

Subverting the Perverted Practice of Provocation: Eliminating Modern Day Uses of LGBT Panic Defenses

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“Why is ‘*I killed him because he was black*’ an outrage, offensive to the very foundation of equal protection jurisprudence, while ‘*I killed him because he was gay*’ is not?”¹

I. INTRODUCTION

The modern American criminal justice system values the lives of heterosexual citizens above those of its homosexual, bisexual, and transgender citizens as is evidenced by the prevalence of gay and trans

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This Article is dedicated to my LGBT community and was written in hopes of making this country a safer place for us all.

1. Joseph R. Williams, “*I Don’t Like Gays, Okay?*” *Use of the “Gay Panic” Murder Defense in Modern American Courtrooms: The Ultimate Miscarriage of Justice*, 78 ALB. L. REV. 1129 (2015) (emphasis added). As Williams emphasizes:

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

panic defenses in our legal system. Gay and trans panic defenses, or “LGBT panic defenses,”² should be abolished in the United States as partial or complete defenses to the assault and murder of the LGBT community. These defenses problematically excuse what should be interpreted as hate crimes against the lesbian, gay, bisexual, and transgender (LGBT) community and capitalize on jurors’ homophobic and transphobic biases. While other legal scholars offer ways to mitigate the negative impacts of panic defenses, an entire remodeling of our criminal justice system is necessary to abolish their use.³ Through this elimination, the legal system can set forth a new normative standard that protects and values the lives of LGBT citizens.

First, this Article will identify how and to what extent LGBT panic defenses operate in the criminal courtroom. Second, it will identify why violence against LGBT citizens must be understood as hate crimes, rather than crimes that may be partially justified through LGBT panic defenses. Third, this Article calls for the elimination of LGBT panic defenses for reasons relating to homophobic and transphobic juror bias. Fourth, it outlines the various consequences of permitting these defenses, including the double victimization of the LGBT community and the ability of these defenses to be used in manipulative ways, both of which result in the overall devaluing of the lives of LGBT victims. This Article concludes by advancing potential mechanisms for eradicating the use of LGBT panic defenses through legislative action, or alternately, through the implementation of American Bar Association requirements disallowing use of these defenses in legal practice.

II. THE LEGAL FOUNDATION OF LGBT PANIC DEFENSES

LGBT panic defenses stem from what scholar Joseph Williams terms an “inglorious history of homosexual [and transphobic] persecution.”⁴ They have been used to legitimize violence against perceived homosexuals and transgender people. Although no uniform definition of LGBT panic exists, these defenses are connected and identifiable in their shared rationale that violence against a LGBT citizen should be partially excused due to the victim’s perceived homosexuality

2. I utilize the term “LGBT panic defenses” as a more inclusive alternative to “gay panic” and “trans panic.” LGBT panic encompasses both defenses, as well as those defenses targeted against a sexual minority that may identify as lesbian or bisexual.

3. See, e.g., J. Kelly Strader, Molly Selvin & Lindsey Hay, *Gay Panic, Gay Victims, and the Case for Gay Shield Laws*, 36 CARDOZO L. REV. 1473, 1475 (2014-2015).

4. Williams, *supra* note 1, at 1144.

or homosexual romantic or sexual advance(s) toward the accused.⁵ While these LGBT panic defenses cannot be applied as stand-alone defenses, they have proven successful under the legally codified defense of provocation.⁶

The provocation defense⁷ is founded on the principle that a victim's behavior may mitigate the wrongfulness of the perpetrator's act.⁸ Hence, these defenses allow sympathetic juries to reduce the accused's criminal charge, often from that of murder to the lesser charge of manslaughter, or inhibit judgment altogether through deadlocked juries.⁹ The provocation doctrine permits jurors to decide the accused's degree of culpability, rather than to focus on the traditional question of guilt or innocence.¹⁰ It is what is known as an "excuse defense," in which the perpetrator's action is viewed as a wrong but where the perpetrator is not evaluated to be morally blameworthy.¹¹ Put simply, the accused admits responsibility for the relevant act but asserts that this act should be excused because of the victim's "provoking" behavior. For the purposes of LGBT panic, the provoking behavior is a perceived homosexual advance or an advance by a transgender individual.¹²

To succeed, the defense must convince a jury that the defendant's actions were "committed under the influence of extreme mental or emotional disturbance for which there is . . . reasonable" provocation."¹³ The term "reasonable" is important in this definition. Jurors must decide how "reasonable" the *accused's* actions were based on the *victim's* behavior. Jury members will assign culpability from their subjective personal biases, which are undoubtedly colored by societal norms of heteronormativity.¹⁴

5. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 475 (2008).

6. Jessica M. Salerno et al., *Excusing Murder? Conservative Jurors' Acceptance of the Gay-Panic Defense*, 21 PSYCHOL. PUB. POL'Y & L. 24 (2015).

7. Though the author of this text supports the abolition of all provocation defenses, commentary on the entire eradication of provocation defenses is beyond the scope of this Article.

8. Vera Bergelson, *Justification or Excuse? Exploring the Meaning of Provocation*, 42 TEX. TECH L. REV. 307 (2009).

9. Salerno et al., *supra* note 6, at 25.

10. *Id.* at 24.

11. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982).

12. *Id.*

13. Andrew Cornford, *Mitigating Murder*, 10 CRIM. L. & PHIL. 31, 40 (2016) (quoting U.S. MODEL PENAL CODE § 1.12(2) (AM. LAW INST. 2016); *see also* Lee, *supra* note 5, at 498).

14. Joan W. Howarth, *Adventures in Heteronormativity: The Straight Line from Liberace to Lawrence*, 5 NEV. L.J. 260, 260 (2004) (Heteronormativity as "the complex social, political,

When LGBT panic defenses succeed under the provocation doctrine they support a “sense of cultural permission to engage in anti-gay violence.”¹⁵ Thus, juries that accept a LGBT panic defense find the perpetrator’s violence more acceptable because of the victim’s perceived homosexual or transgender identity. The current laws in forty-eight states permit the “reasonable provocation” defense, allowing: “[A] nonviolent, nonthreatening sexual advance by a member of the same sex [may] be [*legally adequate*] to constitute sufficient provocation that would incite the ‘reasonable man’ to lose his self-control and [*kill*], without having to answer to the full extent of the law.”¹⁶ The existing framework effectively benefits perpetrators of crimes against the LGBT community, in turn diluting the effectiveness of penal codes designed to prohibit and punish such behavior.

LGBT panic defenses have been used since the early 1950s.¹⁷ Between 1952 and 2005 they were applied in 189 appellate trials, either as a part of the accused’s trial strategy or as a way to frame the facts of the case.¹⁸ However, these figures may underestimate the prevalence of LGBT panic defenses. Criminal law professor Jessica Salerno explains that because this data considered only appellate records, “these statistics might underrepresent the true number of jury trials in which the gay-panic defense [was] invoked successfully, because defendants who are successful at trial will not have convictions to appeal.”¹⁹ In recent history, LGBT panic defenses have not decreased in use. Since 2002 at least forty-five defendants have claimed LGBT panic in defense of their crimes.²⁰

In practice, LGBT panic defenses can result in lenient criminal convictions or sentences, or if persuasive enough, may deadlock a jury. In the case of *Mills v. Shepherd*, for example, the accused was found guilty of voluntary manslaughter,²¹ a verdict that is only handed down

legal, economic, and cultural systems that together construct the primacy, normalcy, and dominance of heterosexuality.”).

15. Lee, *supra* note 5, at 496.

16. Williams, *supra* note 1, at 1147.

17. Salerno et al., *supra* note 6, at 25.

18. *Id.*

19. *Id.*

20. James Nichols, *American Bar Association Votes to Curtail Use of ‘Gay Panic,’ ‘Trans Panic’ Defense*, HUFFINGTON POST (Aug. 16, 2013), http://www.huffingtonpost.com/2013/08/16/american-bar-association-gay-panic_n_3769149.html.

21. *Mills v. Shepherd*, 445 F. Supp. 1231, 1232 (W.D.N.C. 1978), *aff’d*, 605 F.2d 1203 (4th Cir. 1979).

when a jury finds “adequate provocation.”²² The defendant had knocked the victim, a gay man named Billy Francis Brinkley, to the ground.²³ He kicked and beat Brinkley, who died of his injuries, before robbing him and driving home in Brinkley’s car.²⁴ To defend these actions the accused asserted that Brinkley had made a homosexual pass at him.²⁵ In this case, Judge McMillan issued jury instructions that explained the provocation doctrine:

In order, members of the jury, to reduce this crime [from murder] to manslaughter, the defendant must prove not beyond a reasonable doubt, but simply to your satisfaction, that there was no malice on his part. To negate malice, and thereby reduce the crime to manslaughter, the defendant must satisfy [to] you . . . that he, . . . in kicking and beating the deceased, . . . did this in the heat of passion Second, that this passion was produced by [*acts of the deceased*], . . . which the law regards as [*adequate provocation*].²⁶

Thus, the *Mills* jury—by accepting the defendant’s provocation defense—judged Brinkley’s perceived homosexuality as an act of provocation sufficient to excuse not only his violent murder, but also, shockingly, the subsequent robbery and auto theft. This verdict shows the extreme liberties taken by juries when they are able to issue verdicts based on subjective interpretations of reasonableness under the provocation doctrine.

LGBT panic defenses, if unsuccessful in producing a reduced verdict and sentence for the accused, can nevertheless prove powerful enough to result in a hung jury. This was precisely the case in *People v. Merel*.²⁷ In this instance, the victim was only seventeen years old. Her name was Gwen Araujo, and she was violently murdered by four men whom she considered her friends. On the night of October 3, 2002, the four defendants were playing dominos with Araujo when she somehow disrupted their game. In response, Merel, one of the defendants, jumped up and ran his fingers across her throat.²⁸ He then leaned over and asked Araujo to let him “feel” her so that he could “know if she was a

22. N.C. GEN. STAT. ANN. § 14-18; *see, e.g.*, 2016-§ 16-5-2 Ga. Code Ann. Adv. Legis. Serv. (LexisNexis); VA. CODE ANN. § 18.2-35.

23. *Mills*, 445 F. Supp. at 1234.

24. *Id.*

25. Williams, *supra* note 1, at 1147 (citing *Mills*, 445 F. Supp. at 1231).

26. *Id.* at 1148-49.

27. *People v. Merel*, No. A113056, 2009 WL 1314822 (Cal. Ct. App. May 12, 2009).

28. *Id.* at *2.

woman or a man.”²⁹ The defendants had discussed their uncertainty about Araujo’s gender in the months preceding her murder. When Araujo denied Merel’s touching, the defendants told her she had to go to the bathroom with another defendant, Magidson, who proceeded to block her from exiting. At this time, the group heard Merel say, “I swear if *it’s* a man, I’m going to fucking kill him.”³⁰ As attorney Erin Iungerich notes, “The fact [that] Araujo was referred to as ‘*it*’ indicates something [disturbing] about the mindset of her attackers.”³¹

Araujo ended up in the bathroom where the group made the determination that she was “a man.”³² Magidson then assaulted Araujo by pulling her to the floor, removing her underwear, and choking her. She was subsequently beaten with a can of food hard enough to dent it, and when she survived this first assault, was attacked with a frying pan until she stopped responding. Magidson then used rope to tie her neck, hands, knees, and ankles.³³ The night ended when the defendants rolled Araujo’s corpse into a blanket, stomped on it, and threw her body into a shallow grave covered only by rocks.³⁴

The jury instructions regarding the defendants’ provocation defense in the *Merel* case were similar to those in *Mills*: “The question to be answered is whether or not at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause an ordinarily reasonable person of average disposition to [act] . . . from passion rather than from judgment.”³⁵

It is absurd to imagine how, in this case, seventeen-year-old Araujo could have provoked the literal overkill she suffered because of her transgender identity. Yet, at least one jury member was persuaded by the defendants’ LGBT panic-based provocation defense. The jury deadlocked in June 2004 despite a wealth of evidence against the accused. No verdict was reached at this time, and the judge declared the case a mistrial.³⁶

29. *Id.*

30. *Id.* (emphasis added).

31. Erin Iungerich, *Provocation Excuse: Using International Laws and Norms to Give Perspective in the Domestic Sphere*, 4 LAW J. FOR SOC. JUST. 33, 34 (2013) (emphasis added).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Merel*, 2009 WL 1314822, at *9.

36. Henry Lee, *Three Sentenced to Prison in Araujo Slaying*, SF GATE (Jan. 27, 2006), <http://www.sfgate.com/news/article/Three-sentenced-to-prison-in-Araujo-slaying-2542846.php#photo-2095816>.

The Alameda County prosecutors in the *Merel* trial were then forced to risk a second trial that exposed the victim's friends and family to the traumatic and discouraging retrial process.³⁷ In this second trial, Merel and Magidson were convicted of second-degree murder for the death of Araujo. Even so, the jury in the second trial rejected allegations that the slaying was a hate crime that stemmed from Araujo's gender identity despite clear evidence and testimony to the contrary.³⁸ Hung juries like that in the *Merel* case are not uncommon in incidents where LGBT panic defenses are used, and they serve to illustrate the power of these defenses. Assistant Florida State Attorney Molly McGuire argues that mistrials have the same effect as acquittals in that "[j]ustice delayed is justice denied."³⁹ Gwen Araujo's trial is one example of many that illuminates the need to prohibit the use of LGBT panic-based provocation defenses in cases of LGBT-motivated violence.

The *Mills* and *Merel* cases are not included in this text simply to shock the conscience of the reader. Rather, they were included to practically illustrate, first, that LGBT panic defenses operate in contemporary courtrooms and, second, that they can prove successful. This is problematic for many reasons, but primarily because those defendants that benefit from LGBT panic defenses are held less accountable for their actions when they should be held to a higher standard of culpability, because LGBT citizens are protected under special hate crime laws that aim to ensure that acts of LGBT violence are prosecuted with particular severity.

III. LGBT PANIC UNDERSTOOD AS HATE CRIMES

Provocation defenses force the criminal justice system to reconcile the irreconcilable: that the perpetrator who has committed a hate crime against the LGBT community may claim their hatred, or "LGBT panic," as an excuse for their actions. Legal scholar Scott McCoy describes this puzzling phenomenon:

The high-profile killings of [LGBT individuals] and the circumstances surrounding their murders bring into juxtaposition two apparently incongruous concepts in the criminal law: the concept of [*enhanced*] penalties and sentencing for . . . hate-motivated crimes—through hate

37. *Id.*

38. *Id.*

39. Melissa Jeltson, *Mistrial Means Delayed Justice for Shooting Victim*, HUFFINGTON POST (Aug. 13, 2016), http://www.huffingtonpost.com/entry/mistrial-kate-ranta_us_57d8648ee4b0fbd4b7bc2465.

crime statutes—and the doctrine of provocation—based on the [LGBT] defense—where the defendant seeks a [*lessening*] of the penalty because he was provoked by an unwanted homosexual advance.⁴⁰

Importantly, though state hate crime laws vary, the United States federal codes have been reformed so that LGBT hate crimes are penalized more harshly. The reasons for this can be attributed to a cultural recognition—at the federal level—of the particularly unacceptable harm inflicted by acts of violence against people based solely on their perceived sexual or gender identity.⁴¹ These increased punishments for hate crimes are linked to the fact that they do more than threaten the safety and welfare of an individual; rather, they inflict harm on whole communities.⁴² Gender theorist Judith Butler describes how this happens:

If a trans woman is killed, it is a sign to other trans women that they can be killed as well. Same with the harassment, rape, or murder of butches and trans men . . . Every time one trans person is killed, the message goes out to every trans person: You are not safe; this dead body could be yours. So the murder operates as a violent crime and as a threat that more violent crimes will happen.⁴³

For this reason, violence against the LGBT community must continue to be identified as hate crimes at every level rather than be excused in criminal court through the application of LGBT panic-based provocation defenses.

More than simply a matter of principle, recent federal legislation has explicitly declared that instances of violence against the LGBT community that are motivated by sexual or gender identity qualify as hate crimes. In 2009, Congress passed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Shepard-Byrd Act), which was named in part to honor the victim of an LGBT hate crime.⁴⁴ When President Obama signed the Shepard-Byrd Act into law, he noted how

40. Scott D. McCoy, *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 633 (2001).

41. Diana Tourjee, *Why Do Men Kill Trans Women? Gender Theorist Judith Butler Explains*, VICE (Dec. 16, 2015), https://broadly.vice.com/en_us/article/why-do-men-kill-trans-women-gender-theorist-judith-butler-explains.

42. Williams, *supra* note 1, at 1159 (quoting New York statute).

43. Tourjee, *supra* note 41.

44. Angela D. Moore, *Method of Attack: A Supplemental Model for Hate Crime Analysis*, 90 IND. L.J. 1707, 1719 (2015). The murder of Matthew Shepard helped to inspire a movement that recognized LGBT violence as hate crimes. Two men who became “enraged” when Shepard made a sexual advance killed him. The men abducted and drove him to a remote area east of Laramie, Wyoming. There, Shepard was tied to a split-rail fence where the two men severely assaulted him with the butt of a pistol.

important it was that hate crime protections had been expanded to include the LGBT community and other minority identity groups. He remarked, “After more than a decade of opposition and delay, we’ve passed inclusive hate crimes legislation to help protect our citizens from violence based on what they look like, who they love . . . or who they are.”⁴⁵ The Act establishes federal criminal sanctions for those that willfully cause bodily injury, or attempt to cause such harm with fire, firearm, or other dangerous weapons, when “(1) the crime was committed because of the actual or perceived race, color, religion, national origin of any person or (2) the crime was committed because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.”⁴⁶

By passing the Shepard-Byrd Act, the federal government took an affirmative stance to protect gender and sexual minorities from acts of identity-based violence. Thus, under the Shepard-Byrd Act, perpetrators who claim LGBT panic are also perpetrators of hate crimes. This is because in instances where LGBT panic is claimed, the perpetrators are specifically reacting to their own feelings of homophobia or transphobia. In other words, the defendants’ acts of violence are caused by fears that were induced by the victim’s perceived homosexual interest in them. Allowing perpetrators to use their phobias or biases against members of the LGBT community to partially excuse the crimes they commit defies the sentiment and purpose of hate crime laws that were enacted to elevate the punishment of these acts. Our legal system cannot continue to allow LGBT panic defenses while contemporaneously and incongruously advocating for elevated severity of LGBT-based violence through the passage of the Shepard-Byrd Act.

LGBT citizens need greater legal protections for practical reasons. As a community they are more likely to be targets of hate crimes than any other group, for example, twice as likely to be targets of hate crimes than African Americans.⁴⁷ Furthermore, murders of LGBT individuals have rapidly increased in recent years. Notably, the number of reported murders of transgender-identifying citizens doubled between 2014 and

45. Meredith Boram, *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act: A Criminal Law Perspective*, 45 U. BALT. L. REV. 343, 345 (2016).

46. *The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009*, U.S. DEP’T JUST., <https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0> (last visited Jan. 24, 2018).

47. Haeyoun Park & Iaryna Malysan, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), http://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html?_r=0.

2015.⁴⁸ In their response to the growth of violence against the LGBT community, Butler describes the need to identify these acts of violence as hate crimes: “When the crime is not named as a hate crime, . . . the police are sending the same message as the murderer.”⁴⁹ For this reason, our legal system must prevent LGBT panic defenses so that acts of violence against the LGBT community, at every level, are understood for what they are: hate crimes.

IV. A ROAD TO PROHIBITION OF LGBT PANIC

This text advocates for the complete abolition of LGBT panic defenses. Today, many legal scholars advocate for ways to defeat LGBT panic-based provocation defenses but do not advocate for their prohibition. To illustrate the need for the elimination of LGBT panic defenses, this text will present three primary arguments against their use. These arguments relate to unsupported generalizations, First Amendment Theory, and key social science findings and will show why our justice system cannot sustain the continued legalization of LGBT panic defenses.

Some doubt the success of banning LGBT panic defenses because of the failed attempt to do so in the highly publicized murder trial of a gay Wyoming teen named Matthew Shepard. In the trial, Shepard’s attacker, Aaron McKinney, raised an LGBT panic defense in an attempt to excuse his act of violence.⁵⁰ The judge ordered a hearing to decide whether or not the LGBT panic defense would be allowed.⁵¹ After both parties had presented arguments on the issue, the trial judge held that the defense would not be allowed.⁵² In this instance, however, LGBT panic still prevailed in the courtroom: “Despite the judge’s ruling, McKinney’s defense attorneys called two witnesses and used their testimony to convey the idea that Matthew Shepard was sexually aggressive and deserved the beating he got, playing on stereotypical images of gay men as sexual deviants and sexual provocateurs.”⁵³

48. Tourjee, *supra* note 41.

49. *Id.*

50. Lee, *supra* note 5, at 522-24. McKinney’s attorney argued that “Matthew Shepard made an unwanted sexual advance upon McKinney when they were in McKinney’s truck, allegedly grabbing McKinney’s crotch and licking McKinney’s ear. [The attorney] argued that this sexual advance was particularly upsetting to McKinney because of his history with unpleasant homosexual encounters.”

51. *Id.* at 524.

52. *Id.* at 525.

53. *Id.*

In this trial McKinney's LGBT panic defense covertly made its way into the courtroom because of egregious attorney and judge error; neither the prosecuting attorneys nor the judge made an effort to ensure that the panic defense was not introduced.⁵⁴ However, in conjunction with state-based legislative action or ABA prohibition of these defenses, incompetencies like those in the *Shepard* case could be addressed and prevented. Thus, we should not assume that LGBT panic defenses will persist in the face of prohibition.

Others argue that even in cases with astute attorneys and judges, provocation prohibitions will prove insufficient because LGBT panic will find its way into the jury deliberation room, regardless.⁵⁵ Those who argue this position have presented data from a single research study that used the examples of liability insurance and attorneys' fees to illustrate that juries commonly consider these elements in deliberation, despite evidentiary prohibitions.⁵⁶ However, a study concerned with evidence relating to liability insurance and attorneys' fees is not comparable to evidence relating to LGBT panic for a number of reasons.

First, it is not analogous to compare liability insurance and attorneys' fees—both elements relating to damages—to LGBT panic defense evidence. This is because LGBT panic defense evidence relates to the question of guilt or liability, a very different category of consideration than damages. Evidence relating to LGBT panic is also inherently outcome-determinative, whereas evidence relating to liability insurance or attorneys' fees is less likely to be outcome-determinative. Second, the presented study concerns two elements that are applicable to the majority of civil cases and some criminal cases, whereas LGBT panic is present in far fewer cases. Hence, a prohibition of LGBT panic defenses is likely to prove far more successful than prohibitions of these other types, which implicate issues that are more common to ordinary trials. For these reasons, it is unlikely that juries would consider LGBT panic defenses on their own without a defense attorney explaining the proposed excuse phenomenon.

In addition to the mistaken generalization that LGBT panic evidence will “get in regardless,” some also claim that LGBT panic evidence must be permitted under various strains of First Amendment theory.⁵⁷ For example, under the “marketplace of ideas” theory of free

54. *Id.* at 527-28 (Lee herself acknowledges these failings of the *Shepard* court).

55. *Id.* at 528.

56. *Id.* at 530.

57. *Id.* at 532.

speech the expression of both “good” and “bad” beliefs (such as LGBT panic defenses) is advocated based on the notion that this benefits all citizens.⁵⁸ Another strain called the “safety valve” theory alternately asserts that in order to deal with “threat[s] of radical action [like LGBT panic],” societies must “allow individuals to express radical ideas out in the open and to permit others to challenge and debate those ideas.”⁵⁹ The reasoning behind these theories is founded on the belief that the practice of open discussion promotes a more unified society.⁶⁰ The unity is purportedly derived from people’s inclination to support decisions that “go against them” if they feel that they had a voice in the decision-making process.⁶¹

In response to these First Amendment arguments it is necessary to emphasize that the First Amendment is not absolute, and there are already limitations that restrict it. Our legal system recognizes that there are some interests that are more valuable than unlimited free speech. For example, in the case of *Clark v. Arizona*, the Supreme Court affirmed Arizona’s rules that prevent defendants from using mental incapacity as a legal defense.⁶² The regard for LGBT human life should be prioritized over unlimited First Amendment speech. Put plainly, the murders of LGBT individuals should place limitations on the abilities of defendants to assert their bias as a legal defense. Because lives are at stake, there should be little room to advance First Amendment theories that would excuse the murders of LGBT people.

In addition to the above critiques of the social theory arguments in favor of provocation, there also exist key flaws associated with the social science research supporting the defense. This social science research analogizes LGBT bias to racial bias. Specifically, some social science research on jurors’ implicit and explicit racial biases has argued that when race is made salient, attorneys can better combat racial prejudice.⁶³ These studies found that, “when racial stereotypes about Blacks were made salient, low-prejudice individuals seemed to consciously mediate their thoughts about Blacks and align their thoughts with their egalitarian

58. *Id.*

59. *Id.*

60. *Id.* at 532-36.

61. *Id.*

62. *Clark v. State*, 548 U.S. 735, 741 (2006) (finding that there is also no cause to claim that channeling evidence on mental disease and capacity offends any “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”).

63. See, e.g., Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

beliefs.”⁶⁴ This “aligning” allegedly results in more just convictions for victims of color. Thus, some believe that, by making LGBT biases salient, allowing LGBT panic defenses could create a space for prosecutors to combat homophobia and transphobia.⁶⁵

In practice, however, salience has not resulted in the predicted outcome, as evidenced by the 2011 murder trial of an openly gay fourteen-year-old in California.⁶⁶ In response to receiving a Valentine’s Day card from his male classmate Larry King, Brandon McInerney took a .22 caliber handgun and murdered King by shooting the fourteen-year-old twice in the back of the head.⁶⁷ Then, McInerney dropped the gun, pulled his jacket hood up over his face, and left the murder scene.⁶⁸ There was no question that the murder was related to McInerney’s homophobia. In fact, the day before the murder, McInerney became outraged when King had said to him, “I love you.”⁶⁹ Classmates testified that, in response to King’s perceived homosexual interest in him, McInerney had tried to “recruit friends to jump or ‘shank’ King but had been unsuccessful.”⁷⁰

Crucially, McInerney’s defense council used an implicit LGBT panic-based provocation defense to excuse the incident. In response, the prosecution made LGBT bias salient in an effort to counter it. The prosecution told the court, “Let’s just say it, this defense is gay panic. For the past six weeks, there’s been this giant smoke screen.”⁷¹ Still, in an all-too predictable response, the King jury hung and the case was declared a mistrial;⁷² by following the “salience” strategy, the prosecution in the McInerney trial failed to defend against an LGBT panic defense. More importantly, this trial did not achieve justice for Larry King but instead validated a homophobic culture in which LGBT individuals—including children—are endangered.

64. Lee, *supra* note 5, at 543.

65. See, e.g., Lee, *supra* note 63; Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1011 (2003).

66. Strader et. al, *supra* note 3, at 1475 (stating “King was a self-identified gay student who sometimes wore jewelry and eye makeup to school and, according to those who knew him, was possibly transgender”).

67. *Id.* at 1482.

68. *Id.*

69. *Id.* at 1484.

70. *Id.*

71. Salerno et al., *supra* note 6, at 25.

72. *Id.*

The salience hypothesis fails in theory as it does in practice. In theory, the use of LGBT panic defenses is supported—for the purposes of making LGBT biases salient to *reduce* bias—though it is acknowledged that this strategy only impacts what researchers call “low-prejudice” individuals.⁷³ In studies of racial bias, these “low-prejudice” individuals are those that score notably lower on mechanisms created to identify implicit racial bias.⁷⁴ Importantly, both “medium-prejudiced” individuals and “high-prejudiced” individuals react no differently when race is made salient. Thus, supporters of the salience theory are making two significant leaps. First, they assume that low-prejudiced individuals will react similarly when faced with LGBT biases as they do when faced with racial biases. Second, they assume that low-prejudiced individuals will be prevalent enough on juries to be able to counter the use of the LGBT panic defenses. This reasoning is poor. In geographic areas particularly prone to LGBT violence, it is less likely that low-prejudiced individuals will serve on juries.⁷⁵ Thus, this data supports the notion that the continued use of LGBT panic defenses cannot be defended. In a normative system, the possibility of achieving justice for LGBT victims of violence, abuse, and murder would not be left to chance or predicated on the mere hope that a single low-prejudiced juror will express sympathies in the courtroom.

V. THE PROBLEM WITH JURIES

The problem with asking juries to decide the outcomes of LGBT panic-based provocation defenses is rooted in a culture of pervasive homophobia. Jurors that possess biases against the LGBT community are likely to sympathize more with a defendant who killed a victim who may have made a homosexual advance than a defendant who killed under the same circumstances but was not the subject of a homosexual advance. The most recent social science research on this topic, released in February 2015, confirms this assumption.

A team of researchers sponsored by the University of Chicago crafted the latest of only three mock trial simulations ever performed to investigate jurors’ acceptance of the LGBT panic defense.⁷⁶ Unlike in the

73. Lee, *supra* note 5, at 536.

74. *Id.*

75. See, e.g., Brynn Tannehill, *Ohio and the Epidemic of Anti-Transgender Violence*, HUFFINGTON POST (Feb. 20, 2015), http://www.huffingtonpost.com/brynn-tannehill/ohio-and-the-epidemic-of-_b_6720892.html.

76. Salerno et al., *supra* note 6, at 25.

two mock trials that came before it, the University of Chicago simulation accounted for results based on both a general provocation defense as well as a specifically LGBT-based provocation defense, holding all other case facts constant.⁷⁷ This practice ensured accurate determinations of homophobic juror bias. Thus, this study serves as “the first direct test of the effectiveness of [LGBT] panic defense[s] over an otherwise identical provocation defense.”⁷⁸ The results of this experiment confirm the problem of juror bias. The Chicago researchers demonstrated that politically conservative jurors—but not politically liberal jurors—are less morally outraged by a defendant who offers a gay-panic defense relative to an otherwise identical provocation defense that does not include a same-gender sexual advance, ultimately making them more likely to downgrade the defendant’s charge from murder to manslaughter.⁷⁹ This study confirms that gay panic defenses are successful when jury members possess implicit bias against LGBT victims.⁸⁰

LGBT jury bias may be even worse in cases that involve a transgender-identifying victim, like that of seventeen-year-old Gwen Araujo. In 2012, researchers from the University of California at Davis found that, while national attitudes toward transgender people are strongly correlated to national attitudes toward gay, lesbian, and bisexual individuals, attitudes toward transgender people were significantly more negative than attitudes toward sexual minorities.⁸¹ Moreover, these negative feelings were more negative among heterosexual men than women.⁸² The University of California researchers used regression analysis to show that these negative attitudes toward LGBT individuals were associated with “endorsement of a binary conception of gender; higher levels of psychological authoritarianism, political conservatism, . . . anti-egalitarianism, . . . (for women) religiosity; and lack of personal contact with sexual minorities.”⁸³

As confirmed by the recent research produced by both the University of Chicago and the University of California, it would be a literal danger to allow perpetrators of LGBT violence to continue using

77. *Id.*

78. *Id.* at 30.

79. *Id.*

80. *Id.*

81. Aaron T. Norton & Gregory M. Herek, *Heterosexuals’ Attitudes Toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, 68 *SEX ROLES* 738 (June 2013).

82. *Id.*

83. *Id.*

LGBT panic defenses. This defense allows discriminatory jurors to excuse violence against sexual and gender minorities based on their own subjective biases. These biases may stem from every facet of a juror's identity, including political and religious background. Our justice system cannot allow a perpetrator of LGBT violence to be convicted of murder in one state and manslaughter in another simply because of the homophobic and transphobic biases of jury members.

VI. CONSEQUENCES OF LGBT PANIC DEFENSES ON LGBT CITIZENS

LGBT panic defenses present serious consequences for the LGBT community, including the double victimization of sexual and gender minorities, the blaming of LGBT people for their own murders, and the potential for these defenses to be applied by manipulative defendants. Ultimately, all of these outcomes result in the legal system's promulgation of a homophobic and transphobic culture that contributes to the continued persecution and endangerment of LGBT Americans.

In cases where a defendant cries LGBT panic—and in turn receives a lesser verdict and sentence—the justice system has twice victimized the target of LGBT violence.⁸⁴ First, LGBT targets are victimized by the physical act(s) of violence committed against them; subsequently, they are victimized again by a legal system that denies them justice by allowing their attackers to use defenses like provocation to excuse their crime. Second, victims of LGBT-motivated violence are subjected to a form of legally sanctioned “victim blaming.”⁸⁵

Victim blaming is problematic, because it contributes to “the perception that such crimes are not unanimously condemned,” which has the potential to encourage further acts of violence against the LGBT community.⁸⁶ Victim blaming is so pervasive in our legal system that even the act of charging an individual with an LGBT-motivated hate crime can surprise justice officials. For example, in a pretrial hearing for the murder of a gay American named Daniel Wan, presiding Judge Daniel Futch commented to the prosecutor, “That’s a crime now, to beat up a homosexual?”⁸⁷ Legal scholar Joseph Williams demonstrates the discriminatory nature of the victim-blaming phenomenon:

84. Christopher J. Lyons, *Stigma or Sympathy? Attributions of Fault to Hate Crime Victims and Offenders*, 69 SOC. PSYCHOL. Q. 39-40 (2006).

85. *Id.*

86. *Id.*

87. Williams, *supra* note 1, at 1156.

To put it differently, imagine the foreman rising from the jury bench to deliver the following verdict: “We find the defendant ‘not guilty’ of first degree murder, not because we are not convinced that he is the killer, but because the deceased is Hispanic, and we therefore cannot conclude that his killing was entirely blameworthy. We therefore find the defendant guilty merely of voluntary manslaughter.”⁸⁸

Williams points out that most people would react negatively to this hypothetical decision as something that viscerally affronts one’s sense of “civilization and human decency.”⁸⁹ Williams then asks his audience to substitute the word “gay” for the word “Hispanic” to help understand precisely how LGBT panic defenses operate to blame LGBT victims.

Allowing LGBT panic defenses also creates opportunities for perpetrators of violent crime to manipulate the criminal justice system in their favor. Specifically, a perpetrator can cry LGBT panic regardless of whether the victim’s sexual or gender identity actually had anything to do with the crime committed. The more these panic defenses are presented by the media as excuses for crime, the more likely it may be that defendants and their attorneys use the LGBT panic defenses in creatively manipulative ways. By allowing an entirely subjective defense such as LGBT panic, our legal system is unable to uniformly prevent its abuse.

VII. LEGISLATIVE OR ABA ACTION REQUIRED TO ELIMINATE LGBT PANIC

There are two ways in which LGBT panic-based defenses might be eliminated: first, through the passage of state legislation barring the defense; and second, through the implementation of an American Bar Association (ABA) professional ethics requirement disallowing attorneys to use the defense in practice.

California’s adoption of AB 2501 illustrates how legislative action could remedy the problem of LGBT panic defenses.⁹⁰ In 2014, California’s State Assembly passed this bill by a vote of 50-10. Once authorized by Governor Brown, AB 2501 banned the use of LGBT panic defenses from being applied in California criminal courts. The new law, which amended Section 192 of the California Penal Code, was written to prevent subjective discrimination against the LGBT community and achieved this in two parts.⁹¹ First, it defined “reasonable” for the jury:

88. *Id.* at 1155-56.

89. *Id.* at 1156.

90. Assemb. B. 2501, 2014 Leg., Reg. Sess. (Cal. 2014).

91. *Id.*

For purposes of determining sudden quarrel or heat of passion . . . the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted non-forcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.⁹²

Second, AB 2501 defined "gender" inclusively, in order to prevent ambiguity from circumventing the purpose of the legislation: "For purposes of this subdivision, "gender" includes a person's gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person's gender as determined at birth."⁹³ Together, the provisions of AB 2501 protect victims of LGBT-based hate crimes in that they require acts of violence against sexual and gender minorities to be prosecuted like those perpetrated against heterosexual and cisgender citizens.

Though California is one of only two states to have passed specific legislation to ban LGBT panic defenses, other states, too, have passed legislation that effectively limits the availability of these panic defenses. For example, Massachusetts has rejected LGBT panic as the foundation for an insanity defense, and in some parts of Pennsylvania, defendants may not introduce evidence of their own psychosexual history to establish a basis for LGBT panic.⁹⁴ Though the possibility of state movements following California's lead are uncertain, legislatures across the nation should be encouraged to think about changing their respective criminal codes.

Alternately, the ABA may offer another way to prevent the use of LGBT panic defenses. This may serve as an easier route to effect change because the ABA has already publicly come out against the use of LGBT panic defenses and called for bans on their use.⁹⁵ In 2013, the ABA House of Delegates adopted the following policies on LGBT panic, urging governments to

[T]ake legislative action to curtail the availability and effectiveness of the "gay panic" and "trans panic" defenses, which seek to partially or

92. *Id.*

93. *Id.*

94. *See* Commonwealth v. Carr, 580 A.2d 1362, 1363 (Pa. Super. Ct. 1990); Commonwealth v. Doucette, 462 N.E.2d 1084, 1097 (Mass. 1984).

95. *ABA House of Delegates Adopts Policies on 'Gay Panic' Defense, Genocide, Mental Health*, AM. B. ASS'N (Aug. 13, 2013), http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/aba_house_of_delegat7.html.

completely excuse crimes such as murder and assault on the grounds that the victim's sexual orientation or gender identity is to blame for the defendant's violent reaction. Remedial legislation should specify that neither a non-violent sexual advance nor the discovery of a person's sex or gender identity constitutes legally adequate provocation to mitigate the crime of murder to manslaughter, or to mitigate the severity of any non-capital crime.⁹⁶

Though the ABA calls on the government to curtail the use of LGBT panic defenses, the ABA itself could prevent their use. The ABA already imposes standards of ethics and responsibility on practicing attorneys. It could therefore include a provision within its codes that alerts attorneys that LGBT panic defenses violate Bar Association standards of conduct. Alternately, to receive ABA admission, attorneys could be asked to affirm that they will not utilize LGBT panic defense in their respective practices of law. In this way, the ABA could prevent the use of LGBT panic defenses by implementing a policy it has already publicly endorsed.

LGBT panic defenses are a discriminatory means to excuse what should be understood as hate crimes, as well as why they must be eliminated. Their use has shown just how prejudiced Americans are against sexual and gender minorities, using research provided by the Universities of Chicago and California, and how these prejudices can effectively terrorize entire communities of LGBT individuals, as articulated by Judith Butler. The consequences of allowing these defenses are great and result in the overall devaluing of the lives of LGBT victims.

VIII.A CALL FOR LGBT COMMUNITY INPUT

What this text has not addressed—due to practical constraints—is the way in which the conversation around LGBT panic defenses has existed without input, guidance, or engagement with the LGBT community. The legal community has left the LGBT community out of the conversation regarding what to do about LGBT panic defenses when LGBT individuals, as the victims of these defenses, should be the first to have an opportunity to offer insights on this question. This exclusion is indicative of the pervasive exclusion experienced by sexual and gender minorities across the nation. As a member of this community, the author of this text echoes the voices of many sexual and gender minorities by

96. *Id.*

asserting that the LGBT community does not want LGBT panic defenses to be available to defendants in the criminal courtroom. Going forward, to address the future elimination of LGBT panic defenses, the legal community should engage with the LGBT community in order to provide for a solid foundation upon which to unite against the continued use of these defenses.