

A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons From the Lawrence King Case



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ABSTRACT

This Comment contributes to the legal scholarship on the gay panic defense by proposing that, in light of social science research on implicit bias and the foundational clinical data on gay panic as a psychological phenomenon, prosecutors highlight the inconsistencies between the psychology underlying gay panic and gay panic as a legal claim in the presence of the jury. This Comment recognizes that gay panic may very well exist as a legitimate psychological condition. Gay panic should not, however, be an effective means for reducing a defendant's culpability for killing a gender-nonconforming individual because of homophobic bias. This Comment offers its proposal in the context of the recent trial of teenager Brandon McInerney for the murder of his openly gay, effeminate classmate, Lawrence King. In this sad California case, despite the social advances in favor of the LGBT community and the introduction of California's Gwen Araujo Justice for Victims Act, antigay stereotypes apparently operated in the jurors' minds.

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I am grateful for the thoughtful suggestions and encouragement of Professor Stuart Biegel and of my classmates in the Academic Legal Writing course, particularly Melissa Miller, Maureen Montgomery, Patrick Murray, Natalie Samarjian, and Shelly Song. Thanks also to Maeve Fox for allowing me to interview her and for sharing her thoughts and information about the case, and to Professor Michael Boucai, Tara Borelli, Jennifer Pizer, and Professor Orly Rachmilovitz for being willing sounding boards for this project. I am also grateful to Stephanie Plotin and the research staff of UCLA's Hugh & Hazel Darling Law Library. Finally, thanks to my family and friends for their unconditional support.

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INTRODUCTION

The gay panic defense, sometimes stylized as the “Non-violent Homosexual Advance (NHA) Defense,”¹ is a trial strategy that some defendants, typically male,² deploy in criminal murder trials. Defendants assert the gay panic defense to persuade jurors that their homicide charges should be reduced to a less culpable form of homicide. To establish the defense, these defendants argue that their victims had provoked them, driving them to react violently in the heat of passion. They argue that this provocation took the form of an unwanted, nonviolent sexual advance by the victim³—an alleged advance that was not merely sexual but specifically homosexual. Thus, jurors must ask themselves, “Is it reasonable to kill someone for making a nonviolent homosexual advance?”⁴

It is estimated that the gay panic defense has been used in about forty-five cases nationwide.⁵ While forty-five may seem like a small number, the significance of this many cases should not be minimized. A recent study revealed that gay men face higher rates of hate-motivated violence than other groups, including lesbians and bisexuals, protected by federal hate crime laws.⁶ Moreover, as the report explains, “This revelation is especially troubling given prior research has shown that sexual orientation-motivated hate crimes tend to be more violent.”⁷

Antigay bias against LGBT individuals in the United States is widespread and can be intense. Gay boys and men are even targeted with programs of so-called “reparative therapy” to “cure” their homosexuality by changing it.⁸ LGBT youth are often targeted in schools with physical violence and antigay slurs such as “fag”

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1. 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, 202-03 (2000).
 2. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 488 (2008) (“[H]omicide cases involving claims of lesbian panic are rarely seen.”).
 3. For example, an unwanted, nonviolent homosexual advance can occur when a homosexual male flirts with a heterosexual male.
 4. See Lee, *supra* note 2, at 488.
 5. “Gay Panic” Defense Law to Be Invoked, UNITED PRESS INT’L (July 21, 2011, 12:29 PM), http://www.upi.com/Top_News/US/2011/07/21/Gay-panic-defense-law-to-be-invoked/UPI-38001311265772.
 6. Rebecca L. Stotzer, *Comparison of Hate Crime Rates Across Protected and Unprotected Groups—An Update*, WILLIAMS INST. (May 2012), <http://williamsinstitute.law.ucla.edu/research/violence-crime/comparison-hate-crime-rates-update>.
 7. *Id.*
 8. See generally NAT’L ASS’N FOR RES. & THERAPY HOMOSEXUALS, <http://narth.com/about-narth> (last visited Dec. 28, 2012).

and “homo.”⁹ The problem of violent homophobic bullying in schools has received increasing attention from the media and from legal scholars.¹⁰

This homophobic bias has significant negative effects on LGBT individuals. For example, a Center for Disease Control study reported that LGBT middle and high school students are substantially more likely than other students to feel unsafe because of their sexual orientation or gender identity.¹¹ LGBT students are also more likely to skip school, fail to graduate, and have their property vandalized.¹² LGBT adults are frequently subject to employment discrimination because of their sexual orientation and gender identity.¹³ Sadly, because of the particularly high rate of homophobic violence against them, gay men are disproportionately likely to be killed by aggressors as compared to heterosexual men.¹⁴ Therefore,

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9. *Bullying and Gay Youth*, MENTAL HEALTH AM., <http://www.nmha.org/index.cfm?objectid=CA866DCF-1372-4D20-C8EB26EEB30B9982> (last visited Jan. 5, 2013) (“While trying to deal with all the challenges of being a teenager, gay/ lesbian/ bisexual/ transgender (GBLT) teens additionally have to deal with harassment, threats, and violence directed at them on a daily basis. They hear anti-gay slurs such as ‘homo’, ‘faggot’ and ‘sissy’ about 26 times a day or once every 14 minutes. Even more troubling, a study found that thirty-one percent of gay youth had been threatened or injured at school in the last year alone!” (footnote omitted)); see also MARY JO MCGRATH, *SCHOOL BULLYING: TOOLS FOR AVOIDING HARM AND LIABILITY* 6 (2007).
 10. See, e.g., Vanessa H. Eiseman, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-gay Harassment*, 15 BERKELEY WOMEN’S L.J. 125 (2000); Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation’s Schools*, 86 IND. L.J. 872 (2011); Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-bullying Policies*, 72 ALB. L. REV. 147 (2009); Daniel B. Weddel, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641 (2004).
 11. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, *THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS 22–24* (2010) (finding that LGBT students were more likely than their non-LGBT peers to feel unsafe or uncomfortable as a result of their sexual orientation and often missed classes or days of school because they felt unsafe in their school environment); see *Lesbian, Gay, Bisexual and Transgender Health*, CTNS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/lgbthealth/youth.htm> (last visited Dec. 27, 2012) (“Overall, the stresses experienced by LGBT youth also put them at greater risk for mental health problems, substance use, and physical health problems. . . . [P]ositive school climate has been associated with decreased depression, suicidal feelings, substance use, and unexcused school absences among LGBT students.”).
 12. *Bullying and Gay Youth*, *supra* note 9 (“GLBT students are more apt to skip school due to the fear, threats, and property vandalism directed at them. One survey revealed that 22 percent of gay respondents had skipped school in the past month because they felt unsafe there. Twenty-eight percent of gay students will drop out of school.” (footnote omitted)).
 13. M.V. LEE BADGETT ET AL., WILLIAMS INST., *BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION* (2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf>. See generally Williams Inst., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, ESCHOLARSHIP, http://escholarship.org/uc/search?entity=uclalaw_williams_enda (last visited Jan. 26, 2013) (listing publications that document discrimination in states throughout the country).
 14. Stotzer, *supra* note 6.

more cases in which defendants assert the gay panic defense will likely arise in the future.

The trial of Brandon McInerney for the murder of Lawrence King is an important, recent example of a defendant deploying the gay panic defense. McInerney and King were classmates at a Southern California junior high school.¹⁵ At the time of the killing, McInerney was fourteen years old and King was fifteen years old.¹⁶ During school on February 12, 2008, McInerney shot King twice in the back of his head and killed him.¹⁷ The day before the killing, McInerney took the .22-caliber handgun from his grandfather's room¹⁸ and reportedly told at least one of his classmates, "[s]ay goodbye to Larry because [you aren't] going to see him again."¹⁹

How could these events be construed as anything but premeditated murder? At trial, McInerney's defense counsel painted a picture of King as sexually aggressive.²⁰ The witnesses told jurors that King disrupted class by making sexual remarks, wore provocative feminine clothing and accessories, and targeted McInerney with unwanted sexual innuendo and flirting.²¹ The defense lawyers argued that as a result McInerney had been driven into a dissociative state of mind

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15. Jens Erik Gould, *The Lawrence King Case: In Court, Has the Bullied Become the Bully?*, TIME, Aug. 25, 2011, <http://www.time.com/time/nation/article/0,8599,2090287,00.html>. Race was also at issue in this case. King was Latino, and the prosecutor attempted to portray McInerney as a white supremacist. *Id.* Apparently, King claimed he was also half African American. See Ramin Setoodeh et al., *Young, Gay and Murdered*, NEWSWEEK, July 28, 2008, at 41, 43, available at <http://www.newsweek.com/id/147790>. The racial dynamics of the case are beyond the scope of this Comment.
 16. Gould, *supra* note 15; Setoodeh et al., *supra* note 15.
 17. Gould, *supra* note 15.
 18. Angelina Tala, *Teen Gets 21 Years for Murder of Gay Classmate*, MED. DAILY (Nov. 22, 2011, 5:25 PM), <http://www.medicaldaily.com/articles/7983/20111122/larry-king-brandon-mcinerney-lawrence-fobes-king-mcinerney-plea-deal-youth-gets-21-years-in-jail.htm> ("Without the knowledge of his father and grandfather, McInerney took a gun from his house and placed it in his book bag, prosecutors said.")
 19. Catherine Saillant, *Teacher Describes Teen's Changing Gender Identity Before Slaying*, L.A. TIMES, July 9, 2009, <http://articles.latimes.com/2011/jul/09/local/la-me-gay-shooting-20110709>. Witness Avery L., King's friend since elementary school, testified, "Brandon went up to me and said, 'Say goodbye to Larry because I wasn't going to see him again.' Then he smiled a weird smile." *Id.* (internal quotation marks omitted).
 20. Gould, *supra* note 15.
 21. *Id.*; see also Saillant, *supra* note 19 ("The prosecution contends that he decided to kill King because of the flamboyant youth's dress and taunting comments. . . . Friday's testimony began with Avery L., a friend of King's since elementary school. She told the courtroom that campus rumors were swirling the afternoon of Feb. 11, 2008, about King making some kind of flirtatious comment to McInerney and blowing him kisses."); *Teen Gets 21 Years in Jail for Shooting Gay Classmate*, RADAR (Nov. 21, 2011, 6:00 PM), <http://www.radaronline.com/exclusives/2011/11/brandon-mcinerney-sentenced-21-years-shooting-gay-classmate-larry-king>.

and, consequently, killed King in a heat of passion.²² Thus, they asked the jury to return a verdict of not guilty for murder, and the jury returned hung.²³

Eventually, before the second trial could commence, McNerney reached a plea deal with prosecutors, pleading guilty to manslaughter with use of a firearm.²⁴ From the defendant's perspective, the trial was successful because the jury failed to reach a guilty verdict for murder and because the prosecutors accepted a plea for a lesser criminal offense.²⁵ It seems that the jury was persuaded by the gay panic defense at trial, despite the evidence that King had been the subject of homophobic bullying and a jury instruction that ostensibly disallowed antigay bias from influencing the jury's decisionmaking process.

It is likely that the jurors embraced the defense because they believed that King was, in fact, sexually aggressive. By most accounts, however, and by the most credible accounts, he was not.²⁶ Rather, he was shy and struggling with his sexual orientation and gender identity, and he was the target of frequent homophobic bullying in school.²⁷ Social science research on implicit bias illuminates a likely explanation for the jurors' belief that King was sexually aggressive.²⁸ Although the jurors were not openly homophobic, it is likely that they harbored at least subconscious antigay bias. Specifically, the bias would have included the common homophobic stereotype that gay males are promiscuous and sexually aggressive. Even if the stereotype were true for all gay males, a homosexual advance fails to explain a homicidal reaction by the target of that advance. A review of the psychology literature on gay panic supports this view. As I argue, prosecutors in gay panic cases should expose the four major inconsistencies between gay panic as a psychological phenomenon and gay panic as a legal defense.²⁹

Commentators have recognized the murder of Lawrence King, but only as an example among many where a self-identified or perceived LGBT individual

22. See Zeke Barlow, *Jury Can Consider Manslaughter in McNerney Trial; Final Arguments May Begin Wednesday*, VENTURA COUNTY STAR, Aug. 23, 2011, <http://www.vcstar.com/news/2011/aug/23/last-prosecution-witness-testifies-today-in>.

23. Zeke Barlow et al., *Brandon McNerney Accepts Plea Deal in Murder Trial; Will Serve Nearly 25 Years*, VENTURA COUNTY STAR, Nov. 21, 2011, <http://www.vcstar.com/news/2011/nov/21/mcnerney-trial>.

24. *Id.*

25. *Id.*

26. Interview With Maeve Fox, Ventura County Senior Deputy District Attorney, in Long Beach, Cal. (Apr. 29, 2012) [hereinafter Fox Interview] (suggesting that King's classmates who described King as anything but aggressive appeared more credible than King's teachers who, at trial but not in their deposition testimony, described King as sexually aggressive and disruptive).

27. Neal Broverman, *Prosecution Tears Apart McNerney's "Gay Panic" Defense*, ADVOCATE (Aug. 25, 2011, 3:35 PM), <http://www.advocate.com/news/daily-news/2011/08/25/prosecution-tears-apart-mcnerneys-gay-panic-defense>.

28. See Lee, *supra* note 2, at 533–34, 547–49.

29. See *infra* Part III.B.

was targeted with violence because of his sexual orientation or gender identity.³⁰ This Comment adds to legal academic discussions about homophobic violence and the gay panic defense by positioning King's story and his sexual orientation and gender identity at the forefront of its analysis. By using the King case as a framework, this Comment shows that recently recommended strategies for neutralizing the effects of the gay panic defense in jury trials may not be sufficient. I build on the proposed strategies and offer a nuanced variation that challenges prosecutors to interrogate the psychological phenomenon of gay panic.

I argue that the gay panic defense emerges subtly and sways jurors in criminal trials involving victims who not only self-identified as gay but also were nonconforming in their gender presentation, despite prosecutors' attempts at minimizing the defense's effects on the jury. I also propose, however, that the gay panic defense should not necessarily be off limits and banned from courtrooms. Rather, prosecutors should interrogate the psychological roots of gay panic at trial in the presence of the judge and jury. Specifically, prosecutors should proffer expert witness testimony that delinks the psychological phenomenon of gay panic from gay panic as a legal defense.³¹ I contrast these two understandings of gay panic and, as supported by implicit bias research, show that prosecutors can neutralize the defense by making the inconsistency salient for jurors.

My proposal seems to contradict the solutions offered by commentators who seek to promote protections and fairness for LGBT individuals. They argue that banning the defense from discussion in jury trials is the appropriate way to neutralize the antigay animus underlying the gay panic defense.³² Like them, I also ground my argument in the premise that the gay panic defense relies on antigay animus, but I recognize that social science research on implicit bias and sexual orientation reveals that the best way to neutralize antigay animus is to discuss it explicitly.³³

30. See, e.g., 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 (2009); Lee, *supra* note 2, at 471; Sarah E. Valentine, *Traditional Advocacy for Nontraditional Youth: Retbinking Best Interest for the Queer Child*, 2008 MICH. ST. L. REV. 1053; Michael J. Ritter, Note, *Teaching Tolerance: A Harvey Milk Day Would Do a Student Body Good*, 19 TEX. J. WOMEN & L. 59 (2009); Jordan Blair Woods, Comment, *Addressing Youth Bias Crime*, 56 UCLA L. REV. 1899, 1934 (2009).

31. There are four major points where gay panic as a psychological phenomenon diverges from gay panic as a legal claim. See *infra* Part III.B.

32. See, e.g., Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133, 176–77 (1992); Victoria L. Steinberg, Book Note, *A Heat of Passion Offense: Emotions and Bias in "Trans Panic" Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 499, 523–24 (2005) (reviewing MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY* (2004)); Kara S. Suffredini, Note, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 309–13 (2001).

33. See Lee, *supra* note 2, at 532–34, 546–49.

Part I provides a detailed account of the recent trial of Brandon McInerney for the murder of Lawrence King and argues that it represents a classic example of the gay panic defense. Part II discusses the evolution of gay panic defense jurisprudence by examining its theoretical roots in criminal law and its use in the second half of the twentieth century. This Part also identifies the trans panic defense as a transphobic variation on the gay panic defense and discusses how the gay panic defense interacts with hate crime laws. Part III argues that the psychological underpinnings of the gay panic phenomenon are inconsistent with the legal claim of gay panic. Ultimately, this Part proposes that prosecutors should expose this inconsistency in open court. With this strategy, prosecutors can capture the benefits identified by legal scholars who invoke social science research on implicit bias and, hopefully, can neutralize the effects of the gay panic defense on jurors.

I. WHO WAS LAWRENCE KING?

This Part provides a detailed account of the trial of Brandon McInerney for killing Lawrence King and of the events leading up to the killing.³⁴ While this Comment focuses on the gay panic defense's efficacy as a trial strategy, it is important to understand King's background, sexual orientation, and gender identity because they were core issues at trial. Overall, the victim's sexual orientation and gender identity are essential components of a gay panic defense.

A. General Biographical Background, Sexual Orientation, and Gender Identity

Because of his effeminacy and nonconforming gender presentation, Lawrence "Larry" King was a prime target for homophobic bullying. Other factors that appeared to make King a target include his being Latino, short for his age,³⁵ very strong spirited, and adopted.³⁶ He came out as gay in school at age ten.³⁷ Although he self-identified as gay, his gender expression was nonconforming, and at least one scholar speculated that he may have been transgender.³⁸

34. I rely primarily on media accounts because the court documents were unavailable at the time I was pursuing this project.

35. King was 5'1". Setoodeh et al., *supra* note 15, at 41.

36. STUART BIEGEL, *THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS* 186 (2010).

37. Averi Laskey reportedly asked King when he was ten years old if he was gay. King said he was. Setoodeh et al., *supra* note 15, at 42.

38. King was likely sorting out his gender identity shortly before his death. BIEGEL, *supra* note 36, at 185–87.

Shortly before the shooting, King began to wear lipstick, high-heeled boots, and women's jewelry in school. King also told his classmates and at least one of his teachers that he wanted to be called Leticia.³⁹ Additionally, King reportedly called his adoptive mother, Dawn, from the group home where he was staying at the time to tell her that he wanted a sex-change operation.⁴⁰ Another telling event occurred when King's former English teacher, Dawn Boldrin, gave King her oldest daughter's green sequin homecoming dress, which King immediately took to the restroom to try on by himself. Despite the seeming deference Boldrin showed to King regarding his gender presentation, at other times she suggested King tone down his nonconforming gender presentation.

King had a troubled childhood. His biological mother was a drug user, and his father was absent. Greg and Dawn King adopted King when he was two years old.⁴¹ Greg and Dawn also discovered that King had not been fed regularly. King spoke with an impediment and repeated first grade because he had trouble reading. He was described as a gentle child who loved nature and crocheting. King also exhibited some defiant behavior. As Greg King reported, "We couldn't take him to the grocery store without him shoplifting. We couldn't get him to clean up his room. We sent him upstairs—he'd get a screwdriver and poke holes in the walls."⁴² Eventually, King was diagnosed with reactive attachment disorder⁴³ and prescribed ADHD medication.

At about age fourteen in November 2007, authorities removed King from Dawn and Greg's home because King reported to his teachers that Greg was hitting him, which Greg denied.⁴⁴ From that point on, King resided at Casa Pacifica, a group home for abused, neglected, and emotionally troubled children near Oxnard.⁴⁵ Interestingly, as *The Advocate* reported, a child's average stay at Casa

39. Setoodeh et al., *supra* note 15, at 43. E.O. Green student Yuliana T. reportedly said, "[Another E.O. Green student] was asking [King] if he has changed his name, and [King] said, 'Yes I did.' He said it was Leticia." This conversation occurred in the computer lab, only minutes before the shooting. Zeke Barlow, *Emotional Day as Students Testify in Brandon McInerney Murder Trial*, VENTURA COUNTY STAR, July 5, 2011, available at <http://www.vcstar.com/news/2011/jul/06/first-student-testifies-in-brandon-mcinerney> (internal quotation marks omitted).

40. Setoodeh et al., *supra* note 15, at 43.

41. *Id.* at 42.

42. *Id.*

43. *Id.* Reactive attachment disorder is a rare condition in which some affected children never fully bond with their caregivers or parents. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 313.89 (4th ed. 2000).

44. Setoodeh et al., *supra* note 15, at 43. As of this writing, I have not found corroboration of this charge.

45. Casa Pacifica houses youth ranging in age from infancy to eighteen until they return to their families or are taken in by foster parents. *Highlights*, CASA PACIFICA, <http://www.casapacific.org/about/highlights> (last visited Jan. 26, 2013).

Pacifica is thirty days, while King lived there for over four months.⁴⁶ While King lived at Casa Pacifica, and even before, he attended meetings at the Ventura County Rainbow Alliance. Reportedly, King had been attending weekly youth empowerment get-togethers for at least a year.⁴⁷

While at Casa Pacifica, King attended E.O. Green Junior High School. Prior to King's murder, the school provided no literature about or for LGBT students and had no Gay-Straight Alliance student group. The school did have a program called the Second Step violence prevention education program, which lasted until sixth grade and involved weekly classes to teach empathy and emotion management. Both King and McInerney took part in the program, according to a school official.⁴⁸

Kevin Jennings, a former teacher and the founder and executive director of the Gay, Lesbian, and Straight Education Network, a national organization working to ensure safe schools for LGBT students, criticized the lack of literature and programs for LGBT students. As he stated in an interview with *The Advocate*

[t]here's been a real retrenchment of antibullying and diversity programs since No Child Left Behind. What that's done is establish standardized testing as the only measure of good schools. In the late '90s there was a lot of momentum around multiculturalism and diversity. That was really reversed by this imposition of standardized testing. A lot of educators are frustrated because they understand the importance of addressing some of these larger [social] efforts, but when they try to they're told, "You've just got to get the math scores up."⁴⁹

Media reports of comments made by some of King's classmates confirm that King was the subject of homophobic bullying in school. For example, Brianna, a twelve-year-old sixth grader at E.O. Green, said, "I heard that there were a lot of kids picking on Larry because he was different." Another student said, "[The bullies] made fun of him a lot." "He had a lot of enemies," said thirteen-year-old E.O. Green eighth grader Matthew Weber-Hernandez. However, the students also reported that King challenged his bullies. For example, said Weber-Hernandez, "He'd go chase bullies."⁵⁰

46. Neal Broverman, *Mixed Messages*, ADVOCATE (Mar. 27, 2008, 11:00 PM), <http://www.advocate.com/print/news/2008/03/14/mixed-messages>.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

Some E.O. Green students reported that King made public that he had a crush on his eventual killer, McNerney.⁵¹ King had virtually no interactions with McNerney, however, until only shortly before the shooting, and those interactions were generally nonconfrontational.⁵² For example, one student remembered that King often walked over to McNerney merely to stare at him, and one of McNerney's defense attorneys stated there was no relationship between King and McNerney.⁵³ According to Weber-Hernandez, when students mocked King for his crush on McNerney, principal Joel Lovstedt sought out King to see if he was okay and King said he could handle it. Weber-Hernandez also reported that he asked Lovstedt for an emergency school assembly about the issue, which Lovstedt declined to hold, citing King's positive response as the reason. Nevertheless, as Weber-Hernandez said, "Maybe if we had that emergency assembly, this wouldn't have happened."⁵⁴ Perhaps changes in curriculum and pedagogy relating to gender-transgressive and gender-nonconforming youth may also have averted King's murder.⁵⁵ The limited staff and budgetary constraints at the school, however, resulted in a lack of adult advice for both King and McNerney.

B. King's Murder and the Trial of Brandon McNerney

Newsweek described King's murder as "the most prominent gay-bias crime since the murder of Matthew Shepard 10 years ago."⁵⁶ That McNerney, then fourteen years old, shot King is undisputed. On the day of the shooting, February 12, 2008, as media accounts revealed, King felt something was wrong. A student reported that King kept nervously looking over his shoulder before he slipped into his first-period English class around 8:00 a.m. Throughout the class, McNerney kept looking at King, intermittently glancing down at a book, then looking up again at King. Shortly after the class moved to the computer lab, at around 8:30 a.m., McNerney brandished a .22-caliber handgun and shot King in the back of his head. After King fell, McNerney shot King again. McNerney then dropped the gun, pulled his hood over his head, and walked out of the room. Police appre-

51. Michael Martinez, *California Teen to Be Retried in Gay Student Murder*, CNN JUSTICE (Oct. 5, 2011), http://articles.cnn.com/2011-10-05/justice/justice_california-gay-student-murder_1_mcnierney-murder-trial-new-charges.

52. Fox Interview, *supra* note 26.

53. Setoodeh et al., *supra* note 15.

54. Broverman, *supra* note 46.

55. BIEGEL, *supra* note 36, at 186–87.

56. Setoodeh et al., *supra* note 15, at 41.

hended McInerney about seven minutes later a few blocks from the school.⁵⁷ King was rushed to the hospital, and he died two days later from brain injuries.⁵⁸

On the day before the shooting, King and McInerney clashed verbally in class. Following the clash, McInerney allegedly told the other students sitting with him that he was “going to shoot” King.⁵⁹ Sometime after class, King turned to McInerney and said mockingly, “I love you, baby!”⁶⁰ In response, McInerney tried to recruit friends to jump or “shank” King, but was unsuccessful.⁶¹ Thus, according to the prosecutor, McInerney then made his own plan for revenge and shot King the next day.

Maeve Fox, the senior deputy district attorney of Ventura County assigned to the case, charged McInerney as an adult with premeditated murder as a hate crime. She also charged McInerney with using a firearm and lying in wait. The additional charges were important to McInerney’s potential prison sentence. According to Fox,

Probably more significantly from a sentencing perspective is the allegation of the use of the firearm, which is also attached to count one [murder]. That special obligation carries an additional penalty of 25 years to life if found true. The hate crime only adds a punishment of a range of one to three years.⁶²

Initially, at arraignment in late August 2009, McInerney pleaded not guilty to all the charges.

Fox’s decision to try McInerney as an adult was controversial. Fox was able to try McInerney as an adult because she further charged him with lying in wait.⁶³ Fox alleged that McInerney waited for fifteen to twenty minutes in a classroom before shooting King in the computer lab, which constitutes lying in wait.⁶⁴ Since McInerney was tried as an adult, he faced a significant prison sentence with a three-year sentence enhancement under California’s hate crime penalty enhance-

57. *Id.*

58. *Id.*

59. Broverman, *supra* note 27.

60. Gould, *supra* note 15. It is unclear whether this exchange occurred immediately after class or sometime later that day as the two passed each other in a school corridor.

61. Catherine Saillant, *Witnesses Testify About Shooting of Gay Student in Oxnard*, L.A. TIMES, July 7, 2011, <http://articles.latimes.com/2011/jul/07/local/la-me-0707-gay-shooting-20110707>.

62. Broverman, *supra* note 46.

63. Raul Hernandez, *McInerney Pleads Not Guilty to All Charges*, VENTURA COUNTY STAR, Aug. 27, 2009, <http://www.vcstar.com/news/2009/aug/27/mcinerney-pleads-not-guilty-to-all-charges>.

64. *Id.*

ment statute.⁶⁵ If McNerney were tried as a juvenile and found delinquent, however, he would face a sentence of only a few years.⁶⁶ Thus, Fox defended her decision to try McNerney as an adult because if he were tried in juvenile court, he would be released at age twenty-five, which in her view was an unacceptable result for such a violent act.⁶⁷

However, Fox and her colleagues recognized the sensitive nature of McNerney's young age.⁶⁸ Additionally, prominent LGBT advocacy groups issued a joint statement urging Fox to try McNerney in juvenile court. Although the statement declared that "[t]he alleged perpetrator, who turned 14 years old less than three weeks before the shooting, should be held accountable for his actions," it also "support[ed] the principles underlying our juvenile justice system that treat children differently than adults and provide greater hope and opportunity for rehabilitation."⁶⁹ Additionally, Steven Elson, CEO of Casa Pacifica, believed that "50 years to life seemed extremely excessive."⁷⁰ *The Advocate* summarized the contradiction: "It's a striking fact that the society now prosecuting Brandon McNerney as an adult is the same one that failed both him and Lawrence King as children."⁷¹

C. How the Defense Argued Gay Panic at Trial

Media reports provide insights into how the defense attorneys asserted the gay panic defense at trial. A commentator described the use of the gay panic defense in this case as "a classic tactic when defending an indefensible crime: blame

65. CAL. PENAL CODE § 422.75(a) (West 2010); *Larry King Suspect to Be Tried as Adult*, 365GAY (July 25, 2008), <http://web.archive.org/web/20080907080112/http://www.365gay.com/news/larry-king-suspect-to-be-tried-as-adult>.

66. *Larry King Suspect to Be Tried as Adult*, *supra* note 65.

67. Barlow et al., *supra* note 23.

68. "We recognize the delicate nature of the case and the fact that both the victim and the shooter were young teens." *Id.* (quoting Ventura County Chief Deputy District Attorney Mike Frawley).

69. *Joint Statement of LGBT Legal and Advocacy Groups Urging District Attorney to Try Alleged Perpetrator in Lawrence King Murder in Juvenile Court*, NAT'L CTR. FOR LESBIAN RTS., http://www.nclrights.org/site/DocServer/Joint_Statement.pdf?docID=2841 (last visited Dec. 28, 2012). Twenty civil rights groups signed the joint statement. *Groups Advocating for LGBT Rights Urge D.A. to Charge Alleged Lawrence King Murderer as a Minor*, LAMBDA LEGAL (Apr. 14, 2008), http://www.lambdalegal.org/news/ca_20080414_groups-urge-da-charge-alleged-murderer-as-minor.

70. Barlow et al., *supra* note 23.

71. Broverman, *supra* note 46. Commentator Jordan Blair Woods has argued that bias crime penalty enhancements, as applied to youth offenders, should mandate rehabilitation programs that force youth offenders to confront the biases that motivate their crimes. Requiring youth bias crime offenders to complete these programs is consistent with the rehabilitative ideal, which should always be a primary consideration in addressing crimes committed by youth.

Woods, *supra* note 30, at 1934.

the victim, especially if that victim is gay.”⁷² The defense’s basic argument was that McInerney shot King “in the heat of passion caused by the intense emotional state between these two boys at school.”⁷³ In his opening statement, defense attorney Scott Wippert described King as the aggressor who relentlessly flirted with and taunted McInerney, and who had made inappropriate sexual comments at school since he was in the fifth grade.⁷⁴ Importantly, the focus on King, the victim, is consistent with the gay panic defense, which describes the victim’s allegedly aggressive but nonviolent sexual conduct as the defendant’s impetus for killing. Blaming the victim by describing him as sexually aggressive draws on a common antigay stereotype of homosexual males as promiscuous.⁷⁵ As Professor Cynthia Lee writes, “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.”⁷⁶

In addition to disparaging King, Wippert also attempted to garner sympathy for McInerney. Wippert focused on McInerney’s troubled background and his inability to cope with the humiliation of King flirting with him at school. Wippert told the jury that McInerney reached an “emotional breaking point” without recourse to the school officials who allowed King to flaunt his sexuality and failed to rein in King’s conduct. Wippert also proffered a psychologist as an expert witness who “testif[ied] that McInerney was in a dissociative state at the time of the shooting”⁷⁷ and killed King in a heat of passion. The psychologist also testified that McInerney stated that he found King’s alleged homosexual advances “disgusting” and “humiliating” and that King would have to pay for it.⁷⁸ Wippert also attempted

72. James Gilliam, *Gilliam: Attorneys Regrettably Revive the ‘Gay Panic’ Defense*, VENTURA COUNTY STAR, July 23, 2011, <http://www.vcstar.com/news/2011/jul/23/gilliam-attorneys-regrettably-revive-the-gay>.

73. Catherine Saillant, *Trial to Begin in Slaying of Gay Middle School Student Larry King*, L.A. TIMES, July 5, 2011, <http://articles.latimes.com/2011/jul/05/local/la-me-gay-shooting-20110705> (quoting Robyn Bramson, one of McInerney’s attorneys).

74. Catherine Saillant, *Slaying Trial First Focuses on the Victim*, L.A. TIMES, July 6, 2011, <http://articles.latimes.com/2011/jul/06/local/la-me-0706-gay-shooting-20110706>.

75. Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1341–44 (2011).

76. Lee, *supra* note 2, at 566.

77. Saillant, *supra* note 74; see also Zeke Barlow, *Psychologist Says Recent Talks Gave Him New Insights on Brandon McInerney*, VENTURA COUNTY STAR, Aug. 16, 2011, <http://www.vcstar.com/news/2011/aug/16/psychologist-testifies-about-recent-with-brandon>.

78. Catherine Saillant, *Jury Unable to Reach Verdict in Killing of Gay Student Larry King*, L.A. TIMES, Sept. 1, 2011, <http://latimesblogs.latimes.com/lanow/2011/09/gay-slaying-jury.html>.

to garner sympathy for McInerney by offering testimony that his drug-abusing father abused him.⁷⁹

Thus, the defense argued gay panic at trial: By painting a picture of King as a sexual aggressor and McInerney as the emotionally troubled target of King's advances, Wippert attempted to garner sympathy for McInerney and argued that McInerney's crime was voluntary manslaughter, not murder. In contrast, in her opening statement, the prosecutor, Fox, described King as a shy boy who had recently come out of his shell and asserted his sexuality.⁸⁰ She portrayed King as slight and very effeminate, having only girls for friends and being shunned by boys. Fox explained that only after King was placed at Casa Pacifica did he feel confident enough to express his sexual orientation and nonconforming gender identity by wearing high-heeled boots, makeup, and jewelry to school.⁸¹

The attorneys made King's sexual orientation and gender identity, and McInerney's response, salient at trial. For example, to support the claim that King was sexually aggressive, the defense offered testimony about King chasing other boys from a boys restroom at school.⁸² Fox argued, however, that King only chased the boy in response to the boy saying, "I smell queer," in reference to King.⁸³ Fox argued that King's response was a "reasonable response to being teased."⁸⁴ In another example, the defense described an incident in which King waived to McInerney as an act of flirtation. The prosecution argued that whether King was even waiving to McInerney is unclear, however, because they were thirty to forty yards apart at that time.⁸⁵

Fox's closing argument also focused on the gay panic defense, which she worked to make explicit and to discredit.⁸⁶ Fox reportedly argued, "Let's just say it, this defense is gay panic. For the past six weeks, there's been this giant smoke screen."⁸⁷

79. *Id.* Additionally, according to an interview with McInerney's half-brother James Bing, McInerney suffered physical and sexual abuse as a child. *Gay Teen Murder Defendant's Brother Talks About Testimony*, MYFOXLA.COM (Aug. 4, 2011, 2:05 PM), <http://www.myfoxla.com/story/18404301/gay-teen-murder-defendants-brother-talks-about-testimony>.

80. Saillant, *supra* note 78.

81. Importantly, while defense counsel and commentators in the media suggest blaming King because of his effeminate, nonconforming dress, King's dress did not violate E.O. Green Junior High School's dress code policy. Hunter Stuart, *Gay Student's Flamboyant Behavior Blamed for His Murder*, HUFFINGTON POST (Nov. 23, 2011, 10:42 AM), http://www.huffingtonpost.com/2011/11/23/lawrence-king-gay-murder_n_1109047.html (citing an interview with E.O. Green's school district superintendent).

82. Broverman, *supra* note 27.

83. *Id.*

84. *Id.*

85. Fox Interview, *supra* note 26.

86. Broverman, *supra* note 27.

87. *Id.*

Further, Fox argued that despite a natural inclination to feel sympathy for the defendant in light of his troubled background, “the law does not allow for sympathy.”⁸⁸ One of Fox’s goals was to show that McInerney’s violent reaction was unreasonable and that hatred for King because of his sexual orientation actually motivated the killing. Additionally, Fox invoked the Gwen Araujo Justice for Victims Act,⁸⁹ which provided an instruction to jurors not to let their biases toward King’s sexual identity influence their decision.⁹⁰

However, Fox’s appeal was apparently unpersuasive to the jury. Presumably, had Fox successfully neutralized the defense’s gay panic strategy, the jury would likely have been less sympathetic to McInerney and convicted him as charged. Instead, the trial resulted in a hung jury, when jurors voted 7–5 in favor of voluntary manslaughter and against murder.⁹¹ Some of the media reports suggest that the defense’s trial strategy was effective since McInerney was ultimately not found guilty of murder. For example, when referring to “all the circumstances and the evidence that came out in the trial,” presumably crediting the evidence of King’s sexual aggression toward McInerney, Wippert stated that “the agreement [to plea to a lesser homicide crime] was a win.”⁹² Wippert also stated that he believed “this sentence reflects the sentiments of the jury.”⁹³ At a hearing, the sentencing, and apparently other points throughout the trial, several jurors even wore “Save Brandon” rubber bracelets.⁹⁴ One juror stated that she believed it was King who was bullying McInerney, which is consistent with the victim-blaming strategy inherent in the

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88. Catherine Saillant, *Background No Excuse for Shooting Classmate, Prosecutor Says*, L.A. TIMES, Aug. 26, 2011, <http://articles.latimes.com/2011/aug/26/local/la-me-0826-gay-slaying-20110826> (paraphrasing Fox’s closing argument).
 89. Gwen Araujo Justice for Victims Act, CAL. PENAL CODE § 1127h (West Supp. 2012). See *infra* Part II.B for discussion about the development of the law and the trans panic defense.
 90. Catherine Saillant, *Prosecutor Seeks to Quash ‘Gay Panic’ Defense in Oxnard Slaying*, L.A. TIMES, July 21, 2011, <http://articles.latimes.com/2011/jul/21/local/la-me-0721-gay-panic-20110721>.
 91. Zeke Barlow et al., *McInerney Jury Splits on Verdict; Judge Declares Mistrial*, VENTURA COUNTY STAR, Sept. 1, 2011, <http://www.vcstar.com/news/2011/sep/01/mcinerney-jury-unable-to-reach-verdict-in-3-a>.
 92. *Id.* Wippert stated, “I think it’s an appropriate sentence given all the circumstances and the evidence that came out in the trial.” Barlow et al., *supra* note 23.
 93. *McInerney Pleads, Gets 21 Years for Oxnard Gay-Student Shooting*, KABC-TV LOS ANGELES (Nov. 21, 2011) http://abclocal.go.com/kabc/story?section=news/local/ventura_county&cid=8440433.
 94. Zeke Barlow & Raul Hernandez, *McInerney to Be Retried in Adult Court; Hate Crime Allegation Dropped*, VENTURA COUNTY STAR, Oct. 5, 2011, <http://www.vcstar.com/news/2011/oct/05/brandon-mcinerney-to-be-retried-in-adult-court>; Neal Broverman, *McInerney Sentenced to 21 Years for Killing Gay Teen*, ADVOCATE, Dec. 19, 2011, <http://www.advocate.com/news/daily-news/2011/12/19/mcinerney-sentenced-21-years-killing-gay-teen>; Catherine Saillant, *Gay Teen’s Killer Takes 21-Year Deal*, L.A. TIMES, Nov. 22, 2011, <http://articles.latimes.com/2011/nov/22/local/la-me-1122-gay-shooting-20111122>; Greg Risling, *Brandon McInerney, Guilty of Murdering Gay Classmate, Sentenced to 21 Years*, HUFFINGTON POST (Dec. 19, 2011, 11:38 PM), http://www.huffingtonpost.com/2011/12/19/brandon-mcinerney-guilty-sentence_n_1157855.html.

gay panic defense.⁹⁵ Thus, it appears that the gay panic strategy worked, even though the jury did not acquit McInerney.⁹⁶

For the anticipated retrial, Fox dropped the hate crime allegation.⁹⁷ As District Attorney Mike Frawley stated, “[W]e just decided to slim the case down a bit and narrow the focus.”⁹⁸ Instead, Fox charged McInerney with first-degree murder, use of a handgun, and lying in wait.⁹⁹ Despite scheduling the second trial, the case concluded at a hearing on November 21, 2011, when McInerney accepted a plea deal to serve twenty-five years in prison.¹⁰⁰ At the hearing, McInerney, then seventeen years old, pleaded guilty to second-degree murder and voluntary manslaughter with use of a firearm. The sentence for the murder charge was waived, however, and McInerney accepted a twenty-one-year sentence for voluntary manslaughter at a December 19, 2011, sentencing hearing. He did not get credit for the approximately four years he had already served. He would be transferred from juvenile hall to a state prison when he turned eighteen in January 2012. McInerney could be thirty-eight years old when released from prison.

Following the trial, new or modified legislation was suggested. For example, Greg King called for a “Brandon McInerney law” that would bring special charges against those who discharge a weapon in a classroom.¹⁰¹ Also, Wippert called for a “change [to] the law that allows the district attorney to charge children as adults without the defense being able to present evidence to a judge before it goes to adult court.”¹⁰² Neither of these suggestions, however, addresses the core issue of the case and cases like it: that homophobic prejudice motivates violence against gender-nonconforming individuals. The remainder of this Comment takes on this issue in the context of gay panic defense jurisprudence and trial strategy.

95. Barlow & Hernandez, *supra* note 94.

96. See *infra* Part II.A for discussion of gay panic defense jurisprudence.

97. Barlow & Hernandez, *supra* note 94.

98. Martinez, *supra* note 51.

99. *Id.*

100. Barlow et al., *supra* note 23.

101. Zeke Barlow, *Brandon McInerney Sentenced to 21 Years in Prison for Killing Larry King*, VENTURA COUNTY STAR, Dec. 19, 2011, <http://www.vcstar.com/news/2011/dec/19/judge-sentences-brandon-mcinerney-to-21-years-in>.

102. *Id.*

II. THE GAY PANIC DEFENSE IN CRIMINAL LAW DOCTRINE: GAY PANIC DEFENSE, TRANS PANIC DEFENSE, AND HATE CRIME LAWS

A. The Development of Gay Panic Jurisprudence

The gay panic defense has roots in early twentieth-century psychology. Psychiatrist Edward J. Kempf coined the phrase “homosexual panic” in 1920 to describe a felt threat to an individual’s ego and self-control caused by “panic due to the pressure of uncontrollable perverse sexual cravings.”¹⁰³ According to Kempf, homosexual panic produced symptoms such as erotic visions and voices, “‘drugged’ feelings,” “seductive and hypnotic influences,” and “irresistible trance states.”¹⁰⁴ Kempf’s findings were taken to mean that a person experiencing homosexual panic would experience a personality dissociation inducing automatic reactions including hatred and possibly violence.¹⁰⁵

Using Kempf’s ideas as a foundation, psychologists and psychiatrists later defined homosexual panic “as a state of sudden feverish panic or agitated furore, amounting sometimes to temporary manic insanity, which breaks out when a repressed homosexual finds himself in a situation in which he can no longer pretend to be unaware of the threat of homosexual temptations.”¹⁰⁶ Twentieth-century psychology classified homosexual panic as “an abnormal psychogenic reaction of intense anxiety occurring in males whose repressed homosexual tendencies are suddenly inadvertently activated by another male.”¹⁰⁷ In short, the medical community acknowledged homosexual panic as a psychological condition despite formally rejecting homosexuality itself as a psychological disease.

103. 2 ENCYCLOPEDIA OF HOMOSEXUALITY 941–43 (Wayne R. Dynes ed., 1990) (quoting EDWARD J. KEMPF, *PSYCHOPATHOLOGY* (1920)); see also KEMPF, *supra*, at 477–515.

104. 2 ENCYCLOPEDIA OF HOMOSEXUALITY, *supra* note 103, at 942.

105. *Id.*

106. Robert G. Bagnall et al., Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 499–500 (1984) (quoting D.J. WEST, *HOMOSEXUALITY RE-EXAMINED* 202–03 (1977)) (internal quotation marks omitted).

107. *Id.* at 500 (quoting A CONCISE ENCYCLOPAEDIA OF PSYCHIATRY 184 (Denis Leigh et al. eds., 1977)) (internal quotation marks omitted). Another medical text described homosexual panic as “an acute, severe episode of anxiety related to the fear (or the delusional conviction) that the subject is about to be attacked sexually by another person of the same sex, or that he is thought to be a homosexual by fellow-workers.” *Id.* (quoting LELAND EARL HINSIE & ROBERT JEAN CAMPBELL, *PSYCHIATRIC DICTIONARY* 348 (4th ed. 1970)) (internal quotation marks omitted).

Apparently taking a cue from psychology, defendants initially invoked, and courts considered, homosexual panic as an insanity-type defense to homicide.¹⁰⁸ As one author described,

Typically, the defense argued that the homicide victim provided the triggering stimuli that initiated a violent, uncontrollable psychotic reaction in the latently gay defendant. Whether the defendant was conscious of it or not, he was said to be so intensely anxious about his repressed homosexual orientation that the triggering stimuli—in many cases, a non-violent verbal or physical homosexual advance—started a psychological chain reaction which ultimately caused the defendant to temporarily lose the capacity to distinguish moral or legal right from wrong, and thus kill.¹⁰⁹

Commentators¹¹⁰ have identified *People v. Rodriguez*¹¹¹ as the first reported judicial mention of homosexual panic. In *Rodriguez*, the defendant claimed that the victim grabbed his genitals from behind while he was urinating in an alley.¹¹² Defense counsel argued that this action triggered the defendant's violent assault against the victim.¹¹³ The defense proffered expert testimony that the defendant's attack resulted from "acute homosexual panic brought on him by the fear that the victim was molesting him sexually."¹¹⁴ Although the jury rejected the defendant's insanity defense, it found him guilty of second-degree murder rather than first-degree murder.¹¹⁵ Thus, *Rodriguez* signaled a seminal moment in the homosexual panic defense's development.

The defense was reformulated when the American Psychiatric Association formally demedicalized homosexuality as a psychological illness in 1973, deleting it from the Diagnostic and Statistical Manual of Mental Disorders.¹¹⁶ Following

108. Compare *Commonwealth v. Shelley*, 373 N.E.2d 951, 953 (Mass. 1978) (acknowledging the defendant's argument that he was unable to follow the laws against homicide by reason of homosexual panic), and *State v. Thornton*, 532 S.W.2d 37, 44–45 (Mo. Ct. App. 1975) (acknowledging the defendant's argument for an insanity defense by reason of homosexual panic, and noting that no question as to the propriety of jury instructions regarding the definition of a "mental disease or defect" had been raised on appeal), with *People v. Parisie*, 287 N.E.2d 310, 314–15, 325 (Ill. App. Ct. 1972) (rejecting the defendant's argument that he qualified for the insanity defense due to homosexual panic). For a summary of these cases, see Bagnall et al., *supra* note 106, at 502–10.

109. Chen, *supra* note 1, at 201.

110. See, e.g., Bagnall et al., *supra* note 106, at 499 n.4; Suffredini, *supra* note 32, at 292; see also Lee, *supra* note 2, at 478 n.22 (citing Suffredini, *supra* note 32, at 292); Chen, *supra* note 1, at 201 (citing Bagnall et al., *supra* note 106, at 499 n.4).

111. 64 Cal. Rptr. 253 (Ct. App. 1967).

112. *Id.* at 255.

113. *Id.*

114. *Id.*

115. *Id.* at 254.

116. See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 40 (1981).

the demedicalization, courts began to recognize homosexual panic as a provocation defense.¹¹⁷ With homosexuality no longer classified as a medical disease, the doctrine could no longer rationally relate the defense to the defendant's pathology by focusing on the defendant's latent homosexuality, which had been classified as an illness causing the violent reaction, and gay panic could no longer support a claim of insanity. Rather, the defense had to shift from the defendant to the victim, focusing on the latter's conduct. In this new formulation of the gay panic defense, the victim's unwanted, nonviolent homosexual advance was characterized as an external stimulus causing the defendant's homicidal reaction.¹¹⁸ Further, the new formulation included the idea that the reasonable and ordinary person would be provoked to kill because of an understandable loss of normal self-control caused by the homosexual advance.¹¹⁹ Thus, courts recognizing homosexual panic as a legal defense typically construe it as a diminished capacity partial defense, negating the mens rea of premeditation necessary to establish first-degree murder.¹²⁰

Despite the doctrinal shift from recognizing gay panic as insanity to recognizing it as diminished capacity, the gay panic defense appears to continue to rely on its ostensible medical-scientific foundations. The gay panic defense is now positioned as a provocation defense within the law of criminal homicide. A traditional definition of homicide is "the killing of a human being by *another* human being," and a killing is criminal homicide when it is committed without justification or excuse.¹²¹ Additionally, the criminal law of homicide defines and distinguishes several types of killing.¹²² Murder is traditionally defined as intentional homicide with "malice aforethought," involves the highest degree of culpability and moral blameworthiness, and draws the harshest penal sentence.¹²³ Unlike murder, manslaughter can involve provoked killing.¹²⁴ In principle, manslaughter's absence of malice aforethought reduces the attendant moral culpability.¹²⁵

Provocation functions as a partial defense to murder, reducing a homicide conviction from murder to manslaughter, and it is available when a defendant was

117. See Chen, *supra* note 1, at 202–03.

118. *Id.* at 203.

119. *Id.*

120. See Note, *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1545 (1989).

121. JOSHUA DRESSLER, CRIMINAL LAW 297 (1st ed. 2005).

122. For the purposes of this Comment, differences between murder and manslaughter are identified broadly.

123. DRESSLER, *supra* note 121, at 299.

124. Homicide involving provocation is voluntary manslaughter, in contrast to involuntary manslaughter. *Id.* at 311–12.

125. See Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 425–31, 442–43 (1982).

“adequately” provoked.¹²⁶ This type of defense can be classified as an excuse in criminal law, which is based on the theory that the defendant understandably lost normal self-control.¹²⁷ To downgrade a murder to manslaughter under the adequate provocation theory, a defendant must prove the following elements:

- (1) There must have been adequate provocation.
- (2) The killing must have been [in fact] in the heat of passion.
- (3) It must have been a sudden heat of passion—that is, the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool.
- (4) There must have been a causal connection between the provocation, the passion, and the fatal act.¹²⁸

The rationale for the provocation doctrine recognizes that “[t]he law pays . . . regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt.”¹²⁹ In sum, the provocation doctrine holds that a defendant is less culpable if he intentionally killed in a heat of passion caused by an uncontrollable homicidal rage resulting from an understandable and excusable loss of self-control arising from anger.¹³⁰

Whether the provocation was adequate is a question of fact for the jury.¹³¹ To make its determination, a jury must apply a reasonable man test. The test ostensibly provides an objective standard of reasonableness, under which adequate provocation is “provocation which causes a reasonable man to lose his normal self-control; and, although a reasonable man who has thus lost control over himself would not kill, his homicidal reaction to the provocation is at least understandable.”¹³² This version of the reasonable man test does not require the jury to evaluate the defendant’s actions with an ideal standard of human behavior, but to find whether the defendant’s homicidal reaction to the alleged provocation was the result of the un-

126. DRESSLER, *supra* note 121, at 313.

127. 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, 729, 747 (1995).

128. Mison, *supra* note 32, at 140 (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 85 (3d ed. 1982)) (internal quotation marks omitted); *see also* State v. Frederick, 579 P.2d 390, 394 (Wash. Ct. App. 1978).

129. 4 WILLIAM BLACKSTONE, COMMENTARIES *191.

130. *Cf.* Dressler, *supra* note 125.

131. PERKINS & BOYCE, *supra* note 128, at 86; Mison, *supra* note 32, at 139–40. Under English common law, the courts defined several acts that constituted adequate provocation. To foreshadow the gendered nature of the provocation defense discussed *infra*, I highlight that one of these acts was the sight of one’s wife committing adultery with another man. *See, e.g.*, State v. Thornton, 730 S.W.2d 309 (Tenn. 1987) (holding that a husband finding his wife committing adultery with another man constitutes adequate provocation, and that he cannot be guilty of a crime greater than voluntary manslaughter).

132. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.10(b), at 654 (2d ed. 1986).

derstandable loss of normal self-control in any ordinary man with typical human shortcomings.

Defining the reasonable man is another interpretive hurdle for the jury. Historically, a majority of jurisdictions required a strictly objective view of the reasonable man.¹³³ A minority of jurisdictions introduced subjectivity into the test, which these jurisdictions construe as “primarily objective with secondary situation-based subjective factors.”¹³⁴ Even the Model Penal Code introduced subjectivity into the test when it qualified the phrase with “viewpoint of a person in the actor’s situation.”¹³⁵ Significantly, however, in either formulation, the reasonable man is presumptively heterosexual. As Robert Mison stated, “[N]o individual is lacking a sexual identity—whether heterosexual, homosexual, or bisexual . . . [Thus] when the reasonableness standard is blind to sexual orientation, the presumption of sexual identity is almost invariably heterosexual.”¹³⁶

The gay panic defense follows the analytical rubric of the provocation defense. Generally, and in the gay panic defense, “[w]ords alone, no matter how insulting or offensive, [are] insufficient” provocation.¹³⁷ Some physical contact is required. For example, Professor Joshua Dressler sets forth the following examples of supposedly homosexual physical contact that may give rise to a 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 defen-

133. See Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLAL. REV. 1679, 1688–89 (1986).

134. Chen, *supra* note 1, at 209.

135. MODEL PENAL CODE § 210.3 (1962).

136. Mison, *supra* note 32, at 160 (footnotes omitted).

137. Dressler, *supra* note 127, at 733.

dant's penis; and (7) *G* performed a homosexual act upon the sleeping defendant.¹³⁸

Although the examples appear similar because they involve homosexual physical contact, "sufficient provocation . . . must vary with the myriad shifting circumstances of men's temper and quarrels."¹³⁹ Thus, the jury must evaluate the circumstances surrounding the alleged provocation to determine the reasonableness of the defendant's violent response.

B. The Development of Trans Panic Defense Jurisprudence

Recognized as a variation on the gay panic defense, the trans panic defense also typically involves a male defendant who killed a gender-nonconforming or transgender victim and who asserts a claim of psychological panic to reduce his criminal liability.¹⁴⁰ Examining the trans panic defense is relevant here for three reasons. First, commentators have argued that King may have been transgender.¹⁴¹ Therefore, King's nonconforming gender identity, separately from his sexual orientation, may have played a role in McInerney's aggression toward him. Second, it has been reported that McInerney's defense counsel had his classmates and teachers testified that King's effeminate behavior and dress were distracting to other students.¹⁴² This line of argument implicated King's nonconforming gender identity, an integral component of transgenderism and the trans panic defense, at McInerney's trial.

Third, scholars have asserted that homosexual and transgender identities have a natural and discernible interrelationship. As Shannon Minter states, "homophobia and transphobia are tightly intertwined."¹⁴³ Additionally, "antigay bias 'so often takes the form of violence and discrimination against those who are seen as

138. *Id.* at 734 (footnotes omitted) (citing *Commonwealth v. Halbert*, 573 N.E.2d 975, 977 (Mass. 1991); *Commonwealth v. Deagle*, 412 N.E.2d 911, 912 (Mass. App. Ct. 1980); *State v. Handy*, 419 S.E.2d 545, 548 (N.C. 1992); *State v. Escamilla*, 511 N.W.2d 58, 61 (Neb. 1994); *State v. Oliver*, No. 49613, slip op. at 2 (Ohio Ct. App. Oct. 17, 1985); *Schick v. State*, 570 N.E.2d 918, 921 (Ind. Ct. App. 1991); *People v. Lenser*, 430 N.E.2d 495, 496 (Ill. App. Ct. 1981)).

139. *Id.* at 733 (quoting *Commonwealth v. Paese*, 69 A. 891, 892 (Pa. 1908)).

140. Lee, *supra* note 2, at 478. Notably, in the killing of transgender woman Gwen Araujo, for example, a female allegedly arranged the encounter between Araujo and her male killers that precipitated the attack on Araujo. Thus, this case shows that females can also be involved in a trans panic homicide, which disrupts the exclusive linkage between males and fear of gender nonconformity. *Id.* at 513–17.

141. See Part I.A *infra* for discussion of Lawrence King's gender identity.

142. Shay O'Reilly, *15 Year Old Gay Student Killed, "Gay Panic" Used as Defense*, ALTERNET (Sept. 11, 2011), http://www.alternet.org/reproductivejustice/152370/15_year_old_gay_student_killed_%22gay_panic%22_used_as_defense.

143. Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion*, in *TRANSGENDER RIGHTS* 141, 142 (Paisley Currah et al. eds., 2006).

transgressing gender norms.”¹⁴⁴ Minter also notes that many people identified as gay by historians may have actually been transgender as currently defined.¹⁴⁵ Therefore, it is important to understand the trans panic defense to have a full understanding of the King case and the gay panic defense that was asserted at trial.

The trans panic defense began to emerge only in the 1970s, well after the formation of the gay panic defense in the early twentieth century.¹⁴⁶ Similar to the gay panic defense, the trans panic defense involves a defendant who “had his heterosexuality or masculinity so existentially challenged by the [transgender] victim that the defendant acted without reason.”¹⁴⁷ In the trans panic defense, however, the defendant also asserts that the victim misled the defendant as to his or her anatomical sex, as a kind of “sexual fraud.”¹⁴⁸

Defendants may assert the trans panic defense explicitly and/or implicitly. In its explicit form, the defendant argues that the victim provoked him extraordinarily. The provocation caused the defendant to have a less culpable state of mind, warranting more lenient punishment.¹⁴⁹ In its implicit form, the defendant instead seeks to “impeach the victim’s humanity and diminish the sympathy that jurors feel for the victim.”¹⁵⁰ In either form, like the gay panic defense, the trans panic defense “resonate[s] with juries that harbor biases, misinformation, or confusion about transgendered individuals.”¹⁵¹ An example of the implicit version of the trans panic defense appeared in the case of transgender woman Angie Zapata.¹⁵² As Morgan Tilleman noted,

One common example of this subtle appeal to anti-trans bias was on display in the Angie Zapata trial; defense lawyers consistently attempted to remind juror [sic] of Angie’s earlier life as a boy. [For example,] “public defenders Annette Kundelius and Brad Martin questioned [Angie’s family members] about ‘Justin,’ [Angie’s given name as a boy].”¹⁵³

144. BIEGEL, *supra* note 36, at 175 (quoting Minter, *supra* note 143, at 142).

145. *Id.*

146. Morgan Tilleman, Comment, *(Trans)forming the Provocation Defense*, 100 J. CRIM. L. & CRIMINOLOGY 1659, 1668–69 (2010).

147. *Id.* at 1669.

148. *Id.* (quoting Steinberg, *supra* note 32, at 520).

149. *Id.* at 1670–71.

150. *Id.* at 1670.

151. Steinberg, *supra* note 32, at 521.

152. Dan Frosch, *Murder and Hate Verdict in Transgender Case*, N.Y. TIMES, Apr. 22, 2009, <http://www.nytimes.com/2009/04/23/us/23transgend.html>.

153. Tilleman, *supra* note 146, at 1687 (quoting Sharon Dunn, *Angie Zapata’s Friends, Family Take the Stand*, TRIBUNE (Greeley, Co.), Apr. 18, 2009, <http://www.greeleytribune.com/article/20090418/NEWS/904189952>).

An example of the explicit form of the defense appeared in the trial of transgender woman Gwen Araujo's murderer. As Victoria L. Steinberg noted,

Above all, defense counsel argued that Araujo's commission of "sexual fraud" constituted sufficient provocation. . . . While burying Araujo, one defendant said that "he could not believe that someone could ever be so deceitful. By being deceitful, he meant having sex with someone who thought it [sic] was a woman, not simply presenting as a woman when the person was actually a man."¹⁵⁴

This logic "closely parallels the claims made by Allen Andrade in his defense—that he was shocked by the 'revelation' of Zapata's anatomical sex."¹⁵⁵

In reaction to Gwen Araujo's murder, the California legislature enacted legislation in an attempt to limit the impact of the trans panic defense on jurors. The Gwen Araujo Justice for Victims Act reads as follows:

In any criminal trial or proceeding, upon the request of a party, the court shall instruct the jury substantially as follows: Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation.¹⁵⁶

It has been argued, rather offensively, that sexual misrepresentation by a transgender individual is a legally cognizable provocation defense.¹⁵⁷ This theory assumes that transgender individuals' gender identity is defined by their anatomical sex, however, and ignores gender presentation as a legitimate source of one's gender identity.¹⁵⁸ Thus, the "theory of sexual misrepresentation privilege[s] one form of gender identification—*anatomical sex*—over many others . . . [and] denies [transgender individuals'] experience and even their personhood."¹⁵⁹

Scholars and other advocates have proposed limiting or banning the trans panic defense from trials, either legislatively or judicially.¹⁶⁰ Social science research on implicit bias shows, however, that such defenses can be neutralized only when the issue of sexual orientation or gender identity is made salient in the minds of the jurors by attorneys' arguments in open court.¹⁶¹ A simple jury instruction as in the

154. Steinberg, *supra* note 32, at 520.

155. Tilleman, *supra* note 146, at 1669.

156. CAL. PENAL CODE § 1127h (West, Supp. 2012).

157. See, e.g., Bradford Bigler, *Sexually Provoked: Recognizing Sexual Misrepresentation as Adequate Provocation*, 53 UCLA L. REV. 783, 786 (2006).

158. Tilleman, *supra* note 146, at 1683.

159. *Id.* at 1683–84.

160. See *infra* Part III.A.

161. See *infra* Part III.

Gwen Araujo Justice for Victims Act would not suffice according to this research and according to the finding that defense attorneys subtly assert such panic defenses even when the defenses are legislatively or judicially limited.¹⁶²

Moreover, two recent conferences for prosecutors about the gay panic defense contradict the assertion that a ban on the defense is helpful. Fulton County, Georgia District Attorney Paul Howard hosted such a conference in 2005, and about a year later, then-San Francisco District Attorney Kamala Harris hosted a similar conference, “Defeating the ‘Panic Defense’” at Hastings College of Law.¹⁶³ The conferences provided a forum for “intellectual and strategic conversation.”¹⁶⁴ In addition, Harris’s office also sponsored a community-based forum, “bringing together the advocacy, policy making as well as law enforcement communities to cross-educate each other on the ways in which the panic defense is used and how communities can respond to such a strategy.”¹⁶⁵ Because of the need to educate these groups, it appears that all sectors of the criminal justice community ought to be involved in addressing the gay panic defense.

C. Inconsistency in Criminal Law Doctrine: Hate Crime Laws Are Doctrinally Opposed to Gay Panic Claims

Scholars have also criticized the gay panic defense based on its contraposition to hate crime laws.¹⁶⁶ While the criminal law reduces culpability and punishment under the provocation doctrine as concession to human weakness engendered by a homosexual advance, it also heightens culpability and punishment for human wickedness engendered by homophobic violence under antihomophobic hate crime laws.¹⁶⁷ As of 2010, twenty-five states and the District of Columbia have hate crime statutes covering sexual orientation.¹⁶⁸ These laws conflict with the gay panic defense in three ways.

First, homophobia is at the core of the gay panic defense, and the recognition of the defense signals acceptance and legitimization of homophobic violence.¹⁶⁹

162. See *infra* Part III.A.

163. Zak Szymanski, *Harris Announces ‘Panic Defense’ Conference*, BAY AREA REP., Mar. 30, 2006, <http://www.ebar.com/news/article.php?sec=news&article=690>.

164. *Id.*

165. *Id.* (citing a statement issued by the San Francisco County District Attorney office).

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

167. *Id.* at 656–60.

168. ALISON M. SMITH & CASSANDRA L. FOLEY, CONG. RESEARCH SERV., RL33099, STATE STATUTES GOVERNING HATE CRIMES 1 (2010), available at <http://www.fas.org/sgp/crs/misc/RL33099.pdf>.

169. McCoy, *supra* note 166, at 656–58.

In contrast, hate crime laws covering sexual orientation identify some violence as motivated by homophobia, a form of hate. Because these laws punish such violence, they signal the law's rejection of homophobic violence as normative.¹⁷⁰

Second, the punishments are disproportional to each other.¹⁷¹ Hate crime statutes suggest that homophobic violence is deserving of punishment greater than nonhomophobic violence.¹⁷² In contrast, defendants arguing gay panic benefit from reduced culpability and lesser punishment precisely because homophobia motivated their violence.¹⁷³ In other words, a homophobic defendant who selects a gay victim receives harsher penalties, while a homophobic defendant who invokes gay panic receives reduced penalties. Finally, and related to the first two inconsistencies, the presence of both hate crime laws and recognition of a gay panic defense transmits conflicting messages to society and, therefore, "work against each other" in public discourse.¹⁷⁴ As Scott McCoy explains,

While the prohibitions of hate crime statutes on selecting a victim on the basis of sexual orientation send a message of tolerance, inclusion, and equality to the gay and lesbian community, the existence and allowance of the homosexual-advance defense sends a message that the courts and the criminal justice system cannot afford them equal and adequate protection against bias-motivated crimes. At the same time, the existence of the defense sends the message to juries and the public that a homosexual advance is adequate provocation to kill and thus that gay men are deserving of less tolerance or respect than heterosexual men. This flies in the face of the fundamental principle that all members of our society should be treated as equals.¹⁷⁵

Ultimately, McCoy argues that the gay panic defense should be banned to resolve the "philosophical tension" he identifies.¹⁷⁶ McCoy argues further that banning the defense would resolve the mixed message and improve the gay and lesbian community's trust and respect for the criminal justice system.¹⁷⁷

While McCoy, for example, appears to favor hate crime laws, some queer theorists have criticized hate crimes legislation. As Jane Spade and Craig Willse argue, "the rhetoric of hate crimes activism isolates specific instances of violence

170. *Id.*

171. *Id.* at 658–60.

172. *Id.*

173. *Id.*

174. *Id.* at 660.

175. *Id.*

176. *Id.* at 663.

177. *Id.* McCoy misses the fact that there are very few "lesbian panic" cases, so it seems spurious of him to include lesbians in his conclusion.

against queer and transgender people, categorizing these [acts] as acts of individual prejudice, and obscures an understanding of the systemic, institutional nature of gender and sexuality subordination.”¹⁷⁸ Additionally, Leslie Moran argues that “the gay and lesbian demand for law reform feeds a law and order politics of retribution and revenge that may be implicated in the promotion, institutionalization, and legitimation of hate.”¹⁷⁹

Sociologist Yvonne Zylan has also criticized hate crime laws from a queer perspective. Zylan argues that the discourse created by antibias criminal laws is dangerous because it reinforces “the very social dynamics that may create the impetus for such crimes in the first place.”¹⁸⁰ Zylan starts with the premise that law creates a discourse that contains a “power to constitute social reality.”¹⁸¹ Therefore, antigay hate crime laws both doctrinally and through argument in court legitimate a limiting narrative about the dominant bodily sex binary (male and female), gender binary (masculine and feminine), and sexual orientation binary (heterosexual and homosexual).¹⁸²

Similarly, queer theorists posit the gay panic defense as an antigay discourse resulting from the dominant, socially constructed binaries regarding sex, gender, and sexual orientation, which hate crime laws reinforce.¹⁸³ Specifically, by being entrenched in normative gender binaries, the lawyers arguing in cases involving sexual orientation and gender identity miss an opportunity to interrogate the motives of a defendant who asserts a gay panic defense. The gay panic defense’s psychological roots in the defendant’s “own latent, disavowed, homosexual desire” conflict with the theory underlying hate crime laws—that hate motivated the defendant’s violent, homicidal act. Thus, both desire and hate, which Zylan calls “emotive and cognitive motivations,”¹⁸⁴ might be at play in gay panic cases. For example, as Zylan suggests, in the Matthew Shepard case,¹⁸⁵ which was prosecuted on a hate crime theory, the jury did not find whether defendant Aaron McKinney

178. Jane Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38, 39 (2000).

179. Leslie J. Moran, *The Emotional Dimensions of Lesbian and Gay Demands for Hate Crime Reform*, 49 MCGILL L.J. 925, 925 (2004).

180. Yvonne Zylan, *Passions We Like . . . and Those We Don't: Anti-gay Hate Crime Laws and the Discursive Construction of Sex, Gender, and the Body*, 16 MICH. J. GENDER & L. 1, 2 (2009).

181. *Id.*

182. *Id.* at 2–3. Zylan’s conclusions may be problematic because the gay panic jurisprudence predated hate crime legislation. Zylan’s point, though, is not about inception but perpetuation of traditional gender norms. It should be noted that as of 2010, at least 21 states have criminal legislation that addresses gender-identity motivated crimes. SMITH & FOLEY, *supra* note 168, at 1.

183. Zylan, *supra* note 180, at 45. “The homosexual panic defense . . . may paradoxically be reinvigorated by the adjudication of hate crime allegations.” *Id.*

184. *Id.*

185. *See infra* Part III.A.

felt hatred or desire before he killed Shepard. This inquiry would have shown whether the defendant killed because of homophobic hatred, which should trigger hate crime laws warranting greater culpability than if he had killed because of homosexual desire. Importantly then, as Zylan suggests, “it might . . . be worth considering the implications of inviting such a judgment”¹⁸⁶ to allow for a more careful distinction between a hate crime and legitimate homosexual panic.

III. NEUTRALIZING THE GAY PANIC DEFENSE BY EXPOSING THE LIMITATIONS OF ITS PSYCHOLOGICAL FOUNDATIONS

A. Implicit Bias Research Suggests That Limiting or Banning the Gay Panic Defense May Do More Harm Than Good

Legislatively limiting or banning the use of the gay panic defense in homicide trials causes more harm than good. Even if the gay panic defense is limited or banned, my analysis of the King case shows that defense counsel can manage to stealthily add gay panic claims to their arguments to garner sympathy for the defendant.¹⁸⁷ Social science research on implicit bias can explain this result and suggest a more effective solution that accounts for the practical realities of jury trials.

Cynthia Lee urges us to learn this lesson from the Matthew Shepard case. In 1998, defendants Russell Henderson and Aaron McKinney brutally tortured openly gay, twenty-one-year-old Shepard, ultimately causing his death. Henderson reached a plea agreement with the prosecutors. McKinney went to trial, where he asserted the gay panic defense, arguing that Shepard’s homosexual advances caused his violent reaction.

Invoking social science research on implicit bias, Lee suggests that pro-gay and lesbian groups’ pretrial publicity of the Shepard case may have made sexual orientation salient at trial and in jury deliberations.¹⁸⁸ The simple act of openly discussing the fact that sexual orientation is at issue can make it salient in the jurors’ minds throughout trial and their decisionmaking process. Thus, the pretrial publicity about Shepard identifying as gay may have helped jurors to avoid stereotypical thinking about gay men as sexual deviants and to reject defendant McKinney’s gay panic claim and find him guilty of felony murder, rather than of the lesser manslaughter offense. In addition to pretrial publicity, “voir dire questioning of potential jurors, opening and closing arguments, the nature of police testimony, attorneys’ demeanors, and sometimes the nature of the crime itself” could have made the

186. Zylan, *supra* note 180, at 45.

187. See *supra* Part I.B.

188. Lee, *supra* note 2, at 531, 533–34.

issue of Shepard's sexual orientation salient at trial.¹⁸⁹ Lee argues that this anecdotal lesson is important because it shows that making the issue of a victim's sexual orientation salient is beneficial because it could neutralize private antigay bias.¹⁹⁰

However, making gay panic arguments at trial despite a judge banning gay panic as a legal defense is easy to do implicitly.¹⁹¹ For example, in the Shepard trial, the presiding judge, Judge Voigt, explicitly ruled against the defense, despite defense counsel's protests that they were not raising gay panic as a defense.¹⁹² As Judge Voigt observed,

Defense counsel have tried valiantly to convince the Court that their defense is not a homosexual rage defense. But what they hope to do is present testimony that, because of homosexual experiences in the Defendant's past, he flew into a rage and killed Matthew Shepard, without specific intent to kill, but voluntarily in a sudden heat of passion. This is the homosexual rage defense, nothing more, nothing less. The fact that the Defendant attempts to raise it through lay witnesses, rather than through experts, is inconsequential.¹⁹³

Despite the judge's ruling, defense counsel proffered, and the jury heard, two witnesses testify about Shepard's alleged sexual aggression. One of the witnesses, Mike St. Clair, testified that Shepard approached him and asked if he could sit with him at the Fireside Lounge Bar on the night he was murdered.¹⁹⁴ According to St. Clair, shortly after St. Clair agreed and Shepard sat down, Henderson approached the table, leaned down toward Shepard, and whispered something in Shepard's ear.¹⁹⁵ When Shepard then gathered his things, stood up, and said that he would be back, he also "licked his lips like . . . it was him trying to be sexy."¹⁹⁶ In conclusion, St. Clair "believe[d] it was [Shepard] showing he was interested in me, hitting on me"¹⁹⁷ and that Shepard "was blatantly gay, and he made advances on me."¹⁹⁸

189. *Id.* at 531 (citing Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1371 (2000)).

190. *Id.*

191. *Id.*

192. *Id.* at 525 (quoting Decision Letter at 4, *State v. McKinney*, No. 6381 (Wyo. Dist. Ct. Oct. 30, 1999)) (internal quotation marks omitted).

193. *Id.*

194. *Id.* at 525–26 (citing Partial Transcript of Trial Proceedings at 30, *State v. McKinney*, No. 6381 (Wyo. Dist. Ct. 1999) (on file with UCLA Law Review) [hereinafter Partial Transcript]).

195. *Id.* at 526 (citing Partial Transcript, *supra* note 194, at 32–34).

196. *Id.* (citing Partial Transcript, *supra* note 194, at 35).

197. *Id.*

198. *Id.* (citing Partial Transcript, *supra* note 194, at 38).

The other witness, Chris Hoogerhyde, also testified about another of Shepard's alleged sexual advances.¹⁹⁹ During a group midnight trip to a lake in August 1998, Hoogerhyde stated that Shepard asked him to go for a walk around the lake, and when Hoogerhyde declined, Shepard told him, "[Y]ou're just afraid I'm going to try something."²⁰⁰ According to Hoogerhyde, Shepard persisted and Hoogerhyde continued to decline.²⁰¹ Eventually, Shepard tugged on Hoogerhyde's shirt and said, "Come on."²⁰² Hoogerhyde then punched Shepard twice, knocking him out.²⁰³

Lee characterizes defense counsel's use of this testimony in two ways.²⁰⁴ First, defense counsel tried to give credibility to the claim that Shepard in fact made a sexual advance on McKinney.²⁰⁵ Second, he tried to suggest that McKinney's offense at Shepard's homosexual advance and consequent violent response were reasonable.²⁰⁶ This gay-panic-defense line of argument, despite the judge's prohibition, was the focus of defense counsel Dion Custis's closing statement, in which he repeatedly argued that Shepard's sexual advance triggered McKinney's violent reaction.²⁰⁷

Lee explains this apparent inconsistency in part by suggesting that the "the prosecutor and judge may have simply been asleep at the switch."²⁰⁸ Presumably, a prosecutor would have objected to the testimony, and the judge would have sustained the objection or sua sponte barred the testimony. As Lee observes, however, the prosecutor's objecting may actually help the defense by bringing attention to the testimony and perhaps giving the defense an opportunity to rephrase questions and hammer home the argument. At that point, "the judge cannot unring the bell."²⁰⁹ Moreover, in light of the media attention on the trial, the attorneys presumably should have been less likely to flout the judge's order openly. Despite the media attention, however, the attorneys advanced the gay panic defense. Therefore, as Lee's analysis of the Shepard case suggests, defense counsel could subtly or impliedly inject gay panic arguments in any such trial despite these procedural tools and safeguards.²¹⁰

Behavioral research on juries further suggests that a judge's instruction prohibiting certain topics at trial and attorneys' avoiding such topics both fail to remove

199. *Id.* (citing Partial Transcript, *supra* note 194, at 42–45).

200. *Id.* (citing Partial Transcript, *supra* note 194, at 44–45).

201. *Id.* (citing Partial Transcript, *supra* note 194, at 45).

202. *Id.* at 526–27 (citing Partial Transcript, *supra* note 194, at 45).

203. *Id.* at 527 (citing Partial Transcript, *supra* note 194, at 45–46).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 528.

209. *Id.*

210. *Id.* at 529.

these topics from a jury's consideration upon deliberation.²¹¹ Such topics can enter the deliberation room in three identified ways. First, a witness may innocently mention a forbidden topic in response to a question during direct or cross-examination.²¹² Second, an attorney may convince a judge that he or she is introducing the evidence for an allowable purpose such as motive.²¹³ Third, jurors may introduce the topic on their own by bringing their prior experiences, beliefs, and attitudes to the jury room.²¹⁴

A more recent study of juries specifically controlled for homophobia in cases involving the gay panic defense.²¹⁵ One of the study's findings showed that when male jurors are not given jury instructions addressing bias toward homosexuals, they tend to provide more lenient sentences for perceived heterosexual male defendants who killed a male homosexual.²¹⁶ Overall, the study concluded that "homophobia was found to be a significant predictor of defendant guilt and sentence length[, and] expand[ed] upon past research that showed homophobia was related to higher victim blame ratings for homosexual victims by demonstrating homophobia is also related to defendant culpability."²¹⁷

Upon concluding that judicially limiting the gay panic defense is ineffective against jurors' antihomosexual bias, Lee provides three affirmative arguments in favor of allowing the defense. First, Lee draws on First Amendment Theory.²¹⁸ The marketplace of ideas theory of the First Amendment suggests that "the expression of both good and bad ideas is encouraged on the ground that lively debate and discussion can help both those listening and those arguing determine the truth."²¹⁹ The safety valve theory of the First Amendment suggests that "the best way to deal with the threat of radical action is to allow individuals to express radical ideas out in the open and to permit others to challenge and debate those ideas."²²⁰ The

211. See Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1863–66 (2001). This study found, for example, that jurors discussed a party's insurance coverage in 85 percent of the tort cases they studied despite evidentiary rules prohibiting consideration of insurance coverage, and they discussed attorney's fees 83 percent of the time despite a prohibition on considering this topic. *Id.* at 1876, 1898.

212. *Id.* at 1864.

213. *Id.*

214. *Id.* at 1865–66.

215. Shane W. Kraus & Laurie L. Ragatz, *Gender, Jury Instructions, and Homophobia: What Influence Do These Factors Have on Legal Decision Making in a Homicide Case Where the Defendant Utilized the Homosexual Panic Defense?*, 47 CRIM. L. BULL. 237 (2011).

216. *Id.* at 249–50.

217. *Id.* at 254 (footnote omitted).

218. Lee, *supra* note 2, at 532–36.

219. *Id.* at 532.

220. *Id.*

alternative, “suppression of discussion[,] allows force to replace reason.”²²¹ Drawing on social science research on race and implicit bias, Lee concludes as follows:

Open debate about the divergent perceptions and feelings heterosexual men have about sexual advances by gay men is a better way to deal with potential bias against a gay male victim than pretending such bias does not exist. Open discussion also allows judges and jurors to consciously mediate their attitudes and beliefs about homosexuality, sexual deviance, and whether violence is an appropriate response to a non-violent homosexual advance. . . . If defendants are disgusted by non-violent homosexual advances, it is best that these disgust sensibilities be out in the open, so they can become the source of open interrogation and inquiry.²²²

Second, Lee examines social science research on race and implicit bias and applies it to sexual orientation. The research suggests that, although most Americans pride themselves on being egalitarian minded with respect to race, Americans today are not in fact colorblind, at least at the subconscious level.²²³ Some studies show generally that when racial stereotypes about blacks were made salient, participants seemed to consciously mediate their thoughts about blacks and align their thoughts with their egalitarian belief.²²⁴ Conversely, when the stereotypes were not made salient, participants responded in stereotype-congruent ways.²²⁵ Other studies exam-

221. *Id.*

222. *Id.* at 533–34.

223. *Id.* at 545–47.

224. See generally William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 *PSYCHOL. SCI.* 806 (2004); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 *J. PERSONALITY & SOC. PSYCHOL.* 5 (1989). The experiments testing race-based implicit bias recognize conscious versus automatic responses in individuals to black and white individuals. The experiments also recognize that the automatic mode tends to dominate when the individual does not have time to think. Thus, Cunningham tested brain activity for whether the amount of fear-response would be different depending on how long subjects were exposed to black and white faces. In the self-reported results, participants disagreed with prejudiced statements and agreed with nonprejudiced statements. In contrast, the measure of brain activity “showed automatic negative associations toward [b]lack relative to [w]hite faces.” Cunningham et al., *supra*, at 808. As Lee explains, “[t]hese results suggest that when individuals have the opportunity to process the fact that they are being exposed to a [b]lack face, their cognitive processes can mediate their otherwise automatic stereotype-congruent responses.” Lee, *supra* note 2, at 542.

Lee further explains that Devine’s study on stereotypes and prejudice found that “when racial stereotypes about [b]lacks were made salient, low-prejudice individuals seemed to consciously mediate their thoughts about [b]lacks and align their thoughts with their egalitarian beliefs. When racial stereotypes about [b]lacks were not made salient, both high and low-prejudice individuals responded in stereotype-congruent ways.” *Id.* at 543.

225. See Devine, *supra* note 224, at 15 (“Nonprejudiced responses are, according to the dissociation model, a function of intentional, controlled processes and require a conscious decision to behave in a nonprejudiced fashion. In addition, new responses must be learned and well practiced before they can serve as competitive responses to the automatically activated stereotype-congruent responses.”). See generally Cunningham et al., *supra* note 224.

ined this phenomenon in jurors and reported similar results.²²⁶ When race was made salient for white mock jurors, they treated white and black defendants equally in terms of guilt and sentencing.²²⁷ Conversely, when race was not salient, white mock jurors gave the black defendant a significantly higher guilt rating and a more severe sentence than the white defendant.²²⁸ Overall, scientific findings show that one's implicit bias can trump one's sincerely held egalitarian beliefs.²²⁹

Similarly, implicit bias may also trump many Americans' sincerely held egalitarian beliefs with respect to sexual orientation. One study showed that participants exposed to nonprejudiced opinions about homosexuals responded more positively toward gays than those exposed to no opinions at all.²³⁰ The study concluded that "making social norms opposing prejudice salient will likely have a pervasive effect, curbing expressions of prejudice among people who hold less as well as more prejudiced attitudes."²³¹

With the social science data in mind, Lee concludes that claims about gay panic should be drawn out into the open at trial.²³² Lee suggests that if these claims were made salient, attorneys would have to argue about the legitimacy of such claims.²³³ Consequently, jurors would be enabled to process the validity of the claims cognitively and not rely reflexively on subconsciously held biases and stereotypes.²³⁴

Third, Lee assessed institutional competency.²³⁵ Ultimately, Lee argues that the jury is the best body to determine whether a gay panic defense is credible and mitigates culpability.²³⁶ Although they may create a uniform, consistent law that bars the gay panic defense, legislative approaches are problematic because they could not anticipate all the myriad ways an alleged nonviolent homosexual advance could occur or whether the occurrence would have provoked a reasonable person

226. See generally Sommers & Ellsworth, *supra* note 189.

227. *Id.* at 1373–75.

228. *Id.*

229. An oft-cited example is *People v. Goetz*, 497 N.E.2d 41 (1986). There, Bernard Goetz, a white man, shot four young black men on the New York City subway after two of them asked him for five dollars. While no one at trial talked openly about the case's racial dynamics, the defense attorneys appeared to inject the black-as-criminal stereotype at several moments. The jury found Goetz not guilty on all but the least serious charge of unlawful firearm possession. See Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 382–83 (2012) (citing GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 4–6 (1988)).

230. Margo J. Monteith et al., *The Effect of Social Norm Activation on the Expression of Opinions Concerning Gay Men and Blacks*, 18 BASIC & APPLIED SOC. PSYCHOL. 267, 283 (1996).

231. *Id.* at 277.

232. Lee, *supra* note 2, at 549.

233. *Id.*

234. *Id.*

235. *Id.* at 549–57.

236. *Id.*

in the defendant's shoes to react with deadly force.²³⁷ Rather, a judge and jury are in a better position to evaluate the unique facts of each case and could more reliably make the crucial factual determinations.

Lee also suggests that there are benefits to a broad reasonable person test.²³⁸ Formerly, under common law, a defendant could avail himself of only a few rigidly defined circumstances when arguing for mitigation.²³⁹ A statute barring the gay panic defense would be the converse, by defining what could not constitute adequate provocation. Implicitly, Lee recognizes that gay panic may arguably be a legitimate source of adequate provocation. For example, according to Lee, defense counsel might argue, with the support of cognitive studies, that homophobic men who watch a homoerotic video become physically aggressive toward gay men.²⁴⁰ If a homoerotic image in fact causes this reaction, the defendant should be allowed to argue provocation to the jury.

The general position, however, that gay panic is legitimate as a legal defense has three major flaws. First, it legitimizes homophobia as a reasonable social attitude. Second, while a homoerotic video might make a homophobic man squeamish or even lose self-control, a violent homicidal reaction could not possibly be justified or excused. Third, even if gay panic is allowed as a legal defense limited strictly to notions supported by the aforementioned cognitive studies and not by stereotypes, legislative bans or other legal limitations on arguing gay panic as adequate provocation may not be uniformly formulated. The application of such rules would be inconsistent and may be insufficient to persuade the jury that the defendant's violent response was unreasonable. The following analysis focuses on the third flaw.

Lee recognizes that such legislation would be flawed because it represents a one-size-fits-all approach that "cannot possibly take into account the myriad ways in which an encounter preceding an allegedly provoked killing may take place."²⁴¹ Lee does not, however, appear to recognize explicitly that relying on state legislatures

237. *Id.* at 549–52.

238. *Id.* at 551.

239. Under early common law, adequate provocation could be alleged only if the defendant were "(1) engaged in mutual combat with the victim immediately prior to the killing, (2) subject to an aggravated assault or battery immediately before the killing, (3) observed the commission of a serious crime upon a close relative immediately before the killing, (4) illegally arrested, or (5) caught his wife in the act of adultery just before the killing." *Id.* at 551 (citing CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 19 (2003)).

240. Jeffrey A. Bernat, *Homophobia and Physical Aggression Toward Homosexual and Heterosexual Individuals*, 110 J. ABNORMAL PSYCHOL. 179, 185 (2001). In his study, Bernat measured physical aggression toward gay and straight individuals after self-identified heterosexual college males viewed a homoerotic videotape. He found that after watching the video, the homophobic males were significantly more aggressive toward gay males and nonhomophobic males. It is not clear, however, whether these men were actually unable to control their aggressive behavior or simply chose not to do so.

241. Lee, *supra* note 2, at 550.

to create uniform legislation does not necessarily establish a national standard. Rather, the uniformity and consistency Lee recognizes appear only within a given state. Thus, there would likely be inconsistency from state to state in forming anti-gay-panic-defense laws. The inconsistency means that defendants arguing gay panic would be subject to the luck of the draw depending on which state has jurisdiction over the case. Also, theoretically speaking, even states that have a statute banning the gay panic defense likely have internal demographic variation, such that the general population in some parts of the state could be homophobic while the population in other parts is not. Even if a state legislature limited or banned the gay panic defense, there would be inconsistent results among juries' ultimate findings of culpability because juries are selected from relatively localized pools. Such limitations or bans would be inconsistent also because of the covert ways in which lawyers can inject the defense—as in the King case, for example, where defense counsel emphasized King's nonconforming gender presentation. Thus, even if a limitation or ban were applied at trial, a defense lawyer could still introduce evidence of the victim's allegedly provocative actions in some cases.²⁴²

Lee suggests that judges are preferable to legislatures in handling the gay panic defense because they hear all the precise contextual facts of the case and can make better-considered decisions about the legitimacy of defense counsel's use of it.²⁴³ As Lee observes, however, judicial discretion can lead to inconsistent rulings depending on whether a given judge is homophobic.²⁴⁴ Finally, Lee shows that the studies on implicit bias also suggest that, even if a judge professes to be egalitarian, he may ultimately rely on his subconscious homophobia in making rulings.²⁴⁵ This is especially likely since judges lack the company of others who might give voice to and dispel the homophobic stereotypes and who might cause the judge to moderate his initially homophobic response.²⁴⁶

For these reasons, Lee argues that juries are in a better position than judges to evaluate the efficacy of a gay panic defense because the jury deliberation process necessarily involves group debate and discussion.²⁴⁷ Voicing competing moral views of homosexuality is more likely in groups, which can be especially beneficial when

242. See *supra* Part I.B.

243. Lee, *supra* note 2, at 551–52.

244. *Id.* at 552–53.

245. *Id.* at 553.

246. *Id.* at 252. I would add to Lee's analysis that judicial training could help overcome the problems she identifies with judges. For example, the Williams Institute's Judicial Training Program educates judges about issues involving sexual orientation and gender identity. This education could serve to expose subconscious homophobic prejudice. See *Judicial Training Program*, WILLIAMS INST., <http://williamsinstitute.law.ucla.edu/judicial-training-program> (last visited Dec. 28, 2012).

247. Lee, *supra* note 2, at 553–57.

women and homosexuals are part of the group.²⁴⁸ Moreover, as Lee noted, “The community where the crime took place and from which the jury is drawn is more likely to view the verdict as legitimate if a jury considered the gay panic defense and rejected it, than if the judge prohibited the defendant from making the argument. This is because the twelve laypersons serving on the jury have been chosen from the community itself.”²⁴⁹ Thus, a jury that rejects the gay panic defense would send a weighty message to the community that homophobic violence is unacceptable. Lee recognizes the possibility, though, that a closeted homosexual jury member might embrace the gay panic defense to divert suspicion away from his own latent homosexuality.²⁵⁰ With society’s increasingly positive view of homosexuality,²⁵¹ however, the homosexual “closet” is shrinking, and, therefore, it is increasingly less likely that homosexual jurors are closeted.²⁵² Also, society’s increasingly positive views of homosexuality may likely generate more sympathy for victims of crimes motivated by homophobia.

Even though not every member of society has a positive view of homosexuality, a jury is the most competent body to determine the validity of a gay panic defense for three reasons.²⁵³ First, even homophobic jurors may be persuaded that a homicidal reaction to a homosexual advance is wrongful and illegal.²⁵⁴ Second,

248. *Cf. id.* at 552 n.448 (“Social science research has shown that heterosexual men on average manifest more anti-gay prejudice than [do] heterosexual women.” (citing Gregory M. Herek, *Heterosexuals’ Attitudes Toward Lesbians and Gay Men: Correlates and Gender Differences*, 25 J. SEX RES. 451, 452 (1988); Mary E. Kite & Bernard E. Whitley, Jr., *Do Heterosexual Women and Men Differ in Their Attitudes Towards Homosexuality? A Conceptual and Methodological Analysis*, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 39 (Gregory M. Herek ed., 1998); Mary E. Kite & Bernard E. Whitley, Jr., *Sex Differences in Attitudes Toward Homosexual Persons, Behaviors, and Civil Rights, A Meta-analysis*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 336, 337 (1996); Lester W. Wright, Jr. et al., *Development and Validation of the Homophobia Scale*, 21 J. PSYCHOPATHOLOGY & BEHAV. ASSESSMENT 337, 345 (1999) (“The male participants scored significantly higher on the total score on the Homophobia Scale, suggesting higher levels of homophobic responding.”))).

249. *Id.* at 554.

250. *Id.*

251. *See, e.g.*, Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP POL. (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx> (showing increasing approval and decreasing disapproval rates of same-sex marriage); Lydia Saad, *Americans’ Acceptance of Gay Relations Crosses 50% Threshold*, GALLUP POL. (May 25, 2010), <http://www.gallup.com/poll/135764/americans-acceptance-gay-relations-crosses-threshold.aspx>.

252. “The shrinking closet” refers to the cultural development that undisclosed homosexuals are increasingly self-identifying openly as homosexual. Some commentators suggest that this development played a role in King’s death. *See* Setoodeh et al., *supra* note 15, at 42 (“What you might call ‘the shrinking closet’ is arguably a major factor in Larry’s death.”).

253. Lee, *supra* note 2, at 555–57.

254. *Id.* at 555.

social attitudes are increasingly favorable toward homosexuality.²⁵⁵ Third, even homophobic jurors may respond to allegations of an unwanted homosexual advance in nonprejudiced ways.²⁵⁶ These reasons are based on lessons from implicit bias research, which shows that making biased views salient allows individuals to consider their bias more deeply than if they are not addressed at all in making decisions. For example, if a nonhomophobic jury member makes the homophobic views salient, a subconsciously homophobic but egalitarian-minded juror would be more likely to realize and temper his homophobic bias and to conform his opinions to his egalitarian ideals. Overall, in light of the implicit bias studies, the nature of juries as groups, and their ability to evaluate particular sets of facts and circumstances, and despite inefficiencies endemic to a case-by-case approach, juries are in the best position to determine the validity of a gay panic defense claim.²⁵⁷

To limit the effectiveness of an implicit gay panic defense strategy, Lee suggests that prosecutors should question potential jurors in voir dire to identify closet homophobic individuals and make the issue of sexual orientation bias salient at the trial's outset through gender and sexual orientation switching. In this strategy, prosecutors ask the potential jurors to imagine themselves as if they identified their gender or sexual orientation as different from how they currently identify.²⁵⁸ If an attorney can demonstrate that a juror is biased, he can challenge the juror for cause.²⁵⁹ An attorney can also use a peremptory challenge to strike a homophobic juror and remind jurors about their obligation to decide the case without bias or prejudice.²⁶⁰ Research on race shows that asking questions about race makes bias salient and reduces the likelihood that a black defendant will be subject to an unfavorable ruling.²⁶¹ Similarly, a prosecutor could ask jurors general questions about sexual orientation, making the issue of sexual orientation salient. Such questions should have the effect of removing sexual orientation bias as a basis for a juror's decision.²⁶²

255. *Id.* at 555–56.

256. *Id.* at 556.

257. *Id.* at 556–57.

258. *Id.* at 559–66; see also V.F. Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. L. 361, 370 (2004) (reviewing LEE, *supra* note 239) (criticizing Lee's formulation of gender and sexual orientation switching: "[S]ome of the problems lie in the substantive standards and their embedded inequalities, . . . [making it] seem that this solution might simply exacerbate the problem of bias."). Nourse did not appear to account for Lee's introduction of social science research on implicit bias, however, which shows that making prejudice salient reduces actions based on those prejudices. Lee, *supra* note 2, at 533–34.

259. Lee, *supra* note 2, at 559.

260. *Id.*

261. See Samuel R. Sommers, *On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601–06 (2006).

262. Lee, *supra* note 2, at 561–64.

To make the issue of sexual orientation salient at trial, Lee recommends using two versions of gender and sexual orientation switching during opening and closing statements and asking the judge to give an instruction that asks jurors to imagine themselves as a different gender or sexual orientation.²⁶³ In the first version, the prosecutor asks jurors to imagine the same facts but with a gay male defendant who kills a heterosexual female victim after she makes an unwanted sexual advance. In the second version, the judge asks the jurors to imagine the defendant as a gay man who kills a heterosexual woman after she makes a sexual advance similar to the one alleged. Alternatively, the judge asks jurors to imagine the defendant as a heterosexual woman who kills a heterosexual man who makes a sexual advance similar to the one alleged. In these scenarios, jurors would realize any subconscious homophobic bias and be more likely to find the defendant's homicidal reaction to a nonviolent homosexual advance unreasonable.²⁶⁴

B. The Psychological Phenomenon of Gay Panic Fails to Support Gay Panic as a Legal Claim

While the social science data on implicit bias suggest that subconscious homophobic bias is a major factor in the gay panic defense's effectiveness at trial, the medical studies of gay panic as a psychological phenomenon further show that gay panic as a legal claim can be invalidated. Lee identifies four main areas of conflict between the psychology and the legal doctrine.²⁶⁵

First, studies by Dr. Kempf, who is credited with initiating research on the gay panic phenomenon,²⁶⁶ found that separation from rather than exposure to members of the same sex triggered the panic state. Second, while Kempf's studies continue to appear to be valid, the medical community repudiated gay panic as an official psychiatric disorder. Third, Kempf's studies found that subjects did not act aggressively toward others when confronted by a homosexual advance but rather, in fact, became passive. Fourth, women in the studies did not act aggressively when confronted by a homosexual advance. This Subpart describes in greater detail these four inconsistencies between the psychological phenomenon and the legal claim of gay panic. Overall, as Lee concludes,

As a psychological disorder in which neither sexual advance to the patient by another person nor violent attack by the patient of another person are

263. *Id.* at 564–66.

264. *Id.*

265. *Id.* at 482–88; *see also* Suffredini, *supra* note 32, at 287–92 (concluding that the gay panic defense is inconsistent with the psychological underpinnings of the gay panic phenomenon).

266. *See supra* Part II.A.

causal or symptomatic, acute homosexual panic would seem to be inappropriate as the basis of a legal defense for men who claim to have killed another man to ward off his sexual advance.²⁶⁷

First, Kempf's studies found that it was actually separation from, not exposure to, members of the same sex that caused the panic state in subjects.²⁶⁸ The separation would result in anxiety, depression, and sometimes suicidal inclinations.²⁶⁹ Also, the gay panic disorder was described "not [as] a temporary, violent episode, but rather [as] an on-going illness."²⁷⁰ Therefore, gay panic as a psychological disorder would not arise in isolated situations, but rather it would pervade subjects' everyday lives. Further, a patient's panic that is apparently connected to a homosexual encounter can easily be misdiagnosed. According to psychologist Burton Glick, there are two instinctual drives that underlie the disorder: sex and aggression.²⁷¹ "Patients who suffer from a predominate sexual drive, such as those who endure overwhelming homosexual cravings, can be diagnosed appropriately as suffering from homosexual panic. However, patients who suffer from a predominate aggressive drive, such as those who react violently to sexual advances, cannot."²⁷² Glick classifies the latter disorder as "acute aggression panic."²⁷³ Since acute aggression panic is different from homosexual panic and since acute aggression panic may be a more accurate diagnosis of the psychological condition homicide defendants experience, it is important in legal proceedings to determine which type of panic disorder defendants suffer.

Second, while the Diagnostic and Statistical Manual of Mental Disorders listed Homosexual Panic Disorder as part of the American Psychiatric Association's official list of psychiatric disorders in 1952, this was the last time such a disorder appeared in this list. In fact, as Gary Comstock noted in *Dismantling the Homosexual Panic Defense*, very few standard psychiatric and psychological publications recognize homosexual panic as a psychiatric disorder.²⁷⁴ Government and medical institutions have also declassified homosexuality itself as a psychiatric disorder. For example, in response to a communication from the American Psychiatric Association and the American Psychological Association, in 2006 the Department of Defense

267. Lee, *supra* note 2, at 487.

268. Suffredini, *supra* note 32, at 288.

269. *Id.*

270. *Id.* at 289.

271. Burton S. Glick, *Homosexual Panic: Clinical and Theoretical Considerations*, 129 J. NERVOUS & MENTAL DISEASE 20, 26 (1959).

272. Suffredini, *supra* note 32, at 290 (footnote omitted) (citing Glick, *supra* note 271, at 26).

273. *Id.*

274. Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY 81, 82-83 (1992).

revised one of its instructions to declassify homosexuality as a “physical disability.”²⁷⁵ Moreover, in December 1973 the Board of Trustees for the American Psychiatric Association removed homosexuality from the second edition of the Diagnostic and Statistical Manual of Mental Disorders after reviewing the scientific literature and consulting with experts in the field.²⁷⁶ In 1975 the American Psychological Association also discredited homosexuality as a mental disease or disorder.²⁷⁷ Having homosexuality itself discredited as a mental disease or disorder is important because some studies on homosexual panic disorder assume the patient is a latent homosexual. Thus, the patient’s homosexuality, whether express or latent, is not a medical defect and, therefore, cannot be used to justify a homophobic killing on medical grounds. The third inconsistency between gay panic as a psychological phenomenon and a legal claim is that none of Kempf’s studies found that the patients reacted aggressively toward others because of a sexual advance. Rather, the studies found that patients with “homosexual panic” actually became increasingly passive and unable to function. Further, any physical reaction tended to manifest in the patients inflicting punishment upon themselves, not others.²⁷⁸ As Adrian Howe observes,

[T]here was a considerable discrepancy between cases reported in the psychiatric literature and the cases involving immediate reaction or sudden panics described in the legal defences. Patients diagnosed with acute homosexual panic demonstrated a “helplessness, passivity, and inability to be aggressive” far removed from the picture of the explosively violent man constructed by lawyers deploying a HPD [Homosexual Panic

275. The revision also appears to declassify homosexuality as a “mental disorder.” http://www.palmcenter.org/files/active/0/DoD_Number_1332.38.pdf. However, there appears to be some disagreement, and it is unclear whether the repeal of “Don’t Ask Don’t Tell” changed the classification. Gregory Herek, *Psychology 101 for the DoD*, BEYOND HOMOPHOBIA (Nov. 19, 2006, 1:49 PM), <http://www.beyondhomophobia.com/blog/2006/11/19/military-psychology>. The revised instruction still listed homosexuality as a “defect,” however, “along with dyslexia, motion sickness, enuresis (bed-wetting), and repeated venereal disease infections.” *Id.* (internal quotation marks omitted).

276. “A significant proportion of homosexuals are apparently satisfied with their sexual orientation, show no significant signs of manifest psychopathology . . . and are able to function quite effectively.” Robert L. Spitzer, *A Proposal About Homosexuality and the APA Nomenclature: Homosexuality as One Form of Sexual Behavior and Sexual Orientation Disturbance as a Psychiatric Disorder*, in AM. PSYCHIATRIC ASS’N, *HOMOSEXUALITY AND SEXUAL ORIENTATION DISTURBANCE: PROPOSED CHANGE IN DSM-II*, 6TH PRINTING, PAGE 44, at 1, 2 (1973), available at http://www.torahdec.org/Downloads/DSM-II_Homosexuality_Revision.pdf.

277. The American Psychological Association resolved: “Homosexuality per se implies no impairment in judgement, stability, reliability, or general social and vocational capabilities. Further, the American Psychological Association urges all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations.” John J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives*, 30 AM. PSYCHOLOGIST 620, 633 (1975).

278. See KEMPF, *supra* note 103, at 491, cited in Suffredini, *supra* note 32, at 289.

Disorder] defense. The legal argument that this disorder was likely to result in extreme violence therefore had no psychiatric basis.²⁷⁹

Fourth, almost exclusively male defendants have used the gay panic defense.²⁸⁰ Kempf's studies included both male and female subjects. The psychological gay panic studies found, like their male counterparts, that female participants also do not kill in response to homosexual advances.²⁸¹ The use of the gay panic defense in the courtroom, however, has involved almost exclusively male defendants.²⁸² The discrepancy along gendered lines suggests that heterosexist norms and gendered stereotypes operate to legitimize the gay panic defense. As Suffredini explains, "American culture and society seems [sic] to suggest, if not demand, that it is both appropriate and necessary for a man, in responding to gay male attentions, to reestablish and reaffirm both his individual social role and the stability of the entire heterocentric system."²⁸³ Surely, the legal system should avoid operating with the stereotype that men are aggressive to justify unduly violent behavior in some circumstances.

Therefore, in light of these four main discrepancies, gay panic as a psychological phenomenon fails to support gay panic as a legal claim. Instead, it is more likely that gay panic is a product of the social construct known as hegemonic masculinity, which Lee defines as "one that values heterosexism and violence as traits of the masculine and implicitly rejects homoerotic desire,"²⁸⁴ and not a product of an innate psychological failure. The next Subpart argues that prosecutors should make these discrepancies, in combination with findings from implicit bias research, salient at trial to neutralize the effect of gay panic as a legal claim.

279. Adrian Howe, *More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses—Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)*, 19 SYDNEY L. REV. 336, 342 (1997).

280. See Lee, *supra* note 2, at 488.

281. Comstock, *supra* note 274, at 89–90.

282. Lee identifies one of these unusual cases of lesbian panic, in which the jury showed leniency to the defendant by finding her guilty of involuntary manslaughter instead of murder. In the case, Melissa Burch Harton killed her friend Natasha Bacchus after Bacchus told Harton that she was in love with her and wanted to kiss her. Amit R. Paley, *Murder Jury Will Hear a Claim of Obsession*, WASH. POST (Jan. 31, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001389.html>; Amit R. Paley, *Md. Woman Convicted of Killing Female Friend*, WASH. POST (Feb. 11, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/02/10/AR2006021002001_pf.html.

283. Suffredini, *supra* note 32, at 284–85 (citing Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 169–70, 179 (1996)).

284. Lee, *supra* note 2, at 488.

C. Recommended Strategy for Neutralizing the Gay Panic Defense at Trial

It is almost universally accepted that the gay panic defense is rooted in homophobia and that legal claims based on this position of antigay bias are morally indefensible and, therefore, should be legally uncognizable.²⁸⁵ The key inquiry, though, is how prosecutors can eliminate the legal impact of gay panic claims. Some commentators argue that gay panic claims should be banned outright or somehow limited at trial. For example, legislation allowing judges to instruct the jury not to allow antigay bias to enter their decisionmaking process is designed to limit the legal effect of the gay panic defense. The primary advantage of banning claims of gay panic is the ban's expressive power in rejecting antigay bias and homophobia. However, defense counsel can and do assert gay panic claims in other, subtle ways on behalf of their clients.²⁸⁶

Another suggestion for limiting the gay panic defense involves updating the Model Rules of Professional Responsibility to allow attorneys, particularly defense attorneys in gay panic cases, more leeway in withdrawing from gay panic cases where they consider asserting the defense unethical.²⁸⁷ When one attorney withdraws, however, it is likely that another attorney would step in and assert the defense anyway. Therefore, this proposal would do little to limit the use and abuse of the gay panic defense.

While a legislative limitation or ban and an update to the ethical rules fail in the real-world context of a courtroom, allowing the defense to go forward provides an opportunity for prosecutors to make subconscious antigay bias salient. By making antigay bias salient, prosecutors can increase the chances that judges and jurors conform their decisions to their egalitarian-minded principles. My proposal addresses how to make the antigay bias salient in service of defusing the gay panic defense.

I propose that prosecutors put the science behind claims of gay panic on trial. Legal scholars have identified four major inconsistencies between the science and the legal claim.²⁸⁸ It is precisely these inconsistencies that prosecutors ought to expose. Once judges and jurors hear and understand that the science fails to support the legal claim, they will be unlikely to ascribe merit to a legal claim of gay panic. Implicit bias research supports this position.²⁸⁹ Additionally, my proposal captures

285. Gwen Araujo Justice for Victims Act, CAL. PENAL CODE § 1127h (West Supp. 2012). (stating that antigay bias should not be a basis for jurors to make decisions).

286. See *supra* Part I for discussion of the King case.

287. See Teresa Marie Garmon, *The Panic Defense and Model Rules Common Sense: A Practical Solution for a Twenty-First Century Ethical Dilemma*, 45 GA. L. REV. 621, 648–55 (2011).

288. See *supra* Part III.B.

289. See *supra* Part III.A.

the benefits of group discussion in jury deliberations.²⁹⁰ Unlike a ban, my proposal also avoids leaving prosecutors susceptible to the defense's subtle gay panic introductions that they might not anticipate if they believe that the limitation or ban would entirely preempt the defense.

The Federal Rules of Evidence allow expert witness testimony at trials under certain conditions.²⁹¹ Generally, "[a]n opinion is not objectionable just because it embraces an ultimate issue."²⁹² There is a notable exception: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone."²⁹³ This prohibition,²⁹⁴ however, should not prohibit an expert's testimony that a mental state of gay panic does not lead to violence against others.

A review of case law shows that experts are typically allowed to testify about relevant psychological concepts in criminal trials. For example, Elizabeth Loftus is a psychologist who studies memory. Loftus has testified on eyewitness identification issues in criminal trials to expose the complexities of the science behind the human brain's capacity for memory and recognition.²⁹⁵ The defense attorneys who call Loftus intend for her explanations to help the jury understand why an eyewitness may have incorrectly identified the defendant as the person who committed the unlawful act at issue in the trial.

Even in the trial of McInerney, the prosecution spent approximately \$21,000 on expert fees.²⁹⁶ In particular, prosecutor Fox called Kris Mohandie, a criminal psychologist who has studied school shootings and other violent acts committed by juveniles. Fox called Mohandie to rebut the defense testimony of an expert witness who testified that McInerney experienced a dissociative state of mind at the time of the killing caused by King's alleged harassment.²⁹⁷ Mohandie stated, "[McInerney's state of mind is] inconsistent with dissociation but it is consistent with following through with a plan that started with anger."²⁹⁸ Mohandie based

290. See *supra* Part III.A.

291. FED. R. EVID. 702.

292. FED. R. EVID. 704.

293. *Id.*

294. *Id.* The Comments to the Rules suggest that there is a trend to ignore this exception. *Id.* advisory committee's note.

295. Clifford S. Fishman & Anne T. McKenna, *State v. Chapple*, in *JONES ON EVIDENCE: CIVIL AND CRIMINAL* app. § 41:43, at 517 (7th ed. 2011) (citing *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983)).

296. Barlow & Hernandez, *supra* note 94.

297. Zeke Barlow, *Defense Rests, Closing Arguments Could Begin This Week in McInerney Trial*, VENTURA COUNTY STAR, Aug. 22, 2011, <http://www.vcstar.com/news/2011/aug/22/defense-rests-in-brandon-mcinerney-murder-trial>.

298. Barlow, *supra* note 22.

his testimony on the fact that McInerney planned the shooting the night before, secured the gun in advance by stealing it from his grandfather's bedroom, and then carried out his plan.²⁹⁹

Significantly, Mohandie testified as to the psychology underlying the type of violence at issue in the trial. He explained that

[t]here are two kinds of violence[:] predatory and affective. Predatorial is more akin to a proactive, planned act, like to a cat planning and stalking its prey. Affective is the instinctive reaction to an immediate threat, like a cat arching its back when it is threatened . . . [Mohandie also] said it is common for people not to register or remember what is going on during a traumatic situation like a shooting. Police, even after they are involved in multiple shootings, often can't remember the moment shots are fired when adrenaline is flooding the body.³⁰⁰

The defense counsel also called a psychologist, Donald Hoagland, as an expert witness who testified about McInerney's state of mind at the time of the shooting.³⁰¹ Specifically, Hoagland testified that McInerney had experienced a dissociative state at the time he shot King.³⁰² Hoagland explained that a dissociative state is a time of intense emotional stimulation during which one is not completely aware of his actions or their consequences.³⁰³ Just as the parties proffered experts to testify about psychological conditions related to violence, it is likely that a judge presiding over a similar trial would allow an expert witness to testify about the psychological underpinnings of gay panic specifically. In the King case, however, neither the prosecution nor the defense proffered such an expert at trial.³⁰⁴

In a civil trial where antigay bias was at issue, *Perry v. Schwarzenegger*,³⁰⁵ the plaintiffs' counsel went to great lengths to expose the inconsistency between common negative stereotypes about same-sex couples raising children and the reality that same-sex parents raise children successfully.³⁰⁶ The plaintiffs' attorneys called economist Lee Badgett as an expert witness to testify about the results of scientific studies that show that same-sex couples raise children just as well as different-sex couples.³⁰⁷ Badgett's testimony provided the judge with facts to make numerous

299. *Id.*

300. Barlow, *supra* note 297.

301. *Id.*

302. Barlow, *supra* note 77.

303. *Id.*

304. Fox Interview, *supra* note 26.

305. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

306. See Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 950 (2011).

307. *Perry*, 704 F. Supp. 2d at 941; see also M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 DRAKE L. REV. 1081 (2010).

factual findings in favor of the homosexual plaintiffs and to dispel the antigay biases operating in the defense's strategy.³⁰⁸

Similarly, interrogating the science behind gay panic at trial via expert witness testimony would also allow prosecutors to show jurors exactly why a defendant's claim of gay panic should not result in a mitigated verdict. By interrogating the underlying psychology of gay panic in McInerney's trial, the prosecutor could have shown jurors that King's alleged homosexual advances on McInerney could not have caused McInerney to react violently as described by defense counsel because the clinical research underlying gay panic as a psychological phenomenon does not support gay panic as a legal claim. The prosecutor would have shown the jurors that there is no medical foundation that could explain McInerney's violent reaction to King's nonnormative sexual orientation and gender identity. Further, the prosecutor would have been able to show that even if King's advances caused McInerney to become violent, clinical studies suggest that McInerney targeted King for reasons other than gay panic. Indeed, studies have shown that subjects afflicted by gay panic do not direct their violent reactions against the alleged homosexual aggressor. If the subject reacted physically at all in these studies, the violence was self-inflicted.

By proffering this type of evidence via expert witness testimony in open court, the prosecutor would have made the issue of King's sexual orientation salient and framed it in a way to show that it was innocuous. The jurors would have realized any subconscious antigay biases they held and, hopefully, conformed their decision to egalitarian ideals. Overall, by helping the jurors understand that the psychological phenomenon of gay panic fails to support the legal claim, the prosecutor would have been more likely to convince the jury to find McInerney guilty of murder. Should other criminal trials involving the gay panic defense arise, prosecutors should consider deploying this strategy.

CONCLUSION

An analysis of the trial of McInerney for the murder of King shows that the gay panic defense had a significant impact on the jury's verdict. In this case, the gay panic defense prevailed, despite the prosecutor's attempt to neutralize it. The prosecutor even invoked a law designed to reduce the defense's impact, which authorized the judge to instruct the jury not to allow antigay bias to enter its deliberations.³⁰⁹ By portraying McInerney as a victim of King's alleged unwanted sexual aggression,

308. *Perry*, 704 F. Supp. 2d at 941.

309. Gwen Araujo Justice for Victims Act, CAL. PENAL CODE § 1127h (West Supp. 2012).

defense counsel garnered sympathy for McNerney. The jury thus failed to find McNerney guilty of murder.

Scholars have proposed several strategies for dealing with the gay panic defense. Recently, for example, Lee proposed making the issue of sexual orientation salient at trial.³¹⁰ Additionally, as we learned or perhaps reaffirmed from the King case, merely invoking a jury instruction that admonishes jurors to avoid antigay bias in their decisionmaking apparently fails to neutralize the gay panic defense.

Therefore, this Comment proposes a more nuanced trial strategy, which is premised on Lee's assessment of implicit bias research in combination with the inconsistencies between gay panic as a psychological phenomenon and gay panic as a legal claim. Prosecutors should dig deeper into the science underlying the legal claim and expose the four major inconsistencies at trial. Prosecutors should expose the inconsistencies in open court to show jurors why the science fails to support the legal claim. By deploying this strategy, prosecutors would be able to show that gay panic, as a psychological moment in the defendant's mind, does not explain the defendant's reaction of retaliating against the alleged homosexual aggressor. Hopefully, American society will evolve to a point where its citizens no longer bristle at and commit violent acts against homosexuals and gender-nonconforming individuals. Until then, it is important for the legal academy to help devise ways to neutralize defense strategies that rely on the scientifically unfounded causal link between nonviolent homosexual aggression and uncontrollable retaliatory violence.

310. Lee, *supra* note 2, at 531.