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ARTICLE

THE NONSENSICAL NATURE OF THE GAY PANIC AND TRANSGENDER PANIC DEFENSES

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According to FBI hate crime statistics, in 2015, 17.7 percent of hate crimes were motivated by sexual orientation, and another 1.7 percent of hate crimes were motivated by gender identity.¹ Both the existence and prevalence of such crime should shock no one. The violence directed at both homosexual and transgender persons has certainly become a more mainstream theme in terms of political and cultural discussion. The literature is riddled with examples of gay and transgender individuals who have been murdered for their nonconformance to normative gender or sexuality.² What makes this

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TUMCA Law & Policy Review is a platform for current undergraduate moot court participants and TUMCA (Texas Undergraduate Moot Court Association) Alumni to engage in legal scholarship. Each issue centers on a topic that article submissions must discuss in some form. The topic of this issue concerned any area where law and gender cross paths.

¹ *Latest Hate Crime Statistics Released: Annual Report Sheds Light on Serious Issue*, FBI (Nov. 14, 2016), <https://www.fbi.gov/news/stories/2015-hate-crime-statistics-released>.

² See, e.g., Joseph R. Williams, *"I Don't Like Gays, Okay?" Use of the "Gay Panic" Murder Defense in Modern American Courtrooms; The Ultimate Miscarriage of Justice*, 78 ALB. L. REV. 1129, 1133 (2015) ("...Animosity and discrimination against members of the gay community have been systematically ingrained in American culture for centuries ..."); See also Kent Blore, *The Homosexual Advance Defence and the Campaign to Abolish it in Queensland: The Activist's Dilemma and the Politician's Paradox*, 12 QUT L. & JUST. J. 36 (2012) ("After first explaining what the homosexual advance defence is and how the various Australian

particularly problematic is the fact that some aggressors choose to use that nonconformance as justification for the assault in criminal proceedings.

These arguments, known as the “Gay Panic Defense” and the “Transgender Panic Defense”, have been deployed in courtrooms since at least 1967.³ Neither are freestanding legal theories, but are instead “used to bolster a traditional criminal law defense such as insanity, diminished capacity, provocation, or self-defense”.⁴ Simply put, the argument is that the proximity and interaction with a non-normative individual so threatens a defendant, that injuring or killing another person was a lapse in judgment, brought on by a temporary dissociative state.

The Gay Panic Defense (GPD) (also known as Non-violent Homosexual Advance Defense) has been used by some defendants to argue that a “non-violent sexual advance” from a homosexual victim “provoked them, driving them to react violently in the heat of passion”.⁵ The argument typically proceeds when a defendant claims “that his culpability should be mitigated both by the fact that the victim triggered the violent reaction and by the fact that the reaction itself was uncontrollable.”⁶ Such a tactic plays on the stereotypes and biases that jurors unconsciously bring into the courtroom with them.⁷ The GPD blatantly manipulates hegemonic heteronormativity to dehumanize gay victims in the eyes of a jury.

One of the most publicized examples of GPD use was the murder of Lawrence King. In 2008, Brandon McInerney and Lawrence King were high school classmates.⁸ King was frequently bullied in school for being homosexual, and openly had a crush on McInerney.⁹ Their interactions were generally not confrontational. The day before the murder King and McInerney “clashed verbally in class” and King after class “said mockingly, ‘I love you, baby!’” to McInerney.¹⁰ McInerney “took the .22-caliber handgun from his grandfather's room” and warned at least one of his classmates to “say

jurisdictions have dealt with it to date, this article narrates the story of the recent campaign to abolish it..”).

³ See generally Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV 471 (2008).

⁴ *Id.* at 490.

⁵ David Perkiss, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons from the Lawrence King Case*, 60 UCLA L. Rev. 778, 780 (2013).

⁶ Kara Suffredini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L. J. 279, 288 (2001).

⁷ See Jenna Tomei & Robert J. Cramer, *Legal Policies in Conflict: The Gay Panic Defense and Hate Crime Legislation*, 16 J. FORENSIC PSYCHOL. PRAC. 217 (2016).

⁸ Perkiss, *supra* note 5, at 782.

⁹ See *Id.* at 788.

¹⁰ *Id.* at note 19.

goodbye to Larry”¹¹. The next day, McNerney shot King in the back of the head. When King fell, McNerney shot him again. King died in the hospital, two days later.¹²

At trial, the fact that McNerney killed King was “undisputed”.¹³ McNerney’s attorney painted “a picture of King as a sexual aggressor and McNerney as the emotionally troubled target of King’s advances”.¹⁴ He argued that “McNerney’s crime was voluntary manslaughter, not murder”.¹⁵ The trial resulted in a hung jury, even though jury instruction had been administered with the intention of removing antigay bias from the considerations. Before the second trial, McNerney and prosecutors reached a plea deal, and he pled guilty to manslaughter.¹⁶ The fact that prosecutors were unsuccessful in procuring a murder conviction from the jury was a direct result of the defense’s manipulation of the societal bias against homosexuals. Some jurors even wore “Save Brandon” wristbands during the trial.¹⁷

The Transgender Panic Defense (TPD) is similar to the GPD but typically involves another element: the position that a victim committed a kind of “sexual fraud”.¹⁸ The defendant alleges that they were forced into a state similar to “Gay Panic”, but that this frenzy is exacerbated by the victim’s deception. In many cases, defendants who had previously had sexual contact with a transgender female allege that because they were unaware that the victim had male genitals, the discovery of which (in many cases discovered by force) triggered a violent dissociative state. Such was the argument that arose in the courtroom after the brutal beating and murder of Gwen Araujo.

Gwen Araujo was a seventeen-year-old transgender woman.¹⁹ After Araujo was subjected to a forced inspection of her genitalia at a house party, four men, two of which she had been sexually intimate with, “kneaded her in the face, slapped, kicked, and choked her, beat her with a can and a metal skillet, wrestled her to the ground, tied her wrists and ankles, strangled her with a rope, and hit her over the head with a shovel”²⁰ The men dug a shallow grave for her and buried her.²¹ The men that she had been intimate with, Michael Magidson and Jose Merél, asserted at trial that the assault had

¹¹ See *Id.* at 789.

¹² *Id.* at 788.

¹³ *Id.* at 782.

¹⁴ *Id.* at 792.

¹⁵ *Id.*

¹⁶ See *Id.* at 794.

¹⁷ *Id.* at 793.

¹⁸ Morgan Tilleman, *(Trans)forming the Provocation Defense*, 100 J. CRIM. L. & CRIMINOLOGY 1659, 1669 (2010) (internal quotation omitted).

¹⁹ See Aimee Wodda & Vanessa Panfil, “Don’t Talk to Me About Deception”: *The Necessary Erosion of the Trans* Panic Defense*, 78 ALB. L. REV. 927, 951 (2014).

²⁰ Moya Lloyd, *Heteronormativity and/as Violence: The “Sexing” of Gwen Araujo*, 28 HYPATIA 818, 818 (2013).

²¹ See *Id.*

been provoked because Araujo had committed “sexual deceit” by not revealing that she was transgender.²²

The first trial of Araujo’s killers ended with a jury that was unable to agree on a unanimous verdict. The second resulted in convictions of second-degree murder for both Magidson and Merél, though both had originally been charged with first-degree murder.²³ The jury declined to add hate crime enhancements to their sentences. One defendant pled guilty to voluntary manslaughter and received an eleven year sentence in return for testifying against the other three defendants. The fourth man received a six-year prison term after agreeing to “a plea of no contest to voluntary manslaughter”.²⁴ Throughout preliminary hearings and the trial, the defense referred to Araujo as “Eddie”, which was her birth name.²⁵

To its credit, the ABA has condemned the use of Gay and Trans Panic Defenses and has issued a resolution urging legislators to bar the defense from courtrooms.²⁶ However, it is important to note that these defenses can be utilized implicitly as well as explicitly. The horrific 1998 murder of an openly gay University of Wyoming student, Matthew Shepard, “whose bloodied and beaten body was found tied to a wooden fence” is one example.²⁷ One of Shepard’s assailants pled guilty to murder, but the other, Aaron McKinney, went to trial.²⁸ After hearing the defense’s opening statement, the judge barred the use of “a provocation defense based on a gay panic argument”.²⁹ Despite this, the defense put on witnesses that implied that Shepard “deserved the beating he got, playing on stereotypical images of gay men as sexual deviants and sexual provocateurs”.³⁰ Though it is unclear whether this influenced the jury’s decision to convict McKinney of felony murder rather than first-degree murder, it illustrates that even when GPD is banished outright from a courtroom, bias against homosexuals can still quietly be used to confer credibility to a crime.

These theories are only made possible by the normative otherization of gay and transgender individuals. The attempt to legislate away the GPD and TPD are valiant efforts, but perhaps the most efficacious solution is to shine a light on the existence of attempts to manipulate judges and juries. The most important recommendation made by the ABA in its 2013 resolution was that “state and local governments should proactively educate courts, prosecutors, defense counsel, and the public about gay and

²² *Id.* at 821

²³ *See Id.* at 820

²⁴ *Id.*

²⁵ *Id.* at 821

²⁶ Wodda & Panfil, *supra* note 19, at 962-963.

²⁷ Lee, *supra* note 3, at 523.

²⁸ *See Id.*

²⁹ *Id.* at 525.

³⁰ *Id.*

trans panic defenses and the concrete harms they perpetuate against the LGBT community".³¹

It is our responsibility as future and current advocates to be aware of prejudice and bias wherever they manifest, but particularly within the framework of the legal institution. That awareness comes with the added responsibility not only to avoid succumbing to the usage of harmful stereotypes, but the duty to fight against them whenever possible.

³¹ Wodda & Panfil, *supra* note 19, at 962 (internal quotations omitted).