lesbians Opposing Violence ("GLOV"), stated "It looks like they're going with manslaughter because of something we call the 'gay panic' defense." *Id.* Chris Farris, another GLOV co-founder, said he found the defense "familiar" and "repugnant", and noted that "[t]he fact that the suspect is pointing to gayness as an excuse shows the requisite bias." *Id.*
[21] THE LGBT BAR, *LGBTQ+ "Panic" Defense* (last visited October 12, 2020), https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/.
[22] *Id.*
[23] Sommer Mathis, *Hannah Sentenced to Six Months in Beating Death*, DCIST (October 15, 2009), https://dcist.com/story/09/10/15/hannah-sentenced-to-six-months-in-j/.
[24] Bob Moser, *Violence Engulfs Transgender Population in D.C.*, SOUTHERN POVERTY LAW CENTER (December 31, 2003), https://www.splcenter.org/fighting-hate/intelligence-report/2003/violence-engulfs-transgender-population-dc.
[25] Will O'Bryan, *Killer Sentenced in Transgender Murder Case*, METRO WEEKLY (December 21, 2005), https://www.metroweekly.com/2005/12/killer-sentenced-in-transgende/.
[26] *Id.*
[27] *Id.*
[28] *Id.*

years and 8 months, followed by five years of supervised release, after pleading guilty to second degree murder.[29]

While the cases of Bella Evangelista and Tony Hunter garnered particular attention, there have been dozens of verbal and physical attacks against members of the LGBTQ+ community in the District annually. There were 203 reported "bias-related crimes" – the term employed by MPD for bias-motivated or hate crimes – just last year, and 78 year-to-date through August 31, 2020 (the most recently available data).[30] Of those crimes, 60 were "motivated" by the victim's sexual orientation, and 27 by the victim's gender identity or expression.[31] Taken together, crimes motivated by individuals' responses to or perceptions of the victim's sexual orientation and gender identity or expression comprised nearly half of all bias-related crimes in the District.[32] This local data is consistent with national trends regarding bias-related crimes. A 2018 study of national crime data revealed that there were 7,120 reported hate crimes – 7,036 of which were single-bias incidents, and 84 of which were multiple bias incidents.[33] Of the 7,036 single-bias incidents, 17% were based on sexual orientation bias, and 2.4% were based on gender identity bias.

Table 1: Bias-Related Crimes in the District

Type of Bias	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**YTD thru 8/31/2019**	**YTD thru 8/31/2020**
Ethnicity/National Origin	7	5	3	3	3	13	40	49	61	42	17
Race	28	13	17	13	19	13	47	39	46	33	18
Religion	2	5	5	8	5	17	11	12	5	4	1
Sexual Orientation	43	46	31	27	27	40	55	60	60	42	24
Gender Identity/Expression	11	9	12	15	10	19	13	34	27	17	17
Disability	0	1	0	1	0	1	1	0	1	1	0
Political Affiliation	0	1	0	1	2	2	10	10	1	1	1
Homelessness	1	0	0	2	0	1	0	1	0	0	0
Sex/Gender	0	0	0	0	0	0	0	0	2	2	0
Total	**92**	**80**	**68**	**70**	**66**	**106**	**177**	**205**	**203**	**142**	**78**

Source: Metropolitan Police Department[34]

[29] *Id.*
[30] Metropolitan Police Department, *Bias-Related Crimes (Hate Crimes) Data* (last visited October 12, 2020), https://mpdc.dc.gov/hatecrimes.
[31] *Id.*
[32] *Id.*
[33] FBI, *2018 Hate Crime Statistics* (last visited April 22, 2020), https://ucr.fbi.gov/hate-crime/2018/topic-pages/incidents-and-offenses. "A single-bias incident is defined as an incident in which one or more offense types are motivated by the same bias. As of 2013, a multiple-bias incident is defined as an incident in which one or more offense types are motivated by two or more biases." *Id.*
[34] *Supra* note 30.

The District's bias-related crime statute is a sentencing enhancement for criminal acts "that demonstrate an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim of the subject designated act."[35] Anyone convicted of a bias-related crime "shall be fined not more than 1 ½ times the maximum fine authorized for the designated act and imprisoned for not more than 1 ½ times the maximum term authorized for the designated act."[36]

In recent years, the United States Attorney's Office for the District of Columbia ("USAO-DC") has failed to prosecute bias-related crimes, a problem several witnesses spoke to at the public hearing on the bill. Joseph Vardner, speaking on behalf of the National LGBT Bar Association, noted that:

> There has been a significant increase in bias-related crimes in the District of Columbia. In 2018, there were 205 bias-related crimes reported in our city – almost double from two years prior and triple from three years prior. This year there is also a wave of bias-related crime prejudiced on gender identity/expression and sexual orientation with already more reports to date than in six of the last eight years. As the committee noted, in its public hearing announcement, almost none of these crimes were prosecuted under the bias-related crime statute.

Specifically, of the 205 bias-related crimes reported in 2018, "police made arrests in a record 59 hate-crime cases involving adults."[37] USAO-DC "prosecuted only three as hate crimes, and one was quickly dropped."[38] Of the 178 reported hate crimes in 2017, "police closed 54 cases involving adults by arrest", but USAO-DC only "charged two cases as hate crimes, and both were later dropped as part of plea deals."[39] In 2019, after reviewing more than 200,000 cases, the *Washington Post* determined that "hate-crime prosecutions and convictions [were] at their lowest point in at least a decade."[40] Responding to criticism about the dearth of prosecutions for hate crimes, earlier this year, USAO-DC "announced that it prosecuted 11 incidents from last year as hate crimes, doubling the number of such prosecutions from the previous two years combined."[41]

Representatives for USAO-DC declined the Committee's invitation to participate in the hearing. Instead, USAO-DC submitted written testimony to the Committee.[42] The letter, among other things, explained the difference in the number of bias-related crimes reported to law enforcement and those prosecuted by the office:

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[35] D.C. Official Code § 22–3701.
[36] D.C. Official Code § 22–3703.
[37] Michael E. Miller and Steven Rich, *Hate crime reports have soared in D.C. Prosecutions have plummeted*, WASH. POST (August 21, 2019), https://www.washingtonpost.com/graphics/2019/local/dc-hate-prosecutions-drop/.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Natalie Delgadillo, *Following Criticism, The U.S. Attorney For D.C. Announces Increase In Hate Crime Prosecutions*, DCIST (January 24, 2020), https://dcist.com/story/20/01/24/following-criticism-the-u-s-attorney-for-d-c-announces-increase-in-hate-crime-prosecutions/
[42] On file with the Committee.

> As you know, the D.C. Code does not have a stand-alone 'bias-related crime' provision. Rather, it creates an enhanced offense when an underlying crime is bias-related, which allows, but does not require, a judge to impose a higher sentence upon conviction for the enhancement. In the vast majority of the alleged bias-related arrests in 2017 and 2018 presented to USAO-DC for prosecution, the Office charged the underlying crime, often D.C. Code offenses such as assault or threats. Specifically, of the 59 alleged bias-related crimes in 2018 presented for prosecution, we charged the underlying offense in 52 cases; of the 55 alleged bias-related crimes in 2017 presented for prosecution, we charged the underlying offense in 49 cases.

In addition to its charging practices, the letter also discussed the different legal standards governing arrests and convictions:

> Police make arrests based on probable cause, the same standard used, for example, in obtaining a search warrant. But prosecutors must prove each charged offense beyond a reasonable doubt, the highest threshold in the legal system. In some cases, the facts may create probable cause, but fall short of proof beyond a reasonable doubt. Not surprisingly, in some cases, the evidence will give rise to reason to believe that the crime was motivated by bias, but will not meet the exceptionally stringent beyond-a-reasonable-doubt standard. Moreover, to obtain a conviction on the bias enhancement, it is not enough that the victim identifies with, or is perceived to identify with, a protected status. It is also not enough that the perpetrator may be prejudiced against individuals identifying with such a status. Rather, prosecutors must prove, beyond a reasonable doubt, a causal nexus between the underlying crime and the perpetrator's prejudice or bias.

Whatever the reasons may be for the decline in prosecutions for bias-motivated offenses, several witnesses agreed that it undermined feelings of security within the LGBTQ+ community. Mr. Vardner stated that the "lack of prosecutions combined with the confusion as to the outcome of these cases has created a sense of fear and uncertainty within the LGBT community of the city." Similarly, President Bobbi Strang of the Gay and Lesbian Activists Alliance testified that the failure to prosecute bias-motivated offenses "sends a message that if a person hurts members of the LGBTQ community in the District, they will be allowed to get away with it." The Committee agrees that failure to prosecute bias-motivated offenses as such erodes the dignity and security of sexual and gender minorities. While Committee recognizes that the criminal law cannot by itself change a culture where violence against sexual and gender minorities is normalized, all victims – including members of the LGBTQ+ community – should receive full benefit of the law's protection. This protection can also encompass non-prosecution options, in appropriate cases, like restorative practices.

The Local Origins of "Gay Panic"

While the concept of "panic" in response to unwanted sexual advances by LGBTQ+ individuals has existed for nearly a century, its modern understanding differs significantly from its

original meaning. Edward J. Kempf, a psychiatrist at St. Elizabeths Hospital, coined the term "acute homosexual panic" in 1920.[43] He defined "acute homosexual panic" as a "a psychosis 'due to the pressure of uncontrollable perverse sexual cravings.'" The modern meaning began to emerge when "several prominent psychiatrists at state-run hospitals and prisons in the 1940s and 1950s advanced new definitions of gay and trans panic consistent with how the concept is largely understood in criminal cases today – namely, as violent situations triggered by the unwanted sexual advances of LGBTQ people."[44] This conception of "gay and trans panic fell in line with a then-growing consensus in the United States psychiatric profession that homosexuality (which was then generally understood to include gender nonconformity) was a mental illness."[45] As the medical and psychiatric communities formalized stigmatization against sexual minorities, such as listing homosexuality "as a mental disorder in the APA's Diagnostic and Statistical Manual of Mental Disorders,"[46] so too did government and the law.[47] In the 1940s and 1950s, "every state criminalized same-sex sex, and many localities prohibited certain gender nonconforming expression, such as cross-dressing."[48] "Between 1946 and 1959, twenty-nine states enacted sexual psychopath laws," which "were most heavily enforced against gay men."[49] During the Lavender Scare of the 1950s, "there was an organized effort in the federal government and the military to remove and persecute lesbian and gay employees and active service members."[50]

In 1943, Dr. Benjamin Karpman – who also worked at St. Elizabeths Hospital – offered a new understanding of gay and trans panic. He used unwanted sexual advances as evidence that a patient suffered from "gay panic" diverged from Kempf's original conception.[51] Nevertheless, Karpman's treatment of gay panic is "different from how unwanted sexual advances are used to support gay and trans panic defenses today," as Karpman "used the sexual advance as evidence of the patient's mental condition as opposed to the mental state of the person who reacted violently."[52] Eight years after publication of Karpman's article originating this theory, "Russell Dinerstein and Bernard Glueck, Jr. – forensic psychiatrists who worked at the psychiatric clinic at Sing Sing Prison operated by the State of New York – published an article that characterized 'homosexual panic' as a male inmate's violent mental state triggered by the unwanted sexual advance of a gay man."[53]

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[43] Jordan Blair Woods, *Framing Legislation Banning the "Gay and Trans Panic" Defenses*, 54 U. RICH. L. REV. 833, 842-844 (2020).
[44] *Id.* at 846.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 847.
[49] *Id.* at 847–48. "These laws generally took two forms. First, any person who was charged with a crime and found by a jury to be a 'sexual psychopath' could be handed over to a state's department of public health, perhaps indefinitely, until that person was 'cured.' Second, a civil variation allowed for the 'psychiatric commitment of sexual psychopaths, perhaps indefinitely, regardless of whether they were charged with a crime.'" *Id.* at 848.
[50] *Id.* at 850. "As a result of heightened investigations and screens, more than 1000 federal employees either resigned or were terminated, and over 2000 active service members were discharged from the military during the early 1950s for allegations relating to homosexuality." *Id.*
[51] *Id.* at 853.
[52] *Id.*
[53] *Id.* at 853–54.

This historical development of the notion of "homosexual panic" – the terminological precursor for the concept of gay or trans panic and the related legal defense – provides important background to the Committee Print. First, it illustrates the extremely problematic origins of the LGBTQ+ panic defense and the institutionally constructed, justified, and reinforced stigmatization of LGBTQ+ individuals. But it also demonstrates the unique role local governments played in the proliferation of the concept. Kempf, Karpman, Dinerstein, and Glueck were all employed at state-run hospitals – one of which was St. Elizabeths hospital here in the District.

The LGBTQ+ Panic Defense and Relevant Current Law in the District

The LGBT Bar Association describes LGBTQ+ panic defense as:

> [A] legal strategy that asks a jury to find that a victim's sexual orientation or gender identity/expression is to blame for a defendant's violent reaction, including murder. It is not a free-standing defense to criminal liability, but rather a legal tactic used to bolster other defenses. When a perpetrator uses an LGBTQ+ "panic" defense, they are claiming that a victim's sexual orientation or gender identity not only explains—but excuses—a loss of self-control and the subsequent assault. By fully or partially acquitting the perpetrators of crimes against LGBTQ+ victims, this defense implies that LGBTQ+ lives are worth less than others.[54]

The LGBTQ+ panic defense is "not [a] freestanding legal defense[]."[55] Rather, it is employed when a defendant invokes "gay and trans panic concepts to support one of three well-established legal defenses: (1) provocation, (2) insanity (or diminished capacity), and (3) self-defense (or imperfect self-defense).[56] In each case, the defendant would assert that the fact that the victim made an unwanted sexual advance towards the defendant justifies (in the case of self-defense) or excuses (in the cases of provocation, insanity, and diminished capacity) the defendant's conduct. For defenses of insanity or diminished capacity, "[t]he defendant alleges that a sexual proposition by the victim – due to their sexual orientation or gender identity – triggered a nervous breakdown in the defendant, causing an LGBTQ+ 'panic.'"[57] For the defense of provocation, the defendant specifically argues "that the victim's proposition, sometimes termed a 'non-violent sexual advance,' was sufficiently 'provocative' to induce the defendant to kill the victim."[58] Finally, in the case of self-defense, the defendant claims that "they believed that the victim, because of their sexual orientation or gender identity/expression, was about to cause the defendant serious bodily harm."[59]

[54] *Supra* note 4.
[55] *Comber*, 584 A.2d at 833.
[56] *Comber*, 584 A.2d at 834.
[57] *Supra* note 4.
[58] *Id.*
[59] *Id.*

i. *Murder*

In the District, there are three statutes defining murder. D.C. Official Code §§ 22–2101 and 22–2101 define first degree murder, while § 22–2103 defines second degree murder. D.C. Official Code § 22–2101 states that a person commits first degree murder when that person:

> [B]eing of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate an offense punishable by imprisonment in the penitentiary, or without purpose to do so kills another in perpetrating or in attempting to perpetrate any arson, . . . first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, or kidnaping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, or in perpetrating or attempting to perpetrate a felony involving a controlled substance.[60]

D.C. Code § 22–2102 states that a person also commits first degree murder when that person "maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another."[61] Finally, D.C. Code § 22–2103 states that an individual is guilty of second degree murder if that person "with malice aforethought, except as provided in [D.C. Code §§ 22-2101, 22-2102], kills another."

All three statutes define murder by the presence of – *inter alia* – malice on the part of the defendant. In the District, malice "denotes four types of murder, each accompanied by distinct mental states."[62]

> First, a killing is malicious where the perpetrator acts with the specific intent to kill. Second, a killing is malicious where the perpetrator has the specific intent to inflict serious bodily harm. Third, 'an act may involve such a wanton and willful disregard of an unreasonable human risk as to constitute malice aforethought even if there is not actual intent to kill or injure.' In *Byrd v. United States* . . . we referred to this kind of malicious killing as 'depraved heart' murder.
>
> [. . .]
>
> Historically, a fourth kind of malice existed when a killing occurred in the course of the intentional commission of a felony. Under this 'felony-murder' rule, 'malice . . . is implied from the intentional commission of the underlying felony even though the actual killing might be accidental.'[63]

[60] D.C. Official Code § 22–2101.
[61] D.C. Official Code § 22–2102.
[62] *Comber*, 548 A.2d at 38 (quoting *Byrd v. United States*, 500 A.2d 1376, 1385 (D.C. 1986).
[63] *Comber*, 584 A.2d at 38–41.

But even when an individual does act with one of the four mental states described above, a homicide "is not malicious if it is justified, excused, or committed under recognized circumstances of mitigation."[64] This is because " [i]mplicit in the notion of malice aforethought is 'the absence of every sort of justification, excuse or mitigation.'"[65] Therefore, "a defendant is not guilty of any crime at all if [they kill] with justification or excuse."[66]

ii. *Manslaughter*

English courts categorized homicides committed with malice as murder, and those committed without malice as manslaughter. In *United States v. Bradford*, the D.C. Court of Appeals defined voluntary manslaughter as:

> [A]n unlawful killing, intentionally committed, the requisite intent being the general intent to do the act which caused the death rather than a specific intent to cause death. That is to say, that even though the accused did not intend to kill, he did intend to use such force against the decedent as would endanger him. Consequently, the requisite intent in voluntary manslaughter approximates express malice, both as that term has recently been defined — a wanton disregard for human life — and as it has previously been described at common law — an evil design, purposiveness or willfulness. Killings classified as voluntary manslaughter would in fact be second degree murder but for the existence of circumstances that in some way mitigate malice. The purpose to kill is in legal contemplation dampened where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger. A killing committed in the mistaken belief that one may be in mortal danger is classified as voluntary manslaughter.[67]

Or, put more simply, voluntary manslaughter can "accurately be said to be (1) an unlawful killing of a human being (2) with malice which has been mitigated by the presence of circumstances judicially recognized as reducing the degree of criminality."[68] The D.C. Code still does not define manslaughter.[69] Instead, "[m]anslaughter is defined . . . by reference to the common law."[70] Under

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[64] *Comber*, 584 A.2d at 41.

[65] *Comber*, 584 A.2d at 41. "The absence of justification, excuse, or mitigation is thus an essential component of malice, and in turn of second-degree murder, on which the government bears the ultimate burden of persuasion." *Id.*

[66] *Swann v. United States*, 648 A.2d 928 (D.C. 1994)

[67] *Bradford*, 344 A.2d at 215. In contrast, the Bradford court defined involuntary manslaughter as:"[A]n unlawful killing which is unintentionally committed. By unintentionally it is meant that there is no intent to kill or to do bodily injury. The crime may occur as the result of an unlawful act which is a misdemeanor involving danger of injury; as the result of a lawful act performed in an unlawful way; or as the result of the omission to perform a legal duty. The requisite intent in involuntary manslaughter is supplied by the intent to commit the misdemeanor, or by gross or criminal negligence, a term recently defined as lack of awareness or failure to perceive the risk of injury from a course of conduct under circumstances in which the actor should have been aware of the risk. When a person engages in conduct which results in extreme danger to life or serious bodily injury and that person should be aware of the danger but is not, a resultant death will be involuntary manslaughter." *Bradford*, 344 A.2d 208 at 215.

[68] *Id.*

[69] *Comber v. United States*, 584 A.2d 26, 35 (1990) (quoting *United States v. Bradford*, 344 A.2d 208, 213 (D.C. 1975)).

[70] *Id.* (quoting *Williams v. United States*, 569 A.2d 97, 98 (D.C. 1989)).

current case law, "a homicide constitutes voluntary manslaughter where the perpetrator kills with a state of mind which, but for the presence of legally recognized mitigating circumstances, would render the killing murder."[71]

The D.C. Code does not define voluntary nor involuntary manslaughter, but it does specify that anyone found guilty of manslaughter "shall be sentenced to a period of imprisonment not exceeding 30 years"[72] and fined $75,000.[73] While the *Bradford* court speculated that that "while the statutory punishment for voluntary and involuntary manslaughter is ostensibly the same, it is most likely that a sentencing court would impose a more lenient sentence for an unintentional homicide than for an intentional one and also that prospects of parole would be greater for the former."[74]

iii. *Defenses*

Currently, the D.C. Code does not define any general defenses to criminal liability such as self-defense, duress, necessity, provocation, mistake of fact, or intoxication.[75] Instead, in the District, these defenses have been developed through case law. General defenses can fall into one of three categories: justification, excuse, or mitigation. Bills prohibiting the use of the panic defense have generally done so by limiting the application of three defenses when related to discovery or knowledge of the victim's sexual orientation or gender identity: the justification of self-defense, the excuse of insanity, and mitigating circumstance of provocation.

Self-Defense

In the homicide context, justification refers to killings that are "commanded or authorized by law."[76] Examples of justifiable homicides include "the killing of an enemy on the field of battle as an act of war within the rules of war, the execution of a sentence of death pronounced by a competent tribunal, or the slaying of an outlaw who resists capture."[77] But perhaps the most well-known defense of justification is self-defense. The elements of self-defense are that "(1) there was an actual or apparent threat; (2) the threat was unlawful and immediate; (3) the defendant honestly and reasonably believed that [they were] in imminent danger of death or serious bodily harm; and (4) the defendant's response was necessary to save [themselves] from the danger."[78] To assert a so-called "perfect" self-defense claim, the defendant's belief "that lethal force was required to prevent imminent death or serious bodily harm must be objectively reasonable."[79] A successful

[71] *Id.* at 42.
[72] D.C. Official Code § 22–2105.
[73] *Id. See also* D.C. Official Code § 22–3571.01.
[74] *Bradford*, 344 A.2d 208 at 211.
[75] CRIMINAL CODE REFORM COMMISSION, 2016 ANNUAL REPORT 5 (2017) ("Moreover, unlike most jurisdictions that have modernized their criminal codes in recent decades, the District's criminal code does not include general defenses (e.g. self-defense)."
[76] *Comber*, 584 A.2d at 41 n. 16.
[77] *Id.* at 42 (internal citations omitted).
[78] *Brown v. United States*, 619 A.2d 1180, 1182 (D.C. 1992).
[79] *Richardson v. United States*, 98 A.3d 178, 187 n. 11 (D.C. 2014).

perfect self-defense claim entitles the defendant to an acquittal.[80] One of the pattern jury instructions for self-defense instructs the following:

> Every person has the right to use a reasonable amount of force in self-defense if (1) s/he actually believes s/he is in imminent danger of [death or serious] bodily harm and if (2) s/he has reasonable grounds for that belief. The question is not whether looking back on the incident you believe that the use of force was necessary. The question is whether [name of defendant], under the circumstances as they appeared to him/her at the time of the incident, actually believed s/he was in imminent danger of [death or serious] bodily harm and could reasonably hold that belief.
>
> [. . .]
>
> [If you find that [name of defendant] actually and reasonably believed that s/he was in imminent danger of [death or serious] bodily harm and that [name of defendant] had reasonable grounds for that belief, then [name of defendant] has a right to self-defense even if [name of defendant] also had other possible motives, such as feelings of anger toward the [complainant] [decedent] or a desire for revenge. A defendant's other possible motives do not defeat an otherwise valid claim of self-defense but can be considered in evaluating whether the [name of defendant] actually and reasonably believed that s/he was in imminent danger of [death or serious] bodily harm.]
>
> Self-defense is a defense to the charges of [insert all charges to which self-defense applies]. [Name of defendant] is not required to prove that s/he acted in self-defense. Where evidence of self-defense is present, the government must prove beyond a reasonable doubt that [name of defendant] did not act in self-defense. If the government has failed to do so, you must find [name of defendant] not guilty.[81]

If, however, the defendant's belief that lethal force was required to prevent imminent death or serious bodily harm is not objectively reasonable, the defendant's claim of self-defense is "imperfect."[82] A defendant's claim of self-defense is also imperfect if they used excessive force in what would have otherwise been a justified case of self-defense.[83] As discussed below, imperfect self-defense claims function as a mitigating circumstance.

Insanity and Diminished Capacity

It is a longstanding legal tradition that "an individual may be excused from the standards of conduct demanded by society of its members by reason of psychiatric abnormality."[84] The underlying rationale is that "[a]bsent circumstances which in the aggregate satisfy the concept of

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[80] *Id*.
[81] 1 Criminal Jury Instructions for DC Instruction § 9.500.
[82] *Supra* note 81.
[83] *Swann v. United States*, 648 A.2d 928, 932 (D.C. App. 1994) ("[M]itigation to reduce second-degree murder to voluntary manslaughter may arise 'when excessive force is used in self-defense or in defense of another.'").
[84] *Bethea v. United States*, 365 A.2d 64, 72 (D.C. App. 1976).

'free will', an individual transgressor is dealt with in a manner which is significantly different from the response accorded the ordinary offender."[85] Originally, the insanity defense "turned on the existence of one or more of three interrelated capacities: cognition, volition, and control over one's own acts."[86] Juries were asked to consider "whether at the time of the act the accused lacked the particular attributes deemed to constitute the essential aspect of free will."[87]

In *Bethea v. United States*, the D.C. Court of Appeals adopted the following standard for the insanity defense:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this standard, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.[88]

The current state of the insanity defense is, however, more most clearly presented in the pattern jury instruction for the defense, which reads in relevant part:

> A defendant is not guilty by reason of insanity if, at the time of his/her criminal conduct, and as a result of mental disease or defect, s/he either lacked substantial capacity to conform his/her conduct to the requirements of the law or lacked substantial capacity to recognize the wrongfulness of his/her conduct.
>
> Mental disease or defect includes any abnormal condition of the mind, regardless of its medical label, which affects mental or emotional processes and substantially impairs a person's ability to regulate and control his/her conduct. A "mental disease" is a condition which is capable of either improving or deteriorating; a "mental defect" is a condition not capable of improving or deteriorating. An abnormal condition of the mind evidenced only by repeated criminal or otherwise antisocial conduct is not sufficient to establish that [name of defendant] had a mental disease or defect.
>
> In considering whether [name of defendant] had a mental disease or defect at the time of the alleged offense, you may consider any evidence about the development, adaptation and functioning of [name of defendant's] mental and emotional processes and ability to regulate and control his or her conduct. [Name of defendant] need not show that s/he was disoriented as to time or place.

[85] *Bethea v. United States*, 365 A.2d at 64.
[86] *Bethea v. United States*, 365 A.2d 64, 72 (D.C. App. 1976).
[87] *Bethea v. United States*, 365 A.2d 64, 72–73 (D.C. App. 1976).
[88] *Bethea v. United States*, 365 A.2d 64, 79 (D.C. App. 1976).

> [Name of defendant] must prove not only that s/he had a mental disease or defect, but also that there was a causal relationship between the disease or defect and the unlawful act. To meet this burden, [name of defendant] must prove that, at the time of the alleged offense and as a result of mental disease or defect, s/he lacked substantial capacity either to conform his/her unlawful act[s] to the requirements of the law or to recognize the wrongfulness of his/her unlawful act[s]. You may consider any evidence of mental disease or defect you deem relevant in deciding whether the defendant has met this burden.[89]

Provocation

"Unlike circumstances of justification or excuse," discussed above, "legally recognized mitigating factors do not constitute a total defense to a murder charge."[90] While mitigating circumstances are not a total bar to conviction, they serve to "'dampen the otherwise malicious nature of the perpetrator's mental state."[91] The presence of mitigating circumstances may, therefore, "justify a reduction from second-degree murder to voluntary manslaughter."[92] The most common case of mitigation arises when "the killer has been provoked or is acting in the heat of passion."[93] Mitigation may also be found "'when excessive force is used in self-defense' and 'a killing is committed in the mistaken belief that one may be in mortal danger." The pattern jury instructions for the District define mitigating circumstances in the following manner:

> Mitigating circumstances can exist in two situations. They exist where a person acts in the heat of passion caused by adequate provocation. Heat of passion includes such emotions as rage, resentment, anger, terror and fear. Adequate provocation is conduct on the part of another that would cause an ordinary, reasonable person in the heat of the moment to lose his/her self-control and act on impulse and without reflection. For a provocation to be considered "adequate," the person's response must not be entirely out of proportion to the seriousness of the provocation. An act of violence or an immediate threat of violence may be adequate provocation, but mere words, no matter how offensive, are never adequate provocation. [The provocation must be such as would provoke a reasonable sober person. Therefore, if a person was provoked simply because s/he was intoxicated, and a sober person would not have been provoked, the provocation would not be considered as "adequate."]
>
> [Mitigating circumstances also exist when a person actually believes that s/he is in danger of serious bodily injury, and actually believes that the use of force that was likely to cause serious bodily harm was necessary to defend against that danger, but one or both of those beliefs are not reasonable.][94]

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[89] 1 Criminal Jury Instructions for DC Instruction § 9.400.
[90] *Comber*, 584 A.2d at 41.
[91] *Comber*, 584 A.2d at 41.
[92] *Comber*, 584 A.2d at 41.
[93] *Comber*, 584 A.2d at 41.
[94] 1 Criminal Jury Instructions for DC Instruction § 4.202.

Other Jurisdictions' Approaches to Banning the LGBTQ+ Panic Defense

Eleven states – California, Colorado, Connecticut, Hawaii, Illinois, Maine, Nevada, New Jersey, New York, Rhode Island, and Washington – have enacted legislation prohibiting the LGBTQ+ panic defense. While the exact language in each state's prohibition varies, they generally operate by (1) identifying a particular defense or defenses (e.g., provocation, lack of capacity, self-defense, or defense of others); (2) specifying, when necessary, the particular offenses to which that defense applies (e.g., murder); and (3) limiting the defendant's ability to rely on "discovery of, knowledge about or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression or sexual orientation."

The statutes in California, Hawaii, Illinois, New Jersey, and New York are the narrowest in scope. California, New Jersey, and New York's statutes only prohibit the use of the LGBTQ+ panic defense in a single context: mitigating a murder charge to voluntary manslaughter on the basis of adequate provocation. Similarly, Hawaii prohibits the use of the panic defense to mitigate first and second degree murder (and attempted murder) to voluntary manslaughter on account of "extreme mental or emotional disturbance." The Illinois statute is slightly broader, as it additionally bans the use of the panic defense as mitigation in capital cases. As introduced, B23-0435 is most comparable to these five measures, as it only prohibits the use of panic defenses when asserting adequate provocation in prosecutions for crimes of violence. B23-0435 does, however, enumerate traits beyond sexual orientation or gender identity, the discovery or disclosure of which could not be used in a claim of adequate provocation. Nevada and Washington prohibit the use of the panic defense in two contexts. Nevada has eliminated the use of the panic defense in the context of adequate provocation or self-defense. Washington, on the other hand, has banned the use of the panic defense for assertions of diminished capacity or self-defense. The Colorado, Connecticut, Maine, and Rhode Island statutes are the most complete bans of the panic defense. Each prohibits use of the panic defense for cases of adequate provocation, diminished capacity, or self-defense.

One final difference worth noting between statutes prohibiting the panic defense is whether discovery of, knowledge about, or disclosure of the trait of a victim has to be the *sole basis* for the defense. The statutes in California, Hawaii, Illinois, Nevada, New York, and Washington bar the use of panic defenses when commission of the crime "resulted from", was "based on", or was "because of" discovery of, knowledge about, or disclosure of the trait. In contrast, Connecticut, Maine, and Rhode Island bar the use of the panic defense when the crime "resulted solely from" or was "based solely on" discovery of, knowledge about, or disclosure of the trait. Colorado's ban on the panic defense is a hybrid, using "based on" in the context of self-defense, "results solely from" in the context of heat of passion, and, for mental defects, Colorado's ban states that "knowledge or awareness of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation shall not constitute inability to distinguish right from wrong." New Jersey's ban simply states "discovery of, knowledge about, or potential disclosure of the homicide victim's actual or perceived gender identity or expression, or affectional or sexual orientation. . . shall not be reasonable provocation."

Table 2: State LGBTQ+ Panic Defense Bans

State	***Statute***	***Offenses & Defenses Affected***	***Relevant Text***
California	Cal. Pen. Code § 192	Provocation (*murder*)	"Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: (a)Voluntary—upon a sudden quarrel or heat of passion. [. . .] (f) (1) For purposes of determining *sudden quarrel* or *heat of passion* pursuant to subdivision (a), the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship. Nothing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation. (2) For purposes of this subdivision, "gender" includes a person's gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person's gender as determined at birth."
Colorado	Colo. Rev. Stat 16-8-101.5	Lack of capacity due to mental disease or defect (*any offense*)	"(a) 'Diseased or defective in mind' does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct. Evidence of knowledge or awareness of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation shall not constitute inability to distinguish right from wrong."
Connecticut	Conn. Gen. Stat. § 53a-13	Lack of capacity due to mental disease or defect (*any offense*)	"(a) In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law. (b) [. . .] (2) No defendant may claim as a defense under this section that such mental disease or defect was based solely on the discovery of, knowledge about or potential disclosure of the victim's actual or perceived sex, sexual orientation or gender identity or expression, including under circumstances in which the victim made an unwanted, nonforcible, romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship."
	Conn. Gen. Stat. § 53a-16	Provocation (*any offense*)	"In any prosecution for an offense, justification, as defined in sections 53a-17 to 53a-23, inclusive, shall be a defense. Justification as a defense does not include provocation that resulted solely from the discovery of, knowledge about or potential disclosure of the victim's actual or perceived sex, sexual orientation or gender identity or expression, including under circumstances in which the victim made an unwanted, nonforcible, romantic or sexual

State	*Statute*	*Offenses & Defenses Affected*	*Relevant Text*
			advance toward the defendant, or if the defendant and victim dated or had a romantic relationship. As used in this section, 'gender identity or expression' means gender identity or expression, as defined in section 53a-181i."
	Conn. Gen. Stat. § 53a-18	Self-defense and defense of others; defense of premises or property (*any offense*)	"(a) The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances: [. . .] (b) No person is justified in using force upon another person which would otherwise constitute an offense based solely on the discovery of, knowledge about or potential disclosure of the victim's actual or perceived sex, sexual orientation or gender identity or expression, including under circumstances in which the victim made an unwanted, nonforcible, romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship."
Hawaii	H.R.S. § 707-702(2)	Extreme mental or emotional disturbance (*murder* and *attempted murder*)	"(2) In a prosecution for murder or attempted murder in the first and second degrees it is an affirmative defense, which reduces the offense to manslaughter or attempted manslaughter, that the defendant was, at the time the defendant caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be; provided that an explanation that is not otherwise reasonable shall not be determined to be reasonable because of the defendant's discovery, defendant's knowledge, or the disclosure of the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the other person made an unwanted nonforcible romantic or sexual advance toward the defendant, or in which the defendant and the other person dated or had a romantic relationship. If the defendant's explanation includes the discovery, knowledge, or disclosure of the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation, the court shall instruct the jury to disregard biases or prejudices regarding the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation in reaching a verdict."
Illinois	720 ILCS 5/9-1(c)	Death penalty mitigation (*first degree murder*)	"(c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following: Provided, however, that an action that does not otherwise mitigate first degree murder cannot qualify as a mitigating factor for first degree murder because of the discovery, knowledge, or disclosure of the victim's sexual orientation as defined in Section 1-103 of the Illinois Human Rights Act [775 ILCS 5/1-103]."

State	*Statute*	*Offenses & Defenses Affected*	*Relevant Text*
	720 ILCS 5/9-2	Heat of passion / provocation (*second degree murder*)	"(a) A person commits the offense of second degree murder when he or she commits the offense of first degree murder. . . and either of the following mitigating factors are present: (1) at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he or she negligently or accidentally causes the death of the individual killed; or [. . .] (b) Serious provocation is conduct sufficient to excite an intense passion in a reasonable person provided, however, that an action that does not otherwise constitute serious provocation cannot qualify as serious provocation because of the discovery, knowledge, or disclosure of the victim's sexual orientation as defined in Section 1-103 of the Illinois Human Rights Act [775 ILCS 5/1-103].
Maine	17-A M.R.S. § 38	Mental abnormality	"An actor does not suffer from an abnormal condition of the mind based solely on the discovery of, knowledge about or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the actor or in which the actor and victim dated or had a romantic or sexual relationship."
	17-A M.R.S. § 108(3)	Self-defense and defense of others; defense of premises.	"**3.** A person is not justified in using force against another based solely on the discovery of, knowledge about or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the person or in which the person and victim dated or had a romantic or sexual relationship."
	17-A M.R.S. § 201	Heat of passion/ provocation (*murder*)	"1. A person is guilty of murder if the person: A. Intentionally or knowingly causes the death of another human being; [. . .] 3. It is an affirmative defense to a prosecution under subsection 1, paragraph A, that the person causes the death while under the influence of extreme anger or extreme fear brought about by adequate provocation. 4. For purposes of subsection 3, provocation is adequate if: A. It is not induced by the person; and B. It is reasonable for the person to react to the provocation with extreme anger or extreme fear, provided that evidence demonstrating only that the person has a tendency towards extreme anger or extreme fear is not sufficient, in and of itself, to establish the reasonableness of the person's reaction. For purposes of determining whether extreme anger or extreme fear was brought about by adequate provocation, the provocation was not adequate if it resulted solely from the discovery of, knowledge about or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic

State	*Statute*	*Offenses & Defenses Affected*	*Relevant Text*
			or sexual advance toward the person or in which the person and victim dated or had a romantic or sexual relationship."
Nevada	Nev. Rev. Stat. Ann. § 193.225(1)	Heat of passion / provocation (*any offense*)	"1. For the purpose of determining the existence of an alleged state of passion in a defendant or the alleged provocation of a defendant by a victim, the alleged state of passion or provocation shall be deemed not to be objectively reasonable if it resulted from the discovery of, knowledge about or potential disclosure of the actual or perceived sexual orientation or gender identity or expression of the victim, including, without limitation, under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship."
	Nev. Rev. Stat. Ann. § 193.225(2)	Self-defense and defense of others	"2. A person is not justified in using force against another person based on the discovery of, knowledge about or potential disclosure of the actual or perceived sexual orientation or gender identity or expression of the victim, including, without limitation, under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship."
New Jersey	§ 2C:11-4	Heat of passion / provocation (*murder*)	"b. Criminal homicide constitutes manslaughter when: (1) It is committed recklessly; or (2) A homicide which would otherwise be murder . . . is committed in the heat of passion resulting from a reasonable provocation. The discovery of, knowledge about, or potential disclosure of the homicide victim's actual or perceived gender identity or expression, or affectional or sexual orientation, which occurred under any circumstances, including but not limited to circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the actor, or if the victim and actor dated or had a romantic or sexual relationship, shall not be reasonable provocation pursuant to this paragraph. As used herein, the terms "gender identity or expression" and "affectional or sexual orientation" shall have the same meaning as in section 5 of P.L.1945, c.169 (C.10:5-5)."
New York	NY CLS Penal § 125.25, Part 1 of 2	Heat of passion / provocation (*second degree murder*)	"A person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that: (a) (i) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime. (ii) It shall not be a "reasonable explanation or excuse" pursuant to subparagraph (i) of this paragraph when the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth;"

State	*Statute*	*Offenses & Defenses Affected*	*Relevant Text*
	NY CLS Penal § 125.26	Heat of passion / provocation (*aggravated murder; murder in the second degree*)	"3. In any prosecution [for aggravated murder], it is an affirmative defense that: (a) (i) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, aggravated manslaughter in the first degree, manslaughter in the first degree or any other crime except murder in the second degree. (ii) It shall not be a "reasonable explanation or excuse" pursuant to subparagraph (i) of this paragraph when the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth; or"
	NY CLS Penal § 125.27	Heat of passion / provocation (*first degree murder; second degree murder*)	"2. In any prosecution [for first degree murder], it is an affirmative defense that: (a) (i) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree. (ii) It shall not be a "reasonable explanation or excuse" pursuant to subparagraph (i) of this paragraph when the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth; or (b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree."
Rhode Island	R.I. Gen. Laws Section 12-17-17	Heat of passion / provocation (*any offense*)	"For purposes of determining sudden quarrel or heat of passion, the provocation was not objectively reasonable if it resulted solely from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship."
	R.I. Gen. Laws	Diminished capacity (*any offense*)	"A defendant does not suffer from reduced mental capacity based solely on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual

State	*Statute*	*Offenses & Defenses Affected*	*Relevant Text*
	Section 12-17-18		orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic or sexual relationship."
	R.I. Gen. Laws Section 12-17-19	Self-defense	"A person is not justified in using force against another based solely on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic or sexual relationship."
Washington	Rev. Code Wash. (ARCW) § 9A.08.---	Diminished capacity	"A defendant does not suffer from diminished capacity based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or in which the defendant and victim dated or had a romantic or sexual relationship."
	Rev. Code Wash. (ARCW) § 9A.16.---	Self-defense (*any offense*)	"A person is not justified in using force against another based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or in which the defendant and victim dated or had a romantic or sexual relationship."

The Committee is persuaded of the need to eliminate the use of the LGBTQ+ panic defense in the District. The Committee recognizes the harm bias-motivated crimes inflict on the specific individual targeted and the larger community to which that victim belongs. The Committee Print, therefore, bans the use of three specific defenses when that defense is based on the discovery of, knowledge about, or the potential disclosure of the victim's actual or perceived gender identity, gender expression, or sexual orientation: (1) heat of passion caused by adequate provocation; (2) insanity; and (3) self-defense, defense of others, or defense of property. The Committee Print limits the enumerated traits covered by the prohibition to gender identity, gender expression, and sexual orientation – the three traits mentioned in the bill as introduced. The Committee declines to extend the prohibition to defenses based on discovery of, knowledge about, or the potential disclosure of traits beyond gender identity, gender expression, and sexual orientation at this time. No other jurisdiction has limited certain defenses to based on discovery of traits beyond the three enumerated.

The "based on" standard that is used in the Committee Print appears in the bill as introduced and is consistent with a majority of jurisdiction that prohibit the use of panic defenses. This "based on" standard strikes a balance between the less prohibitive "based solely on" standard used in a minority of jurisdictions and the more expansive "related to" standard that appears in Bill 23-0409. The Committee declined to use the "based solely on" standard out of concerns it created to a high a threshold for determining whether or not certain defenses ran afoul of the prohibition on panic defenses. In using the "based on" standard, the Committee also rejected the "related to" standard

proposed in B23-0409. First, the "related to" standard is not used by any of the jurisdictions that have addressed the use of the panic defense. As Naida Henao of the Network for Victim Recovery of the DC testified at the Committee's hearing, "eight other jurisdictions that have employed similar legislation use stronger and more specific language when it comes to the factual nexus between the defendant's action and the discovery of, knowledge about, or potential disclosure of the enumerated victim characteristics." Furthermore, she noted that the phrase "related to" "lacks the specificity and causality of the other terms, and thus prompts NVRDC to wonder if it may have any unintended effects or barriers to prosecution."

At the same time, the Committee understands the need to allow defendants to present a complete defense. At the request of the Public Defender Service for the District of Columbia, the Committee Print includes a specific provision that allows a defendant to present evidence of past trauma. Specifically, the Committee Print states that "the defense may present evidence of prior trauma to the defendant for the purposes of excusing or justifying the defendant's conduct or mitigating the severity of the offense." As Ms. Semyonova testified, this "language ensures that the defendant will not be prevented from providing relevant evidence about the defendant's past traumatic experience. Evidence of traumatic experiences that could be presented under this provision may include, for example, a prior sexual assault committed against the defendant, that a factfinder could conclude excuses, justifies, or mitigates the defendant's violent conduct."

Finally, the Committee did not include the requirement that judges issue the specific anti-bias jury instruction contained in the bill as introduced. During the hearing on the bill, Richard Gilbert, speaking on behalf of the District of Columbia Association of Criminal Defense Attorneys, urged "the Committee to defer to the process by which standard jury instructions in the District of Columbia are developed." At the time, the current anti-bias jury instruction stated that:

> You should determine the facts without prejudice, fear, sympathy, or favoritism. You should not be improperly influenced by anyone's race, ethnic origin, or gender. Decide the case solely from a fair consideration of the evidence.

Since that hearing, the standard jury instruction has been amended to discourage bias against a broader range of characteristics. The body responsible for amending jury instructions includes judges from D.C. Superior Court and practitioners from U.S. Attorney's Office, the Office of Attorney General, the Public Defender Service for the District of Columbia, and the private defense bar. Specifically, the jury instruction now states that:

> As human beings, we all have personal likes and dislikes, opinions, prejudices, and biases. Generally, we are aware of these things, but you also should consider the possibility that you have implicit biases, that is, biases of which you may not be consciously aware. Personal prejudices, preferences, or biases have no place in a courtroom, where our goal is to arrive at a just and impartial verdict. All people deserve fair treatment in our system of justice regardless of any personal characteristic, such as race, national or ethnic origin, religion, age, disability, sex, gender identity or expression, sexual orientation, education, or income level. You should determine the facts solely from a fair consideration of the evidence. You

> should decide the case without prejudice, fear, sympathy, favoritism or consideration of public opinion.[95]

The Committee finds that this more expansive anti-bias instruction addresses the concerns witnesses testified about during the hearing.

b. *Civil Hate Crimes and Human Rights Act Clarification*

The District's current hate crimes civil enforcement regime is found at D.C. Official Code § 22–3704(a), which states that:

> Irrespective of any criminal prosecution or the result of a criminal prosecution, any person who incurs injury to his or her person or property as a result of an intentional act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, homelessness, physical disability, matriculation, or political affiliation of a victim of the subject designated act shall have a civil cause of action in a court of competent jurisdiction for appropriate relief.

The actual scope of this subsection is not immediately apparent given the use of several terms of art. The subsection's initial reference to "intentional acts" – a seemingly broad definition – is limited in scope by the subsection's subsequent reference to "designated acts." D.C. Official Code § 22–3701(2) defines a "designated act" as:

> [A] criminal act, including arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry, and attempting, aiding, abetting, advising, inciting, conniving, or conspiring to commit arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry.[96]

This term "bias-related crime" relies on the definition of "designated acts":

> Bias-related crime" means a designated act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim of the subject designated act.[97]

Taken together, D.C. Official Code § 22–3704(a) can be summarized as allowing victims of bias-related crimes to pursue civil action. [98]

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[95] 1 Criminal Jury Instructions for DC Instruction § 2.102.
[96] D.C. Official Code § 22–3701(1).
[97] *Id*.
[98] *Uzoukwu v. Metro. Wash. Council of Gov'ts*, 983 F. Supp. 2d 67, 91 (D.D.C. 2013) ("This provision does not appear to apply to the instant set of facts because it appears to solely allow civil actions for conduct that would

Under current law, appropriate relief includes an injunction, actual or nominal damages for economic and non-economic loss, punitive damages, and attorney's fees.

The Committee Print strengthens existing law's civil action provision by explicitly permitting OAG to bring an action against a person who (1) commits a bias-related crime, or (2) through any act of violence, force, fraud, intimidation, or discrimination, interferes with, or attempts to interfere with, an individual's exercise of any right secured by the Constitution or District law, or deprives an individual of equal protection under the Constitution or District law. Further, the Committee provides subpoena authority for OAG to effectuate the enforcement power, as well as the ability to seek a range of civil relief, including injunctive relief; actual or nominal damages for economic or non-economic loss, including for emotional distress; punitive damages, including treble damages for economic or non-economic loss; attorney's fees; civil penalties of up to $10,000 per act; and any other relief the court deems just.

The Committee Print importantly defines a "person" subject to the act's penalties to include "any individual, firm, corporation, partnership, cooperative, association, or any other organization, legal entity, or group of individuals however organized; provided, that for the purposes of a civil action brought against an individual pursuant to [the section providing OAG with civil enforcement authority], the term "person" shall not include an individual who is 17 years of age or younger." The bill also expands the definition of "bias-related crime" to explicitly include prejudice based on non-physical disabilities and clarify that a "designated act" demonstrating the defendant's prejudice based on a protected trait "need not solely be based on or because of an accused's prejudice". Lastly, the Print adds a definition for "discrimination" to mean differential treatment based on protected traits in the Human Rights Act.

Regarding the Print's clarification of the definition of "place of public accommodation", this change is described in full on pages 4-5 of this report.

c. ***Community Harassment***

Defacing or Placing Symbols

The Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982 prohibits the defacement of religious or secular symbols, or the display of certain emblems when done with the intent to discriminate against a person or class of persons, to intimidate someone from exercising their rights, to threaten harm, or to cause another to fear for their safety.[99] Specifically, D.C. Official Code § 22–3312.02(a) states that:

> It shall be unlawful for any person to burn, desecrate, mar, deface, or damage a religious or secular symbol on any private premises or property in the District of Columbia primarily used for religious, educational, residential, memorial,

constitute a bias related 'crime.' Indeed, the District of Columbia enacted the bias related crime legislation 'to provide for the collection and publication of data about bias-related crime, and to provide enhanced penalties for persons who commit a bias-related crime and appropriate civil relief for a victim of bias-related crime.'

[99] D.C. Official Code § 22–3701(1).

> charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed, religion, or any other category listed in § 2-1401.01, or on any public property in the District of Columbia.[100]

D.C. Code Official § 22–3312.02(a) also makes it unlawful:

> [T]o place or to display in any of these locations a sign, mark, symbol, emblem, or other physical impression including, but not limited to, a Nazi swastika, a noose, or any manner of exhibit which includes a burning cross, real or simulated.

To be unlawful, the act of defacing or placing a symbol must be done in such a way that it is probable that a reasonable person would perceive that the intent is:

> (1) To deprive any person or class of persons of equal protection of the law or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities of the United States or the District of Columbia from giving or securing to all persons within the District of Columbia equal protection of the law;
>
> (2) To injure, intimidate, or interfere with any person because of his or her exercise of any right secured by federal or District of Columbia laws, or to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws;
>
> (3) To threaten another person whereby the threat is a serious expression of an intent to inflict harm; or
>
> (4) To cause another person to fear for his or her personal safety, or where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability."[101]

In its transmittal letter to the Council, the Executive discussed its concerns regarding a gap in prohibition against defacing symbols or placing emblems:

> The current "display of certain emblems" statute only covers private premises or property in the District primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or any public property. So, while more than twenty suspected nooses and swastikas have been reported in the District in 2017 and 2018, it is not clear that someone placing them on some types of property with an intent to intimidate or frighten the community could be held accountable. By expanding the statute to apply to any public property or private property of another without permission, the bill provides additional recourse in cases of

[100] The original prohibition on burning, desecrating, marring, defacing, or damaging was limited to "a cross or other religious symbol on any private premises or property in the District of Columbia primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed, or religion, or on any public property in the District of Columbia." In 2008, the law was amended to protect against the burning, desecrating, marring, defacing, or damaging of secular symbols. Secondly, it extended the prohibition to private premises or property primarily used for assembly by particular groups beyond race, color, creed and religious by including the list of protected traits find at D.C. Official Code § 2–1401.01.

[101] *Id.*

displays of certain symbols of hate.[102]

The Committee agrees with this concern raised by the Mayor and, accordingly, the Committee Print extends the prohibition to "the private property of another without the permission of the owner or the owner's designee". The Committee Print also makes several additional clarifications to § 22–3312.02. First, to better reflect the fact that prior amendments to the statute expanded its prohibition to the defacement of secular – and not just religious – symbols, the Committee Print amends the section heading to now read "Defacement of certain symbols; display of certain emblems." Secondly, the bill separates the two prohibitions covered by the statute – the defacement of certain symbols and display of certain emblems – into two separate sections. The Committee supports the suggestion of Attorney General Racine to clarify that the prohibition on the display of certain emblems not be limited to physical impressions and, therefore, removes the word "physical" from the statute.

The bill also clarifies the culpable mental states required by the offense based upon recommendations of the Criminal Code Reform Commission. Director Schmechel testified that:

> As articulated in D.C. Code § 22-3312.02, the offense proscribes conduct ". . . where it is probable that a reasonable person would perceive that the intent is . . ." to intimidate, etc. However, it is unclear what intent or other mental state, if any, the offense requires, and that may be relevant as courts have only upheld a true threats exception to the First Amendment where based on at least recklessness.

The Committee Print, accordingly, requires that the person act "[r]eckless to the fact that a reasonable person would perceive that the intent of the person acting is" one of the four enumerated purposes. Secondly, the Committee Print clarifies the language used when describing each of the four intents.

Harassing an Entity

B23-0134, as introduced, would also create a new offense of harassing an entity. In the aforementioned transmittal letter, the Executive explained why it argued the District's current stalking statute does not clearly cover incidents where someone targets an organization with harassment:

> While the rise in reported hate crimes has been disturbing, the harassing incidents that may not currently be covered by our extensive statute on bias related crimes is just as troubling. Organizations have been targeted for repeated harassing phone calls and letters, causing alarm among employees and members. However, the existing stalking statute (D.C. Code § 22-3133) protects an "individual," and it is unclear whether that will extend to the same behavior targeting an organization. As a result, the legislation seeks to serve as a remedy for entities organized by association for any established purpose that are vulnerable to serious incidents of

[102] *Transmittal Letter from Mayor Muriel Bowser to Council Chairman Phil Mendelson for B23-0134, the "Community Harassment Prevention Amendment Act of 2019"* (February 6, 2019), https://lims.dccouncil.us/downloads/LIMS/41857/Introduction/B23-0134-Introduction.pdf.

> harassment and implied threats. By providing law enforcement with a tool for combatting this harassment, it ensures that individuals can safely assemble to advance their common interests.[103]

The Committee is, however, persuaded by testimony from the Public Defender Service, the Criminal Code Reform Commission, and the ACLU-DC that the statute may violate First Amendment protections for the freedom of speech and suffer from overbreadth and vagueness challenges. On this point, Nassim Moshiree of the ACLU-DC testified persuasively:

> Most significantly, the new offense in question raises first amendment concerns about criminalizing speech solely based on its viewpoint. A person could be arrested under this statute for standing outside a fast-food eatery with a sign saying 'eating hamburgers kills innocent animals' (which might make employees feel distressed), while a person would not be liable for standing outside the same business with a sign promoting its business.
>
> The bill's exception clause stating that the 'harassing an entity' section 'does not apply to constitutionally protected activity, is insufficient to protect against concerns that the bill may criminalize speech based on its content. We would not accept a law that provided, 'saying something to an officer that the officer doesn't like is a crime, unless it is constitutionally protected.' Importantly, this exception clause would not prevent arrest and prosecution of individuals engaged in the conduct proscribed by the bill, even if they are ultimately acquitted on the ground that they were exercising a constitutionally protected right. We cannot expect law enforcement officers to be constitutional scholars to know whether an individual has committed a crime, nor should we expect the individuals engaged in the conduct to be constitutional scholars. If enacted into law, this bill could have a serious chilling effect on protected speech and lead to self-censorship and would likely be subject to constitutional challenges on those grounds.

Katya Semyonova, of the Public Defender Service, elaborated on the bill's overbreadth in her testimony:

> Even if the Council could prohibit some of the conduct contained in Bill 23-134, for instance, the prohibition of a course of conduct that includes threats, given the flaws outlined above, the entire statute would susceptible to a challenge for overbreadth. A statute will be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' In 2017, the Illinois Supreme Court considered the constitutionality, on overbreadth grounds, of a stalking statute that Bill 23-134 mirrors in substantial part. The Illinois statute addressed the stalking of individuals rather than entities, but the difference is of little import since Bill 23-134 also targets individuals, but focuses on individuals who are connected with an 'entity.' The Illinois Supreme Court invalidated the stalking statute as overbroad, finding that the communication language prohibited a range of speech - including attending

[103] *Id.*

a public meeting and repeatedly complaining about pollution caused by a local business - that was at the heart of the First Amendment's protections.'"

For these reasons, the Committee Print does not include the offense of harassing an entity, as it declined to do in the temporary legislation on this issue currently in effect.

LEGISLATIVE HISTORY

February 6, 2019	B23-0134 is introduced by Chairman Mendelson at the request of the Mayor.
February 15, 2019	Notice of Intent to Act on B23-0134 is published in the *District of Columbia Register*.
February 19, 2019	B23-0134 is referred to the Committee on the Judiciary and Public Safety.
June 7, 2019	Notice of Public Hearing on B23-0134 is published in the *District of Columbia Register*.
June 24, 2019	Public Hearing on B23-0134 is held by the Committee on the Judiciary and Public Safety.
September 16, 2019	B23-0409 is introduced by Chairman Mendelson and Committee Chairperson Allen.
September 17, 2019	B23-0435 is introduced by Councilmembers Grosso, Committee Chairperson Allen, and Councilmembers Cheh, Nadeau, Silverman, Todd, and Robert White; B23-0409 and B23-0435 are referred to the Committee on the Judiciary and Public Safety.
September 20, 2019	Notice of Intent to Act on B23-0409 is published in the *District of Columbia Register*.
September 27, 2019	Notice of Intent to Act on B23-0435 is published in the *District of Columbia Register*; Notice of Public Hearing on B23-0409 and B23-0435 is published in the *District of Columbia Register*.
October 22, 2019	B23-0513 is introduced by Chairman Mendelson at the request of the Attorney General.
October 23, 2019	Public Hearing on B23-0409 and B23-0435 is held by the Committee on the Judiciary and Public Safety.
November 5, 2019	B23-0513 is referred to the Committee on the Judiciary and Public Safety.

November 8, 2019	Notice of Intent to Act on B23-0513 is published in the *District of Columbia Register*.
January 10, 2020	Notice of Public Hearing on B23-0513 is published in the *District of Columbia Register*.
March 3, 2020	Public Hearing on B23-0513 is held by the Committee on the Judiciary and Public Safety.
November 23, 2020	Consideration and vote on B23-0409 by the Committee on the Judiciary and Public Safety.

POSITION OF THE EXECUTIVE

B23-0134

The Committee received testimony at its June 24, 2019 public hearing on B23-0134 from Kelly O'Meara, Executive Director, Strategic Change Division, Executive Office of the Chief of Police, Metropolitan Police Department, whose testimony is summarized below:

Kelly O'Meara – Executive Director, Strategic Change Division, Executive Office of the Chief of Police, Metropolitan Police Department

Ms. O'Meara testified on behalf of the Executive in support of B23-0134. She noted that the bill would "close gaps in the District's law dealing with offenders trying to intimidate or cause fear in our communities." She stated that under District law, there is not a specific "hate crime." It is, rather, "a designation that makes an enhanced penalty available to the court" in cases where the crime is motivated by bias against the victim. She noted that in 2017, "a synagogue in the District received a series of letters that did not rise to the level of a direct threat, but were certain concerning, especially in totality." The U.S. Attorney's Office "agreed that it was unclear whether the current [stalking] statute would extend to the same behavior targeting an organization." The proposed offense of harassing an entity was developed in response to this perceived gap in the law. She notes that the proposed offense "mirrors the District's existing stalking offense, and prohibits a person from purposefully engaging in a course of conduct directed at a specific entity with the intent to cause members, participants, or employees of that entity to fear for their safety, feel alarmed, disturbed, frightened, or suffer emotional distress." Under the bill, a course of conduct "requires three or more incidents."

Ms. O'Meara also discussed prior bias-motivated incidents that "prompted the proposal to amend the District's statute on burning or desecrating religious or secular symbols, or displaying certain emblems." In 2017, "fifteen nooses were found at museums, monuments, universities, construction sites, and other locations." Swastikas were also found in one dozen cases. The swastikas were typically graffiti and were separately punishable as destruction of property. "The nooses, however, did not involve damage to, or destruction of, property, so it was not clear that the District could hold someone accountable for hanging nooses at construction sites, or on utility wires or trees." The current law would also likely not apply movie theaters and sports arenas, as

they are privately owned properties that are open to the public. The legislation would address this gap in the law "by prohibiting these activities or displays on any private property of another without permission of the owner or the owner's designee, or on any public property in the District. Ms. O'Meara noted that the bill would criminalize the display of certain emblems when done with the intent to threaten property; the law is currently limited to the display of certain emblems when made with the intent to threaten a person. But a "burning cross may only demonstrate a threat to property, but it would be alarming nonetheless."

B23-0409 and B23-0435

The Committee received testimony at its October 23, 2019 public hearing on B23-0409 and B23-0435 from then-Deputy Mayor for Public Safety and Justice Kevin Donahue, whose testimony is summarized below:

Kevin Donahue – Deputy Mayor for Public Safety and Justice

Deputy Mayor Donahue testified on behalf of the Executive in support of B23-0409 and B23-0435. He argued that "use of the defense implies that a victim's sexual orientation or gender identity somehow justifies a defendant's loss of self-control and subsequent attack." He noted that the District would join several states in enacting this legislation, including California, Illinois, Rhode Island, Nevada, Connecticut, Maine, Hawaii, and New York.

B23-0513

The Committee did not receive testimony or comments from the Executive on B23-0513.

ADVISORY NEIGHBORHOOD COMMISSION COMMENTS

The Committee received the following testimony or comments from Advisory Neighborhood Commissions:

B23-0409 and B23-0435

Japer Bowles – Commissioner, 1C07

Commissioner Bowles is the Chair of the ANC Rainbow Caucus, and he testified in support of B23-0409. Mr. Bowles stated that according to the LGBTQ Bar Association, juries have acquitted dozens of individuals accused of murder based on a panic defense; one case was as recent as April 2018. Mr. Bowles stated that the panic defense is not a "freestanding" legal defense, but is a legal strategy used to bolster other defenses. He argued that when a defendant uses a panic defense, "they are claiming that a victim's sexual orientation or gender identity not only explains, but excuses, a loss of self-control and the subsequent assaults." Mr. Bowles stated that the full or partial acquittal of a defendant's conduct against LGBTQ+ individuals implies that their lives are worth less than others. He implored the Committee to pass the bill as an important step in making the LGBTQ+ community safer.

John Guggenmos – Commissioner, 2F02

Mr. Guggenmos reflected on the killing of Matthew Shepard in Laramie, Wyoming. Mr. Shepard was beaten to death by two men for being gay. The two defendants – Russell Henderson and Scott McKinney – unsuccessfully invoked the "homosexual panic defense" at their trial. Mr. Guggenmos believes the defense codifies homophobia into law and is disappointed by its continued availability in the District.

Mike Silverstein – Commissioner, 2B06

Commissioner Silverstein testified on behalf of B23-0409. He is a member of the ANC Rainbow Caucus, which is composed of 23 openly LGBTQ+ advisory neighborhood commissioners from across the District. Mr. Silverstein began his testimony by describing attacks against three members of the LGBTQ community. Zoe Spears, a transgender woman, was shot and killed near her home. Carl Craven and Braden Brecht were assaulted on U Street. Mr. Silverstein also summarized a recent article from the *Washington Post* where it was reported that, of the 204 hate crimes committed in the District, 59 resulted in an arrest, 3 resulted in a prosecution involving the hate crime enhancement, and no cases resulted in convictions. A *Post* article published just that morning revealed that the number of reported hate crimes in the District surpassed the previous year.

In response to crimes committed against their community, the Rainbow Caucus proposes a number of legislative changes to improve the safety of the LGBTQ community. First, Mr. Silverstein proposed banning the gay and trans panic defense. "The idea that someone might attack us or kill us because of our sexuality or gender identity, and that [the panic defense] might consider who we are a mitigating factor is insulting and dehumanizing." He encouraged that the District join at least a dozen other states that have already enacted bans on the panic defense. Mr. Silverstein also recommended that the Council clarify the jury instructions that define a hate crime. He says that the current definition requires that the bias against the protected class must be the "sole" or "primary" factor driving the commission of the offense, which creates an impossibly high threshold for considering an offense a hate crime. Third, he recommended greater transparency with respect to enforcement and prosecution of hate crimes, including notifying the community when a hate crime has taken place, whether an arrest has been made, whether a bias-related enhancement has been sought, and the final disposition of the case. Finally, Mr. Silverstein argued the LGBTQ+ community should be notified of cases involving juveniles who committed the harm.

Kishan Putta – Commissioner, 2E01

Commissioner Putta testified in support of B23-0409. He stated that the District has one of the highest rates of hate crimes in the United States, he expressed support for the bill's inclusion of protected traits in addition to gender identity, gender expression, or sexual orientation. He noted that many members of the Asian and Pacific Islander community have increasingly been victims of hate crimes in the years after the September 11 attacks and after the most recent presidential election. According to South Asians Leading Together, following that election, there were 302 incidents of violence, xenophobia, or harmful political rhetoric aimed at the Asian-Pacific Islander

Community – a more than 45% increase over the previous year. He also recounted ethnic and religious slurs to which he and his family have been subjected.

ANC 2B

Advisory Commission 2B submitted a resolution in support of the bill. The resolution notes that the District has one of the largest LGBTQ populations per capita, but has yet to pass legislation prohibiting the panic defense. It also states that "the most recent victims of locally reported hate crimes against the LGBT+ community are persons of color." The resolution urges the Council to pass legislation banning the use of the panic defense.

ANC 4B

Advisory Neighborhood Commission 4B submitted a resolution in support of the bill. The resolution states that "these defenses imply that LBGTQ lives are worth less than others." The Commission believes the "murders of Ashanti Carmon and Zoe Spears, two D.C. transgender women of color . . . and other recent acts of violence against members of the LGBTQ community clearly underscore the need for this type of legislation." The Commission noted that "[m]ultiple transgender women have been the victims of violent crime within the boundaries of the Commission or directly adjacent to the Commission." The resolution asks that the Council pass legislation prohibiting the use of the panic defense.

B23-0513

Salim Adofo – Commissioner, 8C07

Commissioner Adofo reflected on the historical discrimination Black people have experienced in the United States since its founding. He stated that this discrimination has continued to the present, and he discussed a recent ruling by the D.C. Superior Court regarding housing discrimination. In light of the continued discrimination District residents face, he believes "it is clear that the Attorney General needs to have the authority this bill is requesting."

WITNESS LIST AND HEARING RECORD

B23-0134

On Monday, June 24, 2019, the Committee on the Judiciary and Public Safety held a public hearing on B23-0134. A video recording of the public hearing can be viewed at https://entertainment.dc.gov/page/on-demand-2019. The following witnesses testified at the hearing or submitted statements to the Committee outside of the hearing:

Public Witnesses

Nassim Moshiree – Policy Director, ACLU of the District of Columbia

Ms. Moshiree testified on behalf of the American Civil Liberties Union of the District of Columbia. She stated that the proposed offense of harassing an entity is "vague, overly broad, and could have the unintended consequence of chilling and criminalizing constitutionally protected speech." She noted that the definition of "entity" is vague and argued that it is "unclear how someone could harass an entity without separately harassing the people belonging to that entity, which would already be covered by DC's existing stalking statute, making this provision unnecessary." She noted that the statute's stated purpose of "helping to ensure individuals can safely assemble to advance their common interests" is incredibly broad. She also argued that attaching liability to conduct that causes another to "suffer emotional distress" is too broad, as "emotional distress is a normal byproduct of speech." She also provided examples of the way the law could be viewed as promoting viewpoint-based discrimination in violation of the First Amendment. Finally, Ms. Moshiree urged the Committee to postpone taking action on the bill until the Criminal Code Reform Commission has issued its recommendations for comprehensive criminal code reform.

Government Witnesses

Karl Racine – Attorney General for the District of Columbia

Attorney General Racine testified in support of the bill. He noted the rise in bias-motivated crimes in the District and believes the bill will "offer broader and newer protections for District residents." He proposed amending some of the language in the statute to "make it clear that the sign or mark does not have to be a 'physical impression' left on a structure." With this change, "the project of a noose . . . on a building to intimidate any person or any class of person from" exercising their rights would be covered by the prohibition.

Attorney General Racine also noted that under current law, "persons associated with entities are not protected by the stalking statute." The new crime of harassing an entity "will enable law enforcement and prosecutors to assist during instances where an entity is purposefully targeted by a criminal course of conduct" with the requisite intent. He proposed removing the phrase "but not limited to" as superfluous.

Katya Semyonova – Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

Ms. Semyonova testified on behalf of the Public Defender Service in opposition to the bill. She echoed concerns that the definition of "entity" provided in the bill is vague. She also argued that the bill would violate the First Amendment because it discriminates against speakers based on the content of their speech. The bill "would criminalize, for example, the act of standing outside of a baker that refused to bake a cake for a gay wedding and communicating to others the need to boycott the baker's business." This speech would be unlawful "because it would cause the baker to suffer emotional distress over the loss of business revenue." The bill would not, however,

"criminalize the conduct of standing outside of the baker and telling employees or people who happen to pass by the baker about the amazing skills of the baker." This content-based restriction on speech is "presumed to be invalid."

Ms. Semyonova further argued that "[e]ven if the Council could prohibit some of the conduct contained in [the bill], for instance, the prohibition of a course of conduct that includes threats . . . the entire statute would [be] susceptible to challenge for overbreadth. She noted that an Illinois stalking statute that closely resembles the bill was struck down by Illinois' Supreme Court as overbroad, "finding that the communication language prohibited a range of speech – including attending a public meeting and repeatedly complaining about pollution caused by a local business – that was at the heart of the First Amendment's protections.

In closing, Ms. Semyonova explained why the statute's exception for constitutionally protected activity does not resolve First Amendment concerns. She noted that the exception "functions only as an affirmative defense at trial," and does not prevent the arrest and prosecution of individuals engaged in constitutionally protected speech. The Illinois Supreme Court, dealing with a similar provision on the aforementioned stalking law, noted that "the exemption cannot eliminate the chilling effect on protected speech and the resulting self-censorship." She encouraged the Committee to wait for the Criminal Code Reform Commission's final comprehensive criminal code reform recommendations to be issued before taking action.

Richard Schmechel – Executive Director, Criminal Code Reform Commission

Director Schmechel noted that the bill would "codify a different and much broader rationale for a harassing entity offense than addressing hate crimes – namely, 'helping to ensure that individuals can safely assemble to advance their common interest.'" Although the Mayor's transmittal letter cites the increase in bias-related crimes, the offense is "not limited to stalking that is based on hate or bias, nor are the bill's changes limited to traditional 'protected classes' based on race, religion, national origin, sex, age, etc." The definition of entity includes, but is not limited to, those same protected classes. The offense, consequently, captures a broader range of conduct than just hate or bias-related crimes. Mr. Schmechel also noted that "there is no requirement in the bill . . . that a person actually experienced fear for safety based on the accused's actions." That means that despite its stated purpose, "the harassing an entity statute criminalizes a wide array of conduct that does not necessarily cause a person to fear for their physical safety, individually or in assembly."

Director Schmechel reiterated concerns that the bill "appears to criminalize a wide swath of ordinary, constitutionally-protected First Amendment Activity," and cited the Illinois Supreme Court's decision invalidating a similar stalking statute. He also cautioned that "[f]orceful, bigoted hate speech may reasonably be thought to cause a person severe emotional distress, yet even such speech is protected and cannot be specifically prohibited except where such speech constitutes a "true threat," "solicitation of a crime," or another recognized exception to First Amendment protection." Moreover, the bill's proposed prohibition "reaches speech about a person that is far less condemnable than hate speech," such as "vilifying a business and its employees for environmental pollution, criticizing the performance of a healthcare facility, or remonstrating a government unit for ethical breaches."

Director Schmechel also noted that the savings clause for harassing an entity "does not sufficiently shield such activity from unconstitutionally chilling speech." He noted that the Illinois Supreme Court, in the case reviewing a similar stalking, found that the savings clause is an affirmative defense, "'which cannot eliminate the chilling effect on protected speech and resulting self-censorship.'" Furthermore, a "case-by-case discretionary decision by law enforcement officers and prosecutors does not solve the problem of the chilling effect on innocent speakers who fear prosecution based on negligently made distressing communications to or about a person."

Finally, with respect to the offense of harassing an entity, he noted that the "statute does not require proof of a pattern of infringement against any specific individual." Consequently, "one-time victimization of two persons in an entity . . . is sufficient." This runs counter to the District's current stalking statute, which requires "action on two or more occasions that is directed at the same 'specific individual."

With respect to the amendments to the District's prohibition on defacing symbols or displaying emblems, Director Schmechel cautioned that the Criminal Code Reform Commission has not "fully evaluated or developed draft recommendations regarding [the current statute]." He did, however, noted that "the bill does not specify complete culpable mental state requirements for the amended D.C. Code § 22-3312.02. It is, therefore "unclear what intent or other mental state, if any, the offense requires, and that may be relevant as courts have only upheld a true threats exception to the First Amendment where based on at least recklessness."

B23-0409 and B23-0435

On Wednesday, October 23, 2019, the Committee on the Judiciary and Public Safety held a public hearing on B23-0409 and B23-0435. A video recording of the public hearing can be viewed at https://entertainment.dc.gov/page/on-demand-2019. The following witnesses testified at the hearing or submitted statements to the Committee outside of the hearing:

Public Witnesses

Mark Rodeffer – Public Witness

Mr. Rodeffer testified about his own experience of being attacked by a man who perceived his sexual orientation as gay. In January 2013, Mr. Rodeffer was assaulted in the bathroom of the Washington Sports Club by an individual who repeatedly used homophobic slurs. Mr. Rodeffer's assailant was arrested and charged with assault, and USAO-DC pursued a sentencing enhancement for the commission of a bias-related crime. At trial, Mr. Rodeffer stated that defense counsel told the jury that someone could believe that Mr. Rodeffer was making an unwanted sexual advance on the defendant, and that it is widely known that gay men seek unwanted sexual encounters in public restrooms. Mr. Rodeffer found the experience traumatic. While these claims had no evidentiary basis, the jury ultimately acquitted the defendant in Mr. Rodeffer's case. While he is supportive of the legislation, Mr. Rodeffer believes that it is not comprehensive enough. In addition to prohibiting the use of panic defenses, Mr. Rodeffer believes that defense counsel should be

prohibited from arguing "that people in minority groups are different, weird, or perverted." He asks that the Council stop the use of bigotry as a legal defense.

Bobbi Strang – President, Gay and Lesbian Activists Alliance

Ms. Strang testified in support of the bill. She stated that the District has experienced a significant increase in the commission of hate crimes, and she does not believe this increase can be attributed solely to more frequent reporting. Given the increase, the failure of USAO-DC to prosecute these offenses is troubling. Mr. Strang is skeptical of USAO-DC's claim that the jury instruction for bias-related crime enhancements makes it difficult to pursue such an enhancement at trial. Ms. Strang also discussed the use of panic defenses in the District – most notably, in the cases of Bella Evangelista and Tony Hunter. Ms. Strang opposed the use of panic defenses, stating that "our existence does not constitute incitement and should not be grounds for a legal defense."

Ruby Corado – Executive Director, Casa Ruby

Ms. Corado tested in support of the bill. Ms. Corado is a transgender woman who founded an LGBTQ community center as a refuge for youth struggling from violence and HIV. Ms. Corado recounted the moment she was notified that Bella Evangelista had been shot and about her own experience being attacked by a former romantic partner. She also spoke about being notified about the death of Zoe Spears, and the emotional toll that losing members of her community takes. She discussed how gender identity intersects with race, and that discrimination against LGBTQ people of color reinforces the notion that their lives have little value.

Nina J. Ginsberg – President, National Association of Criminal Defense Lawyers

Ms. Ginsberg testified on behalf of the National Association of Criminal Defense Lawyers in opposition to B23-0409. Ms. Ginsberg argued that eliminating the panic defense will not help reduce violence committed against members of the LBGTQ community, nor will it aid in the prosecution of hate crimes in the District. She argued that the categorical prohibitions against certain defenses contained in the bill undermine a defendant's constitutional right to present a complete defense. The right to present a defense encompasses the presentation of any evidence that shows that the accused person did not commit or crime, or that their actions were justified, excused, or mitigated. She also argued that the "the categorical, legislative prohibition of specific defenses wisely presumes that judges are not capable of determining that which is relevant and admissible evidence, when in fact judges, who have heard all of the evidence during a trial, are in the best position to apply long-established rules of evidence to the unique facts and circumstances of the cases which come before them." Additionally, Ms. Ginsberg stated that the bill "denigrate[s] the ability of your constituents, the persons who are selected to serve on juries in the District to follow instructions, and presupposes that these citizens are incapable of discharging their duty to render fair verdicts due, in the case of these bills, to their own homophobia, transphobia, and bigotry." While she understands the desire to legislate policy changes to protect vulnerable, oppressed, or marginalized populations, she believes the desire to categorically prohibit certain defenses is based on "public discourse around high profile cases which tends to stir passions and to distill complicated facts and circumstances into sensationalistic headlines and rhetorical soundbites."

Richard Gilbert – Chair, Legislative Committee, D.C. Association of Criminal Defense Lawyers

Mr. Gilbert testified on behalf of the D.C. Association of Criminal Defense Lawyers in opposition to B23-0409. First, Mr. Gilbert criticized a provision in the legislation that mandates that a judge issue an anti-bias jury instruction upon request. He urged the Committee "to defer to the process by which standard jury instructions in the District of Columbia are developed." He provided background information on the use of jury instructions, and also explained how jury instructions for the District – consolidated in the "Redbook" – are developed in consultation with judges, prosecutors, and defense attorneys. He proposed alternative language to be used in an anti-bias jury instruction.

Mr. Gilbert then turned to a discussion of the gay panic defense. He said the most common circumstances in which a defendant asserts a gay panic defense is "when a heterosexual male engages with a stranger whom he believes to be biologically [female] for the purposes of a sexual encounter, whether commercial or consensual, and discovers during the encounter that the stranger is biologically [ ] male. Or when a heterosexual male receives an unexpected, unwanted, overt sexual advance from someone he believes to be another male." In passing a bill limiting the defense, Mr. Gilbert believes that the "Council ignores basic human psychology when it ignores the role that sexual interactions can play in human emotions." "Sex," he argued, "is different than our everyday encounters and "is intensely personal, profoundly implicates our self-identity and frequently evokes powerful emotions." While some of these emotions may be positive – such as affection and desire – sex can also implicate negative emotions of revulsion, fear, and shame. He noted that this is "particularly true if the defendant himself has been the victim of sexual abuse as a child." He also argued that "years of religious doctrine and cultural influence may unfortunately convince some heterosexual persons that homosexual conduct is an 'abomination' or 'unnatural.' If these influences "combine in an instant when confronted by unexpected and unwanted" advances, "a defendant should be permitted to" make their case to the jury. Mr. Gilbert also highlighted specific concerns related to the bill's language, including references to "potential disclosure," "unwanted, non-forcible sexual advances," "reduced mental capacity," and group association.

In closing, Mr. Gilbert emphasized that "DCACDL applauds the extension of complete civil rights to the LGBTQ community and we deplore the senseless acts of violence perpetrated on members of it and other minority communities." But DCACDL cannot "support depriving criminal defendants of long recognized defenses simply because of the characteristics of the victim."

Sasha Buchert – Senior Attorney, Lambda Legal

Ms. Buchert testified in support of the bill. She noted that LGBTQ people, and transgender women of color in particular, "move through the world under the constant threat of impending violence." At least 21 transgender people had been murdered in the United States in 2019 as of the hearing. Two of those murders – those of Zoe Spears and Ashanti Carmen – took place in the D.C. Metropolitan Area. Ms. Buchert also noted that a record number of hate crimes took place in the

District in 2019, and a disproportionate number of those crimes were motivated by the offender's bias regarding the victim's actual or perceived sexual orientation.

Ms. Buchert stated that in Bella Evangelista's case, "the defendant argued that he became enraged when he discovered her gender identity." In Mr. Hunter's case, "the defendant told police that he fatally punched Tony in self-defense after Mr. Hunter supposedly made a sexual overture." Ms. Buchert also discussed notable cases from outside the District in which a panic defense was raised, including the cases of Islan Nettles and Matthew Shephard.

Ms. Buchert noted that D.C. has a hate crimes statute that applies whenever someone is targeted for their identity, and she argued that "just as no one should be targeted as a victim based on [the perpetrator's] bias against their gender identity, sexual orientation, or other protected characteristics, those biases should not be the basis for a mental state of mind reducing criminal responsibility." She argued that permitting the panic defense "inevitably sends the message that this violence is culturally understandable and even permissible."

As a final note, Ms. Buchert recommended that the defenses of diminished capacity and self-defense be addressed in the final legislation. She also encouraged that the legislative prohibition against the panic defenses be expanded to cover all protected traits, not just gender identity and sexual orientation.

Glennis McLeod – Pubic Witness

Ms. McLeod testified in opposition to the bill.

Naida Henao – Strategic Advocacy Counsel, Network for Victim Recovery of D.C. ("NVRDC")

Ms. Henao testified on behalf of NVRDC in support of the bill. She stated that while the rate at which hate crimes are committed in the District has increased, there has not been an increased effort at "holding offenders accountable". That being said, NVRDC shares a concern from PDS about the lack of more specific language "when it comes to the factual nexus between the defendant's action and the discovery of, knowledge about, or potential disclosure of the enumerated victim characteristics." Ms. Henao noted that other jurisdictions that have banned the panic defense do so when the defendant's actions are "because of," resulting from," or "resulting solely from" the victim's protected trait. Presently, the D.C. bill only requires that the defendant's action is "related to" these characteristics. She believes that the phrase "related to" lacks specificity, and urged the Committee to closely examine the language present in similar bills from other jurisdictions.

Doron F. Ezickson, Washington, D.C. Regional Director, Anti-Defamation League

Mr. Ezickson testified to the impact of hate crimes on victims and shared national and local data on incidences of such crimes. He provided several recommendations aimed at reducing hate crimes, including reexamining the District's hate crimes framework with key stakeholders, suggesting model language, speaking out against hate and extremism, taking steps to ensure

victims know how to and feel safe reporting hate crimes to law enforcement, and ensuring sufficient resources to prosecute.

Dr. Stacey Karpen Dohn – Senior Manager of Behavioral Health, Whitman Walker Health

Dr. Dohn testified on behalf of Whitman Walker Health in support of the bills. Dr. Dohn facilitated the expansion of Whitman Walker's Behavioral Health Department "to include providing mental health care to LGBTQ youth, specifically victims of violence." She noted that many of her LGBTQ and HIV-positive patients have "fears of discrimination, stigmatization and victimization [that] are ingrained in the day-to-day tasks of living." She argues that the gay and trans panic defense has "instilled fear in the lives of LGBTQ people and their loved ones" because they "allow anyone to use an immutable characteristic . . . to blame the victim for the violence perpetrated against them." Justifying or excusing violence committed against someone because of their sexual orientation, gender identity, or HIV status sends the message that they are "inherently less worthy and less human compared to those who do not identify as LGBTQ or those who are HIV negative."

She noted that in 1973, the American Psychiatric Association removed the diagnosis of homosexuality and homosexual panic disorder from the Diagnostic and Statistical Manual of Mental Disorders. She argued that members of the LGBTQ community "have for decades fought to disassociate themselves with homophobia and transphobic associations with predation, deviance and perversion." But the continued acceptable of panic defenses "legally sanctions those associations." In fact, statistics revealed that LGBTQ are far more likely to be victimized than their non-LGBTQ peers.

Joseph Vardner – President, D.C. LGBT Bar Association

Mr. Vardner testified on behalf of the LGBT Bar Association in support of the bills. He noted that there has been an increase in bias-related crimes in the District. In 2018, there were 206 reported bias-related crimes in the District, a significant increase over prior years. But "almost none of these crimes were prosecuted under the bias-related crimes statute," which "has created a since of fear and uncertainty within the LGBT community."

Mr. Vardner also pointed out the various legal organizations that support elimination of the gay panic defense, including the American Bar Association and the National LGBT Bar Association. He explained that bills eliminating the gay and trans panic defense do so by eliminating "discovery of a person's sexual orientation or gender identity as provocation for a violent crime and it instructs the judiciary to remind jurors that bias and prejudice should not factor into their decision." Mr. Vardner also stated that "[w]hile the state requires evidence 'that demonstrates the accused's prejudice,' the actual jury instructions issued require evidence that the crime was committed 'because of prejudice.' He urged the Committee "to send a message to the publisher of the Red Book encouraging them to align their publication with the statute." Finally, Mr. Vardner also recommended that the Committee update the bias-crime statute "to reduce alleged uncertainty in its requirements."

Government Witnesses

Toni Michelle Jackson – Deputy Attorney General, Office of the Attorney General for the District of Columbia

Ms. Jackson testified in support of the bill, noting that the panic defense "provides an excuse for violent crime based on the victim's identity." The defense "compounds the negative effects of the increase in bias-motivated violence." OAG does not believe "there is any valid criminal justice reason to allow a perpetrator to use a victim's identity to justify or excuse violence."

Katerina Semyonova – Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

Ms. Semyonova testified in opposition to B23-0409 on behalf of the Public Defender Service ("PDS"). PDS categorically opposes "any statutory changes that decrease a jury's ability to hear any defense proffered by the defendant." She noted that this is especially important in the District, which "has one of the highest incarceration rates in the country." She argued that the "proposed limitations on [the] heat of passion [defense] may have the unintended consequence of preventing individuals who are targeted because of their race, gender, or sexual orientation from presenting a full defense."

Ms. Semyonova proceeded to summarize relevant District law. She explained that "in prosecutions for mayhem, malicious disfigurement, assault with intent to commit murder, and first and second degree murder, the prosecution must prove the absence of mitigating circumstances, but only in cases where there is sufficient evidence to warrant an instruction on mitigation." Juror are, accordingly, "never instructed on mitigation, heat of passion, or provocation if a judge does not determine in the first instance that legally sufficient evidence of mitigation exists." If "the prosecution fails to prove the absence of mitigating circumstances, jurors may convict the defendant of lesser included offenses such as assault or manslaughter." She also noted that provocation "exists only when the conduct of another would cause a reasonable person to lose control, and mere words, no matter how offensive, are never adequate."

She asked that if the Council wishes to create some limitation on a defendant's rights to present a full defense, that we modify the language to foreclose a heat of passion defense "*only* when defense is *based solely* on the defendant's discovery of, knowledge about, or potential disclosure of the victim's characteristics." Echoing comments from NVRDC, Ms. Semyonova argued that the "current language, prohibiting the defense when it is 'related to' the discovery of, knowledge or potential disclosure of the victim's characteristics is vague and will lead to arbitrary and potentially overbroad application." She noted that the eight states that have passed bills prohibiting the panic defense "required a more direct causal link between the defendant's actions and the discovery of the complainant's characteristics than the 'related to'" in the present bill.

Ms. Semyonova also argued that some of the language present in B23-0409 is problematic. First, that bill "precludes a heat of passion defense 'under circumstances in which the victim made an unwanted sexual advance toward the defendant or if the defendant and the victim dated or had

a romantic relationship.'" Ms. Semyonova pointed out that "there are countless ways that non-forcible sexual advances may still be terrifying for individuals." In these cases, "defendants should be able to explain their fears fully to a jury and should have available a heat of passion defense that can mitigate the offense." She also pointed out that B23-0409's limitation on the reduced mental capacity defense is unnecessary because in *Bethea v. United States*, the D.C. Court of Appeals rejected this defense. Ms. Semyonova also took issue with B23-0409's proposed limitations on the defense of self-defense. She argued that "an individual is absolutely prohibited from using force solely based on the discovery of someone's sexual orientation or gender." This is because a "person may only use deadly force in self-defense if [that person] actually and reasonably believes at the time of the incident that [they] are in imminent danger of death or seriously bodily harm." Therefore, "[e]ven if someone's gender identity or sexual orientation is not is perceived as a subjective threat, the requirement of reasonableness . . . forecloses the use of self-defense."

Finally, Ms. Semyonova urged the Committee to adopt language present in a federal bill pending which "ensures that the defendant will not be prevented from providing relevant evidence about the defendant's past traumatic experience." That provision specifically reads: "PAST TRAUMA.—Notwithstanding the prohibition in subsection (a), a court may admit evidence, in accordance with the Federal Rules of Evidence, of prior trauma to the defendant for the purposes of excusing or justifying the conduct of the defendant or mitigating the severity of the offense."

Richard Schmechel – Executive Director, Criminal Code Reform Commission

Mr. Schmechel, testifying on behalf of the Criminal Code Reform Commission ("CCRC"), took "no position at present on the substantive merits of whether to codify a categorical exception or multiple exceptions to defenses based on the defendant's knowledge or discovery of the victim's actual or purported gender identity, sexual orientation, or other specified attribute." His testimony first provided important background information on the state of the law regarding general defenses. He noted that the "District is among a minority of jurisdictions nationally that have no codified general defenses." Absent legislation, "a judicial 'common law' regarding the scope and meaning [of] general defenses has continued to evolve in the District." Because the decisions rendered by courts are specific to the case presented, "court decisions establishing the District's law regarding defenses are necessarily incomplete, may include outdated language, and may not reflect current District norms or the will of its elected representatives." Given the limitations of case law, "[l]egal practitioners seeking a common, fixed articulation of District general defenses routinely turn to pattern jury instructions." The District's Criminal Jury Instructions – colloquially referred to as the "Redbook" – "include a short commentary explaining the relevant case law and often provide alternative formulations of an instruction." These instructions, however, are "updated only periodically" and "are imperfect and incomplete."

Mr. Schmechel then turned to commentary on specific provisions within B23-0435. First, he noted that it is unclear whether the bill's reference to the heat of passion defense is meant to "preclude raising such conduct as a defense to any crime of violence, or *only* to murder." There is similar ambiguity as to whether the bill's reference to a "reduced mental capacity" is also meant to preclude an insanity defense. Second, Mr. Schmechel argued that "the causal relationship between the protected attribute and the provocation of violence is unclear," echoing concerns about

the vagueness created by use of the phrase "related to." He also pointed out that D.C. Code § 22-3701(1) – the bias-related crime statute for the District – uses the phrase "based on", while 18 U.S.C. § 249 – the federal hate crime statute – uses the phrase "because of." His recommendations were to either adopt a "based on" or a "based solely on" standard of causation.

Mr. Schmechel also flagged concerns related to the bill's proposed anti-bias jury instruction. He argued that the instruction "appears to be a wholly separate provision that does not appear to confer a new right or remedy but may risk creating a conflict of law in some cases." He recommended either eliminating "the bill's references to a jury instruction, referring the matter to the drafters of the Redbook" or making "the codified jury instruction permissive, subject to judicial approval, by replacing 'the court shall' with 'the court may.'" He also argued that "the rationale for limiting application of the defense exception to any 'crime of violence' is unclear. The offenses statutorily designated a crime of violence "do[] not coincide with the availability of the relevant defenses such as self-defense or adequate provocation." He proposed either eliminating "the limitation on the heat of passion exception so that it would apply to any offense to which a heat of passion defense could be raised" or limiting "the exception for a heat of passion defense to murder."

Finally, Mr. Schmechel stated that "the meaning of 'force' and 'non-forcible romantic or sexual advance' is unclear." While "assaultive conduct would presumably be included in any definition of force, it is unclear whether the definition of force would include non-painful or sexual contact." He believes that a "[c]lear definition of 'force' and 'non-forcible romantic or sexual advance' . . . is critical to any analysis of whether and how the bills constrain self-defense." He proposed either eliminating the bill's "references to an exception to a use of force defense" or defining "force" and "non-forcible romantic or sexual advance", including whether those terms include "coercive threats, the display of weapons (alone), and non-painful physical contact."

B23-0513

On Tuesday, March 3, 2020, the Committee on the Judiciary and Public Safety held a public hearing on B23-0513. A video recording of the public hearing can be viewed at https://entertainment.dc.gov/page/demand-2020-a. The following witnesses testified at the hearing or submitted statements to the Committee outside of the hearing:

Public Witness

Jade Harriell Arrindell – Founder, Victory of the People Movement

Ms. Arrindell testified in support of the bill. She noted the historical and present day discrimination Black people face in the United States and in the District. She noted significant inequities in educational, criminal justice, and healthcare systems. She also drew special attention to "rampant housing discrimination, a homelessness epidemic, and overpolicing." She testified that the bill is a "a good start," but encouraged expanding the legislation to provide accountability for state actors.

Government Witness

Michelle D. Thomas – Chief, Civil Rights Section, Office of the Attorney General for the District of Columbia

Ms. Thomas testified on behalf of the Office of the Attorney General in support of the bill. She noted that "bias-motivated violence is on the rise in the District." While the "LGBTQ+ community bears the brunt of this burden," "attacks based on ethnicity, race, and national origin are also increasing." Ms. Thomas explained that it is the U.S. Attorney's Office "that decides whether to enforce our statute that enhances penalties for bias-motivated violence." She argued that, in light of the U.S. Attorney's Office's failure to prosecute those offenses, "the people of the District need a government that is accountable to them." This legislation would "empower the Office of the Attorney General to hold perpetrators of bias-motivated offenses accountable with civil penalties and injunctions." Current law gives the right to pursue civil action exclusively to victims. Pursuing a civil case is "an onerous task because victims are often focused on recovering from trauma and because the difficulty of finding a lawyer where financial recovery is uncertain." This bill "enables OAG to seek justice for marginalized members of our community and gives them a voice even when federal prosecutors fail to act." It also "expands the types of rights protected under the statute." Specifically, the bill "creates a cause of action for offenses that interfere with rights protected by District and federal law" —including voting rights. Finally, the bill "clarifies that protections extend to people with all sorts of disabilities, not just physical." Ms. Thomas noted that at least two jurisdictions – Maine and Massachusetts – have granted their Attorneys General similar authority.

IMPACT ON EXISTING LAW

B23-0409 would amend the Human Rights Act of 1977 to clarify that the term "place of public accommodation" does not require a person or place to have a physical location in the District or charge for goods or services; to amend the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982 to expand the offense of defacement of certain symbols or display of certain emblems; to amend the Bias-Related Crime Act of 1989 to add definitions, clarify the definition of "bias-related crime", provide civil enforcement authority to the Attorney General against persons who commit bias-related crimes or, through certain acts, interfere or attempt to interfere with an individual's exercise of constitutional or District rights, or deprive an individual of equal protection, to provide subpoena authority, and specify appropriate relief; and to amend Chapter 1 of Title 23 to limit the scope of the defenses of heat of passion caused by adequate provocation, insanity, self-defense, defense of others, and defense of property if certain elements of the defense are based on the victim's actual or perceived gender identity, gender expression, or sexual orientation.

FISCAL IMPACT

The Committee adopts the fiscal impact statement of the District's Chief Financial Officer.

SECTION-BY-SECTION ANALYSIS

Section 1 Provides the long and short titles.

Section 2 Amends the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1401.02(24)), to clarify that the term "place of public accommodation" means any person or place that provides, to a person in the District, access to an accommodation, service, or good, whether or not that place or offeror maintains a physical location in the District or charges for those goods or services.

Section 3 Amends the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982, effective March 10, 1983 (D.C. Law 4-203; D.C. Official Code § 22-3312.02), to expand the offense of defacement of certain symbols or display of certain emblems.

Section 4 Amends the Bias-Related Crime Act of 1989, effective May 8, 1990 (D.C. Law 8-121; D.C. Official Code § 22-3701 et *seq*.), to:

(a) Add definitions for "Attorney General", "discrimination", and "person", and amend the definition of "bias-related crime" to provide that a designated act demonstrating an accused's prejudice based on a protected trait of the victim need not solely be based on or because of that prejudice, and a non-physical disability constitutes a "disability";

(b) Make a technical change;

(c) Make a conforming change; and

(d) Provide civil enforcement authority, subpoena power, and the ability to seek certain relief to the Office of the Attorney General.

Section 5 Amends Chapter I of Title 23 of the District of Columbia Official Code to:

(a) Make a conforming change; and

(b) Add a new subsection to ban the use of three specific defenses when that defense is based on the discovery of, knowledge about, or the potential disclosure of the victim's actual or perceived gender identity, gender expression, or sexual orientation: (1) heat of passion caused by adequate provocation; (2) insanity; and (3) self-defense, defense of others, or defense of property.

Section 6 Provides the applicability clause.

Section 7 Provides the fiscal impact statement.

Section 8 Provides the effective date.

COMMITTEE ACTION

On November 23, 2020, the Committee on the Judiciary and Public Safety held an Additional Meeting to consider and markup B23-0409, the "Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020". The meeting was called to order at 11:05 a.m. Chairperson Charles Allen recognized a quorum consisting of himself, Councilmembers Anita Bonds, Mary M. Cheh, Vincent C. Gray, Jr., Brooke Pinto, and Chairman Phil Mendelson. Chairperson Allen, without objection, moved the Committee Report and Print for B23-0409 en bloc with leave for staff to make technical, editorial, and conforming changes.

Chairperson Allen first described the bill's provisions and the Committee's reasoning. Councilmember Pinto spoke in support of the bill's prohibition on use of panic defenses, which are rooted in homophobia and transphobia. She recounted statistics showing that LGBTQ+ people are disproportionately targeted by criminal acts, and noted the unique harms that result from bias-motivated crimes. After an opportunity for discussion, the Committee voted 6-0 to approve the Committee Report and Print, with the Members voting as follows:

YES: Chairperson Allen, Councilmembers Bonds, Cheh, Gray, and Pinto, and Chairman Mendelson

NO: None

PRESENT: None

ABSENT: None

LIST OF ATTACHMENTS

(A) B23-0409, as introduced
(B) B23-0134, as introduced
(C) B23-0435, as introduced
(D) B23-0513, as introduced
(E) Notice of Public Hearing on B23-0409 and B23-0435, as published in the *District of Columbia Register*
(F) Agenda and Witness List for Public Hearing on B23-0409 and B23-0435
(G) Witness Testimony for B23-0409 and B23-0435
(H) Public Hearing Record for B23-0134
(I) Public Hearing Record for B23-0513
(J) Fiscal Impact Statement
(K) Legal Sufficiency Determination
(L) Comparative Committee Print
(M) Committee Print