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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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[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

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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, McInerney shot King in the back of the head. When King fell, McInerney shot him again. King died in the hospital, two days later.[12]

At trial, the fact that McInerney killed King was "undisputed". [13] McInerney's attorney painted "a picture of King as a sexual aggressor and McInerney as the emotionally troubled target of King's advances".[14] He argued that "McInerney'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, McInerney 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, "kneed 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

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[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 possibly 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

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[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).

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THE MORAL RUBBER STAMP: A DEVICE FOR TRANSCENDING LAWS AND POLICIES THAT MAY HARM AND EXCLUDE WOMEN

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Five women working at the American Cyanamid Company in the late 1970s sterilized themselves upon announcement of a new company policy.[1] The policy restricted all fertile women from working jobs that involved exposure to potentially toxic chemicals. The only way these women could avoid losing their position was by proving they were wholly incapable of ever having children. American Cyanamid Company was only one of the many companies to implement fetal protection policies by the early 1980s. Others included Olin, Bunker Hill, Gulf Oil, Sun Oil, Monsanto, and General Motors.[2] The fetal protection policies, which would be responsible for barring at least 100,000 women from their previously held positions,[3] acquired their name when a series of medical experts at companies such as Johnson Controls began recognizing

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[1] *See* Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1226 (1986).

[2] *See id.*

[3] *See id.*

the effect lead could have on developing fetuses.[4] One company representative expressed concern about the high economic cost associated with choosing to reduce levels of potentially toxic chemicals in the work environment.[5] The economic solution designed to assuage the aforementioned concerns entailed excluding the groups of people from working for the company who could prove to be a liability in the future: any female with the potential to procreate. Facially, the decision to remove all functioning ovaries from a workplace to hedge against a lawsuit that hasn't happened yet is a decision to which the public may not take kindly – unless a better reason can be put forth.

Keith Hearit traces the transformation of a company policy meant only to hedge against potential economic liability into a policy meant to "protect the health of unborn children"[6] and describes how this process occurs through "transcendence."[7] *Dialectical-rhetorical transcendence* is a concept of Kenneth Burke's which serves as a strategy to reconcile two competing ideologies and resolve the contradictions existing among them.[8] Transcendence can take hold in the political sphere, in which individual and dialectically opposite interests merge together.[9] Hearit applies Burkean transcendence to the Johnson Controls company – illustrating how the company's employment of the transcendence strategy allowed them to merge their interests of limited liability and low cost with a societal interest for healthy families into the transcended perspective that Johnson Controls was valuing life over the "value of equal rights."[10] Breaking it down further, this strategy allows a company whose sole interest is to avoid paying money to reduce lead levels to instead *claim* that they want to accomplish some other contradictory motive that sounds more appealing to a targeted audience (i.e. protecting women and the future of tomorrow).

Partisan actors within the United States have a history of using the transcendence strategy to create a myth of two dialectically opposite notions or interests. Kenneth Burke recognizes this history by pointing out its existence in "The United States" name itself.[11] The merging of the divided "states" into one "united" country requires dialectical opposites to come together to form one myth of a unified place of being.

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[4] *See* Keith Michael Hearit, *On the Use of Transcendence as an Apologia Strategy: The Case of Johnson Controls and Its Fetal Protection Policy*, 23 PUB. REL. REV. 217, 221 (1997).

[5] *See id*. at 225.

[6] Peter T. Kilborn, *Who Decides Who Works at Jobs Imperiling Fetuses*?, THE NY TIMES (September 2, 1990), p. 1.

[7] *See generally* Hearit, *supra* note 4.

[8] *See* James P. Zappen, *Kenneth Burke on Dialectical-Rhetorical Transcendence*, 42 PHIL. & RHETORIC 279, 282 (2009) (explaining Kenneth Burke's concepts established in "Attitudes").

[9] *See id.* at 290 (explaining Kenneth Burke's application of dialectical-rhetorical transcendence among rhetorical partisans in "Order").

[10] Hearit, *supra* note 4, at 220.

[11] Kenneth Burke, *A Grammar of Motives*, 375 (1969).

When the 13th Amendment abolished slavery, the desire for racial divides transcended into "separate but equal,"[12] a rhetorical slogan used to merge two dialectical interests: the desire of white persons to still be superior coupled with the nation's interest to abolish slavery in accordance with emerging global norms. When the Supreme Court began to chip away at the "separate but equal" doctrine it once tolerated under the law,[13] racial divide needed a new rhetorical avenue. Recent scholars and activists have traced the transcendence of the Jim Crow era to mass incarceration:[14] a rhetorical front appearing to promote the moral interest of safe communities with an underlying interest to spur on the American need for racial separation. Additionally, political actors have never been shy to apply transcendence to foreign policy motives, with one of the peaks of its use taking place during the Cold War. U.S. Senator Joseph McCarthy capitalized on communist paranoia flooding educational and societal systems,[15] helping transcend what may have begun as a geopolitical struggle into an ideological war.

This paper is written to only touch briefly on how the idea of protecting the fetus has served as a repeated moral strategy for transcending underlying motivations meant to exclude or harm women throughout the 20th and 21st centuries.

While *Muller v. Oregon* is not the beginning point for this strategy, it can serve as a starting point for this conversation. The Supreme Court in *Muller* held that an Oregon statute barring women from working more than ten hours a day was constitutional, partially on the grounds that "healthy mothers are essential to vigorous offspring, [and] the physical well-being of a women becomes an object of public interest and care in order to preserve the strength and vigor of the race".[16] In 1908, promoting the protection of the fetus and the vigor of motherhood for all of humanity was enough to keep a woman from the legal ability to work the same hours as her male counterpart. In 1984, the 11th Circuit Court of Appeals recognized how the holding in *Muller* was "an effective means for employers, legislatures, and courts to limit the equal employment opportunities of women" by "restrict[ing] their employment out of a professed concern

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[12] *See* Marouf Hasian Jr. & Geoffrey D. Klinger, *Sarah Roberts and the Early History of the "Separate But Equal" Doctrine: A Study in Rhetoric, Law, and Social Change,* 53 COMM. STUD. 269, 269 (2009) (describing the Supreme Court's history of upholding the separate but equal doctrine in *Plessy v. Ferguson,* 163 U.S. 537 (1896)).

[13] *See generally Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (holding separate but equal doctrine unconstitutional as applied to public education).

[14] *See generally* Manohla Dargis, *Review: '13TH,' the Journey From Shackles to Prison Bars,* THE NY TIMES, Sept. 29, 2016, *available at* https://www.nytimes.com/2016/09/30/movies/13th-review-ava-duvernay.html.

[15] *See* James B. Rogers & Wesley J. Null, *Attacking Communists as Commisioner: The Role of Earl J. McGrath in the Red Scare of the 1950s*, 36 AM. EDUC. HIST. J. 53, 59 (2009) ("…Joseph McCarthy, capitalized on this fear of Communists spreading their ideology through the schools. McCarthy proclaimed, quite provocatively, that the United States had already been infiltrated by Communists who were seeking to destroy the way of life that Americans had cherished for centuries…").

[16] Becker, *supra* note 1, at 1222 (international citations omitted).

for the health of women and their offspring."[17] In other words, if those in positions of power wanted women OUT, they could transcend their motivations to one of moral soundness by espousing that their true desires were ones of care for a mother and her fetus or child. In 1984, the moral espousal put forth was no longer enough to justify the prevention of women and men from working similar hours, but it was enough to justify fetal protection policies.

For most, there is a strong moral argument to be made about preventing exposure to toxic chemicals that could then in turn harm future life. The argument falls short, however, when science from the 1990's is able to show women are not the sole vehicle capable of transporting potential birth defects to possible offspring. While Johnsons Control and other companies abound proclaimed they were helping the health of a mother and her offspring by keeping any fertile woman out of the work environment, it was also proven at the time that *male* exposure to toxic chemicals could also lead to adverse fetal affects.[18] If the goal was truly to protect the offspring of the future, fetal protection policies should have applied equally to genders, or steps should have been taken to reduce risk exposure among all, but we see through transcendence that moral soundness of female exclusion in toxic environments was merely part of a larger transcendence of motive. In 1991, this action of exclusion was brought to the highest court to answer the begged question: "May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive?".[19] The Supreme Court saw through the shield, noting that "despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees."[20] The "professed moral and ethical concerns" lighting the way for fetal protection policies were no longer enough to support their implementation, and the Supreme Court found against Johnson Controls.[21]

Claiming to care for the health of women and their offspring could no longer be used as a moral disguise to exclude women from the workplace in 1991, but today, the moral outpour is being used to justify fetal protection laws. Once again, we can trace the use of rhetoric proclaiming a desire to protect the fetus as a transcended dialectic covering the underlying action of harming and excluding women further, although once again, it just comes under a different name (hardly). States have begun

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[17] *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1543 (11th Cir. 1984).

[18] *See* Pendleton Elizabeth Hamlet, *Fetal Protection Policies: A Statutory Proposal in the Wake of International Union, UAW v. Johnson Controls, Inc.*, 75 CORNELL L. REV. 1110, 1123 (1990) (internal citations omitted).

[19] *International Union, UAW v. Johnson Controls*, Inc., 499 U.S. 187, 190 (1991).

[20] *Id.* at 198.

[21] *Id.* at 206.

implementing laws that make it illegal for pregnant women to act in ways that could potentially harm their fetus.[22]

Professor Michele Goodwin presents evidence of the rise and increasing number of fetal protection laws across the country, noting particular examples of contemporary fetal protection laws including: sanctions for women who refuse cesarean sections and forced bed rest.[23] Alabama has taken steps to extend their definitions of persons to include any unborn child in the utero at any stage, allowing for women to be prosecuted for "manslaughter, criminally negligent homicide, murder, and assault" if they can be found at fault for the death of a fetus.[24] In Iowa, the tripping and falling of a woman in her home coupled with her expression to medical professionals that she felt "ambivalent" towards her pregnancy was enough to cause the medical professionals to alert the authorities of a possible violation of Iowa's feticide law. This then led to the arrest and two-week investigation of Christine Taylor, who was accused of attempting to murder her unborn child.[25] In Tennessee, assault charges can be brought against women if illegal drug use or any other unlawful act causes harm to her embryo or fetus.[26] Louisiana, Oklahoma, Arkansas, Missouri and North Carolina have all followed suit, implementing legislation like that of Tennessee.[27]

As seen with the restricted work days in the early 20th century and the fetal protection policies in the 1980s, it appears facially there is a positive moral reason for implementing fetal protection laws. This article is not meant to assert that it is wrong or unjust to try to protect unborn children from the symptoms of having an addicted mother – rather this article explores whether the current means is appropriate. Fetal protection laws hurt and exclude women, just as seen with fetal protection policies, yet they espouse morally sound reasons, transcending their motive. Jennifer Henricks takes note that the Supreme Court has already held a woman's heath "is paramount over the health of her fetus," yet by enacting fetal protection laws, states are prioritizing the womb over the health of the woman.[28] Maybe neither type of prioritization (female over womb vs. womb over female) provides a solution or can be considered "just" in light of

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[22] *See* Jennifer Henricks, *What to Expect When You're Expecting: Fetal Protection Law that Strip Away the Constitutional Rights of Pregnant Women*, 35 B.C. J L. & SOC. JUST. 117, 128 (2015).

[23] *See* Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CAL. L. REV. 781, 786 (2014).

[24] *Id*. at 788.

[25] *See id.* at 806-808.

[26] *See* Melissa Ballengee Alexander, *Denying the Dyad: How Criminalizing Pregnant Drug Use Harms the Baby, Taxpayers, and Vulnerable Women*, 82 TENN. L. REV. 745, 759 (2015).

[27] *See* Vanessa Soderberg, *More than Receptacles: An International Human Rights Analysis of Criminalizing Pregnancy in the United States*, 31 BERKELEY J. GENDER L. & JUST. 299, 301 (2016).

[28] Henricks, *supra* note 21, at 138 (referring to the holdings in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)).

their alternative, and a balance must be sought to tend to the health of both fetus and mother, but it appears current fetal protection laws do not in their end state accomplish either goal.

Professor Michele Goodwin has traced the consequences that erupt when fetal protection laws are put in place, showing that often the goal these laws purport is only made worse through their implementation. Most arrests and confinement are initiated by medical professionals during prenatal care.[29] When prenatal appointments are not seen as zones of safety and sanctuary, it can erode their usage by vulnerable women. For women who are addicted and fearing reprisal, one researcher has predicted women are four times less likely to seek prenatal care, which can in turn lead to more risk to the fetus.[30] Some suggest abortions could be sought out at an increased rate[31], in attempt to avoid prosecution while lacking proper prenatal care. In addition to avoidance of proper prenatal care, women could avoid medical screenings altogether.[32]

Protecting the fetus and women's health has been the go-to rubber stamp for other motives meant to exclude or harm women. Slowly, the motives have been revealed, caught in their make, and their dialectical transcendence has been halted. With each revelation, it appears the moral imperative to protect fetuses and women's health gets used to transcend the motive for something more appropriate for the societal era. Now, states across the country profess their moral desire to protect the fetus once more, only this time doing so through prosecuting the women who hold the womb. This transcendence must be recognized. Fetus and women alike should be protected, but this cannot be done by jailing women – treating them as only vaults of another person, rather than a person themselves. Rehabilitation, increased natal care, centers available for addicted persons with low-income – these are the real means to the end that require no dialectical-rhetorical transcendence.

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[29] *See* Goodwin, *supra* note 22, at 871 (internal citation omitted).

[30] *See id*. at 872 (internal citation omitted).

[31] *See, e.g*., Henricks, *supra* note 21, at 139.

[32] *See* Goodwin, *supra* note 22, at 872.