
The Gay Panic Defense

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In this Article, Professor Lee examines the use of gay panic defense strategies in the criminal courtroom. “Gay panic” refers to the situation when a heterosexual man charged with murdering a gay man claims he panicked and killed because the gay man made an unwanted sexual advance upon him. Professor Lee argues that gay panic arguments are problematic because they reinforce and promote negative stereotypes about gay men as sexual deviants and sexual predators. Gay panic arguments are also troubling because they seek to capitalize on unconscious bias in favor of heterosexuality, which is prevalent in today’s heterocentric society. In light of such concerns, most critics of the “gay panic defense” have proposed that judges or legislatures bar gay panic arguments from the criminal courtroom. Professor Lee takes a contrary position and argues that banning gay panic arguments from the criminal courtroom is not the best way to undermine the damaging effects of such arguments, and may have the unintended consequence of bolstering their

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corrosive potential. Rather than precluding defendants from making gay panic arguments, Professor Lee argues that the criminal courtroom is the place where such arguments can and should be aired and battled.

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On February 12th, an openly gay 15-year-old boy named Larry who was an eighth-grader in Oxnard, California was murdered by a fellow eighth-grader named Brandon. Larry was killed because he . . . was gay. Days before he was murdered, Larry asked his killer to be his Valentine And somewhere along the line the killer Brandon got the message that it's so threatening and so awful and so horrific that Larry would want to be his Valentine that killing Larry seemed to be the right thing to do. And when the message out there is [that it is] so horrible . . . to be gay you can be killed for it, we need to change the message.

Ellen DeGeneres (Feb. 29, 2008)¹

INTRODUCTION

Americans today have mixed feelings about homosexuality.² A 2007 Gallup/USA poll found that while 48% of those polled felt homosexuality was an acceptable alternative lifestyle, 46% felt the opposite way.³ Another 2007 poll found that 51% of those polled thought homosexual behavior is morally wrong, and only 35% felt homosexual behavior is acceptable.⁴ Americans are also deeply divided over whether gays and lesbians should be allowed to marry.⁵

¹ DeGeneres spoke about the killing of Lawrence King on the Ellen DeGeneres show during an opening segment on February 29, 2008. For footage of this clip see The Ellen DeGeneres Show, *A Tragedy That Should Never Have Happened*, http://ellen.warnerbros.com/2008/07/a_tragedy_that_should_never_ha.php (last visited Oct. 16, 2008).

² Toni Lester, *Adam and Steve v. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL'Y & L. 253, 254 (2006) (noting that "[w]hile studies indicate that most Americans support the adoption of laws that grant gays the most basic of civil rights, like the right to the kind of privacy in the bedroom that *Lawrence v. Texas* envisioned, many also believe that homosexuality is immoral").

³ Gallup & USA Today, iPOLL Databank, *Gallup/USA Today Poll* (Sept. 7-8, 2007), available at <http://www.ropercenter.uconn.edu/ipoll.html> (basing poll on telephone interviews with national adult sample of 1,028 individuals).

⁴ Quinnipiac Univ. Polling Inst., Polling the Nations, *Quinnipiac University Poll* (Aug. 8, 2007), available at <http://poll.orpub.com> (reflecting views of Florida voters). The same poll found similar results in Pennsylvania and Ohio. *Id.* (finding 53% of Pennsylvania voters felt homosexual behavior morally wrong versus 34% who found it acceptable, and 55% of Ohio voters felt homosexual behavior morally wrong versus 30% who found it acceptable).

⁵ According to a 2007 survey by the Pew Forum on Religion and Public Life, 55% of Americans oppose same-sex marriage while 36% percent support it. Press Release,

While there is more acceptance of lesbians and gays today compared to just a few years ago,⁶ gays and lesbians still experience a significant amount of prejudice and discrimination.⁷ Approximately three-quarters of gays and lesbians have been the target of verbal abuse and approximately one-third have been the target of physical violence based on their sexual orientation.⁸ Violence against gays and lesbians

Pew Research Ctr. for the People & the Press & Pew Forum on Religion & Public Life, Clinton and Giuliani Seen as Not Highly Religious; Romney's Religion Raises Concerns 15 (Sept. 6, 2007), available at <http://people-press.org/reports/pdf/353.pdf>. 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, at A1, available at <http://www.nytimes.com/2004/05/18/national/18MARR.html?pagewanted=1&ei=5070&en=727bcbb424713e7a&ex=1225339200> (last visited Oct. 16, 2008); *Move to Ban Gay Marriage Is Killed in Massachusetts*, WASH. POST, June 15, 2007, at A12, 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, *California Supreme Court Overturns Gay Marriage Ban*, L.A. TIMES, May 16, 2008, at 1, available at <http://www.latimes.com/news/local/la-me-gaymarriage16-2008may16.0,6182317.story>. 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, <http://www.usnews.com/articles/news/national/2008/05/15/california-court-legalizes-same-sex-marriage.html>; 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. As of the writing of this Article, Massachusetts and Connecticut are the only two states in the nation that allow same-sex marriage.

⁶ See Jeni Loftus, *America's Liberalization of Attitudes Toward Homosexuality, 1973 to 1998*, 66 AM. SOC. REV. 762, 765 (2001).

⁷ See HENRY J. KAISER FAMILY FOUND., PUBL'N. NO. 3194, *INSIDE-OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC'S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION* 19 (2001), available at <http://www.kff.org/kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-Sexual-Orientation-Report.pdf>.

⁸ *Id.*; see also Dominic J. Parrott & Amos Zeichner, *Effects of Sexual Prejudice and Anger on Physical Aggression Toward Gay and Heterosexual Men*, 6 PSYCHOL. OF MEN & MASCULINITY 3, 3 (2005) ("Alarming, over one third of gay men and lesbians have been victims of interpersonal violence, and up to 94% report some type of victimization related to their sexual orientation."). In 2006, 1,415 of the 9,080 hate

is a problem even in cities with sizable gay and lesbian populations. In a survey of young adults in the San Francisco Bay Area, “almost 1 in 5 men admitted to physically assaulting or threatening people whom they believed were homosexual.”⁹

When a heterosexual man kills a gay man and faces a murder charge, a common defense strategy is to use the concept of “gay panic” to explain the killing.¹⁰ There is no officially recognized “gay panic” defense, but many use the term to refer to defense strategies that rely on the notion that a criminal defendant should be excused or justified if his violent actions were in response to a (homo)sexual advance.¹¹ Such strategies include using gay panic to bolster claims of insanity, diminished capacity, provocation, and self-defense. In this paper, I use the term “gay panic defense” as shorthand for these strategies.

Initially, the term “homosexual panic” was used to promote “the idea that a latent homosexual — and manifest ‘homophobe’ — can be

crimes reported to the FBI were based on the victim’s sexual orientation. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, 2006 HATE CRIME STATISTICS 1 (2007), available at <http://www.fbi.gov/ucr/hc2006/table1.html> (last visited June 17, 2008). In 2007, the number of reported bias incidents nationwide fell 1.3 percent. *Hate Crimes: Good news on bias incidents based on race and religion. Bad news on those based on sexual orientation*, WASH. POST, Nov. 5, 2008, at A22. This decrease was driven by a 4.2 percent reduction in the number of reported bias crimes based on religion and a 3.2 reduction in those based on race. *Id.* These decreases were accompanied by a 5.5 percent increase in reported hate crimes based on the victim’s perceived sexual orientation. *Id.*

⁹ Karen Franklin & Gregory M. Herek, *Homosexuals, Violence Toward*, in 2 ENCYCLOPEDIA OF VIOLENCE, PEACE, CONFLICT 139, 144 (Lester Kurtz & Jennifer Turpin eds., 1999).

¹⁰ See Duncan Osborne, *The Homosexual Panic Defense: Are Juries Really Buying It?*, LGNY NEWS, Nov. 4, 1999, at 4; see also Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY 81, 81-82 (1992) [hereinafter Comstock, *Dismantling the Homosexual Panic Defense*]; *Developments in the Law — Sexual Orientation and the Law*, 102 HARV. L. REV. 1519, 1542-46 (1989); 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, 726-32 (1995) [hereinafter Dressler, *When “Heterosexual” Men Kill “Homosexual” Men*]; Robert Mison, *Homophobia in Manslaughter: The Homosexual Advance As Insufficient Provocation*, 80 CAL. L. REV. 133, 133-34 (1992); Martha C. Nussbaum, *“Secret Sewers of Vice”: Disgust, Bodies, and the Law*, in THE PASSIONS OF LAW 30, 35-38 (Susan Bandes ed., 1999); 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, 201-03, 210-13 (2000); Kara S. Suffredini, Note, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 279, 302 (2001).

¹¹ Gay panic arguments have been called the Homosexual Advance Defense, the Homosexual Panic Defense, and the Homosexual Rage Defense.

so upset by a homosexual's advances to him that he becomes temporarily insane, in which state he may kill the homosexual."¹² More recently, the term "gay panic" has been deployed to refer to the alleged loss of self-control provoked in a heterosexual man by a gay man's unwanted sexual advance.

In this Article, I examine the use of gay panic defense strategies in the criminal courtroom. I argue that such strategies are problematic because they reinforce and promote negative stereotypes about gay men as sexual deviants and sexual predators.¹³ Gay panic defense strategies are also troubling because they seek to capitalize on unconscious bias in favor of heterosexuality that is prevalent in today's heterocentric society.¹⁴

Most critics of the gay panic defense have proposed that judges or legislatures should bar gay panic arguments from the criminal courtroom.¹⁵ I take a contrary position and argue that banning gay

¹² *Parisie v. Greer*, 705 F.2d 882, 893 (7th Cir. 1983).

¹³ See Gregory M. Herek, *The Social Context of Hate Crimes: Notes on Cultural Heterosexism*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 96 (1992) (noting that gay sexuality is stereotyped as "pathological, predatory, and compulsively promiscuous"); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 541-44 (1992) (discussing portrayals of gay people as child molesters and predatory, promiscuous sex addicts); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 66 n.170 (1995) (discussing images of gay men as sexual predators who exploit children, lust after non-gay men, and are indiscriminately promiscuous with each other); Suffredini, *Pride and Prejudice*, *supra* note 10, at 312 (noting that "men who engage in homosexual behavior are stereotyped as sexual predators"); see also Darren Lenard Hutchinson, "Gay Rights" for "Gay Whites?": *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1382 (2000) (discussing "gay as white and privileged" stereotype); Darren Lenard Hutchinson, *Out yet Unseen: A Racial Critique of Gay and Lesbian Theory and Political Discourse*, 29 CONN. L. REV. 561, 608-09 (1997) (discussing "gay as promiscuous" stereotype and "gay as white and wealthy" stereotype).

¹⁴ See Kathy Miriam, *Toward a Phenomenology of Sex-Right: Reviving Radical Feminist Theory of Compulsory Heterosexuality*, 22 HYPATIA 210, 211 (2007) (noting that "most people cleave to the idea that heterosexuality is natural"); Mison, *supra* note 10, at 147 ("American society is heterocentric in that it is dominated by and centers around a heterosexual viewpoint."); see also DEREK MCGHEE, *HOMOSEXUALITY, LAW AND RESISTANCE* 3 (2001) ("[H]eteronormativity is . . . the term used to specify the tendency in the contemporary Western sex-gender system to view heterosexual relations as the norm, and all other forms of sexual behaviour as deviations from this norm.") (citation omitted); Tiina Rosenberg, *Out Of the National Closet: Show Me Love*, in *SEX, BREATH, AND FORCE: SEXUAL DIFFERENCE IN A POST-FEMINIST ERA* 111 (Ellen Mortensen ed., 2006) ("Heteronormativity is the supposition that everyone is heterosexual, and that the natural way of life is heterosexual.").

¹⁵ See Mison, *supra* note 10, at 176-77 (arguing that judges should rule as matter

panic arguments from the criminal courtroom is a bad idea. When gay panic arguments are forced to take a covert turn — when they are not explicit or out in the open — they may actually be more effective than they would be if out in the open. Social science research on implicit bias suggests that making race salient can diminish the otherwise automatic effect of racial stereotypes on perception and beliefs.¹⁶ Conversely, pretending that race is irrelevant allows unconscious racism to operate without any constraints.¹⁷ It appears the same is true of other types of bias, including sexual orientation bias.¹⁸ Rather than precluding defendants from making gay panic arguments, I argue that the criminal courtroom is the place where such arguments can, and should, be aired and battled.

This Article proceeds in four parts. In Part I, I review the historical origins of the concept of gay panic. Gay panic — the idea that a non-violent homosexual advance by a gay man can cause a heterosexual man to panic and respond with fatal violence — has roots in theories about latent homosexuality as a mental disorder. The term “homosexual panic” was coined in 1920 by a psychiatrist who saw a pattern in many of his patients who self-identified as heterosexual but were attracted to individuals of the same sex.¹⁹ These patients experienced a heightened sense of anxiety in same-sex environments between their feelings of attraction to others of the same sex and what they felt were the socially acceptable feelings they were supposed to have.²⁰

In the 1960s, criminal defense attorneys representing male defendants charged with murdering male victims began using the idea of gay panic to explain why decision makers should find their clients not guilty.²¹ They argued that their clients panicked and killed only

of law that non-violent homosexual advances do not constitute legally adequate provocation); Victoria L. Steinberg, Book Note, *A Heat of Passion Offense: Emotions and Bias in “Trans Panic” Mitigation Claims*, 25 B.C. THIRD WORD L.J. 499, 523-24 (2005) (reviewing MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY* (2004)) (arguing that judges should not allow gay or trans panic arguments); Suffredini, *supra* note 10, at 309-13 (arguing that use of Homosexual Panic Defense should either be limited by application of new evidentiary rules or eliminated altogether). *But cf.* Dressler, *When “Heterosexual” Men Kill “Homosexual” Men*, *supra* note 10, at 726-29 (arguing against Mison’s proposal).

¹⁶ See *infra* text accompanying notes 378-419.

¹⁷ See *infra* text accompanying notes 378-419.

¹⁸ See *infra* text accompanying notes 425-37.

¹⁹ EDWARD J. KEMPF, *PSYCHOPATHOLOGY* 477 (1921).

²⁰ *Id.* at 479.

²¹ Joshua Hammer, *The ‘Gay Panic’ Defense*, NEWSWEEK, Nov. 8, 1999, at 40, available at <http://www.newsweek.com/id/90113/page/2> (last visited Oct. 16, 2008) (noting that gay panic defense “often resulted in acquittals or reduced charges in the

after the victim made a homosexual advance.²² I explain why importing the concept of Homosexual Panic Disorder into the criminal arena to excuse or justify the killing of a gay man is problematic.

In Part II, I first examine the doctrinal underpinnings of the gay panic defense. Initially, heterosexual male defendants charged with murdering gay men linked claims of gay panic to criminal law defenses based on mental deficiency, such as temporary insanity or diminished capacity. More recently, such defendants have used gay panic to bolster claims of provocation and self-defense. I also examine the “trans panic” defense,²³ a fairly recent modification of the gay panic defense under which a male murder defendant charged with murdering a male-to-female transgender individual claims that he panicked upon learning that his sexual partner was biologically male, not female. Just as the defendant claiming gay panic tries to blame the gay male victim for his own death (“if he hadn’t made a pass at me, I wouldn’t have killed him”), the defendant claiming trans panic tries to blame the transgender victim by claiming the victim’s deceit provoked him (“if he hadn’t lied about being a woman, I wouldn’t have killed him”).²⁴ Gay panic arguments linked to claims of mental defect have largely been unsuccessful,²⁵ whereas gay panic arguments linked to claims of provocation have been relatively successful.²⁶

Next, I theorize about why gay panic provocation arguments have enjoyed relative success in the criminal courtroom. First, lenient verdicts in gay panic provocation cases may reflect the jury’s view that it is reasonable for a heterosexual man to react violently to a non-violent homosexual advance. Given that reasonableness in the context of provocation doctrine is usually understood to mean typicality, if the jury believes that the average man would have been provoked by a non-violent homosexual advance, then the jury might conclude that the defendant was reasonably provoked. I question whether the current understanding of reasonableness as that which is typical makes sense.

Related to the above argument, lenient verdicts in gay panic provocation cases may be a reflection of dominant norms of

murders of homosexuals during the 1960s and 1970s”).

²² Suffredini, *supra* note 10, at 292 (noting that first reported judicial mention of homosexual panic disorder came in 1967 case of *People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967)).

²³ See Steinberg, *supra* note 15, at 501 (arguing that judges should decline to instruct juries on manslaughter when trans panic is claimed because trans panic does not fulfill requirements of heat of passion).

²⁴ See *infra* text accompanying notes 211-34.

²⁵ See *infra* text accompanying notes 118-32.

²⁶ See *infra* text accompanying notes 140-210.

masculinity that legitimize the use of physical violence in response to non-violent homosexual advances. Men in this society are supposed to be attracted to women, not other men. Men in this society are supposed to be the sexual aggressors, not the ones aggressed upon. When a heterosexual man is the object of a homosexual advance, the tables are turned. The heterosexual man's masculinity is called into question. He is not the sexual aggressor in this situation; instead, he is the target. In rejecting the homosexual advance in a physically violent manner, the heterosexual man attempts to reclaim his masculinity in a socially acceptable way.

Additionally, lenient verdicts in gay panic cases may reflect the influence of negative stereotypes about gay men as sexual deviants and sexual predators. Despite positive advancements in the recognition of civil rights for gays and lesbians, negative stereotypes about homosexuals still persist. In gay panic cases, the defendant seeks to use such stereotypes to his advantage.

In Part III, I strike a different path from that of other critics of the gay panic defense. Other critics have proposed essentially the same remedy: barring defendants from arguing gay panic. In contrast, I argue that judges should as a general rule allow such arguments as long as some evidence supports the traditional criminal law defense that the defendant is asserting through the gay panic lens. This is the same standard many jurisdictions currently use to decide whether a trial court must allow a proffered defense.²⁷

To bolster this potentially unpopular position, I start with a micro-argument: attempts to ban gay panic from the criminal courtroom will not work because gay panic arguments can and will be made *sub rosa*. I use the Matthew Shepard case to show how defendants can still promote gay panic arguments even when a judge formally bans a gay panic defense. In the Shepard case, the judge ruled against the defense presenting a "homosexual rage" defense.²⁸ Nonetheless, the defense promoted a gay panic argument by calling two witnesses to the stand who testified that Shepard made sexual advances upon them, which made them uncomfortable.²⁹ The defense also included reference to Shepard's alleged homosexual advance upon defendant Aaron McKinney in closing arguments.³⁰

I then turn to several macro-arguments to support my theory that banning gay panic defense strategies from the criminal courtroom is a

²⁷ See *infra* text accompanying notes 470-80.

²⁸ See *infra* text accompanying notes 285-88.

²⁹ See *infra* text accompanying notes 289-305.

³⁰ See *infra* text accompanying note 307.

bad idea. Three broader frameworks support my position: (1) First Amendment theory; (2) recent social science research on implicit bias; and (3) institutional competency arguments.

First Amendment scholars often argue that banning offensive speech is not good policy because this merely allows bad ideas to fester below the surface.³¹ Open discussion of pernicious ideas is a better way to deal with such ideas than banning such discussion outright. Along the same lines, banning gay panic arguments from the criminal courtroom is not a good idea because this simply allows bias against homosexuality to fester in the subconscious realm. Open discussion about whether it is reasonable for a heterosexual man to respond to a non-violent homosexual advance with fatal physical violence is a better way to ensure that such bias is mediated by cognitive processes.

Recent social science research indicates that despite a marked decline over the last several decades in self-reported expressions of racial bias, implicit bias is still very prevalent today.³² Even individuals who self-identify as egalitarian tend to respond more negatively toward Blacks than Whites when racial stereotypes are activated and there is little or no time to consciously recognize that such stereotypes have been activated.³³ Several studies, however, have found that when race is made salient, most individuals are able to consciously mediate their responses and, instead of invoking automatic stereotype-congruent responses, respond in egalitarian ways.³⁴

I suggest that if making race salient — bringing race to the surface and making people conscious of the racial aspects of the situation — helps individuals to act in less biased ways, the same may also be true when sexual orientation is made salient.³⁵ One recent study, which measured the effect of making non-prejudiced norms about sexual orientation salient, provides support for this position.³⁶ This study found that hearing another person publicly express positive opinions about gay-related issues influenced subjects to express positive

³¹ See *infra* text accompanying note 337.

³² See *infra* text accompanying notes 351-78.

³³ See *infra* text accompanying notes 351-78.

³⁴ See *infra* text accompanying notes 378-419.

³⁵ Here, I am *not* making the claim that gays and lesbians are the “same as” Blacks and other racial minorities. See Catherine Smith, *Queer as Black Folk?*, 2007 Wis. L. REV. 379, 382 (2007) (critiquing mainstream lesbian, gay, bisexual, and transgender or LGBT political advocacy that invokes “same as” mantra by comparing LGBT rights to Black civil rights). Rather, I am merely suggesting that insights from social cognition research on race and implicit bias may suggest helpful ways to deal with sexual orientation bias against gays.

³⁶ See *infra* text accompanying notes 426-37.

opinions about gay-related issues themselves, even when completing a questionnaire form in private.

Finally, I consider which institutional actor — the legislature, the judge, or the jury — is best suited to determine whether to grant leniency to the criminal defendant who claims gay panic. I argue that the legislature is the least competent to make this determination because it cannot imagine all possible factual scenarios in advance. The legislature can only enact one-size-fits-all rules, which are particularly ill suited for criminal matters where factual context is critical to a fair adjudication of the defendant's guilt or innocence.

As between judge and jury, I argue that a jury of twelve individuals is better suited to weigh the issues when a heterosexual man charged with murdering a gay man claims gay panic. At least with a twelve-person jury, chosen after each side has had a chance to strike jurors on either extreme, there is a good chance that some jurors will have a positive attitude about homosexuality and express that attitude, making non-prejudiced norms about sexual orientation salient.

It is also better to let twelve individuals deliberate the merits of such claims than to leave this power in the hands of one lone judge. This is because questions such as whether it is reasonable for a heterosexual man to be provoked into a heat of passion by a gay man's non-violent sexual advance, or whether it is likely that a non-violent sexual advance caused the defendant to go temporarily insane, are the kinds of matters about which reasonable minds may disagree. In the end, our society will be better off if juries representing the conscience of the community decide these volatile issues. If we want to rid society of the cultural norms that make gay panic arguments persuasive, we need to openly battle the assumptions that underlie such claims. The best way to engage in this battle is to allow defendants to raise such arguments, make sure prosecutors expose the flaws in such arguments, and encourage jurors to deliberate consciously on these arguments and their underlying assumptions.

In Part IV, I offer some tentative suggestions for reform. To encourage jurors to leave stereotypes and prejudice outside the jury room, I suggest that prosecutors adopt a two-pronged strategy. On the front end, during jury selection, the prosecutor should request specific questions aimed at both reminding egalitarian jurors of their commitment to fairness and equality and ferreting out closet homophobes. During opening statements, the prosecutor should make sexual orientation salient by warning jurors that the defense may try to appeal to stereotypes about gay men as sexual deviants and sexual predators. The prosecutor should ask jurors to guard against

any unconscious bias they might have against the victim on the basis of sexual orientation.

On the back end, after the jury has heard all the evidence and before it retires to deliberate, prosecutors should suggest during closing arguments that jurors engage in sexual orientation and gender switching by imagining the same facts but with the victim a female making a sexual advance upon a gay man who responds by killing her. The prosecutor should also ask the trial court to give a role-reversal jury instruction. This jury instruction would warn jurors against allowing sexual orientation bias to influence their decision-making and encourage jurors to imagine the facts of the case with the defendant as a gay man (rather than a heterosexual man) who kills a heterosexual woman (rather than a gay man) after she makes a non-violent sexual advance upon him. The judge could also instruct jurors to imagine the same facts but with the defendant as a heterosexual woman who kills a heterosexual man after he makes a non-violent sexual advance upon her. The judge would tell jurors that if they come to a different conclusion about the culpability of the defendant in either of these role-reversal exercises, they should go back to the case to make sure they have not allowed sexual orientation bias to influence their decision-making.

I. HISTORICAL ORIGINS OF THE CONCEPT OF GAY PANIC

The use of gay panic in murder cases has its roots in theories about latent homosexuality as a mental disorder. The term “homosexual panic” was coined by Dr. Edward Kempf, a clinical psychiatrist, in 1920.³⁷ After treating many patients who exhibited similar characteristics, Kempf came to the conclusion that certain troubled individuals who thought of themselves as heterosexuals were actually latent homosexuals.³⁸ These individuals suffered from an internal conflict between their feelings of attraction to individuals of the same sex and societal views of such feelings as perverse.³⁹ They also experienced a heightened sense of anxiety in same-sex environments, caused by this tension between their true feelings of attraction to members of the same sex and what they perceived as the socially

³⁷ KEMPF, *supra* note 19, at 477; see also Comstock, *Dismantling the Homosexual Panic Defense*, *supra* note 10, at 82 (citing KEMPF, *supra* note 19, at 477).

³⁸ KEMPF, *supra* note 19, at 477-515.

³⁹ *Id.*

acceptable feelings they were supposed to have — attraction to members of the opposite sex.⁴⁰

According to Kempf, the male patient afflicted with homosexual panic would be attracted to same-sex associations and horrified by the amorous female.⁴¹ After heterosexual failure, the patient would become anxious, depressed, and sometimes suicidal.⁴² Interestingly, separation from an individual of the same sex to whom the patient was attracted, rather than a homosexual advance, would precipitate a panic state.⁴³

The Diagnostic and Statistical Manual of Mental Disorders, the official list of psychiatric disorders published by the American Psychiatric Association, listed “Homosexual Panic Disorder” in its 1952 edition, but the term has not appeared in that Manual since then.⁴⁴ Even in 1952, many of the standard psychiatric and psychological dictionaries did not recognize Homosexual Panic Disorder as a psychiatric disorder.⁴⁵

While Kempf’s original theory has been stretched almost beyond recognition in its use as a defense in the criminal courtroom today, modern support does exist for the idea that men who self-identify as heterosexual and express hostility toward gays may actually be latent homosexuals. In 1996, Henry Adams conducted a study to find out whether heterosexual men who exhibited strong anti-gay sentiments would be aroused by homosexual erotica.⁴⁶ Adams started by measuring sixty-four Caucasian male participants’ feelings toward gays.⁴⁷ All participants self-identified as heterosexual.⁴⁸ After evaluating their responses, Adams divided the participants into two groups which he labeled “homophobic” (those who seemed hostile toward gays) and “not homophobic” (those who were not hostile toward gays). He then placed a sensor on the penises of all the participants, and measured penile response to erotic videotapes involving heterosexuals, lesbians, and gay men engaging in sexual activity. Only the men in Adams’s homophobic

⁴⁰ *Id.*

⁴¹ *Id.* at 511.

⁴² *Id.*

⁴³ Comstock, *Dismantling the Homosexual Panic Defense*, *supra* note 10, at 87-88 (citing LELAND E. HINSIE & ROBERT J. CAMPBELL, *PSYCHIATRIC DICTIONARY* 348-49 (1970)).

⁴⁴ *Id.* at 83 (citation omitted).

⁴⁵ *Id.*

⁴⁶ Henry E. Adams et al., *Is Homophobia Associated With Homosexual Arousal?*, 105 *J. ABNORMAL PSYCHOL.* 440, 440 (1996); *see also* Michael Segell, *Homophobia Doesn’t Lie*, *ESQUIRE*, Feb. 1, 1997, at 35.

⁴⁷ Adams, *supra* note 46, at 441.

⁴⁸ *Id.*

category showed an increase in penile erection in response to male homosexual erotic stimuli.⁴⁹

Even if some self-identified straight men who express strongly negative feelings about homosexuality are actually latent homosexuals repressing their own homoerotic desires, the idea that gay panic should excuse the killing of a gay man is problematic for several reasons. First, treating gay panic as a mental disorder suggests that homophobia⁵⁰ linked to latent homosexuality is a mental illness.⁵¹

⁴⁹ *Id.* at 442-43. In contrast, heterosexual women do not appear to display the same kind of physiological bias against gay men as heterosexual men. Amanda L. Mahaffey et al., *Sex Differences in Affective Responses to Homoerotic Stimuli Evidence for an Unconscious Bias Among Heterosexual Men but Not Heterosexual Women*, 34 ARCHIVES OF SEXUAL BEHAV. 537, 543-44 (2005). In another study, Jeffrey Bernat measured physical aggression toward gay and straight individuals after self-identified heterosexual college males viewed a homoerotic videotape. Jeffrey A. Bernat, *Homophobia and Physical Aggression Toward Homosexual and Heterosexual Individuals*, 110 J. ABNORMAL PSYCHOL. 179, 179 (2001). Bernat found that after watching the video, the homophobic males were significantly more aggressive toward gay male opponents than the non-homophobic men. *Id.* at 185. It is not clear whether these men were actually unable to control their aggressive behavior or whether they simply chose not to do so.

⁵⁰ Critics of the term “homophobia” note that attaching the prefix “homo” to the word “phobia” suggests that individuals with negative attitudes about homosexuality are fearful of homosexuals when anti-homosexual sentiments are often driven more by prejudice than fear. See generally Colleen R. Logan, *Homophobia? No, Homoprejudice*, 31 J. HOMOSEXUALITY 31 (1996) (investigating nature of anti-homosexual responses in male and female undergraduate university students). Colleen Logan warns that “the continued use of homophobia as a descriptor for anti-homosexual responses may be seen by society as implicit permission to continue the oppression of homosexuals, excused by its being the result of inescapable fear.” *Id.* at 32. Similarly, Gregory Herek remarks, “Characterizing hostility toward homosexual persons in terms of a phobia implies that those attitudes are based upon an irrational fear, similar to the fear some people experience when confronted with snakes, spiders, or open spaces.” Gregory M. Herek, *Beyond “Homophobia”: A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, 10 J. HOMOSEXUALITY 1, 2 (1984). Stephanie Shields and Robert Harriman note:

The great difference between the unreasonable fear of spiders (or mutilation, snakes, etc.) and fear of homosexuality lies in the assignment of responsibility for such acquired pathologies. Whereas spider phobics typically accept responsibility for their fear and even seek treatment, homophobic do not. To the homophobic it is homosexual men who are “sick.”

Stephanie A. Shields & Robert E. Harriman, *Fear of Male Homosexuality: Cardiac Responses of Low and High Homonegative Males*, 10 J. HOMOSEXUALITY 53, 66 (1984); see also Darren Lenard Hutchinson, *Dissecting Axes of Subordination: The Need for a Structural Analysis*, 11 AM. U. J. GENDER SOC. POL'Y & L. 13, 15-16 (2002) [hereinafter Hutchinson, *Dissecting Axes of Subordination*] (differentiating “homophobia” which

Studies, however, indicate that negative attitudes about homosexuality tend to come from two sources: sexual conservatism and prejudice.⁵² Although some mental health practitioners might feel otherwise,⁵³ sexually conservative individuals and prejudiced individuals are not necessarily mentally ill.

The idea that homosexuality, latent or otherwise, is a mental illness has long been discredited. In December 1973, after a review of the scientific literature and consultation with experts in the field, the Board of Trustees for the American Psychiatric Association deleted homosexuality from the second edition of the Diagnostic and Statistical Manual of Mental Disorders.⁵⁴ The Board recognized that “[a] significant proportion of homosexuals are apparently satisfied with their sexual orientation, show no significant signs of manifest psychopathology . . . and are able to function quite effectively.”⁵⁵ The American Psychological Association followed suit in January 1975, adopting the following resolution: “Homosexuality per se implies no impairment in judgement [sic], stability, reliability, or general social and vocational capabilities; Further, the American Psychological Association urges all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations.”⁵⁶

Even though more than thirty years have passed since both the American Psychiatric Association and the American Psychological Association rejected the characterization of homosexuality as a mental illness, the idea that it might be normal for someone to be sexually attracted to another person of the same sex is not yet accepted universally. For example, the Boy Scouts of America, which boasts nearly 2.9 million youth members and more than 1.1 million adult

involves “pronounced emotional animus” and “heterosexism” which involves “institutionalized domination of gay, lesbian, bisexual, and transgender individuals”).

⁵¹ See SEXUAL ORIENTATION AND THE LAW 34 (Harvard Law Review eds., 1990).

⁵² See Thomas J. Ficarrotto, *Racism, Sexism, and Erotophobia: Attitudes of Heterosexuals Towards Homosexuals*, 19 J. HOMOSEXUALITY 111, 115 (1990).

⁵³ In 2005, some mental health practitioners began arguing that extreme forms of racism, homophobia, and other prejudice ought to be recognized by the American Psychiatric Association as mental disorders. Shankar Vedantam, *Psychiatry Ponders Whether Extreme Bias Can Be an Illness*, WASH. POST, Dec. 10, 2005, at A1.

⁵⁴ Am. Psychiatric Ass’n, *Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II*, 6th Printing, page 44, Position Statement (Retired), APA Document Reference No. 730008, at 2 (1973), available at http://www.psychiatryonline.com/DSMPDF/DSM-II_Homosexuality_Revision.pdf (last visited Oct. 21, 2008).

⁵⁵ *Id.*

⁵⁶ APA Online, APA Policy Statement: Discrimination Against Homosexuals, <http://www.apa.org/pi/lgbt/policy/discrimination.html> (last visited Oct. 28, 2008).

members,⁵⁷ openly prohibits gay males from membership in the organization because it believes “homosexual conduct is inconsistent with the traditional values espoused in the Scout Oath and Law.”⁵⁸ According to the Boy Scouts of America: “homosexual conduct is inconsistent with the requirement in the Scout oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed.”⁵⁹

Apparently, the Department of Defense also considers homosexuality a mental abnormality. In June 2006, a think tank at the University of California at Santa Barbara discovered a 1996 Department of Defense Instruction that classified homosexuality as a mental disorder, along with mental retardation, impulse control disorders, and personality disorders.⁶⁰ Both the American Psychiatric Association and the American Psychological Association wrote to the Department of Defense, pointing out that homosexuality is no longer regarded as a mental disorder and requesting that the Instruction be corrected.⁶¹ The Department of Defense subsequently released a

⁵⁷ Boy Scouts of Am., *BSA at a Glance*, <http://www.scouting.org/Media/FactSheets/02-501.aspx> (last visited Oct. 15, 2008).

⁵⁸ Press Release, Boy Scouts of Am., Boy Scouts of America Resolution (Feb. 6, 2002), available at <http://www.scouting.org/Media/PressReleases/2002/resolution.aspx> (last visited May 19, 2008).

⁵⁹ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 652 (2000). James Dale unsuccessfully attempted to challenge the constitutionality of the Boy Scouts of America’s anti-gay policy. Dale joined the Boy Scouts when he was eight years old and remained a Boy Scout until he turned 18. *Id.* at 644. Dale was an exemplary Scout and achieved the rank of Eagle Scout, one of the Boy Scouts’ highest honors, in 1988. *Id.* In 1989, Dale applied for adult membership in the Boy Scouts and a position as an assistant scoutmaster. The Boy Scouts approved Dale’s application for adult membership and made him an assistant scoutmaster. About this time, Dale left home to attend Rutgers University where he came out of the closet. He eventually became Vice President of the Rutgers University Lesbian/Gay Alliance. When the Boy Scouts of America found out that Dale was gay, they revoked his adult membership. Dale sued the Boy Scouts, arguing that they had violated New Jersey law prohibiting discrimination on the basis of sexual orientation in places of public accommodation. While the New Jersey Supreme Court agreed with Dale, the United States Supreme Court did not. In a closely divided 5-4 opinion, the Court in 2000 held that applying New Jersey’s public accommodation law to require the Boy Scouts to readmit Dale would violate the Boy Scouts’ First Amendment right of expressive association. *Id.*

⁶⁰ Press Release, Ctr. for the Study of Sexual Minorities in the Military, Lawmakers Dispute Pentagon Document Calling Gays Mentally Ill (June 20, 2006), available at http://www.palmcenter.org/press/dadt/releases/lawmakers_dispute_pentagon_document; see also DEP’T OF DEFENSE, INSTRUCTION NO. 1332.38 (Nov. 14, 1996).

⁶¹ Beyond Homophobia: A Weblog About Sexual Orientation, Prejudice, Science, and Policy by Gregory Herek, <http://www.beyondhomophobia.com/blog/2006/11/19/military-psychology/> (Nov. 19, 2006, 13:49 PST).

revised Instruction, which removed homosexuality from the category of mental disorders.⁶² Nonetheless, the Instruction still lists homosexuality as a “defect” along with dyslexia, motion sickness, enuresis (bed-wetting), and repeated venereal disease infections.⁶³

Another problem with using Kempf’s Homosexual Panic Disorder theory to support a mental defect defense in a murder case is that not one of Kempf’s patients was aggressive toward another because of a sexual advance.⁶⁴ Indeed, separation from an individual of the same sex to whom the patient was attracted would often cause the onset of “homosexual panic” and lead to increased passivity and an inability to function.⁶⁵ Moreover, if physical at all, Kempf’s patients tended to inflict punishment upon themselves, not others.⁶⁶ Adrian Howe observes:

[T]here was a considerable discrepancy between cases reported in the psychiatric literature and the cases involving immediate reaction or sudden panics described in the legal defences. Patients diagnosed with acute homosexual panic demonstrated a helplessness, passivity, and inability to be aggressive far removed from the picture of the explosively violent man constructed by lawyers deploying a HPD [Homosexual Panic Disorder] defence. The legal argument that this disorder was likely to result in extreme violence therefore had no psychiatric basis.⁶⁷

Similarly, Gary Comstock notes:

As a psychological disorder in which neither sexual advance to the patient by another person nor violent attack by the patient of another person are causal or symptomatic, acute homosexual panic would seem to be inappropriate as the basis of a legal defense for men who claim to have killed another man to ward off his sexual advance.⁶⁸

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See Comstock, *Dismantling the Homosexual Panic Defense*, *supra* note 10, at 84.

⁶⁵ See *id.* at 87-88 (citing LELAND E. HINSIE & ROBERT J. CAMPBELL, *PSYCHIATRIC DICTIONARY* 348-49 (1970)).

⁶⁶ *Id.* at 87.

⁶⁷ Adrian Howe, *More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses – Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)*, 19 SYDNEY L. REV. 336, 342 (1997).

⁶⁸ Comstock, *Dismantling the Homosexual Panic Defense*, *supra* note 10, at 86.

A final discrepancy between Kempf's theory and the use of gay panic in the criminal courtroom is that the murder defendants who claim gay panic made them kill have been almost exclusively male,⁶⁹ whereas Kempf's patients were both male and female.⁷⁰ Comstock questions why we should accept claims of gay panic made by men who kill in response to gay male sexual advances when women apparently do not kill in response to lesbian sexual advances:

[I]f the homosexual panic defense is premised on the disorder's causing murderous behavior in those it afflicts, why have female patients not been driven to kill? . . . To be used convincingly as a cause for killing, the disorder would have to be documented with evidence that both male and female patients have killed.⁷¹

While it is not inconceivable that a woman might panic and respond violently to a lesbian sexual advance, homicide cases involving claims of lesbian panic are rarely seen. In one unusual case, a woman named Melissa Burch Harton argued that she killed her friend Natasha Bacchus in self-defense after Bacchus told Harton that she was in love with Harton and wanted to kiss her.⁷² The jury rejected Harton's claim of self-defense, but showed leniency by finding her guilty of involuntary manslaughter, rather than murder.⁷³ While it is certainly possible that Homosexual Panic Disorder, if it exists at all, manifests differently in men and women,⁷⁴ the dearth of lesbian panic cases suggests that gay panic is not the product of a mental disease or defect. Instead, gay panic seems to stem from a specific construction of masculinity, one that values heterosexism and violence as traits of the masculine and implicitly rejects homoerotic desire.

⁶⁹ See *id.* at 89.

⁷⁰ KEMPF, *supra* note 19, at 506-11.

⁷¹ Comstock, *Dismantling the Homosexual Panic Defense*, *supra* note 10, at 89-90.

⁷² Amit R. Paley, *Murder Jury Will Hear A Claim of Obsession*, WASH. POST, Jan. 31, 2006, at B5.

⁷³ Amit R. Paley, *Md. Woman Convicted of Killing Female Friend*, WASH. POST, Feb. 11, 2006, at B4.

⁷⁴ It is undisputed that men are responsible for most violent crime. See UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES: ARRESTS BY SEX (2006), available at http://www.fbi.gov/ucr/cius2006/data/table_42.html (reporting that of 10,472,432 persons arrested in 2006, 7,985,505 were male and only 2,486,927 were female). See generally Richard B. Freeman, *Why Do So Many Young American Men Commit Crimes and What Might We Do About It?*, 10 J. ECON. PERSP. 25, 26 (1996) (noting that in 1993, one man out of every 50 men in workforce was incarcerated).

II. GAY PANIC IN THE CRIMINAL COURTROOM

Borrowing from Kempf's Homosexual Panic Disorder theory, male defendants charged with murdering gay men have sought mitigation or exoneration by claiming gay panic, either as a manifestation of mental disease or defect or as support for a claim of provocation or self-defense. In this part, I first consider whether gay panic, if allowed as a defense, should be recognized as an excuse or a justification. Next, I unpack the doctrinal underpinnings of gay panic defense arguments. Finally, I theorize about why gay panic provocation claims have enjoyed relative success compared to gay panic arguments linked to mental incapacity defenses.

A. *Excuse or Justification?*

A preliminary question is whether gay panic, if allowed as a defense argument, should be recognized as an excuse or a justification. An excuse defense is one in which the actor's conduct is viewed as wrongful, but the actor himself is not seen as morally blameworthy.⁷⁵ A justification defense, in contrast, focuses on the actor's conduct more than the individual characteristics of the actor.⁷⁶ A justification defense says the actor's conduct was appropriate under the circumstances.⁷⁷ Examples of excuse defenses include insanity, duress, and intoxication. Necessity, self-defense, and defense of others are usually considered justification defenses.

It is difficult to argue that gay panic should be called either a justification or an excuse. Justification suggests the defendant did the right thing or took the course of action that society would have wanted him to take. A man who kills a gay man just because that man made a pass at him does not act the way a civilized society should want its men to act.⁷⁸ Gay panic should not be recognized as a justification defense.

⁷⁵ Dressler, *When "Heterosexual" Men Kill "Homosexual" Men*, *supra* note 10, at 763 n.17 ("[A]n excuse is in the nature of a claim that although the actor has harmed society, she should not be blamed . . . for causing that harm [A]n excuse negates the moral blameworthiness of the actor for causing the harm.").

⁷⁶ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 759 (1978) ("A justification speaks to the rightness of the act"); Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 *UCLA L. REV.* 61, 66, 68 n.37 (1984) (discussing distinction between justifications and excuses).

⁷⁷ FLETCHER, *supra* note 76, at 759 ("A justification speaks to the rightness of the act.").

⁷⁸ If the victim does more than just make a pass — if, for example, the victim tries to forcibly rape the defendant, then ordinary self-defense principles would allow the

An excuse defense suggests that the defendant is not as morally blameworthy as one who does the same action without the excusing condition. It is difficult to say that the man who kills a gay man in response to a non-violent homosexual advance is not as morally blameworthy as someone who kills for any other reason.

In any event, answering the justification-excuse question is unnecessary because gay panic is not a separate, freestanding defense,⁷⁹ and I do not argue that courts should recognize it as such. Gay panic is merely an argument used to bolster a traditional criminal law defense such as insanity, diminished capacity, provocation, or self-defense. Therefore, whether a gay panic argument will operate as an excuse or a justification will depend on which traditional defense it is used to support. While one can debate whether the doctrine of provocation is appropriately characterized as a partial excuse (as I have done in previous work),⁸⁰ the general consensus is that provocation is a partial excuse defense, self-defense is a justification defense, and insanity and diminished capacity are excuse defenses.

defendant to protect himself from the imminent threat of grievous bodily injury.

⁷⁹ There are numerous examples of other defenses, which, like the gay panic defense, are not officially recognized defenses but are known in the popular culture. See, e.g., PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* 2 (1997) (“The black rage defense is a *legal strategy* used in criminal cases.”); ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 5 (2004) (“This study analyzes the cultural defense, which, *were it to be established*, would require judges to consider the cultural background of litigants in the disposition of cases before them.”) (emphasis added); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 7-8 (1994) (discussing “battered woman syndrome defense” even though not a freestanding, officially-recognized, defense); see also Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45, 62-65, 72-73 (1999) (evaluating when identity impact evidence, such as cultural defense evidence, evidence of black rage, and battered woman syndrome evidence, should be admissible).

⁸⁰ See CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 227-30 (2003) [hereinafter LEE, *MURDER AND THE REASONABLE MAN*] (arguing that doctrine of provocation contains elements of both justification and excuse); see also A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 307 (1976) (arguing that provocation has elements of both justification and excuse); Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467, 469 (1987) (arguing that provocation is generally viewed as partial excuse); Joshua Dressler, *Why Keep the Provocation Defense? Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 971 (2002) (arguing that provocation should not be understood in justificatory terms); Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse not Justification*, 42 MICH. J. L. REFORM (forthcoming 2009) (on file with author) (arguing that provocation is excuse, not justification); Finbarr McAuley, *Anticipating the Past: The Defence of Provocation in Irish Law*, 50 MOD. L. REV. 133, 133 (1987) (arguing that provocation ought to be viewed as partial justification).

B. Insanity

Beginning in 1967, male defendants charged with murdering gay men began to utilize the concept of homosexual panic to support mental defect defenses such as insanity and diminished capacity.⁸¹ Insanity, a complete defense which results in a not guilty by reason of insanity (“NGI”) verdict, is defined differently depending on whether the jurisdiction follows the *M’Naghten* test or the American Law Institute’s (“ALI”) test, also known as the Model Penal Code (“MPC”) test. Under the *M’Naghten* test, the accused can be found not guilty by reason of insanity if, at the time of the act, the accused “was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.”⁸² The ALI test, found in Section 4.01 of the MPC, provides a defense when, as a result of mental disease or defect, the actor “lacks substantial capacity . . . to appreciate the criminality [wrongfulness] of his conduct.”⁸³ Heterosexual men charged with killing gay men have argued that the victim’s (homo)sexual advance triggered in them a violent psychotic reaction, causing them to lose control over their mental abilities.⁸⁴

There are several problems with defense attempts to claim insanity linked to gay panic. First, to be found not guilty by reason of insanity, a defendant must not have understood the nature and quality of his act or appreciated that what he was doing was wrong. In other words, either he did not know that he was stabbing, choking, or kicking the victim, or he did not know that it was wrong to do so. The male defendant claiming that a homosexual advance made him lose his self-control often cannot claim convincingly that he did not know that he was kicking, beating, or punching the victim or that he did not understand what he was doing was illegal or immoral.

⁸¹ See, e.g., *People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967) (describing how psychiatrist testified for defense that defendant did not know nature and quality of his act at time of attack and was acting as result of acute homosexual panic brought on by fear that victim was sexually molesting him); *People v. Parisie*, 287 N.E.2d 310, 313 (Ill. App. Ct. 1972) (noting proffered defense was “insanity based on ‘homosexual panic’”); *State v. Thornton*, 532 S.W.2d 37, 44 (Mo. 1975) (noting that psychiatric evidence offered by defense suggested defendant was in state of “homosexual panic” at time of stabbing).

⁸² *United States v. Freeman*, 357 F.2d 606, 608 (2d Cir. 1966). Seventeen states and the federal government have adopted a version of the *M’Naghten* test. *Clark v. Arizona*, 548 U.S. 735, 749-50 (2006).

⁸³ MODEL PENAL CODE § 4.01 (2001). Fourteen states have adopted tests for insanity inspired by the MPC. *Clark*, 548 U.S. at 751-52.

⁸⁴ Osborne, *supra* note 10, at 4.

Second, to be found not guilty by reason of insanity, the defendant must have been suffering from a mental disease or defect at the time of his act. The male defendant claiming that a homosexual advance made him crazy often cannot prove he was suffering from a mental disease or defect at the time of his act because the American Psychiatric Association does not recognize Homosexual Panic Disorder as a mental disease.⁸⁵ Additionally, the American Psychiatric Association no longer considers homosexuality a mental disorder.⁸⁶ This makes it difficult for a defendant to claim latent homosexuality as a mental disease or defect.

Most claims of insanity based on homosexual panic have not been successful.⁸⁷ In *People v. Parisie*,⁸⁸ for example, the defendant, John Parisie, was charged with murder and argued he should be found not guilty by reason of insanity based on "homosexual panic."⁸⁹ Parisie testified that he was walking down the road when the victim, whom he had met some time earlier at an automobile dealership, offered him a lift. According to Parisie, after he got in the car, the victim drove a while before turning down a gravel road. He then parked, turned off the lights, slid the seat back, and made an unspecified sexual advance, telling Parisie that if he refused, he would have to walk.⁹⁰ Parisie claimed he went crazy and vaguely remembered struggling with the victim and hearing a noise that sounded like gunshots.⁹¹

At trial, the defense called a clinical psychologist who testified that Parisie was a highly latent homosexual with strong feelings of inferiority. The defense also called a psychiatrist who testified that "'homosexual panic' is severe panic or fear reaction that is provoked by extreme anxiety or psychological trauma, and this often takes the form of a state of amnesia, in which the person sets aside or forgets unconsciously something that his conscious mind cannot tolerate."⁹²

⁸⁵ Comstock, *Dismantling the Homosexual Panic Defense*, *supra* note 10, at 83.

⁸⁶ Am. Psychiatric Ass'n, *supra* note 54, at 1-3.

⁸⁷ 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, 501 (1984) (asserting that "[c]ases involving the defense of homosexual panic which have reached the appellate level have never resulted in a defendant's acquittal by reason of insanity").

⁸⁸ 287 N.E.2d 310, 312 (Ill. App. Ct. 1972).

⁸⁹ *Id.* at 313.

⁹⁰ *Id.* at 313-14.

⁹¹ *Id.*

⁹² *Id.* at 314.

The jury rejected Parisie's claim of insanity,⁹³ finding him guilty of murder, and Parisie's conviction was affirmed on appeal.

A more recent example of a failed attempt to link gay panic to an insanity defense is reflected in the killing of Billy Jack Gaither. In the summer of 1998, Charles Butler and his friend, Steven Mullins, beat an openly gay man named Billy Jack Gaither to death and set his body on fire atop a pyre of tires. The men claimed they killed Gaither because he propositioned them.⁹⁴ At his arraignment on capital murder charges, Butler pled not guilty by reason of mental disease or defect.⁹⁵ Before trial, however, Butler withdrew his mental defect defense,⁹⁶ arguing instead that it was Mullins who actually killed Billy Jack Gaither. Even though Butler formally withdrew his mental defect defense, gay panic was prominently featured at his trial. Butler claimed he hit Gaither only after Gaither told him he was interested in a sexual threesome with Butler and Mullins. Mullins too asserted that the reason he killed Gaither was because Gaither had propositioned him two weeks earlier.

Gaither's friends, however, said it was highly unlikely that Gaither would proposition either man. According to one friend: "[Billy Jack] didn't walk around acting, looking, or talking gay. If anybody was asking for sex, it wasn't him — it was them. We've got a lot of rednecks in here. You don't make advances with them around."⁹⁷ Marian Hammonds, owner of The Tavern, a straight bar which Gaither frequented, described Gaither as a likeable man who, while never denying he was gay, "made a point of never doing the gay thing when he was at our place . . . My husband, Larry didn't even know he was

⁹³ *Id.* at 315.

⁹⁴ See *Trial of Man Accused of Gay Hate Crime Slaying Begins with Defendant Blaming His Cohort*, COURT TV ONLINE, Aug. 4, 1999, http://www.courtstv.com/trials/butler/080499_ctv.html; see also Phillip Rawls, *Man Convicted of Capital Murder in Slaying of Homosexual*, ASSOCIATED PRESS NEWSWIRE, Aug. 5, 1999; Phillip Rawls, *Skinhead Describes Beating Death of Gay Man*, ASSOCIATED PRESS NEWSWIRE, Aug. 4, 1999; Phillip Rawls, *Witness Describes Defendant in Gay Murder as Joking Afterwards*, ASSOCIATED PRESS NEWSWIRE, Aug. 6, 1999; Jay Reeves, *Prosecutor to Recommend Life Without Parole in Killing of Gay Man*, ASSOCIATED PRESS NEWSWIRE, June 25, 1999 [hereinafter Jay Reeves, *Prosecutor to Recommend Life Without Parole in Killing of Gay Man*].

⁹⁵ Val Walton, *Two Plead Not Guilty in Killing of Gay Man*, BIRMINGHAM NEWS, May 21, 1999, at A1 (noting that "Gaither's sister gasped when Butler's attorney, William R. Hill Jr., told Circuit Court Judge John Rochester that his client pleaded not guilty and not guilty by reason of mental defect").

⁹⁶ Jay Reeves, *Prosecutor to Recommend Life Without Parole in Killing of Gay Man*, *supra* note 94.

⁹⁷ Daniel Pedersen, *A Quiet Man's Tragic Rendezvous with Hate*, NEWSWEEK, Mar. 15, 1990, at 65.

gay until about a year ago, and I had to tell him.”⁹⁸ Hammonds further remarked, “He [Gaither] didn’t ever put anybody in [an awkward] position.”⁹⁹

Mullins’s claim that he killed Gaither because Gaither propositioned him is suspect for another reason. Friends of Gaither asserted that Mullins and Gaither had had a sexual relationship which Mullins did not want anyone to know about, and that Mullins wanted Gaither dead to ensure that he never would tell anyone about their homosexual affair. At Butler’s trial, Mullins adamantly denied having sex with Gaither or any other man. Butler’s attorneys, however, presented several witnesses who testified that Mullins had a secret gay sex life. One man, Jimmy Lynn Dean, testified that he and Mullins had had oral sex about four months before Billy Jack Gaither was killed.¹⁰⁰

In Butler’s case, neither gay panic nor the “it wasn’t me” argument worked. The jury convicted Butler of capital murder. Gaither’s family, however, requested that Butler be spared the death penalty.¹⁰¹ Accordingly, the judge sentenced Butler to life in prison without the possibility of parole.¹⁰²

C. Diminished Capacity

Another doctrinal hook for defendants charged with murdering a gay man is the diminished capacity defense. Diminished capacity, a partial defense to murder, generally requires proof that the defendant was acting under the influence of a mental disease or defect which affected his capacity to premeditate and deliberate or form the requisite intent to kill. There are two variants of the diminished capacity defense. Under the mens rea variant, “evidence that [the defendant] suffered from a mental disease or defect at the time of his conduct is admissible whenever it is relevant to prove that he lacked a mental state that is an element of the charged offense.”¹⁰³ Under the partial responsibility variant, the charge is reduced from murder to

⁹⁸ Sue Anne Pressley, *2 Accused of Killing, Burning Gay Man*, WASH. POST, Mar. 5, 1999, at A1.

⁹⁹ *Cops: Men Plotted Gay Man’s Grisly Slaying*, PHILA. DAILY NEWS, Mar. 5, 1999, at 26.

¹⁰⁰ Frontline, *Assault on Gay America: The Life and Death of Billy Jack Gaither, Steve Mullins’ Homosexual Behavior?*, Aug. 5, 1999, <http://www.pbs.org/wgbh/pages/frontline/shows/assault/billyjack/mullet.html>.

¹⁰¹ *Killer of Gay Man in Alabama Gets Life in Prison Without Parole*, N.Y. TIMES, Aug. 17, 1999, at A14.

¹⁰² *Id.*

¹⁰³ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 26.02[B][2], at 320 (3d ed. 2001) [hereinafter DRESSLER, UNDERSTANDING CRIMINAL LAW].

manslaughter because the defendant is seen as “less blameworthy and therefore less deserving of punishment, than a killer who acts with a normal state of mind.”¹⁰⁴

A diminished capacity defense was successfully used in the Jenny Jones murder case in which a heterosexual man named Jonathan Schmitz killed his gay friend Scott Amedure after an appearance on the Jenny Jones Show in 1995.¹⁰⁵ Schmitz had been invited to appear on the show and knew the show’s theme that day was *Secret Admirers*. Schmitz thought an ex-girlfriend was going to be revealed as his secret admirer. In fact, Schmitz’s male friend Scott Amedure appeared on the show as his secret admirer.¹⁰⁶ Even though he was surprised and apparently embarrassed to find that his secret admirer was a man, Schmitz hugged Amedure on the air and even laughed when Amedure recounted a fantasy that involved Schmitz, whipped cream, strawberries, and champagne.¹⁰⁷ Schmitz even offered to give Amedure and Donna Riley, Schmitz’s neighbor who had arranged Schmitz and Amedure’s appearance on the Jenny Jones Show, a ride home.¹⁰⁸ Before they left the Detroit Metropolitan Airport, Amedure snatched a flashing construction light and stashed it in Schmitz’s car.¹⁰⁹

On March 9, 1995, three days after appearing on the show, Schmitz came home from work and found the flashing construction light and an unsigned note in front of his apartment that read, “John. If you want it ‘off’ you’ll have to ask me. P.S. It takes a special tool. Guess Who.”¹¹⁰ Believing the note to be a crude sexual come-on from

¹⁰⁴ *Id.* § 26.03[A][2], at 325-28.

¹⁰⁵ See *People v. Schmitz*, 586 N.W.2d 766, 767 (Mich. Ct. App. 1998) (noting Schmitz was initially charged with first-degree murder, argued diminished capacity, and was found guilty of second-degree murder); Court TV Online, Court TV Verdicts: Michigan v. Schmitz (Aug. 25, 1999), <http://www.courtstv.com/archive/verdicts/schmitz.html> (last visited Oct. 21, 2008) (noting that jury on November 12, 1996 opted against finding Schmitz guilty of first-degree murder, instead finding him guilty of second-degree murder and illegal possession of a firearm in the commission of a felony).

¹⁰⁶ See Keith Bradsher, *Talk-Show Guest is Guilty of Second-Degree Murder*, N.Y. TIMES, Nov. 13, 1999, at A14.

¹⁰⁷ See Court TV Online, Court TV Verdicts: Michigan v. Schmitz (Aug. 25, 1999), <http://www.courtstv.com/archive/verdicts/schmitz.html> (last visited Oct. 21, 2008).

¹⁰⁸ See Michelle Green, *TV’s Fatal Attraction: A Surprise Meeting on ‘Jenny Jones’ Ends in a Shocking Shotgun Murder*, PEOPLE, Mar. 27, 1995, at 40, available at <http://www.people.com/people/archive/article/0,,20105369,00.html> (last visited Oct. 15, 2008).

¹⁰⁹ See *id.*

¹¹⁰ Aldina Vazao Kennedy & Bryan Robinson, *Schmitz Found Guilty of Second-Degree Murder*, COURT TV ONLINE, Aug. 26, 1999, http://www.courtstv.com/archive/trials/schmitz/082699_verdict_ctv.html (last visited Oct. 21, 2008); see also

Amedure, Schmitz drove to his bank, withdrew money from his savings account, then purchased a twelve-gauge pump action shotgun and some ammunition.¹¹¹ He drove to Amedure's house, and after Amedure admitted to writing the note, Schmitz shot Amedure twice in the chest, killing him.¹¹²

Schmitz was charged with first-degree murder. At trial, Schmitz's attorney argued Schmitz was suffering from diminished capacity when he shot and killed Scott Amedure, stemming from his embarrassment on the Jenny Jones Show when Amedure appeared as his secret admirer.¹¹³ At that time, diminished capacity was allowed in Michigan as a partial defense to first-degree murder.¹¹⁴ Despite the overwhelming evidence of premeditation and deliberation, the jury found Schmitz's claim of diminished capacity stemming from homosexual panic credible and found him guilty of second-degree murder rather than first-degree murder.¹¹⁵

Karen Franklin and Gregory Herek have opined that the verdict in the Jenny Jones case reflected "[t]he sense of cultural permission to engage in antigay violence."¹¹⁶ Offering another possible explanation

Jenny Jones with Patsi Bale Cox, *Fatal Attraction*, TORONTO SUN, Nov. 30, 1997, at 48.

¹¹¹ L.L. Brasier, *Jury Hears Tape of 911 Confession Schmitz Upset During Call*, *Dispatcher Says*, DET. FREE PRESS, Oct. 16, 1996, at B1; Megan Garvey, *The Aftershock of Shock TV*, WASH. POST, Mar. 25, 1995, at D1; Stephen Seplow, *Talk TV on Trial: A Taping, a Killing, One Guest Killed the Man Who Liked Him. The Jury is Still Out.*, PHILA. INQUIRER, Nov. 10, 1996, at A1.

¹¹² Frazier Moore, *Critics Blame 'Jenny Jones' Show for Murder*, BALT. SUN, Mar. 11, 1995, at D1; Frazier Moore, *'Retailing of Emotional Conflict' Blamed in TV Talk-Show Tragedy*, SEATTLE TIMES, Mar. 11, 1995, at A3; Frazier Moore, *Talk Show Is Blamed After Guest Shot to Death Critics Charge that Programs Place Subjects in Unexpected, Upsetting Situations for Lively TV*, AKRON BEACON J., Mar. 11, 1995, at A1; *Police Say Talk Show Led to Murder*, CHI. TRIB., Mar. 11, 1995, at N8.

¹¹³ *People v. Schmitz*, 586 N.W.2d 766, 768 (Mich. Ct. App. 1998); see also Teresa Wiltz & David Farhi, *Death Follows Ugly Scene Played out on 'Springer,'* WASH. POST, July 27, 2000, at C1.

¹¹⁴ Diminished capacity is no longer recognized as a defense to first-degree murder in Michigan. *People v. Carpenter*, 627 N.W.2d 276, 283 (Mich. 2001).

¹¹⁵ Jonathan appealed his second-degree murder conviction and was granted a retrial because the trial court had not allowed the defense to remove a juror they found problematic. *Schmitz*, 586 N.W.2d at 769-72. On retrial, the defense was not able to argue diminished capacity again because that defense was only available against a first-degree murder charge. *People v. Biggs*, 509 N.W.2d 803, 805-06 (Mich. Ct. App. 1993). Instead, Jonathan's attorney argued that Jonathan was provoked into a heat of passion by Amedure's sexual advance in an attempt to reduce his conviction to voluntary manslaughter. The jury rejected Jonathan's provocation defense and he was again found guilty of second-degree murder. *Talk Show Guest Convicted of Murder for a 2nd Time: Jury Rejects Killer's Crime-of-Passion Defense*, CHI. TRIBUNE, Aug. 27, 1999, at 6.

¹¹⁶ Franklin & Herek, *supra* note 9, at 148.

for the second-degree murder verdict, Franklin and Herek comment, “[p]articularly revealing in that case was the popular perception that the television show’s producers had humiliated the heterosexual man and thus were responsible for the murder.”¹¹⁷

Over time, the use of mental defect defenses in gay victim homicide cases has fallen out of favor for a number of reasons, not the least of which is the difficulty of securing a favorable jury verdict with a mental defect defense.¹¹⁸ Jurors are often skeptical of defense claims of insanity.¹¹⁹ Even if the defendant is able to convince jurors that he was suffering from a mental disease or defect, it is often difficult to prove that the defendant did not know that what he was doing (killing the victim) was wrong or that the defendant could not control his actions.¹²⁰

Additionally, a verdict of not guilty by reason of insanity (temporary or otherwise) does not mean the defendant goes free. The defendant who is found insane is usually committed to a mental institution for an indefinite period of time. This period of confinement can exceed the length of the prison sentence the defendant would have received if he had been convicted.¹²¹ Many individuals would rather serve a definite prison sentence than endure the stigma and uncertainty of an indefinite period of commitment in a mental institution. Moreover, asserting a mental defect defense is often seen as an unacceptable admission of mental deficiency in the eyes of the defendant.¹²²

Another possible reason for the gradual shift away from the use of gay panic to support a mental defect defense may be the unavailability of those defenses in certain jurisdictions. At least three states do not

¹¹⁷ *Id.*

¹¹⁸ Lisa A. Callahan, *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCH. & L. 331, 337 (1991) (“Although there was considerable variation among the eight states in the acquittal rate (percentage of successful pleas), overall, just one-quarter of [defendants] who raised the [insanity] defense were successful.”).

¹¹⁹ JAMES P. LEVINE, JURIES AND POLITICS 89 (1992) (noting that “[o]ne study found that out of about two million criminal cases dealt with in American criminal courts in a single year, only 1,625 produced verdicts of not guilty on the basis of insanity”).

¹²⁰ See Suffredini, *supra* note 10, at 295.

¹²¹ See *Jones v. United States*, 463 U.S. 354, 368 (1983) (noting that when criminal defendant establishes that he is not guilty of crime by reason of insanity, government may commit him to mental institution until he regains his sanity or is no longer danger to himself or society and that this period of commitment may exceed time he could have been incarcerated had he been convicted).

¹²² Unabomber Ted Kaczynski, for example, refused to plead not guilty by reason of insanity even though his attorneys told him this was the best defense possible. William Glaberson, *Lawyers Drop Mental Defense for Kaczynski*, N.Y. TIMES, Dec. 30, 1997, at A1.

recognize the defense of insanity.¹²³ A number of states have either abolished the defense of diminished capacity or substantially restricted its use. For example, California¹²⁴ and Wyoming¹²⁵ do not recognize the defense of diminished capacity. In Michigan, diminished capacity was allowed as a defense to first-degree murder¹²⁶ until 2001 when the Supreme Court of Michigan ruled that “evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent.”¹²⁷ The United States Supreme Court has encouraged these restrictions on the use of mental defect or deficiency evidence, ruling that states are free to fashion their own rules regarding the admissibility of evidence of mental disease or defect and can bar a defendant’s use of such evidence to negate the requisite mens rea without violating due process.¹²⁸

A final reason why there might be fewer gay panic claims linked to insanity or diminished capacity today compared to thirty years ago could be because the American Psychiatric Association removed homosexuality from its list of mental disorders in 1973, “thus stripping homosexual panic of its medical-scientific legitimacy as a defense and as an illness premised upon homosexual latency.”¹²⁹ Christina Pei-Lin Chen explains that “[u]nder both the insanity and diminished capacity variants of the homosexual panic defense, the defendant’s acute psychotic reaction of homicidal violence was explained by the medical-scientific discourse as directly premised upon the latent homosexual’s mental disorder of repressed sexual

¹²³ See, e.g., IDAHO CODE ANN. § 18-207 (2004) (providing that “mental condition shall not be a defense to any charge of criminal conduct”); KAN. STAT. ANN. § 22-3220 (1995) (allowing defendant to present evidence of mental disease or defect to prove he lacked mental state required for commission of offense, but otherwise mental disease or defect not a defense); MONT. CODE ANN. §§ 46-14-102 to -311 (2005) (permitting mental disease or defect evidence only to prove defendant lacked necessary mens rea, or for consideration at sentencing); see also UTAH CODE ANN. § 76-2-305 (2003) (allowing “guilty but mentally ill” verdict). *But see* *Finger v. State*, 27 P.3d 66, 84 (Nev. 2001) (holding that abolition of insanity defense violates due process).

¹²⁴ CAL. PENAL CODE § 28(b) (2003). *But see* Miguel A. Mendez, *Diminished Capacity in California: Premature Reports of Its Demise*, 3 STAN. L. & POL’Y REV. 216, 222 (1991) (arguing that while diminished capacity is not available as defense, very similar defense of diminished actuality is still possible).

¹²⁵ *Dean v. State*, 668 P.2d 639, 643-45 (Wyo. 1983).

¹²⁶ *People v. Biggs*, 509 N.W.2d 803, 805 (Mich. Ct. App. 1993) (noting that “diminished capacity is not a defense to general intent crimes such as second-degree murder”).

¹²⁷ *People v. Carpenter*, 627 N.W.2d 276, 283 (Mich. 2001).

¹²⁸ *Clark v. Arizona*, 548 U.S. 735, 779 (2006).

¹²⁹ Chen, *supra* note 10, at 202.

perversion.”¹³⁰ According to Chen, once the psychiatric community stopped recognizing homosexuality as a mental disease or defect, insanity and diminished capacity stopped being useful vehicles to transport the message of gay panic.¹³¹

Because of the above-described difficulties, male defendants charged with murdering gay victims today tend to assert the defense of provocation rather than insanity or diminished capacity, claiming that they were provoked into a heat of passion by the victim’s homosexual advance.¹³² Some even claim they acted in self-defense to protect against a violent sexual assault. Both provocation and self-defense require a showing of reasonableness.¹³³ The defendant who claims provocation will not succeed unless the jury finds that the defendant was reasonably provoked into a heat of passion. The defendant who claims self-defense will not succeed unless the jury finds that a reasonable man in the defendant’s shoes would have believed it necessary to use deadly force in self-defense.

Using the concept of gay panic to support a claim of provocation or self-defense is even further removed than insanity or diminished capacity from Kempf’s original idea of Homosexual Panic Disorder, which suggested that some men have secret homosexual desires they try to repress, causing psychiatric disorder. Claims of provocation and self-defense suggest the defendant acted the way most men would have acted. One problem with this move is that the reasonableness requirement in the doctrines of provocation and self-defense allows male defendants claiming gay panic to rely on social norms that favor heterosexuality over homosexuality to bolster their claims of provocation and self-defense.¹³⁴

D. Provocation

Under the provocation doctrine, a defendant charged with murder can be convicted of the lesser offense of voluntary manslaughter if the jury finds that the defendant was actually and reasonably provoked into a heat of passion. At early common law, only certain acts constituted legally

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See generally Dressler, *When “Heterosexual” Men Kill “Homosexual” Men*, *supra* note 10; Mison, *supra* note 10 (discussing provocation defense in homosexual advance prosecutions).

¹³³ LEE, MURDER AND THE REASONABLE MAN, *supra* note 80, at 3.

¹³⁴ See *id.* at 67-95.

adequate provocation.¹³⁵ One of the categories of legally adequate provocation was a serious crime committed against a close relative.¹³⁶ Perhaps foreshadowing the use of gay panic in future provocation cases, early English courts limited this category to cases in which a father discovered someone committing sodomy on his son.¹³⁷ Today, provocation is considered legally adequate if the reasonable person in the defendant's shoes would have been provoked into a heat of passion.

Some jurisdictions follow the Model Penal Code's extreme emotional disturbance test for provocation, under which "a homicide which would otherwise be murder is [mitigated to manslaughter if] committed under the influence of an extreme mental or emotional disturbance for which there is a reasonable explanation or excuse."¹³⁸ The Code goes on to explain that "[t]he 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."¹³⁹

In several cases, heterosexual men who have killed gay men in response to an unwanted non-violent homosexual advance have successfully argued either that a non-violent homosexual advance reasonably provoked them into a heat of passion or that they acted under the influence of extreme mental or emotional disturbance for which there was a reasonable explanation or excuse — a gay man's sexual advance. For example, in *Schick v. Indiana*, seventeen-year-old Timothy Schick met thirty-eight-year-old Stephen Lamie while trying to hitchhike.¹⁴⁰ Schick climbed into Lamie's car, and asked if Lamie knew where they could find some girls.¹⁴¹ When Lamie said he could not help him with this, Schick then asked Lamie if he knew where he could get a blow job.¹⁴² Lamie told Schick, "No, but I will,"¹⁴³ and then drove to a local high school baseball field.¹⁴⁴

¹³⁵ DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 103, § 31.07.

¹³⁶ *Id.* §31.07[8][2][a].

¹³⁷ *Dir. of Pub. Prosecutions v. Camplin*, [1978] A.C. 705 (H.L.) (appeal taken from *Crim. App.*) (U.K.).

¹³⁸ MODEL PENAL CODE § 210.3(1)(b) (2001).

¹³⁹ *Id.*

¹⁴⁰ 570 N.E.2d 918 (Ind. Ct. App. 1991); *see also* Fran Jeffries, *Teen Convicted in Dugout Death*, THE COURIER-JOURNAL (Louisville, Ky.), Nov. 19, 1988, at 6A.

¹⁴¹ *Schick*, 570 N.E.2d at 921.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 922.

According to Schick, as the two men were walking toward the field, Lamie pulled off his shorts and pulled his underwear down to his ankles, grabbed Schick around the waist, and tried to touch Schick's penis.¹⁴⁵ Schick responded by kneeling Lamie in the stomach and hitting Lamie in the face.¹⁴⁶ Lamie fell to the ground, and Schick continued to kick and beat Lamie until he heard gurgling sounds coming from Lamie's chest and throat.¹⁴⁷ Schick then removed Lamie's watch, some cigarettes from Lamie's pocket, and twenty-six dollars from Lamie's wallet.¹⁴⁸ He raced back to Lamie's car and wiped the dashboard and seat to get rid of his fingerprints, then ran away.¹⁴⁹

At approximately 2:30 a.m., Schick knocked on the door of a friend's house.¹⁵⁰ He told his friend and his friend's father that he had met a man while hitchhiking, asked the man where he could get a blow job, and the man offered to provide the service requested.¹⁵¹ Schick said they went to a local high school baseball field and he tried to run away, but the man caught up to him and a struggle ensued.¹⁵² The friend's father placed an anonymous call to the police, reporting that there was a dead or injured person at the baseball field.¹⁵³ Police found Lamie's body at the field.¹⁵⁴

Schick was charged with murder and other offenses.¹⁵⁵ At his 1991 trial, Schick claimed Lamie's unwanted sexual overture provoked him into a heat of passion and, therefore, the jury should convict him of manslaughter rather than murder.¹⁵⁶ The jury found this argument persuasive and found Schick guilty of voluntary manslaughter.¹⁵⁷

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 921.

¹⁴⁹ *Id.* (describing Schick's statement to police). In a post-trial statement, Schick provided another version of the events. In this version, Schick stated that initially, Lamie knocked him unconscious. When Schick awoke, Lamie was trying to force his penis into Schick's mouth. Schick had to fight Lamie off to avoid the sexual attack. Schick eventually broke free and while Lamie was stumbling toward him with his underwear around his ankles, Schick knocked Lamie down. As Lamie lay on the ground, Schick beat and kicked him to death. *Id.* at 927.

¹⁵⁰ *Id.* at 921.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 922.

¹⁵⁶ *Id.* at 926.

¹⁵⁷ *Id.* at 922.

In analyzing the jury's verdict, it is important to consider the relative ages of the defendant and victim. More than 50 % of the perpetrators of anti-gay and anti-lesbian violence are under the age of twenty-nine years.¹⁵⁸ Given the stereotype of the gay man as a violent sexual predator who preys on young boys, Lamie's status as a gay man more than twice Schick's age may have influenced the jury to see Schick's violent reaction as reasonable. Additionally, Lamie's explicit sexual advance (as described by Schick) may have convinced the jury that Schick's violent acts were necessary to protect himself from a sexual assault. If an older man pulled down his underwear, and grabbed a teenage girl around the waist in an attempt to engage in sexual relations, we would probably sympathize with the girl if she used non-lethal force, perhaps a kick or a punch, to escape the older man's sexual advance.

The problem is that even under Schick's version of events, Schick did more than simply use violence to escape Lamie's alleged sexual advance. After Lamie was down on the ground with his underwear around his ankles, Schick proceeded to punch, kick, and stomp Lamie to death. If Schick had been a teenage girl, it is doubtful that a jury would find such a response ordinary or reasonable. Moreover, in light of the fact that Schick had sufficient presence of mind to take Lamie's watch, cigarettes, and cash, and wipe his fingerprints from Lamie's car before fleeing the scene, one might question Schick's claim that the alleged homosexual advance provoked him into such a heat of passion that he completely lost his self-control.

In *Mills v. Shepard*, another seventeen-year-old named David Mills successfully argued he was provoked into a heat of passion by an older man's attempt to have sex with him.¹⁵⁹ Mills met forty-three-year-old Billy Francis Brinkley at a bar.¹⁶⁰ According to Mills, Brinkley offered to pay Mills twenty dollars if Mills would "commit a homosexual act" with Brinkley.¹⁶¹ Mills agreed, and the two men drove to Paw Creek Cove in Brinkley's car.¹⁶² Once there, according to Mills, Brinkley

¹⁵⁸ NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, ANTI-LESBIAN, GAY, BISEXUAL, AND TRANSGENDER VIOLENCE IN 2004: A REPORT OF THE NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS 33 (2005), available at <http://www.ralliance.org/files/2004NCAVPRReport.pdf> (reporting that 20% of anti-gay violence offenders were 18 years or younger and 37% were between ages of 18 to 29 years of age); see also GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 59-60 (1991) [hereinafter COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN].

¹⁵⁹ 445 F. Supp. 1231, 1232 (W.D.N.C. 1978).

¹⁶⁰ *Id.* at 1234.

¹⁶¹ *Id.*

¹⁶² *Id.*

proceeded to grab Mills's privates.¹⁶³ Mills demanded his twenty dollars, but Brinkley said he did not have twenty dollars with him, so Mills pushed Brinkley out of the car, chased him, knocked him down, kicked him, and pulled Brinkley's clothes down to hinder his escape.¹⁶⁴ Mills then took Brinkley's jewelry and fled in Brinkley's car.

Brinkley's body was later found in a cove in Mecklenburg County, North Carolina.¹⁶⁵ Brinkley had died from head injuries and a massive crushing injury to his chest consistent with having been kicked and then thrown against rocks.¹⁶⁶ According to one of Mills's roommates, Mills came home around 1:00 or 2:00 a.m. that night with Brinkley's automobile, watch, ring, and bracelet.¹⁶⁷ Mills told his roommate that he met Brinkley at a bar, Brinkley offered him twenty dollars to commit a homosexual act, they drove out to Paw Creek Cove in Brinkley's car, Brinkley did not have as much money as he had promised, Brinkley made a pass at him, and he fought Brinkley off.¹⁶⁸

Mills was charged with second-degree murder.¹⁶⁹ At trial, Mills maintained the older man's attempt to have sex with him provoked him into a heat of passion.¹⁷⁰ Despite the fact that Mills had agreed to "commit a homosexual act" with Brinkley and beat Brinkley only after Brinkley refused to pay Mills the agreed upon twenty dollars, the jury found Mills's claim credible and convicted him of voluntary manslaughter.¹⁷¹

Mills's voluntary manslaughter verdict is troubling for several reasons. First, it suggests that the jury believed it was reasonable for Mills to become enraged at Brinkley's conduct (grabbing Mills's private parts and making a pass at him), even though Mills had previously agreed to engage in sexual activity with Brinkley. Mills willingly accompanied Brinkley to Paw Creek Cove, knowing that the purpose of the trip was sex. Generally speaking, the criminal law does not excuse a defendant who creates the conditions of his own defense.¹⁷²

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1233.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1234.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1232.

¹⁷⁰ *Id.* at 1234.

¹⁷¹ *Id.* at 1232.

¹⁷² Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study of the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 3-7, 14-17 (1985) (noting that criminal law defenses are often withheld or limited if actor somehow contributed to need for conduct).

Second, the verdict suggests the jury believed Mills's claim that he was genuinely afraid of being sexually assaulted by Brinkley, even though Mills's behavior — pushing Brinkley out of the car, chasing him, knocking him down, kicking him, and pulling his pants down to hinder his escape — seems more consistent with the behavior of someone who intends to kill or seriously injure than the behavior of one who is afraid. If Mills had truly been afraid of Brinkley, he might have tried to get away by driving off in Brinkley's car as soon as he pushed Brinkley out of the car. Instead, Mills chased after Brinkley, knocked him down, and kicked him repeatedly. Once Brinkley was down, he no longer posed an immediate threat to Mills. Nonetheless, Mills proceeded to pull down Brinkley's clothes to hinder his escape. He then either pushed or threw Brinkley into the rocks in the cove where his body was later found.

Finally, Mills's claim that the alleged sexual advance by Brinkley so provoked him that he lost his ability to control his actions is belied by his having the presence of mind to take several of Brinkley's possessions, including his watch, ring, bracelet, and car. Given all of these inconsistencies, the jury's willingness to acquit Mills of murder suggests the influence of deeply rooted negative feelings about homosexuality, which enabled the jury to empathize with the defendant rather than with the victim.

One pattern that emerges from gay panic cases is that the perpetrator who claims he was provoked into a heat of passion often takes money or other items of value from the victim after killing him. Stealing the victim's belongings suggests an economic motivation for the killing, rather than panic or fear. Timothy Schick took Steven Lamie's watch, cigarettes, and money, then wiped off his fingerprints from the dashboard of Lamie's car in an attempt to avoid detection and arrest. David Mills took Billy Francis Brinkley's watch, ring, bracelet, and car. As one observer of gay panic killings has noted, "the number of cases where [gay] murders have been accompanied by robbery suggests that criminal opportunism is a frequent motive for these killings."¹⁷³

Further undermining claims of provocation in gay homicide cases is that the defendant often places himself in a situation in which a

¹⁷³ Steve Tomsen, *Hatred, Murder & Male Honour: Gay Homicides and the "Homosexual Panic Defence,"* 6 *CRIMINOLOGY AUSTRAL.* 2, 4 (1994). Lu-in Wang notes that gay men are often targeted for robbery because of the perception that gays are wealthy and "would prefer to part with their property than to fight back or report the crime and risk revealing their sexual orientation." Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 *B.U. L. REV.* 1399, 1416, 1431-32 (2000).

homosexual advance is likely. Timothy Schick hitched a ride from Stephen Lamie, a total stranger, and stayed in the car even after Lamie suggested he could handle Schick's request for a blow job. David Mills agreed to have sex with Billy Francis Brinkley in exchange for twenty dollars. Yet in case after case, jurors overlook facts that undermine the defendant's claim that he was actually and reasonably provoked.

Why might gay panic provocation claims resonate with juries? First, lenient verdicts in gay panic provocation cases may reflect the jury's view that it is reasonable for a heterosexual man to react violently to a non-violent homosexual advance. If the average heterosexual man would react violently to a gay man's sexual advance, then arguably such a response is reasonable.

Given that reasonableness in provocation doctrine is usually understood to mean that the average or typical person in the defendant's shoes would have been provoked into a heat of passion,¹⁷⁴ this argument has much persuasive value. One can see how a juror might think that the average heterosexual man might become incensed if another man were to make a pass at him. Equating reasonableness with typicality, however, is problematic because it enables entrenched social norms that may embody messages of bias based on race, gender, or sexual orientation to govern outcomes in provocation cases.¹⁷⁵ As I have argued elsewhere, I believe the currently employed positivist conception of reasonableness, which equates reasonableness with typicality, should be supplemented with a normative conception of reasonableness.¹⁷⁶ Normative reasonableness asks the "should" question: should society call what the defendant did reasonable? If the jury asks whether the beliefs and acts of the heterosexual man who kills a gay man in response to a non-violent sexual advance are normatively reasonable, they will likely reach a different conclusion than if they just ask whether the defendant's acts are reasonable in an empirical sense.¹⁷⁷

One might question whether a normative conception of reasonableness is fair to the individual defendant, invoking the

¹⁷⁴ Dressler, *When "Heterosexual" Men Kill "Homosexual" Men*, *supra* note 10, at 753.

¹⁷⁵ See generally LEE, *MURDER AND THE REASONABLE MAN*, *supra* note 80 (discussing problems with positivist conception of reasonableness).

¹⁷⁶ *Id.* at 226-59.

¹⁷⁷ This is particularly likely to occur if the jury is given an instruction directing them to consider the reasonableness (or unreasonableness) of the defendant's acts if the defendant had been a heterosexual woman who responded with fatal violence to a heterosexual man's unwanted non-violent sexual advance or a gay man who responded with deadly force to a heterosexual woman's unwanted non-violent sexual advance. See *infra* text accompanying note 498.

longstanding debate over whether the criminal law should reflect current societal mores or push individuals to behave better than they might otherwise choose.¹⁷⁸ While reasonableness standards reflect the view that the criminal law should be lenient towards those who act the way ordinary people in their shoes would have acted, the criminal law often holds individuals to a higher standard than the one that ordinary persons might choose. For example, in the famous cannibalism case, *Regina v. Dudley & Stephens*, the court rejected the defendants' necessity defense while acknowledging that the defendants had acted the way any ordinary man in their shoes would have acted.¹⁷⁹ As

¹⁷⁸ Introducing a normative conception of reasonableness raises the question whether the criminal law should reflect empirical (positive) realities or be more normative. In support of positivist (empirical) reasonableness, one might argue that certain men, such as the homophobic men in the Adams and Bernat studies, *see generally* Adams, *supra* note 46 (studying whether heterosexual men who exhibited strong anti-gay sentiments would be aroused by homosexual erotica); Bernat, *supra* note 49 (measuring physical aggression toward gay and straight individuals after self-identified heterosexual college males viewed homoerotic videotape), may in fact be so repulsed by a non-violent homosexual advance that they actually would lose their self-control. One might ask whether it is really fair to punish such men as murderers when the provocation doctrine exists to mitigate in cases where the defendant succumbed to human weakness. On the other hand, if we want the criminal law to be more normative, barring gay panic arguments might be the best way to express society's disapproval of killings in response to non-violent (homo)sexual advances. My proposal can be viewed as a compromise between these two views. In recognition of the argument that some men may in fact be so repulsed by a non-violent homosexual advance that they might lose their self-control, my proposal allows such defendants to present a gay panic-provocation argument to the jury. On the other hand, in recognition of the fact that gay panic arguments rely on misguided masculinity norms and negative stereotypes about gay men, my proposal includes a role-reversal jury instruction that seeks to make jurors aware of the double-standard that a gay panic argument seeks to employ. My proposal does not depend on the adoption of a normative conception of reasonableness. In other words, even if provocation doctrine continues to utilize a positivist conception of reasonableness, I still believe it is better to allow defendants to make gay panic-provocation arguments than to bar such claims.

¹⁷⁹ *R. v. Dudley & Stephens*, (1884) 14 Q.B.D. 273, 287-88 (U.K.). In *Regina v. Dudley & Stephens*, two seamen, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker, a 17-year-old crew member. The defendants, Parker, and Ned Brooks, a fourth crewmember, were cast away in a storm on the high seas, 1,600 miles from the Cape of Good Hope. They were able to survive for 20 days on a dinghy with no supply of water and no food except for two one-pound cans of turnips and a turtle which they caught. On day 12, they finished eating the turtle and had nothing to eat for the next eight days. On day 20, Dudley and Stephens suggested that someone should be sacrificed to save the rest. Dudley proposed that lots should be cast to determine which of them would be sacrificed, but Brooks refused to consent. Ultimately, Dudley and Stephens decided it would be best to kill Parker since he was the only one with no family and was already weak and sickened from

Chief Justice Lord Coleridge explained, “We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy”¹⁸⁰

Another problem with this argument is that it is not clear that the average heterosexual man would, in fact, respond to a non-violent homosexual advance with fatal violence. The ordinary man’s reaction to a non-violent homosexual advance might well stop short of physical force. I can think of many reasonable men who would simply say, “No, I’m not interested,” and walk away, rather than respond to a non-violent homosexual advance with physical force.

Lenient verdicts in gay panic cases might also be understood to reflect dominant norms of masculinity.¹⁸¹ A male-on-male sexual advance threatens a heterosexual man’s sense of identity as a man in several ways.¹⁸² First, men in this society are supposed to be interested in women, not men.¹⁸³ Second, men are supposed to be the sexual aggressors, not the ones aggressed upon.¹⁸⁴ A gay man making a sexual

drinking seawater. Dudley, with Stephens’s help, killed Parker. Dudley, Stephens, and Brooks ate Parker’s remains for the next four days. Four days after Parker’s demise, the men were rescued by a passing ship. *Id.* at 273-74. “If the men had not fed upon the body of the boy when they did, they would have died of famine within a few days.” PAUL H. ROBINSON, CRIMINAL LAW CASE STUDIES 15-19 (3d ed. 2007).

¹⁸⁰ *Dudley*, 14 Q.B.D. at 288.

¹⁸¹ See generally Frank Rudy Cooper, “Who’s the Man?": Masculinities and Police Stops (Aug. 22, 2008) (unpublished manuscript, on file with author) (applying insights from field of masculinity studies to *Terry v. Ohio*); see also Jennifer Dumin, *Superstition-Based Injustice in Africa and the United States: The Use of Provocation as a Defense for Killing Witches and Homosexuals*, 21 WIS. WOMEN’S L.J. 145, 174 (2006) (noting that strong cultural and religious beliefs explain leniency shown in South Africa to those who kill witches and in United States to men who kill gay men and claim homosexual provocation).

¹⁸² As others have noted, gays and lesbians “threaten the differentiation between genders and the social roles associated with them.” William A. Jellison et al., *Implicit and Explicit Measures of Sexual Orientation Attitude: Ingroup Preferences and Related Behaviors and Beliefs Among Gay and Straight Men*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 629, 631 (2004). “By derogating gay men who . . . do not conform to . . . cultural standards of masculinity, straight men can affirm their own beliefs that these cultural expectations are appropriate.” *Id.*

¹⁸³ MICHELLE MARY LELWICA, *STARVING FOR SALVATION: THE SPIRITUAL DIMENSIONS OF EATING PROBLEMS AMONG AMERICAN GIRLS AND WOMEN* 25 (2002) (“[M]en are supposed to be sexually attracted (to women), women are supposed to be sexually attractive (to men).”); AYALA MALAKH-PINES, *FALLING IN LOVE: WHY WE CHOOSE THE LOVERS WE CHOOSE* 114 (1999) (“Men are supposed to be attracted to ‘feminine’ women, and women are supposed to be attracted to ‘masculine’ men.”).

¹⁸⁴ See SARA L. CRAWLEY ET AL., *GENDERING BODIES* 102 (2007) (“So there is a general surveillance for all men to be sexually aggressive and for all women to be sexually passive or guarded.”); Deborah S. David & Robert Brannon, *The Male Sex*

advance upon a heterosexual man violates both of these conditions.¹⁸⁵ In doing so, the gay man turns the tables on the heterosexual man, who finds himself acted upon, rather than the one acting.¹⁸⁶ The heterosexual man's feelings of fear and loathing are thus viewed as reasonable in the context of a pervasively heterosexist social world.

Masculinity norms also work to bolster the heterosexual male's claim that he was reasonably outraged by the non-violent homosexual advance. Angela Harris notes that "not being a 'faggot' is as important to being a man as not being a woman."¹⁸⁷ Men in this society are supposed to be "fearful and disdainful of homosexuals," and "are also taught to reject any personal same-gender sexual feelings."¹⁸⁸ Many heterosexual men are so terrified of being perceived as gay that they avoid expressing qualities that they think seem feminine, like the enjoyment of beauty or a loving, caring, gentle or nurturing nature.¹⁸⁹

Role: Our Culture's Blueprint of Manhood and What It's Done for Us Lately, in *THE FORTY-NINE PERCENT MAJORITY: THE MALE SEX ROLE* 31 (Deborah S. David & Robert Brannon eds., 1976) ("Both men and women grow up in our culture thinking of male aggressiveness as natural and normal, and of men as the sexual aggressors . . ."); Cynthia Petersen, *Envisioning a Lesbian Equality Jurisprudence*, in *LEGAL INVERSIONS: LESBIANS, GAY MEN, AND THE POLITICS OF LAW* 118, 120 (Didi Herman & Carl Franklin Stychin eds., 1995) ("Heterosexual men are supposed to be sexually aggressive, and heterosexual women are supposed to be ingratiatingly submissive.").

¹⁸⁵ See CRAWLEY, *supra* note 184, at 102 ("[M]en are expected to be always sexually aggressive, but not toward other men.") (citation omitted).

¹⁸⁶ Pepper Schwartz notes that in some cultures, men who have sex with both women and men are not considered gay as long as they are the sexual aggressors. Pepper Schwartz, *The Social Construction of Heterosexuality*, in *THE SEXUAL SELF: THE CONSTRUCTION OF SEXUAL SCRIPTS* 80, 86 (Michael Kimmel ed., 2007) ("If you are a man who wants to have sex with men in Greece, yet do not want to be thought of as homosexual, you can accomplish this goal, as long as you do not blunder into the 'female' sexual role."). As one Greek man explained, "The queers are the ones who get fucked." *Id.*

¹⁸⁷ Angela P. Harris, *Gender Violence, Race and Criminal Justice*, 52 *STAN. L. REV.* 777, 786-87 (2000); see also David Wyatt Seal & Anke A. Ehrhardt, *Masculinity and Urban Men: Perceived Scripts for Courtship, Romantic, and Sexual Interactions with Women*, in *CULTURE, SOCIETY AND SEXUALITY: A READER* 375, 393 (Richard Parker & Peter Aggleton eds., 2007) ("Men also have traditionally been socialized to avoid evaluative disclosure so as not to appear weak or homosexual.") (citations omitted).

¹⁸⁸ Roy Scrivner, *Gay Men and Nonrelational Sex*, in *MEN AND SEX: NEW PSYCHOLOGICAL PERSPECTIVES* 229, 233 (Ronald L. Levant & Gary R. Brooks eds., 1997); see also John Ibson, *Don't Look Gay: Why American Men are Afraid of Intimacy with Each Other*, *AM. SEXUALITY MAG.*, July 4, 2007, available at <http://www.alternet.org/story/55816> (noting that "countless American boys and the men that they become are afraid of intimacy with each other, fearful of how intimacy might be construed — of what others and maybe even they themselves might decide that the closeness suggests").

¹⁸⁹ See James Harrison, *Roles, Identities, and Sexual Orientation: Homosexuality*,

When a gay man makes a sexual advance upon a heterosexual man, the heterosexual man may fear that others will think he is gay if he does not do something to clearly express his heterosexuality. Responding with violence, in the heterosexual man's mind, is a clear and unambiguous rejection of homosexuality.¹⁹⁰

Masculinity norms also help legitimize the use of physical violence in response to non-violent homosexual advances. Men in this society who are physically strong, aggressive, and willing to use force when necessary are generally admired.¹⁹¹ When a heterosexual man finds his masculinity threatened by a homosexual advance, aggression and violence are considered appropriate ways to respond.¹⁹² The feeling of threat in such cases is analogous to the threat to male identity and honor that allegedly arises when a wife is unfaithful.¹⁹³

Heterosexuality, and Bisexuality, in A NEW PSYCHOLOGY OF MEN 359, 378-79 (Ronald F. Levant & William S. Pollack eds., 1995) (citation omitted); see also Susan M. Alexander, *Stylish Hard Bodies: Branded Masculinity in "Men's Health" Magazine*, 46 SOC. PERSP. 535, 538 (2003) ("Masculinity, then, stems from the fear of being seen as sissy, feminine, or anything less than a man."); Cooper, *supra* note 181, at 19 (citing Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity, in THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY* 25, 30 (2005)) (noting that "masculinity" is repudiation of "femininity").

¹⁹⁰ See BARBARA PERRY, *IN THE NAME OF HATE: UNDERSTANDING HATE CRIMES* 108 (2001) (noting that "violence against gays provides visible, documented proof of offenders' unquestionably straight sexuality"); Cooper, *supra* note 181, at 19 (noting that "the repudiation of homosexual men is part and parcel of the hegemonic masculinity"). As Jana Bufkin notes, "the offender becomes what the victim is not by attacking him/her." Jana L. Bufkin, *Bias Crime as Gendered Behavior*, 26 SOC. JUST. 155, 159 (1999).

¹⁹¹ See PERRY, *supra* note 190, at 108 (noting that gay-basher "proves, by his actions, that he is unafraid to fight, as any real man must be"); Harrison, *supra* note 189, at 378; see also Alexander, *supra* note 189, at 538 (noting that "men today wear the mask of the 'Tough Guise' . . . a performance in which violent masculinity is the norm."); Seal & Ehrhardt, *supra* note 187, at 393 ("[M]any men learn by a very young age that part of being a man is to compete and to conquer, as well as to be 'strong' and to suppress emotional expression or feelings.") (citations omitted). For a historical account of male identity norms, see John M. Kang, *Manliness and the Constitution*, 32 HARV. J.L. & PUB. POL'Y (forthcoming 2008) (discussing image of man as hypermasculine brute consumed by propensity for atavism, violence, and domination as reflected in Thomas Hobbes's *Leviathan*).

¹⁹² See DEBORAH CAMERON & DON KULICK, *LANGUAGE AND SEXUALITY* 39 (2003) ("To a heterosexual man, such an advance is said to constitute a kind of assault, and acts of violence committed in the resulting state of panic must therefore be regarded as justifiable self-defence."); Franklin & Herek, *supra* note 9, at 148 (noting that assumption underlying claims of gay panic is "that violence is the appropriate response to any type of sexual advance from a person of one's same sex"); Tomsen, *supra* note 173, at 2, 5.

¹⁹³ Schwartz, *supra* note 186, at 88 (commenting that Dustin Hoffman who plays

The perceived threat to male identity may be heightened if the advance occurs in front of other people, rather than in a private setting. Writer JoAnn Wypijewski recounts the following conversation she had with a young man from Laramie, Wyoming, the town where Matthew Shepard was killed:

“If a guy at a bar made some kind of overture to you, what would you do?”

“It depends on who’s around. If I’m with a girl, I’d be worried about what she thinks, because, as I said, everything a man does is in some way connected to a woman, whether he wants to admit it or not. Do I look queer? Will she tell other girls?”

“If my friends were around and they’d laugh and shit, I might have to threaten him.”

“If I’m alone and he just wants to buy me a beer, then okay, I’m straight, you’re gay – hey, you can buy me a beer.”¹⁹⁴

The claim of reasonableness linked to anti-gay violence is the product of a culture that privileges heterosexual male violence over other types of violence.¹⁹⁵ A man who responds to a (homo)sexual advance with deadly violence claims he acted as the average heterosexual man would have acted. A woman who tries to make a similar claim would find it extremely difficult to succeed. A woman who responds with deadly force to a man who kisses her or fondles her breasts is not at all typical. Women in this society are supposed to accept a certain amount of unwanted male attention, and while they might frown, struggle, or protest, they are not supposed to use violence to dissuade or thwart men who suggest sexual interest.

Moreover, women are taught to believe that a man who aggressively expresses his sexual attraction for a woman is merely behaving the way a man is supposed to behave.¹⁹⁶ The woman who is the target of

main character in film, *Straw Dogs*, is perceived as not adequately heterosexual because he cannot control his flirtatious wife).

¹⁹⁴ JoAnn Wypijewski, *A Boy’s Life: For Matthew Shepard’s Killers, What Does it Take to Pass As a Man?*, HARPER’S MAG., Sept. 1999, at 61, 74.

¹⁹⁵ See Comstock, *Dismantling the Homosexual Panic Defense*, *supra* note 10, at 99.

¹⁹⁶ David & Brannon, *supra* note 184, at 31 (“Both men and women grow up in our culture thinking of male aggressiveness as natural and normal, and of men as the sexual aggressors”); Lois Pineau, *Date Rape: A Feminist Analysis*, in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN’S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION 484, 486-87 (D. Kelly Weisberg ed., 1996) (discussing normal aggressiveness of male sexuality); see also Comstock, *Dismantling the Homosexual Panic Defense*, *supra* note 10, at 99-100 (noting that “approval of violence against gay

male attention is supposed to be flattered. Even if the woman is just as offended by a non-violent heterosexual advance as a heterosexual male might be by a non-violent homosexual advance, she is unlikely to convince the average juror that a violent response is reasonable because women just are not expected to be violent. David Wertheimer, former Executive Director of the New York City Gay and Lesbian Anti-Violence Project, wryly points out, "If every heterosexual woman who had a sexual advance made to her by a male had the right to murder the man, the streets of this city would be littered with the bodies of heterosexual men."¹⁹⁷

The heterosexual man's claim of reasonableness does more than privilege men over women. It privileges heterosexual men over gay men. If a heterosexual man responds violently to a homosexual advance, he enjoys a presumption of reasonableness. A heterosexual man is supposed to be disgusted and outraged when another man attempts a sexual advance.¹⁹⁸ If, however, a gay man were to respond violently to a heterosexual female's sexual advance, he would have a difficult time convincing anyone that he was reasonably provoked into a heat of passion, even if a heterosexual woman's sexual advance is just as disgusting to him as a gay man's sexual advance might be to a heterosexual man. Men in this society are supposed to be happy if a woman shows she is sexually attracted to him. If a man, however, shows his sexual interest in another man by acting in a similar manner, he supposedly is asking for a violent response.

Charles Butler, the man convicted of capital murder for his part in the slaying and burning of Billy Jack Gaither on a pyre of tires, admitted he would have reacted differently had Gaither been a woman.¹⁹⁹ In an interview with *Frontline*, Butler admitted that Billy

men contrasts sharply with the freedom and lack of vulnerability to attack with which heterosexual men make sexual advances toward women"); Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 179 (1996).

¹⁹⁷ Peter Johnson, 'More Than Ordinary Men Gone Wrong': *Can the Law Know the Gay Subject?*, 20 MELB. U. L. REV. 1152, 1178 (1996) (quoting Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1466 n.188 (1992)). To be precise, the male defendant who claims that a non-violent homosexual advance constitutes legally adequate provocation and is convicted of manslaughter rather than murder is not justified in having killed another person. Provocation is generally considered an excuse defense, which means that the act is still considered wrong.

¹⁹⁸ See Suffredini, *supra* note 10, at 284-85 (arguing that American culture suggests that violence is appropriate and necessary response to any homosexual advance because heterosexual men are supposed to be aggressors in all sexual interactions).

¹⁹⁹ Interview with Charles Butler, in Kilby Prison, Ala., PBS *Frontline* (Feb. 15, 2000), available at <http://www.pbs.org/wgbh/pages/frontline/shows/assault/interviews/>

Jack did not attempt to grab him.²⁰⁰ It was Billy Jack's verbal suggestion of a sexual threesome that made Butler feel disrespected and led him to beat Billy Jack. Butler admitted that had a woman made a similar suggestion, he would not have viewed her remarks as disrespectful.²⁰¹ Because the verbal come-on came from a man, Butler felt he had to react with physical violence.

Race, gender, and age also seem to play a part in gay homicide cases. The perpetrators of anti-gay violence tend to be White and male.²⁰² The majority are in their teens or twenties.²⁰³ In many cases, the victim is much older than the defendant.²⁰⁴ These young White males are often described at their murder trials as well-liked, normal, young men.²⁰⁵ Jurors may be more inclined to view the claims of these young White men as reasonable because they seem to represent the ordinary all-American boy next door.

A final reason why gay panic provocation claims may resonate with juries is the prevalence of negative stereotypes about gay men as

butler.html.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 158, at 59, 61 (reporting that 67% of perpetrators of anti-gay violence are White and 94% are male); see also NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, *supra* note 158, at 34-35 (reporting that 47% of anti-lesbian, gay, bisexual and transgender violence offenders in 2004 were White and 82% were male). According to the Uniform Crime Report published by the Department of Justice, approximately 44% of the perpetrators of anti-gay hate crimes in 2006 were White. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *supra* note 8 (noting that 620 of 1,415 anti-gay offenses in 2006 were committed by White offenders).

²⁰³ See COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 158, at 59 (“[N]early one half of all perpetrators [of anti-gay/lesbian violence] are twenty-one years of age and younger, with the great majority less than twenty-eight years old.”); see also NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, *supra* note 158, at 33 (reporting that 57% of all offenders whose age was known were under age of 30: 20% of offenders were 18 years or younger and 37% were between ages of 18 and 29).

²⁰⁴ See COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 158, at 78 (“Consistent with findings reported earlier in this chapter, the perpetrators are fifteen to twenty-two years of age; they are predominantly white; and their victims are older.”).

²⁰⁵ COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 158, at 82 (“Typical of the defenses for middle-class perpetrators was the use of character witnesses to provide anecdotal evidence of ‘good family backgrounds,’ exemplary behavior in school, and participation in organized athletics.”); see also Stephen Tomsen, *Hate Crimes and Masculinity: New Crimes, New Responses and Some Familiar Patterns*, AUS. INST. OF CRIM., June 2001, at 1, 5, available at <http://www.aic.gov.au/conferences/outlook4/Tomsen.pdf> (noting that “[r]esearch indicates that most acts of racist or ‘homophobic’ harassment and violence are perpetrated by psychologically normal offenders . . .”).

sexual deviants and sexual predators.²⁰⁶ Even though cultural representations of gay men and lesbians in the popular press have changed dramatically over the past fifty years, criminal defense narratives today continue to invoke the “specter of the pathological, predatory, sexually violent deviant” in an attempt to encourage jurors to find that a young heterosexual male defendant’s violent response to an older homosexual male’s sexual advance is reasonable.²⁰⁷ The underlying theme is that gay men are sexual deviants²⁰⁸ who prey on young boys and cannot be trusted to work in positions of supervisory authority²⁰⁹ — the message of both the Religious Right and the Boy Scouts.²¹⁰ Even though the concept of reasonableness is usually associated with reason and calm deliberation, the opposite of violence driven by emotion, a young heterosexual man nonetheless is considered reasonable if he responds violently to an older man’s non-violent homosexual advance.

E. “Trans Panic”

Gay panic has recently morphed into another defense strategy called the “trans panic” defense.²¹¹ In such cases, a male defendant charged with murdering a male-to-female transgender person claims he was provoked into a heat of passion upon discovering that the person with whom he had sexual relations was biologically male rather than female.

Michael Magidson and José Merel, charged with first-degree murder in the killing of Gwen Araujo (born Edward Araujo) used such an

²⁰⁶ PERRY, *supra* note 190, at 110-11 (noting that contemporary stereotypes resurrect historical construction of homosexuality as sinful and deviant and gays as predatory and menacing).

²⁰⁷ Michael A. Smyth, *Queers and Provocateurs: Hegemony, Ideology, and the “Homosexual Advance” Defense*, 40 L. & SOC’Y REV. 903, 904 (2006); *see also supra* note 13 (listing sources that discuss common stereotypes about gay men).

²⁰⁸ *See* EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 19, 43 (1990).

²⁰⁹ *See* PERRY, *supra* note 190, at 115 (noting common refrain, “We don’t want ‘them’ teaching our children, since they might seduce them”).

²¹⁰ *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (holding that forcing Boy Scouts to reinstate gay assistant scoutmaster who was expelled after he publicly declared he was gay would violate Boy Scouts’ First Amendment right of association).

²¹¹ *See* Steinberg, *supra* note 15, at 500-01; *see also* Bradford Bigler, Comment, *Sexually Provoked: Recognizing Sexual Misrepresentation as Adequate Provocation*, 53 UCLA L. REV. 783, 798 (2006) (proposing that sexual misrepresentation be considered legally adequate provocation if defendant engages in sexual act while reasonably deceived regarding fact reasonably material to consent, discovery of which would cause reasonable person severe mental or emotional crisis).

argument at their murder trial.²¹² Magidson and Merel met the seventeen-year-old Araujo in the summer of 2002 and engaged in intimate relations with her.²¹³ Araujo, who was biologically male, lived as a female and had assumed the name of her favorite singer, Gwen Stefani.²¹⁴ At a party in October 2002, Merel and Magidson began to suspect that Araujo was not biologically female.²¹⁵ Magidson took Araujo into the bathroom and tried to hike up her skirt to check whether she was a man or a woman.²¹⁶ When Araujo told Magidson not to touch her, Magidson got a woman from the party named Nicole Brown to check.²¹⁷ Brown went into the bathroom and felt Araujo's genitals. When she discovered Araujo had a penis, Brown screamed

²¹² Initially, four men — Michael Magidson, José Merel, Jaron Chase Nabors, and Jason Cazares — were charged with murder and a hate crime enhancement. See Julian Guthrie, *Why Did it Take a Murder for the People of Newark to Wake up to the Harassment of One of Their Own?*, S.F. CHRON., CHRON. MAG., Dec. 22, 2002, at 12. Nabors pled guilty to voluntary manslaughter in exchange for a promise to testify against the three others, and was sentenced to 11 years in prison for his role in the killing of Araujo. See Henry K. Lee, *11 Years for Defendant in Araujo Killing*, S.F. CHRON., Aug. 26, 2006, at B2. Cazares pled no contest to a lesser charge and received a six-year sentence. See Henry K. Lee, *Prison for 3 in Transgender Teen's Slaying*, S.F. CHRON., Jan. 28, 2006, at B1 [hereinafter Lee, *Prison for 3*]. After a second trial, Magidson and Merel were found guilty of second-degree murder and sentenced to 15 years to life. *Id.* The jury rejected the hate crime enhancement which could have added another four years to their sentence. See Henry K. Lee, *Manslaughter Ruled Out, Araujo Juror Says*, S.F. CHRON., Sept. 14, 2005, at B1 [hereinafter Lee, *Manslaughter Ruled Out*] (“The jury ultimately rejected hate crime enhancements against Merel and Magidson because some panelists believed that the defendants killed Araujo not necessarily because of her gender orientation, but simply to ‘cover up a situation that had gotten out of control.’”); Kelly St. John & Henry K. Lee, *Slain Newark Teen Balanced Between Two Worlds*, S.F. CHRON., Oct. 19, 2002, at A1 (noting that hate crime enhancement could have added as many as four more years in prison).

²¹³ Michelle Locke, *Jurors Deliberate in Slaying of Transgender Teen*, HOUS. CHRON., June 4, 2004, at A7, available at http://www.chron.com/CDA/archives/archive.mpl?id=2004_3769144.

²¹⁴ See John M. Glionna, *Murder Trial Nears End: Closing Arguments Begin in the Slaying of a Transgender Teenager with the Prosecutor Lashing Out at One of the Alleged Killers*, L.A. TIMES, Aug. 25, 2005, at B4.

²¹⁵ See Daisy Hernandez, *Young and Out: Anything but Safe*, COLORLINES, Dec. 22, 2004, at 26. The question of whether Magidson knew or suspected Araujo was transgender before the attack was a key point in the case because prosecutors argued the killing was a premeditated murder while the defense argued it was a crime of passion. See Kelly St. John, *Heavy Drinking, Outrage, Man Testifies He's Accused of Killing Transgender Teenager*, S.F. CHRON., Aug. 16, 2005, at B3.

²¹⁶ See John M. Glionna, *Keeping Focus on Victim in Retrial: Transgender Advocates Publicize the Details of the Latest Proceeding Against Three Men Accused in the Slaying of Teenager Gwen Araujo*, L.A. TIMES, July 5, 2005, at B1.

²¹⁷ See *id.*

and ran from the bathroom.²¹⁸ Magidson allegedly flew into a rage and proceeded to punch, choke, and kick Araujo.²¹⁹ Merel joined in the attack, beating Araujo with a frying pan and soup can.²²⁰ Merel, Magidson, and two others carried Araujo into the garage where Magidson strangled Araujo with a rope and someone else struck Araujo with a shovel.²²¹

Magidson's attorney, Michael Thorman, told the jury that Magidson's shock at discovering that Araujo was transgender provoked him into a heat of passion and therefore the jury should convict Magidson of manslaughter, not murder.²²² According to Thorman, Magidson's discovery that he had unknowingly engaged in homosexual sex incited revulsion and rage in him.²²³ Thorman explained, "This crime didn't occur because Mike [Magidson] had a bias. It happened because of the discovery of what Eddie [Araujo] had done."²²⁴ He continued, "This is a case that tells a story about . . . the tragic results when that deception and betrayal were discovered."²²⁵ The jury, a panel of eight men and four women, deadlocked, and the judge declared a mistrial.²²⁶

The claim that a transgender individual's deception about his or her biological sex should constitute legally adequate provocation, like the claim that a non-violent homosexual advance should constitute legally adequate provocation, rests upon dominant norms of hegemonic

²¹⁸ See *id.*

²¹⁹ See *id.*; Ivan Delventhal, *Prosecutor Cross-Examines Suspect in Araujo Murder Trial*, TRI-VALLEY HERALD (Pleasanton, Cal.), May 20, 2004 (noting that "Cazares testified Tuesday that he intervened repeatedly as Magidson, Merel and Nabors punched and kicked Araujo in the Merel home on Oct. 4, 2002"); *Transgender Slaying Case Ends Without a Verdict*, MARIN INDEP. J. (Marin, Cal.), June 23, 2004 (noting that "Nabors said Merel hit Araujo with a can and a skillet and Magidson punched, choked and kicked her"); Yomi S. Wronge, *Judge Reaffirms No-Bail Ruling*, S.J. MERCURY NEWS, July 25, 2003, at C1 ("According to Nabors, it was Magidson who repeatedly choked, hit and kicked Araujo.").

²²⁰ See Marisa Lagos, *Mistrial Declared in Teen's Killing: Prosecutor Says He Will Move to Retry Three Men Accused of Killing the Transgender Student*, L.A. TIMES, June 23, 2004, at B1 (noting that Merel struck Araujo's head so hard that he dented soup can).

²²¹ See *id.*

²²² See *id.*

²²³ See Vicki Haddock, *'Gay Panic' Defense in Araujo Case*, S.F. CHRON., May 16, 2004, at E1.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See Janine DeFao & Kelly St. John, *Retrial in Araujo Case Presents Challenges*, S.F. CHRON., June 28, 2004, at B3; Lagos, *supra* note 213, at B1.

masculinity.²²⁷ Magidson's attorney was trying to appeal to the masculinity norm that suggests real men prefer women, not other men, when he claimed Magidson was disgusted and enraged upon discovering that he had unknowingly engaged in homosexual sex.²²⁸

There is good reason to reject the argument that a transgender person's deception about his or her biological sex constitutes legally adequate provocation. Under current rape law, a man can use deceit to get a woman to have sex with him. Even if the woman had sex with the man only because of a false promise of marriage or a lie about the man's true identity (he pretended to be rich and famous when he was actually unemployed), the woman's consent to intercourse is considered valid under the law. When a man uses fraud-in-the-inducement to achieve sexual intercourse, the intercourse is not considered rape.²²⁹ The trans panic theory suggests that the victim's deception about his or her "true" identity should be grounds to partially excuse a murder even though using deception to get someone to consent to sex is not considered a crime.²³⁰

At their second trial, Magidson and Merel again argued they were provoked into a heat of passion upon discovering that Araujo had male genitalia and that Araujo's deception about her true sexual identity was what sparked their rage. This time, after deliberating for seven days, the jury rejected the defendants' claim of provocation and

²²⁷ See PERRY, *supra* note 190, at 106 (citing ERVIN GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 128 (1963)) (explaining ideal or "hegemonic" masculinity is reflected in "a young, married, white, urban, northern, heterosexual Protestant father, of college education, fully employed, of good complexion, weight and height, and a recent record in sports").

²²⁸ See Haddock, *supra* note 223, at E1.

²²⁹ See *Boro v. Superior Court*, 210 Cal. Rptr. 122, 125 (Cal. Ct. App. 1985) (holding that fraud-in-the-inducement does not invalidate consent).

²³⁰ Courts are divided over whether pretending to be a woman's husband in order to have sex with her constitutes fraud-in-the-factum or fraud-in-the-inducement. See *Lewis v. State*, 30 Ala. 54, 54 (1857) (finding that even though woman's consent to sexual intercourse was procured by defendant's fraudulent impersonation of woman's husband, act of intercourse did not constitute rape); *Ledbetter v. State*, 26 S.W. 725, 725-26 (Tex. 1894) (affirming conviction for rape where defendant fraudulently impersonated victim's husband). The rationale for treating the impersonating-a-husband case as fraud-in-the-inducement (and not rape) is that the woman knew she was engaging in sexual intercourse, and therefore her consent was valid. *Boro*, 210 Cal. Rptr. at 124 (citing PERKINS & BOYCE, CRIMINAL LAW ch. 9, § 3, 1079 (3d ed. 1982)). Other courts have held that husband impersonation to obtain consent to sexual intercourse constitutes fraud-in-the-factum (and therefore rape) on the theory that "the woman's consent is to an innocent act of marital intercourse while what is actually perpetrated upon her is an act of adultery." *Id.*

found both men guilty of second-degree murder.²³¹ Magidson and Merel were sentenced to fifteen years to life in prison.²³²

The second jury's verdict is comforting. Apparently, the jury felt it was not reasonable for the defendants to have acted the way they did upon discovering that Araujo was transgender. According to Max Stern, a San Francisco lawyer who served on the second jury, "This was not a manslaughter, because it is not reasonable to accept this behavior in response to the circumstances here."²³³ Stern continued, "Even if the defendants believed they had been sexually deceived, that would be 'no basis, no justification for beating and murder.'"²³⁴

F. Self-Defense

Gay panic arguments linked to claims of self-defense, although less common than gay (or trans) panic arguments linked to claims of provocation, are also sometimes successful.²³⁵ Self-defense requires a

²³¹ See John M. Glionna, 2 *Guilty of Killing Transgender Teen*, L.A. TIMES, Sept. 13, 2005, at B1.

²³² Lee, *Prison for 3*, *supra* note 212, at B1.

²³³ Lee, *Manslaughter Ruled Out*, *supra* note 212, at B1.

²³⁴ *Id.* On September 28, 2006, the Gwen Araujo Justice for Victims Act was signed into law. Assemb. B. 1160, 2006 Leg., Reg. Sess. (Cal. 2006). Assembly Bill 1160, introduced by Assemblywoman Sally Lieber (D-San Jose), added a new section 1127h to the California Penal Code, which requires the judge to give the following jury instruction upon request of either party: "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." *Id.* Recent social science research suggests that merely telling jurors not to be biased is inadequate. Shari Seidman & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1864 (2001). Jurors need to be given tools they can use to counter hidden biases. One such tool is a role-reversal jury instruction, which I propose in Part IV of this Article. See *infra* text accompanying notes 498-503.

²³⁵ In a recent case, a 21-year-old man named Stephen Scarborough argued he killed a 62-year-old man named Victor Manious by hitting him with a baseball bat to ward off a homosexual assault. Scarborough claimed that Manious walked into Scarborough's friend's apartment while Scarborough was there alone, knocked him out, and when Scarborough came to, Manious was in his underwear on top of Scarborough sexually assaulting him. See Barton Dieters, *Opening Statements in Stephen Scarborough's Murder Trial Described Two Scenarios in Victor Manious's Death*, GRAND RAPIDS PRESS, Mar. 26, 2008, http://blog.mlive.com/grpress/2008/03/opening_statemets_in_steve_s.html; Barton Dieters, *Scarborough Testifies in Own Defense, Says He Was Being Sexually Assaulted by Slaying Victim*, GRAND RAPIDS PRESS, Apr. 7, 2008, http://blog.mlive.com/gpress/2008/04/scarborough_testifies_in_own_d.html. Scarborough was charged with felony murder, but was found guilty of voluntary manslaughter on April 10, 2008. See *Verdict in Stephen Scarborough Case: Guilty of Voluntary Manslaughter of Victor Manious*, GRAND RAPIDS PRESS, Apr. 10, 2008, http://blog.mlive.com/grpress/2008/04/verdict_

showing that the defendant honestly and reasonably believed deadly force was necessary to protect against an imminent threat of death or serious bodily injury.²³⁶

Just as in the provocation cases discussed above, the defendant claiming self-defense draws upon masculinity norms, heterosexuality norms, and stereotypes about gay men to bolster his claim of reasonableness.

For example, thirty-year-old Stephen Bright argued that he killed fifty-eight-year-old Kenneth Brewer in self-defense after Brewer tried to force him to have sex.²³⁷ Bright met Brewer at a gay bar on September 30, 1997.²³⁸ Brewer bought Bright some drinks and the two men chatted.²³⁹ Bright accompanied Brewer back to his Hawaii Kai condominium for more drinks.²⁴⁰ According to Bright, he was sitting in Brewer's bedroom having a gin vodka mixed drink when Brewer left the room for a short time.²⁴¹ When Brewer came back into the bedroom, he was completely naked with an erection, and said he wanted to f ___ Bright.²⁴² Then, Brewer grabbed his throat and crotch.²⁴³ Bright claimed he got up and started swinging to get Brewer off of him.²⁴⁴ Bright said he did not intend to kill Brewer; he just did not want to be raped or hurt.²⁴⁵ Bright also testified that he was "in a

in_steven_scarborough.html. It is unclear whether the jury mitigated the charges because they felt Scarborough was reasonably provoked into a heat of passion or because they could not agree on a verdict and simply compromised.

²³⁶ See Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFF. CRIM. L. REV. 191, 198-99 (1998) [hereinafter Lee, *The Act-Belief Distinction in Self-Defense Doctrine*].

²³⁷ Susan Kreifels, *Blood in Jeans Evidence of Murder, Says Prosecutor*, HONOLULU STAR-BULL., Oct. 1, 1998, available at <http://archives.starbulletin.com/1998/10/01/news/briefs.html> (last visited Oct. 21, 2008) [hereinafter Kreifels, *Blood in Jeans Evidence of Murder*].

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ See *id.*

²⁴¹ See Partial Transcript of Proceedings in State v. Bright, Cr. No. 97-2720, at 23-25 (September 28, 1998) (direct examination of defendant Stephen Bright by John Tonaki).

²⁴² *Id.* at 25-27.

²⁴³ *Id.*

²⁴⁴ *Id.* at 27-28, 30 ("All I remember is just swinging out of fear of this man.").

²⁴⁵ *Id.* at 31 ("I was just thinking of getting this man off me and leaving, getting out of this room. I didn't want to get raped or hurt.").

panic state.”²⁴⁶ When Bright later heard that Brewer had died, he surrendered to police.²⁴⁷

Bright was charged with second-degree murder.²⁴⁸ At trial, Bright claimed he acted in self-defense, beating Brewer to ward off a sexual assault.²⁴⁹ Self-defense as a defense to murder requires proof that the defendant honestly and reasonably believed it was necessary to use deadly force to protect against an imminent threat of death or serious bodily injury.²⁵⁰ If the defendant could have avoided the threatened harm by taking less fatal action, ordinarily the defendant is not exonerated.²⁵¹ Self-defense doctrine also requires proportionality. An individual cannot use deadly force to counter non-deadly force.²⁵²

Interestingly, Bright’s attorney, Deputy Public Defender Jack Tonaki, did not argue that his client’s fear of sexual assault was somehow worse because his attacker was a man. Instead, in a sophisticated appeal to the women on the jury, Tonaki argued that fighting back in self-defense against the threat of sexual assault is the same whether by a man or a woman.²⁵³ Engaging in a bit of gender and sexual orientation switching,²⁵⁴ Tonaki further argued that it

²⁴⁶ *Id.* at 32 (“I was in such a panic state.”).

²⁴⁷ *Id.* at 34-35.

²⁴⁸ See *Murder Suspect to be Arraigned*, HONOLULU STAR-BULL., Nov. 6, 1997, available at <http://archives.starbulletin.com/1997/11/06/news/briefs.html> (last visited Oct. 21, 2008) (noting that Stephen Bright was charged with second-degree murder in beating death of Kenneth Brewer).

²⁴⁹ See Susan Kriefels, *Beating Death of Hotel Worker Was Self-defense, Defendant Says*, HONOLULU STAR-BULL., Sept. 17, 1998, available at <http://archives.starbulletin.com/1998/09/17/news/story9.html> (“Stephen Bright attacked a homosexual man because of sexual advances, killing him in self-defense, his defense attorney says.”).

²⁵⁰ See Lee, *The Act-Belief Distinction in Self-Defense Doctrine*, *supra* note 236, at 198-99.

²⁵¹ *Id.*

²⁵² Deadly force is generally defined as force intended or likely to cause death or grievous bodily injury. DRESSLER, *UNDERSTANDING CRIMINAL LAW*, *supra* note 103, at 239 (citing *Commonwealth v. Klein*, 363 N.E.2d 1313, 1316 (Mass. 1977)). Many jurisdictions consider rape grievous bodily injury, such that a woman would be allowed to use deadly force to ward off an impending rape. See, e.g., *People v. Maria de L.A.*, 61 Cal. 188, 189-90 (1882) (opining that “[t]he defendant would be justified in using a deadly weapon, if the prosecuting witness was attempting to commit any rape . . .”); see also *Barker v. Yukins*, 199 F.3d 867, 876 (6th Cir. 1999) (holding trial court erred in failing to instruct jury that defendant would have been justified in using deadly force to stop imminent rape).

²⁵³ Susan Kriefels, *Jury Tainted by Homophobia?*, HONOLULU STAR-BULL., Oct. 7, 1998, available at <http://starbulletin.com/98/10/07news/story2.html>.

²⁵⁴ In *Murder and the Reasonable Man*, I propose race, gender, and sexual orientation switching as one way to reduce bias in cases involving race, gender and sexual orientation. See LEE, *MURDER AND THE REASONABLE MAN*, *supra* note 80, at 253.

makes no difference whether the sexual assailant is gay or straight, because an individual has a right to fight off an unwanted sexual attack.²⁵⁵ In his closing argument, Tonaki told the jury:

If a woman were in the same position faced with a man coming at them naked, saying the things Kenneth Brewer said, and that female pulls out a gun and shoots the guy dead, we'd be giving that lady an award for stopping a rape. There's no double standards under the law, ladies and gentlemen. . . . This case is not about homosexuality. . . . It's about a danger of being assaulted, sexually assaulted. That's what it's all about.²⁵⁶

The jury, encouraged to imagine Bright as a woman being sexually attacked by an older man, was primed to sympathize with Bright.

It is true that a woman threatened with imminent rape or other forcible sexual assault would be justified in using deadly force in self-defense if necessary to avoid being killed or seriously injured.²⁵⁷ Use of deadly force to protect against death or serious bodily injury is considered proportionate force. It is doubtful, however, that Stephen Bright had to kill Kenneth Brewer to avoid the alleged sexual advance. Bright was younger by almost thirty years and much stronger than Brewer. According to Wayne Tashima, the prosecutor who tried the case, Bright's body was muscular and stocky.²⁵⁸ Moreover, Bright's job as a construction worker required him to lift heavy objects.²⁵⁹ Brewer, in contrast, was overweight and weak.²⁶⁰ Most likely, Bright did not have to beat Brewer to death to avoid a sexual assault.

Further undermining Bright's claim of self-defense was that police found Brewer's blood on the inside of Bright's jeans, suggesting Bright had his pants off during the beating and may have engaged in some form of consensual sexual activity before the killing.²⁶¹ Bright, however, denied taking off his pants during the evening. His attorney suggested

²⁵⁵ Kreifels, *Jury Tainted by Homophobia?*, *supra* note 253.

²⁵⁶ Partial Transcript of Proceedings in *State v. Bright*, Cr. No. 97-2720, at 29 (September 30, 1998) (Deputy Public Defender John Tonaki's Closing Argument).

²⁵⁷ See *supra* note 252.

²⁵⁸ Telephone Interview with Wayne Tashima, Senior Deputy Prosecuting Attorney, in Honolulu, Haw. (Oct. 20, 2007).

²⁵⁹ *Id.*

²⁶⁰ *Id.* See also Partial Transcript of Proceedings in *State v. Bright*, Cr. No. 97-2720, at 13 (September 20, 1998) (Deputy Prosecuting Attorney Wayne Tashima's Closing Argument) (noting that defendant agreed during his testimony that victim was overweight and not physically built in comparison to defendant).

²⁶¹ See Kreifels, *Blood in Jeans Evidence of Murder*, *supra* note 237.

Brewer's blood could have gotten on the inside of Bright's jeans after he took off his clothes and threw them together in a laundry basket.²⁶² According to the prosecutor, however, Bright did not remove his clothes until at least four hours after the killing.²⁶³ Any blood from the beating probably would have dried by that time, and could not have transferred from one piece of clothing to another.²⁶⁴

The jury deliberated for three-and-a-half days before acquitting Bright of murder, finding him guilty of only third-degree assault, a misdemeanor.²⁶⁵ The maximum punishment for third-degree assault was one year in jail.²⁶⁶ Bright was sentenced to time served and 400 hours of community service.²⁶⁷ Because Bright had already been in jail for one year pending trial, he was released from jail the same day he was convicted.²⁶⁸

III. WHY GAY PANIC DEFENSE STRATEGIES SHOULD NOT BE CATEGORICALLY BARRED

In light of the troubling stereotypes reinforced by gay panic narratives and the obvious attempt by defendants asserting gay panic to tap into unconscious homophobia, it is tempting to join calls for abolition of gay panic defense strategies. In 1992, Robert Mison issued just such a call. In his article, *Homophobia in Manslaughter: The Homosexual Advance As Insufficient Provocation*, Mison argues that the use of gay panic to support a provocation defense should be disallowed because such an argument appeals to irrational fears, revulsion, and hatred against gay men, which are prevalent in our heterocentric society.²⁶⁹ According to Mison, when judges allow

²⁶² Telephone Interview with Wayne Tashima, *supra* note 258.

²⁶³ *Id.*

²⁶⁴ *Id.* The blood on the inside of Bright's jeans suggests Bright may have allowed Brewer to engage in sexual relations with him before he beat Brewer to death. If so, Bright's claim that he was afraid of Brewer and only beat him to ward off a sexual attack is suspect. It seems more plausible that Bright went back to Brewer's home, knowing that Brewer expected some kind of sexual activity in exchange for all the drinks he had purchased for Bright that evening. The two may have started to engage in sexual activity. Bright may have started feeling disgusted with himself, then took his feelings of shame and guilt out on Brewer.

²⁶⁵ *Killer Gets Community Service Hours*, HONOLULU STAR-BULL., July 7, 1999, available at <http://archives.starbulletin.com/1999/07/07/news/briefs.html>.

²⁶⁶ HAW. REV. STAT. § 706-663 (2008); HAW. REV. STAT. § 707-712 (2008).

²⁶⁷ *Killer Gets Community Service Hours*, *supra* note 265.

²⁶⁸ *Id.*

²⁶⁹ Mison, *supra* note 10, at 157-58 (discussing common negative stereotypes about gays, including image of loathsome addict who spreads AIDS and other venereal

defendants to make such arguments, they reinforce and institutionalize violent prejudices at the expense of norms of self-control, tolerance, and compassion, which the law should encourage.²⁷⁰ Therefore, Mison argues, judges should rule as a matter of law that a non-violent homosexual advance does not constitute legally adequate provocation.²⁷¹ In short, Mison asks judges to take the question of whether a reasonable man would be provoked into a heat of passion by a non-violent homosexual advance away from the jury and disallow the provocation defense in such cases. Most critics of gay and trans panic arguments have echoed Mison's call, proposing legislative or judicial action barring defense appeals to gay panic.²⁷²

While I agree that claims of gay panic are problematic for all the reasons outlined in Parts I and II of this Article, I believe the criminal law should not categorically bar gay panic arguments linked to claims of provocation.²⁷³ In this Part, I provide a defense of this potentially unpopular position. I start with a micro-argument: attempts to ban the argument that a non-violent homosexual advance constitutes legally adequate provocation from the criminal courtroom will not work because defense attorneys will find more subtle ways to get the same idea across to the jury. When a message that relies on negative stereotypes is conveyed covertly, it will often have a more powerful impact than if the message had been aired overtly. This is because an explicit argument allows individuals to consciously correct or counter otherwise automatic stereotype-congruent responses, while more subtle insertions of bias are harder to defend against.

I then turn to several macro-arguments to support my theory that it is better to allow defendants to assert claims of gay panic than to

diseases).

²⁷⁰ See *id.* at 176-77.

²⁷¹ *Id.* But see Dressler, *When "Heterosexual" Men Kill "Homosexual" Men*, *supra* note 10, at 728-29 (arguing against Mison's proposal).

²⁷² See, e.g., Steinberg, Book Note, *supra* note 15, at 502 (arguing that judges should not allow gay or trans panic arguments); Suffredini, *supra* note 10, at 279 (arguing that use of Homosexual Panic Defense should either be limited by application of new evidentiary rules or eliminated altogether).

²⁷³ 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.

preclude such arguments. Three broad frameworks illustrate why allowing defendants to argue gay panic better serves the dual purposes of ensuring a fair trial to the defendant and achieving the ends of justice that the State seeks: (1) First Amendment theory; (2) recent social science research on race and implicit bias; and (3) institutional competency arguments in favor of allowing juries to decide whether to be lenient towards a defendant claiming gay panic.

A. *Lessons from the Matthew Shepard Trial*

Formally barring gay panic provocation arguments from the criminal courtroom is not a good idea because it will not keep the jury from considering gay panic arguments. The Matthew Shepard case illustrates this point. Matthew Shepard was the openly gay student at the University of Wyoming whose bloodied and beaten body was found tied to a wooden fence about one mile outside Laramie, Wyoming in October 1998. Police responding to a 911 call about a fight between Aaron McKinney and two Latino youths the same night found Shepard's credit card, one of Shepard's shoes, and the bloody gun used to beat Shepard in McKinney's truck.²⁷⁴ Police arrested McKinney and his friend Russell Henderson. McKinney and Henderson were charged with first-degree murder, aggravated robbery, and kidnapping with intent to inflict bodily injury or terrorize the victim.²⁷⁵ Rather than go to trial, Henderson pled guilty to murder.²⁷⁶ McKinney decided to take his chances with a jury.

One of McKinney's attorneys, Jason Tangeman, raised the specter of the gay man as deviant sexual predator during his opening statement before the jury of seven men and five women.²⁷⁷ Tangeman argued that Matthew Shepard made an unwanted sexual advance upon McKinney when they were in McKinney's truck, allegedly grabbing

²⁷⁴ BETH LOFFREDA, *LOSING MATT SHEPARD: LIFE AND POLITICS IN THE AFTERMATH OF ANTI-GAY MURDER* 152-54 (2000).

²⁷⁵ See Robert W. Black, *Brutal Death of Gay Man Stirs Nation*, STAR-LEDGER (Newark, N.J.), Oct. 14, 1998, at 3.

²⁷⁶ *2nd Trial Starts in Gay Man's Death*, STAR-LEDGER (Newark, N.J.), Oct. 10, 1999, at 18.

²⁷⁷ See Partial Transcript of Trial Proceedings in *State v. McKinney*, No. 6381, at 16-17 (Oct. 11, 1999) (defense attorney Jason Tangeman's opening statement) (on file with author) (alleging that "Mr. Shepard reached over and grabbed [Aaron McKinney's] genitals and licked his ear" which made McKinney very upset and caused him to beat Shepard); Tom Kenworthy, *Wyo. Jury to Weigh Motives in Gay Killing*, WASH. POST, Nov. 3, 1999, at A3 (noting that jury consisted of seven men and five women).

McKinney's crotch and licking McKinney's ear.²⁷⁸ Tangeman argued that this sexual advance was particularly upsetting to McKinney because of his history with unpleasant homosexual encounters. According to Tangeman, when McKinney was seven years old, a neighborhood bully forced him to suck his penis and commit sexual acts with another little boy.²⁷⁹ At the age of twenty, McKinney was traumatized when he accidentally entered a gay and lesbian church in Florida and saw men holding hands and kissing.²⁸⁰ Tangeman concluded that Shepard's unwanted sexual advance, McKinney's history of traumatic homosexual encounters, and McKinney's use of alcohol²⁸¹ and methamphetamines combined to cause McKinney to lose his self-control.²⁸²

The evidence is going to show that it is the advance of Mr. Shepard — the homosexual advance of Mr. Shepard that was significant to Aaron McKinney. That humiliated him in front of his friend, Russell Henderson. His past bubbled up in him. He was fuelled [sic] by drugs. He was fuelled [sic] by alcohol. And in his own words, he left his body.²⁸³

Tangeman's opening statement was unexpected. McKinney's attorneys had not mentioned plans to use a gay panic defense in any of the pretrial hearings.²⁸⁴ Judge Barton Voigt quickly called a hearing to decide whether to allow the defense to introduce evidence of gay panic in support of either a provocation or mental disorder defense. After hearing arguments from both sides, the judge did what Robert Mison would like all judges to do — he ruled against the defense.²⁸⁵ Judge Voigt observed that, despite their protests to the contrary, the defense

²⁷⁸ Partial Transcript of Trial Proceedings in *State v. McKinney*, *supra* note 277, at 16-17.

²⁷⁹ *Id.* at 19.

²⁸⁰ *Id.* at 20.

²⁸¹ Jana Bufkin notes that alcoholic consumption "is practically universally associated with being a man or achieving manhood." Bufkin, *supra* note 190, at 166 (noting that "males equate drinking with masculinity and, perhaps more importantly, this male bonding exercise is often laced with violence").

²⁸² Partial Transcript of Trial Proceedings in *State v. McKinney*, *supra* note 277, at 9-11 (discussing McKinney's addiction to methamphetamine), 16-18 (discussing Shepard's alleged homosexual advance), and 19-20 (discussing McKinney's history of traumatic homosexual encounters).

²⁸³ *Id.* at 22.

²⁸⁴ See LOFFREDA, *supra* note 274, at 132.

²⁸⁵ Decision Letter, *State v. McKinney*, No. 6381 (D. Wyo. Oct. 30, 1999).

was in fact trying to assert what he called a “homosexual rage” defense. He explained:

Defense counsel have tried valiantly to convince the Court that their defense is not a homosexual rage defense. But what they hope to do is to present testimony that, because of homosexual experiences in the Defendant’s past, he flew into a rage and killed Matthew Shepard, without specific intent to kill, but voluntarily in a sudden heat of passion. This is the homosexual rage defense, nothing more, nothing less. The fact that the Defendant attempts to raise it through lay witnesses, rather than through experts, is inconsequential.²⁸⁶

In barring the defense from asserting a provocation defense based on a gay panic argument, the judge ruled that the jury could not consider McKinney’s prior homosexual experiences on the issue of provocation. He explained that provocation is supposed to be based upon an objective reasonable person standard and McKinney’s personal experiences bore only upon his subjective state of mind.²⁸⁷ The judge also ruled that Wyoming law did not recognize the defenses of temporary insanity and diminished capacity, and accordingly those defenses were unavailable to the defense.²⁸⁸

This, however, was not the end of the matter. 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 aggressive²⁸⁹ and deserved the beating he got, playing on stereotypical images of gay men as sexual deviants and sexual provocateurs.²⁹⁰ One witness, Mike St. Clair, testified that he was at the Fireside Lounge Bar the night Shepard was killed. According to St. Clair, Shepard

²⁸⁶ *Id.* at 4.

²⁸⁷ *Id.*

²⁸⁸ *Id.*; see Michael Janofsky, *Gay-Panic Defense Ruled Out*, S.F. CHRON., Nov. 2, 1999, at A3, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1999/11/02/MN90537.DTL&hw=nancy+gay&sn=064&sc=265> (last visited Oct. 22, 2008); *Wyoming Judge Bars ‘Gay Panic’ Defense*, WASH. POST, Nov. 2, 1999, at A7.

²⁸⁹ It is interesting that Shepard’s supposed sexual aggressiveness was used to convey the idea that he deserved to die when sexual aggressiveness is usually a coveted manly trait. See *supra* note 184. Apparently, sexual aggressiveness is viewed as a positive manly trait only in heterosexual interactions.

²⁹⁰ See Kevin T. Berril & Gregory M. Herek, *Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy*, in *HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN* 289, 295 (1992); Lou Chibbaro, Jr., *‘Gay Panic’ Defense Used Despite Ban by Judge, Second Witness Says Shepard Made Pass*, WASH. BLADE, Nov. 3, 1999.

approached him and asked if he could sit with him.²⁹¹ After he agreed to let Shepard sit with him, St. Clair testified that he “began to feel really uncomfortable.”²⁹² A short time later, Russell Henderson approached the table, leaned down towards Shepard, and whispered something in Shepard’s ear.²⁹³ Shepard then gathered up his things, stood up, and said he would be back.²⁹⁴ When St. Clair responded with “what?” Shepard “leaned down” and “licked his lips like . . . it was him trying to be sexy.”²⁹⁵ St. Clair continued, “I believe it was him showing he was interested in me, hitting on me.”²⁹⁶ St. Clair concluded that Shepard “was blatantly gay, and he made advances on me.”²⁹⁷

A second witness, Chris Hoogerhyde, testified that Shepard made a homosexual advance upon him when they went on a midnight trip to a lake with others on August 21, 1998.²⁹⁸ According to Hoogerhyde, Shepard asked him to go for a walk around the lake.²⁹⁹ Hoogerhyde declined, but Shepard persisted and asked him why not.³⁰⁰ Hoogerhyde told Shepard that he did not want to go because it was a big lake and there were bears out there.³⁰¹ Shepard told him, “[Y]ou’re just afraid I’m going to try something.”³⁰² Hoogerhyde testified that he took this as a homosexual advance.³⁰³ After Hoogerhyde told Shepard “no” again, Shepard gave him a little tug on his shirt and said, “Come

²⁹¹ Partial Transcript of Trial Proceedings in *State v. McKinney*, *supra* note 277, at 30 (direct examination of Mike St. Clair).

²⁹² *Id.* at 31; *see also* LOFFREDA, *supra* note 274, at 135. Loffreda notes that this comment suggests the witness was more afraid of his own homosexuality than of Shepard. *Id.*; *see also* Chibbaro, *supra* note 290 (reporting that defense witness who testified that Shepard made sexual advance toward him at Fireside Lounge minutes before Shepard met McKinney and Henderson was 23-year-old University of Wyoming student Mike St. Clair).

²⁹³ Partial Transcript of Trial Proceedings in *State v. McKinney*, *supra* note 277, at 32-34.

²⁹⁴ *Id.* at 35.

²⁹⁵ *Id.*

²⁹⁶ *Id.*; *see also* Bryan Robinson, *Final Ruling on So-Called “Gay Panic” Theory Hangs in Balance as Shepard Murder Defense Begins*, COURT TV ONLINE, Oct. 29, 1999, http://www.courttv.com/trials/mckinney/102999_pm_ctv.html.

²⁹⁷ Partial Transcript of Trial Proceedings in *State v. McKinney*, *supra* note 277, at 38.

²⁹⁸ *Id.* at 42-45 (direct examination of Chris Hoogerhyde).

²⁹⁹ *Id.* at 44.

³⁰⁰ *Id.* at 45.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

on,” as if nagging him to go with him.³⁰⁴ Hoogerhyde responded by hitting Shepard with his fist twice, knocking him out.³⁰⁵

It appears that the defense called these two witnesses not only to give credibility to McKinney’s claim that Shepard had made a sexual advance upon him — a claim which McKinney later admitted was false³⁰⁶ — but also to suggest it was reasonable for McKinney to be offended by Shepard’s alleged homosexual advance and to respond to it with violence. During closing arguments to the jury, Dion Custis, McKinney’s other attorney, repeatedly argued that Shepard’s sexual advance upon McKinney triggered the subsequent beating.³⁰⁷

One might object to using the Shepard case as an example of why attempts to ban gay panic defense strategies will not work on the

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 45-46.

³⁰⁶ In a televised interview from prison in 2004, Aaron McKinney admitted to Elizabeth Vargas of ABC News that he made up the story about going into a rage because Shepard made a pass at him. McKinney and Russell Henderson claimed Shepard’s death was simply a robbery gone bad by two men high on methamphetamine. *The Matthew Shepard Story: Secrets of a Murder* (ABC television broadcast Nov. 26, 2004). McKinney’s admission that there was no homosexual advance raises the question whether McKinney’s attorneys violated any ethical rules by promoting what we now know was a false gay panic defense. Rule 3.3 of the Model Rules of Professional Conduct provides that “[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.” MODEL RULES OF PROF’L CONDUCT R. 3.3 (2004), available at http://www.abanet.org/cpr/mrpc/rule_3_3.html. First, it is not clear whether McKinney’s attorneys knew at the time of McKinney’s trial that Shepard had not made a sexual advance upon McKinney. If McKinney told his attorneys that Shepard made a sexual advance and the attorneys did not know that he was lying, the attorneys would not be in violation of Rule 3.3 because Rule 3.3 requires knowledge of falsity. Second, while knowingly eliciting perjured testimony would be a violation of Rule 3.3, arguably McKinney’s lawyers did not knowingly elicit perjured testimony when they presented the testimony of the two defense witnesses, who were merely describing *their* previous interactions with Matthew Shepard. Aaron McKinney did not testify at trial. Finally, as far as the references to Shepard’s alleged sexual advance in the defense’s opening and closing statements, a lawyer’s statements during opening and closing arguments are not under oath and do not in and of themselves constitute evidence. As law professor Peter Margulies has noted, imposing discipline upon lawyers for what they say in opening and closing statements could chill advocacy in ways that would undermine the Sixth Amendment. Conversation with Peter Margulies, in Seattle, Wash. (Oct. 5, 2008); see also Peter Margulies, *Lawyers’ Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939, 955 (2006) (“[D]efense counsel has no . . . obligation to . . . present the truth.”) (citing *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (White, J., concurring and dissenting)).

³⁰⁷ Partial Transcript of Trial Proceedings in *State v. McKinney*, *supra* note 277, at 68 (defense attorney Dion Custis’s closing statement); see also Patrick O’Driscoll, *Jury Begins Deliberations in Slaying of Gay Student*, USA TODAY, Nov. 3, 1999, at 9A.

ground that the prosecutor and judge may have simply been asleep at the switch. Presumably, a prosecutor who was paying attention would have strenuously objected to the introduction of testimony designed to bolster a defendant's claim of gay panic, and a judge who had ruled that the defense could not argue gay panic would sustain such an objection. It is unclear why the judge permitted this testimony in light of his earlier ruling.³⁰⁸

However, even if an alert prosecutor objects and the judge sustains the objection, the defense attorney will have largely achieved his goal. 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 Shepard 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.³⁰⁹ The defense attorney may ask leave to rephrase the question, which simply gives him another opportunity to hammer home his point. When he then asks the witness, "Tell me, in your own words, how you felt when this man came up to you," the defense attorney does not need an answer because the question has conveyed the point he wishes to make. If the prosecutor objects again, she just helps the defense by calling attention to the fact that the witness, an average man just like the defendant, felt uncomfortable having another man expressing sexual interest in him.

³⁰⁸ The prosecutor did not object to having these witnesses testify. See Partial Transcript of Trial Proceedings in *State v. McKinney*, *supra* note 277, at 23-47 (direct examination of Mike St. Clair and Christopher Hoogerhyde). During Mike St. Clair's direct examination, the prosecutor objected only twice, and neither of these objections went directly to St. Clair's testimony that he felt Shepard had made a homosexual advance upon him. See *id.* at 31-32 (objecting when Mike St. Clair started to say, "[O]ne of my friends told me he apparently introduced . . ."), 33 (objecting to question, "You saw [Russell Henderson] and you said he was appearing to be drunk and running around" because leading). During Hoogerhyde's direct examination, the prosecutor did object to a question that alluded to Shepard having made a homosexual advance, but this was only after the witness had already testified that he took Shepard's invitation to go for a walk around the lake as a homosexual advance. *Id.* at 46 (objecting when defense started to ask, "Was that in response to what you perceived as a homosexual. . .").

³⁰⁹ As Shari Diamond and Neil Vidmar note, "[S]imple admonitions that instruct the jury to disregard psychologically compelling but inadmissible testimony . . . often fail to unring the bell." Seidman & Vidmar, *supra* note 234, at 1864.

One might also object to using the Matthew Shepard case as evidence that defense attorneys will disregard explicit court orders not to use gay panic on the ground that in most cases, when a judge rules that an attorney cannot make a particular argument, the attorney will follow the judge's instructions. One might further argue that perhaps because the Matthew Shepard case was under such intense public scrutiny, it is more of an outlier than a typical case.

The fact that the case received so much public attention, however, makes it all the more remarkable that the defense openly flouted the judge's order. Despite all the media attention, the judge not only allowed the two witnesses to testify, but also allowed the defense to refer to Shepard's alleged (homo)sexual advance again in closing arguments. If this could happen in a case like the Matthew Shepard case, where all eyes were watching, it could happen in any case.

Recent behavioral research on juries suggests that attempts to control the matters that a jury considers by prohibiting the introduction of specific topics at trial simply do not work. In one of the only studies to date based on actual jury deliberations, Shari Diamond and Neil Vidmar reviewed videotaped jury deliberations in forty civil cases, in an attempt to examine the effectiveness of "blindfolding" — the commonly employed technique of withholding certain information from the jury.³¹⁰ Blindfolding is fairly common in both civil and criminal cases and includes withholding from juries information about the prior criminal convictions of a defendant who chooses not to testify, statements made by either party during plea bargaining or settlement negotiations, and subsequent remedial measures taken by a party after an accident.³¹¹ One rationale behind blindfolding is the fear that exposing juries to the prohibited information may improperly bias them. The reason juries are not told about a non-testifying defendant's prior convictions is because we fear they might find the defendant guilty based on his presumably bad character rather than on the evidence presented at trial.³¹² Blindfolding may also encourage certain behaviors which society views as beneficial.³¹³ For example, statements during settlement negotiations are not admissible at trial, in part to encourage the parties to engage in attempts to settle the case.³¹⁴ A rule that precludes the

³¹⁰ *Id.* at 1858 (noting cases filmed with consent of parties, judge, and jurors as part of Arizona Jury Project).

³¹¹ *See id.* at 1863.

³¹² *See id.*

³¹³ *See id.*

³¹⁴ *See id.*

admission of evidence of remedial measures is designed to encourage defendants to take remedial measures without having to fear that those actions will be used against them.³¹⁵

Despite evidentiary rules prohibiting the admission of certain types of evidence, Diamond and Vidmar found that prohibited evidence often finds its way into the deliberation room. Sometimes such evidence is inadvertently introduced when a witness innocently mentions a forbidden subject in response to a question.³¹⁶ Sometimes an attorney is able to convince the judge that she is introducing the evidence for an allowable purpose.³¹⁷ For example, despite the rule of evidence that disallows evidence of prior bad acts, a prosecutor might argue that she is introducing the prior bad act to show motive, an acceptable reason. Finally, jurors, who bring their prior experiences, beliefs and attitudes to the jury room, may think of a forbidden topic on their own.³¹⁸

Diamond and Vidmar found that despite the general evidentiary prohibition reflected in Federal Rule of Evidence 411 and numerous state evidence codes precluding the introduction of evidence that a party carried liability insurance,³¹⁹ conversations amongst jurors about insurance occurred in 85% of the forty tort cases they studied.³²⁰ In several of the cases in which the jury discussed insurance during deliberations, the subject of insurance came up directly or indirectly at trial.³²¹ In four-fifths of the remainder of the cases, even though there was no mention of the subject of insurance at trial, the jurors themselves spontaneously initiated discussions about it.³²² Diamond and Vidmar also found that despite an absolute prohibition on mentioning attorneys' fees, the topic of whether or how much the attorneys would be paid came up in 83% of the cases observed.³²³

Diamond and Vidmar's research suggests that attempts to ban gay panic arguments from the criminal courtroom will not keep jurors from considering gay panic as a reason for the killing. Either the

³¹⁵ *See id.*

³¹⁶ *See id.* at 1864.

³¹⁷ *See id.*

³¹⁸ *See id.* at 1865-66.

³¹⁹ *Id.* at 1875.

³²⁰ *Id.* at 1876.

³²¹ *Id.* at 1877-82.

³²² *Id.* at 1884.

³²³ *Id.* at 1897-98.

subject will come up inadvertently or purposefully during trial, or the jurors may think of the argument on their own.³²⁴

It is unclear whether the gay panic defense strategy used in the Matthew Shepard case influenced the jury which found McKinney guilty of felony murder. On the one hand, one could read this verdict as a repudiation of the defense's attempt to paint McKinney's actions as a reasonable response to an unwanted homosexual advance. Had the jury bought this argument, they probably would have found McKinney guilty of voluntary manslaughter. On the other hand, the jury did not give the government the first-degree murder conviction it sought. They instead found McKinney guilty of felony murder, an offense that does not require proof of premeditation or deliberation. Regardless of which interpretation is correct, the Matthew Shepard case illustrates how easily a claim of gay panic can be made *sub rosa* even when the judge tries to bar the defense.

The outcome in the Matthew Shepard case may even support my argument that making sexual orientation salient can help jurors cognitively process and reject the stereotypic assumptions about gay men underlying claims of gay panic. Sexual orientation can be made salient in various ways, including through pretrial publicity, questions asked during voir dire, opening and closing statements, trial testimony, and jury instructions.³²⁵ In the Matthew Shepard case, gay and lesbian groups made sexual orientation salient when they decried the killing as a hate crime based on the victim's sexual orientation. Extensive pretrial publicity and the defense's promotion of a gay panic defense strategy further helped to make sexual orientation salient. The jury responded by rejecting McKinney's claim of gay panic. In finding McKinney guilty of felony murder rather than manslaughter, it appears the jury did not resort to stereotypical thinking about gay men as sexual deviants, but instead saw Shepard as a human being who had suffered a particularly cruel and senseless death.

³²⁴ *Id.* at 1865-66 (noting that most common situation in which blindfolding attempt fails "occurs when the jurors' pretrial experiences, attitudes, or beliefs provide them with a foundation of potentially relevant information that makes the forbidden topic likely to come to mind").

³²⁵ See generally Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1371 (2000) [hereinafter Sommers & Ellsworth, *Race in the Courtroom*] ("During the course of a trial, racial issues may become salient in any number of ways, including, for example, pretrial publicity, voir dire questioning of potential jurors, opening and closing arguments, the nature of police testimony, attorneys' demeanors, and sometimes the nature of the crime itself, as in a Ku Klux Klan confrontation.").

B. *First Amendment Theory*

This country has a long history of tolerance for dissent. Under the “marketplace of ideas” theory of free speech,³²⁶ the expression of both good and bad ideas is encouraged on the ground that lively debate and discussion can help both those listening and those arguing determine the truth. As Justice Oliver Wendell Holmes explained in his dissenting opinion in *Abrams v. United States*,³²⁷ “[T]he ultimate good desired is better reached by free trade in ideas — . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.”³²⁸

Another reason for allowing individuals to express even speech thought to be dangerous to a free society is the idea that suppression of speech breeds hate, and “hate menaces stable government.”³²⁹ Under the “safety valve” theory,³³⁰ the best way to deal with the threat of radical action is to allow individuals to express radical ideas out in the open and to permit others to challenge and debate those ideas. As Justice Brandeis explained in his concurring opinion in *Whitney v. California*, “[T]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies [T]he fitting remedy for evil counsels is good ones.”³³¹

In one of the most eloquent defenses of the right to freedom of speech, Thomas Emerson explains that suppression of discussion allows force to replace reason.³³² The process of open discussion, on the other hand,

promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process . . . Freedom of expression thus provides a framework in which the conflict

³²⁶ Anna M. Taruschio, *The First Amendment, The Right Not to Speak and the Problem of Government Access Statutes*, 27 *FORDHAM URB. L.J.* 1001, 1009 (2000) (noting “[t]he concept of the marketplace of ideas entered American jurisprudence as a principle of First Amendment liberty in Justice Holmes’ dissent in *Abrams v. United States*”) (citation omitted).

³²⁷ 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

³²⁸ *Id.* at 630 (Holmes, J., dissenting).

³²⁹ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

³³⁰ See generally Bradley C. Bobertz, *The Brandeis Gambit: The Making of America’s “First Freedom,” 1909-1931*, 40 *WM. & MARY L. REV.* 557, 609 (1999).

³³¹ *Whitney*, 274 U.S. at 375.

³³² THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

necessary to the progress of a society can take place without destroying the society.³³³

When a heterosexual male murder defendant argues gay panic, he seeks to appeal to societal norms that value heterosexuality over homosexuality.³³⁴ He further seeks to promote the idea of homosexuality as deviant and abnormal.³³⁵ Such norms are in conflict with norms that recognize that gays and lesbians are human beings and that responding to a non-violent sexual advance (whether heterosexual or homosexual) with fatal physical violence is inappropriate. Though critics of the gay panic defense have argued that gay panic arguments should be barred, trying to change social norms by suppressing norms with which one disagrees is not the best way to bring about lasting change. As Emerson explains: “The principle that the government cannot restrict expression in order to coerce conformity to social norms means that freedom of expression must receive full protection in this context. No matter how deviant the expression may be — how obnoxious or intolerable it may seem — the expression cannot be suppressed.”³³⁶

Moreover, suppressing speech to enforce conformity to social norms can further entrench the existing retrograde norms. Suppressing speech is “likely to bottle up the frustrations, hide the underlying grievances, and ultimately end in explosion.”³³⁷

Just as the suppression of obnoxious ideas can give those ideas more power by forcing them underground where they can fester and gain persuasive force, banning gay panic arguments from the criminal courtroom simply forces these arguments below the surface where they may actually have more influence. As explained in the next section, recent social science research on race and implicit bias suggests that racial stereotypes can automatically influence perception, thought, and action when unmediated by an individual’s cognitive processes. Making race salient — that is, calling more, not less, attention to race — can encourage individuals to suppress what would otherwise be automatic stereotype-congruent responses. The same is likely true when sexual orientation is at issue.³³⁸ Open debate about

³³³ *Id.*

³³⁴ See *supra* text accompanying note 14.

³³⁵ See *supra* note 207.

³³⁶ EMERSON, *supra* note 332, at 45.

³³⁷ *Id.*

³³⁸ Margo J. Monteith et al., *The Effect of Social Norm Activation on the Expression of Opinions Concerning Gay Men and Blacks*, 18 BASIC & APPLIED SOC. PSYCHOL. 267, 277 (1996) [hereinafter Monteith et al., *The Effect of Social Norm Activation on the*

the divergent perceptions and feelings heterosexual men have about sexual advances by gay men is a better way to deal with potential bias against a gay male victim than pretending such bias does not exist. Open discussion also allows judges and jurors to consciously mediate their attitudes and beliefs about homosexuality, sexual deviance, and whether violence is an appropriate response to a non-violent homosexual advance.

Addressing “the selective receptivity of the law to the ‘homosexual panic’ defense,”³³⁹ Dan Kahan argues that when disgust sensibilities are pushed down below the surface of the law, disgust’s influence is harder to detect.³⁴⁰ On the other hand, “when we force decisionmakers [sic] to be open about the normative commitments that underlie their disgust sensibilities, members of the public are fully appraised [sic] of what those commitments are.”³⁴¹ If defendants are disgusted by non-violent homosexual advances, it is best that these disgust sensibilities be out in the open, so they can become the source of open interrogation and inquiry.

One objection to my First Amendment argument is that adjudicative speech, speech which “is both intended and received as a contribution to [a court’s] deliberation about some issue,”³⁴² is “regularly and systematically constrained by rules of evidence, canons of professional ethics, judicial gag orders, and similar devices.”³⁴³ Criminal defendants have no right to insist on being free to argue whatever they like in court. Indeed, the Supreme Court has made clear that the right to proffer a defense is not absolute.³⁴⁴ As Frederick Schauer explains:

Trials, of course, are highly structured affairs, in which there appears to be quite little free speech. There are elaborate rules about who goes when, about who speaks, and about who does not speak. There are rules about how to speak, and there are rules about what not to say. All of that part of the law of

Expression of Opinions Concerning Gay Men and Blacks] (finding that when non-prejudiced norms were made salient, both egalitarian and conservative individuals expressed less prejudiced opinions about gay men).

³³⁹ Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1654 (1998).

³⁴⁰ *Id.* at 1655.

³⁴¹ *Id.*

³⁴² Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 725 n.81 (2004) (citing CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 130 (1993)).

³⁴³ *Id.* at 705.

³⁴⁴ See *infra* text accompanying note 469.

evidence that deals with relevance and materiality can be thought of as a prohibition on speech, a prohibition on saying what (a judge believes) is irrelevant to the particular matter at hand. Those who persist in saying irrelevant things after a ruling by the judge risk punishment for contempt, and thus it is no exaggeration to describe a trial as a place in which people run the risk of imprisonment for saying things that a government official, a judge, believes to be unrelated to the matter at hand.³⁴⁵

This objection, however, misses the point. I am not arguing that criminal defendants have a First Amendment right to assert gay panic arguments in their defense. Rather, I am simply using traditional First Amendment theories to bolster my claim that, apart from promoting reprehensible messages, allowing defendants to argue gay panic can serve valuable purposes, including defeating the gay panic defense strategy.

Another possible objection is that encouraging the expression of obnoxious views about gay men who allegedly make unwanted sexual advances is like hate speech, and can be extremely damaging to the gay community at large.³⁴⁶ Hate speech has been defined as “speech that degrades an individual or group on grounds such as race, gender, nationality, ethnicity, language, religion, or sexual orientation.”³⁴⁷ A gay panic defense, one could argue, is akin to hate speech because in suggesting that gay men are deviant sexual predators to be feared and loathed, it degrades and disparages gay men on the basis of their sexual orientation. Allowing such arguments in the criminal courtroom lends a judicial stamp of approval to hate speech.

I have two responses to this argument. First, even if a gay panic defense is akin to hate speech in the ways outlined above, hate speech is generally considered protected speech.³⁴⁸ Therefore, equating a gay panic defense with hate speech is not a persuasive reason to ban it.

³⁴⁵ Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 *ARK. L. REV.* 687, 689 (1997).

³⁴⁶ Hate speech “arguably cause[s] harms that cannot be remedied by more speech” because it disempowers those who are its targets. Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 *DUKE L.J.* 821, 835 (2008).

³⁴⁷ John T. Nockleby, *Hate Speech*, in *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 752 (Paul Finkelman ed., 2006).

³⁴⁸ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (striking down ordinance used to prosecute individuals who burned cross on black family’s lawn on First Amendment grounds). *But see* Cass R. Sunstein, *Words, Conduct, Caste*, 60 *U. CHI. L. REV.* 795, 822-33 (1993) (critiquing reasoning in *R.A.V.* and arguing that some hate speech can and should be regulated without violating First Amendment).

Hate speech ordinarily cannot be banned unless it falls into the category of fighting words.³⁴⁹

Second, use of a gay panic defense can be distinguished from hate speech. When a defendant utilizes a gay panic defense strategy, there are a number of institutional players, including the judge, the prosecutor, and even the jurors, who are in a position to either counter the gay panic argument or engage in dialogue about its merits. In contrast, a victim of hate speech may be in an isolated setting where it would be dangerous to respond or may feel so demoralized by the speech that he or she cannot respond.³⁵⁰ Given our adversarial system of justice, a prosecutor in a case in which gay panic is asserted is more likely to challenge a claim of gay panic than an individual on the street is likely to counter hate speech directed at him.

C. *Social Science Research on Implicit Bias*

In this section, I borrow from social science research on race and implicit bias. This research suggests that making race salient (i.e., calling attention to race) can help individuals to overcome what would otherwise be automatic stereotype-congruent responses. I argue that if making race salient makes it easier for individuals to battle racial stereotypes, then making sexual orientation salient may similarly make it easier for individuals to battle sexual orientation bias. Disallowing defendants from arguing gay panic simply forces such arguments underground and into the subconscious where stereotypes about gay men as deviant sexual predators, and norms that favor heterosexuality over homosexuality, are likely to have a greater impact.

Over the last several decades, self-reported expressions of prejudicial attitudes toward minority groups have declined substantially.³⁵¹ It is extremely rare to find an individual who

³⁴⁹ The Supreme Court has held that states may prohibit fighting words, words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). This is because fighting words do not contribute to the expression of ideas and have no social value in the search for the truth. *Id.* at 572.

³⁵⁰ See generally Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (examining harms caused by hate speech and arguing for recognition of independent tort action for racial insults).

³⁵¹ HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 191 (1997) (“[T]here has been a strong and generally steady movement of white attitudes from denial to affirmation of equality – so much so that some questions have been dropped by survey organizations because answers were approaching 100 percent affirmation.”); Monica Biernat & Christian S. Crandall,

expresses racist beliefs. Most Americans today pride themselves on being egalitarian-minded. It is common to hear people of all political persuasions saying that race does not matter; we are all just individuals.

Despite these public pronouncements, social science research on race and implicit bias indicates that Americans today are not in fact color-blind. Race does matter, although increasingly at the level of the subconscious.³⁵² Social scientists have documented the existence of implicit bias through numerous experiments using the Implicit Association Test (“IAT”). The IAT documents the existence of implicit bias by measuring the difference between the amount of time it takes to process information that corresponds to well-established associations, which can include stereotypes based on race, and information which is contrary to those associations.³⁵³ Researchers have found that even individuals who self-identify as holding egalitarian beliefs have a harder time performing a simple sorting task when a word that corresponds to a negative stereotype is paired with a pleasant word than when that same word is paired with an unpleasant word.³⁵⁴

One of the first implicit bias experiments had nothing to do with race. In that experiment, subjects were given a random list of words representing flowers, insects, pleasant words, and unpleasant words, and asked to sort these words into the appropriate category.³⁵⁵ If the individual saw the word “tulip,” the individual would hit the key

Racial Attitudes, in MEASURES OF POLITICAL ATTITUDES 291, 297 (John P. Robinson, Phillip R. Shaver & Lawrence S. Wrightsman eds., 1999) (“Today, there is undoubtedly *some* cause for optimism about black-white relations, as surveys reliably show that straightforward antiblack antipathy by whites has been on the decrease . . .”).

³⁵² Charles Lawrence notes that “[i]ncreasingly, as our culture has rejected racism as immoral and unproductive, [unconscious or] hidden prejudice has become the more prevalent form of racism.” Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 335 (1987); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 406 (2007).

³⁵³ See Jerry Kang & Mazharin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1071-72 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1509-10 (2005); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 431 (2007).

³⁵⁴ See Shankar Vedantam, *See No Bias*, WASH. POST MAG., Jan. 23, 2005, at W12.

³⁵⁵ Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998). The experiment also used musical instruments and weapons in lieu of flowers and insects. *Id.* at 1466.

corresponding with the label “flower.” If the individual saw the word “wasp,” the individual was to hit the key corresponding with the label “insect.” If the individual saw the word “love,” the individual was to hit the key corresponding with the label “pleasant words.” If the individual saw the word “rotten,” the individual would hit the key corresponding with the label “unpleasant words.”

In the next stage of the experiment, subjects were again given a random list of words representing flowers, insects, pleasant words, and unpleasant words. This time, however, they were told to hit one key on the left side of the computer if the word on the screen corresponded with one of two categories and another key on the right side of the computer if the word on the screen corresponded with one of two other categories. When the individuals were told to hit one key if the word flashed on the screen fell into the category “flower” or “pleasant word,” and told to hit another key if the word flashed on the screen fell into the category “insect” or “unpleasant word,” the individuals did fine. When, however, the individuals were told to hit one key if the word flashed on the screen fell into the category “flower” or “unpleasant word” and to hit another key if the word flashed on the screen fell into the category “insect” or “pleasant word,” response times became noticeably slower.³⁵⁶ Understandably, subjects found it easier to correlate insects with unpleasant words than to correlate insects with pleasant words because of well-established associations between insects, such as cockroaches, termites, and bedbugs, and unpleasant things, such as dirt, filth, disease, bites, and decay.

The researchers then decided to replace flower names with white-sounding names such as Katie and Meredith and insect names with black-sounding names such as LaTonya and Ebony. They found that when black-sounding names were paired with pleasant words and white-sounding names were paired with unpleasant words, subjects had much more difficulty sorting the words into the appropriate categories than when black-sounding names were paired with unpleasant words and white-sounding names were paired with pleasant words.³⁵⁷ Implicit bias in favor of Whites and against Blacks manifested even in subjects who self-reported non-prejudiced beliefs.³⁵⁸

³⁵⁶ *Id.* at 1468.

³⁵⁷ *Id.* at 1474.

³⁵⁸ *Id.* at 1475; see also John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 534 (1997) (finding that subjects responded faster to positive words following White face than when those words followed Black face and that subjects responded faster to negative words when

Anthony Greenwald explains the theory behind the IAT.³⁵⁹ Consider a thought experiment, he suggests, in which a subject is shown a series of male and female faces and told to respond as quickly as possible, saying “hello” if the face is a male face and “goodbye” if the face is a female face. In the next stage of the experiment, the subject is shown either a male face or name or a female face or name and instructed to say “hello” to male faces and male names and “goodbye” to female faces and female names. The subject should have no trouble responding quickly in either of these conditions. Next, the subject is told to say “hello” if he or she sees either a male face or a female name and to say “goodbye” if he or she sees a female face or male name. To complete this task successfully, the subject will likely respond more slowly than in the first part of the experiment. This, Greenwald theorizes, “follows from the existence of strong associations of male names to male faces and female names to female faces.”³⁶⁰ Attempting to map the same response (“hello” or “goodbye”) when confronted with opposite associations is understandably more difficult than attempting to map the response with given correlating associations. The difference in the time it takes to perform the different sorting tasks “measures the strength of gender-based associations between the face and name domains.”³⁶¹

More than two million people have taken the IAT.³⁶² Ninety percent of the test-takers have been American.³⁶³ Eighty-eight percent of Whites who have taken the IAT have manifested implicit bias in favor of Whites and against Blacks.³⁶⁴ Nearly 83% of heterosexuals have manifested implicit bias in favor of straight people over gays and lesbians.³⁶⁵ More than two-thirds of non-Arab, non-Muslim test-takers

primed with Black face than when primed with White face).

³⁵⁹ Greenwald et al., *supra* note 355, at 1464.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² See Vedantam, *supra* note 354, at W15.

³⁶³ *Id.*

³⁶⁴ *Id.* Studies have found that even African Americans exhibit implicit bias in favor of Whites relative to Blacks. See, e.g., R.W. Livingston, *The Role of Perceived Negativity in the Moderation of African Americans' Implicit and Explicit Racial Attitudes*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 405, 411 (2002) (finding that while African Americans demonstrated strong evidence of in-group bias on explicit measures, they showed out-group, i.e. White, favoritism on implicit measures); B.A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GROUP DYNAMICS 101, 105 (2002) (noting that while Black respondents showed stronger preference for Black over White on explicit measures, reversed pattern was observed on implicit measures with Blacks showing weak preference for White over Black).

³⁶⁵ Vedantam, *supra* note 354, at W15. Gay men, however, manifest implicit bias

have shown implicit bias against Muslims.³⁶⁶ These results were in sharp contrast to the test-takers' self-reported attitudes.³⁶⁷

Recent advances in brain imaging techniques have enabled researchers to confirm scientifically the implicit bias suggested by IAT research. Functional magnetic resonance imaging ("fMRI") offers a non-invasive way to examine the functions of the brain.³⁶⁸ Researchers interested in measuring racial bias have used fMRI to measure activity in the amygdala, a "small, almond-shaped structure in the medial temporal lobe that is primarily known for its role in emotional learning and memory."³⁶⁹ Brain imaging research "suggests that amygdala activity reflects arousal triggered by fast unconscious assessment of potential threat."³⁷⁰ Activity in the amygdala indicates "relatively automatic social evaluation" without conscious awareness or intent.³⁷¹

Researchers have found that exposing White subjects to Black faces can affect their physiological responses in a number of ways, including how much their skin sweats, how fast their hearts pump, and whether their facial muscles twitch.³⁷² Brain imaging allows researchers to examine differences in amygdala activity when subjects are exposed to different stimuli. In one experiment, Elizabeth Phelps used fMRI to record neural activity in the amygdala of White subjects while they were being exposed to Black and White faces.³⁷³ After the fMRI scan, subjects took an IAT. They then answered questions from the Modern Racism Scale, a self-report scale that measures explicit racial attitudes.³⁷⁴ Phelps found that subjects with the most negative implicit attitudes toward Blacks showed the greatest amygdala activation

in favor of homosexuality relative to heterosexuality. William A. Jellison et al., *supra* note 182, at 629, 634.

³⁶⁶ Vedantam, *supra* note 354, at W15.

³⁶⁷ *Id.*

³⁶⁸ See generally Jennifer L. Eberhardt, *Imaging Race*, 60 AM. PSYCHOLOGIST 181 (2005) (noting that fMRI techniques "offer a noninvasive means of examining the functioning of healthy brains"); see also Stacey A. Tovino, *Functional Neuroimaging Information: A Case for Neuro Exceptionalism?*, 34 FLA. ST. U. L. REV. 415, 424-26 (2006) (discussing fMRI studies involving racial evaluation).

³⁶⁹ Elizabeth A. Phelps et al., *Intact Performance on an Indirect Measure of Race Bias Following Amygdala Damage*, 41 NEUROPSYCHOLOGIA 203, 203 (2003).

³⁷⁰ Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social-Cognitive Goals Affect Amygdala and Stereotyped Activation*, 16 PSYCHOL. SCI. 56, 56 (2005).

³⁷¹ *Id.* at 57.

³⁷² Eberhardt, *supra* note 368, at 182.

³⁷³ Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCI. 729, 771 (2000).

³⁷⁴ *Id.* at 730.

responses toward Black faces as compared with White faces.³⁷⁵ These same subjects self-reported little or no prejudice, confirming that there is little correlation between stated attitudes and actual implicit bias. The fact that the subjects with the strongest implicit bias scores also showed the greatest amygdala activity supports the view that the IAT is an accurate measurement of implicit bias.³⁷⁶ Other fMRI experiments have found that both Black and White subjects show greater amygdala activity when exposed to Black faces than when exposed to White faces.³⁷⁷

The fact that individuals consistently self-report more egalitarian views than are reflected in their IAT scores and fMRI scans “suggest[s] at least two modes of evaluation: one that involves conscious and controlled modes of thinking and another that involves relatively automatic processes that operate without deliberate thought or sometimes without conscious awareness.”³⁷⁸ When a racial stereotype like the “Black-as-Criminal” stereotype³⁷⁹ is activated by exposure to a Black face, an individual is likely to experience an automatic stereotype-congruent response, such as fear. If, however, the individual has time to think about whether it makes sense to equate Blackness with criminality under the given circumstances, the individual’s cognitive processes can mediate between the automatic stereotype-congruent

³⁷⁵ *Id.* at 732.

³⁷⁶ Interestingly, these results were not replicated when subjects were shown pictures of familiar and positively regarded Black and White individuals. *Id.* at 733. Phelps theorized that these findings suggest that amygdala response to Black-versus-White faces “is a function of culturally acquired information about social groups, modified by individual knowledge and experience.” *Id.* at 734. It is also possible that greater familiarity with the face allowed subjects to consciously mediate and control what would otherwise have been an automatic stereotype-congruent reaction to the Black face.

³⁷⁷ See, e.g., Matthew D. Lieberman et al., *An fMRI Investigation of Race Related Amygdala Activity in African-American and Caucasian-American Individuals*, 8 NATURE NEUROSCI. 720 (2005) (finding that both African-American and Caucasians showed greater amygdala activity when exposed to African-American targets than when exposed to Caucasian targets). But see Allen J. Hart et al., *Differential Response in the Human Amygdala to Racial Outgroup vs. Ingroup Face Stimuli*, 11 NEUROREP. 2351, 2351 (2000) (finding significantly greater amygdala responses when White subjects were exposed to Black faces than when they were shown White faces and similar results for Black subjects who showed greater amygdala activation when exposed to White faces than when exposed to Black faces).

³⁷⁸ William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 806, 806 (2004).

³⁷⁹ See Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 463 (1996) [hereinafter Lee, *Race and Self-Defense*] (discussing Black-as-Criminal stereotype).

response and the individual's non-prejudiced beliefs, and control the otherwise automatic stereotype-congruent response.

Given these two modes of evaluation (conscious versus automatic) and knowing that the automatic mode tends to dominate when the individual does not have time to think, William Cunningham decided to test whether the amount of fear-response reflected in activation of the amygdala would be different depending on how long subjects were exposed to Black and White faces.³⁸⁰ Cunningham used fMRI to measure amygdala activation in subjects who were presented with Black faces for a short duration of time (30 milliseconds (ms) or barely a flash on the screen), Black faces for a longer duration of time (525 ms), White faces for a short duration of time (30 ms), and White faces for a longer duration of time (525 ms).³⁸¹ After the experiment, all of the subjects took the race IAT, which tested for implicit bias in favor of or against Whites and Blacks. Next, they answered questions from the Modern Racism Scale and the Motivation to Respond Without Prejudice Scale (another self-report scale that measures motivation to think and behave without prejudice).³⁸²

The self-reported measures of prejudice demonstrated little or no prejudice. All participants disagreed with prejudiced statements and agreed with non-prejudiced statements.³⁸³ Nonetheless, on the IAT, subjects "showed automatic negative associations toward Black relative to White faces . . ."³⁸⁴ The fMRI results were consistent with the IAT results. The more implicit bias the subject showed on the IAT, the greater his or her amygdala activity for Black relative to White faces in the 30-ms or short-duration condition.³⁸⁵ When subjects were shown Black and White faces for a longer period of time, however, there was no significant difference in amygdala activity.³⁸⁶

These results suggest that when individuals have the opportunity to process the fact that they are being exposed to a Black face, their cognitive processes can mediate their otherwise automatic stereotype-congruent responses. As Cunningham explains:

Greater Black-White difference in amygdala activation in the 30-ms condition than in the 525-ms condition is consistent

³⁸⁰ Cunningham, *supra* note 378, at 806.

³⁸¹ *Id.* at 807.

³⁸² *Id.* at 808.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 809.

³⁸⁶ *Id.* at 810.

with the idea that unwanted prejudicial responses are most likely to occur under conditions of distraction or cognitive overload, when reflective cognitive processes that might modulate an automatically activated evaluation are otherwise engaged.³⁸⁷

In another study on stereotypes and prejudice, Patricia Devine 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 beliefs.³⁸⁸ When racial stereotypes about Blacks were not made salient, both high and low-prejudice individuals responded in stereotype-congruent ways.³⁸⁹

To activate conscious awareness of the various stereotypes about Blacks, Devine asked subjects to list as many alternate labels of which they were aware for the social group Black Americans.³⁹⁰ Subjects were told that the researcher was interested in how people think about and talk informally about social groups, and were given a minute to perform this task.³⁹¹ Next, researchers asked subjects to list their thoughts in response to the social group Black Americans and various labels ascribed to Blacks.³⁹² Subjects received two pages with ten boxes; different labels associated with Black Americans were at the top of each box, and subjects were told to put one thought in each box.³⁹³ They had ten minutes to complete this task.³⁹⁴ Finally, subjects were asked to complete the Modern Racism Scale.³⁹⁵

Devine assigned subjects to either a high-prejudice or low-prejudice group based on the subjects' scores on the Modern Racism Scale.³⁹⁶ Devine found there was no difference in the proportion of negative

³⁸⁷ *Id.* at 811.

³⁸⁸ Patricia Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 14 (1989).

³⁸⁹ *Id.* at 12.

³⁹⁰ *Id.* at 13.

³⁹¹ *Id.* Negative labels generated by this task included the terms "niggers," "coons," "spades," "spear-chuckers," "jungle bunnies," and "jigs." *Id.* at 14. Devine characterized the label "colored people" as non-pejorative, but I would put this label in the pejorative or negative category. More neutral labels included the terms "Blacks," "Afro Americans," and "Brothers." *Id.*

³⁹² *Id.* at 13.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

labels generated by each group in the first task.³⁹⁷ The proportion of negative or pejorative labels generated by high-prejudice persons was about the same as the proportion generated by low-prejudice persons. This suggested that both high and low-prejudice individuals are equally aware of the various negative stereotypes about Blacks.³⁹⁸

The two groups, however, revealed big differences in their responses to the thought-listing task, which took place right after the stereotype (label)-listing exercise had made racial stereotypes about Blacks salient to the participants. High-prejudice subjects listed more negative than positive thoughts about Blacks and low-prejudice subjects listed more positive than negative thoughts about Blacks.³⁹⁹ Moreover, 60% of the high-prejudice individuals' responses to the thought-listing task reflected themes of hostility, aggressiveness, or violence, whereas only 9% of the low-prejudice individuals' responses reflected similar themes.⁴⁰⁰ Making racial stereotypes salient encouraged the egalitarian or low-prejudice subjects to inhibit stereotype-congruent responses.

In a study published in 2000, Samuel Sommers and Phoebe Ellsworth tested whether making race salient would make a difference in mock jurors' perceptions of guilt and in the severity of their sentencing recommendations.⁴⁰¹ Subjects read a trial summary in which the race of the defendant and victim were varied (White male defendant and Black female victim or Black male defendant and White female victim). The trial summary revealed that the defendant and a group of his friends were at a bar celebrating his recent promotion when his girlfriend stood up and started to make fun of his physique and sexual performance.⁴⁰² The defendant yelled at his girlfriend, forced her into her chair, and slapped her across the face. The slap knocked the girlfriend onto the ground and the girlfriend injured her ankle in the fall. In the race salient version of the trial, the girlfriend testified that the defendant yelled, "You know better than to talk about a White (or Black) man in front of his friends" before he slapped her. In the non-race salient version of the trial, the girlfriend testified that

³⁹⁷ *Id.* at 14.

³⁹⁸ *Id.*

³⁹⁹ *Id.* Negative thoughts were reflected in statements such as "Blacks are free loaders;" "Blacks cause problems (e.g., muggings, fights);" and "Affirmative action sucks." *Id.* Positive thoughts were reflected in statements such as "Blacks and Whites are equal;" "Affirmative action will restore historical inequities;" "My father says all Blacks are lazy, I think he is wrong;" and "It's unfair to judge people by their color – they are individuals." *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 325, at 1367.

⁴⁰² *Id.* at 1372-73.

the defendant yelled, "You know better than to talk that way about a man in front of his friends."⁴⁰³

Sommers and Ellsworth found that when race was made salient, White mock jurors treated the White and Black defendant equally in terms of guilt and severity of punishment.⁴⁰⁴ In contrast, when race was not salient, White mock jurors gave the Black defendant a significantly higher guilt rating than the White defendant.⁴⁰⁵ In their sentence recommendations, White mock jurors were also more punitive towards the Black defendant in the non-race salient condition, recommending longer sentences for the Black defendant than for the White defendant. When White jurors were simply aware of the defendant's race, but did not think race was relevant to the case, implicit bias trumped their sincerely held egalitarian beliefs.⁴⁰⁶

Sommers and Ellsworth suggest the reason why White jurors acted in more egalitarian ways when race was made salient stems from Samuel Gaertner and John Dovidio's theory of aversive racism.⁴⁰⁷ Under this theory, most White Americans hold egalitarian beliefs but still have implicit bias against Blacks.⁴⁰⁸ "[W]hen White people are reminded of the possibility of racial prejudice in an interaction, they may work to inhibit their own racial biases; if they are not reminded, they might not notice, and their biases will often be expressed."⁴⁰⁹

A year later, in 2001, Sommers and Ellsworth conducted another study that confirmed that when race is made salient, White mock jurors will treat Black and White defendants the same; when race is not salient, White mock jurors are more likely to convict Black defendants than similarly situated White defendants.⁴¹⁰ In the 2001 study, a White experimenter approached 196 White participants in waiting areas of a major international airport and asked if they would read and complete a questionnaire about legal attitudes while they

⁴⁰³ *Id.* at 1373.

⁴⁰⁴ *Id.* at 1373-74.

⁴⁰⁵ *Id.* at 1374.

⁴⁰⁶ *See id.*

⁴⁰⁷ *See* Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism, in* PREJUDICE, DISCRIMINATION, AND RACISM 62 (Dovidio & Gaertner eds., 1986) (explaining that "aversive racism represents a particular type of ambivalence in which the conflict is between feelings and beliefs associated with a sincerely egalitarian value system and unacknowledged negative feelings and beliefs about blacks").

⁴⁰⁸ *See id.*

⁴⁰⁹ Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 325, at 1371.

⁴¹⁰ Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 217 (2001) [hereinafter, Sommers & Ellsworth, *White Juror Bias*].

waited for their planes.⁴¹¹ Each participant read a trial summary that involved either a Black defendant and White victim or vice versa. In all of the cases, participants were aware of the defendant and victim's race, age, height, and weight. In some of the cases, race was made salient. In others, race was not made salient.

The trial summary described a high school basketball player charged with one count of battery with serious bodily injury after an altercation with a teammate in a locker room.⁴¹² The government argued that the defendant was upset after losing his place in the starting line-up and attacked his replacement.⁴¹³ The defense admitted that the defendant verbally confronted his teammate in the locker room, but claimed that when a third party tried to intervene and restrain him, he panicked and accidentally made contact with the victim when he tried to break free.⁴¹⁴ In the race-salient version of the trial, a defense witness testified that the defendant was one of only two Blacks (or Whites) on the team and had been the subject of racial remarks and unfair criticism throughout the season from his White (or Black) teammates.⁴¹⁵ In the non-race salient version of the trial, the same defense witness testified that the defendant had been the subject of obscene remarks and unfair criticism from many of his teammates.⁴¹⁶

In the race-salient condition, conviction rates for the White defendant (69%) and the Black defendant (66%) were almost the same.⁴¹⁷ In the non-race salient condition, when the White mock juror subjects were simply aware of race but race was not made salient, they voted to convict the Black defendant 90% of the time and the White defendant only 70% of the time.⁴¹⁸

These studies by Cunningham, Devine, and Sommers and Ellsworth suggest that when race is made salient, individuals who self-report non-prejudiced beliefs will consciously mediate and control their otherwise automatic stereotype-congruent responses.⁴¹⁹ Conversely,

⁴¹¹ *Id.* at 216.

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 217.

⁴¹⁸ *Id.*; see also David A. Harris, *The Importance of Research on Race and Policing: Making Race Salient to Individuals and Institutions Within Criminal Justice*, 6 *CRIMINOLOGY & PUB. POL'Y* 5, 11 (2007).

⁴¹⁹ Devine likens the process of inhibiting stereotype-congruent responses and consciously replacing them with non-prejudiced thoughts to breaking a bad habit.

when race is not made salient — when race is an obvious fact, such as in a case involving a Black defendant or victim, but no one openly discusses the racial implications of the case — individuals are likely to respond in stereotype-congruent ways.

An example of how subtle appeals to racial bias can be effective when race is not made salient is illustrated by the well-known New York subway shooting case. In that case, Bernard Goetz, a white male, shot four black youths after two of them asked him for five dollars on a New York subway.⁴²⁰ At Goetz's trial, no one openly talked about the obvious racial dynamics present in the case.⁴²¹ The defense, however, cleverly activated the Black-as-Criminal stereotype by referring to the victims as savages, predators, and vultures.⁴²² They also reenacted the subway shooting, ostensibly to show the jury the path of the bullets.⁴²³ George Fletcher, a law professor who observed the trial, noted that by bringing in four young, fit, and muscular African Americans to play the part of the four victims, the defense covertly appealed to racial bias and the jury's fear of being mugged by four young black males.⁴²⁴ The jury found Goetz not guilty on all but the least serious charge of unlawful possession of a firearm.

One might question whether the research on implicit racial bias is readily transferable to sexual orientation bias, especially when it seems more people hold explicitly anti-gay attitudes than explicitly racist attitudes. Even if more people are openly anti-gay than explicitly racist, implicit sexual orientation bias is still a concern. As discussed above, many egalitarian-minded heterosexual individuals sincerely believe gays and lesbians should not be discriminated against and self-report positive attitudes about homosexuality, yet manifest implicit bias in favor of heterosexuality and against homosexuality. Implicit

Devine, *supra* note 388, at 15. She notes that “automatic stereotype activation functions in much the same way as a bad habit.” *Id.* Both involve spontaneous and undesirable consequences. *Id.* To eliminate a bad habit, an “individual must (a) initially decide to stop the old behavior, (b) remember the resolution, and (c) try repeatedly and decide repeatedly to eliminate the habit.” *Id.* To inhibit stereotype-congruent responses, one must initially decide that one wants to overcome stereotype-triggered responses. One must remember this desire, and one must make a conscious effort to try repeatedly to replace stereotype-congruent responses with one's egalitarian beliefs. *Id.*

⁴²⁰ See *People v. Goetz*, 68 N.Y.2d 96, 99 (1986).

⁴²¹ See LEE, MURDER AND THE REASONABLE MAN, *supra* note 80, at 148-154 (analyzing *Goetz* case).

⁴²² See GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 206 (1988).

⁴²³ See *id.* at 206-07.

⁴²⁴ *Id.*

bias is a concern whether one is talking about race, gender, sexual orientation, or age (bias against the elderly).

There are additional reasons to believe that the research on race and implicit bias is applicable to sexual orientation bias.⁴²⁵ One study specifically examined whether hearing positive opinions about gay-related issues (in other words, making sexual orientation salient in a positive way for gays) would affect whether individuals privately expressed bias against gay men.⁴²⁶ Margo Monteith, Nicole Deneen, and Gregory Tooman conducted an experiment in which an experimenter would approach a student who was walking alone on campus and ask whether he or she would participate in an opinion poll for a class.⁴²⁷ A confederate would then walk past the experimenter and the subject.⁴²⁸ The experimenter would stop the confederate and ask whether he or she would also participate in the opinion poll.⁴²⁹ The experimenter then administered two questionnaires to the confederate and the participant.⁴³⁰ The first questionnaire contained questions from a standard measure of prejudice against gays called the Heterosexual Attitudes Toward Homosexuals scale ("HATH") and was completed privately by each individual.⁴³¹ The second questionnaire asked for the participant's opinions relating to issues involving gays on campus.⁴³² In some cases, the subject answered questions on the second questionnaire privately without hearing the confederate's views. In other cases, the subject answered questions only after hearing the confederate answer the same questions out loud.⁴³³ In the favorable ratings condition, the confederate expressed non-prejudiced opinions about gay-related

⁴²⁵ See generally Monteith et al., *The Effect of Social Norm Activation on the Expression of Opinions Concerning Gay Men and Blacks*, *supra* note 338 (exploring influence of social norm activation on expression of opinions concerning gay men and blacks).

⁴²⁶ *Id.* at 271-72.

⁴²⁷ *Id.* at 273.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.* at 272.

⁴³³ In those cases, the experimenter explained that he or she had only one questionnaire left and asked the confederate to answer the questions verbally so the experimenter could write his responses on a separate sheet of paper. The participant was then given the supposedly last questionnaire and asked to answer the questions privately. *Id.* at 273-74.

issues on campus. In the unfavorable ratings condition, the confederate expressed prejudiced opinions about the same issues.⁴³⁴

Monteith found that participants exposed to non-prejudiced confederate opinions expressed opinions that were significantly more positive toward gays than those in the no rating condition (where they did not hear the confederate give any opinions).⁴³⁵ Moreover, both low-prejudice and high-prejudice individuals expressed positive opinions after hearing the confederate make non-prejudiced remarks about gay-related issues on campus.⁴³⁶ Monteith concluded that “making social norms opposing prejudice salient will likely have a pervasive effect, curbing expressions of prejudice among people who hold less as well as more prejudiced attitudes.”⁴³⁷

The existing research on stereotypes and prejudice suggests that stereotypes, which are deeply entrenched in the subconscious, are triggered more readily when not made salient. If one is concerned that stereotypes about gay men will be used by unscrupulous attorneys, it would probably be best to have claims of gay panic out in the open and subject to the adversarial system. This would force argument and counter-argument about the legitimacy of such claims above ground, and allow jurors to cognitively process the validity of such claims rather than react without reflection. Moreover, if jurors are exposed to non-prejudiced opinions about gay men (by the prosecutor or other jurors), Monteith’s study suggests this significantly increases the likelihood that even high-prejudiced jurors with negative private views about homosexuality will publicly express non-prejudiced views.

D. Institutional Competency

A final consideration is which institutional actor — the legislature, the judge, or the jury — is best suited to determine whether a heterosexual male defendant’s claim of gay panic is credible and should result in some kind of mitigation. This section evaluates the strengths and weaknesses of each institutional actor and concludes that the jury is best suited to make this determination.

A critic of the gay panic defense might contend that the simplest way to deal with the problem would be for the legislature to pass a statute stating that a non-violent homosexual advance does not

⁴³⁴ *Id.* at 274.

⁴³⁵ *Id.* at 276.

⁴³⁶ *Id.* at 277.

⁴³⁷ *Id.*

constitute legally adequate provocation.⁴³⁸ One benefit of legislative action is uniformity and consistency. All judges in the relevant jurisdiction would be required to follow the legislative rule, leading to uniform results in similarly situated cases. Another benefit is that legislatures can commission studies, take testimony, and conduct continuing oversight investigations.

More than one state legislature has amended its penal code to reflect the view that a certain type of arguably provocative act does not constitute legally adequate provocation. For example, Maryland provides that “[t]he discovery of one’s spouse engaged in sexual intercourse with another does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter even though the killing was provoked by that discovery.”⁴³⁹ Minnesota provides that a crying child does not constitute legally adequate provocation sufficient to mitigate a murder charge to manslaughter.⁴⁴⁰

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. The judge and jury sitting in judgment of a particular defendant, in contrast, can more fully consider the factual context in which the killing took place and thus are in a better position to decide whether the defendant’s claim of gay panic is credible and worthy of some kind of mitigation.⁴⁴¹

⁴³⁸ I am not aware of any such legislation in the United States, but such legislation was proposed in New South Wales. See Santo De Pasquale, *Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy*, 26 MELB. U. L. REV. 110, 119 (2002) (noting that New South Wales Working Party recommended legislation to preclude murder defendants from arguing that non-violent homosexual advance provoked them into heat of passion).

⁴³⁹ MD. CODE ANN., CRIM. LAW § 2-207(b) (West 2002).

⁴⁴⁰ MINN. STAT. ANN. § 609.20(1) (West 2003).

⁴⁴¹ Indeed, some might argue that the existence of social science studies suggesting that homophobic men become more physically aggressive toward gay men after watching a homoerotic videotape, see Bernat, *supra* note 49, supports the view that an

Another problem with having legislatures enact statutes proclaiming that a non-violent homosexual advance does not constitute legally adequate provocation is that such an approach is a throwback to the days when murder defendants had to fit into carefully defined categories of legally adequate provocation to claim the provocation mitigation.⁴⁴² Under the early common law approach to provocation, a murder defendant could receive the provocation mitigation only if he was (1) engaged in mutual combat with the victim immediately prior to the killing, (2) subject to an aggravated assault or battery immediately before the killing, (3) observed the commission of a serious crime upon a close relative immediately before the killing, (4) illegally arrested, or (5) caught his wife in the act of adultery just before the killing.⁴⁴³ This categorical approach was eventually replaced with the modern “reasonable man” test because the categorical approach was too restrictive and insensitive to context.⁴⁴⁴ Allowing the legislature to prohibit claims of gay panic through legislation stating that a non-violent homosexual advance does not constitute legally adequate provocation would lead to the same rigidity problems inherent in the early common law categorical approach.

If the legislature is ill suited to the task of deciding whether claims of gay panic ought to be allowed, should the judge or the jury make this call? Unlike the legislature, the judge presiding over a given case is aware of the factual context in which the claim of gay panic arises. Without a superseding legislative rule instructing judges that they must rule the same way in all cases, however, judges will have the discretion to either take the question of provocation away from the

ordinary heterosexual man can lose his self-control if a gay man makes an unwanted sexual advance upon him, and therefore the heterosexual man should be allowed to argue provocation to the jury.

⁴⁴² A proposal that encourages legislation banning gay panic defense strategies is the converse of the early common law approach to provocation, which carved out categories of things that could constitute legally adequate provocation. A legislative approach would simply carve out categories of things that *cannot* constitute legally adequate provocation.

⁴⁴³ See LEE, MURDER AND THE REASONABLE MAN, *supra* note 80, at 19.

⁴⁴⁴ If the rationale behind the doctrine of provocation is that under certain circumstances a person might understandably snap and do something that he would not ordinarily do, then it does not make sense to allow husbands who catch their wives in the act of adultery to receive the provocation mitigation, but not men who catch their fiancées having sex with another man. The modern approach to provocation addressed this concern, broadening the scope of the defense and allowing the mitigation as long as a reasonable man in the defendant’s shoes would have been provoked into a heat of passion. In its attention to context, the modern approach is much more sensible than the early common law approach. See *id.* at 24-25.

jury or allow the jury to consider the defense. This type of discretion is not necessarily a bad thing, but one obvious problem with this approach is that whether a requested defense is presented to the jury will depend in large part on the luck of the draw.⁴⁴⁵ If the defendant draws a judge who disapproves of homosexuality, then the heterosexual male murder defendant wishing to argue gay panic is likely to get the instruction he seeks and evidentiary rulings in his favor.⁴⁴⁶ If the defendant draws a judge who believes gays and lesbians should not be discriminated against, then the heterosexual male murder defendant claiming gay panic may be less likely to get the jury instructions and favorable evidentiary rulings he seeks.

Inconsistent rulings are to be expected, especially given the different factual contexts that may be present under the umbrella of gay panic. The bigger problem is that trial judges act alone and often have to make evidentiary and other rulings with little time to deliberate. Trial judges, unlike juries, do not have the benefit of co-equal partners deliberating with them to ensure the fairest possible outcome.

There is another reason to be skeptical of relying on a judicial remedy in this context.⁴⁴⁷ Social science research has shown that heterosexual men on average manifest more anti-gay prejudice than heterosexual women.⁴⁴⁸ If this is true, then relying on a judge who is likely to be a

⁴⁴⁵ Of course, a similar objection could be made against having the jury make the decision. Many joke that having a case decided by a jury is like rolling the dice because juries are so unpredictable. Nonetheless, rules governing jury selection give each side some say over who ends up sitting in the jury box such that it is probably more likely than not that one will have egalitarian-minded jurors on any given jury.

⁴⁴⁶ See Mison, *supra* note 10, at 163-64 (detailing cases in which trial judges made disparaging remarks about deceased homosexual victims); see also Michael B. Shortnacy, Comment, *Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309, 318-31 (2001) (noting empirical studies suggesting that judges are hostile to gay defendants).

⁴⁴⁷ See Hutchinson, *Dissecting Axes of Subordination*, *supra* note 50, at 13, 18-24 (urging scholars in field of law and sexuality to conduct multidimensional structural analysis of judicial bias against gay, lesbian, bisexual, and transgender individuals that exists as part of larger system of domination along race, gender, and class lines).

⁴⁴⁸ See Mary E. Kite & Bernard E. Whitley, Jr., *Do Heterosexual Women and Men Differ in Their Attitudes Towards Homosexuality? A Conceptual and Methodological Analysis*, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 39 (Gregory M. Herek ed., 1998); Mary E. Kite & Bernard E. Whitley, Jr., *Sex Differences in Attitudes Toward Homosexual Persons, Behaviors, and Civil Rights, A Meta-Analysis*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 336, 337 (1996); see also Gregory M. Herek, *Heterosexuals' Attitudes Toward Lesbians and Gay Men: Correlates and Gender Differences*, 25 J. SEX RES. 451, 452 (1988) ("One of the most consistent findings is that heterosexual males manifest more anti-gay

heterosexual male to decide whether the claim of gay panic has any legitimacy seems less desirable than giving the question to the jury. According to one source, only 24% of the state judiciary and 19% of the federal judiciary is female.⁴⁴⁹ According to another source, there are only 274 female judges (8.65 percent) and 2,894 male judges (91.35 percent) on the federal bench.⁴⁵⁰ Given these statistics, the odds of drawing a male judge are much greater than drawing a female judge. Additionally, it is more likely that a jury will be comprised of a mix of men and women than be all male (or all female).

Even if an egalitarian judge presides over the case, he or she may not see through all of the subtle appeals to homophobic bias that the defense may try to make. A jury of twelve persons charged with the task of deliberating to a fair and just verdict is better positioned to question a claim of gay panic, especially if the defense makes that claim openly and then the prosecution counters it. This is because the jury has the distinct advantage of being able to engage in group deliberation.

In her important Harvard Law Review article on jury decision-making, Kim Taylor-Thompson describes the benefits of group deliberation.⁴⁵¹ She acknowledges that while “open communication may introduce strongly held beliefs and prejudices into the discussion[,] . . . the existence of competing beliefs and prejudices in jury deliberations may help to reduce their significance.”⁴⁵² Taylor-Thompson also notes that while “[a]n individual juror’s experience can affect her perception of and reaction to the evidence[,] . . . interaction among jurors will expand the range of issues to be discussed and broaden the scope of information shared by the group.”⁴⁵³

A jury of twelve individuals, selected through a process that enables both the defense and the prosecution to strike individuals they believe would be biased against them, is likely to have at least one member

hostility on average than do heterosexual females.”) (citations omitted); Lester W. Wright, Jr., Henry E. Adams & Jeffery Bernat, *Development and Validation of the Homophobia Scale*, 21 J. PSYCHOPATHOLOGY & BEHAV. AWARENESS 337, 337, 345 (1999) (noting that male participants scored significantly higher on Homophobia Scale than female participants, confirming previous studies showing that men as general matter are more homophobic than women).

⁴⁴⁹ THE AMERICAN BENCH: JUDGES OF THE NATION (Marie T. Finn et al. eds., Forster-Long, Inc. 18th ed. 2008).

⁴⁵⁰ See Federal Judicial Center, History of the Federal Judiciary, available at <http://www.fjc.gov> (last visited Nov. 13, 2008).

⁴⁵¹ Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272-76 (2000).

⁴⁵² *Id.* at 1276.

⁴⁵³ *Id.* at 1275.

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.

There is, of course, no guarantee that this would happen. A gay person who does not want others to know that he or she is gay might not to say anything, especially if he or she thinks most of the other jurors are homophobic. It is understandable that an individual juror might choose silence in such a situation. Indeed, a gay person still in the closet might become the most vocal supporter of a defendant's gay panic claim in an attempt to divert suspicion that he is gay.

Monteith's study, however, suggests that if even one juror speaks up and expresses non-prejudiced norms in the jury room, this can have a significant effect on the rest of the jury.⁴⁵⁴ Therefore, as long as the jury has at least one gay person who is out (not in the closet) or at least one heterosexual who is sympathetic to gays and willing to speak up and express non-prejudiced norms, there is a fair chance that the other jurors will at least question and possibly reject the gay panic defense.

I realize that what may be true for gays, may not be true for transgenders. Not all gays and lesbians are sympathetic to transgenders; some may even be biased against transgenders. The odds of a transgender person being on a jury where a trans panic claim is asserted are fairly slim. Therefore, what may be a viable solution in the case of a gay panic claim may not work against a claim of trans panic.

There is another reason why it makes sense to allow juries, rather than judges, to decide the validity of gay panic claims: community buy-in. The community where the crime took place and from which the jury is drawn is more likely to view the verdict as legitimate if a jury considered the gay panic defense and rejected it, than if the judge prohibited the defendant from making the argument. This is because the twelve laypersons serving on the jury have been chosen from the community's midst.⁴⁵⁵ If the long-term goal is changing social attitudes about homosexuality, then starting such change in the jury box is a better way of accomplishing the goal than trying to force such change by legislative or judicial fiat.

One problem with letting juries adjudicate claims of gay panic is that in some parts of this country, homosexual behavior is widely viewed as immoral. If the jury is chosen from such a community, it

⁴⁵⁴ Monteith et al., *The Effect of Social Norm Activation on the Expression of Opinions Concerning Gay Men and Blacks*, *supra* note 338, at 276.

⁴⁵⁵ See Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 *FORDHAM L. REV.* 2027, 2051-59 (2008) (discussing fact that jury functions as voice of community).

may be more inclined to believe that the defendant was reasonably provoked into a heat of passion by the gay victim's non-violent homosexual advance. Research suggests that individuals who live on the West Coast tend to have the most positive attitudes toward homosexuality, while those in the Midwest and the South tend to have the most negative attitudes.⁴⁵⁶ Similarly, individuals with strongly religious backgrounds tend to have negative attitudes about homosexuality.⁴⁵⁷

This problem suggests a reform that would account for regional variations in attitudes. I am not, however, comfortable with proposing a rule that would vary depending on the jurisdiction where the case is tried. If the choice is between allowing or disallowing gay panic arguments, I think the better choice is to allow gay panic arguments, despite the fact that such arguments are reprehensible. Even if one tries to bar gay panic arguments, they are likely to come in through the back door as they did in the Matthew Shepard case.⁴⁵⁸

Even though there remains a lot of anti-gay sentiment in some parts of the country, there is also reason to be hopeful that this will not always translate into lenient verdicts in cases where the defendant argues gay panic. First, even individuals who believe homosexuality is immoral can be persuaded to see that beating someone to death for making a sexual advance is wrongful and illegal.

Second, attitudes about homosexuality have seen fairly steady improvement over the last thirty to forty years.⁴⁵⁹ A majority of Americans today believe it is wrong to discriminate against an individual based on his or her sexual orientation.⁴⁶⁰ In 2003, the U.S. Supreme Court overruled *Bowers v. Hardwick* by striking down a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct on the ground that criminalizing such conduct violated the Due Process Clause of the Fourteenth Amendment.⁴⁶¹ In addition, despite the controversy over same-sex marriage referenced earlier in this Article, many states now recognize

⁴⁵⁶ See Loftus, *supra* note 6, at 765.

⁴⁵⁷ See *id.*

⁴⁵⁸ See *supra* text accompanying notes 274-307.

⁴⁵⁹ Loftus, *supra* note 6, at 778.

⁴⁶⁰ *Id.* ("While the public still overwhelmingly views homosexuality as wrong, the majority is unwilling to restrict the civil liberties of homosexuals.")

⁴⁶¹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). In *Lawrence v. Texas*, the Court reversed *Bowers v. Hardwick*, the infamous decision in which the Court upheld the constitutional validity of Georgia's sodomy statute as applied to a man arrested for having consensual sex with another man in the privacy of his own home. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

same-sex civil unions.⁴⁶² In 2005, *Brokeback Mountain*, a major motion picture about two men who fall in love while working together herding sheep near Wyoming's Brokeback Mountain, won four Golden Globe Awards, including Best Motion Picture-Drama, and three Academy Awards, including Best Director (Ang Lee), Best Adapted Screenplay, and Best Original Score.⁴⁶³

Third, even prejudiced jurors can be encouraged to act in non-prejudiced ways. As discussed above, when non-prejudiced norms are made salient by the expression of positive opinions on gay-related issues, both low and high-prejudice subjects report less prejudiced opinions about gay men.⁴⁶⁴ Apparently, "even high prejudiced persons . . . view general egalitarian ideals as central to their self-concept."⁴⁶⁵

Another problem with allowing juries to decide whether a claim of gay panic ought to result in some sort of mitigation is that juries are notoriously inconsistent. One jury may feel a defendant's gay panic claim is legitimate while a differently constituted jury may feel the same claim is completely bogus.

While it is certainly true that an approach that leaves decision-making in the hands of the jury will sacrifice consistency in results, I believe the benefits of this approach outweigh its costs.⁴⁶⁶ The only way claims of gay panic will lose their appeal in the long run is if the assumptions underlying these claims are exposed for what they are: false negative stereotypes about gay males as deviant sexual predators with little basis in reality. One way to ensure that any change in social attitudes is long lasting is to allow such change to take place gradually in individual

⁴⁶² Six states (Vermont, Connecticut, California, New Hampshire, New Jersey, and Oregon) provide the equivalent of spousal rights to same-sex couples within the state. Three states (Hawaii, Maine, and Washington) and the District of Columbia provide some spousal rights to same-sex couples within the state. See Human Rights Campaign, Relationship Recognition in the U.S., http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (last visited January 11, 2008); see also Anthony Faiola, *New Hampshire Is Set to Approve Same-Sex Civil Unions*, WASH. POST, Apr. 26, 2007, at A1 (noting that in 2000, Vermont became first state to permit civil unions and that since then, other states, including Connecticut, New Jersey, and even relatively conservative state of New Hampshire, have established laws permitting civil unions).

⁴⁶³ See *Brokeback Mountain (2005): Awards*, N.Y. TIMES, <http://movies.nytimes.com/movie/301840/Brokeback-Mountain/awards> (last visited Feb. 14, 2008).

⁴⁶⁴ Monteith et al., *The Effect of Social Norm Activation on the Expression of Opinions Concerning Gay Men and Blacks*, *supra* note 338, at 276.

⁴⁶⁵ Margo J. Monteith, *Self-Regulation of Prejudiced Responses: Implications for Progress in Prejudice-Reduction Efforts*, 65 J. PERSONALITY & SOC. PSYCHOL. 469, 483 (1993) [hereinafter Monteith, *Self-Regulation of Prejudiced Responses*].

⁴⁶⁶ The "cost" here is a large one in that it involves allowing someone who has killed a gay man to receive a reduced sentence or possibly no sentence at all.

courtrooms across the country. Trying to force such change through legislative or judicial bans will only succeed in driving these arguments underground where they can appeal to subconscious bias.

IV. SUGGESTIONS FOR REFORM

A. *Providing Guidance to Trial Courts*

In light of the considerations discussed above, I suggest that when a defendant wishes to assert a gay panic argument to bolster a claim of provocation or self-defense, the judge should allow the defendant to do so as long as there is some evidence to support the elements of the defense.⁴⁶⁷ This approach is consistent with the general principle that a defendant in a criminal case has a constitutional right to present a defense.⁴⁶⁸ While this right is not absolute,⁴⁶⁹ a considerable number of states already require trial judges to give a requested defense instruction if there is any evidence (or some evidence) to support the defense.

For example, in Alaska, “the general rule is that the defendant is entitled to a jury instruction on a defense theory if there is ‘some evidence’ to support it.”⁴⁷⁰ As one judge has explained: “The defendant’s burden of producing ‘some evidence’ in support of a proposed defense is not a heavy one. If a defendant produces some evidence to support each element of a specific instruction, ‘[a]ny weakness or implausibility’ in that evidence is irrelevant.”⁴⁷¹ In Colorado, “[t]he quantum of evidence that must be offered by the

⁴⁶⁷ I have no objection to judges ruling as a matter of law that there is no support for a temporary insanity or diminished capacity defense linked to gay panic given that neither Homosexual Panic Disorder nor homosexuality constitute recognized mental diseases.

⁴⁶⁸ See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.”). For an excellent discussion of one way in which the right to present a defense has been eroded, see Doug Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1316-26 (1987) (arguing against increasing practice of using motion in limine to preclude entire defenses).

⁴⁶⁹ See, e.g., *Clark v. Arizona*, 548 U.S. 735, 747-57 (2006) (holding that Arizona’s judicial rule limiting evidence of mental disease or defect to proving insanity and barring its admission to negate mens rea does not violate due process); *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (upholding Montana statute which precluded evidence of defendant’s voluntary intoxication from being admitted to negate mens rea against due process challenge).

⁴⁷⁰ *Snyder v. State*, 930 P.2d 1274, 1280 (Alaska 1996) (emphasis added).

⁴⁷¹ *State v. Garrison*, 171 P.3d 91, 95 (Alaska 2007) (quoting *Toomey v. State*, 581 P.2d 1124, 1126 n.10 (Alaska 1978)).

defendant in order to be entitled to an instruction on a theory of defense is ‘*a scintilla of evidence*.’⁴⁷² ‘*Some credible evidence*,’ an alternative statement of the ‘scintilla of evidence’ standard, is necessary to present an affirmative defense.’⁴⁷³

In Florida, the defendant “is entitled to have the jury instructed on the rules of law applicable to this theory of the defense if there is *any evidence* to support such instructions.”⁴⁷⁴ Similarly, in Hawaii, “a jury instruction must be given on every defense if there is *any support in the evidence* ‘no matter how weak, inclusive or unsatisfactory the evidence may be.’”⁴⁷⁵ In Illinois:

A defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence, and if there is such evidence, it is an abuse of discretion for the trial court to refuse to so instruct the jury. *Very slight evidence* upon a given theory of a case will justify the giving of an instruction.⁴⁷⁶

Likewise, in Kansas, a defendant “is entitled to an instruction on his or her theory of the case even though the evidence thereon is slight and supported only by the defendant’s own testimony.”⁴⁷⁷ In Maryland, a defendant need only introduce “[*s*]ome evidence” to support his or her proposed instruction.⁴⁷⁸ In Nebraska, a defendant is entitled to an instruction “if there is *any evidence* to support . . . giving [it].”⁴⁷⁹ Similarly, New Hampshire provides that a “defendant is entitled to a jury charge on his theory of defense if it is supported by ‘*some evidence*.’”⁴⁸⁰ A judge who prohibits a defendant from arguing gay panic goes against these rules requiring jury instructions on the defense’s theory of the case as long as it is supported by some evidence.

⁴⁷² *People v. Saavedra-Rodriguez*, 971 P.2d 223, 228 (Colo. 1998) (quoting *People v. Lundy*, 533 P.2d 920, 921 (1975)) (emphasis added).

⁴⁷³ *Id.* (quoting *People v. Dover*, 790 P.2d 834, 836 (Colo.1990)) (emphasis added).

⁴⁷⁴ *Bryant v. State*, 601 So. 2d 529, 533 (Fla. 1992) (quoting *Hooper v. State*, 476 So. 2d 1253, 1256 (Fla. 1985)) (emphasis added).

⁴⁷⁵ *State v. Davalos*, 153 P.3d 456, 458 (Haw. 2007) (quoting *State v. O’Daniel*, 616 P.2d 1383, 1390 (Haw. 1980)) (emphasis added).

⁴⁷⁶ *People v. Jones*, 676 N.E.2d 646, 649 (Ill. 1997) (citing *People v. Crane*, 585 N.E.2d 99, 101 (Ill. 1991)) (emphasis added).

⁴⁷⁷ *State v. Bell*, 80 P.3d 367, 373 (Kan. 2003) (citing *State v. Barnes*, 948 P.2d 627, 638 (Kan. 1997)).

⁴⁷⁸ *Dykes v. State*, 571 A.2d 1251, 1257 (Md. 1990).

⁴⁷⁹ *State v. Nguth*, 701 N.W.2d 852, 858 (Neb. Ct. App. 2005) (emphasis added).

⁴⁸⁰ *State v. Cote*, 725 A.2d 652, 658 (N.H. 1999) (quoting *State v. Aubert*, 421 A.2d 124, 125 (N.H. 1980)) (emphasis added).

Let me be clear. I am not advocating official recognition of a freestanding gay panic defense. I am merely suggesting that attempts to prohibit gay panic claims are not likely to succeed in shielding the jury from considering the forbidden topic. As modern behavioral research demonstrates, attempts to blindfold the jury in other contexts, such as insurance and attorneys' fees, do not work.⁴⁸¹ Implicit bias research suggests that making bias salient can help jurors cognitively process and reject stereotype-congruent responses. For these reasons, judges should allow defendants to present gay panic provocation or gay panic self-defense arguments to the jury when some evidence of each of the elements of the traditional criminal law defense is present.

To limit the effectiveness of gay panic defense strategies, I offer two suggestions to prosecutors: (1) during voir dire, request questions designed to identify closet homophobes, and (2) make the possibility of sexual orientation bias salient throughout the trial.

B. *Questions to Ask During Jury Selection*

During jury selection, attorneys may have the opportunity to ask or request questions designed to flesh out whether a prospective juror is likely to be biased against one side or the other.⁴⁸² If an attorney can demonstrate that a prospective juror is biased, that attorney can challenge the juror for cause.⁴⁸³ Additionally, an attorney can use one of his or her peremptory challenges to strike a prospective juror for any reason (other than race or gender)⁴⁸⁴ or no reason at all. Additionally, during voir dire, the attorneys can remind jurors of their obligation to decide the case without letting bias or unfair prejudice influence their decision-making.

Prosecutors may wish to ask or request questions that are directly relevant to sexual orientation to remind jurors of their duty to be fair and unbiased. Such questions might include the following:

⁴⁸¹ See Diamond & Vidmar, *supra* note 234, at 1865-66.

⁴⁸² See Valerie P. Hans & Alayna Jehle, *The Jury in Practice: Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Juror Selection*, 78 CHI.-KENT L. REV. 1179, 1184-85 (2003).

⁴⁸³ A challenge for cause is a challenge "supported by a specified reason, such as bias or prejudice, that would disqualify that potential juror." BLACK'S LAW DICTIONARY 245 (8th ed. 2004).

⁴⁸⁴ *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (gender); *Batson v. Kentucky*, 476 U.S. 79, 84 (1986) (race).

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?

Social science research on race and the jury suggests that asking prospective jurors about their racial attitudes during voir dire helps to reduce racial bias during decision-making by reminding Category Three jurors of their egalitarian values.⁴⁸⁵ In one study, for example, researchers divided mock jurors into groups before showing them a thirty-minute Court TV video summary of a trial involving a Black defendant charged with sexual assault.⁴⁸⁶ Some groups of mock jurors were subjected to racially relevant voir dire questioning and others were not.⁴⁸⁷ The racially relevant questions included the following:

This trial involves an African American defendant and White victims. How might this affect your reactions to the trial?

Do you have any biases or prejudices that might prevent you from judging an African American defendant fairly?

In your opinion, how does the race of the defendant affect the treatment s/he receives from police?

In your opinion, how does the race of a defendant influence the treatment s/he receives in the legal system as a whole?⁴⁸⁸

Only 34.4% of those in the group that received racially relevant voir dire voted to convict the Black defendant compared to 47.1% of those in the group that received racially neutral voir dire questions.⁴⁸⁹ If making race salient during jury selection helps reduce racial bias during jury deliberations, a similar reduction in sexual orientation basis may occur if sexual orientation is made salient.

⁴⁸⁵ Sommers & Ellsworth, *White Juror Bias*, *supra* note 410, at 222.

⁴⁸⁶ Samuel R. Sommers & Phoebe C. Ellsworth, *On Racial Diversity and Group Decision-making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601-02 (2006).

⁴⁸⁷ *Id.* at 602.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 603.

Just as few individuals are likely to answer affirmatively if asked, "Are you prejudiced against Blacks?," few individuals are likely to admit that they are prejudiced against gays and lesbians. Most heterosexual individuals either will seek to hide their biases because they know it is politically incorrect to be biased against gays and lesbians, or will say positive things about gays and lesbians because they sincerely believe these things. Even jurors who feel positively about gays and lesbians, however, may be implicitly biased in favor of heterosexuality and against homosexuality.

In cases where jurors might try to hide their sexual orientation bias, the attorneys will want to think carefully about the different kinds of individuals who might be in the jury pool. Using race as an example, individuals are likely to fall into one of three categories.⁴⁹⁰ In Category One are *explicit racists*, including members of the Ku Klux Klan and other White supremacist organizations. Category One individuals are not hesitant to express publicly their belief that the White man is superior and the Black man is inferior. In Category Two are *closet racists*, individuals who know that it is unacceptable to say, "I think Blacks are inferior," but who actually believe Blacks are inferior. Finally, in Category Three are *implicit racists*, individuals who hold egalitarian beliefs about Blacks, but also have implicit bias in favor of Whites over Blacks.

Mapping sexual orientation onto these three categories, Category One would include *explicit homophobes* or individuals who are not shy about sharing their belief that homosexuality is abnormal and homosexual behavior is immoral. Some deeply religious individuals might fall into Category One. Category Two would include *closet homophobes* or individuals who will not say publicly that they think gays are immoral and deviant, but actually believe gays are immoral and deviant. Category Two individuals might publicly profess to hold egalitarian views about homosexuality but privately oppose having a gay or lesbian as their child's teacher. Finally, Category Three individuals, *implicit homophobes*, would include heterosexuals who believe gays and lesbians should be treated equally to heterosexuals but who nonetheless would manifest implicit bias in favor of heterosexuality and against homosexuality if they were to take an IAT measuring sexual orientation bias.

In a gay panic case, prosecutors will want to weed out individuals in Category One (explicit homophobes) and Category Two (closet

⁴⁹⁰ See JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* 54-55 (Pantheon Books 1970) (identifying three categories of racists: (1) dominative racists, (2) aversive racists, and (3) unconscious racists).

homophobes). It should not be difficult to find the explicit homophobes in Category One because these individuals will not be ashamed of expressing negative views about homosexuality in public. Category One individuals would likely be subject to a challenge for cause. It may, however, be difficult to ferret out Category Two individuals because closet homophobes know that it looks bad to appear biased against gays and lesbians.

To find the closet homophobes, prosecutors will want to ask questions that indirectly measure a prospective juror's attitudes about homosexuality. Drury Sherrod and Peter Nardi conducted a study designed to identify potentially homophobic jurors during voir dire.⁴⁹¹ Recognizing that some jurors might try to hide their true biases to "save face in the courtroom," Sherrod and Nardi sought to identify proxy or surrogate questions that correlate with homophobic attitudes but are more likely to elicit a truthful response than direct questions about a juror's attitudes about homosexuality.⁴⁹²

Sherrod and Nardi found that as a general matter, the most homophobic individuals did not have any close friends who were gay or lesbian. They also thought the world would be a better place if more people followed "old-fashioned values," were politically conservative, and attended religious services weekly or believed religious beliefs were always important in guiding their daily decisions.⁴⁹³ Additionally, many of the most homophobic individuals thought that the federal and state governments were doing enough to make sure industry does not pollute the environment, did not read the local newspaper or any magazines on a regular basis, were not college educated, had served time in the United States Armed Forces, and lived in the South.⁴⁹⁴ Sherrod and Nardi concluded that if an attorney wants to find out which persons on the venire are the most homophobic, the following questions would be helpful to ask during voir dire:⁴⁹⁵

Do you have any close friends who are gay or lesbian?

Politically, are you liberal, middle-of-the-road, or conservative?

⁴⁹¹ Drury Sherrod & Peter M. Nardi, *Homophobia in the Courtroom: An Assessment of Biases Against Gay Men and Lesbians in a Multiethnic Sample of Potential Jurors*, in *STIGMA AND SEXUAL ORIENTATION*, *supra* note 448, at 27.

⁴⁹² *Id.*

⁴⁹³ *Id.* at 33-35.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.* at 36-37.

How important are your religious beliefs in guiding your daily decisions?

Do you think the world would be a better place if more people followed old-fashioned values?

Do you try to attend religious services at your church or temple every week?

Are federal and state governments doing enough to make sure industry does not pollute the environment we live in?

How thoroughly do you read your local newspaper every day?

Please tell me the postal ZIP code where you live.

What is your current marital status?

What is your religion?

Have you ever served in the U.S. Armed Forces?

Do you feel your life is more controlled by fate than by planning?

Do you read any magazines on a regular basis?

What is your highest level of education?⁴⁹⁶

If prosecutors are able to identify both explicit homophobes and closet homophobes, and strike all or most of these individuals, the jury will be comprised of mostly egalitarian-minded jurors who want to act fairly and not let negative stereotypes about gay men influence the verdict.⁴⁹⁷ If the prosecutor then makes sexual orientation salient,

⁴⁹⁶ Social science research suggests that negative attitudes about homosexuality tend to diminish with increased levels of education. See Wright, Adams & Bernat, *supra* note 448, at 345.

⁴⁹⁷ The defense may try to use their peremptory challenges to strike all the openly gay individuals on the jury. If this happens, the prosecutor should file a *Batson* challenge. *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986) (holding use of peremptory challenge to discriminate on basis of race violates equal protection); see *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (extending *Batson* to prohibit use of peremptory challenges based on gender). The defense will likely argue that *Batson* should not be extended to sexual orientation because sexual orientation has not been recognized as a special classification deserving of heightened scrutiny under the Equal Protection Clause. The prosecutor can counter that *Batson* prohibits the use of peremptory challenges to strike a member of a cognizable group, and that gays and lesbians are a cognizable group because they share a common perspective arising from their life experiences and have been singled out for different treatment under the laws. See *United States v. Castaneda-Partida*, 430 U.S. 482, 494 (1977) (defining cognizable

the jury is likely to reject the defense appeal to negative stereotypes about gay men as deviant sexual predators, and decide the case in an unbiased manner.

C. *Making Sexual Orientation Salient Through Gender and Sexual Orientation Switching*

Another way a prosecutor can make sexual orientation salient is to use gender and sexual orientation switching during opening and closing statements. The prosecutor can ask jurors to imagine the same facts but with a gay male defendant who kills a heterosexual female victim after she makes an unwanted sexual advance. If jurors would think the gay man unreasonable if he were to respond the way the defendant in the actual case responded, they should think twice before deciding that the defendant was reasonably provoked. The prosecutor can then ask jurors to imagine the same facts but with a female defendant who kills a heterosexual man after he makes an unwanted sexual advance. If jurors would think the female unreasonable, jurors should again think twice about whether they should accept the defendant's claim of reasonable provocation.

Second, the prosecutor can ask the judge to give the jury a role-reversal jury instruction.⁴⁹⁸ Such an instruction would tell jurors that it is inappropriate to allow bias on the basis of race, ethnicity, national origin, gender, religion, or sexual orientation to influence their decision-making. The jury instruction would then help make jurors aware of the possibility of anti-gay bias operating at the level of the subconscious by asking jurors to imagine the same facts but with the defendant a gay man who kills a heterosexual woman after she makes a sexual advance similar to the one allegedly made by the actual gay male victim. Alternatively, jurors could imagine the defendant as a heterosexual woman who kills a heterosexual man who makes a sexual advance similar to the one allegedly made by the actual victim. If jurors come to a different conclusion about the defendant's

group).

⁴⁹⁸ In other work, I have proposed that judges give a race-switching jury instruction to limit the influence of racial stereotypes. Lee, *Race and Self-Defense*, *supra* note 379, at 481-82; *see also* LEE, MURDER AND THE REASONABLE MAN, *supra* note 80, at 252-59 (suggesting role-reversal jury instructions as means of illustrating meaning of normative reasonableness). In recognition of the fact that racial stereotypes and prejudice can adversely affect jury decision-making, the Supreme Court has held that a capital defendant accused of an interracial crime is entitled to have prospective jurors questioned on the issue of racial bias if the defendant specifically requests such voir dire. *Turner v. Murray*, 476 U.S. 28, 36-37 (1986).

culpability in the imagined scenarios, this would alert them to the possibility that they may have allowed anti-gay bias to influence their decision-making in the first place. They would then want to reconsider the actual facts of the case.

Some might doubt the efficacy of telling jurors not to be prejudiced against the victim because of his sexual orientation.⁴⁹⁹ The proposed role-reversal instruction, however, goes beyond merely telling jurors not to be biased. It warns jurors of the possibility of sexual orientation bias, tells them that such bias is inappropriate, and then gives jurors a vehicle for checking themselves for such bias. It makes sexual orientation far more salient than an instruction simply telling jurors not to be biased.

Social science research suggests that the use of mental imagery can help reduce implicit bias in all individuals⁵⁰⁰ and that the first step to overcoming implicit bias is awareness.⁵⁰¹ A role-reversal jury instruction can make jurors aware of the possibility of implicit bias in a very tangible way.⁵⁰² Additional research suggests that motivation to be non-biased can curb the otherwise automatic effects of anti-gay bias.⁵⁰³

It is particularly important in cases involving claims of gay panic to allow such claims to be heard. Suppression of gay panic claims, like suppression of bad speech, will not eliminate the underlying stereotypes and assumptions that make such claims persuasive. Open

⁴⁹⁹ See, e.g., Bronwyn Statham, Note, *The Homosexual Advance Defence: 'Yeah, I Killed Him, but He Did Worse to Me'* Green v. R., 20 U. QUEENSLAND L.J. 301, 302, 311 (1998-1999) (arguing that jury instructions telling jurors not to be prejudiced against defendant or victim on basis of their sexual orientation are unlikely to limit influence of homophobic prejudice in Homosexual Advance Defense cases).

⁵⁰⁰ See Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 828 (2001) (finding that participants who engaged in counter-stereotypic mental imagery showed weaker implicit bias than those who engaged in neutral, stereotypic, or no mental imagery).

⁵⁰¹ See Margo J. Monteith, *Self-Regulation of Prejudiced Responses*, *supra* note 465, at 472, 477-78 (finding that when low-prejudice individuals were falsely led to believe that they had discriminated against gay male law school applicant on basis of his sexual orientation and then read essay on reasons why people sometimes respond more negatively toward gays than they think they should and how to reduce such negative responses, they engaged in self-reflection and concerted attempts to control future prejudiced responses).

⁵⁰² The author is currently engaged in empirical research with Donald Braman, Dan Kahan, and Jeff Rachlinski to test whether giving mock jurors a race-switching jury instruction can reduce implicit bias in cases involving minority defendants.

⁵⁰³ See Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCHOL. 268, 277 (2006).

discussion and debate is a better way to combat those assumptions. Making sexual orientation salient through role-reversal exercises can help jurors consciously mediate and control what would otherwise be automatic stereotype-congruent responses.

CONCLUSION

There is no question that when murder defendants argue gay panic, they seek to tap into deep-seated biases against and stereotypes about gay men as deviant sexual predators who pose a threat to innocent young heterosexual males. The question is what role the law should play in mediating the cultural conflict over what constitutes the appropriate response to an unwanted homosexual advance.

Robert Post explains that some believe the law should only enforce existing cultural norms, reflecting the current moral judgments of the community.⁵⁰⁴ Post, however, also notes that while the law is sometimes used to enforce existing cultural norms, it is also sometimes used to revise and reshape, or constitute, culture.⁵⁰⁵ Because cultural norms unfold over time, “law is perennially implicated in cultural conflict, so that cultural change and disagreement is the ordinary state of affairs rather than the exception.”⁵⁰⁶

“Controversies over the status of homosexuality are today the site of intense cultural dispute.”⁵⁰⁷ I believe the law can and should play a role in mediating this cultural dispute — not by dictating what jurors can and cannot consider, but by making sure jurors are cognitively aware of what exactly is at stake when a gay person is the victim of fatal violence, and the person who killed him claims he did so in response to an unwanted sexual advance.

⁵⁰⁴ Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 485-86 (2003) (citing PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 10 (1965)).

⁵⁰⁵ *Id.* at 488.

⁵⁰⁶ *Id.* at 494.

⁵⁰⁷ *Id.* at 495.