

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 12-13, 2013

RESOLUTION

RESOLVED, That the American Bar Association urges 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, which seek to partially or completely excuse crimes such as murder and assault on the grounds that the victim’s sexual orientation or gender identity is to blame for the defendant’s violent reaction. Such legislative action should include:

- (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 a person’s sex or gender identity, constitutes legally adequate provocation to mitigate the crime of murder to manslaughter, or to mitigate the severity of any non-capital crime.

REPORT

Executive Summary

Jorge Steven Lopez-Mercado, age 19, was decapitated, dismembered and burned for being openly gay, but according to the police investigator on the case, “people who live this lifestyle need to be aware that this will happen.” When Matthew Shepard, age 21, made a pass at two men in a gay bar, he should have expected to be beaten, pistol-whipped, tied to a fence, and left to die. When Emile Bernard was stabbed, beaten and blinded after coming on to a hitchhiker, his assailant claimed he could not be guilty since the victim “was asking for trouble” by making sexual advances. If Angie Zapata, age 18, hadn’t initially “hidden” that she had male anatomy, her attacker would never have bludgeoned her to death with a fire extinguisher. And when a fellow student shot Larry King, age 15, execution-style in front of their teacher and classmates, his actions were understandable because Larry wore dresses and heels, and said “Love you, baby!” to him the day before. These are actual defenses, offered by real defendants, in United States courts of law that have succeeded in mitigating or excusing real crimes, even today.

The “gay panic” and “trans panic” legal defenses are surprisingly long-lived historical artifacts, remnants of a time when widespread public antipathy was the norm for lesbian, gay, bisexual, and transgender (‘LGBT’) individuals. These defenses ask the jury to find that the victim’s sexual orientation or gender identity is to blame for the defendant’s violent reaction. They characterize sexual orientation and gender identity as objectively reasonable excuses for loss of self-control, and thereby mitigate a perpetrator’s culpability for harm done to LGBT individuals. By fully or partially excusing the perpetrators of crimes against LGBT victims, these defenses enshrine in the law the notion that LGBT lives are worth less than others.

Historically, the gay and trans panic defenses have been used in three ways to mitigate a charge of murder to manslaughter or justified homicide. First, the defendant uses gay panic as a reason to claim insanity or diminished capacity. The defendant alleges that a sexual proposition by the victim triggered a nervous breakdown in the defendant, and then claims to have been afflicted with “homosexual panic disorder.” This insanity defense has been discredited since 1973, when the American Psychiatric Association removed the diagnosis of homosexual panic disorder from its *Diagnostic and Statistical Manual of Mental Disorders*. However, the legal field has yet to catch up with medical progress, and variations on the defense are still being raised in court.

Second, defendants make a gay panic argument to bolster a defense of provocation by arguing that the victim’s sexual advance, although entirely non-violent, was sufficiently provocative to induce the defendant to kill. Similarly, defendants make a trans panic argument for provocation by pointing to the discovery of the victim’s biological sex, usually after the defendant and victim have engaged in consensual sexual relations, as the sufficiently provocative act that drove the defendant to kill.

Third, defendants use gay/trans panic arguments to strengthen their case for self-defense. In these cases, defendants contend that they reasonably believed the victim was about to cause them serious bodily harm because of the victim’s sexual orientation or gender identity. Although the threat of

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danger would otherwise fall short of the standard for self-defense, the defendant asserts that the threat was heightened solely due to the victim's sexual orientation or gender identity.

Successful gay and trans panic defenses constitute a miscarriage of justice. One form of injustice is obvious: the perpetrator kills or injures the victim, and then blames the victim at trial based on sexual orientation or gender identity. In addition, the successful use of these defenses sends a message to the LGBT community that the suffering of a gay or trans person is not equal to the suffering of other victims, and will not be punished in the same manner. By the same token, in excusing violent behavior towards LGBT individuals, courts teach those who hold anti-LGBT bias that the law does not take bias attacks seriously. For those looking to hurt LGBT individuals, nothing can do more harm than the notion that violence, even homicide, is a reasonable response to a life lived openly.

Some courts and legislatures have begun to curtail the use of gay and trans panic defenses. But in other jurisdictions gay and trans panic defenses remain a valid defense option, and are successful in too many courts across the country. This report makes three recommendations to combat the discriminatory effects of gay and trans panic defenses. First, at the request of any party, courts should provide jury instructions advising juries to make their decisions without improper bias or prejudice. Second, legislatures should specify that neither non-violent sexual advances nor the discovery of a person's gender identity can be adequate provocation for murder. Third, state and local governments should proactively educate courts, prosecutors, defense counsel, and the public about gay and trans panic defenses and the concrete harms they perpetuate against the LGBT community.

Continued use of these anachronistic defenses marks an egregious lapse in our nation's march toward a more just criminal system. As long as the gay and trans panic strategies remain available and effective, it halts the forward momentum initiated by criminal law reforms such as rape shield rules and federal hate-crime laws. To reflect our modern understanding of LGBT individuals as equal citizens under law, gay and trans panic defenses must end.

Introduction

Lawrence "Larry" King, 15, was open about being gay. He was teased and bullied incessantly from the age of ten, but he was proud of his identity and openly expressed it through make-up, accessories, and high heels.¹ 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.² Despite this support, one day after saying "Love you, baby!" to another male student, Larry was shot to death in a classroom in front of his classmates.³

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

² *Id.*

³ 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>.

Larry did not touch Brandon McInerney, 14.⁴ He never threatened Brandon, did not make any advances toward him, and did not put him in any kind of danger.⁵ The day before he was murdered, Larry, wearing make-up and high heels, simply asked Brandon to be his valentine.⁶

Brandon's defense at trial was that Larry was sexually harassing Brandon and that Larry's words and wardrobe were responsible for his death.⁷ His attorney argued that Brandon was just responding to Larry, whom he described as an aggressor and a bully who was known to make inappropriate remarks and sexual advances to males.⁸ Brandon's attorney did not claim that Larry assaulted Brandon or threatened his safety; he didn't have to.⁹ Following this strategy of shaming and demonizing the victim for his sexual orientation, the jury hung when trying to decide if Brandon was deliberate, and wholly blameworthy, in killing Larry.¹⁰

Sadly, Larry's story of murder and subsequent vilification is not unique. Intentional violence against LGBT people is an increasingly common hate crime in the United States.¹¹ Approximately three-quarters of LGBT persons have been targets of verbal abuse and one-third have been targets of physical violence.¹² Data collected under the Hate Crimes Statistics Act indicate that, "gay people report the greatest number of hate crimes at greater per capita rates than all other groups."¹³ Unfortunately, attacks on LGBT persons motivated by their sexual orientation or gender identity have had fatal consequences.¹⁴

⁴ 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.

⁵ *Emotional Day*, *supra* note 5.

⁶ 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.

⁷ Zeke Barlow, *Attorneys Argue over Who Was the Aggressor in Brandon McInerney Trial*, VENTURA COUNTY STAR, July 5, 2011, <http://www.vcstar.com/news/2011/jul/05/lawyers-give-opening-statements-in-brandon-case/> [hereinafter *Attorneys Argue*].

⁸ *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.'").

⁹ *See Attorneys Argue*, *supra* note 8.

¹⁰ *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/>.

¹¹ 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>.

¹² Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 474-75 (2008).

¹³ William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV., 1213, 1215. (2004).

¹⁴ In 2010, at least two people were killed, motivated by anti-gay 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).

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Many defendants charged with violence against LGBT people have claimed “gay panic,” a theory in which the defendant argues that the victim’s sexual orientation excuses, mitigates, or justifies violence.¹⁵ For example, a heterosexual male defendant charged with murdering a gay male may claim that he panicked when the victim made a sexual advance. The defendant thus blames the victim, insisting that it was the victim’s identity and actions that resulted in “an understandable and excusable loss of self-control.”¹⁶ Although gay panic is not a freestanding defense to criminal liability, gay panic arguments are used as grounds for traditional defenses of provocation, self-defense, insanity, or diminished capacity.¹⁷

“Trans panic” is a related defense wherein defendants argue that the victim’s gender identity excuses, mitigates, or justifies violence.¹⁸ A defendant charged with murdering a male-to-female transgender victim, for example, may claim that he panicked when he learned after sexual relations that the victim was biologically male.¹⁹ Like the gay panic defense, the defendant uses trans panic arguments to shift blame to the victim for “deceiving” the defendant.²⁰

The use of gay or trans panic defenses subjects victims to secondary victimization²¹ by asking the jury to find the victim’s sexual orientation or gender identity blameworthy for the defendant’s actions.²² The use of a gay or trans panic defense deprives victims, their family, and their friends of dignity and justice.²³ More broadly, it is designed to stir up and reinforce the anti-gay or anti-transgender emotions and stereotypes that led to the assault in the first place.²⁴ It also suggests that violence against LGBT individuals is excusable.²⁵ Finally, gay and trans panic defenses are irreconcilable with state and federal laws that treat bias crimes against LGBT people as aggravated offenses.²⁶

¹⁵ 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.

¹⁶ *Maheer v. People*, 10 Mich. 212, 220 (1862).

¹⁷ Lee, *supra* note 15, at 490.

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).

¹⁹ See Steinberg, *supra* note 21, at 3.

²⁰ 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).

²¹ 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).

²² Lee, *supra* note 15, at 471 & 475.

²³ See Berrill & Herek, *supra* note 25, at 404-05.

²⁴ 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).

²⁵ *Id.*

²⁶ See Berrill & Herek, *supra* note 28, at 401-04 (explaining that tactics like gay panic defenses undercut hate crime laws, because victims would rather choose not to claim the protections of the hate crime laws instead of enduring

For almost three decades, the ABA has taken a leading role in urging the elimination of discrimination against the LGBT community, keeping pace with our evolving understanding that LGBT persons are healthy, functioning contributors to our society.²⁷ The proposed resolution is consistent with and builds upon the existing ABA policy of supporting equality under the law for LGBT persons.

I. Gay Panic and Trans Panic Defenses

A. Origins of “Gay Panic”

Edward J. Kempf, a clinical psychiatrist, first coined the term “homosexual panic” in the 1920s to describe a psychological disorder.²⁸ 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.”²⁹ Kempf observed that when these patients found people of the same sex attractive, they felt helpless, passive, and anxious.³⁰ However, Kempf’s studies did not find that patients afflicted with such panic became violent towards others.³¹ Instead, he observed that patients became suicidal or self-inflicted punishment.³² Later studies confirmed that homosexual panic disorder rendered patients incapable of aggression.³³

Homosexual panic disorder was briefly recognized in the American Psychiatric Association (“APA”) *Diagnostic and Statistical Manual of Mental Disorders* (“DSM”), appearing in the 1952 edition.³⁴ Homosexual panic depended on a condition of latent homosexuality or “repressed sexual

— or because victims anticipate — the anti-gay consequences, such as panic defenses, that come with accepting the laws’ protections).

²⁷ In 1986, the American Bar Association adopted Goal IX supporting “full and equal participation in the legal profession by minorities, women, persons with disabilities, and persons of different sexual orientations and gender identities.” Since then, the ABA has adopted a host of resolutions aimed at combatting discrimination against LGBT individuals, on issues including housing and employment (1989), child custody (1995), adoption (1999), domestic violence (2006), foster care (2007), immigration (2009), and same-sex marriage (2010). See generally ABA Policy Document Library, available at <http://www.americanbar.org/directories/policy.html>.

²⁸ Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 81, 82 (1992).

²⁹ 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).

³⁰ Lee, *supra* note 15, at 482; Comstock, *supra* note 33, at 87-88.

³¹ Comstock, *supra* note 33, at 86.

³² *Id.*

³³ 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)); 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 28, at 85.

³⁴ Comstock, *supra* note 33, at 83.

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perversion” as the underlying disorder.³⁵ After the APA formally removed homosexuality from the DSM in 1973, homosexual panic disorder was also stripped of recognition.³⁶

B. Gay and Trans Panic in the Courts

Gay panic and trans panic defenses are not officially recognized, freestanding defenses. Instead, these terms describe theories used to establish the elements of traditional criminal defenses including insanity and diminished capacity, provocation leading to heat of passion, and self-defense.

1. Insanity and Diminished Capacity

Gay panic was first raised as an insanity or diminished capacity defense.³⁷ To invoke an insanity defense, the defendant attempts to show that he suffered from a mental defect — in this case, homosexual panic disorder — at the time of his act.³⁸ The defendant then 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.³⁹ A defendant arguing diminished capacity must show that the defendant’s homosexual panic disorder affected his capacity to premeditate and deliberate or to form the requisite intent to kill.⁴⁰

The use of gay panic to make a case for either insanity or diminished capacity is inappropriate. The defense has no medical or psychological basis. Under the insanity or diminished capacity frameworks, the gay panic defense relies on the medical and psychological validity of homosexual panic disorder.⁴¹ However, with the removal of homosexuality from the DSM, defendants can no longer claim to suffer from homosexual panic disorder.⁴² Even if homosexual panic disorder were still medically recognized, the use of homosexual panic disorder in this manner would be inappropriate because according to the early research, those suffering from homosexual panic did not have the ability to react violently to another person.⁴³ Defendants who have assaulted or killed another person thus exhibit violence inconsistent with the once-recognized psychiatric disorder.⁴⁴

³⁵ Chen, *supra* note 34, at 202.

³⁶ *Id.*

³⁷ Chen, *supra* note 34, at 201. The first reported use of the gay panic defense was 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 ultimately rejected the defendant’s homosexual panic defense and convicted him of murder. *Rodriguez*, 64 Cal. Rptr. at 254.

³⁸ Bagnall, Gallagher & Goldstein, *supra* note 28, at 499.

³⁹ *Id.*

⁴⁰ Lee, *supra* note 15, at 494.

⁴¹ Chen, *supra* note 34, at 202.

⁴² See *supra* text accompanying notes 39-41.

⁴³ Comstock, *supra* note 33, at 86.

⁴⁴ *Id.* at 88.

Moreover, the gay panic defense relies on the notion that same-sex attraction is objectionable and that anti-gay violence is culturally understandable, or even permissible.⁴⁵

As homosexual panic disorder has been delegitimized, defendants' arguments that a mental disease was to blame for their actions are increasingly less successful.⁴⁶ Unfortunately, the decline of the gay panic defense then gave way to the defense that a non-violent homosexual advance could constitute provocation to murder.

2. Provocation

The partial defense of provocation is one of the most common forms of gay and trans panic defenses. The provocation defense allows a defendant to mitigate the crime of murder to lesser crime of voluntary manslaughter.⁴⁷

A defendant using a gay panic provocation defense points to the actions of the LGBT victim, usually a non-violent sexual advance toward the defendant, as provocation.⁴⁸ While the use of this provocation defense has become popularly known as "gay panic," it is sometimes described as the "non-violent homosexual advance" defense.⁴⁹

A defendant employing a trans panic defense uses similar strategy.⁵⁰ In a typical trans panic case, a male defendant engages in consensual sexual activity with a victim who is biologically male but presents as female.⁵¹ After the sexual act concludes, the defendant discovers the victim's biological sex, becomes violently angry, and kills the victim in the heat of passion.⁵² At trial the defendant claims that the victim deceived the defendant, and that the discovery of her sex and gender identity should partially excuse the killing.⁵³

Both of those defense strategies seek to exploit jurors' bias and prejudice. By arguing that the victim's sexual orientation or gender identity are partially to blame for the killing, the defendant

⁴⁵ 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).

⁴⁶ Chen, *supra* note 34, at 199; Lee, *supra* note 15, at 497.

⁴⁷ WAYNE R. LAFAVE, CRIMINAL LAW FIFTH EDITION § 15.2 (West 2010).

⁴⁸ 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.

⁴⁹ 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 in the act of 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.

⁵⁰ See Steinberg, *supra* note 21, at 3.

⁵¹ See *id.*

⁵² Lee, *supra* note 15, at 513.

⁵³ *Id.* at 516.

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appeals to deeply rooted negative feelings about homosexuality and transgender people.⁵⁴ 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.⁵⁵ Where the sole basis for the claim of provocation is a non-violent sexual advance or the discovery of the victim's sex or gender identity, the defense should not be available.

3. Self-Defense

Defendants also have enjoyed some success using gay and trans panic arguments when raising the defense of self-defense.⁵⁶ Self-defense is a complete defense to criminal liability that justifies a non-aggressor who uses reasonable force against another, provided that he reasonably believes that he is in immediate danger of serious bodily harm and reasonably believes that the use of force is necessary to avoid the danger.⁵⁷

Under the self-defense framework, the defendant who pursues a gay panic strategy attempts to show that the victim made some advance or overture, and that the defendant reasonably believed defensive force was necessary to prevent imminent danger of serious bodily harm through sexual assault.⁵⁸ The defendant typically focuses on the victim's sexual orientation to convince the jury that his perception of danger was reasonable and that his violent response was necessary.⁵⁹ Self-defense used in this manner is inappropriate because the threat coming from the victim usually falls short of the serious bodily harm standard, and the force used to thwart any perceived attack far outweighs any threat supplied by the victim.⁶⁰

To assert the defense, the defendant points to the victim's sexual orientation as a reason why the defendant reasonably perceived a threat of serious bodily harm, over and above the danger posed by the victim's actions alone.⁶¹ This tactic attempts to call up negative stereotypes that cast LGBT individuals as sexual predators.⁶² The defendant then suggests that because the victim was

⁵⁴ See Bagnall, Gallagher & Goldstein, *supra* note 28, at 501; Lee, *supra* note 15, at 504; Steinberg, *supra* note 21, at 4.

⁵⁵ See Steinberg, *supra* note 21, at 10; Lee, *supra* note 15, at 517.

⁵⁶ Bagnall, Gallagher & Goldstein, *supra* note 28, at 498 & n. 3; Lee, *supra* note 15, at 517.

⁵⁷ LAFAVE, *supra* note 58, § 10.4.

⁵⁸ Comstock, *supra* note 33, at 82.

⁵⁹ See *id.* at 89; Suffredini, *supra* note 38, at 300.

⁶⁰ Comstock, *supra* note 33, at 95-96.

⁶¹ 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).

⁶² 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").

homosexual, the victim's advance must have been more aggressive than his actions would have otherwise indicated.⁶³

Equally troubling, defendants sometimes use gay panic arguments to explain their use of greater force than is reasonably necessary to avoid the danger.⁶⁴ Gary David Comstock has surveyed a number of cases where excessive force was used, including when defendants attacked the victim in groups;⁶⁵ used weapons against unarmed victims;⁶⁶ and acted in a manner that suggested premeditation rather than response to an unexpected sexual assault.⁶⁷ In these cases, the use of excessive force should disqualify the defendant from the defense of self-defense; however juries have permitted excessive force when the sexual orientation of the victim is at issue.⁶⁸

The use of gay panic to bolster a claim of self-defense relies on and propagates negative stereotypes about gay people.⁶⁹ It attempts to appeal to jurors' 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.

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

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

A. Categorical Limits on Gay Panic and Trans Panic Defenses

1. Judicial Restraints on Gay Panic Defenses

Courts have increasingly been skeptical of gay panic arguments to support defense claims of insanity or provocation. Trial courts have refused to provide juries with applicable defense instructions, while appellate courts have made strong statements about why gay panic arguments

⁶³ Comstock, *supra* note 33, at 97. Another way for a defendant to improperly use a victim's sexual orientation is to claim that he suffered from homosexual panic disorder, which heightened his perception of danger. The defendant attempts to convince the jury to consider his weakened mental condition when deciding if his perception of danger was objectively reasonable. *See* Suffredini, *supra* note 38, at 299; Lee, *supra* note 15, at 518-19; 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))). As explained above, the use of the no-longer-recognized homosexual panic disorder in this manner is inappropriate.

⁶⁴ Comstock, *supra* note 33, at 95.

⁶⁵ *Id.* at 96 & n. 105.

⁶⁶ *Id.* at 96 & nn. 106-12.

⁶⁷ *Id.* at 96-97 & nn. 113-18.

⁶⁸ 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.

⁶⁹ Lee, *supra* note 15, at 518.

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are inadequate. Unfortunately, in many jurisdictions gay panic arguments remain viable and continue to do harm.

a. Restrictions on the Defense of Insanity

Several courts have explicitly rejected gay panic as a basis for the insanity defense. For example, the Massachusetts 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 gay panic.⁷⁰ The defendant, William Doucette Jr., drove to a motel with Ronald Landry.⁷¹ Doucette and Landry engaged in sexual activity after which Doucette stabbed Landry in the heart, chest, neck, and back and then left Landry to die.⁷² Doucette later claimed that he killed Landry due to an attempted homosexual attack.⁷³ The jury convicted Doucette of first-degree murder, but Doucette appealed on the ground that his attorney should have raised an insanity defense based on "homosexual panic."⁷⁴ The court disagreed, holding that homosexual panic was merely the defendant's characterization of the events, and not a mental disorder which would compel the interposition of an insanity defense.⁷⁵

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, Claudia Brenner and Rebecca Wight were hiking along the Appalachian Trail.⁷⁶ Having stopped to rest for the night, the two were engaged in lovemaking when suddenly Brenner was shot five times in her right arm, face, and neck. Wight ran for cover but was also shot in the head and back. Brenner attempted to assist Wight, but when she was unable to revive her, left for help. By the time help arrived, Wight had died.

Stephen Roy Carr was arrested for the shooting and found guilty of first-degree murder by a bench trial. Carr attempted to argue that he shot Brenner and Wight in a heat of passion caused by the provocation of observing their homosexual lovemaking. To support his argument, Carr offered to show a history of constant rejection by women, including his mother, who may have been a lesbian.⁷⁷ The trial court refused to consider Carr's evidence of his psychosexual history, finding it irrelevant.

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.

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

⁷⁰ See *Commonwealth v. Doucette*, 462 N.E.2d 1084, 1097 (Mass. 1984).

⁷¹ *Id.* at 1089.

⁷² *Id.* at 1089-90.

⁷³ *Id.* at 1089.

⁷⁴ *Id.* at 1097.

⁷⁵ *Id.*

⁷⁶ *Commonwealth v. Carr*, 580 A.2d 1362, 1363 (Pa. Super. Ct. 1990).

⁷⁷ *Id.* at 1363-64.

or excuse the killing of homosexuals any more than it condones the killing of heterosexuals. Similarly, it does not recognize homosexual 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.⁷⁸

The court thus limited the gay panic defense by categorically eliminating the sight of same-sex sexual activity from what may constitute legally adequate provocation.⁷⁹

Similarly, in a pair of cases, the Massachusetts Supreme Judicial Court rejected the argument that verbal solicitations coupled with a touch on the leg or genitals could constitute provocation. On September 29, 1988, Joshua Halbert and Kevin Pierce telephoned David McLane to “go party” at McLane’s apartment.⁸⁰ McLane treated Halbert and Pierce to beer, whiskey, and rum, and they watched pornographic films.⁸¹ When Halbert left the apartment to purchase cigarettes, McLane grabbed Pierce’s genitals and said, “You know you want it.”⁸² Pierce rejected McLane, pushing him away.⁸³ Once Halbert returned, Pierce said that McLane and Halbert were gay.⁸⁴ McLane responded by placing his hand on Halbert’s knee and asking, “What do you want to do?”⁸⁵ Pierce and Halbert then attacked McLane. Pierce came from behind and locked his arm around McLane’s neck, choking him.⁸⁶ Halbert kicked and punched McLane in the groin, slashed McLane’s neck with a razor blade, and smashed a whiskey bottle over McLane’s head.⁸⁷ Finally, Pierce released his hold over McLane, and stabbed McLane twice through his temple with steak knives.⁸⁸

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.⁸⁹ Halbert argued on appeal that the trial court erred when it did not provide the manslaughter instruction.⁹⁰ He argued that McLane provoked him when McLane put his hand on Halbert’s knee and asked, “What do you want to do?”⁹¹ The court rejected Halbert’s assertion that McLane’s question to Halbert, along with the touch of the knee, was sufficient provocation, reasoning that neither was enough to produce a heat of passion in an ordinary person.⁹²

⁷⁸ *Id.* at 1364-65.

⁷⁹ *Id.* at 1364.

⁸⁰ *Commonwealth v. Pierce*, 642 N.E.2d 579, 581 (Mass. 1994); *Commonwealth v. Halbert*, 573 N.E.2d 975, 977 (Mass. 1991).

⁸¹ *Pierce*, 642 N.E.2d at 581.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Halbert*, 573 N.E.2d at 977.

⁸⁵ *Id.* at 979.

⁸⁶ *Pierce*, 642 N.E.2d at 581; *Halbert*, 573 N.E.2d at 977.

⁸⁷ *Pierce*, 642 N.E.2d at 581; *Halbert*, 573 N.E.2d at 977.

⁸⁸ *Halbert*, 573 N.E.2d at 977.

⁸⁹ *Id.* at 976.

⁹⁰ *Id.*

⁹¹ *Id.* at 979.

⁹² *Id.*

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Having been convicted of first-degree murder, Pierce also argued on appeal that the trial judge erred by not providing the manslaughter instruction.⁹³ He asserted that McLane’s statement, “You know you want it,” and McLane’s grabbing of Pierce’s genitals were provocative enough to incite a heat of passion.⁹⁴ As in *Halbert*, the court disagreed, holding that a sexual invitation and the grabbing of genitals were insufficient to provoke a reasonable person into a homicidal response.⁹⁵

Other state courts have similarly limited the use of gay panic to support a provocation defense.⁹⁶ Internationally, in several jurisdictions the legislature has responded to the gay panic defense by amending the criminal code to exclude non-violent sexual advances as a legally adequate basis for provocation.⁹⁷

B. Jury Instructions to Eliminate Bias

State legislatures are also becoming concerned about the use of gay or trans panic strategies, and have implemented or considered a number of laws aimed at reducing their impact in the courtroom.

For example, in the wake of the murder of Gwen Araujo and the uncertainty that her killers would be held accountable,⁹⁸ 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.⁹⁹

The Act made legislative findings and declarations that the use of panic strategies that appeal to societal bias against a person’s sexual orientation or gender identity conflicted with California’s public policy.¹⁰⁰ The Act further provided that in a criminal trial, either party may request that the

⁹³ *Pierce*, 642 N.E.2d at 581.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *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 v. Troila*, 571 N.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).

⁹⁷ 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; . . .”) (Central Territory of Australia); 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, by itself, a sufficient basis for a defence of provocation; . . .”) (Northern Territory of Australia).

⁹⁸ *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.

⁹⁹ 2006 Cal. Legis. Serv. ch 550 (West); *see also News in Brief*, S. VOICE (Atlanta), October 6, 2006, at 16.

¹⁰⁰ 2006 Cal. Legis. Serv. ch 550 § 2(d) (West).

jury be instructed not to let bias, prejudice, or public opinion influence its decision about the defendant's culpability.¹⁰¹

III. Proposed Responses to Gay Panic and Trans Panic Defenses

To combat the discriminatory effects of gay and trans panic defenses, lawmakers or courts should take the following actions: (1) ensure 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; and (2) eliminate non-violent sexual advances or the discovery of a person's gender identity as sufficient for adequate provocation.

A. Anti-bias Jury Instructions

To reduce the risk of improper bias, legislatures should provide jury instructions that advise jurors of their duty to apply the law without improper bias or prejudice.

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."¹⁰²

B. Eliminate Gay Panic and Trans Panic as Adequate Provocation

In addition, legislatures should specify that neither a non-violent sexual advance, nor the discovery of a person's sex or gender identity, constitutes legally adequate provocation to mitigate the severity of any non-capital crime.¹⁰³ Such an exception would be consistent with the holdings of state supreme courts that have expressly rejected non-sexual advances as a basis for provocation,¹⁰⁴ and with similar categorical exceptions adopted by other state legislatures.¹⁰⁵

Model Language

¹⁰¹ *Id.* § 3.

¹⁰² Modeled from section 1127h of the California Penal Code. CAL. PENAL CODE § 1127h (West 2009).

¹⁰³ Although the Constitution guarantees a criminal defendant the right to present a full defense, *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), courts and legislatures are free to eliminate or narrow criminal defenses. 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §24.4(a) (3d ed. 2007).

¹⁰⁴ *See supra* Part II.A.1.b.

¹⁰⁵ *See, e.g.*, LAFAVE, *supra* note 58, § 15.2(b)(6) (noting that in many states, as a matter of common law, "mere words" are never adequate provocation); MD. CODE ANN., CRIM. LAW § 2-207(b) (LexisNexis 2002) ("[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"); MINN. STAT. ANN. § 609.20(1) (West 2011) ("[T]he crying of a child does not constitute provocation.").

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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.¹⁰⁶

Version 2

(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.¹⁰⁷

IV. Conclusion

An individual's sexual orientation or gender identity does not trigger in another person a medical or psychological panic, does not constitute legally adequate provocation, and does not make a person more threatening. LGBT people should be able to live without fear that being honest about their sexual orientation or gender identity would provide a socially sanctioned excuse or justification for violence.

Accordingly, courts and legislatures should affirmatively act (1) to ensure that juries are aware of the possibility that subconscious or overt bias or prejudice may cloud their judgment and (2) to limit the use of gay or trans panic arguments as a basis for provocation in non-capital cases.

Respectfully submitted,

William Shepherd, Chair
Criminal Justice Section

¹⁰⁶ Modeled from section 2-207 of the Criminal Law Code of Maryland. MD. CODE ANN., CRIM. LAW § 2-207 (LexisNexis 2002).

¹⁰⁷ Modeled from the California Assembly Bill 1160, as introduced. Assem. 1160, 2006 Reg. Sess. (Cal. 2005).

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GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: William Shepherd, Chair

1. Summary of Resolution(s).

This resolution urges legislative action to curtail the availability and effectiveness of the “gay panic” and “trans panic” defenses – including requiring courts instruct the jury not to let the sexual orientation or gender identity of the victims, witnesses, or defendants, bias the jury’s decision, specifying that neither a non-violent sexual advance, nor the discovery of a person’s sex or gender identity, constitutes legally adequate provocation to mitigate the severity of any non-capital case.

2. Approval by Submitting Entity.

The proposed resolution was approved by the Criminal Justice Section Council at its Spring Meeting on May 12, 2013.

3. Has this or a similar resolution been submitted to the House or Board previously?

The ABA has passed numerous resolutions on LGBT issues, this resolution is most similar to and builds upon resolution 10A passed at the Annual Meeting in 1996 (urging bar associations to research bias against LGBT within the legal community).

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

This resolution is unique in addressing the “gay panic” and “trans panic” defenses.

5. What urgency exists which requires action at this meeting of the House?

The use of gay or trans panic defenses subjects victims to secondary victimization by asking the jury to find the victim’s sexual orientation or gender identity blameworthy for the defendant’s actions. The use of a gay or trans panic defense deprives victims, their family, and their friends of dignity and justice. More broadly, it is designed to stir up and reinforce the anti-gay or anti-transgender emotions and stereotypes that led to the assault in the first place. It also suggests that violence against LGBT individuals is excusable. Finally, gay and trans panic defenses are irreconcilable with state and federal laws that treat bias crimes against LGBT people as aggravated offenses.

6. Status of Legislation. (If applicable)

Not Applicable

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The policy will be distributed to various criminal justice stakeholders in order to encourage the necessary legislative action to curtail the availability and effectiveness of the “gay panic” and “trans panic” defenses. The policy will also be featured on the Criminal Justice Section website and in Section publications.

8. Cost to the Association. (Both direct and indirect costs)

No cost to the Association is anticipated.

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2013 Annual Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

Standing Committees

Governmental Affairs

Gun Violence

Pro Bono and Public Service

Legal Aid and Indigent Defendants

Professionalism

Ethics and Professional Responsibility

Special Committees and Commissions

Commission on Civic Education in the Nation’s Schools

Center on Children and the Law

Commission on Disability Rights

Commission on Sexual and Domestic Violence

Commission on Homelessness and Poverty

Center for Human Rights

Center for Racial and Ethnic Diversity

Council for Racial and Ethnic Diversity in the Educational Pipeline

Commission on Racial and Ethnic Diversity in the Profession

Commission on Racial and Ethnic Justice

Commission on Sexual Orientation and Gender Identity

Commission on Women in the Profession

Commission on Youth at Risk

Sections, Divisions

Business Law

Family Law

Government and Public Sector Division

Health Law

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Individual Rights and Responsibilities

Judicial Division

National Conference of Federal Trial Judges

National Conference of Specialized Court Judges

National Conference of State Trial Judges

Litigation

Judicial Division

Senior Lawyers Division

State and Local Government Law

Tort Trial & Insurance Practice

Young Lawyers Division

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EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution urges legislative action to curtail the availability and effectiveness of the “gay panic” and “trans panic” defenses – including requiring courts instruct the jury not to let the sexual orientation or gender identity of the victims, witnesses, or defendants, bias the jury’s decision, specifying that neither a non-violent sexual advance, nor the discovery of a person’s sex or gender identity, constitutes legally adequate provocation to mitigate the severity of a non-capital case.
2. Summary of the Issue that the Resolution Addresses
The use of a gay or trans panic defense deprives victims, their family, and their friends of dignity and justice. More broadly, it is designed to stir up and reinforce the anti-gay or anti-transgender emotions and stereotypes that led to the assault in the first place. It also suggests that violence against LGBT individuals is excusable. Finally, gay and trans panic defenses are irreconcilable with state and federal laws that treat bias crimes against LGBT people as aggravated offenses.
3. Please Explain How the Proposed Policy Position will address the issue
This resolution will help to ensure that juries are aware of the possibility that subconscious or overt bias or prejudice may cloud their judgment; limit the use of gay or trans panic arguments as a basis for provocation in non-capital murder cases.
4. Summary of Minority Views
None are known.