Consistency, Integrity, and Equal Justice: A Proposal to Rid California Law of the LGBT Panic Defense

David L. Annicchiarico*

Gwen Araujo was beaten and strangled to death at a house party in Newark, California on October 3, 2002.[1] Gwen, a 17-year-old transgender woman, had been born Edward Araujo, but had been living as a woman since the age of 14, when she had worked up the courage to come out to her family.[2] Four men were accused of the killing; one pled guilty to a lesser charge and agreed to testify against his friends. Jason Nabors, 19, recounted that José Merel and Michael Magidson, 22, had become worried about Gwen's gender after having anal and oral sex with her in the weeks leading up to the fatal confrontation.[3]

At the party, a female friend of theirs took it upon herself to settle the men's questions. While in the bathroom with Gwen, Nicole Brown pushed the young woman's legs apart and grabbed her crotch. She came out yelling, "I felt something. It's a fucking man!"[4] Brown described, in a preliminary hearing, that what happened next was "chaos."[5] Joined by Jason Cazares, 23, the men cornered Gwen, choked her, and struck her head with a frying pan, a can of tomatoes, a shovel, and a barbell.[6] In the midst of the beating, Gwen pleaded with the men, offered them money, and uttered what would

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* B.A. 2001, Columbia University; J.D. 2006, University of California, Hastings College of the Law. For their kind support and guidance, I would like to thank Professor Mark Aaronson of UC Hastings and Natasha Minsker of the ACLU of Northern California.

[1] Kelly St. John, *Slain Teen's Last Night Recounted*, S.F. CHRON., Feb. 20, 2003, at A15.

[2] Kelly St. John & Henry K. Lee, *Slain Newark Teen Balanced Between Two Worlds*, S.F. CHRON., Oct. 19, 2002, at A1.

[3] Henry K. Lee, *Guilty Plea in Transgender Killing*, S.F. CHRON., Feb. 25, 2003, at A1.

[4] St. John, *supra* note 1.

[5] *Id.*

[6] Lee, *supra* note 3.

be her last words: "No, please don't, I have a family."[7] After strangling her with a rope, the killers hog-tied Gwen, dumped her body in the back of a pick-up, and drove out to the woods in El Dorado County, California.[8] The murderers buried her body in a shallow grave and drove to McDonald's for breakfast.[9]

The brutal slaying of Araujo recalled some of the numerous, well-documented hate crimes against LGBT individuals in recent years. In a 1998 crime that aroused national attention, Matthew Shepard was beaten beyond recognition, tied to a wooden fence, burned, and left to die on a dirt road in Laramie, Wyoming.[10] Four months later, in Alabama, Billy Jack Gaither's attackers slit his throat, bludgeoned him with an ax handle, and threw his body on a pyre of burning tires.[11] These murders have more in common than mere brutality. In each instance, the defendants asserted that the killing was justified because they had been provoked to violence by the victim's gay sexual advances, in the cases of Shepard and Gaither, or, in Araujo's case, by the revelation of the victim's "true sex." The defendants sought to use the criminal law's provocation doctrine to argue that their culpability for the slaying should be mitigated because they acted in the heat of passion.[12] They hoped the jury would follow this doctrine and find them guilty of manslaughter instead of murder, thus entitling them to a significantly lesser sentence.

Claims such as these can collectively be termed the LGBT panic defense.[13] In California, courts have held that, for an intentional homicide to

[7] *Id.*

[8] *Id.*

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

[10] James Brooke, *Gay Man Dies From Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998, at A1; *see also* Scott D. McCoy, Note, *The Homosexual Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 629-30 (2001)

[11] Kevin Sack, *2 Confess to Killing Man, Saying He Made a Sexual Advance*, N.Y. TIMES, Mar. 5, 1999, at A10. *See also* Frontline, *The Life and Death of Billy Jack Gaither*, http://www.pbs.org/wgbh/pages/frontline/shows/assault/billyjack (last visited Sept. 6, 2006).

[12] *See* McCoy *supra* note 10 at 632; Steinberg, *supra* note 9, at 500-01.

[13] The defense has been variously termed "gay panic," "transgender panic," and "homosexual advance," among other designations. *See generally* McCoy, *supra* note 10; Steinberg, *supra* note 9. Some commentators prefer to deem it an "offense," thereby focusing attention on the ways in which these claims are often used to attack the humanity and credibility of the victim, and also on the offensive ways in which the claims institutionalize bias and blame the victim for his or her killing. Steinberg, *supra* note 9, at 499. This article uses the phrase "LGBT panic" to highlight the similarities in the application of these mitigation claims to people with lesbian, gay, bisexual, or transgender identities. While gay men and transgender women are overwhelmingly the targets of violence in LGBT panic cases, all sexual minorities are subject to violence in our society because of their sexual or gender identities, and thus may become victims of the defense. Moreover, the term "panic" is intended to be inclusive of the variety of ways in which the defense is employed because it focuses on the defendant's behavior, rather than the victim's, encompassing both situations in

constitute voluntary manslaughter as a heat-of-passion crime, the evidence must substantially demonstrate the following elements: (1) that the killer's reason was obscured; (2) by a provocation; (3) that aroused a strong passion; (4) sufficient to lead an ordinary person to react rashly or without due reflection and deliberation; and (5) that there was insufficient time between the provoking incident and the fatal assault for the passion to subside and be overcome by reason.[14] Defense attorneys in the Araujo case argued that the men were provoked to kill out of "shame and humiliation, shock and revulsion."[15] The defendants allegedly felt duped into sex with Gwen and blamed the victim's death on her own "deception and betrayal."[16] In his closing argument, one of the attorneys for the men analogized the defendants' discovery of Gwen's sexuality to an Edgar Allan Poe story called *The Masque of the Red Death*. The tale is of a prince who invites his privileged friends to join him in luxurious surroundings, where they wall themselves off from the outside world to avoid the plague. One night the prince holds a masquerade party, only to find that one of the guests has concealed his infliction with the disease behind his mask.[17]

Not only are these defense tactics and rhetoric patently offensive and disrespectful to the lives and memories of the deceased, but they jeopardize the safety of the entire LGBT community.[18] While one would like to think of such killings as isolated incidents, this is sadly far from the case. Acts of violence against members of sexual minorities are disturbingly prevalent and, in fact, they are on the rise nationally.[19] In 2004, the FBI reported that there were 1,406 sexual orientation-related hate crime offenses throughout the country,[20] 15.6 percent of the 9,021 total reported hate crime incidents.[21] This is likely a conservative estimate. The National Coalition of

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which the perpetrator reacts violently to the discovery of the victim's sexual orientation or biological sex and those in which the victim allegedly came on to him. For reasons discussed *infra*, focusing on the defendant's behavior attempts to deflect some of the blame that is inappropriately placed on the victim by the defense. In addition, the article refers to these provocation claims as a "defense" or "justification" interchangeably, as these are the common usages in case law and scholarly articles.

[14] Steinberg, *supra* note 9, at 506.

[15] *Id.* at 502.

[16] *Id.*

[17] P. Espinoza, *DA Chris Lamiero's Final Rebuttal*, Aug. 31, 2005, http://gwenaraujo.blogspot.com/2005/08/da-chris-lamieros-final-rebuttal.html.

[18] CLARENCE PATTON, ANTI-LESBIAN, GAY, BISEXUAL AND TRANSGENDER VIOLENCE IN 2004: A REPORT OF THE NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS 11 (2005), http://ncavp.org/common/document_files/Reports/2004NationalHV%20Report.pdf.

[19] *Id.* at 2.

[20] DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION HATE CRIME STATISTICS 2004, 5 (2005), http://www.fbi.gov/ucr/hc2004/tables/HateCrime2004.pdf.

[21] *Id.*

Anti-Violence Programs (NCAVP) reported 1792 incidents of anti-LGBT bias in 2004, and this included data from only a few participating regions.[22] In addition, the NCAVP found 340 anti-LGBT crimes last year in San Francisco alone, a 7 percent increase from 2003.[23] Complicating this troubling phenomenon for the transgender community, trans women frequently live in areas of high crime rates where housing is cheaper, and many become sex workers because of difficulty in finding employers who will accept their gender identity.[24] Moreover, these and other factors make it harder to locate witnesses, and thus to prosecute crimes, when transgender individuals are victimized.[25] Since the beating and strangling of Gwen Araujo in 2002, four other trans women have been murdered in the Bay Area.[26] Defendants' use of the provocation defense to justify or excuse their crimes sends the dangerous message that crimes of violence against LGBT people are not as deserving of punishment as other crimes. While the jurors in Gwen's case rejected the heat-of-passion claim,[27] other victims are not so lucky.[28]

This article explains that the LGBT panic defense endangers the lives of every lesbian, gay, bisexual, or transgender person. Part I illuminates the ways in which such claims are detrimental to both the LGBT community and the integrity of the criminal justice system. Reviewing influential works addressing the defense, it explains that such provocation claims are an impermissible legitimization and institutionalization of homophobia in the law.[29] The LGBT panic justification is an illegitimate species of the heat-of-passion defense and obscures the bias-motivated nature of the violence. In fact, as Part II explains, we should really be calling such killings what they

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[22] The participating regions were Chicago, Cleveland, Columbus, Houston, Massachusetts, Michigan, Minnesota, New York, Pennsylvania, and San Francisco. *See* PATTON, *supra* note 16, at 1-2.

[23] *Id.*

[24] Wyatt Buchanan, *Transgender Killings an Investigative Quagmire*, S.F. CHRON., Sept. 15, 2005, at A1.

[25] *Id.*

[26] *Id.*

[27] The first time the case was tried, the jury deadlocked. Post-deliberation interviews indicated that the jury had rejected the panic defense, but was unable to decide on first- or second-degree murder. Steinberg, *supra* note 9, at 523. At the retrial, Jose Merel and Michael Madigson were convicted of second-degree murder; however, the jury again deadlocked on Jason Cazares. Christopher Daley, Transgender Law Center, *Victory in Hayward*, Sept. 14, 2005, http://gwenaraujo.blogspot.com/2005/09/victory-in-hayward.html.

[28] For example, contemporaneous with the Araujo verdict, a man who confessed to stabbing and killing a transgender woman received a four-year plea bargain from a Fresno County district attorney. Press Release, Transgender Law Center, *Transgender Law Center Statement on the Gwen Araujo Re-Trial*, http://www.transgenderlawcenter.org/do/release_050915.html (last visited Dec. 8, 2005).

[29] "Homophobia," as used in this article, refers to a prejudice against or hatred toward LGBT individuals because of a fear of sexual minorities' difference or the actor's perceived threat to his own sexuality.

are — hate crimes — charging them as such, and enhancing the penalties accordingly, not reducing them. The panic defense is logically and ethically inconsistent with hate crime laws that punish more severely those perpetrators who victimize others based upon their characteristics or group identity.

Finally, Part III offers several ways in which the California legal system can be modified to avoid the damage caused by this offensive and demeaning doctrine. While a number of scholarly articles have previously identified problems with the legal recognition of the LGBT panic defense, many contain largely abstract discussions of appropriate remedies. This article attempts to provide a more comprehensive and concrete proposal that encompasses a variety of strategies for combating the use and effects of the defense. These options include legislative proposals such as the recent A.B. 1160, which would amend the California manslaughter law to define LBGT panic as insufficient provocation, and hate crime-type penalty enhancements, as well as a variety of suggested modifications to the present jury instructions. It also recommends statewide training and educational programs aimed at judges and prosecutors. Moreover, the work endeavors to assuage any concerns that enhancing the penalties for defendants who justify victimizing others through an LGBT panic defense infringes upon their constitutional rights. Through one or more of the strategies described, we can seek to restore the dignity of LGBT murder victims and their communities and the integrity of the criminal justice system.

I. THE LGBT PANIC DEFENSE

A. *Evolution of the Doctrine*

The defense offered in the Shepard, Gaither, and Araujo cases was first posited in 1920.[30] "Homosexual panic" was initially defined as an uncontrollable, violent reaction by a latently homosexual defendant to a verbal or physical signal from the victim.[31] Often a sexual advance, the triggering act precipitated a psychological reaction that caused the defendant to temporarily lose the ability to distinguish right from wrong. It was contingent upon a recognition that homosexuality (here, the defendant's) was a psychiatric illness.[32] Upon the American Psychiatric Association's removal of homosexuality from its list of psychological disorders, this species of the insanity defense was invalidated for defendants, who could no longer claim an underlying mental defect. However, in a "remarkable doctrinal cross-over," gay panic became a provocation or heat-of-passion defense, rather than a de-

[30] William N. Eskridge, Jr. & Nan D. Hunter, Sexuality, Gender, and the Law 1317 (2d ed. 2004).

[31] *Id.*

[32] *Id.*

fense of insanity.[33] Today, the provocation justification has come to be used by those who kill primarily gay men and transgender women in order to receive a lesser punishment for their crimes by arguing that a sexual advance, or the revelation of the victim's birth sex, caused the defendant to lose control.

As noted above, the heat-of-passion theory requires that the circumstances of the killing were sufficient to rob an ordinarily reasonable person of his or her self-control, thus reducing the individual's culpability. An import from tort law, the reasonable man standard asks whether the provocation was such that it would enrage a reasonable and ordinary man, causing him to lose self-control and kill the provoker.[34] California law codifies these requirements in Penal Code section 192, which provides that voluntary manslaughter is "the unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion."[35] If the defendant is able to convince the jury that the victim's gay overtures or the revelation of his or her biological sex would have provoked an "ordinarily reasonable person in the same circumstances"[36] to kill, he could receive as little as three years in prison.[37] The punishment for second degree murder in California, conversely, is 15 years to life; while first degree murder, if aggravated, could warrant a sentence of death.[38]

B. *A Detrimental Defense*

Robert Mison, in an influential Comment, describes the ways in which use of the heat-of-passion defense, as applied to killings based on homosexual advance or revelation of transgender identity, constitutes a misguided use of provocation theory and the judicial institutionalization of homophobia.[39] Mison convincingly argues that the LGBT panic defense conveys a message to jurors and the public that a homosexual advance is a justification to kill that person and reinforces notions that sexual minorities deserve less respect and protection than heterosexual men. It suggests that hostility and revulsion are natural reactions to homosexual behavior and transgender identity.[40] The author explains how the provocation defense has traditionally been based upon the concepts of justification or excuse: "A justification ne-

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[33] *Id.*

[34] *Id.*

[35] CAL. PENAL CODE § 192(a) (West 2005).

[36] CAL. JURY INSTRUCTIONS § 8.42 (West 2005).

[37] *See* CAL. PENAL CODE § 193.

[38] CAL. PENAL CODE § 190.

[39] Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 136 (1992).

[40] *Id.* at 136-7.

gates an assertion of wrongful conduct. An excuse negates a charge that that the particular defendant is personally to blame for the wrongful conduct."[41] States vary on which theory the heat-of-passion claim rests,[42] but in either case, the message is clear: a gay person expressing his sexual attraction or a transgender woman "deceiving" a man into engaging in an intimate encounter, without initially disclosing her "true" sex, makes a defendant less culpable and is grounds for significantly decreased punishment. Both theories take the focus away from the defendant's deplorable conduct, placing blame on the victim for his or her death.[43] This works injustice upon individual gay and transgender victims and the entire LGBT community by allowing homophobia to influence the verdict.[44]

Mison explains that homophobia and presumptions of heterosexuality, pervasive features of our national culture, are at the heart of the LGBT panic defense.[45] American society is dominated by heterosexism, the view that heterosexuality is socially and morally superior and preferable to alternative sexualities.[46] We see this reflected in public perceptions of sexual desire, marriage, family, entertainment, visual art, literature, and criminality. Widespread in our culture, these sentiments often find their way into the jury box, influencing jurors' evaluations of the evidence and the appropriateness of the defendant's alleged provocation claim.[47] In order to determine a defendant's culpability, the trier of fact measures the defendant's actions against society's normative standards of acceptable behavior. When those norms dictate that same-sex attraction or gender transition is unnatural and immoral, the potential for these evaluations to consciously or unconsciously lead a jury to condone a perpetrator's fatal assault is high.[48]

While attitudes have changed for the better in recent decades, America remains a significantly homophobic country. The National Opinion Research Center survey, in 2002, reported that 53 percent of Americans regard homosexual behavior as morally wrong.[49] In 2003, a Gallup poll found that 49 percent of people surveyed felt that homosexuality should not be considered "an acceptable alternative lifestyle."[50] Also in 2003, USA Today reported that, when asked whether same-sex sexual relations should be legal, if

[41] *Id.* at 144.
[42] *Id.* at 145.
[43] *Id.* at 146.
[44] *Id.* at 147.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 148.
[48] *Id.*
[49] UC Davis Psychology Department, *Sexual Prejudice: Prevalence,* http://psychology.ucdavis.edu/rainbow/html/prej_prev.html (last visited Dec. 8, 2005).
[50] *Id.*; Susan Page, *Americans Less Tolerant on Gay Issues*, USA TODAY, July 29, 2003, at 1A.

among consenting adults, 46 percent of Americans said no.[51] These sentiments are reflected in our laws as well. Bans on or presumptions disfavoring alternative sexual identities feature in the marriage, adoption, and custody laws of many jurisdictions throughout the nation.[52] Another example of institutional homophobia can be found in the proscription on openly LGBT persons serving in the military. Individuals who currently or have ever engaged in homosexual acts, who state that they are gay or bisexual, or who attempt to marry people of the same sex are required to be discharged.[53] Moreover, while the Supreme Court's recent holding in *Lawrence v. Texas*,[54] finding anti-sodomy laws unconstitutional, was certainly a step forward, other high court decisions continue to devalue the lives of sexual minorities. Take, for example, *Boy Scouts of America v. Dale*,[55] which held that the phrase "morally straight" in the Scout Oath could constitute a legitimate proscription on homosexuality. As a result, as Robert Mison notes, "over four million youths receive the message that it is morally wrong to be gay or lesbian and the stereotype that homosexuals cannot provide positive role models for children gains strength and credibility."[56] The prevalence of homophobia makes it likely that participants in the criminal justice system, including juries, judges, prosecutors, law enforcement, and defense attorneys, will be influenced to some degree by societal anti-LGBT bias or attitudes.

Mison explains that there are myriad ways in which homophobia can influence the provocation doctrine. Several areas in which our judicial system is made vulnerable to or reflects anti-LGBT prejudice and bias are in the reasonable man standard, the values of juries, abuse of the defense, and victim-blaming.[57] Mison argues that, because of these factors, the LGBT panic defense undermines the integrity of the trial process and the system as a whole. For this reason, he maintains that judges should find, as a matter of law, that an alleged panic reaction to same-sex advance or the revelation of transgender identity is insufficient provocation to justify a heat-of-passion, manslaughter jury instruction. Contemporary manslaughter law provides that the issue of provocation is a question for the jury to decide; however, "the judge retains discretion to refuse to instruct the jury on voluntary manslaughter when no rational jury could conclude" that the homicide was the result of a legitimate and legally acceptable provocation.[58]

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[51] Page, *supra* note 50.

[52] Mison, *supra* note 39, at 150.

[53] *Id.* at 152-53.

[54] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[55] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 641 (2000).

[56] Mison, *supra* note 39, at 157.

[57] Id. at 158-59.

[58] *Id.* at 158.

As discussed above, the reasonable person standard is intended to be the jury's measure of the culpability of a defendant's conduct and the appropriateness of his use of the LGBT panic defense. As it has traditionally been applied, the reasonable person concept is not an "abstract universal standard" or a Platonic ideal.[59] Rather, in practice, it has embodied only a male standard, making unidimensional reference to men's lives.[60] By failing to reflect universally representative, nongendered social norms, the reasonable person standard can lead to illegitimate and prejudicial results.[61] For example, the Ninth Circuit has recognized that a reasonable man standard can lead to sexist stereotyping and thus prejudicial outcomes.[62] The court held that the fact-finder, in evaluating cases of sexual harassment against women under Title VII, must employ a "reasonable woman" standard, recognizing that a facially "sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experience of women."[63] In the same way, because a jury's evaluation of the ordinarily reasonable man for the purposes of provocation cases is inevitably a heterocentric conception, one colored by homophobia and heterosexism, the proper application of the provocation doctrine is jeopardized.[64]

The reasonable man is intended to be an ideal that reflects the standards of justice to which society holds its citizens. He is the "public embodiment of rational behavior" and, therefore, should not possess harmful prejudices and bias.[65] Mison argues that, even if the ordinary man standard allows for shortcomings and weaknesses, as some commentators maintain, courts should find that homophobia expressed through violent acts is not among the shortcomings we will tolerate.[66] Indeed, the author explains that jurors' views and values are too often tainted with heterosexist bias that will inevitably and impermissibly affect LGBT panic verdicts. As the Ninth Circuit has explained, jury biases in cases dealing with homosexuality often improperly skew the results.[67] American jurisprudence places great value on the input of individual jurors' life experiences in their normative decision-making process. However, a juror also brings his or her prejudice into the

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[59] *Id.* at 159

[60] *Id.* at 159.

[61] *Id.*

[62] *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

[63] *Id.* at 879.

[64] Mison, *supra* note 39, at 161.

[65] *Id.*

[66] *Id.*

[67] *See, e.g. United States v. Gillespie*, 852 F.2d 475 (9th Cir. 1988) (child molestation case where evidence of homosexuality was prejudicial and constituted reversible error).

jury box and the court has a duty to ensure that it does not affect the integrity of our justice system.[68]

Two other problems — abuse of the defense and the phenomenon of victim-blaming — also undermine the propriety of allowing the LGBT panic defense. There is enormous potential for a defendant's abuse of the provocation doctrine in this context by capitalizing on jurors' conscious or unconscious homophobia.[69] California cases involving alleged gay panic bear out this assertion. In the California Supreme Court case of *People v. Lang*,[70] the defendant argued that he killed the victim while they were out hunting because of a panic reaction to a homosexual advance.[71] Lang's story was that the deceased had picked him up while he was hitchhiking, invited him to join in a hunting trip, and later grabbed the defendant's leg and tried to kiss him. The victim was found in the woods, dead from a shotgun blast. The defendant was found afterward with the victim's wallet, using the victim's credit card, and driving his motorhome.[72] In *People v. McDermott*,[73] the victim was brutally stabbed to death in a home he shared with the defendant. McDermott had paid a man she knew to kill the victim, with the instructions that he should make it look like a "homosexual murder."[74] She told him to carve the word "gay" into the body or cut off the deceased's penis, believing that the police would not investigate a homosexual murder as vigorously.[75] While neither Lang nor McDermott succeeded in escaping a murder conviction by blaming their victims' sexuality for the killing, these examples demonstrate that a defendant can easily abuse the doctrine by playing into a jury's potential biases. These homophobic tropes are employed whether or not there was even any kind of provocation related to the victim's gender identity or sexual orientation. The defendant hopes that the decisionmakers' homophobia will cause them to identify with the defendant's violent reaction.

Perhaps the most psychically harmful to the LGBT community is the way in which such justifications blame the victim for his or her own death. The LGBT panic defense invites the jury to conclude that the gay or transgender victim, by virtue of his or her sexuality, "deserved to be a victim."[76] Yet, "[w]hatever a person's opinion may be of gay men and lesbians, 'the law does not condone or excuse the killing of homosexuals any more that it

[68] Mison, *supra* note 39, at 161.
[69] *Id.* at 167.
[70] 782 P.2d 627 (Cal. 1989).
[71] *Id.* at 636.
[72] *Id.*
[73] 51 P.3d 874 (Cal. 2002).
[74] *Id.* at 885.
[75] *Id.*
[76] Mison, *supra* note 39, at 171.

condones the killing of heterosexuals'".[77] The criminal law is aimed at restricting unreasonable impulses to break the law; society expects actors to exercise self-restraint.[78] If a defendant acts upon unreasonable impulses, he should be found guilty of murder and not voluntary manslaughter. Killing another person in response to the revelation that she is transgender or because he made a homosexual advance is a drastically disproportionate and therefore unreasonable response. To allow this justification is to encourage blaming the victim for "the sort of irrational violence that the criminal justice system is designed to control."[79] For this and the other reasons explained herein, Mison argues that judges must choose not to instruct juries on manslaughter in cases where a defendant argues LGBT panic. By tolerating this defense, courts and juries reinforce the idea that homosexuality or transgender identity is culpable behavior and that sexual minorities do not deserve the protection and respect of the criminal justice system.[80]

C. *Objections to Eliminating LGBT Panic*

Professor Joshua Dressler, in arguing that a gay sexual advance should not be inadequate provocation as a matter of law, maintains that many of Mison's arguments against use of the LGBT panic defense are more properly regarded as criticisms of the heat-of-passion defense generally.[81] He characterizes Mison's analysis as misapprehending the theory behind the mitigation claim. Whereas Mison presents a utilitarian rationale for barring LGBT panic arguments, Dressler posits that the provocation defense actually derives from principles of retribution and is a partial excuse, rather than a justification.[82] The reason the law makes a "concession to human weakness" in cases of voluntary manslaughter, according to Dressler, is that common experience dictates that, at some point, rage becomes so intense that people find it extremely difficult to exercise self-control and respond constructively.[83] The defendant's reason is obscured by passion, making it morally unjust to regard him as a murderer; the law thus affords him a partial excuse.[84] While Mison states that the reasonable man is an ideal to which society wants its citizens to aspire, Dressler maintains that this concept is more appropriately understood as the "ordinary man," a person inflicted with

[77] *Id.* (quoting *Commonwealth v. Carr*, 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990)).
[78] *Id.* at 172.
[79] *Id.*
[80] *Id.* at 174.
[81] *See* Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 729 (1995).
[82] *Id.* at 728.
[83] *Id.* at 747-49.
[84] *Id.*

ordinary human weakness.[85] In sexuality-based provocation cases, juries should follow the principle that "the defendant is, unfortunately, just like other human beings."[86]

Based on this reasoning, Dressler argues that there is no principled basis for carving LGBT panic out of the provocation doctrine. Defendants should be punished less severely for less culpable conduct. Because a sexual advance may well constitute adequate provocation to kill in some situations, juries should determine whether a straight man who kills a gay man in response to a sexual advance should have his punishment mitigated. According to Dressler, the only logical basis on which to attack the provocation doctrine is to argue that, because it is a male-oriented doctrine that protects male expressions of anger, it should be abolished so as to discourage violent responses to situations in which men might become emotionally overwrought.[87]

As much as there are good reasons for abandoning the provocation doctrine altogether, Dressler is wrong that there is no principled reason for treating cases of alleged LGBT panic differently. His argument rests on the faulty assumption that, in LGBT panic cases, the killer is not necessarily homophobic. He claims that unwanted sexual advances would cause indignation and anger in both men and women, and that the reason women do not kill in response is simply that women are less violent.[88] In addition, straight men's anger can be aggravated because they might find homosexual acts repulsive, a response which Dressler argues is not homophobic, but rather a consequence of "profoundly complicated and inherently personal" sexual desires.[89] This analysis misses the mark, however. Dressler is of course correct that women in general do not respond as violently as men to provocation. However, in no other combination of sexual advances than a gay or trans person toward a straight man would we consider for a moment a claim of adequate provocation. Suppose, for example, that a woman made a pass at an uninterested straight man, or alternatively, at a gay man. In neither case would a reasonable jury find there to be sufficient provocation to justify a heat-of-passion killing.[90] The point is that there is a crucial difference between simply not finding a sexual act or advance desirable or

[85] *Id.* at 751-52.

[86] *Id.* at 753.

[87] *Id.* at 736-37.

[88] *Id.* at 754-55.

[89] *Id.* at 755.

[90] *See, e.g.* Alafair S. Burke, *2005 Survey of Books Related to the Law: Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1068 (2005) (reviewing CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003)).

pleasurable, on the one hand, and being positively disgusted by it on the other. This difference is rooted in homophobia.

What adequate grounds of provocation have in common is that we understand why the provoked party was angry, even if we ourselves would not act so rashly in response. A man who kills his wife when he finds her in bed with another man has by no means a complete defense to the slaying, but he has a partial excuse justifying decreased punishment because we understand (or empathize with) the underlying rage that caused him to kill; we too would be furious if we were betrayed in the same way. In sexual advance situations, despite Dressler's claim to the contrary, most people would not share feelings of acute anger in response to unwanted, nonviolent propositions. Certainly, if the propositioner were physically larger or stronger, a person could feel threatened; or a person who was constantly hit on might well experience frustration, irritation, or resentment. Yet none but those who harbor feelings of disgust toward gay men and homosexuality would feel the kind of anger that leads one to kill.

Moreover, even if we accept Dressler's idea that the standard for reasonableness relies upon a conception of human frailty, incorporating homophobia into this conception is a dangerous proposition. In cases of LGBT panic, allowing homophobia to be an understandable (or partially excusable) human weakness is tantamount to accepting that such bigotry is so well entrenched in our society that we tolerate it. A comparison to other prejudice, such as racism, demonstrates the infirmity of this argument. The idea that a defendant would be allowed to petition a jury for significantly reduced punishment because he killed his victim upon the discovery that the person with whom he was intimate was actually an African American passing as white, or upon a sexual advance by a Latino person, is truly implausible. The culpability of someone who kills his victim because of the latter's membership in a sexual minority group is just as great. Even if the average juror is more shocked by race-based bias killings than those motivated by sexual orientation, the law should be proactive in its rejection of intolerance. As Dressler admits, opinion polls do not decide issues of morality and are not the standard on which we base justice for the victims of violence.[91]

In addition, while Dressler believes that Mison's criticisms are largely applicable to the provocation defense as a whole, there are important practical and ethical reasons for disallowing the use of the heat-of-passion justification in cases of LGBT advance.[92] The LGBT panic defense institutionalizes and legitimizes bias and hatred toward LGBT individuals and their communities in ways that other provocation justifications do not.

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[91] Dressler, *supra* note 81, at 755.

[92] *See* Part II, *infra*.

Allowing a heat-of-passion instruction in the case of a man who flies into a rage and kills his sister's rapist does not have the same troubling institutional and psychological impact as do killings motivated by a person's status. In fact, in cases of LGBT panic, the criminal law should be increasing the penalties for the killings, not mitigating them. For the same reasons that our society punishes as hate crimes acts of violence against a person because of the victim's membership in a minority group, so too should it discourage bias-related killings of LGBT people committed in the heat of passion. The next section discusses the ways in which LGBT panic slayings are properly considered hate crimes, and the reasons why these acts are deserving of enhanced penalties.

II. HATE CRIMES AND THE PROVOCATION DEFENSE

A. *It Is What It Is: LGBT Panic as Crimes of Bias under California Law*

In 1987, responding to the alarming incidence of hate crimes throughout the state, the California legislature enacted the Tom Bane Civil Rights Act.[93] The Penal Code currently defines these bias-related offenses as:

> [A]ct[s] committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: (1) Disability. (2) Gender. (3) Nationality. (4) Race or ethnicity. (5) Religion. (6) Sexual orientation. (7) Association with a person or group with one or more of these actual or perceived characteristics.[94]

In addition, section 422.56 explains that "'Gender' means sex, and includes a person's gender identity and gender related appearance and behavior whether or not specifically associated with the person's assigned sex at birth . . . . 'Sexual orientation' means heterosexuality, homosexuality, or bisexuality." California thereby explicitly prohibits violence against all LGBT people that is "because of" their status as a sexual minority. The meaning of the causality element becomes crucial because a defendant might attempt to argue that the killing was a result of the victim's overtures or deception, rather than his or her sexual orientation or gender identity. However, section 422.56 clearly belies this interpretation: "'[B]ecause of' means that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist . . . . There is no requirement that the bias be a main factor, or that the crime would not have been committed but for . . . the characteristic." The legislature has indicated that the proscribed bias need only be a "substantial factor" in the offense.[95] As discussed above,

[93] *See In re* MS, 896 P.2d 1365, 1369 (Cal. 1995).

[94] CAL. PENAL CODE § 422.55 (West 2005). All other statutory references are to the Penal Code unless otherwise indicated.

[95] *See* CAL. PENAL CODE § 422.56.

the biases of homophobia and heterosexism are at the heart of the LGBT panic defense and play an unquestionably substantial role in the violence. One need look no further than the fact that we have no corresponding heterosexual advance provocation defense to see that anti-LGBT prejudice is clearly a motivating cause.[96]

Penal Code section 422.6 makes it a crime to, by threat or force, injure or interfere with a person in the enjoyment or exercise of any right accorded to him or her by the laws of California and the nation, because of any of the protected traits listed above.[97] The state hate crime laws also provide for a penalty enhancement of imprisonment of up to one year, or a $10,000 fine, or both, for misdemeanor crimes committed for the purpose of interfering with or intimidating victims in the exercise of their constitutional rights.[98] Violent acts prompted by homosexual advance or transgender identity revelation, which do not result in the victim's death, could qualify for punishment under these provisions. Section 422.75, moreover, adds additional punishment for a felony that is a hate crime. Subsection (a) states: "[A] person who commits a felony that is a hate crime . . . shall receive an additional term of one, two, or three years in the state prison, at the court's discretion."[99] Because intentional homicide is a felony offense, section 422.75 is the hate crime statute most applicable to an LGBT panic killing. Through these provisions, the state has demonstrated a commitment to increased punishment of crimes motivated by hate.[100] Hate crime statutes serve a symbolic and communicative purpose of expressing intolerance for those who would victimize a person because of his or her innate characteristics. They signal to minority groups that they may find protection and recourse in the rule of law.[101] Mitigating the culpability and punishment of a defendant who claims he was provoked to kill his victim because of hatred or

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[96] McCoy, *supra* note 10, at 656. *But see* Dressler, *supra* note 81. Dressler responds to this assertion by arguing that, while it is possible that the lack of a heterosexual-advance defense results from judicial discrimination, whereby judges decline to instruct on the provocation defense in heterosexual-advance cases, it is more likely that the discrepancy is due to the fact that women rarely react violently to unwanted heterosexual advances. Further, when women kill in such a scenario, they more often offer self-defense justifications rather than provocation theories. *Id.* at 743. This argument ignores the better comparator – namely, situations where a woman makes a similarly unwanted pass at a straight man. Yet, whether or not Dressler is correct, his claims do not undermine the fact that the absence of any corresponding heterosexual advance defense (which our heteronormative culture would simply refer to as a "sexual advance defense") demonstrates that prejudice is certainly a substantial factor in LGBT panic cases. Homophobia is clearly at the root of the defense.

[97] *See* CAL. PENAL CODE § 422.6(a).

[98] *See* CAL. PENAL CODE § 422.7.

[99] CAL. PENAL CODE § 422.75(a).

[100] McCoy, *supra* note 10, at 654.

[101] *Id.* at 655.

disgust for the latter's sexual orientation or gender identity simply cannot logically or ethically coexist with California hate crime provisions.[102]

Indeed, the detrimental social effects and motivating legislative concerns of hate crimes and LGBT panic killings are inextricably linked. As the Supreme Court has observed, "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[103] Hate crimes tend to be more brutal than other crimes. Psychologically, violence based on prejudice invokes feelings of helplessness because the attacked characteristic is immutable. Moreover, homophobic assaults and slayings can discourage an entire community from participation in social and political life.[104] Such crimes strike an individual at the core of his or her identity.[105] Bias-related killings also risk pitting one community against another, increasing intergroup retributive violence and animosity.[106] "As Blackstone said long ago, 'it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.'"[107] As the foregoing analysis has detailed, LGBT panic killings are crimes of hate, which visit harm upon gay and transgender individuals and the broader society alike; they are thus deserving of increased penalties, not mitigation.

B. *Penalty Enhancements and Constitutional Rights*

Critics have maintained that hate crime enhancements impinge upon constitutionally guaranteed rights. However, both the United States Supreme Court and the California Supreme Court have consistently upheld hate crime statutes against such attacks. The arguments for the constitutional legitimacy of these provisions are equally applicable to penalty enhancements applied to defendants who murder their victims based on homophobic reactions to homosexual advance or disclosure of transgender identity. In *Wisconsin v. Mitchell*, the federal high court found that a state hate crime statute, similar to that of California, comported with the First Amendment's protection of free expression.[108] The defendant in that case maintained that the statute's effect was to impermissibly punish bigoted beliefs.[109] The Court explained that, while it is true that hate crime proscriptions provide greater penalties for certain acts based upon the perpetrator's

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[102] *Id.* at 658-59.

[103] *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993).

[104] Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1928-29 (1993).

[105] McCoy, *supra* note 10, at 651-52.

[106] *Id.* at 653.

[107] *Mitchell*, 508 U.S. at 488 (quoting 4 W. BLACKSTONE, COMMENTARIES 16).

[108] *Id.*

[109] *Id.* at 484.

motivation, this does not run afoul of the First Amendment.[110] Indeed, motive is an integral factor in criminality, deeply ingrained in American legal tradition. Motives are relevant, for example, when a trial judge determines the severity of a defendant's sentence and can serve to increase or diminish culpability.[111] The Court noted that abstract beliefs are not an appropriate subject of punishment under the Constitution. However, penalty enhancements for bias-related crimes do not violate the law because, in the same way that employment discrimination statutes like Title VII bar only the differential treatment of employees because of their protected characteristics, so too do hate crime enhancements only punish selection of a victim because of the defendant's bias against that group.[112]

In addition, murders or less severe offenses that are motivated by hate do not constitute expressive conduct protected under the First Amendment.[113] The Supreme Court's decision in *R.A.V. v. City of St. Paul*[114] invalidated a municipal ordinance that prohibited the use of "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'"[115] Aimed at offenses like cross-burning, which seek to intimidate on the basis of minority status, the city's law proscribed only certain classes of fighting words.[116] In this way, it impermissibly engaged in viewpoint discrimination. However, whereas the *R.A.V.* ordinance was directed explicitly at expression, hate crime statutes such as California's only regulate acting upon one's prejudice, not expressing it, and the Constitution does not extend it's free-speech protection to violent crime.[117] Nor do penalty enhancements for LGBT panic defendants violate the First Amendment due to an overbroad chilling effect on protected speech. Mitchell argued that hate crimes ultimately punish a defendant for his bigoted speech when a prosecutor later uses his prior statements against him at trial, to bolster the evidence that the defendant selected his victim because of a protected characteristic.[118] The Court explained that the idea that a person would be restrained in expressing his beliefs about a particular minority group because of a fear that they would later be used against him in a hate crime prosecution is far too attenuated and speculative to violate First Amendment standards.[119] Furthermore, the Constitution does not prohibit evidentiary use of prior

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[110] *Id.* at 485.
[111] *Id.*
[112] *Id.* at 487.
[113] *Id.*
[114] 505 U.S. 377 (1992).
[115] *Id.* at 391.
[116] *Id.*
[117] *Mitchell*, 508 U.S. at 487.
[118] *Id.* at 488-89.
[119] *Id.* at 489.

statements to establish intent, motive, or the elements of a crime; indeed, such evidence is frequently admitted in criminal trials.[120]

In addition, the California Supreme Court has specifically upheld the constitutionality of our state's hate crime laws. In a case decided not long after the federal ruling in *Mitchell*, the defendants in *In re* M.S. made many of the same First Amendment arguments.[121] In that case, several gay men, heading from their truck to a restaurant in San Francisco's Castro District, were accosted by two juvenile women and two men. The group shouted threats such as "We are going to get you faggots" and "We are going to kill you, you are all going to die of AIDS," and ultimately beat and kicked the victims on the sidewalk.[122] The Court rejected a challenge that sections 422.6, 422.7, and 422.75 are impermissible content-based regulations.[123] It distinguished *R.A.V.*[124] and elaborated on the U.S. Supreme Court's holding that hate crime statutes regulate violent conduct and not protected expression.[125] Under the Supreme Court's test in *United States v. O'Brien*,[126] the California laws pass muster because, when speech and nonspeech elements combine in a single course of conduct, an important government interest can justify incidental limitations on speech or expression. This reasoning extends to provocation killings motivated by prejudice as well. Because of the special psychic, ethical, and institutional harms of bias-related killings, including those committed in the heat of passion, the government's important interest in enhancing their punishment is manifest. Moreover, as the Supreme Court has previously held, when the state does not seek to prohibit conduct because of its expressive content, a defendant's acts are not exempted from regulation simply because they express discriminatory views.[127]

In re M.S. goes on to explain that the California statutes do not transgress the limited category of "true threats" punishable under the First Amendment, nor are they unconstitutionally vague in violation of due process.[128] If a reasonable person would foresee that hate-motivated words and their import would cause the listener to believe that he or she will become the victim of physical violence, the threat falls outside the purview of the First Amendment.[129] Additionally, the causality provision "because of," in

[120] *Id.*
[121] *In re* M.S., 896 P.2d 1365 (Cal. 1995).
[122] *Id.* at 1369.
[123] *Id.* at 1377-80.
[124] *Id.* at 1378.
[125] *Id.* at 1379.
[126] *United States v. O'Brien*, 391 U.S. 367 (1968).
[127] *In re* M.S., 896 P.2d at 723, (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)).
[128] *Id.* at 1370-71.
[129] *Id.* at 1370.

the language of the hate crime statutes, does not violate due process standards of vagueness because it's requirement that the bias be a substantial factor in the crime comports with traditional principles of criminal justice and "gives the person of ordinary intelligence a reasonable opportunity to know what the statutes prohibit."[130]

The California Court of Appeal has also found that punishment of crimes motivated by homophobia, racism, or other prejudices does not violate the Fourteenth Amendment's equal protection doctrine. In *People v. MacKenzie*, the defendant argued that bias-motivated crimes should be reviewed under strict scrutiny because they impinge upon the fundamental right to hold and express bigoted beliefs, impermissibly distinguishing among "similarly situated" defendants only on the basis of their motivation.[131] Rejecting this argument, the Court of Appeals explained that hate crime punishments have already been held not to violate freedom of expression, but notwithstanding, strict scrutiny is not warranted when a law merely has an incidental effect on a fundamental right.[132] The California statutes do not directly regulate thoughts or speech, only violence, and thus need only pass the rational basis test.[133] This they easily achieve due to the unique detriment bias-motivated crimes visit upon individual victims, their communities, and society at large.[134]

A final challenge to the propriety of enhanced penalties for LGBT panic-motivated violence and other hate crimes comes from Joshua Dressler, who argues that many of the same criticisms of the LGBT panic defense can be made against the provocation excuse generally.[135] The argument suggests that, if Mison is correct, then we should move to have legislatures abolish the heat-of-passion defense, rather than encourage judges to decline to instruct juries upon it only in cases of sexuality-based violence. Professor Dressler is concerned that special treatment of anti-LGBT bias crimes, such as this article proposes, jeopardize a defendant's rights because it assumes that deterrence is the only objective of the criminal law. Rather, it also should differentiate between offenses of greater and lesser severity "to safeguard offenders against excessive, disproportionate or arbitrary punishment."[136] Dressler argues that we need to maintain the provocation doctrine so that defendants are not penalized for heat-of-passion crimes out of proportion to their actions. However, this very argument, that the pun-

[130] *Id.* at 1376.
[131] *People v. MacKenzie*, 34 Cal. Rptr. 2d 793, 799 (Cal. Ct. App. 1995).
[132] *Id.* at 801.
[133] *Id.*
[134] *Id.*
[135] Dressler, *supra* note 81, at 750.
[136] *Id.* at 751 (quoting MODEL PENAL CODE § 1.02(2)(c) (1985)).

ishment should reflect the seriousness of the crime, is the primary justification for charging LGBT panic violence as hate crimes. In light of the special harms of homophobia-motivated crimes, as recognized by the Supreme Court, legal scholars, and anti-violence organizations nationwide,[137] LGBT panic killers cause unique psychological and social detriment and their legal culpability should reflect that fact.

Because of the damage the LGBT panic defense inflicts upon sexual minorities, California has a duty to seek ways in which to eradicate it. We need to treat these offenses as what they are — hate crimes — and charge penalty enhancements accordingly. In provocation cases where homosexual advance or transgender revelation is offered as a defense, judges should also refuse to instruct juries on voluntary manslaughter. Indeed, in doing so, the courts would not be forging new ground; rather, they would follow the expression of the legislature that this type of bias and discrimination, proscribed by our hate crime laws, is no longer tolerable.[138] By treating LGBT panic violence as a hate crime, we reverse the message that LGBT individuals are deserving of less protection under our laws, conveying instead that hate-motivated violence of any kind will not be condoned in our system of criminal justice.

In cases where the facts known to the district attorney indicate that homophobia was at the root of the killings, the state should charge a defendant under the existing hate crime statutes. However, when the prosecution has insufficient evidence or is unaware of the bias motivation before trial, the DA will be unable to charge the defendant with an enhancement. Moreover, even when a hate crime is charged, a jury's decision-making may be obscured by LGBT panic arguments. For example, the Araujo jury, in the face of voluminous and conflicting evidence, declined to find a hate crime violation.[139] We thus need to determine other methods of both ensuring that a defendant's sentence reflects the seriousness of the crime and barring the use of the LGBT panic defense, or at least, diminishing its abuse and effects. The remainder of the article is devoted to a breadth of proposals for ridding California law of this detrimental doctrine.

III. PROPOSALS

A. *Legislative Action*

If we acknowledge that these killings are actually hate crimes, then a defense that says that a killer is less culpable for having killed in response to

[137] *See generally* PATTON, *supra* note 18.
[138] McCoy, *supra* note 10, at 661.
[139] Press Release, Transgender Law Center, *supra* note 28.

a gay sexual advance cannot survive. In addition to charging hate crime enhancements when a defendant kills his victim because of the victim's same-sex intimate overtures or revelation of a transgender identity, opponents of LGBT panic should therefore seek to have the legislature remove the sexuality-based mitigation claim as a defense to murder in California. Gay and trans panic arguments impregnate the justice system with intolerance and inconsistency. The legislature should write these injurious influences out of the law, either via amendments to the current manslaughter provision, such as the recently proposed A.B. 1160, or through a sentencing scheme that enhances the penalties for manslaughter when it is aggravated by bias-motivation.

1. Assembly Bill 1160

Assembly Bill 1160 was introduced by Assembly Member Sally Lieber on February 22, 2005.[140] However, legislative momentum was diverted and the first hearing that had been set for it was cancelled.[141] A.B. 1160 would have amended California manslaughter law to invalidate a heat-of-passion defense when the violence was motivated by protected traits of the victim. The Bill added, under the definition of voluntary manslaughter in Penal Code section 192, an explanation that:

> Sufficient provocation to support "sudden quarrel" or "heat of passion" does not exist if the defendant's actions are related to discovery of, knowledge about, or the potential disclosure of one or more of the following characteristics, or perceived characteristics: disability, gender, nationality, race or ethnicity, religion, or sexual orientation . . . . This limitation applies even if the defendant dated, romantically pursued, or participated in sexual relations with the victim. [In addition,] [s]ufficient provocation . . . does not exist if the defendant's actions are related to . . . the victim's association with a person or group with one or more of the characteristics . . . .[142]

The amendment would specifically apply to transgender persons as well: "For the purposes of this section, "gender" means sex, and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[143] In this way, A.B. 1160 would clearly exempt crimes motivated by a person's status, like killings based on homophobia, from the provocation defense. Similar to

[140] Assemb. B. 1160, 2005-06 Leg., Reg. Sess. (Cal. 2005)

[141] *Id.*

[142] *Id.*

[143] *Id.*

hate crime legislation, this approach writes prejudice out of the law, directly and explicitly.[144]

With an amendment like A.B. 1160 there would be no confusion and no discretion. A jury could not legally find that LGBT panic was sufficient provocation to warrant a verdict of manslaughter and the statute would eliminate any argument on appeal that a trial judge erred in refusing to instruct a jury on voluntary manslaughter in such cases. The idea that it is somehow justifiable or excusable for a man to kill a gay or transgender person because of his or her sexuality would no longer be perpetuated by the law. The defense would cease fostering anti-LGBT bias in the minds of jurors, witnesses, the media, and the public at large. Above all, this approach legislatively sends the message that California does not tolerate any violence against its citizens motivated by hate or disgust and that we have respect for the lives of sexual minorities.

2. Sentence Enhancements for Bias-Related Manslaughter

This article has argued that the crimes for which defendants offer LGBT panic excuses, such as a transgender woman "deceiving" him as to her gender identity or a gay man making a pass at him, are rooted in heterosexism and homophobia and should be treated as hate crimes under California law. Yet, in practical application, it may not always be possible to charge each of these perpetrators under the hate crime statutes. Certainly, where investigation of the crime reveals evidence that the defendant killed his victim because of LGBT-bias-related motives, a prosecutor will be able to offer that proof to the grand jury and seek to obtain an indictment charging a violation of section 422.75's proscription on felonies committed because of hate. This might occur, as in the murder of Gwen Araujo, where several witnesses at the party could testify as to the men's reactions upon the discovery of Gwen's birth-sex and their statements such as "I can't be fucking gay."[145] However, the district attorney may not always be aware of the anti-LGBT motivations in advance of trial. Reasons for this could include that the defendant and the victim were alone during the incident or that the

[144] Since the writing of this article, A.B. 1160 was reintroduced in modified form. The most current version of the bill, as of May 2, 2006, now proposes to amend the criminal jury instructions as follows:

> SEC. 2. Section 1127h is added to the Penal Code, to read: 1127h. In any criminal trial or proceeding, upon the request of a party, the court shall instruct the jury as follows: 'Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation.'

See http://www.leginfo.ca.gov/pub/bill/asm/ab_1151-1200/ab_1160_bill_20060502_amended_sen.pdf

[145] Lee, *supra* note 3, at A1.

defendant is simply fabricating the sexuality-related provocation in an attempt to play into the jury's biases. Recall *People v. Lang*, where the defendant argued homosexual advance, but may well have simply convinced the victim to pick him up while hitchhiking and then murdered and robbed him in the woods.[146] LGBT panic justifications may not surface until the trial is in progress. Because of these limitations and dangers, if we accept that LGBT panic violence is indeed a crime of hate, deserving of increased punishment, we need an alternative scheme for enhancing the penalties for its commission.

Therefore, one option for legislative reform seeking to ameliorate the harmful effects of defendants' use of the LGBT panic defense would be to amend Penal Code section 193,[147] which provides the range of penalties for voluntary manslaughter, to include special punishment for provocation killings that are motivated by bias against victims in any of the protected categories in the hate crime laws. This new category in the manslaughter statute would preserve the criminal law's long-standing recognition that there is a qualitative difference between murder and killings committed in the heat of passion, while also recognizing that bias-related slayings are more offensive and detrimental to our society than killings with no such motivation. As the state has already seen fit to punish crimes of bias more harshly, a similar amendment to the manslaughter sentencing provisions is a logical complementary step.

Through section 422.75, the legislature has indicated its belief that one-to-three extra years is the proper addition to the standard felony penalties; this seems an appropriate model for sentencing enhancement in LGBT-panic provocation killings. The judge could ask the jury to answer a series of questions regarding whether it believed that bias against LGBT persons was a substantial factor in the defendant's decision to kill the victim and, if so, sentence the defendant to a bias enhancement accordingly. This approach is less satisfying to opponents of the panic defense, who advocate for its complete elimination, but it may nonetheless be an important alternative strategy, were there is a lack of political will to do so. The intermediate category of bias-related manslaughter also could allay the fears of critics who would argue that a judge's decision to decline to instruct a jury on manslaughter deprives the defendant of his right to a trial by jury. LGBT panic arguments could still be offered, but they would come at a price. If the legislature or the courts are willing to allow a jury to consider the provocation defense, sentencing enhancements would be a positive step toward ensuring that the punishment appropriately reflects the destructiveness of a

[146] *See supra* text accompanying notes 70-72.
[147] CAL. PENAL CODE § 193 (West 2005).

bias-related killing. In this way, we could restore a measure of consistency to the criminal law and make the justice system better serve LGBT communities.

B. *Jury Instructions*

As a (less effective) alternative to legislative reform, California could alleviate the problems of the LGBT panic defense by adopting new jury instructions. In addition to informing jurors of the applicable legal standards, jury instructions are intended to safeguard against individual bias.[148] Manslaughter instructions also caution the fact-finder that a defendant is not permitted to set his own standard.[149] The jury is to measure the perpetrator's actions against normative standards of justice and avoid sympathizing with the defendant. While, these guidelines are designed to minimize juror prejudice, they frequently fail to achieve this objective.[150] Although jury instructions are limited in their efficacy as a method of redressing the ill effects of the LGBT panic doctrine, there are ways in which they may be improved and employed to reduce the pernicious influence of homophobia on the criminal law.

1. California Manslaughter Instructions

The current jury instruction for voluntary manslaughter, explaining the "sudden quarrel or heat of passion" element, provides:

> To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.
>
> The heat of passion which will reduce a homicide to manslaughter must be such a passion as would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his] [her] own standard of conduct and to justify or excuse [himself] [herself] because [his] [her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] [her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation.[151]

Robert Mison explains that this instruction actually perpetuates the acceptance of the LGBT panic mitigation claims.[152] While jury instructions are

[148] Mison, *supra* note 39, at 164.
[149] CAL. JURY INSTRUCTIONS § 8.42 (West 2005).
[150] Mison, *supra* note 39, at 164.
[151] CAL. JURY INSTRUCTIONS § 8.42.
[152] Mison, *supra* note 39, at 164-65.

intended to reduce individual bias, and a person who kills because of a perceived threat to his sexuality or prejudice against sexual minorities cannot be deemed the ordinarily reasonable person, the California instructions' references to provocations that "naturally would excite and arouse the passion" and a "passion as naturally would be aroused" have the effect of triggering a juror's biases.[153] The fact-finder is prompted to compare the defendant's reaction with his or her own feelings about homosexuality and transgender identity and this presents special risk of prejudicial bias. The current instruction does not adequately discourage improper identification with the defendant.[154] While it explains that a defendant cannot set his own standard of conduct, there is a great risk that bias, which is often unconscious, will affect what is supposed to be the non-discriminatory, normative influence of a jury's evaluation of reasonable provocation. For these reasons, special instructions aimed at exposing bias are needed in cases of alleged LGBT panic.

2. Models for New Instructions

At the outset, any proper instruction on provocation must include an explanation that mere words are insufficient provocation for deadly violence.[155] This applies both to situations in which a homosexual man makes a verbal pass at the defendant or when a transgender person informs the defendant of her biological sex. This was the tradition at common law[156] and, as Victoria Steinberg notes, California law has incorporated this requirement in holding that a provocation must be an act caused by the victim, not simply a revelation or verbal expression of intimate interest.[157] There is a legal and ethical obligation to instruct a jury that the words of others, no matter how uncomfortable an individual defendant may be with alternative sexualities, are simply not a proper justification for violence under the heat-of-passion doctrine. Indeed, Cynthia Lee explains that jurors err when they ignore act reasonableness and focus only on emotional reasonableness.[158] That is, the jury must consider the reasonableness of the brutal and violent reaction, not simply whether the passions aroused in the defendant comport with objective understandings of provocation. Without a specific instruction to the contrary there is a risk that jurors will inappropriately empathize with a defendant's discomfort with sexual minorities and that their verdict will fall prey to prejudices and bias.

[153] *Id.*
[154] *Id.* at 165-66.
[155] McCoy, *supra* note 10, at 661-62.
[156] WAYNE R. LAFAVE, CRIMINAL LAW § 15.2 (4th ed. 2003).
[157] Steinberg, *supra* note 9, at 508-09.
[158] Burke, *supra* note 90, at 1053.

Another way to improve the California voluntary manslaughter instructions would be to amend them to define the ordinarily reasonable person, for purposes of the provocation doctrine, as one who would not kill based on homosexual advance or transgender revelation. One way to accomplish this is by adding an explanation such as the following, in cases where the defendant offered an LGBT panic justification:

> Passion aroused by discovery, or knowledge of, or potential disclosure of the victim's actual or perceived gender identity or sexual orientation [or the defendant's bias on the basis of sexual orientation or gender identity] would not cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than judgment.[159]

In truth, this instruction is very much like an A.B. 1160-type amendment that defines voluntary manslaughter to bar LGBT panic claims. However, a potential benefit of this jury instruction over A.B. 1160 is that it is not an explicit legislative removal of any possibility of the defense under the Penal Code. While allowing the defense to continue to exist in this manner certainly has the negative consequence of risking that a jury will be consciously or unconsciously governed by its own biases, this approach may appeal to politicians who would otherwise decline to support efforts to eradicate the LGBT panic defense due the notion that they would somehow be infringing upon defendants' rights. Another similar suggestion is to add a phrase such as the following to the jury instruction: "An ordinarily reasonable person of average disposition is free from bias on the basis of sexual orientation or gender identity."[160] This instruction is simpler and activates the notion of bias in the minds of the jurors, hopefully prompting them to examine the extent to which prejudice may be factoring into their decisions. However, it is not as strong of a statement that LGBT panic killings absolutely should not be considered excusable. Yet, as with all jury instruction remedies, this amendment would be a better solution than if judges were to decline to instruct juries on manslaughter, because it does not appear to deprive the defendant of the right to jury trial, which some critics fear. Nor would there be the possibility that a judge's decision not to instruct a jury would be overturned on appeal.

A further influential and attractive recommendation for improvement of LGBT-panic jury instructions is the idea of "switching" developed by Cynthia Lee.[161] Lee suggests that, in gay advance or transgender revelation cases, jurors should switch the characteristics and orientations of the actors involved. Where a defendant argues homosexual-advance provocation, the

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[159] Materials provided by the American Civil Liberties Union of Northern California.
[160] *Id.*
[161] See *Burke*, *supra* note 90, at 1067-68.

jury could be instructed to evaluate the reasonableness of the perpetrator's violence from the point of view of a gay man confronted with unwanted heterosexual overtures from a woman. This is an illuminating proposition and one which California should incorporate into its jury instructions. It allows the jury to consider only the objective facts and circumstances surrounding the defendant's conduct and not psychological peculiarities, or the jury's own identification with the perpetrator's anti-LGBT sentiment.[162] The jurors could thereby envision the truly neutral reasonable person that should be the benchmark of the provocation standard.[163]

Indeed, V. F. Nourse maintains that we need to invite jurors to upend the status hierarchy in our society, when considering the issue of heat of passion.[164] As described above, the reasonable person standard is a heterosexual-male-biased doctrine. An instruction could ask, in addition, whether it would be reasonable for a heterosexual man to kill a woman for a sexual advance he found distasteful. "The theory of an 'upending instruction' is that it is about norms as well as characteristics, relations as well as defendants: it says to juries 'do not reward defendants for relative social and cultural privilege . . . .'"[165] By the same token, substituting the disabled, or African Americans, or Jews for the provoking characteristic of the victim poignantly illuminates the indefensibility and hypocrisy of tolerating the LGBT panic doctrine.[166] No rational jury would conclude that a victim's race, religion, or disability constituted provocation to kill. Such a switching instruction would be a significantly beneficial addition to California's instructions.

Unfortunately, however, jury instructions may ultimately be insufficient to combat all the detrimental effects of this species of the provocation justification. Even if a trial judge specifically tells a jury to set aside its heterosexism and homophobia, the jury may be unable to apply the instruction effectively.[167] It is quite possible that jurors will neither comprehend nor follow the instructions. For these reasons, legislative amendments or the judicial decision to rule as a matter of law that LGBT panic is insufficient provocation for a mitigation defense, are better remedial strategies. "While courts generally express faith in 'the ability of juries to approach their task responsibly' . . . there are some contexts 'in which the risk that a jury will

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[162] *Id.* at 1070.
[163] *Id.* at 1071.
[164] V. F. Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. L. 361, 367 (2004) (reviewing CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003)).
[165] *Id.*
[166] Steinberg, *supra* note 9, at 509.
[167] Mison, *supra* note 39, at 166.

not, or cannot follow instructions is so great . . . that the practical and human limitations of the jury system cannot be ignored."[168] As V.F. Nourse has noted: "If bias is embedded in the law itself, must one not change the law, rather than simply switch the facts? Are not bright lines really the safest measure here . . .?"[169]

C. *Training and Education*

All participants in the criminal justice system influence the perpetuation of the LGBT panic defense. Judges, prosecutors, defendants, and their attorneys each have a role to play in the system that supports the doctrine, and therefore have the potential to mitigate its ill effects. Through statewide training programs for lawyers and judges, we can instruct practitioners on the illegitimacy of the LGBT panic defense and ways in which to discourage its use. This strategy is a complement to rather than a replacement for other remedies, such as charging LGBT-panic violence as a hate crime, A.B. 1160, or "switching" instructions.

1. Judges

There are at least two compelling arguments supporting statewide training programs for California judges who may encounter cases of alleged voluntary manslaughter based on LGBT provocation: (1) judges are not immune to homophobia or heterosexism; and (2) they have an ethical duty to prevent the exploitation of bias in their courtrooms. Although judges are, by definition, expected to be impartial, they too may be susceptible to bias.[170] While Mison argues that the solution is for judges to decline to instruct juries on manslaughter in LGBT panic cases, he acknowledges that those same judges can possess homophobia and contribute to the continued existence of the defense.[171] For example, following a manslaughter verdict in a San Francisco case where the defense presented a homosexual advance justification, the Superior Court judge commented that the victim "'contributed in large part to his own death' by his 'reprehensible conduct.'"[172] We owe it to the victims of hate-motivated violence to ensure that our state judges understand the ways in which anti-LGBT bias is at the heart of the panic defense and that these purportedly reasonable provocation killings are properly considered hate crimes. Moreover, by explaining to judges that LGBT panic is insufficient provocation, we can teach them to reject the

[168] Mison, *supra* note 39, at 167 (quoting *Bruton v. United States*, 391 U.S. 123, 135 (1968)).
[169] Nourse, *supra* note 165, at 367-68.
[170] Mison, *supra* note 39, at 163.
[171] *Id.* at 164.
[172] *Id.* (quoting Robert Lindsey, *After Trial, Homosexuals Say Justice Not Blind*, N.Y. TIMES, Mar. 21, 1988, at A17).

defendant's request for a jury instruction upon heat-of-passion manslaughter. Judges should, at the least, be made aware of the serious potential for abuse of the doctrine so that they may bar any such bias-related manipulation.

In addition, California judges are bound by an explicit duty to guard against prejudice influencing the trial process, an obligation of which they should be reminded via statewide judicial education programs. The California Code of Judicial Ethics provides that "[a] judge shall perform judicial duties without bias or prejudice. A judge shall not . . . engage in speech, gestures, or other conduct that would reasonably be perceived as . . . bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status . . . ."[173] The Code indicates this is not an all-inclusive list and therefore would likely be interpreted as protecting gender identity as well. The judge's duty extends to requiring lawyers in proceedings before the court to refrain from manifesting such bias or prejudice.[174] The judge should learn to recognize when a defendant is attempting to impermissibly play on a jury's prejudices and bar those abuses. Moreover, judges arguably have an ethical duty not to instruct a jury on provocation in LGBT panic cases because they would otherwise, for the reasons described herein, be performing their duties with heterosexist bias. Finally, the state mandates that judges shall treat those with whom the judge deals with courtesy and respect.[175] This must apply equally to victims of violence, even the deceased; allowing defendants to attempt to mitigate punishment for their killings because of hatred and fear of LGBT persons is the epitome of disrespect.

Recently, there have been efforts in California to achieve some of these judicial goals. The Center for Judicial Education and Research broadcast a satellite program, on November 29, 2005, aimed at addressing issues of sexual orientation and gender identity in the legal system.[176] The program was sent to courts statewide, for viewing by judges and their staff, and a portion of the hour-long presentation was dedicated to a discussion of the provocation doctrine as applied to LGBT panic. A hypothetical news story presented the case of a transgender woman who had been fatally shot when the defendant learned of her biological sex. Four panelists, including members of prominent California LGBT rights organizations and a Superior Court judge, discussed the offensive nature of allowing mitigation claims for bias-related killings. Chris Daley, of the Transgender Law Center, explained

[173] CAL. CODE JUD. ETHICS, Canon 3(B)(5) (2006), *available at* http://www.courtinfo.ca.gov/rules/appendix/appdiv2.pdf.

[174] *See* CAL. CODE JUD. ETHICS, Canon 3(B)(6).

[175] *See* CAL. CODE JUD. ETHICS, Canon 3(B)(4).

[176] Satellite Broadcast, Center for Judicial Education and Research, *Sexual Orientation and Gender Identity: Emerging Law and Legal Issues*, Nov. 29, 2005.

that California has otherwise taken the lead in legal protections for transgender individuals, making the LGBT panic doctrine that much more contradictory and hypocritical.[177] While the broadcast was an important advance, it would have benefited from a more in-depth consideration of the practical ways in which judges can combat the defense. A comprehensive training should detail for judges the dangers of allowing homophobia to be institutionalized in the courts. It should point to the potential for improperly prejudicing a verdict and the fact that such bias-motivated offenses are, in fact, hate crimes. Such a program would teach judges that they retain the discretion to determine whether a jury instruction on voluntary manslaughter is warranted by the evidence,[178] and that they have an ethical duty to prevent bias in the courtroom. In these ways, California judges could become better equipped to minimize any damage caused by the continuing existence of the LGBT panic doctrine.

2. Prosecutors

District attorneys also have a critical role to play in combating mitigation claims based on homosexual advance or revelation of transgender identity. The first line of defense, the prosecutor has the initial ability and discretion to charge LGBT panic killings as hate crimes under the penal code. Statewide trainings for prosecutors should aim at teaching DAs to recognize these hate crimes and to seek appropriate penalty enhancements. Perhaps more crucially, prosecutors need assistance in preparing arguments to rebut the defense, illuminating for the jury that homophobic motivations do not constitute justifiable provocation. The Alameda County district attorney in Gwen Araujo's case, Chris Lamiero, was by all accounts commendable. He sought hate crime enhancements for the slaying and worked to undermine the reprehensible justifications put forth by the defense.[179] While the jury did not render a hate crime verdict, Lamiero's efforts did lead to murder convictions for two of the men, setting an example for prosecutors around the state.[180] Unfortunately, there is currently no statewide program for DAs that addresses these issues. The California District Attorney's Association offers training on homicide-related trial work, but their educational endeavors do not include information on LGBT panic.[181] The San Francisco District Attorney's Office has taken the lead in this area by planning a

[177] *Id.*

[178] Mison, *supra* note 39, at 158.

[179] Press Release, Transgender Law Center, *supra* note 28.

[180] *Id.*

[181] Telephone Interview with Suzanne Hunter, Senior Training Consultant, California District Attorneys Association (Nov. 29, 2005).

2006 conference dedicated to combating the LGBT panic justification.[182] While still in its formative stages, the conference is intended to educate prosecutors and law enforcement personnel about strategies, from the investigative stage through trial, for dealing with the defense and obtaining hate crime enhancements. This kind of training is necessary all over the state in order to ensure that California adequately protects and responds to the needs of the LGBT community.

CONCLUSION

As the foregoing discussion has demonstrated, homophobia remains a salient feature of American society. We see it reflected in opinion polls, in marriage, adoption, and custody regulations, in the military's Don't Ask, Don't Tell policy, in Supreme Court decisions, and in myriad other indicators of national sentiment. Toleration of the heat-of-passion defense in cases of brutal violence against LGBT victims is perhaps one of the most striking examples of this disquieting prejudice. Bias-motivated crimes against sexual minorities are on the rise nationally, yet we are institutionalizing and legitimizing prejudice by mitigating punishment for these attacks through the manslaughter doctrine. Provocation theory and the ordinarily reasonable person standard should reflect the ideals of rationality and neutrality, which we must require of all of our citizens. As Robert Mison notes, "[e]ven though it is common in our heterocentric society, homophobia must not be elevated to the rank of a normative social aspiration incorporated into the standards that govern jury decisionmaking."[183] A murderous reaction to a sexual advance by a gay or bisexual person, or the discovery of a transgender individual's biological sex, should be considered an irrational, idiosyncratic, and eminently culpable characteristic and should not be permitted to bolster the purported reasonableness of the defendant's reaction. When judges allow the LGBT panic defense to go before a jury, they contribute to an "unacceptable judicial affirmation of homophobia."[184]

Indeed, California law should treat these killings as what they truly are: hate crimes. LGBT-panic murders meet our definition of hate crimes because they are motivated in substantial part by the victim's sexual orientation or gender identity, a statutorily protected characteristic. A legal system that enhances the penalties for bias-related violence simply cannot ethically or logically coexist with a doctrine that mitigates punishment in cases where the defendant kills a member of a sexual minority because of the latter's

[182] Telephone Interview with Susan Christian, Assistant District Attorney, San Francisco District Attorney's Office (Dec. 6, 2005).

[183] Mison, *supra* note 39, at 177.

[184] *Id.* at 178.

homosexual overtures or revelation of transgender identity. For these reasons, legislative remedies aimed at exempting LGBT panic from the manslaughter law and ensuring increased penalties for those who are provoked to murder because of bias toward lesbian, gay, bisexual, or transgender victims may be the most appropriate and effective solution. They eliminate the detrimental defense and remove the decision from the hands of judges and juries, who are at risk of falling victim to societal heterosexism and homophobia. Failing the complete eradication of the LGBT panic doctrine, revisions to the current manslaughter instructions, focusing jurors on the potential influence of anti-LGBT bias in their decision-making, may cause them to see such arguments for the prejudicial justifications they are. Finally, educational programs aimed at training judges and prosecutors to recognize and avoid the negative effects of the LGBT panic defense may go a long way to ridding the law of homophobia. In these ways, California can begin to restore consistency and integrity to the criminal justice system, protecting the lives and dignity of LGBT victims of violence and their communities.