



*the*  
**Williams**  
INSTITUTE

**MODEL LEGISLATION FOR  
ELIMINATING THE GAY AND TRANS  
PANIC DEFENSES**

**By Jordan Blair Woods, Brad Sears, & Christy Mallory**

September 2016

### ***About the Authors***

**Jordan Blair Woods** is an Assistant Professor of Law at the University of Arkansas. Until the Summer of 2016, he was the Richard Taylor Law Teaching Fellow at the Williams Institute.

**Brad Sears** is the Associate Dean at UCLA School of Law & Executive Director and Roberta A. Conroy Scholar of Law and Policy at the Williams Institute.

**Christy Mallory** is the Anna M. Curren Fellow and Senior Counsel at the Williams Institute.

### ***About the Williams Institute***

**The Williams Institute** is dedicated to conducting rigorous, independent research on sexual orientation and gender identity law and public policy. A national think tank at UCLA School of Law, the Williams Institute produces high-quality research with real-world relevance and disseminates it to judges, legislators, policymakers, media and the public.

### ***Acknowledgements***

The authors gratefully acknowledge Kirkland & Ellis LLP for their assistance with legal research.

## TABLE OF CONTENTS

INTRODUCTION .....	1
PART I: THE GAY AND TRANS PANIC DEFENSES IN COURT OPINIONS.....	5
PART II: CONSTITUTIONAL CHALLENGES TO LEGISLATION ELIMINATING THE GAY AND TRANS PANIC DEFENSES .....	15
PART III: MODEL LEGISLATION ELIMINATING THE GAY AND TRANS PANIC DEFENSES.....	22

# MODEL LEGISLATION FOR ELIMINATING THE GAY AND TRANS PANIC DEFENSES

By Jordan Blair Woods, Brad Sears, and Christy Mallory

## INTRODUCTION

Lesbian, gay, bisexual, and transgender (LGBT) people have historically faced and continue to suffer disproportionately high rates of violence.<sup>1</sup> In 2014 alone, over 1,200 anti-LGBT hate crimes were reported to U.S. law enforcement agencies.<sup>2</sup> Homicides involving LGBT victims are particularly high.<sup>3</sup> Available data underestimate the true extent of violence against LGBT people, given that many anti-LGBT hate crimes go unreported every year.<sup>4</sup>

In recent decades, there have been some advances in law and policy to address anti-LGBT violence, including hate crime legislation at the federal, state, and local levels.<sup>5</sup> In spite of

---

<sup>1</sup> Jaime M. Grant, *et al.*, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011), [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf) (reporting that 61% of the 6,450 respondents in the National Transgender Discrimination Survey were the victim of physical assault); Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION AND VIOLENCE BEHAVIOR 170 (2009) (providing a comprehensive review of data on violence against transgender people); Gregory M. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates from a National Probability Sample*, 24 J. INTERPERSONAL VIOLENCE 54, 54 (2009) (reporting that approximately 20% of LGB adults reported having experienced a person or property crime based on their sexual orientation).

<sup>2</sup> These statistics are based on the most recent data from the Federal Bureau of Investigation's Uniform Crime Reports. See 2014 Hate Crime Statistics, available at [https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2014/topic-pages/incidentsandoffenses\\_final](https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2014/topic-pages/incidentsandoffenses_final).

<sup>3</sup> National Coalition of Anti-Violence Programs, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2014 8 (2015), available at [http://www.avp.org/storage/documents/Reports/2014\\_HV\\_Report-Final.pdf](http://www.avp.org/storage/documents/Reports/2014_HV_Report-Final.pdf).

<sup>4</sup> James J. Nolan & Yoshio Akiyama, *An Analysis of Factors That Affect Law Enforcement Participation in Hate Crime Reporting*, 15 J. CONTEMP. CRIM. JUST. 111, 114 (1999) (concluding that gay, lesbian, bisexual, and transgender victims frequently do not report hate crimes because they fear police insensitivity and secondary victimization by police officers).

<sup>5</sup> See The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2014); Movement Advancement Project, *Hate Crime Laws*, [http://www.lgbtmap.org/equality-maps/hate\\_crime\\_laws](http://www.lgbtmap.org/equality-maps/hate_crime_laws) (reporting that as of May 13, 2016, 17 states and the District of Columbia have

these developments, the “gay and trans panic” defenses remain valid defenses in many states today. The gay and trans panic defenses allow perpetrators of LGBT murders to receive a lesser sentence, and in some cases, even avoid being convicted and punished, by placing the blame for homicide on a victim’s actual or perceived sexual orientation or gender identity.

The gay and trans panic defenses are rooted in antiquated ideas that homosexuality and gender non-conformity are mental illnesses. Although these ideas have been discredited, their widespread historical acceptance is illustrated by the fact that homosexuality was included in the American Psychological Association’s Diagnostic and Statistical Manual of Mental Disorders until 1973.<sup>6</sup> In line with this view, criminal defense attorneys began invoking the gay and trans panic defenses in the 1960s, arguing that an LGBT victim’s unwanted sexual advance caused perpetrators to enter a state of “homosexual panic,” and kill the LGBT victim.<sup>7</sup>

Since the 1960s, the gay and trans panic defenses have appeared in court opinions in approximately one-half of the states.<sup>8</sup> No state recognizes gay and trans panic defenses as free-standing defenses under their respective penal codes. Rather, defendants have used concepts of gay and trans panic in three different ways in order to reduce a murder charge to manslaughter or to justifiable homicide.<sup>9</sup>

First, defendants have relied on gay and trans panic defenses to support a defense theory of provocation. Specifically, defendants argue that the discovery, knowledge, or potential disclosure of a victim’s sexual orientation or gender identity was a sufficiently provocative act that drove them to kill in the heat of passion. Second, defendants have used gay and trans panic defenses to support a defense theory of diminished capacity (and in fewer cases, to support a defense theory of insanity). Under the more common diminished capacity

---

hate crime laws that cover sexual orientation and gender identity, and 13 states have laws that only cover sexual orientation).

<sup>6</sup> In 1980, “gender identity disorders” were included in the DSM. GORDENE OLGA MACKINZIE, *TRANSGENDER NATION* 69 (1994). Those labels remained in the DSM until 2013, when the APA changed “gender identity disorders” to appear as “gender dysphoria.” American Psychological Association, *REPORT OF THE APA TASK FORCE ON GENDER IDENTITY & GENDER VARIANCE* (2008), <http://www.apa.org/pubs/info/reports/gender-identity.aspx>. This change reflected the APA’s intent to avoid stigmatizing transgender people who sought gender reaffirming medical care and to “better characterize the experiences of affected children, adolescents, and adults.” American Psychiatric Association, *GENDER DYSPHORIA* (2013), <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>.

<sup>7</sup> Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 477 (2008).

<sup>8</sup> States with reported court decisions discussing the gay and trans panic defenses are Arizona (2010), California (1967, 2002), Florida (2012), Georgia (2001), Kansas (2006), Illinois (1972, 1977, 1993, 2000, 2004), Indiana (2001), Iowa (2015), Louisiana (1990), Massachusetts (1978, 2005), Michigan (2000), Missouri (1975, 1990, 2000), New Jersey (2004), New York (2012), North Carolina (1978), Nebraska (1994), New Jersey (1988), Ohio (1988), Pennsylvania (2010), Tennessee (1998, 2009), Texas (2007), Wisconsin (2001), and Wyoming (1979, 1999).

<sup>9</sup> American Bar Association, *Gay and Trans Panic Defenses Resolution* (2013), *available at* <http://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>.

approach, defendants argue that the discovery, knowledge, or potential disclosure of a victim's sexual orientation or gender identity caused them to have a temporary mental breakdown, driving them to kill — in other words, a “homosexual panic.” Third and finally, defendants have used gay and trans panic defenses to support a theory of self-defense. Here, defendants argue that they had a reasonable belief that they were in immediate danger of serious bodily harm based on the discovery, knowledge, or potential disclosure of a victim's sexual orientation or gender identity.

The gay and trans panic defenses are rooted in irrational fears based on homophobia and transphobia, and send the wrong message that violence against LGBT people is acceptable. In 2013, the American Bar Association unanimously approved a resolution calling for state legislatures to eliminate the gay and trans panic defenses through legislation.<sup>10</sup> At that point, no state legislature had passed legislation to ban the gay and trans panic defenses, although some courts had rejected the defenses under state law.<sup>11</sup> In 2014, California passed legislation amending the statutory definition of voluntary manslaughter,<sup>12</sup> to become the first state to eliminate the gay and trans panic defenses through legislation.<sup>13</sup> Since then, legislation banning the gay and trans panic defenses has been introduced in Illinois, New Jersey, and Pennsylvania.<sup>14</sup>

---

<sup>10</sup> *Id.*

<sup>11</sup> Those states are Florida, Illinois, and Kansas. *See infra* Part I.

<sup>12</sup> Assembly Bill 2501 amended the statutory definition of voluntary manslaughter under the California Penal Code to include the following language:

(f)(1) For purposes of determining sudden quarrel or heat of passion pursuant to subdivision (a), the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship. Nothing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation.

(2) For purposes of this subdivision, “gender” includes a person's gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person's gender as determined at birth.

CAL. PENAL CODE § 192(f) (2015).

<sup>13</sup> Parker Marie Molloy, *California Becomes First State to Ban Gay, Trans “Panic” Defenses*, THE ADVOCATE, Sept. 29, 2014, available at <http://www.advocate.com/crime/2014/09/29/california-becomes-first-state-ban-gay-trans-panic-defenses>.

<sup>14</sup> Illinois: Bill Status of SB 3046, 99<sup>th</sup> General Assembly, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=3046&GAID=13&DocTypeID=SB&LegId=96385&SessionID=88&GA=99>; New Jersey: Bills 2014-2015, A4083, [http://www.njleg.state.nj.us/2014/Bills/A4500/4083\\_11.PDF](http://www.njleg.state.nj.us/2014/Bills/A4500/4083_11.PDF), Pennsylvania: HB 1509, <http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2015&sInd=0&body=H&type=B&bn=1509>.

This brief presents legal and policy analysis, and model legislation, for eliminating the gay and trans panic defenses. Part I provides an overview of what we know about the gay and trans panic defenses from court opinions across the United States. Part II evaluates potential constitutional challenges to state legislation eliminating the gay and trans panic defenses. Part III presents model legislation to eliminate the gay and trans panic defenses. The model legislation offers language to prohibit defendants from using the gay and trans panic defenses under the major defense theories of provocation, insanity/diminished capacity, and self-defense.

## **PART I: THE GAY AND TRANS PANIC DEFENSES IN COURT OPINIONS**

Since the 1960s, discussions of the gay and trans panic defenses have appeared in court opinions in approximately one-half of the states.<sup>15</sup> Although most of these decisions specifically involve the gay panic defense, there are several media reports of defendants raising the trans panic defense in court.<sup>16</sup> Because the reasoning behind a jury's verdict is not published in an opinion, most cases in which defendants successfully raise gay and trans panic defenses never result in a court opinion. For this reason, the available reported opinions are skewed towards cases involving defendants who were convicted of murder after not successfully raising a gay or trans panic defense, and are challenging their convictions in an appeal or habeas corpus proceeding.

In spite of these limitations, the examples from reported court opinions below show a variety of ways that defendants have raised gay and trans panic defenses based on theories of provocation, insanity/diminished capacity, and self-defense. The examples also show a mix of outcomes in cases in which defendants have raised the gay and trans panic defense. In some cases, defendants have successfully raised gay and trans panic defenses, resulting in the defendants avoiding a murder conviction and receiving reduced punishment for a lesser manslaughter offense. In other cases, courts have rejected that gay and trans panic defenses are valid defenses under state law. In some cases when defendants have raised gay and trans panic defenses, judges have allowed an instruction on a lesser included manslaughter offense to go to a jury, but juries rejected the defense and convicted the defendants of murder. In other cases, judges have refused to give the jury an instruction on a lesser included manslaughter offense based on the specific facts of the case, but it is unclear whether the judges would give the jury instruction in another case with different facts involving defendants who raise gay and trans panic defenses.

### **EXAMPLES OF CASES INVOLVING PROVOCATION**

Defendants in several states have used the gay and trans panic defenses to support a defense theory of provocation, which reduces a murder charge to a lesser voluntary manslaughter offense. Generally, when raising a provocation defense, defendants argue that they intentionally killed "another while under the influence of a reasonably-induced emotional disturbance . . . causing a temporary loss of normal self-control."<sup>17</sup> In cases involving gay and trans panic defenses, defendants allege that the discovery, knowledge, or potential disclosure of

---

<sup>15</sup> See *supra* note 8.

<sup>16</sup> For a list and discussion of cases reported in the media in which perpetrators have used the trans panic defense see Aimee Wodda & Vanessa R. Panfil, "*Don't Talk To Me About Deception*": *The Necessary Erosion of the Trans Panic Defense*, 78 ALBANY L. REV. 927, 942-57 (2014/2015).

<sup>17</sup> Wayne R. LaFave, 2 SUBST. CRIM. L. § 15.2 (2d ed.) (West 2015).



a victim's sexual orientation or gender identity was a sufficiently provocative act that drove them to kill in the heat of passion.

#### Arizona

In *Greene v. Ryan*,<sup>18</sup> the defendant alleged that the victim offered to pay to perform oral sex on the defendant. The defendant accepted, but later changed his mind. In response, the victim purportedly smiled and touched defendant's leg. The defendant alleged that he "freaked out," and impulsively struck the victim several times, killing him. The defendant was convicted of murder. The jury rejected the defendant's version of the story that he "freaked out" during a dangerous homosexual encounter; rather, in convicting the defendant, the jury appeared to accept the prosecution's theory of the case that the defendant murdered the victim in order to gain access to the victim's property.

#### California

In *People v. Chavez*,<sup>19</sup> the defendant alleged that the victim made a sexual advance towards him after getting into the victim's car. The defendant purportedly tried to get away from the victim by exiting and walking away from the car, after which the victim grabbed the defendant's arm. The defendant then stabbed the victim, killing him. At trial, the defendant argued that he killed the victim in a heat of passion triggered by the victim's unwanted homosexual advance. The defendant also claimed that he acted unconsciously, based on the theory that he stabbed the victim during the midst of an epileptic seizure, and produced experts who testified regarding his epilepsy. The jury found the defendant guilty of voluntary manslaughter, not murder.

#### Florida

In *Patrick v. State*,<sup>20</sup> the defendant met the victim at a public park and later beat the victim to death. The defendant alleged that the victim tried to have sex with the defendant multiple times while the two were lying in bed at the victim's apartment. The defendant further alleged that after refusing each advance, he lost control and eventually "cut loose" on the victim. The trial court excluded evidence regarding the victim's inclination to pick up men at the public park and bring them home. In upholding the trial court's ruling, the Supreme Court of Florida stressed, "The State of Florida does not recognize a nonviolent homosexual advance as

---

<sup>18</sup> No. CV-03-605, 2010 WL 1335490 (D. Ariz. Mar. 31, 2010).

<sup>19</sup> No. F038767, 2002 WL 31863441 (Cal. Ct. App. Dec. 23, 2002).

<sup>20</sup> 104 So.3d 1046, 1057 (Fla. 2012) (citing *Davis v. State*, 928 So.2d 1089, 1120 (Fla. 2005)).

sufficient provocation to incite an individual to lose self-control and commit acts in the heat of passion.”<sup>21</sup>

### Illinois

In *U.S. ex rel. Page v. Mote*,<sup>22</sup> the defendant stabbed the victim at the victim’s house. After being convicted for murder and losing his direct and post-conviction appeals in state court, the defendant filed a habeas corpus motion in federal district court. In his motion, the defendant argued that his trial counsel were constitutionally ineffective because they failed to present sufficient evidence to support a lesser voluntary manslaughter charge. One of the alleged pieces of evidence was that the victim made unwanted sexual advances towards the defendant immediately before the killing. In rejecting the defendant’s claim, the federal district court held that, “[u]nder Illinois law, an unwanted homosexual advance is not one of the recognized categories of provocation under the voluntary manslaughter offense.”<sup>23</sup>

### Indiana

In *Dearman v. State*,<sup>24</sup> the defendant claimed that the victim began biting on the defendant’s neck and grabbing his thigh. When the defendant resisted, the victim then allegedly threw him to the ground. The defendant subsequently crushed the victim’s skull with a concrete block. At trial, the defendant claimed that he was entitled to a voluntary manslaughter instruction. The trial court declined to instruct the jury on manslaughter, and the jury convicted the defendant of murder. On appeal, the Supreme Court of Indiana concluded that the trial court properly refused to submit a manslaughter instruction to the jury because the record did not show the defendant to be, “in such a state of terror or rage that he was rendered incapable of cool reflection.”<sup>25</sup> Further, the court observed, “[l]ifting and striking a person in the head twice with such a large object in a claimed attempt to thwart sexual

---

<sup>21</sup> *Id.* at 1057.

<sup>22</sup> Nos. 02C 232, 01 C 233, 2004 WL 2632935 (N.D. Ill. Nov. 17, 2004). In reaching this conclusion, the federal district court cited to a line of Illinois Supreme Court precedent dating at least as far back as a 1926 case, *People v. Russell*, 322 Ill. 295 (Ill. 1926). This authority stands for the proposition that under Illinois law, there are only certain categories of provocation adequate to support a heat of passion theory: “substantial physical injury or substantial physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender’s spouse.” *People v. Garcia*, 165 Ill.2d 409, 429 (Ill. 1995). As a corollary, “[n]o words or gestures, however opprobrious, provoking, or insulting, can amount to the considerable provocation which will so mitigate intentional killing as to reduce the homicide to manslaughter.” *Russell*, 322 Ill. at 301. Under this constricted definition of adequate provocation, the district court concluded that an apparently nonviolent yet unwanted homosexual advance was insufficient.

<sup>23</sup> *Mote*, 2004 WL 2632935, at \*9.

<sup>24</sup> 743 N.E.2d 757 (Ind. 2001).

<sup>25</sup> *Id.* at 762.

advances does not indicate that the killing was done in the sudden heat and without reflection.”<sup>26</sup>

#### Kansas

In *Harris v. Roberts*,<sup>27</sup> police officers found the victim dead in an alley, shot several times. At trial, the defendant tried to raise a provocation defense, claiming he stated to the police that he shot the victim after the victim made an unwanted sexual advance, and the defendant became angry. The trial court refused to give a voluntary manslaughter instruction to the jury based on a theory of provocation, and the defendant was convicted of second-degree murder. On appeal, the defendant claimed that it was error for the trial court to refuse to give the instruction on the lesser voluntary manslaughter offense. The court rejected the defendant’s claim, concluding that, “an unwanted homosexual advance is insufficient provocation to justify an instruction on the lesser included offense of voluntary manslaughter.”<sup>28</sup>

#### New York

In *People v. Cass*,<sup>29</sup> the defendant admitted to strangling the victim, but claimed he “just lost it” and “snapped” when the victim grabbed his genitals and made other sexual advances towards him during an argument. One year earlier, the defendant had also strangled another person he met in a bar when, after falling asleep at the person’s home, he found that person on top of him, kissing and grabbing him. At trial, the defendant raised a “defense of extreme emotional disturbance, claiming his violent response to [the victim’s] unexpected sexual advances was due to mental illness caused by protracted sexual abuse he suffered as a child.”<sup>30</sup> The jury rejected the defendant’s arguments and convicted him of second-degree murder.

#### Tennessee

In *State v. Wilson*,<sup>31</sup> the defendant alleged that he met the victim for the first time at a restaurant, and invited the victim back to his place for a few drinks. The victim then purportedly made a sexual pass at the defendant, which the defendant rejected. The victim allegedly picked up a handgun, pointed it at the defendant, and told the defendant, “you are going to be my boy tonight.” The defendant told the victim to hold on, and that he needed to use the restroom

---

<sup>26</sup> *Id.*

<sup>27</sup> 130 P.3d 1247 (Table) (Kan. Ct. App. 2006).

<sup>28</sup> *Id.* at \*5.

<sup>29</sup> 942 N.Y.S.2d 416 (2012).

<sup>30</sup> *Id.* at 421.

<sup>31</sup> No. M2007-01854, 2009 WL 2567863 (Tenn. Ct. App. Aug. 20, 2009).

first. The defendant returned with a shotgun. Both men put their weapons down and began to talk. The victim then reached for the handgun, a struggle ensued, and the defendant obtained possession of the gun and fired it, killing the victim. The defendant argued he responded with violence only in response to threats and homosexual advances from the victim. The defendant was convicted of second-degree murder. The defendant argued on appeal that the evidence was insufficient to convict him for second-degree murder and that it supported only a voluntary manslaughter verdict. The court held that it was within the prerogative of the jury to reject the defendant's "heat of passion" argument.

### Wisconsin

In *State v. Bodoh*,<sup>32</sup> the victim made sexual advances towards the defendant. Soon after, the defendant shot the victim while they were riding in a car. The defendant believed that the victim had molested him months earlier when the defendant was passed out from drinking. At trial, the defendant raised a provocation defense on the grounds that when he shot the victim, he was flashing back to the prior sexual assault. The jury convicted the defendant of first-degree murder. On appeal, the defendant claimed that his counsel was constitutionally ineffective for not pursuing a psychosexual evaluation for the defendant, which, had it been pursued, would have enabled the defendant to more adequately present a homosexual panic defense. The court rejected the defendant's claim and upheld his conviction.

## **EXAMPLES OF CASES INVOLVING INSANITY OR DIMINISHED CAPACITY**

Several defendants have used the gay and trans panic defenses to support a defense theory of diminished capacity. Under this theory, defendants argue that they were incapable of having the required mental state of a specific crime because of a temporary mental impairment or mental disease.<sup>33</sup> Diminished capacity is not a full defense<sup>34</sup> to a crime, but merely results in the defendant being convicted of a lesser offense.<sup>34</sup> In cases involving gay and trans panic defenses, defendants raise a diminished capacity defense in order to avoid a murder conviction and receive reduced punishment for a lesser manslaughter offense. To do this, defendants allege that the discovery, knowledge, or potential disclosure of a victim's sexual orientation or gender identity caused them to have a temporary mental breakdown, driving them to kill — in other words, a "homosexual panic."

In fewer cases, defendants have used the gay and trans panic defenses to support a defense theory of insanity. Unlike diminished capacity, the insanity defense is a full defense to a

---

<sup>32</sup> No. 00-2370, 635 N.W.2d 905 (Wisc. Ct. App. Sept. 5, 2001).

<sup>33</sup> LaFave, *supra* note 17, at § 9.2.

<sup>34</sup> *Id.*

crime, and results in the defendant being found not guilty by reason of insanity.<sup>35</sup> In raising an insanity defense, defendants argue that they were legally insane<sup>36</sup> at the time of the crime, and therefore, could not have had the requisite mental state to be held criminally responsible for that crime.<sup>37</sup> In cases involving gay and trans panic defenses, defendants argue that they suffer from the purported syndrome of gay or trans panic, which prevented them from knowing what they were doing, or knowing that what they were doing was wrong, at the time they killed an LGBT victim.<sup>38</sup>

### Louisiana

In *State v. Dietrich*,<sup>39</sup> the defendant killed the victim by stabbing him sixteen times in the victim's apartment. The defendant alleged that the victim offered him \$50 in return for sexual favors and that the victim threatened him with violence when he refused. The trial court excluded the defendant's evidence involving, "homosexual anxiety panic syndrome." On appeal, the court affirmed the trial court's ruling on the grounds that, the "State of Louisiana does not recognize the doctrine of diminished responsibility,"<sup>40</sup> and that the defendant was able to distinguish right from wrong at the time of the offense.

---

<sup>35</sup> LaFave, *supra* note 17, at § 7.1.

<sup>36</sup> Jurisdictions have adopted four different tests for determining legal insanity. As Wayne R. LaFave explains:

As for insanity as a defense, under the prevailing M'Naghten rule (sometimes referred to as the right-wrong test) the defendant cannot be convicted if, at the time he committed the act, he was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, as not to know he was doing what was wrong. A few jurisdictions have supplemented M'Naghten with the unfortunately-named "irresistible impulse" test which, generally stated, recognizes insanity as a defense when the defendant had a mental disease which kept him from controlling his conduct. For several years (but no longer) the District of Columbia followed the so-called Durham rule (or product test), whereby the accused was not criminally responsible if his unlawful act was the product of mental disease or mental defect. And in recent years a substantial minority of states have adopted the Model Penal Code approach, which is that the defendant is not responsible if at the time of his conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

*Id.*

<sup>37</sup> *Id.* at § 7.1.

<sup>38</sup> This iteration assumes that the majority M'Naghten rule applies in a given jurisdiction. If another legal test for insanity applies, then defendants might raise different gay and trans panic arguments to support an insanity defense.

<sup>39</sup> 567 So.2d 623 (La. Ct. App. 1990).

<sup>40</sup> *Id.* at 633.

### Massachusetts

In *Commonwealth v. Cutts*,<sup>41</sup> the defendant went to the victim's house as they were both part of a circle of friends who routinely gathered to play cards, watch pornographic films, and do drugs. After the victim went to bed, the defendant fractured the victim's skull, left a gearshift from a Jaguar automobile protruded in the victim's ear, and hung white rope around the victim's neck. At trial, the defendant raised a diminished capacity defense, contending that his actions were the result of "homosexual panic." Multiple psychologists testified that the defendant's conduct was a frenzied and unanticipated response to a perceived sexual advance by the victim. The jury rejected the defendant's gay panic defense and convicted him of first-degree murder.

### Michigan

In *People v. Harden*,<sup>42</sup> the defense counsel attempted to solicit testimony that the victim was gay in order to bolster the defense's theory that the victim's death resulted from his unwanted homosexual advances towards the defendant. The defense counsel decided not to assert an insanity defense, and the jury convicted the defendant of second-degree murder. On appeal, the defendant claimed that the testimony suggested that he was legally insane at the time of the killing. The court rejected the defendant's claim.

### New Jersey

In *Affinito v. Hendricks*,<sup>43</sup> the defendant claimed that he attacked the victim only after the victim made unwanted homosexual advances towards him. The defendant argued he had diminished capacity at the time of the homicide as a result of a "convulsive disorder." The jury convicted him of murder. The defendant argued that his counsel was ineffective for, among other things, failing to provide relevant documents to a defense expert that may have aided in the defendant's diminished capacity defense. The court ultimately denied the defendant's ineffective assistance of counsel claim.

### Ohio

In *State v. Van Hook*,<sup>44</sup> the defendant met the victim at a bar, and the two went back to the victim's apartment. At the apartment, the defendant killed the victim by stabbing him multiple times. The defendant then stole various items of jewelry from the victim's apartment.

---

<sup>41</sup> 444 Mass. 821 (2005).

<sup>42</sup> No. 199958, 2000 WL 33407197 (Mich. Ct. App. Sept. 1, 2000).

<sup>43</sup> 366 F.3d 252 (3d Cir. 2004).

<sup>44</sup> 39 Ohio St.3d 256 (Ohio 1988).

At trial, a psychologist testified and prepared a written testimony addendum suggesting that the killing may have occurred as a result of a “homophobic panic.”<sup>45</sup> The defendant pled not guilty by reason of insanity for the offenses of aggravated murder and aggravated robbery. Waiving his right to a trial by jury, a three-judge panel found him guilty on both charges and the specified aggravated circumstances.<sup>46</sup>

## EXAMPLES OF CASES INVOLVING SELF-DEFENSE

Several defendants have used the gay and trans panic defense to support a theory of self-defense. To prove self-defense, defendants must reasonably believe that a victim put them in immediate danger of death or serious bodily harm when they used deadly force against the victim.<sup>47</sup> In cases involving gay and trans panic defenses, defendants have primarily argued that an LGBT victim’s unwanted sexual advance, or the discovery that the victim was LGBT, resulted in a reasonable belief that they were in immediate danger of serious bodily harm.

### Georgia

In *Harris v. State*,<sup>48</sup> the defendant met the victim and spent multiple nights with him, engaging in sexual acts. One night, the defendant became angry after one of their sexual encounters. When the victim purportedly continued to make sexually suggestive remarks, the defendant went to another room, but the victim followed. The defendant then picked up a knife and stabbed and killed the victim. The defendant argued self-defense and decided after discussion with counsel not to request a manslaughter instruction out of fear that he would likely be convicted of manslaughter and have no issues to raise on appeal. The defendant was convicted of murder.

### Iowa

In *State v. Pollard*,<sup>49</sup> the defendant used a crowbar to strike the manager of an adult movie theater in the head and strangle him, resulting in his death. Soon after, the defendant left the theater with a black bag of merchandise. The defendant admitted to killing the manager, but argued that he acted in self-defense. The defendant claimed that he panicked after the manager allegedly sat down next to him during the movie, and touched his leg. The jury rejected the gay panic defense used to support the defendant’s theory of self-defense, and convicted him of first-degree murder and first-degree robbery.

---

<sup>45</sup> *Van Hook v. Bobby*, 661 F.3d 264, 267 (6th Cir. 2011).

<sup>46</sup> *Van Hook*, 39 Ohio St.3d at 257.

<sup>47</sup> LaFave, *supra* note 17, at § 10.4.

<sup>48</sup> 554 S.E.2d 458 (Ga. 2001).

<sup>49</sup> 862 N.W.2d 414 (Table) (Iowa Ct. App. 2015).

### New Jersey

In *State v. Camacho*,<sup>50</sup> the victim regularly dressed in feminine attire (a wig, makeup, jewelry, brown skirt, brown blouse, and high heels) during the evenings. After leaving a gay bar one night, the victim met the defendant while dressed in feminine attire on a street known to be a gay pick-up area. The victim offered the defendant \$20 to have sex. After entering the victim's apartment, the victim got undressed. Upon seeing the victim's genitals, the defendant alleged that he became angry. The defendant further alleged that he had a knife in his jacket that was visible to the victim, and he believed that the victim was going to grab the knife and use it against him. The defendant then stabbed, beat, and killed the victim. The jury convicted the defendant of first-degree murder. On appeal, the defendant claimed that his counsel was constitutionally ineffective for failing to request, among other things, an instruction for self-defense and/or imperfect self-defense. The court rejected the defendant's claim.

### Texas

In *Cutsinger v. State*,<sup>51</sup> the defendant argued on appeal that the evidence was insufficient to sustain a conviction for capital murder because, among other things, the defendant killed the victim in self-defense after what he perceived to be homosexual advances. The jury convicted the defendant of murder. On appeal, the court concluded that the evidence was sufficient to allow the jury to reject that the defendant killed the victim in self-defense to an attempted sexual assault, and to conclude that the defendant killed the victim to rob him.

## **EXAMPLES OF CASES INVOLVING POST-CONVICTION RELIEF**

In many cases, defendants invoke gay and trans panic defenses at trial in order to avoid a murder conviction and receive a reduced punishment based on a lesser charge, or avoid conviction and punishment entirely. Some defendants who have been convicted of murder, however, have also raised gay and trans panic defenses during post-conviction proceedings in order to get their murder convictions overturned and obtain a new trial.

### Missouri

In *Jones v. Delo*,<sup>52</sup> the defendant shot and killed the victim, and was sentenced to death for first-degree murder. In his motion for state post-conviction relief, the defendant argued that trial counsel was ineffective for failing to prepare and present an affirmative mitigating case at the penalty phase of the trial. At the defendant's state post-conviction hearing, a psychologist testified that the defendant had described that he experienced panic after the victim made a

---

<sup>50</sup> No. 01-06-0660, 2010 WL 3218888 (N.J. Ct. App. 2010).

<sup>51</sup> No. 14-06-00893, 2007 WL 4442609 (Tex. Ct. App. 2007).

<sup>52</sup> 258 F.3d 893 (8th Cir. 2000).



direct sexual advance. The psychologist further testified that the defendant described that he remembered shooting a gun, but experienced intermittent memory loss in the process of the actual killing. The state court denied post-conviction relief, concluding that the defendant was not acting under homosexual panic when he shot and killed the victim.

### Pennsylvania

In *Commonwealth v. Martin*,<sup>53</sup> the defendant asked the victim for money and the victim responded that he would give money in exchange for sex. In response to the victim's homosexual advance, the defendant hit the victim over the head, bound his wrists and ankles, and suffocated the victim with a plastic bag. On habeas, the defendant alleged that trial counsel was ineffective for failing to present a provocation defense to the jury. He argued that the victim's sexual advances triggered Post-Traumatic Stress Disorder flashbacks of sexual abuse he suffered as a child, thereby making him incapable of cool reflection. The defendant argued he was prejudiced by his counsel's omission because the presentation of a provocation defense would have reduced his crime from murder to manslaughter by effectively negating the defendant's specific intent to kill. The Court held that the defendant's ineffective assistance of counsel claim lacked merit, accepting a lower court's factual finding that even if the homosexual advance triggered PTSD flashbacks, such an event did not, "render [the defendant] incapable of cool reflection so as to support a provocation defense."<sup>54</sup>

---

<sup>53</sup> 5 A.3d 177 (Pa. 2010).

<sup>54</sup> *Id.* at 186.

## **PART II: CONSTITUTIONAL CHALLENGES TO LEGISLATION ELIMINATING THE GAY AND TRANS PANIC DEFENSES**

Critics of state legislation eliminating the gay and trans panic defenses would most likely argue that such legislation violates defendants' rights protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>55</sup> A court, however, would be highly unlikely to conclude that a statute eliminating the gay and trans panic defenses violates the Due Process Clause because: (1) states are given broad latitude to define evidentiary rules in criminal trials and the elements of criminal offenses/defenses, (2) defendants do not have an absolute right to present relevant evidence in their defense, and (3) the gay and trans panic defenses have relatively recent origins in common law, have not been uniformly and consistently adopted by the fifty states, and their elimination is supported by considerable state policy justifications.

### **MONTANA V. EGELHOFF**

*Montana v. Egelhoff*<sup>56</sup> is the key case that governs the constitutional analysis on whether state legislation eliminating the gay and trans panic defenses violate defendants' due process rights under the Fourteenth Amendment. In *Montana v. Egelhoff*, the U.S. Supreme Court considered whether the Due Process Clause was violated by Montana Code Annotated § 45-2-203, which stated that voluntary intoxication, "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense."<sup>57</sup> The defendant had been convicted of deliberate homicide after the police found him drunk in a vehicle next to his gun with two victims who had been shot in the head. At trial, the jury was instructed that, pursuant to section 45-2-203, it could not consider voluntary intoxication in determining the defendant's mental state at the time of the crime. The Supreme Court of Montana reversed the defendant's conviction, finding that the Montana statute violated due process because the State did not have to prove beyond a reasonable doubt every element of the crime where the jury could not consider evidence relevant to establishing *mens rea*.<sup>58</sup>

In a plurality opinion written by Justice Scalia, the U.S. Supreme Court reversed the decision of the state supreme court. The Court concluded that the defendant did not meet the heavy burden imposed under traditional due process that the rule allowing the defense to introduce evidence of intoxication offended, "some principle of justice so rooted in the

---

<sup>55</sup> The Due Process Clause of the Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. Amend. XIV.

<sup>56</sup> 518 U.S. 37 (1996).

<sup>57</sup> Mont. Code Ann. § 45-2-2-3.

<sup>58</sup> *Egelhoff*, 518 U.S. at 41.

tradition and conscience of our people as to be ranked as fundamental.”<sup>59</sup> The Court reasoned that this rule was too new, had not received sufficiently uniform and permanent allegiance, and displaced a lengthy common law tradition supported by legitimate state policy justifications rejecting inebriation as a criminal defense.<sup>60</sup> Justice Ginsburg concurred, reasoning that the statute could be upheld as being within the traditional broad discretion given to state legislatures to define the elements of criminal defenses.<sup>61</sup>

The plurality opinion also rejected the state supreme court’s reasoning that the statute was unconstitutional because it made it easier for the State to meet the requirement of proving *mens rea* beyond a reasonable doubt. The Court reasoned that *any* evidentiary rule can have that effect, and that “reducing” the State’s burden in this manner is not unconstitutional unless the rule of evidence itself violates a fundamental principle of fairness. The Court stressed, “[w]e have rejected the view that anything in the Due Process Clause bars States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions.”<sup>62</sup>

### **STATES HAVE BROAD DISCRETION IN EXCLUDING CATEGORIES OF EVIDENCE FROM BEING CONSIDERED BY JURIES IN CRIMINAL CASES AND IN DEFINING THE ELEMENTS OF CRIMES/DEFENSES**

In *Montana v Egelhoff*, the U.S. Supreme Court reaffirmed the broad discretion of states to determine the evidentiary rules in criminal trials and to define the elements of state crimes/defenses.

#### Limiting Evidence at Criminal Trials

Justice Scalia’s plurality opinion in *Montana v. Egelhoff* considered the Montana statute at issue as an evidentiary rule, and affirmed states’ discretion in determining evidentiary rules in criminal trials. The plurality opinion stressed that, “preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and . . . we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally ‘within the power of the State to regulate procedures under which its laws are carried out.’”<sup>63</sup>

---

<sup>59</sup> *Id.* at 43 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

<sup>60</sup> *Id.* at 51.

<sup>61</sup> *Id.* at 57.

<sup>62</sup> *Id.* at 54.

<sup>63</sup> *Id.* at 43 (quoting *Patterson v. New York*, 432 U.S. at 201-202). See also *Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996) (applying *Patterson* test); *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) (“The Due

## Defining Elements of a Criminal Offense/Defense

In her concurrence in *Egelhoff*, Justice Ginsburg rejected the categorization of the Montana statute as an evidentiary prescription based on the fact that the law appears in a chapter entitled, “General Principles of Liability,” rather than in a chapter regarding evidentiary rules. As such, Justice Ginsburg stressed that the statute, “extract[s] the entire subject of voluntary intoxication from the *mens rea* inquiry,”<sup>64</sup> thereby rendering any such evidence irrelevant to proof of the requisite mental state. She further stressed that, “[c]omprehended as a measure redefining *mens rea*, [the statute] encounters no constitutional shoal. States enjoy wide latitude in defining the elements of criminal offenses . . . particularly when determining the extent to which moral culpability should be a prerequisite to conviction of a crime.”<sup>65</sup>

Justice Scalia’s plurality opinion expresses its “complete agreement” with the rationale of Justice Ginsburg’s concurrence and concludes that the Montana law can be supported either as an evidentiary rule or as a modification of a definition of an element of a crime.<sup>66</sup> The plurality opinion stresses that, “[i]n fact, it is for the states to make such adjustments: ‘The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.’”<sup>67</sup> The plurality’s support of Justice Ginsburg’s concurring opinion arguably makes it the majority opinion and the holding of the Court.<sup>68</sup> Moreover, it appears that even the dissenters in *Montana v. Egelhoff* would have upheld the statute if they had viewed the rule as redefining an element of a crime. The dissenting Justices, however, ultimately rejected this framing on the grounds that the Supreme Court of Montana framed the statute as an evidentiary rule in its decision below.<sup>69</sup>

---

Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules”).

<sup>64</sup> *Egelhoff*, 518 U.S. at 58 (citations omitted).

<sup>65</sup> *Id.* (citations omitted).

<sup>66</sup> *Id.* at 50 n.4.

<sup>67</sup> *Id.* at 56 (quoting *Powell v. Texas*, 392 U.S. 514, 535-36 (1968)).

<sup>68</sup> See *Marks v. United States*, 430 U.S. 188, 193 (1977) (when fragmented Court decides case by varying rationales, holding is “that position taken by those Members who concurred in the judgments on the narrowest grounds . . .”).

<sup>69</sup> See *Egelhoff*, 518 U.S. at 73 (“[A] State may so define the mental element of an offense that evidence of a defendant’s voluntary intoxication at the time of commission does not have exculpatory relevance and, to that extent, may be excluded without raising any issue of due process”) (J. Souter dissenting) and *Id.* at 71 and 64 (due process concern “would not be at issue” for “[a] state legislature certainly has the authority to identify the elements of the offenses it wishes to punish”) (J. O’Connor dissenting).

## **DEFENDANTS IN CRIMINAL CASES DO NOT HAVE A CONSTITUTIONAL RIGHT TO HAVE A JURY CONSIDER ALL RELEVANT EVIDENCE IN THEIR DEFENSE**

Consistent with its support of giving broad latitude to state legislatures in the area of criminal law, in *Montana v. Egelhoff*, the Supreme Court explicitly rejected the principle that criminal defendants have a due process right to present and have considered by a jury all relevant evidence to rebut the State's evidence on each element of the offense charged.<sup>70</sup> In reaching this conclusion, the Court reviewed a number of well-established evidentiary rules that prohibited the introduction of relevant evidence based on a defendant's failure to comply with procedural requirements and rules which prohibited evidence for substantive reasons.<sup>71</sup> In addition, the plurality opinion by Justice Scalia explicitly rejected an argument made by Justice O'Connor, that these evidentiary rules were distinguishable from a rule that prohibited consideration of, "a category of evidence tending to prove a particular fact" – "[s]o long as the category of excluded evidence is selected on a basis that has good and traditional policy support."<sup>72</sup>

## **THE GAY AND TRANS PANIC DEFENSES ARE NOT FUNDAMENTAL PRINCIPLES OF JUSTICE PROTECTED BY THE DUE PROCESS CLAUSE**

In order for a defendant to challenge an evidentiary rule as violating the Due Process Clause, he or she must meet the heavy burden imposed under traditional due process analysis that the proscription offend, "some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental."<sup>73</sup> To determine whether the relevant principle is fundamental, the Court looks at: (1) "historical practice": how long-standing the rule is and how uniformly it has been adopted; and (2) any state policy justifications which support the elimination of the rule or defense.<sup>74</sup>

---

<sup>70</sup> *Id.* at 42. The Court stressed, "The proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible. As we have said: 'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" *Id.* (citing *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)).

<sup>71</sup> *Id.* (e.g. "Evidence 403 provides: 'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Hearsay rules, see *Fed. Rule Evid. 802*, similarly prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable.'").

<sup>72</sup> *Id.* at 43 n. 1.

<sup>73</sup> *Id.* at 43 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

<sup>74</sup> *Id.* at 51.

### Historical Practice

The Court primarily looks to “historical practice” to help determine whether a particular rule represents a fundamental principle of justice.<sup>75</sup> To be deemed fundamental, the principle must be “deeply rooted” in our nation’s tradition and conscience at the time that the Fourteenth Amendment was adopted, although the Court does indicate that a defendant can “perhaps” demonstrate that a rule has become deeply rooted since then.<sup>76</sup> The Court considers when the rule was first adopted in the United States and whether the rule has commanded, “uniform and permanent allegiance” since its adoption.<sup>77</sup> The Court determines whether a rule has been uniformly followed by looking at the number of states and jurisdictions that have adopted it.<sup>78</sup>

In *Egelhoff*, the Court concluded that the common law tradition of considering voluntary intoxication when determining the requisite *mens rea* did not have sufficient longevity to make it fundamental. It noted that the emergence of this rule was traced to an 1819 English case, but the rule was “slow to take root” in the United States until the end of the 19th century. By the end of the 19th century, however, voluntary intoxication could be considered in most American jurisdictions when determining whether a defendant had the specific intent necessary to commit a crime.<sup>79</sup>

In *Egelhoff*, the Court stressed that the defendant had not shown the uniform and continuing acceptance necessary for a rule to be fundamental because one-fifth of the states had never adopted or were no longer following the rule that voluntary intoxication should be considered when determining *mens rea*.<sup>80</sup> It stressed, “[a]lthough the rule allowing a jury to consider evidence of a defendant's voluntary intoxication where relevant to *mens rea* has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental.”<sup>81</sup>

If a rule applied by courts in the 19th century is “of too recent vintage” to be deemed fundamental,<sup>82</sup> then it is extremely unlikely that a court would find that the gay and trans panic defenses are fundamental. The first judicial mention of the gay panic defense in the

---

<sup>75</sup> *Id.* at 43.

<sup>76</sup> *Id.* at 48.

<sup>77</sup> *Id.* at 48.

<sup>78</sup> *Id.* at 48-49.

<sup>79</sup> *Id.* at 44.

<sup>80</sup> *Id.* at 48.

<sup>81</sup> *Id.* at 51.

<sup>82</sup> *Id.* at 51.

United States was in a case before the California Court of Appeal in 1961, *People v. Stoltz*.<sup>83</sup> In addition, if the Supreme Court held that a rule adopted by 80% of the states in the United States is not sufficient to be fundamental in *Egelhoff*, then it is unlikely that a court will hold that the gay and trans panic defenses have been so uniformly adopted. Only about half of the fifty states<sup>84</sup> have reported court opinions discussing gay or trans panic arguments. Moreover, no state has codified the gay and trans panic defenses in its penal code.

Thus, because the gay and trans panic defenses are recent common law innovations and do not have widespread uniform acceptance across the states, a court would not find them to be “fundamental principles of justice” protected by the Due Process Clause.

### **STATE POLICY JUSTIFICATIONS SUPPORT ELIMINATING THE GAY AND TRANS PANIC DEFENSES**

Finally, the Court looks to any state policy justifications for eliminating the rule in question when determining whether it is fundamental. Such justification standing alone, “casts doubt upon the proposition that the rule is a ‘fundamental principle.’”<sup>85</sup> Regarding criminal trials, the introduction of relevant evidence can be limited by the State for a “valid” reason.<sup>86</sup>

In *Egelhoff*, the Court noted that excluding evidence of voluntary intoxication was supported by the following state policy justifications: (1) preventing a large number of violent crimes, (2) increasing the punishment for all unlawful acts committed in that state – thereby deterring irresponsible behavior while drunk, (3) serving as a specific deterrent by ensuring that those who prove incapable of controlling violent impulses while voluntarily intoxicated go to prison, (4) implementing society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences, (5) interrupting the perpetuation of harmful cultural norms that validate drunken violence as a learned behavior, and (6) excluding misleading evidence because juries, “who possess the same learned belief . . . may be too quick to accept the claim that the defendant was biologically incapable of forming the requisite *mens rea*.”<sup>87</sup>

---

<sup>83</sup> 16 Cal. Rptr. 285 (Cal. Ct. App. 1961). In *Stoltz*, the defendant was convicted of second-degree murder and grand theft. The defendant alleged that he killed the victim after the victim made unwanted sexual advances towards him, which frightened him. A psychiatrist and neurologist testified for the defense that the defendant killed the victim in a homosexual panic, a “panic reaction to a homosexual situation [that was] recognized in the field of psychiatry.” *Id.* at 287.

<sup>84</sup> *See supra* note 8.

<sup>85</sup> *Egelhoff*, 518 U.S. at 49.

<sup>86</sup> *Id.* at 53.

<sup>87</sup> *Id.* at 51.

Likewise, elimination of the gay panic and trans panic defenses serve multiple legitimate state policy justifications, some of which directly echo the policy considerations in *Egelhoff*. Elimination of gay and trans panic defenses are supported by the legitimate policy justifications of: (1) increasing punishment for acts made unlawful by the state, (2) specifically deterring further criminal actions by those who kill due to alleged gay or trans panic, (3) reinforcing society's moral conception of personal responsibility, (4) interrupting the perpetuation of harmful cultural norms that validate violence against LGBT people, (5) furthering the policies expressed in state hate crime laws and anti-discrimination legislation, (6) preventing defendants from exploiting any potential homophobic and transphobic biases among the members of a jury, and (7) precluding unnecessary and invasive testimony about a victim's sexuality, sex, and/or gender identity/expression in state criminal trials.

For these reasons, it is unlikely that any due process challenges to state legislation eliminating the gay and trans panic defenses would be successful.



## **PART III: MODEL LEGISLATION ELIMINATING THE GAY AND TRANS PANIC DEFENSES**

### **AN ACT CONCERNING THE ELIMINATION OF THE GAY AND TRANS PANIC DEFENSES**

Be it enacted by the Legislature of the State of ABC that Title XXX is amended to include a new Article 123, which reads as follows:

#### **ARTICLE 123 ELIMINATING THE GAY AND TRANS PANIC DEFENSES**

##### **Section 101. Restrictions on the Defense of Provocation**

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

##### **Section 102. Restrictions on the Defense of Diminished Capacity**

A defendant does not suffer from reduced mental capacity based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.

##### **Section 103. Restrictions on the Defense of Self-Defense**

A person is not justified in using force against another based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.