

MASCULINITY ON TRIAL: GAY PANIC IN THE CRIMINAL COURTROOM

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I. INTRODUCTION

When a male defendant is charged with murdering a gay man, a common defense strategy is to claim that the gay man made an unwanted sexual advance that caused the defendant to panic, lose self-control, and respond with fatal violence.¹ Less common, but no less problematic, is the use of a trans panic argument when a man kills a transgender woman.² Here, the defendant will claim that the victim's deception about her gender identity and the discovery that the person with whom the defendant was sexually intimate was a "he" instead of a "she" provoked the defendant into a heat of passion and caused him to lose his self-control.³

There is no official, freestanding gay or trans panic defense. Gay and trans panic arguments are usually tied to an existing traditional criminal law defense like provocation or insanity. Gay and trans panic defense strategies are problematic because they seek to capitalize on conscious and unconscious bias against gays and trans individuals. They also reinforce

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1. See Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008) [hereinafter *The Gay Panic Defense*]; 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 (1995); Robert B. Mison, *Homophobia in Manslaughter: the Homosexual Advance As Insufficient Provocation*, 80 CAL. L. REV. 133, 135 (1992).

2. Victoria L. Steinberg, Book Note, *A Heat of Passion Offense: Emotions and Bias in "Trans Panic" Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 499, 500-01 (2005).

3. *Id.* at 501.

negative stereotypes about gay men and other gender-nonconforming individuals.

This paper proceeds in three parts. In Part II, I examine the historical origins of the gay panic defense. In Part III, I explain the doctrinal underpinnings of gay and trans panic defense strategies. In Part IV, I critique the notion that underlies each of these defense strategies: that having sex with another man threatens a heterosexual man's sense of masculine identity so deeply and disturbingly that the typical heterosexual man will react violently in response to such a threat. I conclude by suggesting a few ways prosecutors can try to combat the use of such strategies in the criminal courtroom.

II. HISTORICAL ORIGINS

The idea of gay panic has roots in theories about latent homosexuality as a mental disorder. The term "homosexual panic disorder" (HPD) was coined in 1920 by a psychiatrist named Edward Kempf, who saw a pattern in many of his patients who self-identified as heterosexual but were attracted to individuals of the same sex.⁴ Kempf noticed that some of his patients experienced a heightened sense of anxiety in same-sex environments because their feelings of attraction to others of the same sex differed from what they felt were the socially acceptable feelings they were supposed to have.⁵ The problem, according to Kempf, was latent homosexuality.⁶ His patients were gay, but had not yet acknowledged this to themselves or others.⁷

Criminal defense attorneys began importing the idea of gay panic into the criminal courtroom in the 1960s, arguing that their clients panicked and killed after the victim, a gay man, made an unwanted sexual advance.⁸ There are several problems with importing Kempf's theory into the criminal courtroom. One problem is that none of Kempf's patients were aggressive towards others because of a same-sex advance.⁹ Kempf's male patients experienced heightened anxiety when they were separated from a same-sex love-interest (not when another man made a sexual advance upon them).¹⁰

4. See EDWARD J. KEMPF, *PSYCHOPATHOLOGY* 477 (C.V. Mosby Co. 1920).

5. *Id.*

6. *Id.* at 486.

7. *Id.*

8. See *People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (Ct. App. 1967); *People v. Parisie*, 287 N.E.2d 310, 313 (Ill. App. Ct. 1972); *State v. Thornton*, 532 S.W.2d 37, 44 (Mo. Ct. App. 1975).

9. See Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 L. & SEXUALITY: A REV. OF LESBIAN & GAY ISSUES 81, 84 (1992).

10. KEMPF, *supra* note 4, at 477.

Second, in treating gay panic as a mental disorder stemming from latent homosexuality, the gay panic defense suggests that latent homosexuality is a mental disorder when both the American Psychiatric Association and the American Psychological Association take the position that homosexuality is not a mental illness.¹¹ Finally, Kempf's patients who were identified as being afflicted with HPD included both males and females,¹² yet claims of gay panic are by and large made exclusively by male defendants.¹³

III. DOCTRINAL UNDERPINNINGS

Gay panic arguments have been used to support several different kinds of defenses: (1) mental defect defenses such as temporary insanity or diminished capacity,¹⁴ (2) the defense of provocation (also known as the heat of passion defense),¹⁵ and (3) the defense of self-defense.¹⁶ In this Part, I focus on gay panic strategies in cases where the defendant claims a mental defect defense or provocation.

A. *Insanity*

Insanity is defined differently depending on the jurisdiction. Under the M'Naghten Test, the prevailing test for insanity, a defendant can be found not guilty by reason of insanity if, at the time of the act, the accused was suffering from a mental disease or defect such that he did not know the nature and quality of what he was doing or, if he did know it, he did not know that what he was doing was wrong.¹⁷ Heterosexual men charged with killing gay men have argued that the victim's sexual advance triggered in

11. AM. PSYCHIATRIC ASS'N, HOMOSEXUALITY AND SEXUAL ORIENTATION DISTURBANCE: PROPOSED CHANGE IN DSM-II 44 (6th prtng. 1973); *Discrimination Against Homosexuals*, AM. PSYCHOL. ASS'N., <http://www.apa.org/about/policy/discrimination.aspx> (last visited March 30, 2013).

12. KEMPF, *supra* note 4, at 506-11.

13. Comstock, *supra* note 9, at 89.

14. See *People v. Rodriguez*, 64 Cal. Rptr. 253, 254 (Cal. Ct. App. 1967); *People v. Parisie*, 287 N.E.2d 310, 313 (Ill. App. Ct. 1972); *State v. Thornton*, 532 S.W.2d 37, 44 (Mo. 1975).

15. *Schick v. Indiana*, 570 N.E.2d 918, 930-31 (Ind. Ct. App. 1991).

16. Susan Kriefels, *Beating Death of Hotel Worker Was Self-Defense, Defendant Says*, HONOLULU STAR BULL., Sept. 17, 1998 ("Stephen Bright attacked a homosexual man because of sexual advances, killing him in self-defense, his defense attorney says.").

17. *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).

them a violent psychotic reaction, causing them to temporarily lose control over their mental abilities.¹⁸

There are several problems with the attempt to link gay panic to an insanity defense. First, to be found not guilty by reason of insanity, the defendant must not have understood the nature and quality of his act or that what he was doing was wrong.¹⁹ In other words, either he did not know that he was stabbing, choking, kicking or beating the victim or he did not know it was wrong to do so.²⁰ It is difficult for a defendant to claim convincingly that he did not know what he was doing and that it was wrong to beat, kick, or stab another human being.

Second, the defendant must have been suffering from a mental disease or defect at the time of his act.²¹ Since neither homosexual panic disorder nor latent homosexuality are recognized as mental diseases, it is difficult for the heterosexual man with no history of mental illness to argue insanity.²²

B. *Diminished Capacity*

Diminished capacity, a partial defense to murder, requires proof that the defendant was acting under a mental disease or defect not amounting to insanity.²³ Depending on whether the jurisdiction uses the mens rea variant of diminished capacity or the partial responsibility variant of this defense, a charge of murder can be reduced to voluntary manslaughter or a charge of first-degree murder can be reduced to second-degree murder.²⁴

A diminished capacity defense based on gay panic was successfully used in the late 1990's in a case involving an appearance on the Jenny Jones television show.²⁵ Jonathan Schmitz was invited to appear on the Jenny Jones show, which was having a special on secret admirers.²⁶ Schmitz thought an ex-girlfriend would be revealed as his secret admirer.²⁷ Instead, his male friend, Scott Amedure, appeared on the show as his secret

18. Duncan Osborne, *The Homosexual Panic Defense: Are Juries Really Buying It?*, LGNY NEWS, Nov. 4, 1999, at 4.

19. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 25.04 [C][1] (5th ed. 2009).

20. *The Gay Panic Defense*, *supra* note 1, at 491.

21. DRESSLER, *supra* note 19.

22. *The Gay Panic Defense*, *supra* note 1.

23. DRESSLER, *supra* note 19, at § 26.01 (5th ed. 2009).

24. *Id.* at § 26.02.

25. See *People v. Schmitz*, 586 N.W.2d 766, 768 (Mich. Ct. App. 1998) (noting Schmitz was initially charged with first-degree murder, argued diminished capacity, and was found guilty of second-degree murder).

26. *Id.*

27. *Id.*

admirer.²⁸ Even though he laughed on the set when Amedure recounted a fantasy involving whipped cream, strawberries, champagne and the two of them,²⁹ Schmitz later told family and friends that he felt angered and humiliated by this appearance on national television.³⁰ Three days after appearing on the show, Schmitz found a flashing light and a note in front of his apartment that said, “John, if you want it off, you have to ask me. It takes a special tool. Guess who.”³¹ Schmitz suspected that the note was a crude sexual come-on from Scott Amedure since he was with Amedure when Amedure snatched a flashing construction light from the Detroit Metropolitan Airport after the show.³²

Schmitz drove to his bank, withdrew money from his savings account, and then purchased a shotgun and some ammunition.³³ He then drove to Amedure’s home, and after confirming that the note came from Amedure, went back to the car to get the shotgun, loaded it, then came back to the house and shot Amedure twice in the chest, killing him.³⁴

At his trial for first-degree murder, Schmitz argued that at the time he shot Amedure, he was suffering from diminished capacity from his embarrassment on the Jenny Jones show and the crude note, which he perceived to be a sexual advance.³⁵ Despite the overwhelming evidence of premeditation and deliberation, which supported a finding of first-degree

28. See Keith Bradsher, *Talk-Show Guest is Guilty of Second-Degree Murder*, N.Y. TIMES, Nov. 13, 1996, at A14.

29. Jim Kirk, *Jury Finds TV Show Liable In Slaying*, CHI. TRIB., May 8, 1999, at N1.

30. *Schmitz*, 586 N.W.2d at 768.

31. LOUIS GENEVIE, *JENNY JONES SHOW LIABLE FOR DEATH OF SCOTT AMEDURE: MICHIGAN JURY AWARDS \$25 MILLION IN SLAYING OF GUEST* (Litigation Strategies, Ltd., 1999), available at <http://www.litstrat.com/Cases/JENNYJONES.pdf> (publication by litigation strategists who provided jury selection assistance to plaintiff’s attorney in wrongful death suit against Jenny Jones).

32. 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>.

33. 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.

34. 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.

35. See *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.

murder, the jury found this claim credible and found him guilty of second-degree murder.³⁶

C. *Provocation*

More common than insanity or diminished capacity is a claim of gay panic as part of a provocation defense. Provocation is a partial defense to murder.³⁷ Generally speaking, a defendant arguing provocation argues that he was provoked into a heat of passion by something the victim did, the reasonable person in his shoes would have been provoked, and he did not have adequate time to cool off.³⁸

Over the years, heterosexual defendants charged with murdering gay men have argued they were provoked into a heat of passion by a non-violent same-sex advance. For example, in 1991, Timothy Schick successfully argued that he was provoked into a heat of passion by an unwanted same-sex advance.³⁹ Schick had hitched a ride from a man named Stephen Lamie.⁴⁰ Upon entering Lamie's car, Schick asked Lamie whether he knew where they could find some girls.⁴¹ Lamie said he could not help him with this.⁴² Schick then asked Lamie whether he knew where he could get a blow job.⁴³ Lamie told Schick, "No, but I will," then drove to a local high school baseball field.⁴⁴

According to Schick, as the two men were walking towards the field, Lamie pulled down his shorts and underwear, grabbed Schick around the waist and tried to touch Schick's genitals.⁴⁵ Schick responded by kneeing Lamie in the stomach and hitting him in the face.⁴⁶ He continued to beat

36. *Schmitz*, 586 N.W.2d at 769-72.

37. DRESSLER, *supra* note 19, at 542. Whether provocation should be recognized as an excuse or justification defense is an unsettled question, with the bulk of scholars favoring characterization of the defense as an excuse. See Kyron Huigens, *A Critical Introduction to the Symposium*, 43 U. MICH. J. L. REFORM 1, 1 (2009); Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion As Excuse Not Justification*, 43 U. MICH. J. L. REFORM 27, 28-29 (2009) (arguing that the defense of provocation is best characterized as an excuse).

38. *Id.* at 535-42; see also CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 25* (NYU Press 2003) [hereinafter *MURDER AND THE REASONABLE MAN*] (discussing elements of the provocation defense).

39. *Schick v. Indiana*, 570 N.E.2d 918 (Ind. Ct. App. 1991).

40. *Id.* at 921.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 922.

46. *Id.*

Lamie until Lamie could not move.⁴⁷ He then removed Lamie's watch and some money from Lamie's wallet, then went back to the car and wiped down the dashboard and seat to try to eliminate his fingerprints.⁴⁸ At his trial for murder, Schick argued he was reasonably provoked into a heat of passion by Lamie's unwanted sexual advance and the jury agreed, finding him not guilty of murder, but instead guilty of voluntary manslaughter.⁴⁹

A gay panic argument was asserted in the Matthew Shepard case as well. Matthew Shepard was an openly gay student at the University of Wyoming who was beaten to death and left tied to a wooden fence about one mile outside of Laramie, Wyoming in October 1998.⁵⁰ Two men, Aaron McKinney and Russell Henderson, were charged with first-degree murder after they were found with Shepard's credit card and one of his shoes.⁵¹ Henderson pled guilty to murder to avoid the death penalty.⁵² At McKinney's trial, McKinney's attorney, Jason Tangeman, stated that Shepard made an unwanted sexual advance upon his client when they were in his truck, grabbing McKinney's crotch and licking McKinney's ear.⁵³ Tangeman also told the jury that this sexual advance was particularly upsetting to McKinney because when McKinney was seven years old, a neighborhood bully forced McKinney to suck his penis and engage in sexual acts with another boy.⁵⁴ Tangeman argued that Shepard's unwanted sexual advance caused McKinney to lose his self-control.⁵⁵ After Tangeman's opening statement, the judge issued a ruling, which prohibited the defense from arguing homosexual rage provocation.⁵⁶ Despite the judge's order, the defense called two witnesses to the stand, who essentially bolstered the argument that Shepard was a sexually aggressive deviant whose sexual advances made other heterosexual men uncomfortable.⁵⁷ The gay panic defense strategy did not work in this case, probably because the case was followed closely by the media and LGBT advocacy groups who

47. *Id.*

48. *Id.* at 921-22.

49. *Id.* at 922, 926.

50. BETH LOFFREDA, *LOSING MATT SHEPARD: LIFE AND POLITICS IN THE AFTERMATH OF ANTI-GAY MURDER 1* (Columbia Univ. Press 2000).

51. *Id.* at 152-54.

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

53. Transcript of Record at 16-17, *State v. McKinney*, 279 Wyo. 297 (2010) (No. 6381).

54. *Id.* at 19.

55. *Id.* at 20.

56. Decision Letter from Judge Barton R. Voigt in *State v. McKinney* (Oct. 30, 1999).

57. Transcript of Record at 30-35 & 42-45, *State v. McKinney*, 279 Wyo. 297 (2010) (No. 6381).

made salient the fact that Shepard was gay.⁵⁸ McKinney was found guilty of felony murder, and sentenced to life imprisonment.⁵⁹ In 2004, during a prison interview with ABC 20/20's Elizabeth Vargas, McKinney admitted that he made up the story about going into a rage because Shepard made a pass at him.⁶⁰

Even more recently, a gay panic argument was raised at the 2011 murder trial of Brandon McInerney.⁶¹ On February 12, 2008, in Oxnard, California, 14-year-old McInerney shot his 15-year-old 8th grade classmate Larry King twice in the back of his head at point blank range while King was typing a paper for his English class in the computer lab.⁶² The teacher in the classroom at the time said she heard a loud pop, smelled smoke, saw McInerney standing with a gun in his hand, looked at him and asked him, "What the hell do you think you're doing?"⁶³ McInerney looked at her, aimed the gun at King, pulled the trigger again, and then walked out the door.⁶⁴

58. *The Gay Panic Defense*, *supra* note 1, at 529.

59. *Killer of Gay Student Avoids Death Penalty: Aaron McKinney Sentenced to Two Life Terms*, CNN, Nov. 4, 1999, available at <http://www.cnn.com/US/9911/04/gay.attack.verdict.02/>.

60. *New Details Emerge in Matthew Shepard Murder*, ABC News (Nov. 26, 2004), <http://abcnews.go.com/2020/story?id=277685&page=1#.Ub46vJNesZI>. A recently published book reveals a more complicated story than the one that was told during trial. Several sources confirmed that McKinney enjoyed sex with other men, and would engage in sex with men in exchange for drugs or money. Kyle Smith, *New Book Questions Matthew Shepard Killing*, N.Y. Post, Sept. 21, 2013 (opinion) (reviewing STEPHEN JIMENEZ, *THE BOOK OF MATT: HIDDEN TRUTHS ABOUT THE MURDER OF MATTHEW SHEPARD* (2013)).

61. See Catherine Saillant, *Prosecutor Seeks to Quash 'Gay Panic' Defense in Oxnard Slaying*, L.A. TIMES (July 21, 2011), <http://articles.latimes.com/2011/jul/21/local/la-me-0721-gay-panic-20110721>.

62. *Gay Student Shooting: 'I Wanted to Kill Him,' Accused Told Expert*, L.A. TIMES, Aug. 25, 2011, available at <http://latimesblogs.latimes.com/lanow/2011/08/gay-student-shooting-i-wanted-to-kill-him-accused-told-expert.html> (last visited Sept. 14, 2011) (noting that McInerney shot two bullets into King's head); Catherine Saillant, *Gay Teen's Killer Takes 21-Year Deal: The Youth Avoids a Retrial by Pleading Guilty to Shooting His Classmate in 2008*, L.A. TIMES, Nov. 22, 2011, available at <http://articles.latimes.com/2011/nov/22/local/la-me-1122-gay-shooting-20111122> [hereinafter *21-Year Deal*] (reporting that Brandon McInerney was 14 when he pulled a gun out of his backpack and shot Larry King two times at point-blank range); *Mistrial Declared in Killing of Gay California Student*, CNN JUSTICE (Sept. 1, 2011), <http://www.cnn.com/2011/CRIME/09/01/california.gay.student.murder/index.html> ("McInerney allegedly shot [King] in the back of the head"); Ramin Setoodeh, *Young, Gay and Murdered*, NEWSWEEK, July 28, 2008, at 41.

63. Jim Dubreuil & Denise Martinez-Ramundo, *Boy Who Shot Classmate at 14 Will Be Retried As an Adult*, 20/20 ABC NEWS, Oct. 5, 2011, available at <http://abcnews.go.com/US/eighth-grade-shooting-larry-king-brandon-mcinerney-boys/story?id=14666577#.UZvT7KI-aVE> (last visited May 21, 2013).

64. *Id.*

Prosecutors argued the killing was first-degree murder.⁶⁵ McInerney's attorneys argued that what happened was voluntary manslaughter because McInerney was provoked by King's repeated "sexual taunts."⁶⁶ One or two days before the shooting, King had asked McInerney to be his Valentine while McInerney was playing basketball with his friends.⁶⁷ McInerney's friends started teasing McInerney about making "gay babies" with King.⁶⁸ The day before the shooting, King had approached McInerney at school and said, "What's up, baby?"⁶⁹ Apparently the last straw for McInerney was not even a comment King directed at McInerney. McInerney told a psychologist hired by his defense attorneys that he snapped when he heard King tell a classmate that he had changed his name to Leticia.⁷⁰ Despite what seemed like overwhelming evidence of premeditation and deliberation, McInerney's trial ended in a hung jury, with seven in favor of finding McInerney guilty of voluntary manslaughter and five in favor of finding him guilty of murder.⁷¹

IV. MASCULINITY ON TRIAL

Why might gay panic arguments resonate with juries? Lenient verdicts in gay panic-provocation cases can be understood as a reflection of dominant norms of masculinity.⁷² A male-on-male sexual advance threatens the heterosexual man's sense of masculinity in a number of ways. First,

65. Crimesider Staff, *California Teen Brandon McInerney Sentenced to 21 Years For Point-Blood Murder of Gay Classmate*, CBS NEWS, Dec. 19, 2011, available at http://www.cbsnews.com/2102-504083_162-57345168.html (last visited May 21, 2013).

66. Catherine Saillant, *Mistrial Declared in Slaying of Gay Oxnard Teen*, L.A. TIMES, Sept. 2, 2011, available at <http://articles.latimes.com/2011/sep/02/local/la-me-0902-gay-student-20110902> (last visited May 20, 2013) [hereinafter *Mistrial*].

67. Setoodeh, *supra* note 62, at 45.

68. *Id.*

69. *Mistrial*, *supra* note 66.

70. *Gay Student Shooting: 'I wanted to kill him,' Accused Told Expert*, L.A. TIMES (Aug. 15, 2011), <http://latimesblogs.latimes.com/lanow/2011/08/gay-student-shooting-i-wanted-to-kill-him-accused-told-expert.html>.

71. *Mistrial Declared in Killing of Gay California Student*, CNN JUSTICE, Sept. 1, 2011, available at <http://www.cnn.com/2011/CRIME/09/01/california.gay.student.murder/index.html> (last visited Sept. 14, 2011); Zeke Barlow, *DA Wants to Retry Brandon McInerney in Classmate's Killing*, VENTURA COUNTY STAR (Sept. 2, 2011), <http://www.vcstar.com/news/2011/sep/02/da-wants-to-retry-mcinerney/?print=1>. McInerney later pled guilty to second-degree murder and voluntary manslaughter, and accepted a sentence of 21 years in prison. See *21-Year Deal*, *supra* note 62.

72. See generally Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Police Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009) (applying insights from field of masculinity studies to Terry stops and frisks).

men in this society are supposed to be interested in women, not men.⁷³ The heterosexual man might be worried that a same-sex advance will signal to others that he is gay. As Angela Harris notes, “not being a ‘faggot’ is as important to a man as not being a woman.”⁷⁴ Recall that Brandon McInerney was so worried about being seen as gay by his friends that he felt compelled to kill Larry King.

Second, men are supposed to be the sexual aggressors, not the ones aggressed upon.⁷⁵ As Russell Robinson notes, a man who is on top can retain his masculine identity while engaging anal intercourse with another man, whereas a man who is penetrated is seen as a woman.⁷⁶ If a gay man makes a sexual advance upon a heterosexual man, the heterosexual man finds himself in the position of being the one being aggressed upon, not the one doing the aggressing.⁷⁷ To reaffirm his own sense of masculinity, the

73. 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.”).

74. 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., Routledge 2007) (1999) (“Men also have traditionally been socialized to avoid evaluative disclosure so as not to appear weak or homosexual.”) (citations omitted).

75. SARA L. CRAWLEY ET AL., *GENDERING BODIES* 102 (2008) (“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 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., Newbery Award Records, Inc. 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.”).

76. Professor Russell Robinson notes that when a man is penetrated by another man, this is known as being bottomed, and being on the bottom makes the man being penetrated a woman, whereas if a man is the one on top doing the penetrating of another man, he can retain his status as masculine even while engaging in male-on-male sex. Russell Robinson’s remarks at the 2013 LatCrit Annual Meeting in Chicago, Illinois, Oct. 6, 2013.

77. 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.*

heterosexual man responds to the gay man's sexual advance with violence and hopes to show the world that he is not gay.⁷⁸

The claim that the heterosexual man's violent response was reasonable is the product of a culture that privileges heterosexual male violence over other types of violence. A woman who responds with fatal violence to a man grabbing her buttocks or breasts would not be seen as reasonable.⁷⁹ Women are supposed to accept a certain amount of unwanted male attention, and while they might frown, struggle, protest, even push the man aside, they are not supposed to use fatal violence to dissuade or thwart men who suggest sexual interest in them.⁸⁰ A gay man who responds violently to a non-violent sexual advance from a woman would not be seen as reasonable.⁸¹ Men in this society are supposed to like it if a woman shows she is sexually attracted to him.⁸²

Additionally, successful verdicts in gay panic cases reinforce the stereotype of the homosexual as sexual deviant and sexual predator.⁸³ In the McInerney case, one juror felt so strongly that King, the teenager who was shot, was the one at fault and that McInerney, the shooter, was the true victim that she wrote a letter to the judge after the trial, expressing her view that King was a deviant:

You all know this was not a hate crime. You all know the victim had a long history of deviant behavior. Yes, I said deviant. Not his sexual orientation - deviant behavior. . . . After weeks of testimony, it is my firm belief that this young man [Brandon McInerney] reacted to being bullied and being the target of Larry King's sexual harassment. There was provocation.⁸⁴

Recently, a variation on the gay panic defense has started to emerge. In several cases, male defendants charged with murdering transgender females have asserted what has been called the "trans panic" defense.⁸⁵ In these cases, the defendant claims that the revelation or discovery that the person he had intimate relations with was biologically male, not female as he had

78. See BARBARA PERRY, *IN THE NAME OF HATE: UNDERSTANDING HATE CRIMES* 110-11 (Routledge 2001); Frank Rudy Cooper, *Who's the Man? Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 688-92 (2009).

79. *The Gay Panic Defense*, *supra* note 1, at 510-11.

80. *Id.* at 510.

81. *Id.* at 511.

82. *Id.*

83. See PERRY, *supra* note 77, at 110-11 (noting that contemporary stereotypes construe homosexuality as sinful and deviant and gays as predatory and menacing).

84. Letter from Juror Number 11 to District Attorney Gregory D. Totten (September 28, 2011) (on file with author). The author thanks Professor Kelly Strader of the Southwestern Law School in Los Angeles, California, for sharing this letter with her.

85. Steinberg, *supra* note 2.

believed, caused him so much distress that he lost his self-control.⁸⁶ The argument here is that the victim's deception or trickery provoked the defendant into a heat of passion and that the reasonable man in the defendant's shoes would have been provoked, and therefore the defendant should not be held liable for murder, but for some lesser homicide.⁸⁷

For example, on October 3, 2003, Gwen Araujo (born Eddie Araujo) was brutally beaten to death by several teens she had considered to be her friends after they confirmed their suspicions that she was biologically male.⁸⁸ Araujo had been sexually intimate with two of the teens,⁸⁹ Jose Merel and Michael Magidson. They became suspicious that Araujo was not biologically female after she refused to have vaginal intercourse with each of them, claiming to be menstruating more than once in a two-week period.⁹⁰ After confirming their suspicions, the teens brutally beat Araujo to death; one using a can of food and then a frying pan to hit Araujo's head.⁹¹ The teens were charged with murder.⁹² The prosecution argued that the defendants should be found guilty of first-degree murder.⁹³ Attorneys for Merel and Magidson argued their clients were reasonably provoked into a heat of passion upon discovering that they had been sexually intimate with another man.⁹⁴ The jury was unable to come to an agreement on whether Merel and Magidson were guilty of first-degree murder or second-degree murder, causing a mistrial.⁹⁵ At their retrial, a second jury found the two teens guilty of second-degree murder.⁹⁶

86. Cynthia Lee and Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women* (manuscript on file with author).

87. *Id.*

88. *People v. Merel*, No. A113056, 2009 WL 1314822, at *1 (Cal. App. 1 Dist. May 12, 2009).

89. *Id.*

90. *Id.*

91. *Id.* at 3-4.

92. *Id.* at 9.

93. Kelly St. John & Henry K. Lee, *Mistrial in Transgender Murder Case / Deadlock Over First-Degree Murder Charges—3 to Face Retrial in Slaying of Newark Teen*, S.F. CHRON. (June 23, 2004), <http://www.sfgate.com/default/article/Mistrial-in-transgender-case-Deadlock-over-2747298.php>; Nat'l Ctr. for Lesbian Rights, *Justice for Gwen Delayed, Not Denied*, NCLR.org (June 22, 2004), http://www.nclrights.org/site/PageServer?pagename=press_pr_gwenaraujo062204.

94. *People v. Merel*, No. A113056, 2009 WL 1314822, at *9-10 (Cal. App. 1 Dist. May 12, 2009).

95. *Id.* at 9; *see also* Kelly St. John, *supra* note 93; Nat'l Ctr. *Justice for Gwen*, *supra* note 93.

96. *People v. Merel*, No. A113056, 2009 WL 1314822, at *9 (Cal. App. 1 Dist. May 12, 2009).

V. COMBATING GAY AND TRANS PANIC DEFENSE STRATEGIES

How might a good prosecutor deal with a gay or trans panic defense strategy? How might she effectively combat the appeal to bias underlying such strategies? To encourage jurors to leave stereotypes and prejudice outside the jury room, I suggest that prosecutors adopt a two-pronged strategy to combat the gay panic defense. On the front end, during jury selection, the prosecutor should ask or request questions designed to ferret out people who have negative views about homosexuality but may not be openly homophobic, i.e., closet homophobes.⁹⁷ During opening statements, the prosecutor should confront the gay or trans panic argument head on by warning the jury that the defendant may try to argue he was provoked into a heat of passion and suggesting reasons why the jury should be skeptical of this argument. The prosecutor should remind jurors that, despite significant advances in employment and housing antidiscrimination law and growing popular support for marriage equality, prejudice and discrimination against gays is still very strong in certain settings. For example, much of the bullying that takes place today is against gay, lesbian, and gender-nonconforming youth. In trans panic cases, the prosecutor should seek to educate the jury about what it means to be a transgender person and inform them of the high levels of discrimination and violence suffered by trans people.

On the back end, before the jury retires to deliberate, the prosecutor can make sexual orientation or gender identity bias salient by engaging the jury in a gender-switching exercise in the closing argument.⁹⁸ For example, in the Matthew Shepard case, the defense argued that Aaron McKinney was provoked into a heat of passion after Shepard licked McKinney's ear and tried to grab his crotch. The prosecutor in this case could have asked the jury to imagine a woman in McKinney's situation who was the subject of an unwanted sexual advance from a man who licked her ear and tried to grab her crotch. If that woman were to beat the man to death with the butt of a gun, then leave him tied to a fence in freezing cold snowy weather, would the jury think she was reasonably provoked by the man's unwanted nonviolent sexual advance, and therefore should be partially excused?

97. See Giovanna Shay, *In Open Court* (unpublished manuscript on file with author) (reflecting on the difficulty of questioning prospective jurors on their attitudes towards LGBT people and sexuality). See also Lee, *supra* note 1, at 559-564 (suggesting questions the prosecutor can ask prospective jurors to discern their attitudes about homosexuality and the LGBT community).

98. See MURDER AND THE REASONABLE MAN, *supra* note 38, at 253; Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 482 (1996) (proposing a race-switching jury instruction).

Alternatively, the prosecutor could have asked the jury to imagine a gay man who found himself the unwanted object of a woman's attention. If the woman, not knowing the man was gay, were to lick the gay man's ear and try to touch his crotch in the privacy of his car, would a jury think the gay man reasonable if his reaction were to beat the woman to death?

In a trans panic case, the prosecutor should seek out evidence suggesting the defendant knew beforehand that the victim was a transgender individual. Evidence that the defendant frequented gay bars or that the victim was open about her gender identity might help. The prosecutor could also ask the jury to imagine a man who has sex with a woman and later discovers that the woman lied to him by leading to him to believe her breasts were her own when she actually had breast implants. How many of us would find beating the woman to death a reasonable response to her failure to disclose that her breasts were not the ones she was born with? If it is not reasonable for a man to be provoked by the discovery of this kind of deception, is it really reasonable for a man to be provoked by the discovery that the person with whom he was sexually intimate is biologically male but identifies as a female? The prosecutor may need to think of a more compelling example in order to make this point since male jurors may think that finding out one's intimate partner has breast implants is not as shocking as finding out that one's intimate partner was not the biological sex that one thought she was.

The prosecutor could also explain to the jury that the transgender woman who does not tell her partner that she was born with male genitalia is not lying since she self-identifies as a woman. The prosecutor might also push jurors to think about whether and when the transgender female victim has a duty to tell her partner about her biological sex, and to think about why, if the evidence suggests such disclosure was not made, the transgender female may have been reluctant to do so. The prosecutor should also educate jurors about the cultural structures of masculinity that may have driven the defendant to kill, and the perniciousness of those structures of masculinity.

Finally, language and terminology is extremely important. The words "battered woman syndrome," for example, conjure up feelings of sympathy for the woman who kills her abusive husband or boyfriend.⁹⁹ If the defense strategy for battered women had been called "the avenging woman defense," it would have conjured up quite different feelings.¹⁰⁰ Similarly,

99. See Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 132 (2002).

100. I wish to thank Anupam Chanders for suggesting this when I presented a work-in-progress at CAPALF at UC Hastings College of Law in February 2013.

the words “gay panic” and “trans panic” may conjure up feelings of sympathy for the heterosexual male defendant who wants people to think he simply panicked and killed upon impulse and without thinking. Perhaps prosecutors and activists should start calling these defense strategies the “trans rage” defense or the “gay rage” defense to convey that the defendant’s act of killing was the result of unacceptable rage, not panic.