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THE INDEFENSIBLE “GAY PANIC DEFENSE”

*Devan N. Patel**

INTRODUCTION

We didn't realize the amount of violence and discrimination . . . against the gay community until after he died. We thought, he was born here . . . he has all the rights, responsibilities, duties and privileges of every other American citizen.¹

In October 1998, Aaron McKinney and Russell Henderson were at a gay bar when they targeted a drunk twenty-one-year-old college student for robbery.² The two men told the student that they would happily drive him home, since he was in no condition to drive himself.³ While in the car, the student put his hand on McKinney's thigh.⁴ After rebuffing the advance, McKinney and Henderson drove to a remote area of Laramie, Wyoming and robbed the student.⁵ They dragged him out of the truck and began beating him: pistol-whipping the student in the face twenty times,⁶ grabbing rope from the truck, tying the student to a fence, and beating him some more.⁷ They stole his shoes and wallet, and abandoned him where he would not be found for another eighteen hours before being rushed to the emergency room.⁸ Matthew Shepard lay unresponsive in a coma for five days thereafter, and, as his mother described upon first entering the emergency room to see her child, he was “all bandaged, face swollen, stiches everywhere, [h]is fingers curled, toes curled, one eye a little bit open.”⁹ Matthew Shepard died of his injuries on October 12, 1998.¹⁰

At trial, McKinney's attorney acknowledged his client's savage beating of Shepard, but claimed that the “five minutes of emotional rage and chaos” that ultimately caused Shepard's death was triggered by the homosexual advance made upon McKinney in his truck.¹¹ McKinney, who suffered from drug addiction and alcoholism according to his attorney, was a child abuse victim, and Matthew Shepard's

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¹ Emily Shapiro & Robert Zepeda, *Matthew Shepard: The Legacy of a Gay College Student 20 Years After His Brutal Murder*, ABC NEWS (Oct. 26, 2018, 08:21 AM), <https://abcnews.go.com/US/matthew-shepard-legacy-gay-college-student-20-years/story?id=58242426>.

² *Id.*

³ *Id.*

⁴ Meghan Keneally, ‘Gay Panic’ Defense Still Used in Violence Cases May be Banned by New Federal Bill, ABC NEWS (Jul. 18, 2018, 02:32 PM), <https://abcnews.go.com/US/gay-panic-defense-violence-cases-banned-federal-bill/story?id=56662902>.

⁵ ABC NEWS, *New Details Emerge in Matthew Shepard Murder*, ABC NEWS (Nov. 26, 2004), <https://abcnews.go.com/US/matthew-shepard-legacy-gay-college-student-20-years/story?id=277685>.

⁶ Shapiro & Zepeda, *supra* note 1.

⁷ ABC NEWS, *supra* note 5.

⁸ Shapiro & Zepeda, *supra* note 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Julie Cart, *Defense Says Homosexual Advance Triggered Slaying, Trial: In a Chilling Opening Argument, the Attorney for a Man Accused of Killing Matthew Shepard Says Sexual Panic Led to the Gay Student's Fatal Beating*, L.A. TIMES (Oct. 26, 1999, 12:00 AM), <http://articles.latimes.com/1999/oct/26/news/mn-26455>.

homosexual advances erupted the emotional well that formed as a result of McKinney's life experiences.¹²

This phenomenon is not merely a relic of the past. In September 2015, James Miller went over to the home of his neighbor, Daniel Spencer, to have a few drinks and play some music together.¹³ After an alleged sexual advance by Spencer, Miller felt threatened, even though no physical altercation nor threat of violence ever arose.¹⁴ Miller then removed a knife from his pocket and stabbed Miller twice in the back, killing him and leaving him in a pool of his own blood.¹⁵ When Miller turned himself in to the police, he told them, "we're musicians and all that kind of stuff, but I'm not a gay guy."¹⁶ At trial, Miller claimed self-defense as a result of the gay man coming on to him, and it paid off. Miller was only sentenced to ten years of probation and six months in a local jail.¹⁷

Gay panic, or non-violent homosexual advance ("NHA"), defenses are employed in the United States today as partial or complete defenses to assault and murder involving LGBT victims or victims perceived to be LGBT.¹⁸ These defenses arose over fifty years ago, rooted in a fundamental societal misunderstanding of the nature of homosexuality.¹⁹ Although society has come to generally accept LGBT individuals as simply who they are, instead of as victims of perverse pathologies,²⁰ gay panic defenses are nevertheless still in use today.²¹ This Note will argue permitting the use of these defenses only sanctions violent and homophobic thoughts and behaviors and

¹² *Id.*

¹³ Lucas Grindley, *Why This Texas Man Got Probation for Murdering Gay Neighbor*, ADVOCATE (Apr. 29, 2018, 01:16 PM), <https://www.advocate.com/crime/2018/4/29/why-texas-man-got-probation-murdering-gay-neighbor>.

¹⁴ Katie Hall, *Police: Murder Suspect Admits Stabbing Victim at East Austin Apartment*, STATESMAN (Sept. 25, 2018, 07:15 PM), <https://www.statesman.com/news/20160904/police-murder-suspect-admits-stabbing-victim-at-east-austin-apartment>.

¹⁵ Ryan Autullo & Mark D. Wilson, *BREAKING: Miller Gets 10 Years on Probation, 6 Months in Jail for 2015 Slaying of Austin Musician*, STATESMAN (Sept. 22, 2018, 02:38 AM), <https://www.statesman.com/news/20180425/breaking-miller--gets-10-years-on-probation-6-months-in-jail-for-2015-slaying-of-austin-musician>.

¹⁶ Hall, *supra* note 14.

¹⁷ Grindley, *supra* note 13.

¹⁸ The legal defense strategy colloquially known as "gay panic" is also known as "homosexual panic" or "non-violent homosexual advance," but this Note will refer to the issue as "gay panic" and the "gay panic defense." There are times when a separate "trans-panic" defense is discussed in academia when victims identify as transgender. I believe such a unique issue deserves its own separate discussion, and so this Note will focus on "gay panic" as related to bisexuals and homosexuals. As a result, I use the shorthand descriptor of "LGB" to refer to the three classes of persons most-often grouped under "gay panic" discussions — victims who are lesbian, gay, and bisexual. For brevity, I also use the term "homosexual" throughout this piece as a generic catchall for lesbian, gay, and bisexual individuals.

¹⁹ Homosexuality was categorized by the American Psychiatric Association as a pathological disorder until 1973. See Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5(4) BEHAV. SCI. 565-575 (2015), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4695779/>.

²⁰ See discussion *infra* pp. 6–7.

²¹ In 2018, a jury convicted James Miller of criminally negligent homicide. Miller claimed self-defense after he rebuffed an attempted kiss from the victim, Miller's neighbor, and the victim then allegedly flew into a rage as a result, forcing Miller to defend himself by stabbing the victim to death. However, there was no evidence at trial that the victim had attacked Miller. Miller was sentenced to six months in jail and ten years of probation. Cleve R. Wootson Jr., *A Former Cop Said He Killed a Man in 'a Gay Panic' - an Actual Legal Defense That Worked*, WASH. POST (Apr. 27, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/04/27/a-former-cop-said-he-killed-a-man-in-a-gay-panic-an-actual-legal-defense-that-worked/>.

also serves to send a message that LGBT persons are not deserving of the same level of protection afforded to the rest of society.

This Note will proceed as follows: In Part I, this Note will discuss the background notions of homosexuality and gay panic. Part II will describe the use and development of these defense strategies, delineating defenses of insanity (or diminished capacity), provocation, and self-defense when gay panic defenses are put forward by defendants. In Part III, the current uses and allowances of the gay panic defense will be discussed on both the federal and state levels. In Part IV, this Note will propose the adoption of comprehensive reforms to curb and eliminate the gay panic defense, bringing together disparate suggestions previously promoted by certain organizations, scholars, and legislators. In so doing, this Note will take up the proposals of Professor Cynthia Lee, who in 2008 wrote on the gay panic defense and ultimately proposed retaining the defense within the courtroom in order to combat LGBT discrimination and negative attitudes toward members of the LGBT community.²² In proposing reforms, Part IV will serve to rebut Professor Lee's arguments for preserving the gay panic defense.

I. GAY PANIC

A. HOMOSEXUALITY & THE PUBLIC SPHERE

Public opinion on homosexuality in America shifted dramatically between the time of the Clinton and Trump presidencies.²³ In 1997, Americans were largely split, with approximately 50% of those polled saying homosexuality should be accepted by society and 50% saying it should be discouraged by society.²⁴ In 2007, those numbers were 51% and 38%, respectively.²⁵ Ten years after that, in 2017, only 24% of those polled said homosexuality should be discouraged by society.²⁶ To put this all into perspective, same-sex sexual activity was criminalized in parts of the nation until 2003, with the landmark decision in *Lawrence v. Texas* overturning such criminalization.²⁷

The same general trends followed when looking at Americans' attitudes toward same-sex marriage.²⁸ Following *Lawrence*, approximately 30–40% of Americans favored allowing gay and lesbian couples to enter into same-sex marriages.²⁹ Today,

²² Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 471–72 (2008).

²³ GALLUP, GAY AND LESBIAN RIGHTS, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Sept. 21, 2019) (1996 and 2017 responses to “Do you think gay and lesbian relations between consenting adults should or should not be legal?” were “should be legal” 44% and 72%, respectively).

²⁴ PEW RESEARCH CENTER, THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER: HOMOSEXUALITY, GENDER AND RELIGION (Oct. 05, 2017), <http://www.people-press.org/2017/10/05/5-homosexuality-gender-and-religion/>.

²⁵ *Id.*

²⁶ With 70% of those polled saying homosexuality should be accepted by society. *Id.*

²⁷ The Court, in *Lawrence v. Texas*, 539 U.S. 558, 566–567 (2003), chose to overrule its previous ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which held that the Due Process Clause of the 14th Amendment did not grant any fundamental rights to homosexuals in engaging in private, consensual acts of sodomy between adults in their homes. In so doing, the Court asserted that both *Bowers* and the state laws penalizing sodomy at issue demeaned the lives of homosexuals in denying them the right to control their destiny. After the *Lawrence* decision in 2003, only 46% of Americans polled said that gay and lesbian relations between consenting adults should be legal. Fast-forward fifteen years to 2018, and 75% of Americans believe that consenting homosexual relationships should be legal. See GALLUP, *supra* note 23.

²⁸ PEW RESEARCH CTR., CHANGING ATTITUDES ON SAME-SEX MARRIAGE (May 14, 2019), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

²⁹ POLLING REPORT, *LGBT*, <http://www.pollingreport.com/lgbt.htm> (last updated Jan. 2019) (reporting statistics from various polling organizations). See also GALLUP, *supra* note 23.

the number of those supporting same-sex marriage is around 60–70%.³⁰ The progress of same-sex marriage legalization was contentious and wrought with setbacks for both sides of the debate.³¹ These legal fights culminated in both the *Windsor* and *Obergefell* cases, which held federal and state bans on same-sex marriage as unconstitutional, respectively.³²

While this progress in legal and societal acceptance of homosexual relations and marriage is notable, gay, lesbian, bisexual, and transgender Americans still experience a significant amount of institutional and personal discrimination and prejudice.³³ Institutionally, nearly a quarter of LGBT Americans report having experienced discrimination due to their sexuality or gender identity when applying for jobs and promotions as well as in seeking housing.³⁴ Over half of all LGBT individuals in America have experienced slurs, offensive comments, non-sexual harassment, and threats to their personal safety.³⁵ Matthew Shepard was sadly not an outlier—over half of all LGBT Americans have been the direct target of violence due to their sexuality or gender identity.³⁶

³⁰ See POLLING REPORT, *supra* note 29 (noting both a May 2018 Gallup poll citing 67% support for same-sex marriage as well as a March 2018 Public Religion Research Institute poll citing 60% support for same-sex marriage).

³¹ See Lee, *supra* note 22, at 473 n.5 (discussing developments in the battle for gay marriage up until 2008: “In 2004, after Massachusetts became the first state to legalize same-sex marriage, see Pam Belluck, *Same-Sex Marriage: The Overview; Hundreds of Same-Sex Couples Wed in Massachusetts*, N.Y. TIMES, May 18, 2004 . . . available at <https://www.nytimes.com/2004/05/18/us/same-sex-marriage-the-overview-hundreds-of-same-sex-couples-wed-in-massachusetts.html> [sic] (last visited Oct. 16, 2008); *Move to Ban Gay Marriage Is Killed in Massachusetts*, WASH. POST, June 15, 2007 . . . 11 states passed constitutional referendums banning same-sex marriage. Jonathan Rauch, *Saying No to ‘I Do,’* THE WALL ST. J., Dec. 27, 2004, at A8 (“On Nov. 2, 11 out of 11 states passed constitutional referendums banning same-sex marriage”). In May of 2008, the California Supreme Court became the second state in the nation besides Massachusetts to legalize same-sex marriage. See *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); Maura Dolan, *Gay Marriage Ban Overturned* [sic], L.A. TIMES, May 16, 2008, at 1, available at <https://www.latimes.com/archives/la-xpm-2008-may-16-me-gaymarriage16-story.html> [sic]. Almost immediately, opponents of same-sex marriage began collecting signatures to place an initiative amending the California Constitution to outlaw same-sex marriage on the November ballot. See Justin Ewers, *California Court Legalizes Same-Sex Marriage*, U.S. NEWS & WORLD REP., May 15, 2008, <https://www.usnews.com/news/national/articles/2008/05/15/california-court-legalizes-same-sex-marriage> [sic]; Rauch, *supra* note 5, at A8. On November 4, 2008, a majority of California voters passed Proposition 8, amending the California Constitution to ban same-sex marriage in California. Randal C. Archibold & Abby Goodnough, *California Voters Ban Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, available at <http://www.nytimes.com/2008/11/06/us/politics/06ballot.html?partner=rssnyt&emc=rss> (last visited Nov. 19, 2008). On October 10, 2008, the Connecticut Supreme Court reversed a legislative ban on same-sex marriage. William Branigan, *Conn. Ban on Gay Marriage Reversed*, WASH. POST, Oct. 11, 2008, at A2.”). At the time Professor Lee published her article, Massachusetts and Connecticut were the only two states to legalize same sex marriage. *Id.*

³² See generally *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³³ NAT’L PUB. RADIO, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH, *DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS 1* (2017), <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>.

³⁴ *Id.* at 1 (The discrimination figures are 20% when applying for jobs, 22% for workplace promotions, and 22% for renting or buying a home or apartment.).

³⁵ *Id.* (“Regarding individual forms of discrimination, a majority of all LGBTQ people have experienced slurs (57%) and insensitive or offensive comments (53%) about their sexual orientation or gender identity. A majority of LGBTQ people say that they or an LGBTQ friend or family member have been threatened or non-sexually harassed (57%) . . .”).

³⁶ *Id.* In 2006, of the 9080 hate crime offenses reported to the Federal Bureau of Investigation, 1415 of those were based on sexual-orientation bias. FBI, U.S. DEP’T OF JUSTICE, *UNIFORM CRIME REPORT, HATE CRIME STATISTICS, 2006* (2007). Ten years later, in 2016, there were 7321 hate crime offenses reported to the

B. HOMOSEXUALITY & “GAY PANIC” IN MEDICINE

When a heterosexual male kills a homosexual male and faces a charge of murder, one legal strategy that is often raised is called the “gay panic defense” (or “homosexual panic defense”).³⁷ “Homosexual panic” and the corresponding psychological classifications of homosexuality were first put forth by psychiatrist Edward Kempf in 1920.³⁸ Kempf used the term to describe a “panic due to the pressure of uncontrollable perverse sexual cravings . . . [that] threatens to overcome the *ego*, the individual’s self-control.”³⁹

According to Kempf, an afflicted person’s fear of being identified as “homosexual” (thus having one’s association with society severed as a result of such label) led the person to repress his uncontrollable homosexual desires, causing erotic delusions and hallucinations to satisfy those perverse sexual cravings.⁴⁰ The tension between the social fear of homosexuality and the fantasies of homoeroticism could lead to both anxiety and panic, which in turn would produce symptoms such as erotic visions, voices telling the afflicted person of his inferior masculinity, feelings of being drugged and sedated, and hypnotic trance states.⁴¹ Additionally, Kempf posited that afflicted persons whose sexual delusions were experienced as external reality suffered more severe episodes of homosexual panic.⁴² In the most severe cases, individuals would suffer personality dissociation and were likely to react in a dangerous manner toward others because homosexual panic induced “autonomic reactions to fear,” wherein the afflicted felt threatened by physical violence, the voices in his head, societal out-casting, or even imminent death.⁴³

After Kempf, this theory was rebranded as “a state of sudden feverish panic or agitated furore [sic], 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.”⁴⁴ In 1952, the American Psychiatric Association (“APA”), in its first *Diagnostic and Statistical Manual*, listed homosexuality as a “psychopathic personality with pathologic

FBI, 1329 of which were based on sexual-orientation or transgender bias. FBI, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORT, HATE CRIME STATISTICS, 2016 (2017). While reports of hate crimes in the last decade have decreased significantly, it is important to note that LGBT-bias-related hate crimes have not experienced a similarly-dramatic level of shrinkage. The numbers for transgender Americans are starker. See JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011), <https://www.hivlawandpolicy.org/sites/default/files/Injustice%20at%20Every%20Turn.pdf> (detailing that 61% of the 6450 respondents in the 2011 National Transgender Discrimination Survey were the victim of physical assault and 64% were the victim of sexual assault).

³⁷ Lee, *supra* note 22, at 475.

³⁸ See EDWARD J. KEMPF, PSYCHOPATHOLOGY 477–515 (1920).

³⁹ *Id.* at 477.

⁴⁰ *Id.* at 478.

⁴¹ See *id.* at 479.

⁴² *Id.* at 478.

⁴³ *Id.* at 478–79.

⁴⁴ Christina Pei-Lin Chen, Note, *Provocation’s Privileged Desire: The Provocation Doctrine, “Homosexual Panic,” and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL’Y 195, 200 (2000) (quoting 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)).

sexuality.”⁴⁵ It was not until 1973 that the APA removed homosexuality from its previous diagnosis as a pathological disorder.⁴⁶

II. DEVELOPMENT OF THE DEFENSE

While there is no official recognition of a “gay panic defense” *per se*, defendants will invoke the doctrine as an excuse or justification for said violent actions.⁴⁷ Defendants claim the knowledge of, belief about the victim’s sexual orientation, or a non-violent homosexual advance triggered the defendant’s actions and ultimately caused the injury or death of the victim. Gay panic has been used in prior defense strategies, including insanity, diminished capacity, self-defense, and provocation.⁴⁸

A. FIRST USES OF GAY PANIC–INSANITY AND DIMINISHED CAPACITY

Insanity, if proven, is a full defense to a criminal charge.⁴⁹ Insanity does not focus on whether the defendant formed the requisite *mens rea* (insane persons can form *mens rea*), unlike diminished capacity defenses which do.⁵⁰ The dispositive question in cases involving insanity claims is only whether the claimed insane person’s intent was generated by a diseased mind.⁵¹ The policy rationale underlying this defense is that insane persons cannot be deterred by common methods of deterrence, and it is therefore illogical to punish them in the same fashion as the rest of the criminal population.⁵² The goals of incapacitation can still be achieved via committing insane persons to mental institutions—which serves to avoid both the stigmatization as well as the safety issues related to classifying the insane as standard prisoners and imprisoning them as such. It is important to note that the term “insanity” is a legal term of art and is not to be confused with the term as used in medical and psychiatric fields, though often medical professionals and classifications serve to inform the basis of insanity findings.⁵³

There are generally three standards for assessing insanity in the courtroom: the *M’Naghten* test, the Model Penal Code standard, and the federal standard.⁵⁴ Under the *M’Naghten* test, insanity is found where either the defendant did not know the quality and nature of his act, or, if he did understand, he did not know that what he was doing at the time was wrong.⁵⁵ Under the Model Penal Code’s standard, the defendant must

⁴⁵ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL 39 (1st ed. 1952), <http://www.turkpsikiyatri.org/arsiv/dsm-1952.pdf>.

⁴⁶ Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565, 565 (2015) (Switz.), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4695779/>.

⁴⁷ See discussion *infra* p. 8.

⁴⁸ See discussion *infra* pp. 9, 13, 15.

⁴⁹ MODEL PENAL CODE § 4.01 (AM. LAW INST. 2018).

⁵⁰ See discussion *infra* p. 8.

⁵¹ MODEL PENAL CODE § 4.01 note on subsection (1) (AM. LAW INST. 2018).

⁵² Richard Lowell Nygaard, *On Responsibility: Or, the Insanity of Mental Defenses and Punishment*, 41 VILL. L. REV. 951, 952–57 (1996) (discussing American penology rationales in the context of the mentally insane adjudged guilty in criminal trials).

⁵³ See *State v. Guido*, 191 A.2d 45, 52 (N.J. 1963) (wherein the testifying psychiatrist changed his mind as to whether the defendant suffered from a mental disease due to the differing legal standards adopted by the court).

⁵⁴ See *United States v. Freeman*, 357 F.2d 606, 608 (2d Cir. 1966) (discussing the *M’Naghten* test for insanity); MODEL PENAL CODE § 4.01 (AM. LAW INST. 2018); 18 U.S.C. § 17(a) (2018).

⁵⁵ See *Freeman*, 357 F.2d at 608.

be found to lack substantial capacity to either appreciate the criminality of his conduct or to conform to the conduct required by law.⁵⁶ The federal standard eliminates the volitional prong found in the Model Penal Code but maintains the standard under which the defendant must be unable to appreciate the criminality of his act.⁵⁷

Some jurisdictions also recognize the defense of diminished capacity, which allows a defendant who cannot maintain a full insanity defense to argue that he was not able to form the requisite *mens rea*, or even know of the risk creation (if proof of negligence or recklessness is required) for the crime charged, due to the defendant's diminished mental capacity.⁵⁸ Whereas insanity is a complete defense to a criminal charge, diminished capacity is a manner of mitigating the severity of a specific criminal offense and can often be proven with a lesser showing of mental disorder/incapacity than that which is necessary to maintain insanity.⁵⁹

In the specific instances of insanity and diminished capacity as related to gay panic, the defendant would claim the gay panic disorder (as first elucidated by Kempf and later classified by the APA) as the specified disease of mind, with the victim's sexual orientation—whether actual or alleged—being the trigger of the defendant's violent behavior.⁶⁰ Due to the disorder, therefore, the defendant would claim he was unable to appreciate the criminality and moral wrongness of his actions. In regard to diminished capacity, the defendant would claim his gay panic disorder prevented him from formulating the requisite *mens rea* to assault or kill.⁶¹

The first case describing “homosexual panic” via insanity was *People v. Rodriguez* in 1967.⁶² In that case, the defendant, a seventeen-year-old male, testified that on the night in question, he went into an alleyway and began to urinate between a garage and some bushes.⁶³ An older man, then, grabbed the defendant from behind and began yelling at him.⁶⁴ Allegedly thinking the older man was attempting to engage in a homosexual sexual act with him, the defendant picked up a four-foot long branch and began beating the man in the head, resulting in the victim's death.⁶⁵ The defense presented an expert witness who testified that “in his opinion defendant did not know the nature and quality of his act at the time of the attack and was acting as a result of an acute homosexual panic brought on him by the fear that the victim was molesting him sexually.”⁶⁶ The defense attempted to prove via this homosexual panic that the defendant was insane and therefore not guilty of murder. The jury did not find that claim credible and convicted Rodriguez on all charges after hearing the arresting officer testify that Rodriguez appeared calm at the time of the arrest (a mere two hours after the killing) and also understood his rights.⁶⁷

While not directly named, cases describing factual scenarios similar to gay panic increased in frequency beginning in the 1970s, with these defense arguments resting

⁵⁶ MODEL PENAL CODE § 4.01 (AM. LAW INST. 2017).

⁵⁷ 18 U.S.C.A. § 17(a) (Westlaw through Pub. L. No. 115-281).

⁵⁸ MODEL PENAL CODE § 4.02(1) (AM. LAW. INST. 2017).

⁵⁹ *United States v. Brawner*, 471 F.2d 969, 998 (D.C. Cir. 1972) (“Mental condition, though insufficient to exonerate, may be relevant to specific mental element of certain crimes or degrees of crime.”).

⁶⁰ *See, e.g., People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967).

⁶¹ JORDAN BLAIR WOODS ET AL., MODEL LEGISLATION FOR ELIMINATING THE GAY AND TRANS PANIC DEFENSES 9 (2016).

⁶² *Rodriguez*, 64 Cal. Rptr. at 255.

⁶³ *Id.* at 255.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 258.

on theories of insanity in order to acquit the respective defendants.⁶⁸ But following the APA's removal of homosexuality as a pathological disorder in 1973,⁶⁹ the ability of defendants to engage the gay panic defense vis-à-vis insanity and diminished capacity became moot from a medical perspective. Courts soon thereafter followed suit and rejected gay panic claims resting on insanity.⁷⁰ Rather than falling into disuse as a remnant of dated and incorrect assumptions, the gay panic defense continued as a different defense strategy, that of provocation.

B. PROVOCATION

In the United States, a finding of adequate provocation acts to mitigate a charge of murder, often reducing the crime to voluntary manslaughter.⁷¹ Provocation is analyzed under either the Model Penal Code or the common law "heat of passion" doctrine.⁷² Under the Model Penal Code, when such a homicide is adequately provoked, it must have been "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."⁷³ The MPC's first requirement is that the defendant must have been under extreme emotional disturbance at the time of the killing—a purely subjective analysis.⁷⁴ The second requirement under the MPC is that fact finders must ask whether there was a reasonable explanation for the defendant's extreme emotional disturbance, based on the viewpoint of a person in the defendant's situation, under the circumstances as the defendant believed them to be.⁷⁵

⁶⁸ See, e.g., *People v. Parisie*, 287 N.E.2d 310, 329 (Ill. App. Ct. 1972) (Craven, J., concurring) ("[T]he appeal is grounded on the defense of insanity predicated upon the fact that the defendant, a latent homosexual, was not criminally responsible for his conduct while repulsing an asserted homosexual attack. The evidence in this case does not establish lack of criminal responsibility nor incompetency on the part of the defendant. 'Homosexual panic' has in no way been equated with insanity or incompetency."); *State v. Thornton*, 532 S.W.2d 37, 44 (Mo. Ct. App. 1975) (allowing expert testimony to be presented to the jury for consideration of mental defect, as homosexual panic results in "fright, flight or fight", and a loss of ability to distinguish between right and wrong and the suspension of premeditation or [sic] wilful intent"); *Commonwealth v. Shelley*, 373 N.E.2d 951, 956 (Mass. App. Ct. 1978) (acknowledging that while homosexual-induced panic is a real infliction, nonetheless, deliberate premeditation could be found as "there was evidence from which the jury could find that on becoming enraged at the victim's homosexual advances, the defendant deliberately procured deadly weapons and concealed them for the purpose of killing the victim").

⁶⁹ See Dreschler, *supra* note 46.

⁷⁰ See, e.g., *Commonwealth v. Doucette*, 462 N.E.2d 1084 (Mass. 1984) (On appeal from a conviction of murder, the defendant's argument for ineffective assistance of counsel rested partially on a doctor's evaluation that the defendant was triggered by a homosexual panic. The defendant claimed his defense attorney should have but did not argue insanity using this medical assessment. The Supreme Court of Massachusetts rejected this argument, as the court recognized the lack of medical credibility of homosexual panic-induced insanity and therefore because of that, the homosexual panic claimed by the defendant merely described the version of events according to the defendant and nothing more).

⁷¹ MODEL PENAL CODE § 210.3 (AM. LAW. INST. 2018).

⁷² Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133, 140 (1992) (describing the common law and model penal code definitions of provocation).

⁷³ MODEL PENAL CODE § 210.3 (AM. LAW. INST. 2018).

⁷⁴ MODEL PENAL CODE § 210.3(1)(b) (AM. LAW. INST. 2018).

⁷⁵ For a discussion of this hybrid reasonableness standard, see, e.g., *People v. Casassa*, 404 N.E.2d 1310, 1316 (N.Y. 1980) ("The first requirement [that a particular defendant must have acted under the influence of extreme emotional disturbance] is wholly subjective—i.e., it involves a determination that the particular defendant did in fact act under extreme emotional disturbance, that the claimed explanation as to the cause of

In common law jurisdictions, mitigation of murder to manslaughter is generally established if: (a) the provocation was adequate, (b) the killing was committed in the heat of passion, (c) the killing proceeded from the heat of passion without adequate time for the passion to cool, and (d) there was a causal connection between the alleged provocation, the claimed passion, and the act which led to the victim's death.⁷⁶

With the shift from gay panic defenses rooted in insanity claims to provocation claims, the doctrine became known in academic circles as the Non-Violent Homosexual Advance ("NHA") defense.⁷⁷ Defendants attempting to advance this defense often assert that it was the non-violent homosexual advance made by the victim that either stirred the defendant into a heat of passion or caused extreme emotional disturbance.⁷⁸ Examples of such non-violent homosexual advances include, but are not limited to, the following:

- (1) while 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

his action is not contrived or sham. The second component is more difficult to describe—i.e., whether there was a reasonable explanation or excuse for the emotional disturbance. . . . The ultimate test, however, is objective; there must be 'reasonable' explanation or excuse for the actor's disturbance. . . . [T]he determination whether there was reasonable explanation or excuse for a particular emotional disturbance should be made by viewing the subjective, internal situation in which the defendant found himself and the external circumstances as he perceived them at the time, however inaccurate that perception may have been, and assessing from that standpoint whether the explanation or excuse for his emotional disturbance was reasonable, so as to entitle him to a reduction of the crime charged from murder in the second degree to manslaughter in the first degree." (internal quotations omitted); *see also* Chen, *supra* note 45, at 210 ("[U]nder the currently formulated provocation doctrine . . . the jury determines whether a reasonable man, or more precisely an *ordinary man* with typical human weaknesses would be provoked by the victim's conduct and whether the defendant's response to the provocation was that of an ordinary man, who lost his normal self-control as a result of typical human weaknesses.").

⁷⁶ *See* Mison, *supra* note 72.

⁷⁷ *See* Chen, *supra* note 45, at 210 (describing the transition in terminology from "gay panic defense" to "Non-Violent Homosexual Advance Defense").

⁷⁸ Though at times, defendants are not on the receiving end of a non-violent homosexual advance, which then triggers their state of extreme emotional disturbance, but rather they are witnesses to homosexual advances. *See* Scott D. McCoy, Note, *The Homosexual-Advance Defense and Hate Crime Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 640-41 (2001) (discussing the origins and justifications of the non-violent homosexual advance defense, McCoy notes that courts have at times "allowed third-party defendants, who have not been the target of the advance, to assert the defense. This scenario presents itself when the defendant was not the target of the homosexual advance but heard about such an advance made to another person. These third-party incidents appear to involve same-sex individuals . . ."); *see also* McCoy, *supra* citing to *Trimble v. State*, 138 S.E.2d 274 (Ga. 1964) (upholding the defendant's conviction for murder and death sentence by electrocution after the defendant shot his wife multiple times and killed her after he discovered the wife having sexual relations with a woman known to the defendant to be a lesbian.). It should also be noted that words alone are not enough under the provocation theory of non-violent homosexual advance defenses. *See* 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, 733 (1995).

oral sex, and then pulled the defendant onto his lap and seized his genitals; (6) while naked from the waist down, *F* embraced the defendant and tried to grab the defendant's penis; and (7) *G* performed a homosexual act upon the sleeping defendant.⁷⁹

Such advances are to be understood, according to defendants, as sufficient to cause an understandable loss of self-control among reasonable persons.

One case in which a defense of provocation was asserted from gay panic was *People v. Chavez*.⁸⁰ In *Chavez*, one night, the defendant accepted a ride to a friend's house from the victim, a complete stranger.⁸¹ While in the car, the victim asked the defendant what his thoughts were on homosexuals, to which the defendant replied he had gay friends and had no issue with homosexuals or homosexuality.⁸² Later on, when both men were out of the vehicle, the victim, allegedly a homosexual, grabbed the defendant's arm as an alleged sexual advance.⁸³ At that point, the defendant allegedly went into a state of unconsciousness and attacked the victim, ultimately stabbing the man seventeen times and then driving away in the victim's vehicle.⁸⁴ At trial, the defendant successfully claimed the killing was committed in a heat of passion caused by the victim's non-violent homosexual advance—the jury found the defendant, who was originally charged with murder, guilty of the lesser-charge of voluntary manslaughter.⁸⁵

In contrast to *Chavez*, the defendant's provocation defense in *Huff v. State* was unsuccessful in mitigating the charge of murder to manslaughter.⁸⁶ In *Huff*, the defendant and the victim were friends who would often drink heavily together at the victim's apartment.⁸⁷ On one such night of heavy drinking, the victim told the defendant about a previous occasion when the two friends had been drinking heavily and the two engaged in acts of homosexual sex.⁸⁸ The victim informed the defendant that he recorded the sexual acts and sent them to the defendant's girlfriend.⁸⁹ At this point, the defendant became infuriated, allegedly feeling emasculated and fearing that he contracted AIDS.⁹⁰ The defendant then began attacking the victim, ultimately stabbing him thirty-four times and shattering the victim's collarbone into three pieces in the process.⁹¹ Because of his impulse-control issues caused by his post-traumatic stress disorder, the defendant claimed his being informed of their previously engaging in homosexual sex provoked him to such a passion that he killed the victim.⁹² The jury

⁷⁹ Dressler, *supra* note 78, at 734 (citing to, in order: *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. October 17, 1985); *Schick v. State*, 570 N.E.2d 918, 922 (Ind. Ct. App. 1991); *People v. Lenser*, 430 N.E.2d 495, 496 (Ill. App. Ct. 1981)).

⁸⁰ *People v. Chavez*, No. F038767, 2002 WL 31863441, at *3 (Cal. Ct. App. Dec. 23, 2002).

⁸¹ *See id.*

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *Id.* at *1, *34.

⁸⁵ *See id.* at *1, *3.

⁸⁶ *Huff v. State*, 739 S.E.2d 360, 361 (Ga. 2013).

⁸⁷ *See id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 362.

was instructed on mitigating the charge down to manslaughter, but they determined the defendant's provocation, which was allegedly caused by the discovery of him engaging in homosexual sex, was insufficient to meet the standards under Georgia's penal code, and so they found him guilty of malice murder.⁹³

C. SELF DEFENSE

Self-defense is a justification for the use of deadly force, which completely mitigates a charge of murder.⁹⁴ Under the common law standard, the defendant has the burden of proving he subjectively believed that he was threatened with imminent force, that belief was objectively reasonable, and with respect to the force he was threatened with, that would justify the force he used in response (i.e. deadly force only to repeal deadly force).⁹⁵ Under the Model Penal Code, the defendant, at the time of the incident, must have reasonably believed that such deadly force was immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on that present occasion.⁹⁶ In regard to gay panic and the doctrine of self-defense, defendants will often claim that it was the homosexual sexual advance or the discovering or revealing of the victim's homosexuality which caused a reasonable belief in the defendant that he was in immediate danger of serious bodily harm and, as a result of needing to protect himself, used deadly force against the victim.⁹⁷

One of the earliest cases asserting self-defense in relation to gay panic was *People v. Rowland*.⁹⁸ In that case, the defendant was convicted of assault with a deadly weapon after the victim was shot following an alleged homosexual advance.⁹⁹ At trial, the judge halted a line of questioning inquiring into the homosexual nature of the victim and the victim's tendency to be a sexually aggressive homosexual.¹⁰⁰ The defendant attempted to show that the victim's aggressive sexual behavior manifested itself into a homosexual advance, from which the defendant felt it necessary to defend himself with a firearm.¹⁰¹ On appeal, the defendant's conviction was reversed because of the victim's potentially aggressive sexual nature as a homosexual, which would have shed light on the victim-witness' credibility.¹⁰²

In another self-defense case, *People v. Miller*, the defendant and the victim, co-workers, crossed paths hiking in a park when the victim allegedly attempted to force the defendant, a heterosexual male, to perform homosexual sexual acts.¹⁰³ It was then that the defendant, allegedly defending himself from the victim's homosexual advance, grabbed a rock, and began beating the victim over the head, resulting in the victim's death.¹⁰⁴ The jury found the defendant guilty of second-degree murder after the trial

⁹³ *Id.* (citing to GA. CODE ANN. § 16-5-2 (2019)).

⁹⁴ *See, e.g.,* *Brown v. United States*, 256 U.S. 335, 344 (1921).

⁹⁵ *People v. Goetz*, 497 N.E.2d 41, 47–50 (N.Y. 1986).

⁹⁶ Model Penal Code § 3.04 (Am. Law Inst. 2018).

⁹⁷ *See Lee, supra* note 22, at 517 n.235 (describing the case of Steven Scarborough, who beat Victor Manious with a baseball bat after awaking to find Manious on top of him, in his underwear).

⁹⁸ *People v. Rowland*, 69 Cal. Rptr. 269 (Cal. Ct. App. 1968).

⁹⁹ *Id.* at 270.

¹⁰⁰ *Id.* at 272.

¹⁰¹ *See id.* at 270–71.

¹⁰² *Id.* at 273.

¹⁰³ *People v. Miller*, 981 P.2d 654, 656 (Colo. App. 1998).

¹⁰⁴ *Id.* at 656–57.

court excluded evidence of the victim's prior homosexual conduct, as such prior conduct had no bearing on any element of the defendant's self-defense claim.¹⁰⁵

III. CURRENT STATUS OF THE DEFENSE ON THE STATE AND FEDERAL LEVELS

As of January 2019, the gay panic defense is allowed in federal courts as well as the state courts of forty-seven states.¹⁰⁶ California became the first state to address the issue of the gay panic defense in 2006, when Republican Governor Arnold Schwarzenegger signed Assembly Bill 1160, amending the California Penal Code.¹⁰⁷ A.B. 1160 included a provision that allowed a party to request the jury be given an instruction that includes a definition of bias—this definition would include sexual orientation and gender identity among explicitly prohibited classes on which bias can be grounded.¹⁰⁸ In 2014, California went on to become the first of three states that have outright banned the gay panic defense in state courts, followed by Illinois in 2017, and Rhode Island in 2018.¹⁰⁹ Similar legislation has been proposed, but has not yet

¹⁰⁵ *Id.* at 658. For additional discussion of non-violent homosexual advance defenses as related to self-defense, see William Shepard, Commission on Sexual Orientation and Gender Identity, *Report to the House of Delegates, Gay Panic*, 2013 A.B.A. SEC. INDIVIDUAL RTS. & RESP'S 1, 8 n.61 (citing to *Walden v. State*, 307 S.E.2d 474 (Ga. 1983)); see also Woods et al., *supra* note 61, at 12-13 (citing to *Harris v. State*, 554 S.E.2d 458 (Ga. 2001); *State v. Pollard*, 862 N.W.2d 414 (Iowa Ct. App. 2015); *State v. Camacho*, No. 01-06-0660, 2010 WL3218888, at *1 (N.J. Super. Ct. App. Div. 2010); and *Cutsinger v. State*, No. 14-06-00893, 2007 WL 4442609, at *1 (Tex. Crim. App. 2007)).

¹⁰⁶ BFoundAPen, *Gay Panic Defense Still Legal in 47 States*, MEDIUM (July 24, 2018), <https://medium.com/@bfoundalens/gay-panic-defense-still-legal-in-47-states-258ccb34e297>.

¹⁰⁷ Assemb. B. 1160, 2005 Assemb., Reg. Sess. (Cal. 2006) ("This bill, the Gwen Araujo Justice for Victims Act, would state legislative findings and declarations regarding the influence of a defendant's bias against the victim upon the trier of fact in a criminal proceeding and defendants' use of panic strategies based upon discovery or knowledge of an actual or perceived characteristic of their victim to decrease criminal culpability for crime. This bill would also provide that a party may request that the jury receive an instruction that defines bias as inclusive of bias against the victim or victims based upon disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation, in any criminal trial. This bill would also require the Office of Emergency Services, to the extent funding becomes available for that purpose, to develop practice manuals, as specified, for district attorneys' offices explaining how panic strategies are used to encourage jurors to respond to societal bias and providing best practices for preventing bias from affecting the outcome of a trial.").

¹⁰⁸ *Id.* After the adoption of Assemb. B. 1160, the California Penal Code read, "[i]n 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.'" CAL. PENAL CODE § 1127h (West 2018).

¹⁰⁹ Anna Pulley, *California Bans Gay and Trans Panic Def.: A Landmark Move for LGBT Rights*, EAST BAY EXPRESS (Sept. 30, 2014), <https://www.eastbayexpress.com/CultureSpyBlog/archives/2014/09/30/california-bans-gay-and-trans-panic-defense>; Samantha Allen, *The LGBT 'Panic Def.' is Unjust. It Could Become Illegal*, DAILY BEAST (July 18, 2018, 04:51 AM), <https://www.thedailybeast.com/the-lgbt-panic-defense-is-unjust-it-could-become-illegal>; S. B. 1761, 100th Gen. Assemb., Reg. Sess. (Ill. 2017) (amending § 9-1(c) of the Illinois Criminal Code to read, "[p]rovided, however, that an action that does not otherwise mitigate first degree murder cannot qualify as a mitigating factor for first degree murder because of the discovery, knowledge, or disclosure of the victim's sexual orientation as defined in Section 1-103 of the Illinois Human Rights Act" and § 9-1(b) to read, "[s]erious provocation is conduct sufficient to excite an intense passion in a reasonable person provided, however, that an action that does not otherwise qualify as serious provocation because of the discovery, knowledge, or disclosure of the victim's sexual orientation as defined in Section 1-103 of the Illinois Human Rights Act."); H. Act 7066, 2018 Gen. Assemb., Jan. Sess. (R.I. 2018) (providing for bans on the defenses of provocation, diminished capacity, and self-defense based off of actual or perceived gender, gender identity, gender expression, or sexual orientation).

passed, in Connecticut, Minnesota, Nevada, New Jersey, New York, Pennsylvania, Washington, and the District of Columbia.¹¹⁰

Currently there is no ban on the use of gay panic defenses in federal courts. In 2018, Massachusetts Senator Ed Markey and Representative Joe Kennedy proposed companion bills in the U.S. Senate and House banning the use of the gay panic defense in federal courts, though both bills ultimately stalled in their respective committees for the remaining duration of the 115th Congress.¹¹¹ That prohibition, had it passed, would have amended 18 U.S.C. Chapter 1 by adding: “[n]o nonviolent sexual advance or perception or belief, even if inaccurate, of the gender, gender identity or expression, or sexual orientation of an individual may be used to excuse or justify the conduct of an individual or mitigate the severity of an offense.”¹¹²

IV. MOVING FORWARD: PROPOSALS FOR THE GAY PANIC DEFENSE

A. PROPOSALS MADE BY PROFESSOR CYNTHIA LEE

In *The Gay Panic Defense*, George Washington University Law School Professor Cynthia Lee argues in favor of keeping the gay panic defense in the criminal courtroom.¹¹³ It should be noted that Professor Lee is in favor of disallowing gay panic claims for mental insanity, but is in favor of allowing gay panic claims for provocation and self-defense.¹¹⁴ Professor Lee’s argument in favor of allowing defendants to claim gay panic roughly goes as follows: (1) Even if gay panic defenses based on provocation were banned, clever defense attorneys would still find subtle ways to bring up the issue to judges and juries, and the covert expression of negative stereotypes is more insidious than the overt expression juries would see if the gay panic defense were allowed; (2) allowing defendants to argue gay panic better serves the rights of the defendant as well as the idea of justice and fairness our criminal system endeavors to seek; and (3) juries, not judges nor legislatures, are the most institutionally competent to decide whether to be punishing or lenient toward a defendant asserting a defense of gay panic.¹¹⁵

Lee asserts that banning the defense would not prevent the jury from considering the issue.¹¹⁶ Employing the Matthew Shepard trial as a possible example, Lee

¹¹⁰ For a broad overview, see *Gay and Trans Panic Def.*, NAT’L LGBT BAR ASS’N, <https://lgbtbar.org/what-we-do/programs/gay-and-trans-panic-defense/> (citing to proposed bills in Washington, D.C.; New Jersey; Minnesota; Pennsylvania; Washington; Nevada; Connecticut; and New York).

¹¹¹ *Bill Seeks to End Use of So-Called “Gay-Panic” Def.*, ASSOCIATED PRESS, July 14, 2018, <https://www.apnews.com/83d0d88e64c045d890d7aa4dfdab9149>; Gay and Trans Panic Defense Prohibition Act of 2018, S. 3188, 115th Cong. (2018); Gay and Trans Panic Defense Prohibition Act of 2018, H.R. 6358, 115th Cong. (2018).

¹¹² Gay and Trans Panic Defense Prohibition Act of 2018, S. 3188, 115th Cong. (2018). The bill would still have allowed federal courts to admit evidence of prior trauma for the purpose of excusing or justifying the defendant’s conduct. *Id.*

¹¹³ See Lee, *supra* note 22, at 472.

¹¹⁴ “I am less opposed to barring gay panic arguments linked to claims of mental defect because there is no identifiable mental disease or defect that could support such a claim. Homosexual Panic Disorder is not a recognized mental disease or defect today. Therefore, I would support a categorical ban on claims of gay panic linked to insanity or diminished capacity. With respect to self-defense, a defendant who claims he reasonably believed he was threatened with imminent death or serious bodily injury has an arguable claim of self-defense. Being threatened with rape, heterosexual or homosexual, generally is considered a threat of serious bodily injury. Therefore, I would not categorically bar all gay panic self-defense claims.” *Id.* at 522 n.273.

¹¹⁵ *Id.* at 522-23.

¹¹⁶ *Id.*

describes how a clever defense attorney will still bring the issue in front of the jury regardless of if the defense was barred from claiming gay panic:

The defense attorney will have conveyed the message that a male-on-male sexual advance is something that would offend and disgust the average heterosexual man by simply asking the male witness, “And how did *you* feel when [the gay victim] sat down beside you and licked his lips suggestively?” In strenuously objecting, the prosecutor just helps the defense by highlighting the question and raising its significance in the eyes of the jury. Even if the judge sustains the objection and instructs the jury to disregard the question, the judge cannot unring the bell that the jury has just heard.¹¹⁷

According to Professor Lee’s logic, banning the gay panic defense would simply make things difficult for the prosecution and the jury in snuffing out the homophobia underlying the covert gay panic defense, and so it is better to keep the gay panic defense in the courtroom where it would be visible to all.

But just because banning the defense could possibly make the jobs of attorneys and juries more difficult, does not mean that society should not even try banning the defense—sending a message that such clear homophobic attitudes will not be tolerated by our justice system is a powerful and worthwhile endeavor to lend security and dignity to the homosexual community in this nation. Sly defense attorneys are assuredly trying their hand in getting messages across after explicitly being prohibited from doing so. This is not a new phenomenon envisioned by Lee.¹¹⁸

Additionally, if, according to Lee, the jury *is* going to consider the issue of the victim’s homosexuality regardless of whether the gay panic defense is barred or not, why not send the unequivocal message to the jury that negative stereotypes about homosexuals will be given no quarter in the courtroom?

Professor Lee then appeals to First Amendment theory in order to support her argument in favor of keeping the gay panic defense.¹¹⁹ Lee embraces the marketplace-of-ideas notion to support her argument: it is better to air hateful and unpopular speech publicly in the courtroom so as to be able to disarm and repudiate it with more favorable speech.¹²⁰ For Lee, “trying to change social norms by suppressing norms with which one disagrees is not the best way to bring about lasting change.”¹²¹

I completely agree with the marketplace-of-ideas concept as well as Professor Lee’s quote on changing social norms. I disagree, however, with the scope in which she analyzes the gay panic defense. The proposed ban on the gay panic defense is not an attempt to reconfigure society and the norms widely held throughout it. Rather, barring the claim is a narrow ban within the confines of the courtroom. As Lee herself notes, this is not the same as public speech, this is “adjudicative speech . . . which is ‘both intended and received as a contribution to a court’s deliberation about some issue,’ is ‘regularly and systematically constrained by the rules of evidence, canons of professional ethics, judicial gag orders, and similar devices.’”¹²² Bans on the gay panic

¹¹⁷ *Id.* at 528.

¹¹⁸ And though the judge “cannot unring the bell that the jury has just heard,” there are still specific types of evidence or claims that are barred in the courtroom via state and federal rules of evidence. Barring the claim of gay panic would not be breaking new ground in this sense. *Id.*

¹¹⁹ *Id.* at 532.

¹²⁰ *Id.*

¹²¹ *Id.* at 533.

¹²² *Id.* at 534 (quoting Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L.

defense in the courtroom are simply not equivalent to societal bans on the type of speech that appeals to negative stereotypes about homosexuals.

Lee attempts to rebut this objection by claiming that allowing defendants to employ the gay panic defense serves to defeat homophobic attitudes by letting prosecutors, judges, and juries openly debate and show why homophobic attitudes are wrong.¹²³ On this, Lee misses the point. First, the courtroom is not the proper venue for a debate on societal norms. The courtroom is the venue for factfinding and adjudicating whether someone is liable for the wrongs they have been alleged to have perpetrated. Forcing courts to become social arbiters is not only an unnecessary burden to add to the already-strained judicial system,¹²⁴ but doing so removes from communities, schools, townhalls, and places of worship the key role of discussing and debating the proper and prevailing norms in society. Additionally, Lee seems to continuously miss the larger point of dignitary harm and embarrassment caused by keeping the gay panic defense alive. The issue is not whether or not the gay panic defense and its use is considered hate speech, but whether keeping the defense actually causes more harm to those minority groups that are purportedly better-off with the defense.

Finally, Lee discusses which institutional actor is in the best position to consider and decide whether a heterosexual defendant's claim of gay panic is cause for mitigation. She concludes that juries are in the best position.¹²⁵ Lee's objection to legislatures deciding on whether or not to ban the gay panic defense rests on the premise that legislatures often enact broad-sweeping legislation that is too rigid to accommodate the fact-specific needs of the courtroom.¹²⁶ However, congressional hearings, investigations, and testimonies could all serve to tailor a narrower or more flexible bill that would ultimately prohibit the use of the gay panic defense. In fact, this is what the 2018 proposed bills in the U.S. House and Senate would have done; the federal ban would have still allowed courts to admit evidence of a defendant's prior trauma in pursuit of a justification or mitigation to the crime alleged.¹²⁷ Further, a rule

REV. 705, 725 n.81, 705 (2004) (citation omitted)).

¹²³ *Id.* at 536.

¹²⁴ For discussions, tabulations, and research on the tremendous amount of stress already on the judiciary, see *Judicial Stress Resource Guide*, NAT'L CTR. FOR ST. CTS. <https://www.ncsc.org/Topics/Judicial-Officers/Judicial-Stress/Resource-Guide.aspx> (last updated May 20, 2019) (discussing various types of judicial stress, the trauma suffered by judges, and the rate of obesity as linked to judicial stress); *Judicial Vacancies*, A.B.A.

https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/judicial_vacancies/ (last updated Sept. 20, 2019) (discussing the vacancies in the federal court system during the 115th Congress); Jennifer Bendery, *Federal Judges are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Oct. 01, 2015), https://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b (discussing the overburdened workload of judges); *Federal Judicial Caseload Statistics 2018*, U.S. CTS. (Mar. 31, 2018), <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018> (discussing the eight percent increase of criminal defendant filings between 2017 and 2018).

¹²⁵ Lee, *supra* note 22, at 549.

¹²⁶ "The problem with relying on the legislature to determine what types of activities should or should not constitute legally adequate provocation is that legislatures tend to enact broad-based legislation that will apply to many different cases based on an abstract hypothetical set of facts. A one-size-fits-all rule is particularly ill suited to address the question of which defenses the jury ought to hear because such a rule, crafted in advance, cannot possibly take into account the myriad ways in which an encounter preceding an allegedly provoked killing may take place. The legislature cannot possibly know in advance the precise facts of the case which will be relevant to whether a reasonable person in the defendant's shoes would have been provoked into a heat of passion." *Id.* at 550.

¹²⁷ Gay and Trans Panic Defense Prohibition Act of 2018, S. 3188, 115th Cong. § 28(b) (2018).

passed down from the legislature would create consistency and uniformity throughout courtrooms, which would give parties sufficient notice of the relevant rules and would also provide a more equal playing field in conservative jurisdictions, where there may be higher levels of negative feelings toward homosexuals.

Lee does not believe judges are the best-suited institutional actors because of the unitary power of trial judges.¹²⁸ Whether a defense of gay panic will be presented to the jury or not depends wholly on *that* judge—a judge who tends to have more negative feelings toward homosexuals may allow the defense, while a judge who tends to have more positive feelings toward homosexuals may not allow the defense. Additionally, trial judges are often asked to make evidentiary rulings on the spot, without much time for deliberation, and trial judges do so as unitary arbiters. This lack of an ability to thoroughly deliberate the matter, in conjunction with the lack of peers to consult with, leads to Lee’s conclusion that judges are not in the best position to decide a gay panic defense claim.¹²⁹

This also leads to Lee’s conclusion that juries are the most capable of the three institutional actors to decide on a defense of gay panic. First, the jury has the benefit of being a group and is therefore capable of group discussion, as opposed to a judge who deliberates individually, a key weakness as noted by Lee.¹³⁰ Lee also supposes that, through *voir dire*, the defense and prosecution will ultimately come up with a panel of fair and balanced members, striking from the panel those with overt negative feelings toward homosexuality.¹³¹ Lee also supposes that a jury of twelve members “is likely to have at least one member who is gay or lesbian or sympathetic to gays and lesbians. That individual can remind the other jurors of the homophobic assumptions that underlie a defense claim of gay panic.”¹³² Further, Lee believes that the community in which the trial is taking place is more likely to view the results of the trial as more legitimate if the jury was given the chance to deliberate over the gay panic defense and ultimately rejected it.¹³³

There are many problems with this viewpoint. First, just because there are twelve people, instead of one, does not guarantee that the jury is going to always see the gay panic defense as a relic of the past needing to be discarded. Furthermore, there is no guarantee that a jury will have a member who is gay or lesbian or is sympathetic to gays and lesbians. The notion of greater legitimacy throughout the community is also not guaranteed, as there are surely communities across this country that hold negative attitudes toward homosexuals and homosexual acts.¹³⁴ It should also be noted that giving juries this responsibility in no way guarantees consistent outcomes against the use of the gay panic defense.

Professor Lee provides for certain actions to be taken in order to mitigate the detrimental effects of allowing the gay panic defense to be proffered.¹³⁵ Among these include (1) having judges allow defendants to present claims of gay panic as long as there is some evidence to support the defendant’s claim, (2) prosecutors requesting

¹²⁸ Lee, *supra* note 22, at 552.

¹²⁹ *Id.*

¹³⁰ *Id.* at 553.

¹³¹ *Id.* at 553-54.

¹³² *Id.*

¹³³ *Id.* at 554.

¹³⁴ For example, more people in Alabama and Mississippi oppose same-sex marriage than support it as of 2017, and over a third of residents in those two states oppose basic non-discrimination protections for LGBT citizens. *The American Values Atlas*, PUB. RELIGION RES. INST. (2017), <http://ava.prri.org/#lgbt/2017/States>.

¹³⁵ Lee, *supra* note 22, at 557.

questions to be asked to uncover potential jury members' homophobia,¹³⁶ and (3) making the possibility of sexual orientation bias conspicuous during the course of the trial.¹³⁷

B. PROPOSALS

In light of the continued employment of the gay panic defense, what should be done? The first step would include passing a federal bill banning the use of the gay panic defense throughout federal courts.¹³⁸ While the bill proposed in 2018 in the Senate and House of Representatives was a laudable first attempt, improvements can be made to such a bill.¹³⁹

Three distinct provisions should be added to the federal bill: providing for bans on gay panic defenses when used in (1) insanity and diminished capacity claims, (2) provocation claims, and (3) self-defense claims.¹⁴⁰ An exception for judges to admit evidence of prior relevant trauma should also be included in the bill.

In advocating for the adoption of a federal bill, I am aware of the fact that most criminal cases involving assault and murder would typically proceed through state courts and would thus be governed by state law. State legislatures should adopt state analogues to a federal bill or bills similar to those already enacted in other states. Even while I certainly advocate for the states to adopt their own bans on the gay panic defense, I still believe it is important that a federal bill be enacted. A powerful message is sent to the nation with the adoption of a bill banning the gay panic defense: homosexuals in this country will no longer have to fear that simply being homosexual or coming out as homosexual can provide a societal sanction for violence against them. The bill would send the message that a reasonable person is *not* provoked to deadly action simply by a non-violent homosexual advance or the discovery or knowledge of the victim's sexuality.

Bills banning the use of the gay panic defense are not the end of the matter, however—work must still be done in the courtroom. *Voir dire* presents the opportunity to root out those with homophobic beliefs just as it presents the opportunity to remove those with racist and sexist beliefs. Attorneys also play an important role in that they

¹³⁶ Sample questions include, "This trial involves a gay male victim. How might this affect your reactions to the trial?[] Do you have any biases or prejudices that might prevent you from judging this case fairly given that it involves a gay victim?[] In your opinion, should the sexual orientation of the defendant influence the treatment he receives in the legal system?" *Id.* at 559-560.

¹³⁷ *Id.* at 559. Lee proposes that prosecutors can make sexual orientation bias salient by switching sexual orientation out with gender—asking the jury to consider the same facts but with a gay male defendant killing a heterosexual female after the female has made unwanted sexual advances toward the gay male or even the same situation but with a heterosexual female defendant killing a heterosexual male defendant after that male has made unwanted sexual advances toward the heterosexual female. *Id.* at 564.

¹³⁸ Even though control of the current 116th Congress is split between Democrats in the House and Republicans in the Senate, this type of bill could have the sort of bipartisan support that is rarely seen these days in Washington. Republican Governor of Illinois Bruce Rauner signed his state's ban on the gay panic defense, while Democrat Governor of California Jerry Brown did the same in his state. Associated Press, *Illinois to Become Second State to Ban 'Gay Panic Defense'*, NBC NEWS (Dec. 29, 2017, 02:15 PM), <https://www.nbcnews.com/feature/nbc-out/illinois-become-second-state-ban-gay-panic-defense-n833441>. Additionally, organizations considered to be both left- and right-of-center have endorsed bans on the gay panic defense, such as the center-left Equality California, the center-right American Unity Fund, among others. John Riley, *Bill Introduced in Congress to Ban Use of Gay and Trans Panic Defenses*, METRO WKLY. (July 13, 2018), <https://www.metroweekly.com/2018/07/bill-introduced-congress-ban-gay-trans-panic-defenses/>.

¹³⁹ I would propose maintaining Section 2 of the federal bill, which stated congressional findings. Gay and Trans Panic Defense Prohibition Act of 2018, S. 3188, 115th Cong. §2 (2018).

¹⁴⁰ The Williams Institute proposed such model legislation in 2016. WOODS ET AL., *supra* note 61, at 22.

should maintain the ability to ask the judge for jury instructions on avoiding sexual-orientation bias.¹⁴¹ Additionally, training should be provided for judges and attorneys in handling the gay panic defense should it arise before them in trial. If our judges and attorneys are aware of the issues surrounding the gay panic defense, then they are properly equipped to adhere to and carry out the federal or state bans on the defense.

V. CONCLUSION

Defendants who assert claims of gay panic do so in hopes of appealing to overt or subconscious negative feelings toward homosexuals. While the courtroom has a place in the cultural debates of our time, it is a minimal place. The people, through their legislatures, should play the dominant role in discussing the proper cultural norms. That defendants would be deprived of one avenue of excuse or mitigation and juries would be deprived of an issue to consider, pales in comparison to the benefits derived from banning the use of the gay panic defense. A federal ban on the gay panic defense would recognize the dignity inherent in the lives of all homosexual Americans. Not only that, but a federal ban would also send a powerful message to those who would otherwise try to claim gay panic: society will no longer defend your homophobia if you assault or murder someone for no other reason than that they hold an immutable characteristic different from you, that they are homosexual.

¹⁴¹ See Assemb. 1160, 2005 Leg., Gen. Sess. (Cal. 2006).