NOTE

"I DON'T LIKE GAYS, OKAY?" USE OF THE "GAY PANIC" MURDER DEFENSE IN MODERN AMERICAN COURTROOMS: THE ULTIMATE MISCARRIAGE OF JUSTICE

*Joseph R. Williams**

I. INTRODUCTION

> *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.*[1]

On November 14, 2009, the body of Puerto Rican teenager George Steven Lopez Mercado was found a few miles outside of his

* Katheryn D. Katz Fellow, The Legal Project; J.D., Albany Law School, 2015; B.S., Manhattan College, 2011. The author served as Executive Editor for Notes and Comments, *Albany Law Review*, volume 78. Many thanks to Professors Donna Young and Sarah Rogerson for their invaluable guidance and expertise throughout this process.

[1] AM. BAR ASS'N, RESOLUTION 113A AND REPORT 1 (2013), *available at* http://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf.

hometown.[2] His arms, legs, and head had been ripped from his body, burned, and dumped on the side of the road.[3] Why? Mercado was openly gay.[4] While news of this brutal attack sent a shockwave through the gay community in Puerto Rico, what was perhaps most disturbing was the response from law enforcement officials working on the case. In a public statement issued by the police department, an investigator explained why Mercado had been killed and sent a warning to the rest of the gay population that "people who lead this type of lifestyle need to be aware that *this will happen*."[5]

Unfortunately, displays of homophobia and ignorance like this one do not exist in isolation; all across the United States, members of law enforcement, members of the public, lawyers, and judges alike engage in this type of harmful behavior every day.[6] Sadly, members of the LGBT community all too often fall victim to this homophobic mindset, and the consequences that result can be devastating.

In Washington State, for example, former mayor Pete Brudevold was bashed over the head several times with a beer bottle and a flashlight before his attacker strangled him to death.[7] At trial, however, it was not these heinous acts of violence that captured the jury's attention, but rather the fact that Brudevold may or may not have been a homosexual.[8] No fewer than nine lay witnesses were prepared to come to the defense of Brudevold's killer and testify in

---

[2] Rose Ellen, *Hate Crime: Gay Puerto Rican Teen George Steven Lopez Mercado Brutally Killed*, CLEVELAND PRIDE (Nov. 17, 2009), http://www.clevelandpride.org/home/hate-crime-gay-puerto-rican-teen-george-steven-lopez-mercado-brutally-killed/.

[3] *Id.*

[4] *Id.*

[5] *Id.* (emphasis added) (internal quotation marks omitted). Mercado's killer never went to trial; he pleaded guilty to murder and was sentenced at a pretrial hearing. Andrés Duque, *Sudden Justice in the Murder of Jorge Steven López Mercado*, BLABBEANDO (May 12, 2010), http://blabbeando.blogspot.com/2010/05/sudden-justice-in-murder-of-jorge.html#.Uyu2gTnA6fQ.

[6] Research on gay and lesbian hate speech has yielded the following statistics:

> -97% of students in public high schools report regularly hearing homophobic remarks by their peers.
>
> -The typical high school student hears anti-Gay slurs more than twenty-five times a day.
>
> -53% of students report hearing homophobic comments made by school staff.
>
> -80% of Gay and Lesbian youth report severe social isolation.
>
> . . . .
>
> -30% of Gay and bisexual adolescent males attempt suicide at least once.

Shannon Gilreath, *"Tell Your Faggot Friend He Owes Me $500 for My Broken Hand": Thoughts on a Substantive Equality Theory of Free Speech*, 44 WAKE FOREST L. REV. 557, 576–77 (2009).

[7] State v. Bell, 805 P.2d 815, 816 (Wash. Ct. App. 1991).

[8] *Id.*

court that Brudevold had a "reputation" for homosexuality or that he "displayed" homosexual conduct in the past.[9] Arguing that his actions constituted "justifiable and excusable homicide," the defendant put forth expert testimony that he was chronically "homophobic."[10] Brudevold's alleged attempt to grab the defendant's crotch and kiss him was sufficient, according to the defendant, to send him into an uncontrollable homicidal rage, thereby negating the intent element necessary to convict him of first degree murder.[11] This alleged nonviolent, nonthreatening "homosexual advance" was offered to *justify* the defendant's actions in brutally taking the life of an innocent man, all based on the alleged sexuality of the deceased.

This note turns a critical eye on the availability of the "gay panic" defense[12] in modern American courtrooms—a defense used to mitigate or excuse the killing of another person based on that person's actual or perceived sexual orientation or sexual identity.[13] Part II attempts to illustrate some of the social and cultural influences that have permeated the American criminal justice system, providing the theoretical framework underlying this defense. Part III examines the mechanics and procedural guidelines of the defense and how it is functionally applied to substantive criminal law. Part IV examines the use of the gay panic defense in actual criminal trials, demonstrating the profound impact it has had on the fabric of American case law. Part V

---

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] The term "gay panic" has evolved colloquially from the term "homosexual panic," coined in 1920 by psychiatrist Edward J. Kempf, who believed homosexuality to be a mental illness. Teresa Marie Garmon, Note, *The Panic Defense and Model Rules Common Sense: A Practical Solution for a Twenty-First Century Ethical Dilemma*, 45 GA. L. REV. 621, 631–32 (2011). Kempf's theory was that certain individuals who asserted themselves to be heterosexual were actually "latent homosexuals," and they experienced "anxiety, panic, depression, hallucinations, and suicidal thoughts" as a result of this internal conflict. *Id.* This concept was originally introduced as a legal defense under the theory that these "latent homosexuals" were mentally disturbed and therefore defense attorneys argued that they suffered from "insanity" or "diminished capacity" when charged with homicide. *Id.* at 632. While Kempf's theories have been largely abandoned by the enlightened world, the term "gay panic" has remained as a part of the legal vocabulary. *Id.* Currently, the defense is used "almost exclusively . . . as an incarnation of the . . . provocation or 'heat of passion doctrine.'" *Id.*

[13] It is important to note that this study addresses only the gay panic defense and does not touch upon the related "trans panic" defense. While different members of the LGBT community face similar struggles, the gay panic and trans panic defenses differ in their applications, and this note therefore does not encompass both forms. For an analysis of the trans panic defense, see Aimee Wodda & Vanessa R. Panfil, *"Don't Talk to Me About Deception": The Necessary Erosion of the Trans* Panic Defense*, 78 ALB. L. REV. 926 (2014/2015).

examines federal and New York State hate crime legislation, specifically as applied to violent crimes motivated by sexual orientation and gender identity bias. This section then scrutinizes the functionality of this protective legislation within a system that essentially rewards defendants for carrying out the types of crimes the statutes were enacted to proscribe. Finally, Part VI looks to the American Bar Association's recent resolution urging courts to phase the gay panic defense out of existence and joins in its heartfelt plea to modernize our nation's legal system, acknowledging and respecting the dignity of every human being regardless of their sexual orientation. This section also highlights recent legislation passed by the State of California, which puts an end to the use of this bogus defense in California criminal courtrooms, and urges the New York legislature to likewise take up this cause and offer the promise of equality to all of its citizens—gay or straight.

There may be little that can be done, from a legal perspective, to transform the inner workings and prejudices of the predisposed human mind. However, at the very least, it is our duty to ensure that our *courts of law*, heralded as champions for equal justice, cease to function as judicial endorsements of homophobia, and begin to operate in a way that extends equal protection, and equal treatment, to *all* Americans. Especially in light of recent legislative enactments seeking to penalize and proscribe violence based on animus towards a person's sexuality,[14] there is no room in the modern legal system for a defense that devalues the lives of gay victims and condones bias-motivated violent crimes. There is a fundamental flaw in a justice system that makes the sexual orientation of a deceased victim a threshold issue in determining the culpability of his killer.

II. LIVING IN A HOMOPHOBIC AMERICA

A. Statistical Background of Sexual-Orientation-Based Crimes

According to data collected under the Hate Crime Statistics Act of 1990, gay people report the greatest number of hate crimes, per capita, as compared with all other groups.[15] Gay people also report person-based hate crimes (as opposed to property-based hate

[14] *See* discussion *infra* Part V (discussing developments in hate crime laws to extend protections to gays and lesbians).

[15] William B. Rubenstein, *The Real Story of U.S. Hate Crime Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1233–34 (2004).

crimes) at a disproportionately high rate.[16] Reporting more than double the number of person-based attacks (e.g., murder, manslaughter, assault, intimidation) than any other group surveyed, it is apparent that "crimes against gay persons are particularly virulent in nature, as well as frequent in number."[17] Unfortunately, this statistical trend has not improved much since the 1990 enactment of the Hate Crime Statistics Act, as evidenced by the FBI's most recent report on national hate crime statistics in 2012.[18]

These statistics are likely not altogether surprising, however, as animosity and discrimination against members of the gay community have been systematically ingrained in American culture for centuries and reports of violent attacks on homosexuals rarely even make national headlines. Starting as early as the 1970s, violent beatings, murders, and arsons were reportedly attributed to extreme animosity towards homosexuals.[19] When questioned by

[16] *Id.* at 1243.

[17] *Id.* at 1233.

[18] *Compare id.* at 1233–34 (reporting an average of 1216 hate crimes committed against individuals based on their sexual orientation between the years 1991 and 2001), *with* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORT: HATE CRIME STATISTICS (2012), *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/victims/victims_final (reporting 1376 hate crimes committed against individuals based on their sexual orientation in 2012).

[19] *See* Connell O'Donovan, *"The Abominable and Detestable Crime Against Nature": A Revised History of Homosexuality & Mormonism, 1840–1980*, CONNELL O'DONOVAN, http://www.connellodonovan.com/lgbtmormons.html (last visited Mar. 13, 2015) (reporting on a story largely withheld from the press; the 1969 killing of Howard Efland that was found to be an "excusable homicide" by the jury despite the fact that Efland was unarmed, did not resist, and was beaten to death by Los Angeles police officers in the middle of the street and in front of witnesses because he had allegedly "groped" one of the officers); John LaPlace & Ed Anderson, *29 Killed in Quarter Blaze: Arson Possibility Is Raised*, TIMES-PICAYUNE, June 25, 1973, at 1 (reporting the arson of "The Upstairs," a gay bar in New Orleans, in which a large number of homosexual patrons were killed); Pete Kotz, *Castration Murder of Mark Shemukenas Solved After 32 Years*, TRUE CRIME REP. (Oct. 17, 2009), http://www.truecrimereport.com/2009/10/mark_shemukenas_30_a_potter.php (recounting the 1977 murder of gay man Mark Shemukenas, who was castrated, had his throat and stomach slit open, and a fork stabbed into his chest); *Robert Hillsborough, 1945–1977*, UNCLE DONALD'S CASTRO STREET (July 9, 2005), http://thecastro.net/parade/parade/hillsborough77.html (describing the 1977 murder of Robert Hillsborough, who was stabbed fifteen times while his attacker yelled, "Faggot, Faggot, Faggot!" (internal quotation marks omitted)); Mel Maguire, *Gay Hate Crimes: Truth or Hysteria, Part II*, GAY CONSERVATIVE (Dec. 3, 2008), http://gayconservative.org/2008/12/03/gay-hate-crimes-truth-or-hysteria-part-ii/ (recounting the 1979 murder of Lee Benscoter, who was beaten to death in his apartment, his attackers inscribing the words "fags will die" in toothpaste on his furniture); *Steven Charles*, GAY HIST. WIKI: HIST. DISCOVERED, http://gayhistory.wikidot.com/steven-charles (last updated Oct. 9, 2009) (describing the 1979 attack on Steven Charles, who was punched, kicked, and beaten to death with driftwood by a group of teenage boys on a deserted beach on Staten Island, and noting how one of the attackers "got off completely," while the "leader" of the pack served only seven years in prison).

police officers about the 1979 stabbing of openly gay man, Robert Allen Taylor, his attacker, offered the justification: "I don't like gays, OK?"[20]

This disturbing trend of violent prejudice continued throughout the 1980s[21] and 1990s,[22] senselessly claiming countless victims in

[20] Jason Garrigus, *So, Exactly What Is Enough?*, GAY FRESNO, http://www.gayfresno.com/content/view/1654 (last visited Mar. 13, 2015) (internal quotation marks omitted).

[21] *See* Nina Bernstein, *Man Held for 1980 Killings Outside a Gay Bar Seeks Release From Hospital*, N.Y. TIMES, July 20, 1999, at B3 ("A man who shot and killed two people and wounded six others outside a [New York City] gay bar in 1980 . . . said . . . he believed gay men [are] agents of the devil, stalking him and 'trying to steal [his] soul just by looking at [him].'"); *A Memoriam to Charles Howard: Murdered for Being Gay*, DAILY KOS (May 5, 2009), http://www.dailykos.com/story/2009/05/06/728309/-A-Memoriam-to-Charles-Howard-Murdered-for-Being-Gay# (describing the 1984 murder of Charlie Howard, whose attackers threw him over a bridge to drown because he was gay); State v. Hamilton, 681 So. 2d 1217, 1220–21 (La. 1996) (describing the 1987 murder of Father Patrick McCarthy, a Catholic priest, who was "stabbed five times in the throat . . . hit eight times in the face, forehead and top of skull with a heavy instrument like a claw hammer, [and] [s]alt had been poured over his eyes and face and down his throat"; despite these horrific acts, the defendant argued that he should only be charged with manslaughter because the victim had provoked him with "repeated homosexual advances"); Jennifer Weiner, *Claudia Brenner A Shooting Victim Now Crusades Against Violence Aimed at Gays*, INQUIRER (June 8, 1995), http://articles.philly.com/1995-06-08/living/25688999_1_claudia-brenner-eighth-bullet-rebecca-wight (recounting the 1988 killing of Rebecca Wight, who was shot to death while camping with her girlfriend by a drifter who claimed he was enraged by their lesbianism and shot at them nine times, killing Rebecca and injuring her lover); *Long Term in Gay Man's Death*, N.Y. TIMES, Nov. 29, 1989, at B3 (describing the 1988 murder of Richard Reihl, who was beaten to death with a fireplace log in his own home because of his sexual orientation); *Gerardo Valdez*, INT'L JUST. PROJECT, http://www.internationaljusticeproject.org/nationalsGValdez.cfm (last visited Mar. 13, 2015) (recounting the 1989 killing of Juan Barron, who was shot twice, had his throat slashed, and was burned in a barbecue pit after his killer read to him from the Bible about the "sinfulness of homosexuality," telling him that he "[did] not deserve to live"); *Man Sentenced to Life in Killings of Gay Men*, N.Y. TIMES, June 22, 1999, at A23 (recounting the strangulations of five gay men in the 1980s who were killed "to stop the spread of AIDS").

[22] *See* Donatella Lorch, *Death of a 'Lost Soul': A Gentle Man Is Killed in His Sanctuary*, N.Y. TIMES, Jan. 26, 1990, at B1 (describing the 1990 killing of James Zappalorti, a disabled gay man who was stabbed and had his throat slashed by two men who harassed him in public, calling him a "queer" and a "faggot" (internal quotation marks omitted)); Donna Minkowitz, *It's Still Open Season on Gays*, NATION, Mar. 23, 1992, at 368 (recounting the 1990 murder of gay bartender Julio Rivera, who was butchered with a hammer, knife, and plumber's wrench by a group of boys who had "gone out looking for a 'homo' to 'tune up'"); *Woodlands Man Granted Parole in Gay-Bashing Murder of Paul Broussard*, KHOU.COM (July 5, 2011), http://www.khou.com/story/news/2014/07/17/11502522/ (describing the 1991 murder of Paul Broussard, who was beaten with a nail-studded two-by-four and "gutted . . . like a deer"); *The Next Jenny Jones Could Be on Court TV*, CHI. TRIB., Oct. 31, 1996, at 2 (describing the 1995 killing of Scott Amedure, who was murdered because his killer was embarrassed when Amedure revealed that he had a crush on him on the Jenny Jones television show); Erin Rook, *Queer Heroes NW 2013: Roxanne Ellis and Michelle Abdill*, PROUD QUEER (June 3, 2013), http://www.pqmonthly.com/queer-heroes-nw-2013-roxanne-ellis-and-michelle-abdill/14889 (recounting the 1995 murder of lesbian couple Roxanne Ellis and Michelle Abdill, who were shot to death and left for days in the back of a pickup truck by their neighbor who was "sick to [his] stomach" after finding out that the couple were lesbians (internal quotation marks omitted)); Fred Mangione, LGBT HATE CRIMES PROJECT, http://archive.is/Ck44 (last visited Mar. 13, 2015) (recounting the 1996 slaying of Fred Mangione, who was stabbed

its wake.[23] On October 27, 1992, twenty-two-year-old Navy officer Allen R. Schindler was beaten and stomped to death in a public bathroom by two of his shipmates because he had recently told the captain of the ship that he was gay.[24] The attack on Schindler was so vicious that every organ in his body was destroyed, and his mother had to identify him only by the bloody remains of the tattoos on his arm.[25] During interrogations the day after the murder, one of Schindler's attackers told investigators that he "hated homosexuals"; that he was "disgusted by them"; and that "[Schindler] deserved it," adding, "I don't regret it. I'd do it again."[26]

This alarming "justification" for the commission of such atrocious acts of violence exemplifies the danger inherent in a society that tolerates, and in fact, facilitates, behavior in accordance with these strongly held prejudices. Unfortunately, while society has admittedly made great strides toward obtaining LGBT equality in

thirty-five times outside a bar in Texas); Kevin Sack, *In Latest Atlanta Bombing, 5 Are Injured at a Gay Bar*, N.Y. TIMES, Feb. 23, 1997, at 18 (reporting the bombing of the "Otherside Lounge," an Atlanta gay bar, where at least five patrons were seriously injured); *Billy Jack Gaither's Life and Death*, N.Y. TIMES, Mar. 9, 1999, at A22 (recounting the 1999 murder of Billy Jack Gaither, who was beaten to death with an ax handle and burned on a pile of old tires because his killers "knew that [he] was gay"); Sam Stanton & Gary Delson, *"I'm Guilty of Obeying the Laws of the Creator,"* SALON (Nov. 8, 1999), http://www.salon.com/1999/11/08/hate_5/ (describing the 1999 murder of gay couple Gary Matson and Winfield Mowder, who were shot to death in their bed by a white supremacist who told law enforcement officials that "the only regret he has about the murders is that they didn't inspire others to emulate him," adding that his actions were not criminal, but rather, God told him to do it); Francis X. Clines, *Killer's Trial Shows Gay Soldier's Anguish*, N.Y. TIMES, Dec. 9, 1999, at A18 (recounting the 1999 murder of gay Army Private Barry Winchell, who was beaten to death with a baseball bat by a fellow soldier after months of being called "a faggot," "a queer," and "a homo" (internal quotation marks omitted)); Gilreath, *supra* note 6, at 583–84 (reporting the explanation from a defendant responsible for assaulting a group of gay men in Los Angeles: "faggots were not really human and . . . it was like 'smashing pumpkins on Halloween'").

[23] Between 1974 and 1975, there was a string of fourteen murders and three assaults of homosexual men in San Francisco by an unidentified serial killer known as "The Doodler." *Murder Suspect Free Because Gays Silent*, EUGENE REGISTER-GUARD, July 8, 1977, at 13C. He gained his name due to a practice of sketching the men he met at gay nightclubs before having sex with them, and then stabbing them to death. *Id.* However, while the police arrested a suspect they believed to be the killer, they were unable to prosecute him because the surviving victims refused to testify against him for fear of being "outed" to the public. *Id.*

[24] Sam Jameson, *Sailor's Killer Had No Regret, Court is Told*, L.A. TIMES, May 26, 1993, at A2; *Sailor Pleads Guilty in Death of Gay Shipmate*, L.A. TIMES, May 3, 1993, at A11.

[25] Jameson, *supra* note 24, at A2; *Sailor Pleads Guilty in Death of Gay Shipmate*, *supra* note 24, at A11.

[26] Jameson, *supra* note 24, at A2 (internal quotation marks omitted). The leader of the attack on Schindler, Terry Helvey, never went to trial, as he pleaded guilty to committing murder with intent to inflict great bodily harm, a form of unpremeditated killing, rather than premeditated murder with which he was originally charged. *Sailor Pleads Guilty in Death of Gay Shipmate*, *supra* note 24, at A11.

recent years,[27] violent bias-motivated attacks have not decreased in numbers since the turn of the century.[28]

In fact, according to the New York Police Department, New York City was projected to see "double the number of attacks on gays by the end of 2013" as it did the year before.[29] As recently as May of

[27] The Movement Advancement Project, which compiles a yearly study about advancements made by members of the LGBT community, has cited the following as major strides for gays and lesbians in 2014:

- seventeen states now allow gay marriage,
- the federal government is now required to recognize marriages of same-sex couples,
- twenty-one states and Washington, D.C., now allow same-sex couples to petition for joint adoption,
- restrictions on changing one's gender on identification documents have been eased, and
- the nation has seen a number of openly gay public officials.

MOVEMENT ADVANCEMENT PROJECT, THE MOMENTUM REPORT—2014 EDITION: AN ANALYSIS OF KEY INDICATORS OF LGBT EQUALITY IN THE U.S., i–ii, 25 (2014), *available at* http://www.lgbtmap.org/file/momentum-report-2014.pdf.

[28] *See Man Who Says Gay Jokes Prompted Shooting Arraigned*, ABC NEWS, http://abcnews.go.com/US/story?id=95644 (last visited Mar. 13, 2015) (reporting the 2000 shooting at the Backstreet Café, a Virginia gay bar, where the gunman, having asked for directions to a gay bar so that he could "shoot some gay people," opened fire, killing one and wounding six others (internal quotation marks omitted)); Austin Fenner & Richard Weir, *Grisly Murder in BX Hair Stylist Stabbed 43 Times in Bathtub*, N.Y. DAILY NEWS, Aug. 6, 2002, at 8 (describing the 2002 slaying of hair stylist Rodney Velasquez, who was strangled and stabbed forty-three times in his bathroom, his killer scrawling the message "Bloods hate f[ags]" along with a heart in Velasquez's blood on the wall (internal quotation marks omitted)); *Kentucky Gay Murder Trial Begins*, ADVOCATE (Jan. 20, 2005), http://www.advocate.com/news/2005/01/20/kentucky-gay-murder-trial-begins-14849 (recounting the 2003 killing of Richie Phillips, whose body was found inside a suitcase in a river days after he was killed for being openly gay); *Overkill in Alabama: All the Rage*, BEYOND HOMOPHOBIA (Sept. 13, 2007), http://www.beyondhomophobia.com/blog/antigay-overkill/ (recounting the 2004 murder of Scotty Joe Weaver, who was cut, strangled, and nearly decapitated by his roommates before they dumped his body in the woods, urinated on it, and then set it on fire because they "had problems with [his] homosexuality" (internal quotation marks omitted)); Anthony Glassman, *Final Man Pleads Guilty to Beating Daniel Fetty to Death*, GAY PEOPLE'S CHRON. (Nov. 11, 2005), http://www.gaypeopleschronicle.com/stories05/november/1111055.htm (describing the 2004 killing of deaf gay man Daniel Fetty, who was beaten to death with bricks, bottles, and boards and left in a dumpster); *Gay Man's Killing May Change Hate-Crime Laws*, NBC NEWS (Mar. 22, 2007), http://www.nbcnews.com/id/17745016/ns/us_news-crime_and_courts/t/gay-mans-killing-may-change-hate-crime-laws/#.UyufHTnA6fQ (reporting the 2007 murder of Andrew Anthos, who was approached by a stranger on a city bus who asked him if he was gay and called him a "faggot" before following him off the bus and beating him over the head with a lead pipe (internal quotation marks omitted)); Oren Yaniv et al., *Teen in Fatal Knifing Faces Hate-Crime Rap*, N.Y. DAILY NEWS, June 15, 2007, at 34 (describing the 2007 killing of Roberto Duncanson, who was stabbed to death by a teenager who waited for him to come outside of the apartment he was visiting, snarling at him, "What are you looking at . . . ?" (internal quotation marks omitted)); Joal Bryant, *Gay Gang Member Killed in Baltimore*, SAME SAME (Aug. 20, 2008), http://www.samesame.com.au/news/2876/Gay-Gang-Member-Killed-In-Baltimore (reporting the 2008 murder of Steven Parrish, who was stabbed over fifty times and stomped by members of the gang that he was a part of after they found "gay" text messages on his phone and decided that "he had to go" (internal quotation marks omitted)).

[29] *Anti-Gay Hate Crimes Set to Double in New York City in 2013*, RT (Aug. 19, 2013),

2013, a New York City man, Mark Carson, was shot in the face at point-blank range, and killed, while walking down the street with his boyfriend.[30] According to law enforcement officials, the shooter, thirty-three-year-old Elliot Morales, taunted the men prior to the shooting, calling them "queer" and "f[aggo]t" and asking, "Do you want to die here?"[31] When asked why he shot Carson, Morales simply explained that Carson was trying to act "tough in front of his bitch," boasting, "It's the last thing he'll remember."[32]

It is apparent from reports like these that violence against members of the gay community is very much a modern-day issue.[33]

---

www.rt.com/usa/anti-gay-crimes-double-691/.

[30] *See* Denis Slattery et al., *Slay Is Gay Hate! Cops: Suspect Held in Village Shooting*, N.Y. DAILY NEWS, May 19, 2013, at 20.

[31] *Id.* (internal quotation marks omitted). Morales pleaded not guilty to charges of second degree murder as a hate crime, criminal possession of a weapon, and menacing, and is currently being held without bail on Rikers Island awaiting trial. According to his court-appointed defense attorney, Kevin Canfield, Morales intends to present psychiatric evidence at trial that he was "temporarily insane" at the time of the shooting. *See* Tom Hays, *Elliot Morales, Suspect in Anti-Gay New York City Hate Crime Shooting, Pleads Not Guilty*, HUFFINGTON POST (June 18, 2013), http://www.huffingtonpost.com/2013/06/18/mark-carson-hate-crime-plea_n_3461677.html; Andrea Swalec, *Elliot Morales, New York Gay Hate Crime Suspect, May Plead Not Guilty by Reason of Insanity*, HUFFINGTON POST (July 30, 2013), http://www.huffingtonpost.com/2013/07/30/elliot-morales-not-guilty-plea_n_3677963.html.

[32] Hays, *supra* note 31.

[33] *See* Pete Kotz, *Joshua Wilkerson, 18, Beaten & Burned to Death by Friend Hermilio Moralez for Allegedly Making a Pass*, TRUE CRIME REP. (Nov. 19, 2010), http://www.truecrimereport.com/2010/11/joshua_wilkerson_18_beaten_bur.php (describing the 2010 murder of gay teenager Joshua Wilkerson, who was beaten to death by his friend, dumped in a field, and set on fire after "making a pass" at his killer); *Sentenced to Life, Man Apologizes to Family of Victim He Stabbed 132 Times*, CBS DETROIT (Apr. 25, 2012), http://detroit.cbslocal.com/2012/04/25/man-convicted-of-murder-during-gay-robbery-apologizes/ (describing the 2010 murder of Robert Miller Jr., who was stabbed over 130 times by his attacker, who met Miller on a gay dating website and who feigned a romantic interest in him, only to murder and rob him upon their initial meeting); Sara Jean Green & Keith Ervin, *Hairdresser Danny Vega's Fatal Beating a Mystery*, SEATTLE TIMES (Nov. 28, 2011), http://seattletimes.com/html/localnews/2016882628_vega29m.html (recounting the 2011 killing of Danny Vega, a gay man who was jumped, punched, and kicked to death as he walked down the street); Cheryl Chodun, *Family and Friends Want Murder Charge, Not Manslaughter, for a 26-Year-Old Man Beaten and Stabbed*, WXYZ DETROIT (Jan. 9, 2012), http://www.wxyz.com/news/region/detroit/family-and-friends-want-a-murder-charge-not-manslaughter-for-a-26-year-man-beaten-and-stabbed (reporting the 2012 killing of Charlie Hernandez, who was beaten and stabbed while gay slurs were shouted, after he accidentally stepped on a pair of sunglasses); Henrick Karoliszyn, *Slain Gay Rights Activist to be Remembered at Sunnyside Vigil*, N.Y. DAILY NEWS (Nov. 16, 2012), http://www.nydailynews.com/new-york/queens/vigil-slain-activist-lou-rispoli-article-1.1203262 (recounting the 2012 killing of gay rights activist and marriage equality advocate Lou Rispoli, who was beaten in the head by three suspects who still remain at large); *Man Found Beaten in San Francisco's Duboce Triangle Taken Off Life Support, Pronounced Dead*, CBS SAN FRANCISCO (Aug. 13, 2014), http://sanfrancisco.cbslocal.com/2014/08/13/man-found-beaten-in-san-franciscos-duboce-triangle-taken-off-life-support-pronounced-dead/ (reporting the August 2014 murder of thirty-one-year-old Bryan Higgins, a member of the homosexual spiritual group known as the Radical Faeries, who was beaten to death in a park in San Francisco). As recently as September of 2014, a gay couple was brutally

However, in order to fully comprehend the nature and scope of this longstanding animosity, it is important to undertake a critical examination of the cultural and legal trends that have led us down this unfavorable path.

B. Religious and Legislative Trends That Have Fostered an Environment Hostile to the Homosexual Population

> *[Homosexuality] is a pathetic little second-rate substitute for reality, a pitiable flight from life. . . . [I]t deserves no encouragement, no glamorization, no rationalization, no fake status as minority martyrdom, no sophistry about simple differences in taste—and, above all, no pretense that it is anything but a pernicious sickness.*[34]

One of the primary sources of the odium towards gays and lesbians is the longstanding nonacceptance of homosexuality by a number of the world's major religions. For thousands of years, the Judeo-Christian tradition, the predominant religious influence in the Western world, denounced homosexuality as an "abominable sin against natural law."[35] Even in the current Christian tradition homosexuality is similarly condemned. When drafting the most recent version of the official Catechism of the Catholic Church for publication in 1992, homosexuality was denounced by church leaders as being "intrinsically disordered" such that "[u]nder no circumstances can [it] be approved."[36] Pope Benedict XVI, a recent, former leader of the Catholic Church,[37] has labeled homosexuality

assaulted in Philadelphia by a group of ten to twelve individuals who "savagely pummel[ed] them in the face and chest," leaving one with several fractured bones and a shattered jaw, after asking one of the males, "Who is that, your f[uck]ing boyfriend?" Vinny Vella, *'Hate-Crime' Victims Recount Savage Center City Beating*, PHILLY (Sept. 17, 2014), http://articles.philly.com/2014-09-17/news/53988635_1_two-men-victims-boyfriend.

[34] *The Homosexual in America*, TIME, Jan. 21, 1966, at 40–41.

[35] Christina Pei-Lin Chen, Note, *Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J. L. & PUB. POL'Y 195, 198 (2000). This "abominable sin" is proclaimed in the biblical text of Leviticus as follows: "[I]f a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them." *Id.* (quoting *Leviticus* 20:13).

[36] *Stances of Faiths on LBGT Issues: Roman Catholic Church*, HUM. RTS. CAMPAIGN, http://www.hrc.org/resources/entry/stances-of-faiths-on-lgbt-issues-roman-catholic-church (last visited Mar. 13, 2015) (quoting CATECHISM OF THE CATHOLIC CHURCH 2357, at 556 (1994)) (internal quotation marks omitted).

[37] Benedict XVI was the pope of the Roman Catholic Church from 2005 to 2013. *See Pope Benedict XVI*, BIOGRAPHY, http://www.biography.com/people/pope-benedict-xvi-15045109 (last visited Mar. 13, 2015).

"an intrinsic moral evil,"[38] and in 2003, the Vatican publicly denounced same-sex unions as "evil" and urged followers to oppose equality legislation.[39]

Members of the Catholic faith are not alone in this crusade: a majority of Evangelicals think that society should "discourage[]" homosexuality;[40] the Jewish Torah strictly forbids the homosexual act, known as *mishkav zakhar*;[41] the Mormon church believes that acting on a homosexual attraction or impulse is sinful;[42] and the Koran teaches that homosexuality "is a vile form of fornication, punishable by death."[43] This seemingly universal practice of religious persecution of homosexuality is undeniably illustrative of the widespread hostility felt by members of the LGBT community at the hands of the religious faithful.[44] With seventy-nine percent of the American population subscribing to some form of organized religion,[45] it is impossible to ignore the weight of the influence these longstanding doctrines have exerted over their followers.

The framers of the U.S. Constitution attempted to avoid this type of improper influence in the government's lawmaking capacity by placing the Freedom of Religion Clauses in the First Amendment.[46] It has long been axiomatic that the First Amendment erects a constitutional barrier between actions of the government and those

---

[38] *Stances of Faiths on LGBT Issues: Roman Catholic Church*, *supra* note 36 (quoting Letter from Joseph Cardinal Ratzinger, Congregation for the Doctrine of the Faith, to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons (Oct. 1, 1986), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html) (internal quotation marks omitted).

[39] *Stances of Faiths on LGBT Issues: Roman Catholic Church*, *supra* note 36.

[40] Ed Stetzer, *Mainline Protestants: Views of Homosexuality*, EXCHANGE (Mar. 24, 2009), http://www.christianitytoday.com/edstetzer/2009/march/mainline-protestants-views-of-homosexuality.html.

[41] Michael Gold, *Homosexuality and Halakhah,* MY JEWISH LEARNING, http://www.myjewishlearning.com/life/Sex_and_Sexuality/Homosexuality/Homosexuality_and_Halakhah.shtml (last visited Mar. 13, 2015).

[42] *Love One Another: A Discussion on Same-Sex Attraction*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, http://www.mormonsandgays.org/ (last visited Mar. 13, 2015).

[43] *What Does the Religion of Peace Teach About . . . Homosexuality*, RELIGION PEACE, http://www.thereligionofpeace.com/Quran/026-homosexuality.htm (last visited Mar. 13, 2015).

[44] I acknowledge that not every religion, nor every member of a particular religion, shares the same outlook on homosexuality as described above. This section simply seeks to provide a contextual framework of some of the sources of antagonism faced by gays and lesbians. *See, e.g.*, *Where Do They Stand—Protestant Denominations and LGBT Members*, SACRED PAUSES, http://www.sacredpauses.com/where-do-they-stand-protestant-denominations-and-lgbt-members/ (last visited Mar. 13, 2015) (describing the recent practice of the Episcopal Church in blessing gay marriages, and even ordaining openly gay clergy members).

[45] Michelle Boorstein, *Study: 20% List Religion as 'None,' but Many Still Believe*, WASH. POST, Oct. 9, 2012, at A1.

[46] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

of religious organizations.[47] Although the phrase "separation of church and state" never explicitly appears in the language of the Constitution, a series of Supreme Court cases, starting in 1878,[48] have used that famous language to express the mandate that the government cannot endorse or intermingle with the practice of any religion, and must strictly function within a purely secular framework.[49]

Nevertheless, "separation of church and state" seems to have failed miserably in regards to the government's "purely secular" position on homosexuality. One way in which this doctrinal breakdown manifests itself is through enactments by state legislatures that impede on the fundamental rights of homosexual men and women. Laws commonly known as "sodomy statutes" were in effect in all fifty states until the mid-1960s,[50] and their enforceability was upheld by the U.S. Supreme Court as recently as 1986.[51] Making gay sex between two consenting adults a felony nationwide,[52] these statutes, which forbade "crimes against nature," bore an eerie resemblance to the admonishments of homosexuality found in various religious texts.[53]

Section 21-3505 of the Kansas Penal Law defined "criminal sodomy" as sexual contact either between "members of the same sex or between a person and an animal."[54] Section 21.06 of the Texas Penal Law, overtly entitled "Homosexual Conduct," sets forth that "[a] person commits an offense if he engages in deviate sexual

---

[47] *See id.*

[48] *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 493 (1961); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); Reynolds v. United States, 98 U.S. 145, 164 (1878).

[49] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) ("[T]he statute must have a secular legislative purpose . . . its principal or primary effect must be one that neither advances nor inhibits religion . . . [and] the statute must not foster 'an excessive government entanglement with religion.'" (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)) (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968))).

[50] *See* Carlos Maza, *State Sodomy Laws Continue to Target LGBT Americans*, EQUALITY MATTERS (Aug. 8, 2011), http://equalitymatters.org/blog/201108080012.

[51] *See* Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986) (ruling that homosexuals have no fundamental right to engage in "sodomy" and therefore laws criminalizing gay sex are not inherently unconstitutional), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[52] Maza, *supra* note 50.

[53] *See* Margot Canaday, *The Strange History of Sodomy Laws*, NATION (Sept. 16, 2008), http://www.alternet.org/story/99092/the_strange_history_of_sodomy_laws (pointing out that when states began repealing their sodomy statutes in the 1960s and 1970s they were met with powerful opposition from the Catholic Church).

[54] KAN. STAT. ANN. § 21-3505 (West 2009) (repealed 2010). Drawing a parallel between sexual contact with a member of the same sex and engaging in bestiality further suggests the level of depravity with which the homosexual lifestyle was viewed by mainstream American culture.

intercourse with another individual of the same sex."[55] These statutes, and others like them,[56] which existed in some form or another in every state across the country, sent a clear message to the gay population: not only was their lifestyle frowned upon, it was condemned and criminalized, and anyone whose sexuality was deemed "deviant" would be swiftly and rigorously brought to "justice."

In 2003, the U.S. Supreme Court took another look at the constitutionality of these statutes when it heard the case of *Lawrence v. Texas*. In that case, the court ruled six to three that Texas's sodomy statute was unconstitutional, with Justice Kennedy declaring that "[t]he State cannot demean [homosexual individuals'] existence or control their destiny by making their private sexual conduct a crime."[57] While this landmark ruling came as a major victory for LGBT groups, as it effectively nullified the enforceability of "anti-sodomy" laws nationwide, to this day there are still a number of states that refuse to remove such laws from their penal codes, regardless of their inability to be successfully invoked. In fact, a staggering eighteen states *still* have statutes that criminalize homosexual "sodomy."[58]

Perhaps most alarming is the state of affairs in Michigan, where the legislature has yet to repeal the state's "Gross Indecency" laws[59] and certain "strict constructionist" judges still continue to pursue the prosecution of gay sex, despite the Supreme Court's holding in *Lawrence*,[60] "even where the proscribed conduct occurs between two consenting adults."[61] "According to Rudy Serra, attorney and chairman of the Executive Clemency Council for the State of Michigan, police officers continue to aggressively prosecute LGBT

---

[55] TEX. PENAL CODE ANN. § 21.06 (West 2013), *invalidated by Lawrence*, 539 U.S. 558.

[56] *See, e.g.*, ARK. CODE ANN. § 5-14-122 (2004) (repealed 2005) ("A person commits sodomy if such person performs any act of sexual gratification involving . . . [t]he penetration, however slight, of the anus or mouth of an animal or a person by the penis of a person of the same sex or an animal."); MINN. STAT. ANN. § 609.293 (West 2014) ("'Sodomy' means carnally knowing any person by the anus or by or with the mouth.").

[57] *Lawrence*, 539 U.S. at 578.

[58] Maza, *supra* note 50.

[59] *See* MICH. COMP. LAWS ANN. § 750.338 (West 2014) ("Any male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony . . . ."); *id.* § 750.338a ("Any female person who, in public or in private, commits or is a party to the commission of, or any person who procures or attempts to procure the commission by any female person of any act of gross indecency with another female person shall be guilty of a felony . . . .").

[60] Maza, *supra* note 50.

[61] People v. Kalchik, 407 N.W.2d 627, 629 (Mich. Ct. App. 1987).

people without legal challenge,"[62] exposing would-be violators to the risk of having to register as a sex offender and facing prison sentences of up to fifteen years for acts that are perfectly legal in virtually every other state.[63] In Michigan's Kent County, the sheriff's department has been conducting undercover sting operations at local parks targeting gay men.[64] Between July and October of 2010, "undercover police officers, pretending to be sexually interested in men, arrested at least 33 men in Kent County parks"[65] as part of an initiative termed the "Bag-a-Fag" operation; the men were led to believe that the undercover officers wished to engage in consensual sexual activity with them, and were then charged with violations of the state's gross indecency laws.[66]

This seemingly archaic application (and arguably, abuse) of legal discretion seems out of step with our nation's otherwise progressive and forward-thinking sensibilities. It acts as a prime example, therefore, of the tendency of our nation's justice system to be "stuck in slow motion," so to speak, when it comes to reconciling the law with current societal outlooks and attitudes.[67]

Even in those states where these unrepealed sodomy laws are not actively prosecuted, their mere presence as a standing part of the

---

[62] Maza, *supra* note 50.

[63] *Id.*

[64] Letter from Jay Kaplan, Staff Attorney, Am. Civil Liberties Union of Mich., & Miriam Aukerman, Staff Attorney, Am. Civil Liberties Union of Mich., to Lawrence A. Stelma, Sheriff, Kent County Sheriff's Department 1 (June 20, 2011), *available at* http://grandrapidslgbthistory.files.wordpress.com/2011/10/kent-county-gay-stings-letter-no-appendices.pdf. Similar sting operations were successfully challenged in Detroit where a judge required the city to "repeal or amend ordinances it had used to target gay men, required police officers to participate in sensitivity training, [and] mandated the expungement of arrest records." *Id.*

[65] *Id.* at 2. In one case, a man discussed his sexual preferences with the undercover officer, indicated that he could not "do anything" that day, but suggested that they exchange e-mail addresses and arrange to meet up at a hotel. *Id.* He was arrested. *Id.* Another man was arrested after an undercover officer suggested that the two engage in sexual activity, to which the man responded, "If you are offering." *Id.*

[66] Similar tactics have been used by members of the Palm Beach County Sheriff's Office in South Florida, where 320 gay men were arrested in 2012 after being solicited by undercover officers who "approach[ed], lure[d] and entice[d] guys who [were] sitting alone in their car, start[ed] a sexually charged conversation and then look[ed] for a way to arrest them." Jason Parsley, *'Bag-A-Fag' Tactics Not Acceptable, Lawyers Say*, S. FLA. GAY NEWS (FEB. 28, 2012), http://southfloridagaynews.com/Local/bag-a-fag-tactics-not-acceptable-lawyers-say.html. An attorney who has represented a number of gay men targeted by this corrupt police operation pointed out the hypocrisy inherent in the practice: "If you took an attractive female officer and put her by the restroom in a city park and she walked up to guys as they went in and out and asked them to show their private parts, I think they would arrest a lot of guys." *Id.* (internal quotation marks omitted).

[67] *See* Bob Altemeyer, *Changes in Attitudes Toward Homosexuals*, 42 J. HOMOSEXUALITY 63, 63 (2001) ("Cross-sectional data . . . indicate[] attitudes toward homosexuals have become increasingly tolerant and accepting over the past 14 years.").

state's legal code conveys a powerful sentiment as to the intrinsic value of the members of that state's gay community.[68] Accordingly, "[t]hese laws reinforce negative stereotypes about homosexuality, same-sex relationships, and the validity of the lives of LGBT people,"[69] notwithstanding the fact their successful enforcement is unlikely. Laws like these carry a significance "completely independent of their actual enforcement,"[70] since, despite the government's lack of intent to actually enforce the statutes, their mere presence in the state's official criminal code sends a message to society that homosexuality is still considered unacceptable by the state government.[71]

Another legislative enactment that functioned as a governmental admonition of the homosexual lifestyle came in the form of the 1996 Federal Defense of Marriage Act (DOMA).[72] This statute, officially entitled "An Act To define and protect the institution of marriage,"[73] empowered states to refuse to recognize same-sex marriages, regardless of their legality in the states where they were performed.[74] Until 2013, when the Supreme Court finally struck down the relevant portion of that statute as unconstitutional,[75] it functioned to deny an array of federal benefits to same-sex couples that were being readily offered to heterosexual couples without question.[76] Cloaked in a desire to promote traditional values and protect the integrity of the cherished matrimonial institution,[77] the statute, as applied, did little more than reinforce the bigotry and

---

[68] In 2008, a gay couple was arrested in North Carolina and charged with a Class I felony for engaging in "private, consensual, homosexual sex." Maza, *supra* note 50. The charges were eventually dropped, however not before the men were arrested, taken to jail, and publicly humiliated. *Id.*

[69] *Id.*

[70] *Id.* (quoting Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 114 (2000)) (internal quotation marks omitted).

[71] Maza, *supra* note 50.

[72] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (1996); 28 U.S.C. § 1738C (1996)).

[73] *Id.*

[74] 28 U.S.C. § 1738C.

[75] *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("[DOMA] deprive[s] same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages . . . [and] impose[s] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.").

[76] *"DOMA": Federal Discrimination Against Same-Sex Married Couples*, GLAD, http://www.glad.org/uploads/docs/publications/doma-flyer.pdf (last visited Mar. 13, 2015).

[77] *See* CHRIS GACEK, FAMILY RESEARCH COUNCIL, THE DEFENSE OF MARRIAGE ACT: WHAT IT DOES AND WHY IT IS VITAL FOR TRADITIONAL MARRIAGE IN AMERICA 1 (2010), *available at* http://downloads.frc.org/EF/EF10G25.pdf.

provincialism underlying the American lawmaking process.

In fact, one need look no further than the House of Representatives Judiciary Committee Report to Congress, in which it lays out the rationale for DOMA.[78] This report states in relevant part: "Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality . . . entail[ing] both moral disapproval of homosexuality, and . . . moral conviction[s] that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[79]

It is amply apparent, therefore, that even within the last decade, our nation's legislature and judiciary have served as authoritative mechanisms for furthering the antipathy faced by the LGBT community, fostering a state-sanctioned atmosphere of homophobia and intolerance.[80] The invocation of the gay panic murder defense is a modern-day outgrowth of this depraved mindset—a tangible example of a nation's inglorious history of homosexual persecution.

III. THE PROVOCATION DOCTRINE, GENERALLY

A. The Emergence of the Provocation Doctrine in American Homicide Jurisprudence

The modern-day understanding of the gay panic defense has evolved from centuries of homicide jurisprudence, which acknowledged that certain killings should not be punished as severely as others.[81] In the earliest days of American common law,

---

[78] Garance Franke-Ruta, *The Jaw-Dropping Reason Congress Drafted DOMA: 'Moral Disapproval of Homosexuality*,*'* ATLANTIC (Mar. 27, 2013), http://www.theatlantic.com/politics/archive/2013/03/the-jaw-dropping-reason-congress-drafted-doma-moral-disapproval-of-homosexuality/274418/.

[79] H.R. REP. NO. 104-664, at 15–16 (1996).

[80] *See* Ethan Klapper, *On This Day in 1993, Bill Clinton Announced 'Don't Ask, Don't Tell*,*'* HUFFINGTON POST (July 19, 2013), http://www.huffingtonpost.com/2013/07/19/bill-clinton-dont-ask-dont-tell_n_3623245.html (describing the 2011 repeal of "Don't Ask, Don't Tell"—the official U.S. policy regarding homosexuality in the military that effectively functioned as a statutory ban on homosexual service, resulting in the discharge of a number of gay and lesbian service members). It is also worth noting that gay and bisexual men are permanently banned by the Food and Drug Administration from donating blood, based on the "risk factor" of HIV or Hepatitis B exposure, regardless of their actual HIV status, while heterosexual women who have actually had sexual intercourse with an HIV positive partner are only deferred from donating blood for one year. *See* FOOD & DRUG ADMIN., DEP'T OF HEALTH & HUMAN SERVS., GUIDANCE FOR INDUSTRY: ELIGIBILITY DETERMINATION FOR DONORS OF HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASED PRODUCTS (HCT/PS) 14–15 (2007), *available at* http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Tissue/ucm091345.pdf.

[81] *See* JOHN C. KLOTTER, CRIMINAL LAW 80 (7th ed. 2004) ("[T]he law does not condone killing; . . . however, the law does not ignore the weakness of human nature. Therefore, if

all killings were presumed to be the result of malice aforethought and were therefore uniformly punished by a penalty of death.[82] However, upon consideration of certain killings that the court deemed "less morally objectionable,"[83] judges began to carve out categorical exceptions to this general rule in an attempt to spare the lives of these "less-blameworthy" defendants.[84] Thus, killings that occurred as a response to "(1) substantial physical injury or assault; (2) mutual quarrel or combat; (3) illegal arrest; [or] (4) adultery with the offender's spouse"[85] were deemed the result of "serious provocation"[86] and, as such, "[a] violent reaction was understandable under the circumstances."[87] While not a complete defense to murder, defendants whose crimes fit into one of these rigid categories were able to argue that their violent behavior was justified based on the abhorrent conduct of the victim, and their charge for murder could be mitigated to the lesser offense of manslaughter.[88]

While this categorical approach legally prevailed for a time, "[c]lassifying the multitude of possibly provocative acts ultimately proved too difficult and led judges to abandon the per se approach."[89] Currently, in order for a killing that would otherwise be murder to be reduced to manslaughter, based on a finding of "provocation," four requirements generally must be met:[90] (1) there must have been an *adequate* provocation, (2) the killing must have occurred *during* the "heat of passion," (3) there must have been *no reasonable opportunity* for the person to "cool off" following the provocation, and (4) there must be a *causal* connection between the provocation, the "heat of passion," and the killing.[91]

---

there is absence of malice and the killing is due to the influence of sudden passion, the crime is reduced from murder to manslaughter.").

[82] Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133, 137 (1992).

[83] *Id.* One example is a killing in response to witnessing an assault on a relative. KLOTTER, *supra* note 81, at 81.

[84] Mison, *supra* note 82, at 137.

[85] United States *ex rel.* Tenner v. Gilmore, No. 97 C 2305, 1998 U.S. Dist. LEXIS 16188, at *24 (N.D. Ill. Oct. 8, 1998).

[86] *Id.*

[87] Mison, *supra* note 82, at 138.

[88] *Id.* at 146.

[89] *Id.* at 139.

[90] *See* KLOTTER, *supra* note 81, at 80. The language of the elements varies by jurisdiction. However, this analysis contains a general set of elements that is largely consistent with the tests applied by the majority of state penal codes.

[91] Mison, *supra* note 82, at 140; *see* David Alan Perkiss, Comment, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons from the Lawrence King Case*, 60 UCLA L. REV. 778, 798 (2013) (setting forth the requirements for a defendant to downgrade a charge

The underlying rationale offered in support of the defense is that "[t]he harm to society from the intentional killing is reduced 'by the magnitude of the immoral nature of [the v]ictim's provocative conduct.'"[92] Focusing on the behavior of the victim, rather than that of the defendant, de-emphasizes the culpability inherent in the defendant's actions, and turns the spotlight onto the conduct of the deceased.[93]

Before a court can assess whether the defendant was adequately provoked, however, it must first address the threshold issue of whether the provocative behavior of the victim was "sufficiently egregious that the . . . ordinary, usually law-abiding person would be expected to become enraged."[94] In other words, was the conduct of the victim sufficiently provocative that it would incite the ordinary person to lose his self-control and *kill* in the heat of passion?[95] In applying this test, courts have adopted the fictitious legal standard of "the reasonable man."[96] The "reasonable man" is an idealized citizen, "reflecting the standard to which society wants its citizens and system of justice to aspire. It is an 'entity whose life is said to be the public embodiment of rational behavior.'"[97] Essentially, if the defendant can convince the jury that the victim's behavior was so offensive that it would "inflame the passions of a reasonable man," then he is guilty only of manslaughter.[98]

B. Gay Panic as Adequate Grounds for Provocation

The provocation defense is invoked within the context of gay

---

of murder to manslaughter under the provocation theory); KLOTTER, *supra* note 81, at 80.

[92] Mison, *supra* note 82, at 146 (quoting Joshua Dressler, *Rethinking Heat of Passion: A Defense of a Rationale*, 73 J. Crim. L. & Criminology 421, 457 (1982)).

[93] *See*, *e.g.*, State v. Vigilante, 608 A.2d 425, 427–28 (N.J. Super. Ct. App. Div. 1992). In this case, standing trial for killing his father, who had a long history of mental illness, violent temper, and repeated verbal and physical assaults on family members, the defendant argued the defense of provocation. *Id.* The court focused on the actions of the deceased in screaming at the defendant, and chasing him through the house with a pipe wrench because the deceased thought that the defendant had stolen some money. *Id.* at 428. The defendant shot his father when he became cornered against a pole in the laundry room. *Id.*

[94] Mison, *supra* note 82, at 142 (quoting Dressler, *supra* note 92, at 465) (internal quotation marks omitted).

[95] *See* KLOTTER, *supra* note 81, at 81 ("The courts have indicated that staggering blows to the face of the person, the infliction of pain and bloodshed, or the killing or assaulting of a relative are sufficient provocation to reduce the crime from murder to manslaughter.").

[96] Mison, *supra* note 82, at 140.

[97] *Id.* at 160–61 (quoting Ronald K. L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man*,*"* 8 RUTGERS CAMDEN L.J. 311, 315 (1977)).

[98] Mison, *supra* note 82, at 147; *see also* Garmon, *supra* note 12, at 632–34 (providing an overview of the classic provocation doctrine and how it functions in criminal law).

panic most frequently "in situations where an individual has killed another person of the same sex after having been the object or recipient of an unwanted homosexual advance."[99] While there are arguably scenarios in which applying the general provocation doctrine leads to an equitable and just resolution,[100] applying this doctrine within the context of gay panic is not only inherently unjust, but it is "immoral and inconsistent with the goals of modern criminal jurisprudence."[101] As the law currently stands in forty-nine states,[102] a nonviolent, nonthreatening sexual advance by a member of the same sex may be *legally adequate* to constitute sufficient provocation that would incite the "reasonable man" to lose his self-control and *kill*, without having to answer to the full extent of the law.[103] The natural consequence of this wayward application of legal precedent is that courts label the underlying act of the victim—an act that reflects his homosexuality—as offensive, provoking, and infuriating. By granting defendants permission to use this defense, courts send "a message to juries and the public that if someone makes a homosexual overture, such an advance may be sufficient provocation to kill that person."[104] Courts effectively equate the "trauma" of an unsolicited touch or kiss by a member of the same sex to years of physical and emotional abuse at the hands of a batterer[105] or the threat of an imminent deadly assault,[106]

---

[99] Garmon, *supra* note 12, at 633 (internal quotation marks omitted).

[100] *See* Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 960–63 (2002) (exploring some of the contrasting views of the utility of the provocation defense).

[101] Mison, *supra* note 82, at 135.

[102] California is the first and only state to abolish the homosexual-advance defense. *See infra* Part VI.B (discussing California Assembly Bill 2501).

[103] Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 730 (1995). Professor Joshua Dressler provides the following examples of "homosexual conduct" that may give rise to the gay panic defense:

> (1) [W]hile they watched a pornographic movie at A's home, A put his hand on the defendant's knee and asked "Josh, what do you want to do?"; (2) in an automobile, B put his hand on the defendant's knee, was rebuffed, and then placed his hand on the defendant's upper thigh "near [the] genitalia," and asked the defendant to spend the night with him; (3) at a party, C asked the defendant "something about gay people," held his hand for fifteen seconds, and later grabbed his right buttock while the defendant was walking through a doorway; (4) D permitted the defendant to enter his house to use his telephone, after which D locked the door, rubbed up against the defendant, and tried to touch his scrotum; (5) E offered the defendant money to perform oral sex, and then pulled the defendant onto his lap and seized his genitals; (6) while naked from the waist down, F embraced the defendant and tried to grab the defendant's penis; and (7) G performed a homosexual act upon the sleeping defendant.

Id. at 733–34.

[104] Mison, *supra* note 82, at 135–36.

[105] *See, e.g.*, Tina Susman, *Jury Accepts Battered-Wife Defense, Acquits N.Y. Woman of*

declaring all three adequate grounds to justifiably respond with lethal violence.

The gay panic defense capitalizes on societal and individual perceptions about homosexuality, anticipating that the jury will respond with "fear, disgust, and hatred with regard to homosexuals."[107] "The defendant's goal is to convince the jury that his [homicidal] reaction was only a reflection of this visceral societal reaction,"[108] seeking that the jury identify with the American dossier of heterocentrism and homophobia, and acknowledge that such a response is inherently "reasonable" under the circumstances.[109] Taking advantage of a rather interesting dichotomy, proponents of the gay panic defense use this antigay bias not only as the *cause* leading to the violent act, but also as the proposed *justification* for the commission of the homophobic violence.[110]

The distinction between murder and manslaughter, in cases where the provocation defense is utilized, turns on whether the behavior is deemed acceptable or unacceptable by society.[111] By putting this question before the jury courts essentially ask jurors to evaluate the life of the gay victim and to make a determination of whether the defendant's actions were entirely blameworthy, considering the "condition" of the victim. In *Mills v. Shepherd*,[112] North Carolina District Court Judge James McMillan read the following instruction to the jury in the murder trial of David L. Mills, who was charged with the killing of a gay man, Billy Francis Brinkley:

> In order, members of the jury, to reduce this crime [from murder] to manslaughter, the defendant must prove not beyond a reasonable doubt, but simply to your satisfaction, that there was no malice on his part. To negate malice, and thereby reduce the crime to manslaughter, the defendant

Murder, L.A. TIMES, Oct. 6, 2011, at A15 (recounting a 2011 case in which a wife was found justified in killing her husband after seventeen years of intense physical abuse).

[106] *See, e.g.*, State v. Vigilante, 608 A.2d 425, 427–28 (N.J. Super. Ct. App. Div. 1992) (holding that the evidence submitted at trial was sufficient to support a verdict of manslaughter in a case where the defendant shot his father after being chased through the house by him and threatened with a wrench).

[107] Mison, *supra* note 82, at 158.

[108] *Id.*

[109] *Id.*

[110] Kara S. Suffredini, Note, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 313 (2001).

[111] Mison, *supra* note 82, at 172.

[112] Mills v. Shepherd, 445 F. Supp. 1231 (W.D.N.C. 1978).

> must satisfy you . . . that he, . . . in kicking and beating the deceased, . . . did this in the heat of passion . . . . Second, that this passion was produced by *acts of the deceased*, . . . which the law regards as *adequate provocation* . . . .[113]

In that case, the "acts of the deceased" the judge was referring to were the alleged grabbing of the defendant's privates and making a "pass" at him.[114] According to the jury, these "homosexual act[s]" constituted legally adequate provocation to knock Brinkley to the ground, kick and stomp him to death, rob him of his jewelry, and then drive home in his automobile.[115] After deliberation, the jury only found Mills guilty of voluntary manslaughter.[116]

Whether successful in mitigating the killing or not, the presentation of such a defense offers the jury an excuse, or a *justification*, for why the defendant did what he did. Even if such an argument is unsuccessful, it demonstrates a judicial endorsement of the defense's validity and serves to isolate gays and lesbians from the solace of the court's protection. In practice, "the homosexual-advance defense is an acceptance of violence predicated on homophobia."[117]

IV. "BUT HE'S GAY, YOUR HONOR"

A. Gay Panic in Practice: Justice Denied to Gay Victims

Far from a nebulous legal construct that exists only in theory, or an antiquated remnant of long forgotten legal doctrine, the gay panic defense remains a powerful defensive tool in modern day courtrooms across the United States.[118] It continues to be invoked by real defendants, who are guilty of unspeakably violent crimes against actual victims, continuously depriving families, friends, and

---

[113] *Id.* at 1234 (emphasis added) (internal quotation marks omitted).

[114] *Id.*

[115] *Id.* at 1234, 1237.

[116] *Id.* at 1237.

[117] Scott D. McCoy, Note, *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 657 (2001).

[118] As recently as 2009, this defense was used to *acquit* a defendant for stabbing his gay neighbor sixty-one times. *See* Michael Rowe, *"Gay Panic Defense" Used to Acquit Illinois Man Who Stabbed Neighbor 61 Times*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/michael-rowe/man-acquitted-of-murder-a_b_231748.html. In that case, Joseph Biedermann was acquitted by an Illinois jury for the murder of his neighbor, Terrance Michael Hauser, whom he stabbed sixty-one times, "claiming that [Hauser] had made . . . unwanted sexual advances and that he had merely been defending himself." *Id.* According to the jury, "it had taken Biedermann *61 stab wounds* in order to successfully fend off an unwanted sexual advance from another man." *Id.*

loved ones of the justice they deserve.

In a highly publicized trial in 1999 for the kidnapping and murder of gay college student Matthew Shepard, the defense attorney used this very strategy—shifting the focus away from the defendant's admittedly savage and brutal behavior, and focusing instead on Shepard's alleged "homosexual advance."[119] Admitting in his opening statement that his client "savagely beat Shepard and left him for dead," defense attorney Jason Tangeman was prepared to explain his client's deplorable behavior: Shepard had "grabbed [his] genitals and licked his ear," sending his killer into a "fit of uncontrollable homicidal rage."[120] While Shepard was left beaten, bloody, unconscious, and tied to a fence post in the remote outskirts of Laramie, Wyoming, his attacker was allowed to argue before the jury that his actions were *not so morally objectionable* that a murder conviction was warranted; instead, he should only be convicted of nonpremeditated, nondeliberate, voluntary manslaughter.[121]

More than ten years later, a court was again faced with this very issue when it heard testimony in the case of Lawrence King.[122] Lawrence "Larry" King was a fifteen-year-old student at E.O. Green Junior High School in Oxnard, California.[123] Larry was openly gay; however, instead of succumbing to the homophobic teasing and bullying of his classmates, Larry chose to embrace his sexual identity, and expressed himself by wearing make-up, jewelry, and

[119] Chen, *supra* note 35, at 196.

[120] *Id.* (internal quotation marks omitted).

[121] *Id.* at 196–97. The judge presiding over the Matthew Shepard trial, Judge Barton R. Voigt, declined to allow the defense attorneys the use of a jury instruction on the gay panic defense for fear that it would "mislead and confuse the jury." Michael Janofsky, *Judge Rejects 'Gay Panic' as Defense in Murder Case*, N.Y. TIMES, Nov. 2, 1999, at A14. Despite this ruling, however, "defense attorneys alluded to the victim's homosexuality and attempted to establish him as a sexual predator throughout the trial." Garmon, *supra* note 12, at 635. "Two witnesses testif[ied at trial] about Shepard's alleged sexual aggression." Perkiss, *supra* note 91, at 807. One witness testified that Shepard was "blatantly gay" and that, at one point, he "licked his lips . . . trying to be sexy." *Id.* at 807 (internal quotation marks omitted). Another witness testified that Shepard tugged on his shirt, trying to get him to take a walk with him. *Id.* at 808. Shepard's killer was found guilty of felony murder, kidnapping, and aggravated robbery, rather than the more serious charge of first degree murder, which involves premeditation. *Killer of Gay Student Avoids Death Penalty*, CNN (Nov. 4, 1999), http://www.cnn.com/US/9911/04/gay.attack.verdict.02/.

[122] Newsweek called the murder of Larry King "the most prominent gay-bias crime since the murder of Matthew Shepard." Ramin Setoodeh, *Young, Gay and Murdered*, NEWSWEEK, July 28, 2008, at 41, 41.

[123] Mary McNamara, Television Review, *'Valentine Road' Offers Clear-Eyed View of Larry King Murder*, L.A. TIMES, Oct. 7, 2013, at 6.

high heels to school from time to time.[124] However, not everyone at E.O. Green was as comfortable with Larry's flamboyant sexuality. In February of 2008, while working in the school's computer lab, a fourteen-year-old student, Brandon McInerney, took a gun out of his sweatshirt pocket and shot Larry twice in the back of the head, killing him.[125]

As the shock set in for the family, friends, and faculty of the California middle school, the demand to know *why* this happened grew ever louder. Larry had never harmed Brandon McInerney; he had never even touched him. He never threatened him; he never put him in any kind of danger.[126] When asked to justify the brutal, public killing, Brandon's defense team put forth the following argument: the day before the murder, Larry had said to Brandon, "Love you, baby!" and asked him to be his valentine.[127] Despite testimony from classmates that they "never saw [Larry] be sexually aggressive toward anyone," and that his flirtatious behavior was innocent fun,[128] Brandon's attorney asked the jury to ignore the fact that, the day before the killing, Brandon told one of his classmates, "[S]ay goodbye to Larry because [you aren't] going to see him again."[129] The defense argued that the killing was not premeditated, but rather that Brandon was pushed to the edge by Larry's "inappropriate remarks" and "sexual advances."[130] Focusing neither on the brutality and depravity of the killing, nor the culpability or malice of the killer, the jury was tasked with considering *Larry's* "threatening" and "harassing" behavior.[131] And sadly, this strategy of "shaming and demonizing" Larry based on his sexual orientation worked; the jury hung, unable to decide if Brandon was wholly blameworthy in killing Larry.[132] One juror

---

[124] *Id.*

[125] *Id.*

[126] AM. BAR ASS'N, *supra* note 1, at 3.

[127] *Id.* at 2–3.

[128] *See* Zeke Barlow, *Emotional Day as Students Testify in Brandon McInerney Murder Trial*, VENTURA COUNTY STAR (July 6, 2011), http://www.vcstar.com/news/local-news/crime/first-student-testifies-in-brandon-mcinerney (stating that, in flirting with Brandon, Larry was "just messing" with him).

[129] Perkiss, *supra* note 91, at 782 (second alteration in original).

[130] Zeke Barlow, *Attorneys Argue Over Who Was the Aggressor in Brandon McInerney Trial*, VENTURA COUNTY STAR (July 5, 2011), http://www.vcstar.com/news/local-news/crime/lawyers-give-opening-statements-in-brandon-case.

[131] A psychologist retained by Brandon's defense attorney testified that Brandon found Larry's advances "disgusting" and "humiliating." Perkiss, *supra* note 91, at 791.

[132] AM. BAR ASS'N, *supra* note 1, at 3. The prosecutor argued in her closing: "Let's just say it, this defense is gay panic. For the past six weeks, there's been this giant smoke screen." Perkiss, *supra* note 91, at 792 (internal quotation marks omitted).

even stated that she believed Larry was the one who had been bullying Brandon,[133] clear evidence that the defendant's "gay-blaming" strategy was successful.

While the Matthew Shepard and Larry King cases made national headlines, capturing the attention of the mainstream news media,[134] there are countless other cases, and countless other victims, whose deaths did not receive this type of recognition. In Tennessee, for example, thirty-six-year-old Bill White was violently beaten to death with a metal-tipped black jack and his throat was slit open by a group of teenage boys who attacked him in his own home.[135] The teenagers then stuffed White's body into the trunk of a car and drove to a creek not far from his house where the body was found by investigators days later.[136] The boys then proceeded to rob White's home of his personal possessions before burglarizing his pawnshop.[137] While "each of the three defendants *denied* that the victim made an overt homosexual advance toward them," one of the three teenagers testified that the victim merely "put his arm around [a co-defendant] in such a manner as to suggest more than a 'male bonding type hug,'" and that, although he was not in the room at the time, he thought that White might have "tried something . . . because [he] had heard . . . that [White] was *that way*."[138] That testimony, coupled with evidence that White had a "reputation of being a homosexual," was sufficient for the Tennessee Court of Criminal Appeals to conclude that there was "ample proof" to support the argument that a "homosexual advance" may have occurred that evening.[139] White's attackers, who mercilessly beat him to death, slit his throat, dumped his lifeless body in a creek, then robbed his house and burglarized his pawn shop, were able to successfully avoid a first degree murder conviction by arguing that this "rage killing"[140] was *not a result of premeditation*, but was a

[133] Perkiss, *supra* note 91, at 793–94.

[134] Shepard's death was commemorated in the made-for-TV movie The Matthew Shepard Story, released in 2002. THE MATTHEW SHEPARD STORY (Alliance Atlantis Communications et al. 2002). King's death was commemorated in an HBO documentary entitled Valentine Road, released in 2013. VALENTINE ROAD (BMP Films & Eddie Schmidt 2013); *see* McNamara, *supra* note 123, at 6.

[135] Wiggins v. State, No. 03C01-9605-CC-00191, 1997 Tenn. Crim. App. LEXIS 277, at *4 (Mar. 20, 1997).

[136] *Id.* at *5.

[137] *Id.* at *5–6.

[138] *Id.* at *31 (emphasis added) (internal quotation marks omitted).

[139] *Id.* at *32.

[140] *Id.* at *33.

reasonable response to an unwanted "homosexual advance"[141] by a man who had a "reputation" for being gay.[142]

The fact that each defendant individually testified that, in fact, no such advance actually took place[143] is plain evidence of the danger and potential for abuse and misapplication inherent in this particular defense. Despite the massive weight of the evidence to the contrary, a panel of twelve men and women unanimously decided that this particular killing was not the result of malice aforethought, but rather weighed the reputation of the victim for *being* gay, as well as the fact that he allegedly "put his arm around" one of the boys, in concluding that a first degree murder charge was not warranted—a conclusion that was affirmed on appeal.[144]

In California, justice was likewise denied to gay entrepreneur Boyd William Finkel, who was killed in 1983 by Scott Andrew Stockwell.[145] Finkel's decomposing body was found by investigators in the trunk of Stockwell's Cadillac, half naked and soaked in blood, his head and face so badly beaten that "his skull resembled a cracked eggshell."[146] An industrial-sized rubber hammer was found nearby "covered in blood, hair and bone fragments."[147] Autopsy experts believed that Finkel was attacked from behind while he was sitting on the couch and he "never knew what hit him."[148]

At trial in 1996, Stockwell's defense attorney, Jon Alexander, described Finkel as a "maniacal homosexual, who died trying to break a straight guy into gay," offering in his closing argument that "[t]his is a case about perversion . . . and how normal people react."[149] Alexander argued that Stockwell suffered from "diminished capacity" as a result of a sudden episode of posttraumatic stress disorder (PTSD) brought on by Finkel's alleged sexual advances.[150] According to Dr. Glenn Lipson, a psychiatrist retained to testify for the defense, "heterosexuals have a strong

---

[141] *Id.* at *32.

[142] *Id.* at *4.

[143] *Id.* at *31.

[144] *Id.*

[145] R. Scott Moxley, *Kill a Gay Man and Go Free: Homosexuality and Justice in Orange County*, OC WKLY. (Feb. 2, 1996), http://www.ocweekly.com/1996-02-08/features/kill-a-gay-man-and-go-free/.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* (internal quotation marks omitted).

[150] *Id.* "PTSD has been diagnosed among survivors of the atomic bomb at Hiroshima, Korean POW camps, the Holocaust and the Vietnam War. It is the clinical response to overwhelming, catastrophic stress." *Id.*

aversion to homosexuality—almost an overreaction"—and "straight males respond to homosexual contact by *seeing red*."[151] Alexander described the deceased Finkel to the jury as a "domineering and calculating homosexual who *would have died anyway*," and stated that "[Finkel] got off taking straight guys and making them do homosexual acts."[152] Alexander then sought to play to the jurors' potential distaste for homosexuality by introducing testimony from two of Finkel's former sex partners, the details of which many jurors found unsettling.[153]

While the prosecutor implored the jurors to "resist blaming the victim,"[154] they eventually returned a verdict convicting Stockwell of involuntary manslaughter, "the lowest possible finding other than 'not guilty.'"[155] Some of the jurors indicated that they too shared "enraging experiences involving gay men," and "put responsibility for Finkel's murder on Finkel himself."[156] One female juror later remarked that "it was okay to defend oneself against homosexual advances by whatever means necessary," saying that Stockwell had "suffered enough."[157]

Finkel's lifeless body was stuffed into the trunk of a Cadillac after it had been beaten so violently that his blood spattered the walls fifteen feet away.[158] As a result, his killer, Scott Stockwell, was sentenced to time served plus fifty-four *days* in jail.[159] One day earlier, a jury in the same county sentenced a man to *eighteen years to life* in prison for accidentally killing a friend in a drunk driving accident.[160]

B. Need for Uniform Judicial Intervention

Consider, for a moment, the following scenario: A woman is on trial for the murder of a male victim whom she intentionally killed after he made a pass at her in a bar and placed his hand on her backside. No reasonable judge or magistrate would realistically entertain the argument that this nonviolent, nonthreatening, albeit sexual, advance was adequate provocation for the woman to turn

151 *Id.* (emphasis added) (internal quotation marks omitted).
152 *Id.* (emphasis added) (internal quotation marks omitted).
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.* (internal quotation marks omitted).
157 *Id.* (internal quotation marks omitted).
158 *Id.*
159 *Id.* (emphasis added).
160 *Id.*

around and kill her admirer.[161] Likewise, a defense attorney would be laughed out of the courtroom if he argued that his client was justified in killing a black or Muslim victim because he had an adverse reaction to the victim's race or religion.[162] With that in mind, it then begs the question: *What is the difference* between the perfectly legitimate gay panic defense and the preposterous examples of "black panic" and "Islamic panic" cited above? Why is "*I killed him because he was black*" an outrage, offensive to the very foundation of equal protection jurisprudence, while "*I killed him because he was gay*" is not?[163] The obvious answer lies in society's continued reluctance to accept the validity of the homosexual lifestyle, and the availability of this arcane defense functions as a judicial sanction of that reluctance.

It is entirely foreseeable that a homophobic individual can, and likely will, serve as a juror in a criminal trial at some juncture; however, the same is true for a racist juror, a sexist juror, or an ageist juror. While each of these jurors may bring his prejudices and biases with him into the jury box,[164] what is *not* allowed is a judicially sanctioned consideration of the race of the victim, the sex of the victim, or the age of the victim when determining the guilt of the defendant.[165] Why, then, is it permissible for judges to cater to the potential prejudices of the jury by not only *allowing* a consideration of the victim's sexual orientation, but, in fact, making it one of the main issues focused on at trial? To put it differently, imagine the foreman rising from the jury bench to deliver the following verdict: *"We find the defendant 'not guilty' of first degree*

---

[161] *See* McCoy, *supra* note 117, at 656–57 ("[I]f a heterosexual man were to make a nonviolent sexual advance toward a heterosexual woman and the woman, in response, killed the man, she would not be able to claim that she was provoked into killing him by the unwanted advance."). Lois Reckitt, a member of the National Organization of Women, quipped: "I am a lesbian and I have been approached by men in straight bars. In discouraging their advances, I have never found it necessary to try to kill them. I [say] 'no.'" Suffredini, *supra* note 110, at 307–08 (alteration in original) (internal quotation marks omitted).

[162] *See* McCoy, *supra* note 117, at 657 ("[A] killer cannot avail himself of the provocation defense due to the race of the victim or racial antagonism. The fact that the victim is African American or Jewish is not sufficient provocation.").

[163] This is not to say that killings based on an animus to a person's race or religion do not occur, or that hate crimes based on race and other characteristics are not a problem in this country—it is simply not a legally recognized defense sufficient to mitigate the severity of a crime, as is the case with the gay panic defense.

[164] A defense attorney being interviewed about use of the gay panic defense strategy remarked that "[he] would have loved former Marines, former servicemen [on the jury], because there's a strong element of antagonism toward homosexuals in groups like that." Suffredini, *supra* note 110, at 304 (alteration in original) (internal quotation marks omitted).

[165] *See* McCoy, *supra* note 117, at 657.

murder, not because we are not convinced that he is the killer, but because the deceased is Hispanic, and we therefore cannot conclude that his killing was entirely blameworthy. We therefore find the defendant guilty merely of voluntary manslaughter." The mere thought of such a decision is garishly offensive to any sense of civilization and human decency, and it is far from conceivable in an American court of law. However, merely substitute the word "gay" for the word "Hispanic," and you have the verdicts in the murder trials of Bill White's killers[166] and Billy Brinkley's killer,[167] among others. This practice draws a stark distinction between sexual orientation and other immutable human characteristics, classifying the former as immoral, objectionable, and less worthy of protection, while shielding all others from the danger of potential prejudice in the interest of nondiscrimination.

Even if jurors are not openly homophobic, social science suggests that "it is likely that they harbor[] at least [some] subconscious antigay bias."[168] There are a number of common gay stereotypes, including that "gay males are promiscuous and sexually aggressive,"[169] and it is likely, therefore, that even jurors who would not identify as "homophobic" may nonetheless succumb to the influence of testimony regarding a gay victim's aggressive sexual advances.[170]

Jurors are not the only ones who are susceptible to this type of improper influence, however. More importantly perhaps, judges too may be affected by biases that cloud their ability to administer the law in an equitable fashion. In a pretrial hearing for the beating and murder of gay man, Daniel Wan, whose assailants repeatedly kicked him and threw him against a moving vehicle while calling him a "faggot," Judge Daniel Futch remarked to the prosecutor, "That's a crime now, to beat up a homosexual? . . . Times really have changed."[171] Similarly, in a 1988 trial where the gay panic defense was used to mitigate the defendant's charge from murder to manslaughter, California Superior Court Judge Daniel Weinstein

---

166 Wiggins v. State, No. 03C01-9605-CC-00191, 1997 Tenn. Crim. App. LEXIS 277, at *32 (Mar. 20, 1997).

167 Mills v. Shepherd, 445 F. Supp. 1231, 1233 (W.D.N.C. 1978).

168 Perkiss, *supra* note 91, at 783.

169 *Id.*

170 *Id.* Professor Cynthia Lee argued: "There is no question that when murder defendants argue gay panic, they seek to tap into deep-seated biases against and stereotypes about gay males as deviant sexual predators who pose a threat to innocent young heterosexual males." Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 566 (2008).

171 Mison, *supra* note 82, at 163 (internal quotation marks omitted).

commented that the victim "contributed in large part to his own death by his reprehensible conduct."[172]

In that same year, defendant Richard Lee Bednarski was on trial for the murders of Tommy Lee Trimble and John Lloyd Griffin, two gay men from Texas.[173] Eighteen-year-old Bednarski had picked the two men up and drove them to a nearby park in Dallas.[174] After they refused to comply with Bednarski's demand that the two men remove their clothing, Bednarski opened fire and shot both men to death.[175] There was no evidence introduced at trial to indicate that any sexual advance had taken place; on the contrary, witnesses testified that Bednarski had "set out to harass homosexuals" and had "the intent of beating them" all along.[176] The prosecutor sought a life sentence for Bednarski.[177] However, Criminal District Court Judge Jack Hampton sentenced Bednarski to only thirty years in prison, stating that the victims would not have been killed "if they hadn't been cruising the streets picking up teenage boys."[178] Judge Hampton went on to explain that he valued "prostitutes and gays at about the same level . . . and I'd be hard put to give somebody life for killing a prostitute."[179]

Six years later, in Salt Lake City, this sentiment was echoed by conservative, Mormon Judge David Young when he presided over the trial of David Nelson Thacker, who was charged with murdering a gay man, Doug Koehler.[180] After remarking to a bartender that Koehler "was as queer as a three-dollar bill," Thacker went home with Koehler and the two did drugs together.[181] Thacker alleged at trial that Koehler had "tried to kiss him" and Thacker threw Koehler out of his condo.[182] Shortly thereafter, Thacker decided to

---

[172] Robert Lindsey, *After Trial, Homosexuals Say Justice Is Not Blind*, N.Y. TIMES, Mar. 21, 1988, at A17 (internal quotation marks omitted).

[173] Lisa Belkin, *Texas Judge Eases Sentence for Killer of 2 Homosexuals*, N.Y. TIMES, Dec. 17, 1988, at 8.

[174] *Id.*

[175] *Id.*

[176] *Id.* According to William W. Waybourn, president of the Dallas Gay Alliance, "it was common for Dallas high school students to spend evenings 'gay-bashing'—driving in neighborhoods thought to be favored by homosexual men and harassing pedestrians." *Id.*

[177] *Id.*

[178] *Id.* (internal quotation marks omitted); Lori Montgomery, *Why Judge Went Easy on Gays' Teen Killer*, DALLAS TIMES HERALD, Dec. 16, 1988, at A-1.

[179] Belkin, *supra* note 173, at 8. In a newspaper interview following the trial, Judge Hampton explained why he gave Bednarski such a lenient sentence: "I don't care much for queers cruising the streets. I've got a teen-age boy." *Id.* (internal quotation marks omitted).

[180] Lambda Lore, *Death of a Gentle Giant*, GAY SALT LAKE (Sept. 15, 2011), http://gaysaltlake.com/news/2011/09/15/lambda-lore-death-of-a-gentle-giant/.

[181] *Id.* (internal quotation marks omitted).

[182] *Id.*

"go get the guy," and followed Koehler into the parking lot where he shot him right between the eyes, killing him instantly.[183] The prosecutor argued that "anything less than a one-to-15-year sentence would be inadequate for this killing."[184] However, Judge Young disagreed, finding that sentence to be "too high" and "too stiff."[185] He instead sentenced Thacker to six years,[186] reasoning that consuming drugs and alcohol, coupled with Koehler's alleged attempt to kiss Thacker, had *incited the defendant to kill* Koehler and Koehler therefore "had some responsibility in his [own] death."[187]

At trial, judges play a crucial gatekeeping role in determining what evidence will be presented before the jury and how the jury will be instructed on the law and any applicable defenses available to the accused. Leaving to the "sound discretion" of the trial judge the decision of whether to allow the defendant to put forward the gay panic defense invites judges with homophobic biases to communicate that bias to the jury, thereby increasing the likelihood of an inequitable outcome premised on an aversion to the victim's sexuality rather than the culpability of the defendant's actions.

It is essential, therefore, when faced with an argument that pins the blame for a violent act on the sexuality of the victim, that the discretion of whether or not to allow the defendant to invoke the gay panic defense be removed from the hands of the trial judge. Just as a racist judge has no leeway in instructing a jury that the slain victim's race can have an impact on the culpability of his killer,[188] justice demands an analogous rule that forbids such discretion when the sexual orientation of the deceased is at issue.

V. RESCINDING LGBT HATE CRIME PROTECTIONS

While the gross potential for judicial abuse is among the top concerns associated with the use of the gay panic defense, it is not the only red flag that this defense raises. Use of the gay panic defense is also entirely incompatible with the explicit intent of legislatures nationwide to provide increased protection to victims of bias-motivated hate crimes, including crimes committed against

183 *Id.* (internal quotation marks omitted).

184 *Id.* (internal quotation marks omitted).

185 *Id.* (internal quotation marks omitted).

186 *Id.* It is worth noting that this sentence is *less* than the penalty for shoplifting in Utah. *Id.*

187 *Id.*

188 *See* McCoy, supra note 117, at 657.

homosexuals.

A. Hate Crime Legislation in the United States

In 2009, due in part to the social outcry caused by the brutal killing of Matthew Shepard,[189] a bill was passed by Congress entitled the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.[190] Recognizing the need to include gays and lesbians among the recipients of federal hate crime protections,[191] eleven years after Shepard's murder, Congress finally approved a bill that would allow the Justice Department to step in and assist local law enforcement agencies in their investigation of sexual-orientation-motivated hate crimes.[192] This bill also expanded upon earlier federal hate crime law[193] to include crimes that are motivated by the gender, sexual orientation, or gender identity of the victim, declaring that any person who "willfully causes bodily injury to [another] . . . because of . . . actual or perceived religion, national origin, gender, *sexual orientation*, gender identity, or disability" shall be punished under federal criminal law.[194]

Many states have taken the federal government's lead and urged their individual legislatures to take remedial action to protect these disenfranchised groups in the wake of increased homophobic violence nationwide.[195] A total of forty-five states and the District of Columbia have enacted statutes criminalizing bias-motivated violent crimes and thirty-one of these expressly include

---

[189] *See supra* text accompanying notes 119–21.

[190] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4701, 123 Stat. 2190, 2835 (2009) (codified in scattered sections of 18 and 42 U.S.C.). James Byrd Jr. was the victim of an anti-black hate crime in 1998, when he was dragged behind a pickup truck and decapitated by a group of white men in Texas. *Man Executed for Dragging Death of James Byrd*, CNN (Sept. 22, 2011), http://www.cnn.com/2011/09/21/justice/texas-dragging-death-execution/.

[191] Congress declared that "[t]he incidence of violence motived by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem" and that "[e]xisting Federal law is inadequate to address this problem." § 4702(1), (4), 123 Stat. at 2835.

[192] Tammerlin Drummond, *Matthew Shepard Hate Crimes Act Passes Congress, Finally*, SAN JOSE MERCURY NEWS (Oct. 25, 2009), http://www.mercurynews.com/columns/ci_13628360.

[193] Act of Apr. 11, 1968, Pub. L. No. 90-284, Sec. 101, § 245, 82 Stat. 73, 73 (codified as amended at 18 U.S.C. § 245 (2013)).

[194] 18 U.S.C. § 249(a)(2)(A) (emphasis added). While this legislation is a major victory for LGBT victims of hate crimes, in order to obtain jurisdiction to prosecute these crimes under federal law, the government must demonstrate that the criminal activity was in or affected interstate commerce. *Id.* § 249(a)(2)(B).

[195] *See supra* text accompanying notes 19–33.

homosexuals as a statutorily protected class.[196] Only Arkansas, Georgia, Indiana, South Carolina, and Wyoming have yet to adopt such protective legislation.[197]

New York, on the other hand, has been leading the way in campaigning for increased protection for gay and lesbian crime victims. In October of 2000, New York State adopted a hate crime act[198] after a legislative finding that violent crimes based on bias and prejudice had "become more prevalent . . . in recent years."[199] Defining the term "hate crime" to include all crimes in which "victims are intentionally selected . . . because of their race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation," the New York legislature argued that "[h]ate crimes do more than threaten the safety and welfare of all citizens," but rather, "[t]hey inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society."[200] Concerned not only with the physical wellbeing of the crime victim, but also with the "powerful message of intolerance and discrimination" these crimes send "to all members of the group to which the victim belongs,"[201] New York State has statutorily strengthened its sentencing laws when a defendant is found guilty of committing a hate crime, including crimes committed against gays and lesbians.[202]

By increasing the maximum sentence for hate crime convictions, New York and other states that have enacted similar legislation have sent a clear message that intolerance and discrimination is entirely inconsistent with the goals of a free society.[203] While the idea that sexual-orientation-based crimes should be met with harsher punishments has been legislated into New York's penal code, this proactive approach to protecting the rights of homosexuals brings into sharp juxtaposition another aspect of New

---

[196] *Anti-Defamation League State Hate Crime Statutory Provisions*, ANTI-DEFAMATION LEAGUE (2011), http://www.adl.org/assets/pdf/combating-hate/state_hate_crime_laws.pdf.

[197] *Id*. While I would advocate that all states should adopt such legislation and that all states should expressly include "sexual orientation" as a covered bias, that argument is beyond the scope of this note.

[198] Act of July 10, 2000, ch. 107, sec. 1–2, §§ 485.00–.10, 2000 N.Y. Laws 2635 (codified as amended at N.Y. PENAL LAW §§ 485.00–.10 (McKinney 2014)).

[199] *Id.* at sec. 2, § 485.00, 2000 N.Y. Laws at 2635.

[200] *Id.*

[201] *Id.*

[202] *Id.* at sec. 2, § 485.10, 2000 N.Y. Laws at 2636–37.

[203] *See* McCoy, *supra* note 117, at 655 ("Hate crimes laws send a message. These statutes tell would-be criminals and/or bigots that society will not tolerate crimes and behavior informed by prejudices such as racism, sexism, religious intolerance, or homophobia.").

York's criminal justice system. Within the same body of law where we find this recognition of the unique harm of homophobic violence, we also encounter the gay panic doctrine, which exists to excuse or mitigate the severity of the homophobic act itself.[204] This incongruity has yet to be addressed by our state's legislature.

B. Gay Panic Incompatible with Federal and State Hate Crime Legislation

Based on a societal acquiescence that a homophobic killing is somehow less blameworthy than a "regular" killing, the gay panic defense flies in the face of everything many of our nation's legislatures have sought to protect through the passage of protective hate crime legislation. Allowing a prosecutor to seek an enhanced sentence based on the sexual orientation of the crime victim, while simultaneously allowing the defendant to seek leniency based on the *exact same reasoning*, demonstrates a glaring inconsistency in this area of the law.[205] The criminal act, which is grounded in and inseparable from the actor's homophobia,[206] cannot be accorded such conflicting treatment by our nation's courts. These two doctrines are in diametric opposition to one another—one seeking to mitigate punishment for committing a homophobic act, the other seeking to enhance it.[207]

> When both the [gay panic] defense and hate crimes statutes are allowed to operate in the same legal system, it is possible that one defendant could receive a significantly increased sentence under the hate crimes law while another could have his sentence greatly reduced by being convicted of manslaughter instead of murder.[208]

Perpetrators may even be encouraged to target homosexual victims given the availability of the defense.[209] Since no equivalent "provocation" doctrine exists for any other segment of the population, "[g]ay men and lesbians become comparatively more attractive targets" than victims selected by their race or religion due to the availability of this unique mitigating defense.[210]

Not surprisingly, the rationales underlying these conflicting

---

[204] *See supra* Part III.A.
[205] McCoy, *supra* note 117, at 658–60.
[206] *Id.* at 657.
[207] *Id.* at 660.
[208] *Id.* at 658–59.
[209] *Id.* at 659.
[210] *Id.*

doctrines are equally in disagreement. In promulgating hate crime statutes, legislatures seek to "send a message of tolerance, inclusion, and equality to the gay and lesbian community," whereas the gay panic defense sends the message that the courts and the criminal justice system do not deem gays and lesbians worthy of "equal and adequate protection against bias-motivated crimes."[211] Proponents of the gay panic defense subscribe to the school of thought whereby a victim's sexuality is used to explain *why* the crime occurred, whereas supporters of aggressive hate crime legislation insist that such "justification" is never legally permissible.

Within a legal system that favors consistency and predictability of outcomes, as well as an insistence on impartiality and equal access, there is simply no room for such an incongruous application of the law. The only resolution to this blatant miscarriage of legal justice is for all courts to outlaw the use of the gay panic defense once and for all, recognizing it as the "outdated vestige of the criminal law"[212] that it is. Not only would this bring to an end the impermissible inconsistency in the law, as well as remove the potential for judicial abuse and bias, it would also "go a long way toward reenfranchising the gay and lesbian community in the criminal justice system."[213] Just as New York State was instrumental in advancing the hate crime protection movement, it is imperative that New York lawmakers likewise take a pioneering role in putting an end to the use of the unconscionable gay panic defense in New York courts.

VI. PROMISES OF PROGRESS

A. The American Bar Association Takes on Gay Panic

In order to combat the inequitable and irreconcilable outcomes of this homophobic trial tactic, this note joins the body of existing scholarly thought[214] in calling for an end to the use of the gay panic defense once and for all. In August of 2013, the influential voice of the American Bar Association (ABA) supplemented this plea when it released a resolution urging federal, state, and local governments to take legislative action to "curtail the availability and

[211] *See* Perkiss, *supra* note 91, at 804.
[212] McCoy, *supra* note 117, at 663.
[213] *Id.*
[214] *See, e.g.*, *id.*; Mison, *supra* note 82.

effectiveness" of the gay panic defense.[215] In its resolution, the ABA put forth two recommendations: (1) that courts be required to instruct juries not to let bias, prejudice, or public opinion based upon sexual orientation influence their decision making; and (2) a categorical rule that a nonviolent sexual advance cannot constitute legally adequate provocation to mitigate the severity of a crime.[216]

While conceding that "[c]ourts have increasingly been skeptical of gay panic arguments"[217] in recent years, ABA scholars have pointed out the reality that "in many jurisdictions gay panic arguments remain viable and continue to do harm."[218]

The ABA argued that an essential component of removing detrimental bias from the courtroom is providing a jury instruction advising jurors of "their duty to apply the law without improper bias or prejudice," suggesting the following model language: "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."[219] Such language is necessary to remind jurors of their legal obligation to act impartially and to minimize the potentially damaging effect of homophobic bias on the ultimate verdict.

The ABA further recommended that legislatures across the country follow the lead of foreign nations like Australia, which have enacted affirmative legislative policies that combat the use of the gay panic defense.[220] In support of this argument, the ABA offered the following model language for legislatures to consider: "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."[221]

---

[215] AM. BAR ASS'N, *supra* note 1, at 1.

[216] *Id.*

[217] *Id.* at 9, 12 & n.96 (citing People v. Page, 737 N.E.2d 264, 274 (Ill. 2000); State v. Latiolais, 453 So. 2d 1266, 1270 (La. Ct. App. 1984); Commonwealth v. Troila, 571 N.E.2d 391, 394–95 (Mass. 1991); State v. Volk, 421 N.W.2d 360, 365 (Minn. Ct. App. 1988)).

[218] AM. BAR ASS'N, *supra* note 1, at 10.

[219] *Id.* at 13 (internal quotation marks omitted). The ABA Resolution is modeled from section 1127h of the California Penal Code. *Id.* at 13 n.102; CAL. PENAL CODE § 1127h (West 2014).

[220] In 2012, the Australian government passed a law stating that "conduct of the deceased consisting of a nonviolent 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." *Crimes Act 1900* (ACT) s 13(3) (Austl.).

[221] AM. BAR ASS'N, *supra* note 1, at 14 (emphasis added).

Arguing that "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," William Shepherd, chair of the Criminal Justice Section of the ABA, vehemently urged legislatures to take action "(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 . . . panic arguments as a basis for provocation."[222] Hoping to send "a clear message to state legislatures that legal professionals find no validity in the sham defenses mounted by those who seek to perpetuate discrimination and stereotypes as an excuse for violence," D'Arcy Kemnitz, executive director of the National LGBT Bar Association, applauded the recent ABA resolution as "an important first step towards realizing [the] goal" of a criminal justice system free from improper bias and prejudice.[223]

B. California Follows the Advice of the ABA

Less than one year after the announcement of the ABA resolution, California Assembly Member Susan A. Bonilla authored a bill urging the legislature in her state to ban these "panic" defenses as a matter of law, denouncing their use as "absolutely inexcusable."[224] Cosponsored by Equality California and California Attorney General Kamala D. Harris, the bill, Assembly Bill 2501, altered the state's definition of voluntary manslaughter to ensure that gay victims do not continue to be twice victimized by these homophobic defenses.[225]

In California, voluntary manslaughter is defined as "the unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion."[226] Assembly Bill 2501 added the following language to the state's voluntary manslaughter statute:

> For purposes of determining sudden quarrel or heat of passion . . . the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived

[222] *Id.*

[223] Steve Williams, *The LGBT Panic Defense Could Soon Be History*, CARE2 (Aug. 16, 2013), http://www.care2.com/causes/the-lgbt-panic-defense-could-soon-be-history.html.

[224] Equality California, *Bill to Curb "Panic Defense" Passes Assembly,* YUBANET.COM (May 31, 2014), http://yubanet.com/california/Bill-to-Curb-Panic-Defense-Passes-Assembly.php#.VT-FsfC2djW.

[225] *Id.*

[226] CAL. PENAL CODE § 192(a) (West 2014).

> gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.[227]

The bill, initiated largely in response to the murders of Gwen Araujo,[228] Joel Robles,[229] and Larry King, is a declaration that "[h]omophobia and transphobia have no place in California's justice system."[230] As Assembly Member Bonilla urged fellow lawmakers:

> This is 2014! We as a society are moving rapidly away from the hate, bias and prejudice against people who are lesbian, gay, bisexual or transgender . . . . It is shocking to know that criminal defendants are encouraged by their counsel to employ this so-called "gay panic" . . . defense in order to receive a possible lesser sentence for murdering an individual just because of their sexual orientation or gender identity.[231]

The bill, which was introduced in February 2014, passed both houses of the California legislature in August, after being amended slightly by representatives in both houses.[232] The bill was presented to California Governor Jerry Brown on September 9, 2014,[233] and was signed into law on September 27, 2014,[234] making California the first and only state in the nation to take affirmative

---

[227] Assemb. 2501, 2013–2014 Reg. Sess. sec. 1, § 192(f)(1) (Cal. 2014) (enacted).

[228] Gwen Araujo was a seventeen-year-old transgendered California woman who was beaten and strangled to death in 2002. At trial, the defendants alleged that they "panicked" when they learned that Gwen was transgendered. None of her killers received an enhanced hate crime charge in connection with the killing, and two of them were found guilty only of manslaughter. *AB 2501: Banning Panic Defenses in Court*, EQUALITY CAL., http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb-08c4b0246a88%7D/EQCA_AB_2501_FACT_SHEET2.PDF (last visited Mar. 13, 2015).

[229] Joel Robles was stabbed twenty times after his attacker found out that he was transgendered. *Id.* Before trial, his killer prepared a trans panic defense; instead of going to trial, the defendant pleaded guilty and was sentenced to only four years in prison. Wodda & Panfil, *supra* note 13, at 944.

[230] *California Bill Would Ban "Gay Panic" Defense for Murder Defendants*, SAN DIEGO GAY & LESBIAN NEWS (Feb. 26, 2014), http://www.sdgln.com/news/2014/02/26/california-bill-would-ban-gay-panic-defense-murder-defendants#sthash.5qUCfwsX.9oWCi4DQ.dpbs (internal quotation marks omitted).

[231] *Id*. (internal quotation marks omitted).

[232] *AB-2501 Voluntary Manslaughter (2013–2014): History*, CAL. LEGIS. INFO., http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml (last visited Mar. 13, 2015).

[233] *Id.*

[234] Dominic Yobbi, *California Outlaws 'Gay Panic' Homicide Defense*, JURIST PAPER CHASE (Sept. 29, 2014), http://jurist.org/paperchase/2014/09/california-outlaws-gay-panic-homicide-defense.php.

action to combat the use of these inequitable gay panic defenses.[235]

C. New York Lawmakers Need to Take Action

Echoing the sentiments of Assembly Member Bonilla, Attorney General Harris, and the throngs of supporters for this important piece of legislation, lawmakers and lobbyists in New York, and in every other state nationwide, need to take up this torch and work to get analogous legislation passed in their home states.

Currently, in New York State, murder is statutorily reduced to manslaughter in the first degree when it can be shown that the defendant acted "under the influence of extreme emotional disturbance."[236] "Extreme emotional disturbance" is defined in the New York Penal Law as a "disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined *from the viewpoint of a person in the defendant's situation* under the circumstances as the defendant believed them to be."[237] While the language of the statute itself does not provide much insight as to New York's stance on the use of the gay panic defense, even a cursory review of the state's case law reveals that this broad and deferential statutory language has been, and continues to be, a powerful defensive tool in reducing and excusing crimes against homosexual New Yorkers.

In interpreting the applicability of the extreme emotional disturbance defense, the New York State Court of Appeals, the court of highest authority in New York State, has determined that the "disturbance" in question "precludes mere annoyance or unhappiness or anger, but requires disturbance excessive and violent in its effect upon the defendant."[238] By its own language, the Court of Appeals thereby classifies a nonviolent homosexual act (such as a kiss or a nonthreatening touch) as an "excessive and violent" disturbance, causing the defendant to suffer "a significant mental trauma."[239] Applying this standard, multiple appellate

---

[235] *Id.*

[236] N.Y. PENAL LAW § 125.20(2) (McKinney 2014) ("The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree.").

[237] *Id.* § 125.25(1)(a) (emphasis added).

[238] People v. Patterson, 347 N.E.2d 898, 900 (N.Y. 1976); *see also* People v. Moye, 489 N.E.2d 736, 738 (N.Y. 1985) ("The defense requires proof of both a subjective element (that defendant did in fact act under the influence of extreme emotional disturbance) and an objective element (that there was reasonable explanation or excuse for the emotional disturbance).").

[239] *Patterson*, 347 N.E.2d at 900, 908.

departments have upheld trial court decisions allowing defendants to use gay panic arguments to prove their claims of extreme emotional disturbance. In 1990, the Third Department affirmed a trial court's ruling admitting evidence that the murder victim, who had been beaten and stabbed to death, had made a homosexual advance on the defendant, finding that the jury "could have determined that defendant was so offended by [the victim's] advance that he acted under extreme emotional disturbance."[240] Similarly, in 1999, the Fourth Department took no issue with the introduction at trial of alleged "homosexual advances" made by the victim to support the defendant's argument that he acted under extreme emotional disturbance in stabbing the victim to death with a hunting knife.[241]

In 1994, a New York court allowed a defendant to testify that the victim had massaged his neck and "grabbed [his] penis through his clothing" in order to support his extreme emotional disturbance argument, explaining why he was justified in stabbing the victim in the throat, back, and neck before stealing his watch, wallet, and credit cards and fleeing the scene.[242] During jury selection, the "court and the attorneys questioned prospective jurors about their feelings concerning the possibility of a homosexual theme in the case,"[243] thereby turning the spotlight directly onto the victim's sexuality, and broadcasting it as a major consideration in the case, at the earliest possible moment in the proceeding. Finding no problem with this, the court held that evidence of the victim's homosexuality was "relevant in several respects" and that it "ha[d] a significant bearing on the issues of [the] case."[244] More recently, in 2004, a New York court found that evidence pertaining to the defendant's "outwardly homosexual victims" was "highly probative" to his extreme emotional disturbance claim, in that it "mitigates the intent element required for conviction for intentional murder."[245]

It is clear from cases like these that, absent statutory language to the contrary, courts can, and will, continue to allow defendants to utilize these homophobic defenses in order to mitigate or excuse their violent actions, preying on inappropriate and dangerous

---

[240] People v. Foster, 553 N.Y.S.2d 489, 490 (App. Div. 3d Dep't 1990).

[241] People v. Spaich, 688 N.Y.S. 324, 325 (App. Div. 4th Dep't 1999).

[242] People v. Childs, 615 N.Y.S.2d 232, 233 (Sup. Ct. 1994).

[243] *Id.*

[244] *Id.* at 234.

[245] People v. Cass, 784 N.Y.S.2d 346, 348–49 (Sup. Ct. 2004) (internal quotation marks omitted).

stereotypes and prejudices that have no place in our nation's courts of law. It is essential that the judicial precedent set in New York by this line of cases be promptly addressed by our state's legislature so that justice may cease to be posthumously denied to victims of horrific acts of violence, simply based on their sexual orientation.

As Equality California executive director John O'Connor put it: "It is an outrage to allow the use of panic defenses and in doing so blame the victims of horrific acts of violence."[246] While the California legislature should be applauded for its pioneering role in dismantling this inequitable defense in its state, this concept is not unique to California. "Though California's on the right track with a bill to render the defense illegal, that's not enough. In all the other states, it'll still be fair game, promoting a culture where murderers aren't held responsible for their crimes and victims are blamed for who they are."[247] Members of the LGBT community nationwide need to feel the protection of their states' laws, and no parent, friend, or spouse should ever again be faced with the notion that an attack on their loved one was *justified* because their son, daughter, friend, or partner was gay.

VII. CONCLUSION

It is unquestionable that, as a nation, we have greatly expanded the rights and protections available to homosexual men and women. Oppressive sodomy statutes have been rendered unenforceable.[248] Denying federal benefits to same-sex couples has failed to survive constitutional scrutiny.[249] A number of states have provided equal marital access to gay couples.[250] Federal and state hate crime statutes have provided special protection for gay victims of bias-motivated violence.[251] The question that remains is why the gay panic defense has survived; continuing to exist as one of several obstacles gay men and women must face in their quest for equal protection in the eyes of the court.

---

[246] Trudy Ring, *Calif. Bills Seek to Ban 'Gay Panic' Defense, Address Other Issues*, ADVOCATE (Feb. 27, 2014), http://www.advocate.com/politics/2014/02/27/calif-bills-seek-ban-gay-panic-defense-address-other-issues.

[247] Rebecca Luxton, *'Gay Panic' Can Still Get You Off the Hook for Hate Crimes in America*, RYOT, http://www.ryot.org/california-bill-ab-2501-governor-brown-gay-panic/804173 (last visited Mar. 13, 2015).

[248] *See supra* text accompanying notes 57–58.

[249] *See supra* text accompanying note 75.

[250] *Timeline of Gay Marriage in the United States*, GAY MARRIAGE STATES, http://www.statesthatallowgaymarriage.com/ (last visited Mar. 13, 2015).

[251] *See supra* text accompanying notes 189–97.

Enough innocent lives have been senselessly taken, and enough sinister acts gone unpunished, under the despotism of this backwards perversion of the law. The complacency and inaction that have allowed this rampant homophobia to escape legal and ethical scrutiny must come to an end if we are to reach a place of legitimization and respect for all individuals. "The court's continued acceptance of the homosexual-advance defense is an unacceptable judicial affirmation of homophobia. Such a violent reaction to nonthreatening behavior *cannot be condoned* by the courts or society."[252]

This note joins with the sound reasoning of the ABA, and the groundbreaking advocacy of the California State Legislature, and urges legislatures in every other state to take swift action to remedy a legal deficiency that denies protection to innocent victims of unspeakable acts of violence. No longer can the lives of gay men and women be devalued, debased, and undefended. No longer can the legislatures and judiciaries of this country sit idly by while lives are taken and relationships destroyed—all because of a heterocentric aversion to their sexual preferences. It is time for change. It is time that the rest of the nation joins its sister state of California in removing one of the remaining roadblocks on the path to sexual equality, leaving the way clear for gay men and women to share in the full province of the protections afforded to us by our nation's courts.

[252] Mison, *supra* note 82, at 178 (emphasis added).