Getting Rid of Gay and Trans Panic

Michael Aphibal

Executive Summary 2

I. Introduction 4

II. Gay Panic and Trans Panic Defenses 9
A. Origins of "Gay Panic" 9
B. Gay Panic and Trans Panic in the Courts 11
1. Defense of Insanity and Diminished Capacity 12
2. Defense of Provocation 14
3. Defense of Self-Defense 17
C. Sample Cases Involving Gay Panic or Trans Panic 20
1. Scott Amedure 20
2. Gwen Araujo 21
3. Terrance Michael Hauser Jr. 22
D. Secondary Victimization and Discrimination 25

III. Courts and Legislatures Have Begun to Curtail Gay Panic and Trans Panic Defenses 28
A. Categorical Limits on Gay Panic and Trans Panic Defenses 28
1. Judicially Created Restraints on Gay Panic Defenses 28
2. International Attempts to Eliminate Gay Panic and Trans Panic Defenses 35
B. Jury Instructions to Eliminate Bias 37
1. California Requires Anti-bias Jury Instructions 37
2. New York Attempts to Enact Anti-bias Jury Instructions 38
C. Education of Courts, Attorneys, and Law Enforcement 39

IV. Proposed Responses to Gay Panic and Trans Panic Defenses 40
1. Model Language 42
B. Anti-bias Jury Instructions 43
1. Model Language 44
C. Educate Courts, Prosecutors, Defense Attorneys and Juries 44
1. Model Language 45
V. Conclusion 45

Executive Summary

This report details the history and problems associated with the "gay panic" and "trans panic" legal defense to murder. Defendants have used the gay panic and trans panic defenses to mitigate their own responsibility and to avoid being convicted of a higher level of murder than they might have been otherwise. These defenses characterize sexual orientation or gender identity as reasonable excuses for loss of self-control. Additionally, it subjects the victim to secondary victimization by the legal system. The defense asks the jury to find the victim's sexual orientation or gender identity, by itself, blameworthy for the defendant's reaction leading him to kill.

The gay panic and trans panic defense has been used to mitigate a case of murder to manslaughter or justified homicide historically in three ways. First, the defendant uses gay panic as a reason for insanity or diminished capacity. In using the insanity and diminished capacity defenses, the defendant, claiming to be afflicted with the condition "homosexual panic disorder," alleges that a sexual proposition by the victim becomes a triggering event bringing upon a nervous breakdown in the defendant. This defense has

become difficult to use because the removal of homosexuality from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* in 1973.

Second, gay panic and trans panic have been used to bolster the defense of provocation. With this method, the defendant argues that the proposition by the victim, termed "non-violent sexual advance," was adequately provocative to excuse the defendant killing the victim. Similarly, trans panic is used to mitigate killing a transgender person. The defendant points to the victim's revelation of his or her biological sex, usually after they engaged in consensual sexual relations, as the adequately provocative act.

Third, gay panic is used to strengthen the defense of self-defense. In these cases, the defendant uses gay panic to support their contention that there was a reasonable belief that the victim was about to inflict serious bodily harm. This defense is inappropriate because, while the threat of danger from the victim would otherwise fall short of the serious bodily harm standard, the defendant asserts that the threat of danger was heightened solely due to the victim's sexual orientation.

Gay panic and trans panic defenses also subject the victim and the LGBT community to secondary victimization. Not only does the victim endure the initial attack, but during trial, the victim is blamed for the attack, predominantly because of his sexual orientation. Moreover, the successful use of these defenses sends message to both the LGBT community and those holding anti-LGBT bias that courts do not take bias attacks seriously and anti-LGBT attacks are either acceptable or encouraged.

Thankfully, courts and legislatures have already begun to curtail the use of gay panic and trans panic as a defense. The Massachusetts Supreme Judicial Court decided in 1979 that homosexual

panic was not connected to any mental disorder that could support an insanity argument. An appellate court in Pennsylvania decided that the sight of gay sex did not constitute adequate provocation for murder to be mitigated to manslaughter. Additionally, Massachusetts has decided that touching of the genitals and unwanted sexual advances are not adequate provocation for fatal reactions. Some legislatures have also introduced restraints on gay panic and trans panic defenses. California passed legislation requiring courts give anti-bias jury instructions. New York legislators have also attempted to enact similar measures to correct the discriminatory effect of this defense.

This important report makes three recommendations to combat the discriminatory effects of gay panic and trans panic defenses. First, legislatures should disallow the non-violent sexual advance and the revelation of a person's gender identity from serving as adequate provocation. Second, courts should provide jury instructions advising juries to make its decision free of improper bias and prejudice. Third, state and local governments should proactively educate courts, prosecutors, defense attorneys, and the public about the gay panic and trans panic defenses and its harm on the lesbian, gay, bisexual, and transgender communities.

I. Introduction

Lawrence "Larry" King, 15, was open about being gay. He was teased for it and bullied incessantly from the age of ten.[1] However, he was proud of his identity and openly expressed it through

[1] Ramin Setoodeh, *Young, Gay and Murdered*, Newsweek, Jul. 28, 2008, at 40.

make-up, accessories, and high heels.[2] He had the support of some of his school's administration, who stood up for him when students and teachers expressed concern about his appearance.[3] Despite this support, he became a victim at the hands of a fellow student. A day after making the quip, "Love you, baby!" to another student, Larry was shot to death in a classroom in front of his classmates.[4]

Larry did not touch Brandon McInerney, 14.[5] He never threatened Brandon, did not make any advances toward him, and did not put him in danger of any kind.[6] The day before he was murdered, Larry, wearing make up and high heels, simply asked Brandon to be his valentine.[7] Yet, Brandon decided that Larry's attire and words were punishable and he shot him twice in the back of the head.

Brandon's defense was that Larry was sexual harassing Brandon and that Larry's words and wardrobe were responsible for his death.[8] Brandon's attorney argued that Brandon was just re-

---

[2] Rebecca Cathcart, *Boy's Killing, Labeled a Hate Crime, Stuns a Town*, N.Y. TIMES, Feb. 23, 2008, at A11.

[3] Setoodeh, *supra* note 1.

[4] Jens Erik Gould, *The Lawrence King Case: In Court, Has the Bullied Become the Bully?*, TIME, Aug. 25, 2011, http://www.time.com/time/nation/article/0,8599,2090287,00.html.

[5] Zeke Barlow, *Emotional Day as Students Testify in Brandon McInerney Murder Trial*, VENTURA COUNTY STAR, July 6, 2011, http://www.vcstar.com/news/2011/jul/06/first-student-testifies-in-brandon-mcinerney/ [hereinafter *Emotional Day*]; Setoodeh, *supra* note 1.

[6] *Emotional Day*, *supra* note 5.

[7] Catherine Saillant, *Oxnard School's Handling of Gay Student's Behavior Comes Under Scrutiny*, LOS ANGELES TIMES, Aug. 11, 2011, at A1; Setoodeh, *supra* note 1.

[8] Zeke Barlow, *Attorneys Argue over Who Was the Aggressor in Brandon McInerney Trial*, VENTURA COUNTY STAR, July 5, 2011,

sponding to the Larry.[9] He called Larry an aggressor and a bully who was known to make inappropriate remarks and sexual advances.[10] How did Larry sexually harass Brandon? According to his lawyer, it was by wearing women's dresses and heels.[11] What Brandon's attorney did not claim was that Larry assaulted him or threatened his safety.[12] He did not need to. By shaming and demonizing Larry because of his sexual orientation, the jury hung when trying to decide if Brandon was deliberate, and wholly blameworthy, for killing Larry.[13]

Sadly, Larry's story, the murder and the subsequent vilification, is not unique. Intentional violence against lesbian, gay, bisexual, and transgender ("LGBT") people is a common and rapidly increasing hate related crime in the United States.[14] Approximately three-quarters of LGBT persons have been targets of ver-

---

http://www.vcstar.com/news/2011/jul/05/lawyers-give-opening-statements-in-brandon-case/ [hereinafter *Attorneys Argue*].

[9] *Attorneys Argue*, *supra* note 8 ("[Brandon's attorney] said of his client, 'He [Brandon] was pushed there [to kill Larry] by a young man who repeatedly targeted him with unwanted sexual advances.'").

[10] *Id.*

[11] Caterine Saillant, *Trial of Teen Grows Heated*, LOS ANGELES TIMES, July 30, 2011, at AA1.

[12] *See Attorneys Argue*, *supra* note 8.

[13] *Mistrial Declared in CA Gay Student Killing Trial*, VENTURA COUNTY STAR, Sept. 1, 2011, http://www.vcstar.com/news/2011/sep/01/jury-stuck-in-calif-gay-student-killing-trial/.

[14] In 2010, 1,277 of the 6,628 hate crimes reported to the FBI were based on the victim's sexual orientation. Fed. Bureau of Investigation, U.S. Dep't of Justice, FBI — Table 1 (2011), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/index (follow "Incidents and Offenses" hyperlink; then follow "Table 1" hyperlink). Of all hate crimes, the percentage of crimes linked to sexual orientation has steadily increased over the last five years from 14.2% in 2005 to 19.3% in 2010. *Id.*; Fed. Bureau of Investigation, U.S. Dep't of Justice, Table 1 — Hate Crime Statistics 2005 (2006), http://www2.fbi.gov/ucr/hc2005/table1.htm.

bal abuse and one-third have been targets of physical violence.[15] Information collected through the Hate Crimes Statistics Act indicates that, "gay people report the greatest number of hate crimes at greater per capita rates than all other groups."[16] Unfortunately, attacks on LGBT persons motivated by their sexual orientation or gender identity have led to fatal consequences.[17]

Many defendants charged with murdering an LGBT person have sought mitigation or exoneration by claiming "gay panic." Gay panic is a theory in which the defendant argues that the victim's sexual orientation excuses, mitigates, or justifies the killing.[18] A heterosexual male defendant charged with murdering a gay male victim, for example, may claim that he panicked when the victim made a sexual advance. Instead of taking responsibility for the criminal act, a defendant who claims gay panic blames the victim, insisting that it was the victim's identity and actions that resulted in "an understandable and excusable loss of self-control."[19] Alt-

---

[15] Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 474-75 (2008).

[16] William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV., 1213, 1215. (2004).

[17] In 2010, at least two people were killed, motivated by anti-homosexual bias. Fed. Bureau of Investigation, U.S. Dep't of Justice, FBI — Table 4 (2011), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/index (follow "Incidents and Offenses" hyperlink; then follow "Table 4" hyperlink).

[18] Victoria L. Steinberg, *A Heat of Passion Offense: Emotions and Bias in "Trans Panic" Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 1, 3 (2005). Gay panic, trans panic, and similar terms are sometimes used in a more general way to describe when a defendant seeks mitigation of a crime or sympathy from the jury by claiming that the defendant held some negative (but understandable) emotions toward the victim's sexual orientation that motivated the defendant's actions. This report focuses only on the use of gay panic and trans panic in defense of a murder charge.

[19] Maher v. People, 10 Mich. 212, 220 (1862).

hough gay panic is not a separate, freestanding defense to criminal liability, gay panic arguments may be used as grounds for traditional defenses like provocation, self-defense, insanity, or diminished capacity.[20]

Relatedly, some defendants have employed a "trans panic" defense.[21] Trans panic is a theory in which the defendant argues that the victim's gender identity excuses, mitigates, or justifies the killing. A defendant charged with murdering a male-to-female transgender victim, for example, may claim that he panicked when he learned that the victim was biologically male, not female.[22] Often the killing will follow sexual relations between the defendant and the transgender victim.[23] Like the gay panic defense, the defendant uses trans panic arguments to shift blame for the murder to the victim for deceiving the defendant.[24]

The use of the gay panic or trans panic defenses subject victims to secondary victimization.[25] The defense asks the jury to find that the victim's sexual orientation or gender identity, by itself, blameworthy for the defendant's reaction leading him to kill.[26] The use of the gay and trans panic defense denies victims, their

---

[20] Lee, *supra* note 15, at 490.

[21] Victoria L. Steinberg, *A Heat of Passion Offense: Emotions and Bias in "Trans Panic" Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 1, 3 (2005).

[22] *See* Steinberg, *supra* note 21, at 3.

[23] *Id.*

[24] *See* Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 171 (1992); Lee, *supra* note 15, at 515 (noting that the defendant argued that it was the transgender victim's "deception and betrayal" that caused the killing).

[25] Kevin T. Berrill & Gregory M. Herek, *Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy*, J. INTERPERSONAL VIOLENCE, 401, 404 (1990).

[26] Lee, *supra* note 15, at 471 & 475.

family, and their friends dignity and justice.[27] More broadly, it is designed to stir up and reinforce the anti-gay or anti-transgender emotions and stereotypes that led to the killings in the first place.[28] It also suggests that killing LGBT individuals is excusable, unlike killing those belonging to other minority groups.[29] Furthermore, gay panic and trans panic defenses are irreconcilable with state and federal laws that treat bias crimes against LGBT people as aggravated offense.[30] Congress recognized that, far from being excusable or mitigable, a killing motivated by the victim's sexual orientation or gender identity causes significant harm to the LGBT community and is deserving of enhanced punishment.[31]

II. Gay Panic and Trans Panic Defenses

A. Origins of "Gay Panic"

"Gay panic," as the term is presently used, began first as "homosexual panic." Edward J. Kempf, a clinical psychiatrist, first coined "homosexual panic" in the 1920's to describe a psychologi-

---

[27] *See* Berrill & Herek, *supra* note 25, at 404-05.

[28] Robert G. Bagnall, Patrick C. Gallagher & Joni L. Goldstein, Comment: *Burdens on Gay Litigants and Bias in the Judicial System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L.L. REV. 497, 501 (1984).

[29] *Id.*

[30] *See* Berrill & Herek, *supra* note 28, at 401-04 (explaining that tactics, such as homosexual panic defenses, undercut hate-crime laws, because victims would rather not claim the protections of the hate-crime laws instead of enduring — or because victims anticipate — the anti-gay consequences, such as homosexual panic defenses and other acts, that comes with accepting those laws' protections).

[31] Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701-13, 123 Stat. 2190, 2835-44 (2009) (codified at 18 USC § 249).

cal disorder.[32] It referred to a panic that resulted from the internal struggle of a patient's "societal fear of homosexuality and the delusional fantasy of homoeroticism."[33] Kempf observed that when these patients found those of the same sex attractive, they felt helpless, passive, and anxious.[34] Kempf's studies also found that no patients afflicted with the panic became violent towards others.[35] Instead, he observed that the patients became suicidal or self-inflicted punishment.[36] Later studies confirmed Kempf's findings that homosexual panic disorder rendered the patient incapable of being aggressive.[37]

---

[32] Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 81, 82 (1992).

[33] Christina Pei-Lin Chen, Note: *Provocation's Privileged Desire: The "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 195, 199 (2000).

[34] Lee, *supra* note 15, at 482; Comstock, *supra* note 33, at 87-88.

[35] Comstock, *supra* note 33, at 86.

[36] *Id.*

[37] Burton Glick, an author of an article discussing the clinical and theoretical considerations of the homosexual panic disorder, noted, "panic patients are unable to function at all." Kara S. Suffrendini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 289 (2001) (citing Burton S. Glick, *Homosexual Panic: Clinical and Theoretical Considerations*, 129 J. NERVOUS & MENTAL DISEASE 20, 21 (1959)). Likewise, Henry Harper Hart, in a study about the fear of homosexuality of college male students in the 1950's, observed that a patient's "obsessive fear of homosexuality developed when a homosexual made a sexual advance to him." Comstock, *supra* note 33, at 85 (quoting Henry Harper Hart, *Fear of Homosexuality in College Students*, *in* PSYCHOSOCIAL PROBLEMS OF COLLEGE MEN BY THE STAFF OF THE DIVISION OF STUDENT MENTAL HYGIENE 200, 204 (Bryant M. Wedge ed., Department of University Health, Yale University 1973). Rather than become violent, however, the patients blamed themselves with contempt for their homosexual cravings. Suffrendini, *supra* note 38, at 289; Comstock, *supra* note 33, at 85 (quoting Hart, *supra*, at 204).

Homosexual panic disorder was once officially recognized in the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") of the American Psychiatric Association ("APA"), appearing in the 1952 edition.[38] Homosexual panic was initially medically legitimized because it had its roots in homosexuality as the underlining disorder, directly premised upon a condition of latent homosexuality or "repressed sexual perversion."[39] However, the APA formally removed homosexuality from the DSM in 1973.[40] With the medical community no longer recognizing homosexuality as a disorder, its companion, homosexual panic disorder, was also stripped from recognition.

B. Gay Panic and Trans Panic in the Courts

When a person is charged with murdering a homosexual person, a common defense strategy is to claim that the defendant suffered a gay panic that explains the killing. Likewise, a person charged with murdering a transgender person might claim that the defendant was under a trans panic at the time of the killing. Gay panic and trans panic defenses are not officially recognized, free-standing defenses. Instead, the terms are used to describe a tactic where defendants "bolster claims of insanity, diminished capacity, provocation, and self-defense."[41] In other words, gay panic and trans panic are theories proposed by the defendant to establish the elements of traditional criminal defenses.

Gay panic and trans panic defenses are raised in three contexts: (1) insanity and diminished capacity, (2) provocation leading to heat of passion, and (3) self-defense.

---

38 Comstock, *supra* note 33, at 83.

39 Chen, *supra* note 34, at 202.

40 *Id.*

41 Lee, *supra* note 15, at 475.

1. Defense of Insanity and Diminished Capacity

Gay panic was first raised as an insanity or diminished capacity defense.[42] The defendant uses homosexual panic disorder to claim that he was either insane or suffered from diminished capacity when he killed and for that reason should be excused from the killing.

To invoke an insanity defense, the defendant attempts to show that he suffered from a mental defect — homosexual panic disorder — at the time of his act.[43] Then, the defendant tries to prove that the victim's sexual orientation and actions triggered in him a violent psychotic reaction, and because of the disorder he did not understand the nature and quality of his act or appreciate that that what he was doing was wrong.[44] A defendant arguing the defense of diminished capacity must show that the defendant's homosexual panic disorder affected his capacity to premeditate and deliberate or form the requisite intent to kill.[45]

The use of homosexual panic to make a case for either insanity or diminished capacity has several problems. First, the defense has no medical or psychological basis. The homosexual panic defense, using the insanity or diminished capacity framework, relies on the

---

[42] Chen, *supra* note 34, at 201. The first reported use of the gay panic defense came in 1967 in *People v. Rodriguez*. 64 Cal. Rptr. 253 (Cal. Ct. App. 1967). According to the defendant, when the victim grabbed him from behind, the defendant became temporarily insane due to an acute homosexual panic, which resulted in a violent, uncontrollable psychotic reaction. *Rodriguez,* 64 Cal. Rptr. at 255; Chen, *supra* note 34, at 201. The jury, however, ultimately rejected the defendant's homosexual panic defense and convicted him of murder. *Rodriguez*, 64 Cal. Rptr. at 254.

[43] Bagnall, Gallagher & Goldstein, *supra* note 28, at 499.

[44] *Id.*

[45] Lee, *supra* note 15, at 494.

medical and psychological validity of homosexual panic disorder.[46] However, with the removal of homosexuality from the DSM, defendants can no longer claim to suffer from homosexual panic disorder.[47]

Second, even if homosexual panic disorder were still medically recognized, the use of homosexual panic disorder in this manner is inappropriate because in no case studies did those suffering from homosexual panic have an ability to react violently to another person.[48] Defendants who have killed another, thus, exhibit violence inconsistent with the once recognize psychiatric disorder, suggesting that the defendant cannot be afflicted with homosexual panic.[49]

Third, the defense relies on the notion that same-sex attraction is objectionable and that antigay violence is culturally understandable, or even permissible.[50] Such was the case when a defendant, charged with first-degree murder, was found to have diminished capacity in the killing of a gay victim.[51] The victim and the defendant appeared on a national talk show where the victim announced his attraction for the defendant.[52] Surprised and embarrassed, the defendant the defendant shot and killed the victim a few days after the announcement.[53] Even though there was over-

---

46 Chen, *supra* note 34, at 202.

47 *See supra* text accompanying notes 39-41.

48 Comstock, *supra* note 33, at 86.

49 *Id.* at 88.

50 Lee, *supra* note 15, at 496-7 (citing Karen Franklin & Gregory M Herek, *Homosexuals, Violence Toward*, *in* 2 ENCYCLOPEDIA OF VIOLENCE, PEACE, CONFLICT 139, 148 (Lester Kurtz & Jennifer Turpin eds. 1999).

51 *Id.* at 495.

52 *Id.*

53 *Id.* at 495-96.

whelming evidence of premeditation and deliberation, the jury found the defendant's homosexual panic claim credible and mitigated the charge to second-degree murder.[54] Some commentators noted that the jury's decision to mitigate the charges might have resulted from the popular perception that because the national media humiliated the heterosexual man, he should not be held wholly responsible.[55]

As homosexual panic disorder became delegitimized, defendants' arguments that a mental disease was to blame for their actions became incredible and increasingly less successful.[56] The eventual decline of the homosexual panic defense then gave way to a new argument under another framework, the non-violent homosexual advance defense as a provocation to murder.

2. Defense of Provocation

The defense of provocation allows a defendant to mitigate a charge of murder to voluntary manslaughter.[57] A defendant using a gay panic provocation defense attempts to point to the actions of the LGBT victim, usually some non-violent sexual advance toward the defendant, as the adequate provocation.[58] While the use of this provocation defense has become popularly known as gay panic or

---

54 *Id.*

55 *See id.* at 497 (citing Franklin & Herek, *supra* note 51, at 148 ("Franklin and Herek comment, '[p]articularly revealing in the case, was the popular perception that the television show's producers had humiliated the heterosexual man and thus were responsible for the murder.'")).

56 Chen, *supra* note 34, at 199; Lee, *supra* note 15, at 497.

57 WAYNE R. LAFAVE, CRIMINAL LAW FIFTH EDITION § 15.2 (West 2010).

58 Lee, *supra* note 15, at 500. The non-violence of the sexual advance is essential. Any violence used in the solicitation allows the defendant to claim self-defense as justification for the killing. Chen, *supra* note 34, at 202.

homosexual panic, it is sometimes described as the "non-violent homosexual advance" defense.[59]

A defendant employing a trans panic defense uses a strategy similar to the non-violent homosexual advance defense under the provocation framework.[60] Although the trans panic defense is a variation of the gay panic and homosexual advance defenses, the trans panic defense has usually relied on the provocation framework instead of the insanity and diminished capacity frameworks.[61]

In a typical trans panic defense case, the victim, a biological male that presents as a female, and the male defendant will first engage in consensual sexual activity.[62] It is only after the sexual act concludes that the defendant finds out about the victim's biological sex, leading the defendant to kill the victim.[63] The defendant, at trial, then claims that the victim deceived the defendant by presenting as a female.[64] And once the victim revealed his biologi-

---

59 Chen, *supra* note 34, at 202. Many of the cases where gay panic is used to support a provocation defense involve a defendant that has been the subject of a homosexual advance. Scott D. McCoy, Note: *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 641 (2001). However, there is at least one case where the defendant employed a provocation defense when he was not the subject of a solicitation. In *Commonwealth v. Carr*, a man shot two lesbian women, killing one of them, after he found them naked and lovemaking. 580 A.2d 1362, 1363 (Pa. 1990). The defendant argued that his rage against homosexuality provoked him to shoot. *Id.* This use of the provocation defense corresponds more to a homosexual panic defense rather than a homosexual advance defense. McCoy, *supra*, at 641 n. 73.

60 *See* Steinberg, *supra* note 21, at 3.

61 *Id.*

62 *See id.*

63 Lee, *supra* note 15, at 513.

64 *Id.* at 516.

cal sex as male and not female, it provoked the defendant into a heat of passion.[65]

In a way, the trans panic defense demands less of a provocation than the homosexual advance defense. While the homosexual advance defense requires that the victim make some sort of unwanted sexual advance toward the defendant, in trans panic cases the initial sexual relation is often consensual and welcome by both the defendant and the victim, albeit the defendant is mistaken about the biological sex of the victim. The defendant does not lose his self-control or has any desire to kill the victim until after the biological sex of the victim is revealed. The provocative act is the revelation of the victim's transgender identity, not the sexual act itself.[66]

A defendant employing gay panic to establish the provocation defense will argue that the victim's sexual orientation and actions reasonably provoked the defendant. In a trans panic case, the defendant will argue that it was a deception about the victim's transgender identity that provoked the defendant. By making these arguments, the defendant appeals to deeply rooted negative feelings about homosexuality and trans-sexuality.[67] It implicitly supports the idea that a heterosexual man's disgust and bias against gay or transgender individuals is reasonable and that a violent reaction, a killing no less, toward gay and transgender individuals is an understandable outcome of that bias.[68]

---

65 Steinberg, supra note 21, at 3.

66 *See id.* at 12.

67 *See* Bagnall, Gallagher & Goldstein, *supra* note 28, at 501; Lee, *supra* note 15, at 504; Steinberg, *supra* note 21, at 4.

68 *See* Steinberg, *supra* note 21, at 10; Lee, *supra* note 15, at 517.

3. Defense of Self-Defense

Defendants charged with the murder of a gay victim also have enjoyed some success when claiming gay panic using the defense of self-defense.[69]

The defense of self-defense justifies a person who, when faced with violence and is not the aggressor, uses a reasonable amount of force against another if the person reasonably believes that he is in immediate danger of unlawful serious bodily harm and that the use of such force is reasonably necessary to avoid the danger.[70] Using gay panic under the self-defense framework, the defendant attempts to show that the victim made some advance or overture, and that the defendant reasonably believed defensive force was necessary because the advance posed an imminent danger of serious bodily harm due to a sexual assault.[71] Usually, the defendant focuses on the victim's sexual orientation to convince the jury that his perception of danger was reasonable and that his violent response was reasonably necessary.[72]

The defense of self-defense used in this manner is often inappropriate because the threat of danger coming from the victim usually falls short of the serious bodily harm standard, and the defendant's use of force to thwart any perceived attack far outweighs the amount of force supplied by the victim.[73]

To assert the defense, the defendant points to the victim's sexual orientation as a reason why the defendant reasonably perceived a

---

[69] Bagnall, Gallagher & Goldstein, *supra* note 28, at 498 & n. 3; Lee, *supra* note 15, at 517.

[70] LAFAVE, *supra* note 58, § 10.4.

[71] Comstock, *supra* note 33, at 82.

[72] *See id.* at 89; Suffredini, *supra* note 38, at 300.

[73] Comstock, *supra* note 33, at 95-96.

threat of serious bodily harm. There are cases where the defendant used the fact that the victim was gay to argue that the defendant faced a greater amount of danger over and above the danger posed by the victim's actions alone.[74] This tactic attempts to call up negative stereotypes about "homosexuals," including one that casts LGBT individuals as sexual predators,.[75] The defendant then suggests that because the victim was homosexual, the victim's advance must have been more aggressive than his actions would have otherwise indicated.[76]

Another way for a defendant to improperly use a victim's sexual orientation to bolster claims that he actually believed that he was in serious danger is to claim that he suffered from homosexual panic disorder, which heightened his perceived danger.[77] Although the cases are not clear, the defendant probably attempts to convince the jury to consider his weakened mental condition when deciding if his perception of danger was objectively reasonable.[78]

---

[74] McCoy, *supra* note 60, at 640 n. 67 (providing two example cases, *People v. Rowland*, 69 Cal. Rptr. 269 (Cal. Ct. App. 1968), and *Walden v. State*, 307 S.E.2d 474 (Ga. 1983), where the defendant pointed to the victim's sexual orientation as evidence that a sexual advance was more menacing or violent in order to assert the defense of self-defense).

[75] Mison, *supra* note 24, at 157 (describing common negative stereotypes surrounding the term "homosexual," which include: "homosexuals are loathsome sex addicts who spread AIDS and other venereal diseases; homosexuals are unable to reproduce and therefore must recruit straight males to perpetuate their ranks; homosexuals are unproductive and untrustworthy members of society; homosexuals are insane and dangerous because homosexuality is a mental illness").

[76] Comstock, *supra* note 33, at 97.

[77] *See* Suffredini, *supra* note 38, at 299; Lee, *supra* note 15, at 518-19.

[78] *See* Comstock, *supra* note 33, at 95 (citing Bagnall, Gallagher & Goldstein, *supra* note 28, at 508 (quoting Parisie v. Greer, 671 F.2d 1011, 1016 (7th Cir. 1982))).

However, as mentioned above, the use of homosexual panic disorder in this manner is inappropriate. Not only has the APA discredited homosexual panic as a true disorder, but also the disorder, as it was clinically defined, had always described afflicted patients as self-punishing, withdrawing, and passive, not aggressive.[79]

The defendant's perception of danger notwithstanding, the defendant usually employs a greater amount of force than is reasonably necessary to avoid the danger.[80] Reports from various news sources indicate that there is a tendency for defendants to overpower and use excessive force against their victims.[81] Gary David Comstock, in his article, surveys a number of cases where excessive force was used, including when defendants attacked the victim in groups;[82] used weapons against unarmed victims;[83] and acted in a manner that suggested premeditation rather than in response to an unexpected sexual assault.[84] In these cases, a jury should find that the excessive force disqualifies the defendant from the defense of self-defense; however cases have shown that juries permit the excessive force when the sexual orientation of the victim is at issue.[85]

---

[79] Comstock, *supra* note 33, at 95-96; *see supra* text accompanying notes 33-38.

[80] Comstock, *supra* note 33, at 95.

[81] *Id.* at 96.

[82] *Id.* at 96 & n. 105.

[83] *Id.* at 96 & nn. 106-12.

[84] *Id.* at 96-97 & nn. 113-18.

[85] Lee, *supra* note 15, at 518-20. For example, a jury found that when the defendant, a 30 year old, muscular, stocky, construction worker, claimed that he was sexually assaulted by an overweight and weak 58 year old, deadly force was appropriate despite the likelihood that the defendant probably could have avoided the assault without killing the victim. *Id.* at 520.

The use of gay panic for the defense of self-defense relies and propagates negative stereotypes about gay men.[86] It attempts to appeal to juries' biases and invites them to mischaracterize both the advance as seriously threatening and the defendant's violent reaction as reasonable, simply because of the victim's sexual orientation.

C. Sample Cases Involving Gay Panic or Trans Panic

1. Scott Amedure

The "Jenny Jones murder case" is a well-known case where a diminished capacity gay panic defense was used successfully.[87] Jonathan Schmitz had been invited to the Jenny Jones Show on March 6, 1995 to discuss the topic of *Secret Admirers*.[88] Schmitz expected an ex-girlfriend to appear as his secret admirer, but instead Schmitz's male friend, Scott Amedure, appeared.[89] Schmitz was surprised and embarrassed to learn that Amedure had a crush on him, but appeared to take the revelation well.[90] Three days after the show, Amedure left a flashing construction light and an unsigned note in front of Schmitz's apartment, which read, "John. If you want it 'off' you'll have to ask me. P.S. It takes a special tool. Guess Who."[91] Schmitz, believing the note to be a sexual proposition from Amedure purchased a shotgun and ammunition.[92] He then drove to Amedure's home, and after Amedure ad-

---

86 Lee, *supra* note 15, at 518.

87 *Id.* at 495.

88 *Id.*; Suffredini, *supra* note 38, at 279.

89 Lee, *supra* note 15, at 495.

90 *Id.*

91 *Id.* at 495-96.

92 *Id.* at 496

mitted to writing the note, Schmitz shot him twice in the heart, killing him.[93]

Charged with premeditated murder, Schmitz argued that he suffered from diminished capacity due to homosexual panic disorder and the embarrassment he experienced when Amedure revealed his attraction to Schmitz on the Jenny Jones Show.[94] He claimed that the panic rendered him unable to plan the killing and therefore could not be guilty of premeditated murder.[95] The prosecution presented overwhelming evidence that Schmitz deliberated and premeditated Amedure's killing, however the jury believed Schmitz's claim of diminished capacity caused by homosexual panic and reduced the charge to second-degree murder.[96]

2. Gwen Araujo

Gwen Araujo (born Edward Araujo), a 17 year old transgender teen, was brutally murdered when she was beaten and choked after two men, with whom she had sexual relations, discovered that she was biologically male.[97] In the summer of 2002, Michael Magidson and José Merel met Gwen Araujo and they engaged in consensual sex.[98] Although Gwen Araujo was biologically male, she lived as a female.[99] Magidson and Merel began to suspect that Araujo was not biologically female several months later and tried to find out by taking Araujo in a bathroom and hiking up her skirt during a party.[100] When Magidson learned that Araujo was biolog-

---

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 Lee, *supra* note 15, at 514; Steinberg, *supra* note 21, at 1-2.

98 Lee, *supra* note 15, at 514.

99 *Id.*

100 *Id.*

ically male, Magidson began to punch, choke, and kick Araujo.[101] Merel joined the attack by beating Araujo with a frying pan and a soup can.[102] They then carried Araujo to a garage where they strangled her, tied her up, and hit her with a shovel.[103] Araujo died that night.[104]

At trial, Magidson's attorney employed a trans panic defense by claiming that Magidson's violence was caused by the shock at discovering that Araujo was transgender, which provoked Magidson to kill in the heat of passion.[105] Magidson's attorney further explained that when Magidson's discovered that he unknowingly engaged in homosexual sex, it stirred up in him revulsion and rage.[106] The jury, unable to decide whether to accept Magidson's trans panic defense, deadlocked.[107] In the second trial, Magidson's attorney again argued that Magidson was provoked and killed in the heat of passion.[108] The jury, however, rejected Magidson's claim and found him guilty of second-degree murder.[109]

3. Terrance Michael Hauser Jr.

Stabbed sixty-one times, Terrance Michael Hauser Jr. died on March 5, 2008, in his own home. His killer, Joseph Biedermann, walked away from the scene with nothing more than a few scratches and cuts on his arms. Biedermann claimed he killed Hauser in self-defense.

---

101 *Id.* at 515.
102 *Id.*
103 *Id.*; Steinberg, *supra* note 21, at 2.
104 Steinberg, *supra* note 21, at 2.
105 Lee, *supra* note 15, at 515.
106 *Id.*
107 *Id.*
108 *Id.* at 516.
109 *Id.* at 516-17.

The two first met at a neighborhood bar in Hoffman Estates, Illinois, a suburb of Chicago, in the early morning hours.[110] They were drinking and talking about sports until the bartender refused to continue serving Biedermann.[111] They then both left the bar and went to Hauser's apartment to continue drinking.[112]

At trial, Biedermann testified that at the apartment, they continued to talk until Biedermann passed out on the couch.[113] When he woke, Hauser, according to Biedermann, was standing over him with a medieval sword and a dagger and threatened him with a sexual assault.[114] Biedermann then claimed to struggle with Hauser, removing the dagger from his hands.[115] Biedermann then slayed Hauser with the dagger repeatedly in order to escape.[116] Biedermann said that left the apartment wounded.[117] Biedermann also portrayed Hauser as a child pornography abuser. He claimed that before he passed out, Hauser asked if Biedermann liked pornography and said that he had "kiddie porn."[118]

---

110 Marie Wilson, *Man Says Stabbing Purely Self-Defense Hoffman Estates Resident Says Neighbor Was Trying to Sexually Assault Him*, CHI. DAILY HERALD, July 8, 2009, at 5.

111 Barbara Vitello, *Testimony Concludes in Wrongful Death Suit*, CHI. DAILY HERALD, March 11, 2011, at 4; Christopher Placek, *Suspect: 'I Was in Big Trouble,'* CHI. DAILY HERALD, at 1.

112 Vitello, *supra* note 112.

113 Placek, *supra* note 112.

114 *Id.*

115 *Id.*

116 Eric Zorn, Op-Ed, *Murder Defendant Gambles — and Wins*, CHI. TRIB., July 17, 2009, at 21.

117 Wilson, *supra* note 111.

118 Placek, *supra* note 112.

Medical reports later confirmed that Hauser was stabbed sixty-one times.[119] He suffered several fatal lacerations, including wounds to his jugular vein, lungs, kidneys, pancreas, and abdomen.[120] Biedermann's injuries, however, were far less severe.[121] Biedermann had a scratch on his right bicep, cuts on both forearms, and a few minor scratches on his hands.[122] Additionally, police analysis of Hauser's computer showed that while Hauser did access websites containing child pornography, he had not downloaded any images.[123]

The prosecutor tried to poke holes in Biedermann's story and his claim of self-defense.[124] Michael Clark, the state's attorney, questioned Biedermann on why his injuries were so minor, especially when compared with the slashing that he laid on Hauser.[125] Clark also pointed out that there was little evidence of a life-and-death struggle.[126] There were no overturned pieces of furniture, two video game guitars remained untouched, and even two half-filled glasses of wine stood upright on the coffee table.[127] Additionally, the police officer that interviewed Biedermann shortly after the killing testified that Biedermann never mentioned an attempted sexual assault.[128] Clark also questioned why Biedermann would need to stab Hauser sixty-one times just to escape.[129] Blood tests

---

119 Vitello, *supra* note 112.
120 *Id.*
121 Wilson, *supra* note 111.
122 *Id.*
123 Placek, *supra* note 112.
124 Vitello, *supra* note 112.
125 *Id.*
126 *Id.*
127 *Id.*
128 Placek, *supra* note 112.
129 *See* Vitello, *supra* note 112.

showed that Hauser was more drunk than Biedermann that night, and Biedermann was also physically larger than Hauser.[130] Clark's point was that Biedermann's actions could not have been committed solely for self-defense; the violence was just too excessive.[131]

In Illinois, first-degree murder does not require premeditation.[132] First-degree murder requires only that the killer intentionally, knowingly, or recklessly kill and can include killings committed "under the influence of extreme mental or emotional disturbance."[133] Second-degree murder is a killing that could qualify as a first-degree murder; but the killer also believed circumstances existed which would excuse or justify the killing, albeit his beliefs were both false and unreasonable.[134] Biedermann, using an all-or-nothing strategy, declined the option to allow a second-degree murder instruction.[135] This left the jury two options: convict Biedermann on first-degree murder or accept his explanation that he acted solely in justifiable, and reasonable, self-defense.[136] The jury decided to acquit.[137]

D. Secondary Victimization and Discrimination

The ongoing use of gay panic and trans panic defenses subject victims and the LGBT community to secondary victimization. Secondary victimization occurs when people of minority status expe-

---

130 *Id.*; Zorn, *supra* note 117.

131 *See* Vitello, *supra* note 112.

132 720 ILL. COMP. STAT. ANN. 5/9-1 (West 2002); *see also* Zorn, *supra* note 117.

133 § 9-1(a) & (c)(2).

134 § 9-2(a)(2).

135 Vitello, *supra* note 112.

136 Zorn, *supra* note 117.

137 Vitello, *supra* note 112.

rience reduced or unavailable civil protections due to their status.[138] It also occurs when others respond to victims negatively after a crime due to their status.[139] Secondary victimization conveys to the minority group that the group does not deserve full legal protection and justice.[140] It also signals to those outside the minority group that bias crimes will not be punished and may even be acceptable.[141]

When gay panic or trans panic defenses are employed, it asks the jury to find that the victim's sexual orientation or gender identity was to blame for the defendant's reaction leading him to kill.[142] In doing so, the defense appeals to stereotypes that LGBT persons are sexually predatory and blames the victim for provoking or inviting the attack.[143] In essence, it send the message that because of their LGBT status, LGBT persons will be perceived as wrongdoers themselves, and this perception may influence the judge or jury's view of the events and the ultimate judgment of the case.[144]

Further, it impedes the prevention and prosecution of later bias crimes and also contributes to the perception that such crimes are

---

138 Berrill & Herek, *supra* note 25, at 402.

139 Monique Noella, *The Psychological and Social Effects of Antibisexual, Antigay, and Antilesbian Violence and Harassment*, *in* 2 HATE CRIMES 73, 79 (Barbara Perry ed., 2009).

140 *See* Berrill & Herek, *supra* note 25, at 403.

141 *See id.;* Teresa Eileen Kibelstis, Student Article, *Preventing Violence Against Gay Men and Lesbians: Should Enhanced Penalties at Sentencing Extend to Bias Crimes Based on Victims' Sexual Orientation?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309, 325 (1995).

142 Lee, *supra* note 15, at 471 & 475.

143 Berrill & Herek, *supra* note 25, at 404-05.

144 Kibelstis, *supra* note 142, at 323.

not unanimously condemned or are excusable.[145] Inquiries into a victim's actions undermine an LGBT person's belief in the fairness of the criminal justice system.[146] Furthermore, when the gay panic or trans panic defenses result in a more lenient sentence, the LGBT community senses an unwillingness, by the courts, to protect LGBT individuals to the same extent as heterosexuals.[147]

Moreover, it is designed to stir up and reinforce the anti-gay or anti-transgender emotions and stereotypes that led to the killings in the first place.[148] The recognition of a gay panic or trans panic defenses allows, or rewards, anti-LGBT violence because hatred of LGBT individuals becomes a reasonable excuse for committing a violent crime against LGBT individuals.[149] Leniency in the courts for anti-LGBT violence casts LGBT individuals as especially vulnerable victims because they lack legal protections against discrimination and it may even embolden biased offenders to attack.[150] Furthermore, it reinforces the idea that murder is an appropriate response to a sexual advance.[151]

The persisting acceptance and success of these defenses in court illustrate the continuing discrimination against gay and transgender individuals.[152] A common element between all the gay panic defenses is the suggestion that LGBT individuals and relationships are objectionable or disgusting and that permits, or

---

145 Christopher J. Lyons, *Stigma or Sympathy? Attributions of Fault to Hate Crime Victims and Offenders*, 69 SOC. PSYCHOL. Q. 39, 39 (2006).

146 Kibelstis, *supra* note 142, at 323.

147 *Id.* at 324.

148 Bagnall, Gallagher & Goldstein, *supra* note 28, at 501.

149 Kibelstis, *supra* note 142, at 325.

150 *Id.* at 333.

151 Berrill & Herek, *supra* note 25, at 405.

152 *See* Steinberg, *supra* note 21, at 11.

at least partially excuses, excessive violence towards LGBT people. Martha Nussbaum[153] and Victoria Steinberg[154] compare these gay panic and trans panic defenses to the defenses used long ago where violence was excused against victims who were Jewish, black, or with disabilities.[155] Just as those defenses have been discredited, the defenses where the defendant's violence is due to some negative reaction to the victim's sexual orientation or gender identity should also be discredited. The permissiveness and success of gay panic and trans panic defenses perpetuate bias and discrimination against LGBT persons.

III. Courts and Legislatures Have Begun to Curtail Gay Panic and Trans Panic Defenses

As gay panic and trans panic defenses have become less credible and more obviously driven by discriminatory intent, some courts have refused to recognize the validity of the defense and some legislatures have acted to limit their success.

A. Categorical Limits on Gay Panic and Trans Panic Defenses

1. Judicially Created Restraints on Gay Panic Defenses

In the last few decades, courts increasingly have been skeptical of gay panic arguments to support defense claims of insanity or provocation. Trial courts, unconvinced by gay panic arguments, have refused to provide juries with applicable defense instructions. At the same time, appellate courts have made strong statements about why gay panic arguments are inadequate. The fol-

---

153 MARTHA C. NUSSBAUM, HIDING FROM HUMANITY (2004).

154 Steinberg, *supra* note 21, at 1.

155 *Id*. at 11 (citing NUSSBAUM, *supra* note 154, at 134).

lowing, a survey of some of those cases, indicate a step in the right direction. However, in most jurisdictions, gay panic arguments remain viable and continue to do harm in a wide range of circumstances.

a. Restrictions on the Defense of Insanity

Several courts have explicitly rejected homosexual panic as a basis for the insanity defense. In Massachusetts, for example, the Supreme Judicial Court rejected a defendant's argument that he was entitled to invoke an insanity defense against a charge of murder because he suffered from homosexual panic.[156] On February 6, 1979, the defendant, William Doucette Jr. drove to a motel with Ronald Landry.[157] Once arriving to the motel, Doucette and Landry engaged in sexual activity after which Doucette stabbed Landry in the heart, chest, neck, and back.[158] Doucette then left Landry to die.[159] Doucette later claimed that he killed Landry due to an attempted homosexual attack.[160]

At trial, Doucette was found guilty of murder in the first degree.[161] Doucette appealed and argued that he was denied effective assistance of counsel because his attorney did not investigate or argue an insanity defense.[162] Doucette pointed to a jail infirmary report that characterized his actions as a "homosexual panic."[163] Doucette argued that this report should have motivated counsel to investigate the possibility of employing an insanity de-

---

156 *See* Commonwealth v. Doucette, 462 N.E.2d 1084, 1097 (Mass. 1984).

157 *Id.* at 1089.

158 *Id.* at 1089-90.

159 *See id.* at 1089-90.

160 *Id.* at 1089.

161 *Id.* at 1088.

162 *Id.* at 1096-97.

163 *Id.* at 1097.

fense.[164] The court disagreed.[165] It found that homosexual panic, rather than point to a mental disorder which would compel the interposition of an insanity defense, was merely the defendant's characterization of the events.[166] In other words, the court rejected Doucette's claim that he would have been able to argue insanity because homosexual panic was not a mental disorder.[167]

b. Restrictions on the Defense of Provocation

Similarly, several courts have curtailed the use of gay panic arguments as a basis for provocation. In one high-profile Pennsylvania case, for example, Claudia Brenner and Rebecca Wight were hiking along the Appalachian Trail.[168] Having stopped to rest for the night at a suitable campsite, the two engaged in lovemaking.[169] Suddenly, Brenner was shot five times in her right arm, her face, and her neck.[170] Wight immediately ran for cover but was also shot in her head and back.[171] After the shootings, Brenner attempted to help Wight, who had become unconscious.[172] Unable to revive her, Brenner left for help, but by the time help arrived Wight had died.[173]

Police soon arrested Stephen Roy Carr for his suspected shooting and killing.[174] Carr, tried by a bench trial, was found guilty of

---

164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*
168 Commonwealth v. Carr, 580 A.2d 1362, 1363 (Pa. Super. Ct. 1990).
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.*
173 *Id.*
174 *Id.*

first-degree murder.[175] Carr attempted to argue that he shot Brenner and Wight in the heat of passion caused by the provocation of their nude homosexual lovemaking.[176] To support his argument, Carr offered to show a history of constant rejection by women, including his mother who may have been a lesbian.[177] He further argued that this evidence was relevant because he was impassioned when provoked by the "show" put on by the women, including their nakedness, their hugging and kissing and their oral sex.[178] The trial court, however, refused to consider Carr's evidence of his psychosexual history, finding it irrelevant.[179]

On appeal, the Superior Court of Pennsylvania agreed with the trial court that Carr's evidence of his psychosexual history was irrelevant to prove the defense of provocation.[180] The court held that regardless of Carr's psychosexual history, the sight of lovemaking could never form adequate provocation.[181]

> The sight of naked women engaged in lesbian lovemaking is not adequate provocation to reduce an unlawful killing from murder to voluntary manslaughter. It is not an event which is sufficient to cause a reasonable person to become so impassioned as to be incapable of cool reflection. . . . [T]he law does not condone or excuse the killing of homosexuals any more than it condones the killing of heterosexuals. Similarly, it does not recognize homosexual

---

175 *Id.*
176 *Id.*
177 *Id.* at 1363-64.
178 *Id.* at 1364.
179 *Id.*
180 *Id.* at 1365.
181 *Id.* at 1364.

> activity between two persons as legal provocation sufficient to reduce an unlawful killing of one or both of the actors by a third person from murder to voluntary manslaughter.[182]

Hence, the court limited the gay panic defense by categorically eliminating the sight of same-sex sexual activity from what may constitute legally adequate provocation.[183]

In a pair of cases, the Massachusetts Supreme Judicial Court rejected the allegation that verbal solicitations coupled with either a touch on the leg or a touch of the genitals were enough for provocation. On September 29, 1988, Joshua Halbert and Kevin Pierce telephoned David McLane, an acquaintance of Pierce, to have him pick up Halbert and Pierce to "go party" at McLane's apartment.[184] McLane treated Halbert and Pierce to beer, whiskey, and rum, and they watched pornographic films.[185] At some point, Halbert left the apartment to purchase cigarettes when McLane grabbed Pierce's genitals and said, "You know you want it."[186] Pierce rejected McLane by pushing him away.[187]

Once Halbert returned, Pierce told McLane that Halbert and he were gay.[188] McLane responded by placing his hand on Halbert's

---

182 *Id.* at 1364-65.

183 *Id.* at 1364.

184 Commonwealth v. Pierce, 642 N.E.2d 579, 581 (Mass. 1994); Commonwealth v. Halbert, 573 N.E.2d 975, 977 (Mass. 1991).

185 *Pierce*, 642 N.E.2d at 581.

186 *Id.*

187 *Id.*

188 *Halbert*, 573 N.E.2d at 977.

knee and asking, "Josh, what do you want to do?"[189] Halbert refused McLane's invitation.[190]

This was when Pierce and Halbert's attack on McLane began. Pierce came from behind McLane, locked his arm around McLane's neck, and choked him.[191] Halbert then kicked and punched McLane in the groin, slashed McLane's neck with a razor blade, and smashed a whiskey bottle over McLane's head.[192] Pierce released his hold over McLane, and with a few steak knives, stabbed McLane twice through his left temple.[193]

At Halbert's trial, the judge refused to instruct the jury on voluntary manslaughter due to provocation, and the jury found Halbert guilty of first-degree murder.[194] Halbert argued on appeal that the trial court erred when it did not provide the manslaughter instruction.[195] He argued that McLane provoked him when McLane put his hand on Halbert's knee and asked, "Josh, what do you want to do?"[196] Halbert also offered evidence that he was sexually abused as a child and that he was the victim of a homosexual "gang" rape.[197] However, this did not persuade the court. First, the court discounted Halbert's history of sexual abuse by stating, "[I]t has no bearing on the question whether the victim's conduct satisfied the objective test of provocation."[198] The court then re-

---

189 *Id.* at 979.
190 *Id.* at 977.
191 *Pierce*, 642 N.E.2d at 581; *Halbert*, 573 N.E.2d at 977.
192 *Pierce*, 642 N.E.2d at 581; *Halbert*, 573 N.E.2d at 977.
193 *Halbert*, 573 N.E.2d at 977.
194 *Id.* at 976.
195 *Id.*
196 *Id.* at 979.
197 *Id.* at 978-79.
198 *Id.* at 979.

jected Halbert's assertion that McLane's questions to Halbert along with the touch of the knee was sufficient provocation.[199] The court reasoned that neither the question nor the accompanying physical gesture was enough to produce in an ordinary person a heat of passion.[200] The court found Halbert's evidence insufficient and affirmed the trial court.[201]

At Pierce's trial, the judge also refused to instruct the jury on voluntary manslaughter due to provocation.[202] Having then been convicted of first-degree murder, Pierce argued on appeal that the trial judge erred by not providing the manslaughter instruction.[203] He asserted that McLane's statement, "You know you want it," and McLane's grabbing of Pierce's genitals were provocation enough to incite a heat of passion.[204] Just like in *Halbert*, the court disagreed.[205] It held that a sexual invitation and the grabbing of genitals were insufficient to provoke a reasonable person into a homicidal response.[206] The court then upheld the trial court's decision not to provide a voluntary manslaughter instruction.[207]

Other state courts have also similarly limited the use of gay panic in supporting a provocation defense.[208]

---

199 *Id.*

200 *Id.*

201 *Id.*

202 *Pierce*, 642 N.E.2d at 581.

203 *Id.* at 582.

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.* at 583.

208 *E.g.,* People v. Page, 737 N.E.2d 264, 273-74 (Ill. 2000) (attempting to "make out" with the defendant is not a category of provocation); Commonwealth

2. International Attempts to Eliminate Gay Panic and Trans Panic Defenses

Internationally, some jurisdictions have responded to panic defenses by disallowing gay panic or trans panic to support adequate provocation.

Queensland, Australia is currently experiencing public pressure to change its criminal code to exclude non-violent sexual advances from the defense of provocation.[209] This follows after the beating and death of Wayne Robert Rucks in 2008 by two men, Richard John Meerdink and Jason Andrew Pearce, who claim they attacked Rucks after he tired to grab Pearce's crotch.[210] They beat Rucks to death near a church in Maryborough, Queensland, Australia, and left Rucks to die of his injuries through the night.[211] The two escaped a murder conviction and were instead found guilty of manslaughter.[212]

---

v. Troila, 571N.E.2d 391, 394-95 (Mass. 1991) ("making a pass" at the defendant is not evidence that provocation existed); State v. Volk, 421 N.W.2d 360, 365 (Minn. Ct. App. 1988) (revulsion by the defendant to a homosexual advance is not a provocation sufficient to elicit a heat of passion response); State v. Latiolais, 453 So. 2d 1266 (La. App. 3d Cir. 1984) (touching defendant's leg in a manner which was not rough but just "meaningful," indicating that the victim was determined to have sexual relations with the defendant, was not provocation sufficient to justify vicious attacks).

209 *Support for 'Gay Panic' Petition*, SUNSHINE COAST SUNDAY (Queensland, Austl.), January 15, 2010, at 10.

210 *Call to End 'Gay Panic,'* COURIER MAIL (Austl.), January 11, 2012, at 9; Carlie Walker, *Gay Panic Defence Deplorable — Priest*, FRASER COAST CHRONICLE (Queensland, Austl.), November 19, 2011, at 7.

211 Annie Guest, *Gay Panic Under Focus Again*, ABC TRANSCRIPTS (Austl.), January 11, 2012.

212 *Id.*

Since the killing, public outcry has prompted Queensland Attorney-General Paul Lucas to announce that he would recommend changes to the criminal code that would ensure that an unwanted sexual advance would not be enough to establish provocation.[213] However, he qualified the change by remarking that a provocation defense could still succeed if there were exceptional circumstances.[214]

If Queensland, Australia enacts changes to its criminal code specifically outlawing the use of non-violent sexual advance from its defense of provocation, it will be the third state or territory in Australia to do so.[215] Both the Australian Central Territory and Northern Territory both have provisions in their criminal code that specifically reject the use of non-violent sexual advances to claim provocation.[216] As of February 2012, no bill has yet been introduced in the Queensland parliament that would amend the criminal code.[217]

---

213 *Blight Government Set to Change Criminal Code*, AUSTL. GOV'T NEWS, January 25, 2012.

214 *Id.*

215 *QLD: Fry Supports Qld Gaw Law Protest*, AAP NEWSFEED (Austl.), January 11, 2012.

216 Crimes Act 1900, AUSTL. CAP. TERR. LAWS § 13(3) (2012) ("[C]onduct of the deceased consisting of a non-violent sexual advance (or advances) towards the accused — (a) is taken not to be sufficient, by itself, to be conduct to which [the defense of provocation] applies; . . . ."); Criminal Code Act, N. TERR. AUSTL. LAWS § 158(5) (2012) ("[C]onduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant: (a) is not, buy itself, a sufficient basis for a defence of provocation; . . . .").

217 Queensland Government, Bills Introduced to the 53rd Parliament (Feb. 20, 2012), http://www.legislation.qld.gov.au/Bill_Pages/Bill_53_12.htm.

B. Jury Instructions to Eliminate Bias

States are also becoming concerned about the use of gay panic strategies in courts to obtain lesser charged offenses or lighter sentences. To combat the use of gay panic or trans panic defenses, state legislatures have considered a number of laws aimed at reducing the impact that these strategies have in the courtroom.

1. California Requires Anti-bias Jury Instructions

In the wake of the vicious murder of Gwen Araujo and the uncertainty that her killers would be held accountable,[218] the California legislature sought to curtail the use of gay panic defenses by defendants. In 2006, the California legislature passed and Governor Arnold Schwarzenegger signed into law the Gwen Araujo Justice for Victims Act, aimed at limiting the success of gay panic defenses.[219]

The Act made legislative findings and declarations that the use panic strategies, which appeal to societal bias against a person's sexual orientation or gender identity, conflicted with California's public policy.[220] The Act further provides that in a criminal trial, either party may request a jury instruction which instructs the jury not to let bias, prejudice, or public opinion to influence its decision about the defendant's culpability.[221]

---

218 *Prosecutors Examine Ways to Counter 'Gay Panic' Defense*, USA TODAY, July 21, 2006, http://www.usatoday.com/news/nation/2006-07-21-gaypanic-trials_x.htm; *see supra* text accompanying notes 98-110.

219 2006 Cal. Legis. Serv. ch 550 (West); *see also News in Brief*, S. VOICE (Atlanta), October 6, 2006, at 16.

220 2006 Cal. Legis. Serv. ch 550 § 2(d) (West).

221 *Id.* § 3.

2. New York Attempts to Enact Anti-bias Jury Instructions

Following California's example, the members of the New York legislature have also attempted to pass laws that would curb the effect of panic strategies. The first of these bills was introduced by Assemblyman Ruben Diaz Jr.[222] after the arrest of a 16 year old suspect who allegedly attacked a drag queen performer, Kevin Aviance, when the performer allegedly made an inappropriate advance toward the suspect.[223] The bill was modeled closely after California's AB 1160 bill.[224] It provided legislative findings and declarations affirming New York's stance against hate crimes and also declared that it is against New York public policy for a defendant to be acquitted or convicted of a lesser crime due to appeals to societal bias against the victim's sexual orientation or gender identity.[225] The bill also allowed either party in a criminal case to request jury instructions aimed at attacking bias or prejudice against the victim's or a witness's sexual orientation or gender identity.[226] The instruction tells the jury not to let bias, prejudice, or public opinion influence its decision.[227]

The bill, although introduced in 2006 and in every legislative session thereafter, has not passed either the Assembly or the Senate.[228]

---

222 Assem. 12079, 2006 Reg. Sess. (N.Y. 2006).

223 Andy Humm, *News Briefs*, GAY CITY NEWS, June 22-28, 2006, http://204.2.109.187/gcn_525/newsbriefs.html.

224 Assem. 12079-Memo, 2006 Reg. Sess., para. 8 (N.Y. 2006).

225 Assem. 12079, 2006 Reg. Sess. § 1 (N.Y. 2006).

226 Assem. 12079, 2006 Reg. Sess. § 2 (N.Y. 2006).

227 *Id.*

228 S. 5738, 2012 Reg. Sess. (N.Y. 2011); Assem. 881, 2012 Reg. Sess. (N.Y. 2011); Assem. 9044, 2010 Reg. Sess. (N.Y. 2009); Assem. 2211, 2010 Reg. Sess. (N.Y. 2009); S. 3359, 2008 Reg. Sess. (N.Y. 2007); Assem. 3763, 2008 Reg. Sess. (N.Y. 2007).

C. Education of Courts, Attorneys, and Law Enforcement

Another way legislatures and governments can combat the success of gay panic defenses is to educate courts, prosecutors, defense attorneys, and the public about the strategy. This was what law enforcement officials did in Atlanta after Ahmed Dabarran, a Fulton County, Georgia, assistant district attorney, was killed by Roderiqus Reshad Reed on May 6, 2001.[229]

At trial, Reed testified that Dabarran lured Reed to his apartment with the promise of a party "with girls," and then forced Reed to accept oral sex at gunpoint.[230] To escape, Reed hit Dabarran several times in the head.[231] Prosecutors questioned Reed's account by arguing that Dabarran was actually asleep at the time that Reed attacked him.[232] The jury accepted Reed's account and acquitted him of murder and all other charges.[233] Critics claimed that the case's outcome was due to a failure of prosecutors to effectively counter Reed's gay panic defense.[234] Specifically, critics blamed the poor result on the lack of knowledge about gay panic.[235]

Following Reed's acquittal, the Atlanta Police Department and the Federal Bureau of Investigation's Atlanta office hosted the first national symposium on "Defeating the Gay Panic Defense."[236]

---

229 Laura Douglas-Brown, *Symposium Takes Aim at 'Gay Panic' Defense*, WASH. BLADE, March 4, 2005, at 16.

230 *Id.*

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.*

The symposium featured a range of topics, from panels on broad social issues to practical trial advice, such as strategies for police investigations, jury selection, and opening and closing statements.[237]

California also provides education about gay panic and trans panic defenses. The Gwen Araujo Justice for Victims Act instructs a California government agency to develop and provide educational materials to district attorneys explaining how panic strategies are used in court and identify best practices for preventing bias from influencing the jury.[238]

IV. Proposed Responses to Gay Panic and Trans Panic Defenses

To combat the discriminatory effects of gay panic and trans panic defenses, lawmakers should introduce a variety of measures to hamper the strategy. One method is to eliminate non-violent sexual advances or the discovery of a person's gender identity as sufficient for adequate provocation. Legislatures could also provide that any party during a criminal trial may ask that the court instruct the jury to make its decision free from bias or prejudice and to disregard any appeals to societal bias or prejudice. In addition, governments could also provide for the development of materials and training for judges, prosecutors, defense attorneys, and the public educating about the gay panic and trans panic defenses and best practices for dealing with the defense. Eliminate Gay Panic and Trans Panic as Adequate Provocation

---

237 *Id.*

238 2006 Cal. Legis. Serv. ch 550 § 4 (West).

Courts and legislatures are permitted to determine what behavior is sufficient for adequate provocation. Although a state may not prevent a defendant from presenting a full defense, states may change the content of the criminal law by eliminating or narrowing criminal defenses.[239] Eliminating or narrowing a defense to criminal liability is entirely within the legislature's power. For example, a state may define and limit the defense of insanity.[240] In fact, a few have abolished by statute the defense altogether.[241]

Just as legislatures have defined the limits of the defense of insanity, legislatures have also limited what may provide adequate provocation. In Maryland, spousal adultery cannot support a mitigation of murder to voluntary manslaughter based on heat of passion. Since 2002, Maryland law has provided 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."[242] Minnesota has likewise removed a child's cry from a category of acceptable adequate provocation. Minnesota statues provide, "[T]he crying of a child does not constitute provocation."[243]

---

239 *See generally* Rock v. Arkansas, 483 U.S. 44, 52 (1987) ("[F]undamental to [an accused's right to make a defense] is an accused's right to present his own version of events in his own words."); 6 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE §24.4(a) (3d ed. 2007).

240 LAFAVE, *supra* note 58, § 7.1(a) (discussing which of the various rules — the *M'Naghten* rule, the *Durham* rule, or the Model Penal Code rule — states use to determine if a defendant qualifies for the defense of insanity).

241 *Id.* § 7.1(d), at 396.

242 MD. CODE ANN., CRIM. LAW § 2-207(b) (LexisNexis 2002).

243 MINN. STAT. ANN. § 609.20(1) (West 2011).

And in many states, as a matter of common law, "mere words" are never adequate provocation.[244]

Also, as noted earlier, several international jurisdictions have eliminated non-violent sexual advance as a ground for provocation.[245]

Thus, legislatures should exclude non-violent sexual advance as a permitted form of adequate provocation. Additionally, legislatures should disallow the revelation of a person's gender identity from serving as adequate provocation.

1. Model Language

Version 1

(1) A non-violent sexual advance does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to the crime of manslaughter even though the killing was provoked by that advance.

(2) The discovery of a person's sex or gender identity does not constitute legally adequate provocation for the purposes of mitigating a killing from the crime of murder to the crime of manslaughter even though the killing was provoked by that discovery.[246]

Version 2

(1) Conduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant is not a sufficient basis for a defense of provocation.

---

[244] LAFAVE, *supra* note 58, § 15.2(b)(6).

[245] *See supra* text accompanying notes 210-18.

[246] Modeled from section 2-207 of the Criminal Law Code of Maryland. MD. CODE ANN., CRIM. LAW § 2-207 (LexisNexis 2002).

(2) The discovery of the deceased's sex or gender identity is not a sufficient basis for a defense of provocation.[247]

Version 3

(1) Sufficient provocation to support "sudden quarrel" or "heat of passion" does not exist if the defendant's actions are related to discovery of, knowledge about, or the potential disclosure of one or more of the following characteristics or perceived characteristics: disability, gender nationality, race or ethnicity, religion, or sexual orientation, regardless of whether the characteristic belongs to the victim or the defendant. This limitation applies even if the defendant dated, romantically pursued, or participated in sexual relations with the victim.

(2) Sufficient provocation to support "sudden quarrel" or "heat of passion" does not exist if the defendant's actions are related to discovery of, knowledge about, or the potential disclosure of the victim's association with a person or group with one or more of the characteristics, or perceived characteristics, in paragraph (1).

(3) For the purposes of this section, "gender" means sex, and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.[248]

B. Anti-bias Jury Instructions

In general, a jury composed of one's peers will reflect the societal values and be able to take account of the complicated facts of each case better than a legislature. On the other hand, there is a risk

---

[247] Modeled from section 158(5) of the Criminal Code Act of Northern Territory of Australia. Criminal Code Act, N. TERR. AUSTL. LAWS § 158(5) (2012).

[248] Modeled from the California Assembly Bill 1160, as introduced. Assem. 1160, 2006 Reg. Sess. (Cal. 2005).

that jurors, individually and collectively, may be influenced by even subtle biases and prejudices.

To reduce the risk of improper bias, legislatures should provide jury instructions that advise jurors of their duty to apply the law free of improper bias and prejudice.

1. Model Language

In any criminal trial or proceeding, upon the request of a party, the court shall instruct the jury substantially as follows: "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 sexual orientation."[249]

C. Educate Courts, Prosecutors, Defense Attorneys and Juries

Another way legislatures and governments can combat the success of gay panic and trans panic defenses is to educate courts, prosecutors, defense attorneys and the public about the strategy. hey should be aware that gay panic and trans panic defenses are used to inject bias and prejudice against the victim's sexual orientation or gender identity to reduce the culpability of the criminal defendant. Governments should provide educational materials and training to help identify how gay panic and trans panic strategies are used and provide best practices for dealing with those strategies both in court and in the public discourse. Academics

[249] Modeled from section 1127h of the California Penal Code. CAL. PENAL CODE § 1127h (West 2009).

have argued that community education is an essential strategy for halting the success of gay panic or trans panic defenses.[250]

1. Model Language

The [appropriate government agency] shall, to the extent funding becomes available for that purpose, develop practice materials for district attorneys' offices in the [state/jurisdiction]. The materials, which shall be developed in consultation with knowledgeable community organizations and county officials, shall explain how panic strategies are used to encourage jurors to respond to societal bias against people based on actual or perceived disability, gender, including gender identity, nationality, race or ethnicity, religion, or sexual orientation and provided best practices for preventing bias from affecting the outcome of a trial.[251]

V. Conclusion

An individual's sexual orientation or gender identity does not trigger in another person a medical or psychological panic, is not adequately provocative, and does not make a person more life threatening. In living their lives, individuals should be able to live openly, without fear that being honest about one's sexual orientation or gender identity would provide a socially sanctioned excuse or justification that permits fatal violence.

This resolution asks that courts and legislatures affirmatively act to limit the use of gay panic or trans panic arguments to bolster the defense of insanity, diminished capacity, provocation, or self-defense.

---

250 *See generally* Berrill & Herek, *supra* note 25, at 407-10.

251 Modeled from section 4 of the California Assembly Bill 1160, as enacted. 2006 Cal. Legis. Serv. ch 550 § 4 (West).

This resolution also asks that courts and legislatures affirmatively act to thwart the effect of gay panic or trans panic defenses by ensuring that juries are aware of the possibility that subconscious or overt bias or prejudice may cloud their judgment and allowing any party in a criminal trial or proceeding to request a jury instruction informing the jury of their duty to act without improper bias. Furthermore, this resolution asks that efforts be made to educate our courts, prosecutors, defense attorneys, and the public of the prejudicial and discriminatory effect of gay panic and trans panic defenses against the LGBT community.