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RESEARCH THAT MATTERS

BANNING THE USE OF GAY AND TRANS PANIC DEFENSES

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EXECUTIVE SUMMARY

When LGBTQ people are killed and the gay and trans panic defense is invoked, those fatal acts of violence need to be understood within the broader context of widespread violence that LGBTQ people face in general—starting from an early age—and often from people they know including romantic and dating partners.

LGBTQ people in the U.S. face widespread stigma, discrimination, and violence. Recent media accounts detail an epidemic of violence against transgender women, particularly transgender women of color; federal data show that a substantial percentage of hate crimes are related to anti-LGBTQ bias; and decades of research establish that LGBTQ people are at increased risk of violent victimization. Much of this violence is hate-based or occurs within the context of a dating or romantic relationship. Often, violence against LGBTQ people starts early in their lives, at the hands of family members or other students at school. Violence against LGBTQ people can result in death, and even when victims survive, has lasting effects on their physical, mental, and emotional health and well-being.

LGBTQ people face several barriers to addressing violence. LGBTQ people may be reluctant to seek help due to experiences of, or fear of, discrimination and harassment by law enforcement. LGBTQ survivors may also be reluctant to seek help from health care and service providers out of fear of being mistreated or turned away. Moreover, in many states, laws do not adequately protect LGBTQ survivors of intimate partner violence and hate violence.

One way states can combat the epidemic of violence against LGBTQ people is by passing laws that bar defendants from asserting gay and trans panic defenses in court. Gay and trans panic defenses are rooted in antiquated ideas that being LGBTQ is a mental illness, and rely on the assumption that it is reasonable for a perpetrator to react violently to discovering the victim's sexual orientation or gender identity or to a romantic advance by an LGBTQ victim. Since the 1960s, the gay and trans panic defenses have appeared in publicly reported court opinions in approximately one-half of the states. To date, 12 states and the District of Columbia have passed legislation eliminating the use of gay and trans panic defenses, but the defenses remain available in most states.

This report presents evidence of violence against LGBTQ people in the U.S., provides an overview of how the gay and trans panic defenses have been used in court, and presents model legislation to eliminate use of the gay and trans panic defenses.

VIOLENCE AGAINST LGBTQ PEOPLE

LGBTQ PEOPLE EXPERIENCE HIGH RATES OF VIOLENCE

LGBTQ people have historically faced—and are still subject to—widespread stigma, discrimination, and violence. Recent media accounts detail an epidemic of violence against transgender women in the U.S., particularly transgender women of color; federal data show that a substantial percentage of hate crimes are related to anti-LGBTQ bias; and decades of research establish that LGBTQ people are at increased risk of violent victimization. Much of this violence is at the hands of someone well-known to the victim, including those with whom they have dating and romantic relationships. This violence can result in death, and even when victims survive, often has lasting effects on their physical, mental, and emotional health and well-being.

Violence against LGBTQ people generally

Over the last decade, a number of studies have shown that many LGBTQ people experience violence because of their sexual orientation or gender identity. Several of these studies indicate that violence disproportionately impacts transgender people—particularly transgender women—and LGBTQ people of color. Research has also found that many LGBTQ survivors knew the person who victimized them; and often times the offender was a neighbor, coworker, or family member.

A recent Williams Institute study examined rates of violent victimization among sexual and gender minorities¹ using data collected through the National Crime Victimization Survey conducted by the federal Bureau of Justice Statistics—the only nationally representative survey to collect data about the sexual orientation and gender identity of crime survivors. The analysis found that LGBTQ people were more likely to be victimized than non-LGBTQ people across a range of crimes.² Comparing per capita rates of serious violence (including rape or sexual assault, robbery, and aggravated or simple assault), the analysis found 71.1 incidents of violent victimization per 1,000 people among LGBTQ people compared to 19.2 instances of violent victimization among non-LGBTQ people.³ In addition, the study found that LGBTQ people were more likely than non-LGBTQ people to experience violence at the hands of someone well-known to them.⁴ A separate Williams Institute study analyzed victimization of gender minority people only and found that per capita rates of violent victimization were even higher: 86.2 victimizations per 1,000 people compared to 21.7 victimizations per 1,000 people among cisgender people.⁵

Data on hate crimes collected and published by the FBI also show high rates of victimization based on sexual orientation and gender identity. The most recent data available, collected in 2019, indicate that 16.7% of all hate crime victims were targeted because of their sexual orientation and

¹ Andrew R. Flores et al., *Victimization Rates and Traits of Sexual and Gender Minorities in the United States: Results from the National Crime Victimization Survey, 2017*, 6 *SCI. ADVANCES* (2020).

² *Id.*

³ *Id.* at 5.

⁴ *Id.*

⁵ Andrew R. Flores, *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017-2018*, e1 *AM. J. PUB. HEALTH* (Feb. 18, 2021).

2.7% were targeted because of their gender identity.⁶ Data collected in previous years (2011–2018) consistently show that between 15.8% to 20.4% of all hate crimes victims were targeted because of their sexual orientation, and between 0.5% to 2.2% were targeted because of their gender identity.⁷ The percentage of hate crimes victims who are LGBT is about three to four times higher than the percentage of LGBT people in the US adult population: 4.5% of adults identify as LGBT, including 0.6% who identify as transgender.⁸

Other studies have further documented pervasive violent victimization among LGBTQ people. For example, reports on hate violence against LGBTQ people and people living with HIV conducted by the National Coalition of Anti-Violence Programs (NCAVP) documented over 3,000 incidents of violence over a three-year period (2015–2017).⁹ The reports are based on data collected by local member organizations across the nation that provide programs and services for survivors of hate violence. While this data does not represent the total number of violent incidents against LGBTQ people over this time period, the reports provide insight into the demographics of LGBTQ victims and the types of violence they commonly face. Findings from the most recent NCAVP reports (2015, 2016, and 2017) include:

- In 2017, the NCAVP collected 825 incidents of hate violence against LGBTQ survivors and survivors living with HIV.¹⁰ Ten local NCAVP member organizations in 10 states provided these accounts.¹¹
 - Of all survivors, 41% were cisgender men, 15% were cisgender women, 22% were transgender women, 8% were transgender men, and the remaining 14% selected other gender identities.¹²
 - The majority (57%) of survivors were people of color, including 22% who were Black and 21% who were Latino/a.¹³
 - The most common types of violence reported by survivors were verbal harassment (17%), threats or intimidation (13%), and physical violence (10%).¹⁴
 - Of the 775 survivors who reported information about their relationship to the offender, the majority (57%) reported that they knew the person; most commonly employers or

⁶ 2019 *Hate Crime Statistics – Victims*, FBI, <https://www.justice.gov/hatecrimes/hate-crime-statistics> (last visited Mar. 25, 2021).

⁷ See generally *Hate Crimes*, FBI, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> (last visited Mar. 25, 2021).

⁸ Williams Inst., *LGBT Data & Demographics*, <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density> (last visited Mar. 23, 2021); ANDREW. R. FLORES ET AL., WILLIAMS INST., *HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES?* (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf>.

⁹ See generally *Reports*, NYC ANTI-VIOLENCE PROJECT, <https://avp.org/reports> (last visited Jan. 12, 2021).

¹⁰ BEVERLY TILLERY ET AL., NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, *LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED HATE AND INTIMATE PARTNER VIOLENCE IN 2017*, at 6 (2018), <http://avp.org/wp-content/uploads/2019/01/NCAVP-HV-IPV-2017-report.pdf>.

¹¹ *Id.* at 33.

¹² *Id.* at 31.

¹³ *Id.* at 32.

¹⁴ *Id.* at 17.

- coworkers (22%), relatives or family members (21%), and landlords or neighbors (20%).¹⁵
- Nearly half (46%) of survivors reported being injured as a result of the violence they experienced and 45% sought medical attention.¹⁶
 - In 2016, the NCAVP collected 1,036 incidents of hate violence against LGBTQ survivors and survivors living with HIV.¹⁷ Twelve local NCAVP member organizations in 11 states provided these accounts.¹⁸
 - Of all survivors, 44% were cisgender men, 21% were cisgender women, 21% were transgender women, 5% were transgender men, and the remaining 9% selected other gender identities.¹⁹
 - The majority (61%) of survivors were people of color, including 29% who were Latinx and 21% who were Black/African American.²⁰
 - The most common types of violence reported by survivors were verbal harassment (20%), threats or intimidation (17%), and physical violence (11%).²¹
 - Of the 981 survivors who reported information about their relationship to the offender, the majority (58%) reported that they knew the person; most commonly landlords or neighbors (22%), relatives or family members (17%), employers or coworkers (16%), and former romantic partners (10%).²²
 - Nearly one-third (31%) of survivors reported being injured as a result of the violence they experienced.²³
 - In 2015, the NCAVP collected 1,253 incidents of hate violence against LGBTQ survivors and survivors living with HIV.²⁴ Thirteen local NCAVP member organizations in 12 states provided these accounts.²⁵
 - Of all survivors, 30% were cisgender men, 25% were cisgender women, 22% were transgender, and the remaining 23% selected other gender identities.²⁶
 - The majority (60%) of survivors were people of color.²⁷

¹⁵ *Id.* at 21.

¹⁶ *Id.* at 20.

¹⁷ EMILY WATERS ET AL., NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2016, at 25 (2017), http://avp.org/wp-content/uploads/2017/06/NCAVP_2016HateViolence_REPORT.pdf.

¹⁸ *Id.*

¹⁹ *Id.* at 9.

²⁰ *Id.* at 9–10.

²¹ *Id.* at 12.

²² *Id.* at 32.

²³ *Id.* at 13.

²⁴ EMILY WATERS ET AL., NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2015, at 14 (2016), http://avp.org/wp-content/uploads/2017/04/ncavp_hvreport_2015_final.pdf.

²⁵ *Id.*

²⁶ *Id.* at 9.

²⁷ *Id.*

- The most common types of violence reported by survivors were verbal harassment (15%), discrimination (14%), physical violence (12%), and threats or intimidation (11%).²⁸ Survivors of color were twice as likely to experience physical violence as white survivors.²⁹
- Of the 1,024 survivors who reported information about their relationship to the offender, the majority (62%) reported that they knew the person; most commonly landlords or neighbors (25%), employers or co-workers (16%), relatives or family members (11%), and former romantic partners (10%).³⁰

Other studies conducted over the past decade have found similar patterns of violence against LGBTQ people, including higher rates of violent victimization among transgender people and LGBTQ people of color. Key findings from these studies include:

- A 2010 study by the National Center for Injury Prevention and Control based on data from the National Intimate Partner and Sexual Violence Survey found that bisexual women experienced significantly higher rates of sexual victimization over their lifetimes than men or women of other sexual orientations.³¹ Nearly half (46.1%) of bisexual women experienced rape in their lifetimes compared to 13.1% of lesbian women and 17.4% of heterosexual women; and 74.9% of bisexual women experienced sexual violence other than rape compared to 46.4% of lesbian women and 43.3% of heterosexual women.³² In addition, more than one-third of bisexual women (36.6%) had experienced stalking victimization compared to 1 in 6 (15.5%) heterosexual women.³³ Gay and bisexual men were also more likely than heterosexual men to experience sexual violence other than rape (47.4% of bisexual men, 40.2% of gay men, and 20.8% of heterosexual men).³⁴
- A 2019 report by the Transgender Law Center based on a survey of transgender people in 13 Southern states found that 47% of transgender respondents—including 58% of trans women and femme respondents—reported experiencing high-intensity violence from strangers.³⁵
- A 2019 report by the Human Rights Campaign and the Transgender People of Color Coalition documented 157 homicides of transgender people between 2013–2019.³⁶ At least 87% of the victims were transgender women, and 81% of them were transgender women of color.³⁷ Of the 139 victims who were people of color, 122 were Black.³⁸ At least 49% of the transgender people killed by violence in 2019 were killed by someone they knew, including an

²⁸ *Id.* at 10.

²⁹ *Id.*

³⁰ *Id.* at 23.

³¹ M.L. WALTERS ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION 1 (2013), https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf.

³² *Id.*

³³ *Id.* at 2.

³⁴ *Id.* at 1.

³⁵ TRANSGENDER L. CTR., THE GRAPEVINE: A SOUTHERN TRANS REPORT 6 (2019), http://transgenderlawcenter.org/wp-content/uploads/2019/05/grapevine_report_eng-FINAL.pdf.

³⁶ HUMAN RIGHTS CAMPAIGN FOUND., A NATIONAL EPIDEMIC: FATAL ANTI-TRANSGENDER VIOLENCE IN THE UNITED STATES IN 2019, at 12 (2019), https://www.washingtonblade.com/content/files/2019/11/Anti-TransViolenceReport_111519final.pdf.

³⁷ *Id.*

³⁸ *Id.* at 13.

acquaintance, friend, family member, or intimate partner.³⁹ In about one-third of the deaths (32%), the relationship between the victim and the killer is unknown.⁴⁰

- The 2015 U.S. Transgender Survey—the largest survey of transgender people in the U.S. to date—⁴¹ found high rates of violence against transgender respondents:
 - 47% of transgender respondents reported that they had been sexually assaulted at some point in their lives; one in ten had been sexually assaulted in the prior year.⁴²
 - 13% of transgender respondents reported that they had been physically attacked within the past year; 5% of respondents were attacked by a stranger because of their gender identity.⁴³ When asked how they were attacked, respondents most commonly reported that they were grabbed, punched, or choked (73%); had an object thrown at them (29%); or were sexually assaulted (29%).⁴⁴
 - Among transgender respondents who were out to their families, 10% reported that a family member was violent toward them because they were transgender.⁴⁵
- A 2011 study based on data collected through the Behavioral Risk Factor Surveillance System survey in Massachusetts found that lesbian and bisexual women were more likely to report sexual victimization in their lifetimes than heterosexual women.⁴⁶

These findings consistently demonstrate that LGBTQ people experience high rates of violence and that while often this violence is from strangers, it is just as likely, if not more likely, to be perpetrated by people that they know, as further discussed below.

Intimate partner violence against LGBTQ people

Research shows that, in addition to violence more generally, LGBTQ people are also at increased risk of experiencing violence within intimate relationships.

For example, reports on intimate partner violence (IPV) against LGBTQ people and people living with HIV conducted by the NCAVP documented over 6,000 incidents of IPV over a three-year period (2015–2017).⁴⁷ Like the NCAVP's reports on hate violence, the reports on intimate partner violence are based on data collected by local member organizations across the nation that provide programs and services for survivors. While these data do not represent the total number of incidents of IPV against LGBTQ people over this time period, the reports illustrate the impact of such violence on LGBTQ communities. Findings from the most recent NCAVP reports (2015, 2016, and 2017) include:

³⁹ *Id.* at 21.

⁴⁰ *Id.*

⁴¹ SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 2 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

⁴² *Id.* at 3.

⁴³ *Id.* at 203.

⁴⁴ *Id.* at 204.

⁴⁵ *Id.* at 71.

⁴⁶ Kerith J. Conron et al., *A Population-Based Study of Sexual Orientation and Identity and Gender Differences in Adult Health*, 100 AM. J. OF PUB. HEALTH 1953 (2010).

⁴⁷ See generally NYC ANTI-VIOLENCE PROJECT, *supra* note 9.

- In 2017, the NCAVP collected information about 2,144 incidents of IPV against LGBTQ survivors and survivors living with HIV.⁴⁸ Fourteen local NCAVP member organizations in 11 states provided these accounts.⁴⁹
 - Of all survivors, 45% were cisgender men, 35% were cisgender women, 11% were transgender women, 4% were transgender men, and the remaining 5% selected other gender identities.⁵⁰
 - The majority (59%) of survivors were people of color, including 21% who were Black and 27% who were Latino/a.⁵¹
 - The most common types of violence reported by survivors were verbal harassment (19%), physical violence (16%), and threats or intimidation (11%).⁵² Transgender women were nearly 2.5 times more likely to experience IPV that included sexual violence than other LGBTQ survivors.⁵³
 - Nearly half (48%) of survivors reported being injured as a result of the violence they experienced and 45% sought medical attention.⁵⁴
- In 2016, the NCAVP collected information about 2,032 incidents of IPV against LGBTQ survivors and survivors living with HIV.⁵⁵ Fourteen local NCAVP member organizations in nine states provided these accounts.⁵⁶
 - Of all survivors, 43% were cisgender men, 38% were cisgender women, 11% were transgender women, 3% were transgender men, and the remaining 5% selected other gender identities.⁵⁷
 - The majority (59%) of survivors were people of color, including 30% who were Latino/a and 18% who were Black/African American.⁵⁸
 - The most common types of IPV reported by survivors were physical violence (19%), verbal harassment (18%), and threats or intimidation (11%).⁵⁹
 - Twenty-eight percent of survivors reported being injured as a result of the violence they experienced and 20% sought medical attention.⁶⁰

⁴⁸ TILLERY ET AL., *supra* note 10.

⁴⁹ *Id.* at 33.

⁵⁰ *Id.* at 31.

⁵¹ *Id.* at 32.

⁵² *Id.* at 18.

⁵³ *Id.* at 17.

⁵⁴ *Id.* at 20.

⁵⁵ EMILY WATERS, NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2016, at 11 (2017), <http://avp.org/wp-content/uploads/2017/11/NCAVP-IPV-Report-2016.pdf>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 12.

⁶⁰ *Id.* at 20.

- In 2015, the NCAVP collected information about 1,976 incidents of IPV against LGBTQ survivors and survivors living with HIV.⁶¹ Seventeen local NCAVP member organizations in 14 states provided these accounts.⁶²
 - Of all survivors, 32% were cisgender men, 31% were cisgender women, 10% were transgender, and the remaining 27% selected other gender identities.⁶³
 - The majority (54%) of survivors were people of color, including 24% who were Latino/a and 21% who were Black/African American.⁶⁴
 - The most common types of IPV reported by survivors were physical violence (20%), verbal harassment (18%), and threats or intimidation (13%).⁶⁵ Transgender women were three times more likely to report IPV that included sexual violence than other LGBTQ survivors.⁶⁶

In addition to the NCAVP reports, a number of other studies have documented IPV against LGBTQ people over the past decade. Many of these studies show that LGBTQ people are at elevated risk of IPV compared to non-LGBTQ people, and reveal particular vulnerability among marginalized communities within the LGBTQ population, including transgender women, bisexual women, and LGBTQ youth. Key findings from some of these studies include:

- The 2010 National Center for Injury Prevention and Control study—based on data from the National Intimate Partner and Sexual Violence Survey—indicated that bisexual men and women were more likely to experience IPV in their lifetimes than men or women of other sexual orientations.⁶⁷ Sixty-one percent of bisexual women and 37.3% of bisexual men experienced IPV, including rape, physical violence, and/or stalking by an intimate partner, compared to 43.8% of lesbian women, 26.0% of gay men, 35.0% of heterosexual women, and 29.0% of heterosexual men.⁶⁸ Rates of IPV involving severe physical violence were also higher among bisexual women (49.3%) compared to lesbian (29.4%) and heterosexual (23.6%) women.⁶⁹ Gay men and heterosexual men experienced similar rates of IPV involving severe physical violence (16.4% and 13.9%; no data on bisexual men).⁷⁰ Many survivors of IPV reported that the experience had negative impacts on their lives, including necessitating missing work or school, causing them to be fearful, and their exhibiting post-traumatic stress symptoms.⁷¹

⁶¹ EMILY WATERS, NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2015, at 14 (2016), http://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf.

⁶² *Id.*

⁶³ *Id.* at 17.

⁶⁴ *Id.* at 9, 17.

⁶⁵ *Id.* at 9.

⁶⁶ *Id.* at 10.

⁶⁷ NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION, at 2 (2014), https://www.acesdv.org/wp-content/uploads/2014/06/NISVS_FactSheet_LBG-a.pdf.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

- A 2018 study based on a survey of young transgender women in Chicago and Boston found that 42% had experienced IPV in their lifetime.⁷²
- A 2017 study analyzing data on IPV collected from patients seeking primary care at an urban community health center found that 12.1% of transgender or gender non-conforming women, 6.6% of transgender or gender non-conforming men, and 8.2% of non-binary individuals experienced IPV within the prior year, compared to 2.7% of cisgender women.⁷³
- The 2011 analysis of Behavioral Risk Factor Surveillance System survey data in Massachusetts found that bisexual women were more likely to report IPV in their lifetime than heterosexual women.⁷⁴
- Similarly, a 2013 analysis of health survey data from California found that bisexual women had more than three times the odds of experiencing lifetime IPV, and four times the odds of experiencing IPV within the past year, compared to heterosexual women.⁷⁵ In comparison to heterosexual men, gay men had two and half times the odds of both lifetime and past-year IPV.⁷⁶
- A 2014 study based on a survey of youth across three states found that LGB youth experienced higher levels of dating victimization than non-LGB youth: 43% of LGB youth reported physical dating violence (compared to 29% of non-LGB youth), 59% reported psychological dating abuse (compared to 46% of non-LGB youth), 37% reported cyber dating abuse (compared to 26% of non-LGB youth), and 23% reported sexual coercion (compared to 12% of non-LGB youth).⁷⁷
- An analysis of data from the nationwide 2019 Youth Risk Behavior Survey (YRBS) found that LGB high school students were more likely to experience IPV than heterosexual students.⁷⁸ LGB students were more likely to report physical and sexual dating violence than heterosexual students: 13.1% of LGB students reported physical dating violence within the past year compared to 7.2% of the heterosexual students, and 16.4% of LGB students reported sexual dating violence within the past year compared to 6.7% of heterosexual students.⁷⁹ In addition, 19.4% of LGB students had been forced to have sexual intercourse when they did not want to, compared to 5.5% of heterosexual students.⁸⁰
- Rates of dating violence were also higher among transgender students compared to cisgender students. An analysis of YRBS data collected in 2017 from 19 states and localities found

⁷² Rachel C. Garthe et al., *Prevalence and Risk Correlates of Intimate Partner Violence Among a Multisite Cohort of Young Transgender Women*, 5 *LGBT HEALTH* 333, 337 (2018).

⁷³ Sarah E. Valentine et al., *Disparities in Exposure to Intimate Partner Violence Among Transgender/Gender Nonconforming and Sexual Minority Primary Care Patients*, 4 *LGBT HEALTH* 260, 264 (2017).

⁷⁴ Conron et al., *supra* note 46.

⁷⁵ Naomi G. Goldberg & Ilan H. Meyer, *Sexual Orientation Disparities in History of Intimate Partner Violence: Results from the California Health Interview Survey*, 28 *J. OF INTERPERSONAL VIOLENCE* 1109 (2013).

⁷⁶ *Id.* at 1113.

⁷⁷ Meredith Dank et al., *Dating Violence Experiences of Lesbian, Gay, Bisexual, and Transgender Youth*, 43 *J. OF YOUTH & ADOLESCENCE* 846, 851 (2014).

⁷⁸ J. Michael Underwood et al., Ctrs. for Disease Control & Prevention, *Overview and Methods for the Youth Risk Behavior Surveillance System – United States, 2019*, 69 *MORBIDITY & MORTALITY WKLY. REP.* 1, 22 (2020).

⁷⁹ *Id.* at 23.

⁸⁰ *Id.*

that 26.4% of transgender students had experienced physical dating violence, 22.9% had experienced sexual dating violence, and 23.8% were forced to have sexual intercourse.⁸¹ Cisgender male and female students were less likely to have experienced all three types of IPV: 8.7% of cisgender female and 5.8% of cisgender male students had experienced physical dating violence; 12% of cisgender female and 3.5% of cisgender male students had experienced sexual dating violence; and 10.5% of cisgender female and 4.2% of cisgender male students were forced to have sexual intercourse.⁸²

- The 2015 U.S. Transgender Survey found that more than half (54%) of transgender respondents experienced some form of IPV.⁸³ Over 40% of respondents (42%) reported experiencing at least one type of physical IPV and 24% reported severe physical violence by an intimate partner.⁸⁴ In addition, about one-third (34%) of respondents who had been sexually assaulted in their lives (47%) said that they were assaulted by a current or former partner.⁸⁵

Violence against LGBTQ people begins when they are young

Violence against LGBTQ people often starts early in their lives, either by family members at home or by other students at school. Many non-LGBTQ youth observe this mistreatment and the ways in which adults and institutions respond, or fail to respond. Some non-LGBTQ youth, of course, are also the ones harassing and bullying LGBTQ youth.

Research shows that many LGBTQ youth have strained relationships with their families because of their sexual orientation and gender identity.⁸⁶ For example, in one study about the challenges that youth face, LGBT youth ranked non-accepting families as the most important problem in their lives (26%), followed by school and bullying problems (21%) and fear of being open about being LGBT (18%).⁸⁷ In contrast, non-LGBT youth ranked classes/exams/grades (25%), college/career (14%), and financial pressures related to college or job (11%) as the most important problems in

⁸¹ Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, *Transgender Identity and Experiences of Violence Victimization, Substance Abuse, Suicide Risk, and Sexual Risk Behaviors Among High School Students – 19 States and Large Urban School Districts, 2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 67, 69 (2019).

⁸² *Id.*

⁸³ JAMES ET AL., *supra* note 41, at 207.

⁸⁴ *Id.* at 208.

⁸⁵ *Id.* at 205–06.

⁸⁶ See, e.g., Bryan N. Cochran et al., *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with Their Heterosexual Counterparts*, 92 AM. J. PUB. HEALTH 733 (2002); Anthony R. D’Augelli et al., *Parents’ Awareness of Lesbian, Gay, and Bisexual Youths’ Sexual Orientation*, 67 J. MARRIAGE & FAM. 474 (2005); Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L.J. 774, 788 (2006); Darrel Higa et al., *Negative and Positive Factors Associated with the Well-Being of Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning (LGBTQ) Youth*, 46 YOUTH & SOC’Y 663, 669 (2012); Les B. Whitbeck et al., *Mental Disorder, Subsistence Strategies, and Victimization Among Gay, Lesbian, and Bisexual Homeless and Runaway Adolescents*, 41 J. SEX RES. 329 (2004); CHRISTY MALLORY ET AL., WILLIAMS INST., ENSURING ACCESS TO MENTORING PROGRAMS FOR LGBTQ YOUTH (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Access-to-Youth-Mentoring-Programs.pdf>.

⁸⁷ HUMAN RIGHTS CAMPAIGN, GROWING UP LGBT IN AMERICA: HRC YOUTH SURVEY REPORT KEY FINDINGS 2 (2012), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf.

their lives.⁸⁸ In some cases, these strained family relationships include physical, emotional, and other types of childhood abuse.⁸⁹ For example, a 2002 analysis of data from the National Survey of Midlife Development in the United States found that LGB men and women reported higher rates of physical and emotional childhood maltreatment than non-LGB men and women.⁹⁰ The differences in treatment were most pronounced for major physical abuse, with LGB men being about three times as likely to report these experiences, and LGB women about eight times as likely, as their non-LGB counterparts.⁹¹ In addition, the 2015 U.S. Transgender Survey found that 10% of respondents who were out as transgender when they were children experienced violence at the hands of a family member because of their gender identity.⁹²

Research also indicates that LGBTQ youth face high rates of bullying and victimization at school. An analysis of data collected through the 2019 national YRBS found that LGB high school students were more likely than their non-LGB peers to report being bullied at school (32% LGB students v. 17.1% heterosexual students), being threatened or injured with a weapon on school property (11.9% v. 6.3%), and feeling unsafe at school (13.5% v. 7.5%).⁹³ Prior reports based on YRBS data have documented similar patterns of bullying and harassment against LGB students.⁹⁴ Transgender students also face elevated levels of violence at school compared to cisgender students. An analysis of YRBS data collected in 2017 from 19 states and localities found that among transgender students, 34.6% reported being bullied at school, 23.8% reported being threatened or injured with a weapon at school, and 26.9% reported feeling unsafe at or on the way to school.⁹⁵ By comparison, 20.7% of cisgender female and 14.7% of cisgender male students reported being bullied; 4.1% of cisgender female students and 6.4% of cisgender male students reported being threatened or injured with a weapon; and 7.1% of cisgender female students and 4.6% of cisgender male students reported feeling unsafe at or on the way to school.⁹⁶

Community-based surveys have documented similar levels of violence against LGBTQ students. For example, the GLSEN 2019 National School Climate Survey found that more than 80% of LGBTQ

⁸⁸ *Id.*

⁸⁹ See, e.g., S. Bryn Austin et al., Disparities in Child Abuse Victimization in Lesbian, Bisexual, and Heterosexual Women in the Nurses' Health Study II, 17 *J. WOMENS HEALTH* 597 (2008); Andrea L. Roberts et al., *Childhood Gender Nonconformity: A Risk Indicator for Childhood Abuse and Posttraumatic Stress in Youth*, 129 *PEDIATRICS* 410 (2012); Elizabeth M. Saewyc et al., *Hazards of Stigma: The Sexual and Physical Abuse of Gay, Lesbian, and Bisexual Adolescents in the United States and Canada*, 85 *CHILD WELFARE* 195 (2006); Joel P. Stoddard et al., *Sexual and Physical Abuse: A Comparison Between Lesbians and Their Heterosexual Sisters*, 56 *J. HOMOSEXUALITY* 406 (2009); Christopher Zou and Judith P. Andersen, *Comparing the Rates of Early Childhood Victimization across Sexual Orientations: Heterosexual, Lesbian, Gay, Bisexual, and Mostly Heterosexual*, 10 *PLoS ONE* (2015).

⁹⁰ Heather L. Corliss et al., *Reports of Parental Maltreatment During Childhood in a United States Population-Based Survey of Homosexual, Bisexual, and Heterosexual Adults*, 26 *CHILD ABUSE & NEGLECT* 1165 (2002).

⁹¹ *Id.* at 1171–73.

⁹² JAMES ET AL., *supra* note 41, at 65.

⁹³ Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students – Youth Risk Behavior Survey, United States, 2015–2019*, 69 *MORBIDITY & MORTALITY WKLY. REP.* 19, 23 (2019).

⁹⁴ *Id.* at 22.

⁹⁵ Johns et al., *supra* note 81.

⁹⁶ *Id.*

students reported that they experienced some type of harassment or assault at school.⁹⁷ More specifically, 34.2% experienced physical harassment, 14.8% experienced physical assault, and 58.3% experienced sexual harassment.⁹⁸ Similarly, in response to the 2015 U.S. Transgender Survey, many respondents who were out as transgender reported experiencing bullying and harassment at school: 54% reported experiencing verbal harassment, 24% reported physical assault, and 13% reported sexual assault.⁹⁹

VIOLENCE AGAINST LGBTQ PEOPLE CAN RESULT IN DEATH

It is not possible to reliably estimate the number of LGBTQ deaths attributable to violence due to limitations in the way data on violent deaths are collected and reported. The National Violent Death Reporting System, which pools data on violent deaths from multiple sources (e.g., death certificates, law enforcement reports, etc.) across states, provides a structure for collecting data on sexual orientation and gender identity, but this information is generally incomplete and unreliable due to the challenges of collecting information about LGBTQ status after death and the inconsistency in data collection and recording methods across states.¹⁰⁰ Other surveillance systems that track violent deaths, such as the National Incident-Based Reporting System and the Uniform Crime Reports, similarly do not collect reliable information about victims' LGBTQ status.¹⁰¹ As a result, the extent to which violence results in death among LGBTQ people cannot be accurately assessed.

Nonetheless, the NCAVP reports, based on reports from community organizations, provide some insight into homicides of LGBTQ people and people living with HIV. The three most recent reports produced by the NCAVP gathered information about nearly 200 homicides related to hate violence and IPV between 2015 and 2017. Key findings include:

- In 2017, the NCAVP collected information about 67 homicides of LGBTQ people and people living with HIV.¹⁰²
 - Fifty-two homicides were related to hate violence.¹⁰³ The majority of victims were people of color (71%) and/or transgender or gender non-conforming (52%).¹⁰⁴ Forty percent of the homicide victims were transgender women of color.¹⁰⁵
 - Almost one fourth (22.3%) were homicides related to IPV.¹⁰⁶ Nine of these victims were cisgender men, five were cisgender women, and one was a transgender man.¹⁰⁷

⁹⁷ JOSEPH G. KOSCIW ET AL., GLSEN, THE 2019 NATIONAL SCHOOL CLIMATE SURVEY XIX (2020), <https://www.glsen.org/sites/default/files/2020-11/NSCS19-111820.pdf>.

⁹⁸ *Id.* at 28–39.

⁹⁹ JAMES ET AL., *supra* note 41, at 132.

¹⁰⁰ Vickie M. Mays & Susan D. Cochran, *Challenges and Opportunities for Modernizing the National Violent Death Reporting System*, 109 AM. J. PUB. HEALTH 192 (2019).

¹⁰¹ See generally *UCR Technical Specifications, User Manuals, and Data Tools*, FBI, <https://www.fbi.gov/services/cjis/ucr/data-documentation> (last visited Jan. 14, 2021).

¹⁰² TILLERY ET AL., *supra* note 10, at 13.

¹⁰³ *Id.* at 7.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 13.

¹⁰⁷ *Id.* at 14.

- In 2016, the NCAVP collected information about 92 homicides of LGBTQ people and people living with HIV.¹⁰⁸
 - Seventy-seven incidents were homicides related to hate violence, including the 49 victims of the Pulse Nightclub shooting in June 2016.¹⁰⁹
 - Excluding the Pulse Nightclub shooting, over one-third (32.6%) were homicides related to IPV.¹¹⁰ Sixty percent of these 15 victims were people of color.¹¹¹ Nine of these victims were cisgender men, three were cisgender women, two were transgender women, and one was non-binary.¹¹²
- In 2015, the NCAVP collected information about 37 homicides of LGBTQ people and people living with HIV.¹¹³
 - Twenty-four incidents were homicides related to hate violence.¹¹⁴ Two-thirds (67%) of the victims were transgender or gender non-conforming.¹¹⁵ Over half (54%) of the homicide victims were transgender women of color.¹¹⁶
 - Over one third (35.2%) were homicides related to IPV.¹¹⁷ Three-quarters (77%) of these victims were people of color.¹¹⁸ Six of the victims were transgender women—all of whom were transgender women of color; four of the victims were cisgender men and three were cisgender women.¹¹⁹

Prior NCAVP reports show similar patterns of homicides of LGBTQ people and people living with HIV. Between 1998 and 2014, NCAVP documented 429 homicides related to hate violence and 151 homicides related to HIV.¹²⁰

In addition to the NCAVP reports, a 2019 report by the Human Rights Campaign and the Transgender People of Color Coalition documented 157 homicides of transgender people between 2013–2019.¹²¹ At least 87% of the victims were transgender women, and 81% of them were transgender women of color.¹²² Of the 139 victims who were people of color, 122 were Black.¹²³

¹⁰⁸ WATERS ET AL., *supra* note 17, at 9; WATERS, *supra* note 55, at 10.

¹⁰⁹ WATERS ET AL., *supra* note 17, at 9.

¹¹⁰ WATERS, *supra* note 55, at 10.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ WATERS ET AL., *supra* note 24, at 9; WATERS, *supra* note 61, at 8.

¹¹⁴ WATERS ET AL., *supra* note 24, at 9.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ WATERS, *supra* note 61, at 8.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 9.

¹²⁰ OSMAN AHMED & CHAI JINDASURAT, NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED HATE VIOLENCE IN 2014, at 24 (2015), http://avp.org/wp-content/uploads/2017/04/2014_HV_Report-Final.pdf.

¹²¹ HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 36, at 12.

¹²² *Id.*

¹²³ *Id.* at 13.

LGBTQ PEOPLE FACE BARRIERS TO ADDRESSING VIOLENCE, INCLUDING IPV

Discrimination and harassment by law enforcement

Discrimination and harassment by law enforcement can create barriers to addressing crimes against LGBTQ people and providing help to LGBTQ victims. For decades, LGBTQ communities—particularly LGBTQ people of color, youth, and transgender and gender non-conforming people—have been subject to various forms of mistreatment by law enforcement, including profiling, entrapment, discrimination, harassment, and violence.¹²⁴ These incidents have been well-documented in surveys, court cases, media reports, academic scholarship and other sources.¹²⁵ Recent research indicates that these longstanding issues have not been resolved despite expanding legal rights and growing public acceptance of LGBTQ people, and continue to create tension between law enforcement and LGBTQ communities.¹²⁶ Research conducted over the past decade documenting discrimination and harassment by law enforcement against LGBTQ communities include:

- The 2015–2017 NCAVP reports documented homicides caused by police and rates of police misconduct among LGBTQ people and people living with HIV who were affected by hate violence and IPV.¹²⁷ Over the three year period, seven homicides were caused by police, and 5% to 14% of survivors who interacted with police reported police misconduct.¹²⁸
- A 2019 report by the Transgender Law Center based on a survey of transgender people in the South found that 41% of all respondents, including 52% of respondents of color, reported experiencing high-intensity violence by law enforcement.¹²⁹
- The 2015 U.S. Transgender Survey found that a significant number of respondents who had interacted with the police in the past year had negative experiences.¹³⁰ The majority (58%) of respondents who interacted with police that knew or thought they were transgender said that they had experienced at least one form of disrespect or mistreatment.¹³¹ In terms of harassment and assault, 20% reported that they were verbally harassed by officers, 4% said they were physically attacked by officers, and 3% said they were sexually assaulted by officers.¹³² American Indian, multiracial, Latino/a, and Black respondents were more likely to report that they experienced one or more forms of police mistreatment.¹³³

¹²⁴ See CHRISTY MALLORY ET AL., WILLIAMS INST., DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY 6 (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf>; ARI SHAW, WILLIAMS INST., VIOLENCE AND LAW ENFORCEMENT INTERACTIONS WITH LGBT PEOPLE IN THE US (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Violence-Law-Enforce-Mar-2020.pdf>.

¹²⁵ See *supra* note 124.

¹²⁶ *Id.*

¹²⁷ See reports cited *supra* notes 10, 17, 24, 55, and 61.

¹²⁸ Information was not included in all reports. For specific references to available data, see reports cited *supra* note 10, at 8; *supra* note 17, at 15, 83, 75; *supra* note 24, at 24; *supra* note 55, at 10.

¹²⁹ TRANSGENDER L. CTR., *supra* note 35, at 6.

¹³⁰ JAMES ET AL., *supra* note 41, at 14.

¹³¹ *Id.* at 185.

¹³² *Id.* at 186.

¹³³ *Id.*

- A 2015 report by Lambda Legal based on a national survey of LGBTQ people and people living with HIV found that 73% of respondents had face-to-face contact with the police in the past five years.¹³⁴ Of those respondents, 21% reported encountering hostile attitudes from officers, 14% reported verbal assault by the police, 3% reported sexual harassment, and 2% reported physical assault at the hands of law enforcement officers.¹³⁵ Police abuse, neglect, and misconduct were consistently reported at higher frequencies by respondents of color and transgender and gender nonconforming respondents.¹³⁶
- A 2012 report by the Center for Constitutional Rights on the New York City Police Department's stop and frisk practices found that "LGBTQ/GNC [Gender Nonconforming] communities are heavily impacted by stops and frisks. Several people interviewed for this report described stops where police treated them in a cruel or degrading manner because of their actual or perceived sexual orientation, or gender identity, or expression, or because they were gender non-conforming."¹³⁷ Transgender women in particular were found to be "a huge target for NYPD discrimination."¹³⁸
- A 2012 report by Make the Road New York found that members of LGBTQ communities of color in Queens reported high rates of abuse from law enforcement.¹³⁹ The report surveyed more than 300 Queens residents about their interactions with police officers.¹⁴⁰ Fifty-four percent of LGBTQ respondents reported that they had been stopped by police, compared to 28% of non-LGBTQ respondents.¹⁴¹ Among those who reported being stopped, 51% of all LGBTQ respondents—including 61% of all transgender respondents—reported that they had been physically or verbally harassed by the police during the stop, compared with 33% of non-LGBTQ respondents.¹⁴²
- A 2012 report by Bienestar that examined interactions between law enforcement and Latina transgender women in Los Angeles County found that respondents reported experiencing high rates of discrimination and mistreatment.¹⁴³ Two-thirds reported that they had been verbally harassed by law enforcement, 21% reported that they had been physically assaulted by law enforcement, and 24% reported that they had been sexually assaulted by law enforcement.¹⁴⁴

¹³⁴ LAMBDA LEGAL, PROTECTED AND SERVED? 6 (2015), https://www.lambdalegal.org/sites/default/files/publications/downloads/ps_executive-summary.pdf.

¹³⁵ *Id.*

¹³⁶ *Id.* at 8.

¹³⁷ CTR. FOR CONST. RIGHTS, STOP AND FRISK: THE HUMAN IMPACT REPORT 11 (2012), <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>.

¹³⁸ *Id.* at 12.

¹³⁹ MAKE THE ROAD N.Y., TRANSGRESSIVE POLICING: POLICE ABUSE OF LGBT COMMUNITIES OF COLOR IN JACKSON HEIGHTS (2012), https://maketheroadny.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf.

¹⁴⁰ *Id.* at 4.

¹⁴¹ *Id.*

¹⁴² *Id.* at 5.

¹⁴³ FRANK H. GALVAN & MOHZEN BAZARGAN, BIENESTAR, INTERACTIONS OF TRANSGENDER LATINA WOMEN WITH LAW ENFORCEMENT 1 (2012), <https://escholarship.org/uc/item/62p795s3>.

¹⁴⁴ *Id.*

- In 2011, the U.S. Department of Justice’s Civil Rights Division released a report finding that LGBTQ people were often the victims of “discriminatory policing” by the New Orleans Police Department (NOPD).¹⁴⁵ LGBT citizens—as well as NOPD officers—agreed that LGBT community members in particular were subject to “harassment and disrespectful treatment, and unfairly target[ed] for stops, searches, and arrests.”¹⁴⁶ More specifically, LGBT community members reported “harassment and even sexual and physical abuse by law enforcement,” as well as a “long-standing failure by NOPD to take complaints by LGBT individuals seriously.”¹⁴⁷ The LGBT community additionally reported that these tactics “serve to drive a wedge between the police and the public, antagonizing and alienating members of the community.”¹⁴⁸
- A 2011 report based on a survey of New York City youth found that LGBQ youth reported experiencing negative police contact more often than their straight counterparts (61% versus 47%, respectively).¹⁴⁹ This was especially true for negative verbal experiences with the police, where 54% of LGBQ youth and 39% of non-LGBQ youth reported having such an experience, and negative sexual experiences with police (28% versus 10%, respectively).¹⁵⁰ Additionally, more than half of LGBQ youth reported feeling stressed or worried to some extent by police.¹⁵¹

Negative interactions between LGBTQ people and law enforcement can create barriers to reporting and addressing crime. Several recent studies show that LGBTQ survivors often do not report crimes against them because they fear hostility or inaction from police, and that many LGBTQ people who have reported crimes do not feel like they were adequately addressed. For example:

- The 2015–2017 NCAVP reports collected information about whether respondents reported violence to police and, if so, how law enforcement responded.¹⁵² Over the three year period, 39% to 60% of hate violence and IPV survivors said that they reported the crime or interacted with police as a result of the violence they experienced.¹⁵³ Across reports, 35% to 55% of hate violence survivors who interacted with police said that police were indifferent and 7% to 39% of survivors said police were hostile.¹⁵⁴ Among IPV survivors across reports, 12% to 47% said that police were indifferent and 7% to 12% said that police were hostile.¹⁵⁵
- The 2015 U.S. Transgender Survey found that the majority of respondents (57%) would feel uncomfortable asking for help from the police, including 70% of Middle Eastern, 67% of Black, and 67% of multiracial respondents.¹⁵⁶

¹⁴⁵ U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 31 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf.

¹⁴⁶ *Id.* at ix.

¹⁴⁷ *Id.* at 37.

¹⁴⁸ *Id.* at 35.

¹⁴⁹ Brett G. Stoudt et al., *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. SCH. L. REV. 1331, 1351 (2011).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1354.

¹⁵² See reports cited *supra* notes 10, 17, 24, 55, and 61.

¹⁵³ *Id.*

¹⁵⁴ See reports cited *supra* note 10, at 8; *supra* note 17, at 12; *supra* note 24, at 24.

¹⁵⁵ See reports cited *supra* note 10, at 8; *supra* note 55, at 15; *supra* note 61, at 10.

¹⁵⁶ JAMES ET AL., *supra* note 41, at 188–89.

- The 2014 Lambda Legal report found that many survivors received inadequate responses from police when reporting crimes committed against them.¹⁵⁷ The majority of those who were physically assaulted (62%), along with 41% of those who were IPV survivors and 39% of those who were sexually assaulted, said that police did not fully address their complaints.¹⁵⁸

Discrimination by health care and service providers

Discrimination, and fear of discrimination, by health care and service providers can also create barriers to survivors accessing the services they need. Many LGBTQ people, particularly transgender people, report experiencing discrimination in health care or when accessing services. This discrimination takes many forms, including the outright denial of care or services and the provision of substandard care. For example, a 2010 Lambda Legal report based on a national survey of LGBTQ people and people living with HIV found that 56% of LGB respondents and 70% of transgender respondents reported experiencing at least one form of health care discrimination.¹⁵⁹ Another analysis of a nationally representative survey by the Center for American Progress found that 8% of LGB respondents and 29% of transgender respondents reported being refused care entirely in the preceding twelve months because of their sexual orientation or gender identity.¹⁶⁰ In terms of discrimination by service providers, among U.S. Transgender Survey respondents who experienced homelessness and stayed in a shelter in the previous year, 70% reported some form of mistreatment, including being harassed, assaulted, or kicked out because of their gender identity.¹⁶¹ And, a 2017 qualitative analysis of LGBTQ youths' experiences in homeless shelters included examples of outright denials of service and harassment and discrimination by staff.¹⁶²

Some studies have specifically documented discrimination against LGBTQ violence survivors by health care and other service providers. For example, the 2017 NCAVP report found that 43% of IPV survivors who sought shelter services reported that they were turned away. Nearly one-third (32%) of those who were denied services reported that they were turned away because of their gender identity.¹⁶³ A 2015 analysis of data collected through the National Transgender Discrimination Survey found that 5.8% of transgender respondents who tried to access IPV services and 4.8% of those who tried to

¹⁵⁷ LAMBDA LEGAL, *supra* note 134, at 7.

¹⁵⁸ *Id.*

¹⁵⁹ LAMBDA LEGAL, WHEN HEALTH CARE ISN'T CARING 5 (2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf; see also Jennifer Kates et al., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S.*, KAISER FAMILY FOUND. (May 3, 2018), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/health-and-access-to-care-and-coverage-for-lesbian-gay-bisexual-and-transgender-individuals-in-the-u-s>.

¹⁶⁰ Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), <https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care>.

¹⁶¹ See JAMES ET AL., *supra* note 41, at 176.

¹⁶² Deborah Coolhart & Maria T. Brown, *The Need for Safe Spaces: Exploring the Experiences of Homeless LGBTQ Youth in Shelters*, 82 CHILD & YOUTH SERVS. REV. 230 (2017).

¹⁶³ TILLERY ET AL., *supra* note 10, at 8.

access a rape crisis center experienced discrimination.¹⁶⁴ Transgender people of color and those with disabilities were more likely to experience unequal treatment when accessing IPV services than white and non-disabled transgender respondents.¹⁶⁵

In addition, LGBTQ people may be reluctant to seek out services because they fear discrimination or substandard care by health care and other service providers. Scholars have found that LGBTQ people may perceive service providers as unwelcoming toward LGBTQ survivors, unable to provide competent care to LGBTQ survivors, and only available to support heterosexual, cisgender women.¹⁶⁶ Research also shows that some LGBTQ people are concerned about experiencing health care discrimination and have delayed needed care for this reason.¹⁶⁷ As a result, LGBTQ survivors may encounter additional barriers to accessing services, even if they are available to them.

Inadequate laws to protect LGBTQ survivors of hate violence and IPV

In many states, existing laws do not adequately protect survivors of IPV and hate violence. Currently, forty-five states have hate crimes laws, but many of them do not include sex, sexual orientation, and/or gender identity as protected characteristics. Of the forty-five states with hate crimes laws, 18 do not include sex as a motivating factor, 12 do not include sexual orientation as a motivating factor, and 28 do not include gender identity as a motivating factor.¹⁶⁸ As a result, perpetrators of crimes

¹⁶⁴ Kristie L. Seelman, *Unequal Treatment of Transgender Individuals in Domestic Violence and Rape Crisis Programs*, 59 SW PUBLICATIONS 1, 20 (2015).

¹⁶⁵ *Id.* at 21.

¹⁶⁶ See, e.g., TAYLOR N.T. BROWN & JODY L. HERMAN, WILLIAMS INST., INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE: A REVIEW OF EXISTING RESEARCH (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/IPV-Sexual-Abuse-Among-LGBT-Nov-2015.pdf> (literature review); see generally JAMES ET AL., *supra* note 41.

¹⁶⁷ JAMES ET AL., *supra* note 41, at 98; LAMBDA LEGAL, *supra* note 159, at 13; Mizra & Rooney, *supra* note 160; U.S. Department of Health and Human Services, Office of Disease Prevention and Health Promotion, *Lesbian, Gay, Bisexual, and Transgender Health*, HEALTHYPEOPLE.GOV <http://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health?topicid=25> (last visited Jan. 14, 2021); INST. OF MED., THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE 222–25 (2011); JODY L. HERMAN ET AL., UCLA CTR. HEALTH POL'Y RES., DEMOGRAPHIC AND HEALTH CHARACTERISTICS OF TRANSGENDER ADULTS IN CALIFORNIA 7 (2017), <https://pubmed.ncbi.nlm.nih.gov/29091375/>.

¹⁶⁸ See *State Hate Crimes Statutes*, BRENNAN CTR. FOR JUSTICE (July 2, 2020), <https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-statutes>. Arkansas, Indiana, North Dakota, South Carolina, and Wyoming do not have hate crimes laws. *Id.* The District of Columbia and Puerto Rico maintain hate crimes laws which expressly provide for sex, sexual orientation, and gender identity as motivating factors, while the remainder of the U.S. territories maintain no hate crimes laws at all. *Id.* Among the states with hate crimes laws, nine (Alabama, Idaho, Montana, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, and Virginia) do not include sex, sexual orientation, or gender identity as motivating factors. *Id.*; S.B. 209, 2019–2020 Gen. Assemb., Reg. Sess. (N.C. 2019), <https://webservices.ncleg.gov/ViewBillDocument/2019/1163/0/DRS45078-MLa-67A> (proposing amending North Carolina's hate crimes law to add sex (as "gender"), sexual orientation, and gender identity as motivating factors). The laws of three states—Alaska, Mississippi (as "gender"), and West Virginia—include sex, but not sexual orientation or gender identity. BRENNAN CTR. FOR JUSTICE, *supra*. The Supreme Court of Appeals of West Virginia previously assessed its state's law and determined that "sex" is not inclusive of sexual orientation. *State v. Butler*, 239 W. Va. 168 (2017). However, the court did not reach the question of whether that is the case for gender identity as well, and it remains to be seen whether the court will ultimately reverse itself in light of *Bostock*. Twelve states—Arizona, Georgia, Iowa, Louisiana, Maine, Michigan, Minnesota, Missouri, Nebraska, Rhode Island, Tennessee, and Texas—include sex and sexual orientation, but not gender identity. BRENNAN CTR. FOR JUSTICE, *supra*. Among these states, Arizona, Louisiana, Michigan, Nebraska, Rhode Island, Tennessee,

motivated by bias against LGBTQ victims cannot be charged under standalone hate crimes provisions or receive penalty enhancements for targeting victims because of their sex, sexual orientation, or gender identity in these states.¹⁶⁹

In addition, IPV laws in several states fail to adequately protect individuals regardless of whether they have faced violence at the hands of a same-sex or different-sex partner. Although laws that criminalize IPV expressly apply to individuals in both same-sex and different-sex relationships in all states but North Carolina (discussed *infra*), there is considerable variation in these laws that leaves many survivors without protection. For example, while all laws apply to people in unmarried relationships, 11 states require that such unmarried couples cohabitated in the present or past to receive protection.¹⁷⁰ In other words, these laws would not apply to people in unmarried relationships who have never lived together. Additionally, a number of state laws give courts the discretion to determine whether IPV survivors and their abusers were in a dating relationship, instructing them to consider a number of factors such as the type of relationship, the length of the relationship, the frequency of interaction between the couple, declarations of romantic interest, and attendance at

and Texas specifically protect against discrimination on the bases of “gender” and sexual orientation, but appear to interpret the former term consistent with other states’ use of “sex,” rather than as shorthand for gender *identity*. *Id.* While Georgia’s recently enacted statute contains both “sex and gender” as separate motivating factors, it does not specifically note gender identity. *Id.* This is unlike all other states who expressly provide distinct coverage for gender identity-motivated acts in addition to coverage for acts motivated by either sex or sexual orientation, and so we also include Georgia as being among the states who do not allow for gender identity as a motivating factor. *See also* Nick Morrow, *Human Rights Campaign on Hate Crimes Legislation Enacted in Georgia*, HUM. RIGHTS CAMPAIGN (June 30, 2020), <https://www.hrc.org/news/human-rights-campaign-on-hate-crimes-legislation-enacted-in-georgia>. The Supreme Court’s reasoning in the *Bostock* case may impact courts’ interpretations of the terms “sex,” “gender,” and “sexual orientation” within these statutes; for example, the Michigan Supreme Court recently remanded a court of appeals decision—finding that the state’s hate crimes law’s covering of “gender” does not include crimes motivated by gender identity—for “reconsideration in light of *Bostock*.” *People v. Rogers*, 950 N.W.2d 48 (Mich. 2020). Four states—Florida, Kansas, Kentucky, and Wisconsin—include only sexual orientation, and not sex or gender identity. BRENNAN CTR. FOR JUSTICE, *supra*. Five states—Colorado, Delaware, Massachusetts, Nevada, and Oregon—include both sexual orientation and gender identity, but not sex. *Id.*; S.B. 577, 80th Leg. Assemb., 2019 Reg. Sess. (Or. 2019) (amending Oregon’s statute to include gender identity). Notably, while Colorado’s statute only specifically lists “sexual orientation,” the term is defined inclusive of “transgender status.” COLO. REV. STAT. ANN. § 18-9-121 (West 2013). Finally, California, Connecticut, Hawaii, Illinois, Maryland, New Hampshire, New Jersey, New Mexico, New York, Utah, Vermont, and Washington all include sex, sexual orientation, and gender identity as distinct motivating factors. BRENNAN CTR. FOR JUSTICE, *supra*; H.B. 608, H.R., 2019 Reg. Sess. (N.H. 2019) (amending the state’s hate crimes law, among others, to include gender identity); S.B. 1047, 242nd Leg., 2019 Sess. (N.Y. 2019) (same); S.H.B. 1732, 66th Leg., 2019 Reg. Sess. (Wa. 2019) (same). While Maryland’s law specifically lists just “sexual orientation [and] gender,” the former term is defined inclusive of “gender-related identity.” MD. CODE ANN., CRIM. LAW § 10-301 (West 2020).

¹⁶⁹ *See id.*; *see also* MOVEMENT ADVANCEMENT PROJECT, HATE CRIME LAWS (2020), <https://www.lgbtmap.org/img/maps/citations-hate-crime.pdf> (providing citations and brief analysis on each state’s laws, or lack thereof).

¹⁷⁰ *See Domestic Violence/Domestic Abuse Definitions and Relationships*, NAT’L CONFERENCE OF STATE LEGISLATURES (June 13, 2019), <https://www.ncsl.org/research/human-services/domestic-violence-domestic-abuse-definitions-and-relationships.aspx>.

social outings as a couple, among others.¹⁷¹ Allowing judges to decide whether relationships qualify under these criteria could result in same-sex couples being afforded less protection. Research indicates that some judges lack cultural competence around LGBTQ issues and may be biased against LGBTQ victims and litigants.¹⁷²

On its face, North Carolina's IPV law uniquely excludes violence occurring within a same-sex dating relationship. More specifically, the law protects same-sex and different-sex spouses equally, but offers protection to unmarried couples only if they consist of "persons of the opposite sex."¹⁷³ However, in December 2020, the North Carolina Court of Appeals held that this law's failure to protect unmarried same-sex couples while nonetheless providing protection for similarly situated different-sex couples is a violation of due process and equal protection under both the North Carolina and U.S. Constitutions.¹⁷⁴ While it remains to be seen if the state will appeal and obtain a reversal of this result, the Court of Appeal's ruling currently requires that the same- or different-sex nature of a relationship "not be a factor in the [state's] decision to grant or deny [a claim for protection under the law]."¹⁷⁵

¹⁷¹ See, e.g., ARIZ. REV. STAT. ANN. §13-3601 (West, Westlaw through 2d. Reg. Sess., 2020 Leg.) (providing "factors" meant to determine whether individuals were in a romantic or sexual relationship, including the "type" and length of the relationship).

¹⁷² See LAMBDA LEGAL, *supra* note 134, at 7 (providing survey data suggesting anti-LGBT bias by a number of actors within the judicial system); Todd Brower, *Twelve Angry—and Sometimes Alienated—Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 DRAKE L. REV. 669 (2011); see also Robert G. Bagnall et al., *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984); Heather C. Brunelli, *The Double Bind: Unequal Treatment for Homosexuals within the American Legal Framework*, 20 B.C. THIRD WORLD L.J. 201 (2000); Aaron M. Clemens, *Executing Homosexuality: Removing Anti-Gay Bias from Capital Trials*, 6 GEO. J. GENDER & L. 71 (2005); Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard*, 39 J. HOMOSEXUALITY 93 (2000); Sally Kohn, *Greasing the Wheel: How the Criminal Justice System Hurts Gay, Lesbian, Bisexual, and Transgendered People and Why Hate Crime Laws Won't Save Them*, 27 N.Y.U. REV. L. & SOC. CHANGE 257 (2001); Sheila M. Seelau & Eric P. Seelau, *Gender-Role Stereotypes and Perceptions of Heterosexual, Gay and Lesbian Domestic Violence*, 20 J. FAM. VIOLENCE 363 (2005). Cf. Chan Tov McNamarah, *Sexuality on Trial: Expanding Pena-Rodriguez to Combat Juror Queerphobia*, 17 DUKEMINIER AWARDS J. 393 (2018).

¹⁷³ N.C. GEN. STAT. ANN. § 50B-1(b)(2) (West, Westlaw through 2020 Reg. Sess.).

¹⁷⁴ M.E. v. T.J., No. COA18-1045, 2020 WL 7906672, at *7 (N.C. Ct. App. Dec. 31, 2020).

¹⁷⁵ *Id.*

THE GAY AND TRANS PANIC DEFENSES

In recent decades, there have been advances in law and policy attempting to address anti-LGBTQ violence, including hate crime legislation at the federal, state, and local levels.¹⁷⁶ In spite of these developments, however, the so-called “gay and trans panic” defenses remain available as valid defenses in many states today. When invoked successfully, the gay and trans panic defenses allow perpetrators of LGBTQ murders to receive lesser sentences, and in some cases, avoid being convicted and sentenced altogether, by placing the blame for homicide on the victim’s actual or perceived sexual orientation or gender identity.

Instead of considering the current context of violence against LGBTQ people, including hate crimes and IPV, the gay and trans panic defenses are rooted in the antiquated ideas that being LGBTQ is a mental illness and rely on the assumption that it is reasonable for a perpetrator to react violently to discovering the victim’s sexual orientation or gender identity, or to a romantic advance by an LGBTQ victim. Additionally, some scholars have noted the defenses’ roots in “prejudicial stereotypes of ‘bad’ homosexuals as sexual predators.”¹⁷⁷ In line with these views, criminal defense attorneys began invoking the gay and trans panic defenses in the 1960s, arguing that an LGBTQ victim’s unwanted sexual advance caused perpetrators to enter a state of “homosexual panic.”¹⁷⁸ Although these ideas have since been discredited, their widespread historical acceptance is illustrated by the fact that homosexuality was included in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders until 1973, and that “gender identity disorders” remained in that Manual for 30 additional years.¹⁷⁹

The gay and trans panic defenses wrongly send the message that violence against LGBTQ 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.¹⁸⁰ At that point, no state legislature had yet passed legislation to ban the gay and trans panic defenses, although some courts had rejected the defenses under state law.¹⁸¹ In 2014, California passed legislation amending its

¹⁷⁶ See The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2014); *Hate Crime Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/hate_crime_laws (last visited Jan. 22, 2021) (noting that the hate crime laws of 23 states, two territories, and the District of Columbia expressly cover both sexual orientation and gender identity, while the hate crime laws of 11 other states expressly cover sexual orientation only).

¹⁷⁷ Matthew T. Helmers, *Death and Discourse: The History of Arguing Against the Homosexual Panic Defense*, 17 L. CULTURE & HUMANITIES 285 (2017).

¹⁷⁸ See generally Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 477 (2008); Jordan Blair Woods, *Framing Legislation Banning the Gay/Trans Panic Defenses*, 54 U. RICH. L. REV. 833 (2020).

¹⁷⁹ GORDENE OLGA MACKINZIE, *TRANSGENDER NATION* 69 (1994). This remained the case until 2013, when the APA changed “gender identity disorders” to “gender dysphoria.” AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5)* 451–60 (5th Ed. 2013). 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.” AM. PSYCHIATRIC ASS’N, *GENDER DYSPHORIA* (2013), <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>.

¹⁸⁰ *Id.* at 2.

¹⁸¹ Those states are Florida, Illinois, and Kansas.

statutory definition of voluntary manslaughter,¹⁸² simultaneously becoming the first state to eliminate the gay and trans panic defenses through legislation.¹⁸³ Since then, Illinois, Rhode Island, Nevada, Connecticut, Maine, Hawaii, New York, New Jersey, Washington, Colorado, Virginia, and the District of Columbia have eliminated the gay and trans panic defenses legislatively, and Maryland's legislature passed a ban in 2021, but it has not yet been signed by the governor.¹⁸⁴ Legislation banning the gay and trans panic defenses has been introduced—but not yet enacted—in Minnesota, Pennsylvania, Texas, Massachusetts, New Mexico, Wisconsin, Iowa, Nebraska, Florida, and Oregon.¹⁸⁵ While legislation banning the use of gay and trans panic defense has also been introduced in the U.S. Senate and House of Representatives,¹⁸⁶ it has also yet to be enacted, leaving individuals across the U.S. (including in states which have enacted their own reforms) free to assert the defense in federal cases.

DOCUMENTED USE OF THE GAY AND TRANS PANIC DEFENSES

No state recognizes the gay and trans panic defenses as free-standing defenses under their respective penal codes.¹⁸⁷ 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.¹⁸⁸

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 the 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 approach, defendants argue that the discovery,

¹⁸² 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).

¹⁸³ Parker Marie Molloy, *California Becomes First State to Ban Gay, Trans "Panic" Defenses*, THE ADVOCATE (Sept. 29, 2014), <http://www.advocate.com/crime/2014/09/29/california-becomes-first-state-ban-gay-trans-panic-defenses>.

¹⁸⁴ See LGBTQ+ "Panic" Defense, NAT'L LGBT BAR ASS'N, <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/gay-trans-panic-defense-legislation/> (last visited Feb. 1, 2021) (documenting each state's legislation).

¹⁸⁵ *Id.*

¹⁸⁶ See, e.g., Gay and Trans Panic Defense Prohibition Act of 2018, S. 3188, 115th Cong. (2018).

¹⁸⁷ See references cited *supra* note 178.

¹⁸⁸ Am. Bar Ass'n, Res. 113A, at 1 (2013), <https://lgbtbar.org/wp-content/uploads/sites/6/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>.

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 the 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.

Since the 1960s, the gay and trans panic defenses have appeared in publicly reported court opinions in approximately one-half of the states.¹⁸⁹ The reasoning behind a jury's verdict is not published, and cases in which defendants successfully raised the gay and trans panic defenses generally never result in a court opinion. Additionally, most of the publicly available court decisions on this topic specifically involve the gay panic defense, with several cases of defendants raising the trans panic defense in court instead being reported through the media.¹⁹⁰ For these reasons, the examples from court cases below are skewed toward cases involving defendants who were convicted of murder after not successfully raising a gay or trans panic defense, and who are challenging their convictions in an appeal or habeas corpus proceeding.

In spite of these limitations, these examples show a variety of ways that defendants have raised the gay and trans panic defenses based on theories of provocation, insanity/diminished capacity, and self-defense. These examples also show a mix of outcomes in cases in which defendants have raised the gay and trans panic defenses. In some cases, defendants have successfully raised the gay and trans panic defenses, resulting in those defendants avoiding a murder conviction and receiving reduced sentences for a lesser manslaughter offense. In other cases, courts have rejected that the gay and trans panic defenses are valid defenses under state law. In some cases where defendants have raised the gay and trans panic defenses, judges have allowed an instruction on a lesser included manslaughter offense to go to a jury, though juries have often rejected these defenses 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 the gay and trans panic defenses.

Prior Research on Use of the Gay and Trans Panic Defenses

In 2020, Professor W. Carsten Andresen published research analyzing use of the gay and trans panic

¹⁸⁹ These states include Arizona (2010), California (1967, 1988, 1989, 2002), Florida (2012), Georgia (2001), Kansas (2000, 2006), Illinois (1972, 1977, 1993, 2000, 2004), Indiana (2001), Iowa (2015), Louisiana (1990), Maryland (1992), 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, 2011), Pennsylvania (1989, 2010), Tennessee (1998, 2009), Texas (2007), Wisconsin (2001), and Wyoming (1979, 1999).

¹⁹⁰ For a list and discussion of pre-2015 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); see also Cynthia Lee & Peter Kar Yu Kwan, *The Trans Panic Defense: Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77 (2014).

defenses in the United States.¹⁹¹ He found at least 104 cases across 35 states, the District of Columbia, and Puerto Rico where defendants attempted to raise the defenses between 1970 and 2020.¹⁹² Texas had the highest concentration of cases (16), followed by California (11) and Pennsylvania (10). Other states with at least 3 instances of the defenses included Florida (5), Georgia (5), Michigan (4), Mississippi (4), Illinois (3), Louisiana (3), Massachusetts (3), and New York (3), as well as the District of Columbia (3).

Andresen analyzed the outcomes of cases in which the gay and trans panic defenses were used. He found that charges were reduced for defendants who used the gay and trans panic defenses about one-third of the time (32.7% of cases), “even though the majority of these homicides include incredible violence.”¹⁹³ Overall, defendants were found guilty of homicide in 82.7% of cases and acquitted in 4.8% of cases. For the remaining cases, charges were pending, not indicated, or unknown.¹⁹⁴

The study also presented information about the circumstances of the crime and age of the victim. In the vast majority of cases (86.5%), the victim was older than the defendant.¹⁹⁵ In terms of weapons use, knives were most commonly used (45.2% of cases), followed by firearms (26.0%) and other objects (20%).¹⁹⁶ In over one-fifth of cases (22.1%) the defendant used multiple weapons.¹⁹⁷ Finally, over half of the murders (53.8%) were committed in the course of a theft or robbery.¹⁹⁸

Additionally, in response to the authors’ request, Andresen provided details about the relationships between the victims and the defendants where this information was known in the cases he collected (80 cases).¹⁹⁹ Out of the 80 cases, Andresen found that in about 30 of them, the victim and defendant had a preexisting relationship prior to the homicide. The nature of these relationships ranged from friendships, to coworker or employee/employer relationships, to sexual or dating relationships. In several more cases, the violence arose as the victim and defendant became acquainted with each other through sex work or a pick up.

Andresen concluded that while he has identified 104 cases in his study, he was “certain that there are hundreds of cases I have yet to identify.” The examples provided below were identified through our research and may or may not overlap with those identified by Andresen.

Gay and Trans Panic Defenses in Court Opinions

Cases alleging provocation

Defendants in several states have used the gay and trans panic defenses to support a defense theory

¹⁹¹ W. Carsten Andresen, *I Track Murder Cases That Use the ‘Gay Panic Defense,’ A Controversial Practice Banned in 9 States*, THE CONVERSATION (Jan. 29, 2020), <https://theconversation.com/i-track-murder-cases-that-use-the-gay-panic-defense-a-controversial-practice-banned-in-9-states-129973>.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Email from Warren C. Andresen, Asst. Prof., St. Edwards Univ., to author (Apr. 6, 2021, 12:32 PDT).

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.”²⁰⁰ In cases involving the gay and trans panic defenses, defendants allege 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.

Arizona

In *Greene v. Ryan*,²⁰¹ the defendant alleged that the victim offered to pay to perform oral sex on the defendant after meeting him in a park. 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 jury rejected the defendant’s version of the events and convicted him, with the appeals court finding that a reasonable factfinder could have determined that the prosecution’s theory of the case—that the defendant murdered the victim in order to gain access to the victim’s property, rather than due to his advances—was correct.

California

In *People v. Chavez*,²⁰² the defendant alleged that the victim made a sexual advance towards him after getting into the victim’s car, following their meeting on the street that same evening. 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.

In *People v. Merel*,²⁰³ the defendants, two men, met a transgender woman after she joined their social circle in the summer of 2002. The men both had separate sexual encounters with her in the following weeks, as did another member of their circle. The men began to discuss their suspicions that the transgender woman “was a man,” and during a night of drinking with that group of friends in October, forcefully coerced her into the bathroom to find out.²⁰⁴ Upon finding out that she was a transgender woman, one of the men cried and stated that “I can’t be fuckin’ gay.”²⁰⁵ The two men, along with two other friends who were present, then brutally killed the victim by striking her with their fists and heavy objects such as a frying pan. While, as later described by the court, there was “ample evidence that [one of the defendants] was upset,” the jury ultimately rejected a provocation defense and convicted both men of second-degree murder.²⁰⁶ The court sentenced both men to 15 years to life in prison in 2005.

²⁰⁰ WAYNE R. LAFAVE, SUBST. CRIM. L. § 15.2 (2d ed. 2015).

²⁰¹ No. CV-03-605, 2010 WL 1335490 (D. Ariz. Mar. 31, 2010).

²⁰² No. F038767, 2002 WL 31863441 (Cal. Ct. App. Dec. 23, 2002).

²⁰³ No. A113056, 2009 WL 1314822 (Cal. Ct. App. May 12, 2009).

²⁰⁴ *Id.* at *3.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at *14.

Florida

In *Patrick v. State*,²⁰⁷ the defendant met the victim at a public park and later beat the victim to death. The defendant, who had recently been released from prison, met the victim at the park while the two were taking refuge from the rain. The victim invited the defendant to his home for lunch and to give him a place to stay “until [he] was back on his feet.”²⁰⁸ The defendant alleged that the victim tried to have sex with him 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.²⁰⁹ After the murder, the defendant “withdrew approximately \$900 from [the victim’s] bank account using his ATM card in three separate transactions.”²¹⁰ 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, “[t]he State of Florida does not recognize a nonviolent homosexual advance as sufficient provocation to incite an individual to lose self-control and commit acts in the heat of passion.”²¹¹

Illinois

In *U.S. ex rel. Page v. Mote*,²¹² the defendant stabbed the victim to death at the victim’s house, initially claiming he did so to carry out a “grudge” against the victim. It appears that the grudge was on behalf of another person, as the record reflects that the victim was stabbed after refusing to turn over photos showing him (the victim) engaged in sexual relations with the defendant’s male accomplice. The defendant and his accomplice stole the victim’s credit cards and car immediately after the murder, and later returned to steal his television. 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.”²¹³

²⁰⁷ 104 So.3d 1046, 1057 (Fla. 2012).

²⁰⁸ *Id.* at 1053.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 1057. (citing *Davis v. State*, 928 So.2d 1089, 1120 (Fla. 2005)).

²¹² Nos. 02C 232, 01 C 233, 2004 WL 2632935 (N.D. Ill. Nov. 17, 2004).

²¹³ *Mote*, 2004 WL 2632935, at *9. 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 inherently insufficient. *Mote*, 2004 WL 2632935, at *9.

Indiana

In *Dearman v. State*,²¹⁴ the defendant met the victim while working to track down distant relatives. The victim claimed to know two of them and offered the defendant a ride in his car to discuss. 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, and fled the scene in the victim's car. He later returned with a friend, stole money, jewelry, and a credit card from the victim's body, and ultimately abandoned the victim's car after taking the jewelry to a pawn shop. 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."²¹⁵ 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 advances does not indicate that the killing was done in the sudden heat and without reflection."²¹⁶

Kansas

In *State v. Harris*,²¹⁷ police officers found the victim dead in an alley, shot several times. Media reports confirm that the defendant met the victim several months before the murder,²¹⁸ which he argued in court occurred as part of an effort with his girlfriend to "rob a white man and burglarize his house."²¹⁹ The defendant and his accomplice stole the victim's car, and were found by police after attempting to cash a \$672 check from the victim that they wrote out to the defendant. 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."²²⁰

New York

In *People v. Cass*,²²¹ the defendant admitted to strangling his roommate to death, but claimed he "just lost it" and "snapped" when the victim grabbed his genitals and made other sexual advances towards him during an argument. At trial, the defendant raised a "defense of extreme emotional disturbance,

²¹⁴ 743 N.E.2d 757 (Ind. 2001).

²¹⁵ *Id.* at 762.

²¹⁶ *Id.*

²¹⁷ 130 P.3d 1247 (Table) (Kan. Ct. App. 2006).

²¹⁸ Dawn Bormann, *KC Man Sentenced in Wheatland Native's Death*, QUAD-CITY TIMES (Nov. 26, 2002), https://qctimes.com/news/local/kc-man-sentenced-in-wheatland-natives-death/article_a4076287-666e-5b45-b1f9-0f5a8d8e2f68.html.

²¹⁹ *Harris*, 130 P.3d at *2.

²²⁰ *Id.* at *5.

²²¹ 942 N.Y.S.2d 416 (2012).

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."²²² However, the prosecution raised that the defendant had strangled another person he met in a bar one year earlier when, after falling asleep at the person's home, he found that person on top of him, kissing and grabbing him. The jury rejected the defendant's arguments and convicted him of second-degree murder.

Tennessee

In *State v. Wilson*,²²³ 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 asked to use the restroom and 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, but 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. However, 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*,²²⁴ the victim allegedly made sexual advances toward a friend of several months. That friend, believing that the victim had molested him months earlier while he was passed out from drinking, left and met with another acquaintance to get a gun. The defendant then returned and shot the victim while they were riding in a car with their shared acquaintance. At trial, the defendant raised a provocation defense on the grounds that when he shot the victim, he was flashing back to the alleged 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.

Cases alleging 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 for a specific crime because of a temporary mental impairment or mental disease.²²⁵ Diminished capacity is not a full defense to a crime, but merely results in the defendant being convicted of a lesser offense.²²⁶ In cases involving the gay and trans panic defenses, defendants often raise a diminished capacity defense in order to avoid a murder conviction and

²²² *Id.* at 421.

²²³ No. M2007-01854, 2009 WL 2567863 (Tenn. Ct. App. Aug. 20, 2009).

²²⁴ No. 00-2370, 2001 WL 1008151 (Wisc. Ct. App. Sept. 5, 2001).

²²⁵ LAFAYE, *supra* note 200, at § 9.2.

²²⁶ *Id.*

receive reduced sentences 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—or in other words, into 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 crime, and results in the defendant being found not guilty by reason of insanity.²²⁷ In raising an insanity defense, defendants argue that they were legally insane²²⁸ at the time of the crime, and therefore, could not have had the requisite mental state to be held criminally liable for that crime.²²⁹ In cases involving the 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 LGBTQ victim.²³⁰

Louisiana

In *State v. Dietrich*,²³¹ the defendant killed the victim by stabbing him sixteen times in the victim's apartment. The defendant alleged that the victim, who he had met that night while out with friends, 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 alleging “homosexual anxiety panic syndrome.”²³² 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,”²³³ and that the defendant's expert testifying as to his ability to distinguish right from wrong at the time of the offense proved fatal to an insanity defense.

²²⁷ *Id.* at § 7.1.

²²⁸ Jurisdictions have adopted four different tests for determining legal insanity. As 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.

²²⁹ *Id.*

²³⁰ 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.

²³¹ 567 So.2d 623 (La. Ct. App. 1990).

²³² *Id.* at 632.

²³³ *Id.* at 633.

Massachusetts

In *Commonwealth v. Cutts*,²³⁴ 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 protruding from the victim's ear, and hung white rope around the victim's neck. The defendant then left the victim's home with his television and stereo, which he ultimately sold for "cash and several rocks of crack cocaine."²³⁵ 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 defense and convicted him of first-degree murder.

Michigan

In *People v. Harden*,²³⁶ the defense counsel attempted to solicit testimony that the victim, a YMCA employee, 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, however, 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, in part because he could not "help one bit in terms of remembering what went on."²³⁷ The court rejected the defendant's claim.

New Jersey

In *Affinito v. Hendricks*,²³⁸ the defendant claimed that he attacked the victim only after the victim made unwanted homosexual advances towards him. The defendant and victim were both regular patrons of the same bar, though the record reflects that "they neither were good friends nor had they known each other very long."²³⁹ The defendant argued he had diminished capacity at the time of the homicide as a result of a "convulsive disorder."²⁴⁰ The jury convicted him of murder, which occurred after the defendant and his accomplice attacked the victim while driving in the victim's car; they had initially hoped to take the car and "drive around" while the victim was unconscious in the bar.²⁴¹ The defendant argued at appeal 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, noting that the defendant could not show "a reasonable likelihood that a different result would have been reached"²⁴² if that separate expert had testified.

²³⁴ 444 Mass. 821 (2005).

²³⁵ *Id.* at 825.

²³⁶ No. 199958, 2000 WL 33407197 (Mich. Ct. App. Sept. 1, 2000).

²³⁷ *Id.* at *4.

²³⁸ 366 F.3d 252 (3d Cir. 2004).

²³⁹ *Id.* at 253.

²⁴⁰ *Id.* at 259.

²⁴¹ *Id.* at 253–54.

²⁴² *Id.* at 261.

Ohio

In *State v. Van Hook*,²⁴³ 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. 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."²⁴⁴ 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.²⁴⁵ The defendant appealed in 2011, arguing that evidence on his "homophobic panic" was wrongfully excluded at trial and would have supported his insanity claim if admitted. However, the appeals court rejected this argument, noting that, "[n]o expert testified that Van Hook met the standard for insanity, nor did any expert testify that the murder was the result of a mental disease. Moreover, neither of the [excluded documents] state that Van Hook met the standard for insanity or suffered from a mental disease or defect."²⁴⁶

Cases alleging self-defense

Several defendants have also used the gay and trans panic defenses to support a theory of self-defense. To prove self-defense, defendants must demonstrate their reasonable belief that a victim put them in immediate danger of death or serious bodily harm when they used deadly force against that victim.²⁴⁷ In cases involving the gay and trans panic defenses, defendants have primarily argued that an LGBTQ victim's unwanted sexual advance, or the discovery that the victim was LGBTQ, resulted in a reasonable belief that they were in immediate danger of serious bodily harm.

California

In *People v. Hurst*,²⁴⁸ the defendant claimed that he killed the victim, his step-father, in self-defense after an alleged attempted sexual assault. The defendant stated the victim attempted "sexual stuff" with him while in their shared home and he "flipped out," kicking victim in the head, hitting him with a five-pound dumbbell, and stabbing victim multiple times with a kitchen knife.²⁴⁹ At trial, the defendant added allegations that the victim had sexually assaulted him numerous times before the day in the question. Ultimately, the trial court convicted the defendant of first-degree murder. The defendant's appeal, claiming in part that the court erred by denying him the right to present expert witnesses who could explain his theories of "overkill" and "defense rage killing," was later denied.²⁵⁰

²⁴³ 39 Ohio St.3d 256 (Ohio 1988).

²⁴⁴ *Van Hook v. Bobby*, 661 F.3d 264, 267 (6th Cir. 2011).

²⁴⁵ *Van Hook*, 39 Ohio St.3d at 257.

²⁴⁶ *Van Hook*, 661 F.3d at 268.

²⁴⁷ LAFAYE, *supra* note 200, at § 10.4.

²⁴⁸ No. B206915, 2009 WL 3531967 (Cal. Ct. App. Nov. 2, 2009).

²⁴⁹ *Id.* at *2.

²⁵⁰ *Hurst v. Lopez*, No. CV 10-9859-JGB (SP), 2015 WL 4748841 (C.D. Cal. Aug. 7, 2015).

Georgia

In *Harris v. State*,²⁵¹ the defendant met the victim and accepted an invitation to spend the night with him, though they did not engage in sexual acts. A few nights later, the defendant asked the victim for additional lodging and he obliged, picking up the defendant and a friend of his. After the friend left, the two engaged in sexual acts before the victim left momentarily himself to procure drugs for the defendant. When the victim returned and purportedly continued to make sexually suggestive remarks, the defendant became angry and 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, with his ineffective assistance of counsel claim later denied.

Iowa

In *State v. Pollard*,²⁵² 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 and \$30, which he later claimed to have taken to “make it look like a robbery.”²⁵³ 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 a 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.

New Jersey

In *State v. Camacho*,²⁵⁴ 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 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.

Pennsylvania

In *Commonwealth v. Benton*,²⁵⁵ the defendant entered a hotel to look for a friend. The hotel clerk confirmed that the friend had left, but that he (the hotel clerk) had a room. The defendant viewed this

²⁵¹ 554 S.E.2d 458 (Ga. 2001).

²⁵² 862 N.W.2d 414 (Table), 2015 WL 405835 (Iowa Ct. App. 2015).

²⁵³ *Id.* at *2.

²⁵⁴ No. 01-06-0660, 2010 WL 3218888 (N.J. Ct. App. 2010).

²⁵⁵ No. 0797, 2006 WL 5430175 (Pa. Com. Pl. July 19, 2006).

as an unwanted homosexual invitation, and a verbal altercation followed. The defendant claimed that the hotel clerk spit on him and appeared to be reaching for something, and so he pulled out a gun and shot the hotel clerk, killing him. The court found that the appellant did not act in self-defense and had the requisite malice to support a conviction for third-degree murder.

Texas

In *Cutsinger v. State*,²⁵⁶ 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. However, the appeals court concluded that the evidence was sufficient to allow a rational jury to reject that the defendant killed the victim in self-defense and instead conclude that the defendant killed the victim to rob him. In doing so, the court relied on the fact that the defendant, who met the victim while hitchhiking, stole \$1,000 in cash from the victim's wallet after the murder.

Cases Invoking the Defenses for Post-Conviction Relief

In many cases, defendants invoke the gay and trans panic defenses at trial in order to avoid a murder conviction and receive a reduced sentence based on a lesser charge, or avoid conviction and sentencing entirely. However, some who have been convicted of murder have then raised the gay and trans panic defenses for the first time during post-conviction proceedings in attempts to overturn their sentences and/or receive a retrial.

Missouri

In *Jones v. Delo*,²⁵⁷ the defendant shot and killed the victim, and was sentenced to death for first-degree murder. The two met in the months leading to the murder, with reports suggesting that the defendant feigned a relationship with the victim—who was several decades his senior—in order to have him buy the defendant a new Camaro.²⁵⁸ In his motion for 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 post-conviction hearing, a psychologist testified that the defendant had described that he experienced panic after the victim made a 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. While the court noted that the expert's diagnosis of "ego dystonic homosexuality"²⁵⁹ would have enabled defense counsel to argue defendant was incapable of cool deliberation at trial, it ultimately concluded that the facts of the case would likely have led the jury to come to the same decision, affirming the lower court's verdict.

²⁵⁶ No. 14-06-00893, 2007 WL 4442609 (Tex. Ct. App. 2007).

²⁵⁷ 258 F.3d 893 (8th Cir. 2000), *cert. denied*, *Jones v. Luebbers*, 535 U.S. 1066 (2002).

²⁵⁸ *Id.* at 895; see also *William Robert Jones, Jr.*, CLARKPROSECUTOR.ORG, <http://www.clarkprosecutor.org/html/death/US/jones809.htm> (last visited Feb 10, 2021).

²⁵⁹ *Jones*, 258 F.3d at 897.

Pennsylvania

In *Commonwealth v. Martin*,²⁶⁰ the defendant killed the victim while on a two-hour temporary release from prison, the two having been corresponding while the defendant was incarcerated. The defendant was driven to the victim by his girlfriend and then asked the victim for money, who responded that he would give money in exchange for sex. In response to the victim's purported homosexual advance, the defendant hit the victim over the head, bound his wrists and ankles, and suffocated the victim with a plastic bag. The defendant and his girlfriend then stole the victim's checkbook, credit cards, and car, using them to "fund their westward travel" until being apprehended in Arizona.²⁶¹ 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 (PTSD) 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 victim's advance triggered PTSD flashbacks, such an event did not, "render [the defendant] incapable of cool reflection so as to support a provocation defense."²⁶²

Examples Documented in the Media

Cases in which defendants successfully raise the gay and trans panic defense do not often result in published court opinions for the reasons explained above. However, the media has reported on a number of high-profile cases involving LGBTQ victims in which defendants have asserted the gay and trans panic defenses. As with the published opinions, these examples should not be understood as a complete record of the use of gay and trans panic defenses, but rather as illustrative of how the defenses have relied upon by defendants.

California

In 2008, a middle school student pulled out a gun in his computer lab and shot his classmate twice in the back of his head.²⁶³ Weeks before the shooting, the victim told friends he was gay and came to school wearing high heels and makeup.²⁶⁴ Additionally, two weeks before the shooting, the school's administration had sent an email to all teachers asking for their support of the student and his desired forms of presentation.²⁶⁵ A day or two before his death, the victim asked the defendant to be

²⁶⁰ 5 A.3d 177 (Pa. 2010), *cert. denied*, *Martin v. Pennsylvania*, 563 U.S. 1035 (2011).

²⁶¹ *Id.* at 181.

²⁶² *Id.* at 186.

²⁶³ Jim Dubreuil & Denise Martinez-Ramundo, *Boy Who Shot Classmate at Age 14 Will be Retried as Adult*, ABC News (Oct. 5, 2011), <https://abcnews.go.com/US/eighth-grade-shooting-larry-king-brandon-mcinerney-boys/story?id=14666577>.

²⁶⁴ Alexa D'Angelo, *10 Years After Larry King Killing, E.O. Green Junior High Sees Shift in School Culture*, VC Star (June 7, 2018, 11:00 AM), available at <https://www.vcstar.com/story/news/education/2018/06/07/larry-king-shooting-10-years-later-e-o-green-junior-high-school-sees-change/630855002>.

²⁶⁵ Ramin Setoodeh, *Young, Gay and Murdered*, NEWSWEEK (July 19, 2008), <https://web.archive.org/web/20080723000641/http://www.newsweek.com/id/147790/page/4>.

his valentine.²⁶⁶ This comment allegedly made the defendant so uncomfortable that he killed the victim on Valentine's Day.²⁶⁷ The first murder trial ended in a hung jury in 2011.²⁶⁸ The defendant later pleaded guilty to second-degree murder and voluntary manslaughter and was sentenced to 21 years in prison.²⁶⁹ In later interviews, some jury members revealed they did not want to give a life sentence to a teenager and shared that the victim had contributed to his own death while sexually harassing the defendant.²⁷⁰ Another juror stated that the defendant was "solving a problem" by killing the victim.²⁷¹

Illinois

In 2008, a man in Illinois stabbed his male neighbor 61 times after going back to his apartment following a night of drinking.²⁷² The defendant reported that he passed out on the victim's couch, and awoke to the victim brandishing a 14-inch sword and threatening to sexually assault him.²⁷³ This allegedly started a fight, in which the defendant grabbed a dagger and stabbed the victim repeatedly while trying to escape.²⁷⁴ The jury acquitted the defendant on first-degree murder charges and was not allowed to consider second-degree murder charges.²⁷⁵ By acquitting, the jury accepted as reasonable the premise that the defendant needed to stab the victim 61 times to fend off the alleged sexual advance.²⁷⁶

In 2009, a 23-year-old man beat his 53-year-old co-worker to death with a heavy tool at the auto repair shop where they worked.²⁷⁷ The defendant stated that the victim made sexual advances towards him while they were sleeping in a bed at the repair shop.²⁷⁸ The defendant told investigators that he then left the bed, put on gloves, grabbed the tool, and beat the victim in the head until his arm was tired.²⁷⁹ He told them he would do it again if the opportunity arose.²⁸⁰ In 2010, a court sentenced the defendant to 25 years in prison as part of a plea deal.²⁸¹

²⁶⁶ *Id.*

²⁶⁷ Chase Strangio, *Remembering Larry King*, ACLU (Feb. 12, 2014, 11:16 AM), <https://www.aclu.org/blog/lgbt-rights/transgender-rights/remembering-larry-king>.

²⁶⁸ Dubreuil & Martinez-Ramundo, *supra* note 263.

²⁶⁹ Mary McNamara, *Review: 'Valentine Road' Offers Clear-Eyed View of Larry King Murder*, L.A. TIMES (Oct. 6, 2013, 12:00 AM), <https://www.latimes.com/entertainment/tv/la-xpm-2013-oct-06-la-et-st-valentine-road-20131007-story.html>.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Zach Christman, *Gay Panic Defense Gets Murder Defendant Off*, NBC CHICAGO (July 17, 2009, 8:56 AM), <https://www.nbcchicago.com/news/local/Gay-Panic-Defense-Gets-Murder-Defendant-Off.html>.

²⁷³ Michael Rowe, "Gay Panic Defense" Used to Acquit Illinois Man Who Stabbed Neighbor 61 Times, HUFFPOST (Aug. 14, 2009, 5:12 AM), https://www.huffpost.com/entry/man-acquitted-of-murder-a_b_231748.

²⁷⁴ Christman, *supra* note 272.

²⁷⁵ *Id.*

²⁷⁶ Rowe, *supra* note 273.

²⁷⁷ Jake Griffin, *Plea Deal Reached in Bloomington Mechanic's Murder*, DAILY HERALD (Jan. 19, 2010, 10:48 AM), <http://prev.dailyherald.com/story/?id=352026>.

²⁷⁸ *Id.*

²⁷⁹ Pam Spaulding, *IL: Another Murder Suspect Cites 'Gay Panic' Defense*, SHADOWPROOF (Mar. 7, 2009), <https://shadowproof.com/2009/03/07/il-another-murder-suspect-cites-gay-panic-defense>.

²⁸⁰ *Id.*

²⁸¹ Griffin, *supra* note 277.

New York

In 2013, a group of men punched a transgender woman to the ground after passing her on the street.²⁸² The victim was knocked unconscious, but one man continued to assault her as she lay on the street.²⁸³ She was taken to a hospital and declared brain dead as a result of the injuries.²⁸⁴ The man turned himself in and testified that he started flirting with the victim, unaware she was transgender.²⁸⁵ When his friends began to mock him for flirting with a transgender woman, he attacked her.²⁸⁶ The defendant was sentenced to 12 years in prison in 2016, a penalty the victim's family said was too light.²⁸⁷

Tennessee

In 2020, a firefighter was shot and killed by a man after having propositioned the man and his girlfriend have sex at a park "well-known [as a] gay cruising area."²⁸⁸ In statements given to the police, the male defendant noted that he felt "uncomfortable" after being offered sex by the victim and immediately shot him multiple times, killing him.²⁸⁹ The man and his girlfriend were indicted on felony charges related to the murder in October 2020.²⁹⁰

Texas

In 2015, the victim invited his neighbor, the defendant, to his house for a night of music and drinking.²⁹¹ The defendant allegedly told police that he was not gay, and rejected the victim when he made an advance.²⁹² The rejection allegedly caused the defendant to lunge towards him with a glass.²⁹³ He then stabbed the victim twice in the back, killing him, claiming that he felt he going to be

²⁸² Irene Plagianos, *Man Pleads Guilty to Beating Transgender Woman Islan Nettles to Death*, DNA INFO (Apr 4, 2016, 12:37 PM), <https://www.dnainfo.com/new-york/20160404/central-harlem/man-pleads-guilty-beating-transgender-woman-islans-nettles-death>.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ James C. McKinley Jr., *Man Sentenced to 12 Years in Beating Death of Transgender Woman*, N.Y. TIMES (Apr 19, 2016), <https://www.nytimes.com/2016/04/20/nyregion/man-sentenced-to-12-years-in-beating-death-of-transgender-woman.html>.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ Donald Padgett, *Gay Firefighter Killed After Flirting with Straight Couple*, OUT.COM (July 22, 2020), <https://www.out.com/crime/2020/7/22/gay-firefighter-killed-after-flirting-straight-couple>.

²⁸⁹ *Arrests Made in the Shooting Death of a Memphis Firefighter, Police Say*, FOX13MEMPHIS.COM (July 18, 2020), <https://www.fox13memphis.com/news/local/arrests-made-shooting-death-memphis-firefighter-police-say/ZP44BTO545DXPEJ6SV2NOHBPHM>.

²⁹⁰ *Couple Indicted in Death of Off-Duty Firefighter*, SHELBY CTY. DIST. ATT'Y (Oct. 8, 2020), <https://www.scdag.com/news-releases/couple-indicted-in-death-of-off-duty-firefighter>.

²⁹¹ Julie Compton, *Alleged 'Gay Panic Defense' in Texas Murder Trial Stuns Advocates*, NBC (May 2, 2018, 11:12 AM), <https://www.nbcnews.com/feature/nbc-out/alleged-gay-panic-defense-texas-murder-trial-stuns-advocates-n870571>.

²⁹² Curtis M. Wong, *Texas Man who Killed Neighbor Uses 'Gay Panic' Defense and Avoids Murder Charge*, HUFFPOST (Apr. 28, 2018, 3:30 PM), https://www.huffpost.com/entry/texas-james-miller-gay-panic_n_5ae35296e4b04aa23f22efe8.

²⁹³ Compton, *supra* note 291.

hurt and his actions were self-defense.²⁹⁴ The jury convicted the defendant of criminally negligent homicide, which carries a lighter sentence than murder or manslaughter.²⁹⁵ The judge sentenced the defendant to maximum six months jail time, 100 hours of community service, and ordered \$11,000 in restitution to the victim's family, along with 10 years of probation as recommended by the jury.²⁹⁶

CHALLENGES TO BANS ON THE GAY AND TRANS PANIC DEFENSES

Critics of state legislation eliminating the gay and trans panic defenses have argued that such legislation violates defendants' rights,²⁹⁷ specifically those protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.²⁹⁸ However, as of this writing, no constitutional challenges have been brought against laws banning the availability of these defenses. Additionally, controlling Supreme Court precedent suggests that, should a court ever consider such a challenge, it would be highly unlikely to conclude that a statute eliminating the gay and trans panic defenses violates the Due Process Clause.

In *Montana v. Egelhoff*,²⁹⁹ the U.S. Supreme Court considered whether the Due Process Clause was violated by a state law which declared 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."³⁰⁰ In other words, the Supreme Court was asked to determine whether states violate the Due Process Clause by using legislation to prohibit the availability of certain defenses in criminal trials. A plurality of the Court held that they do not, and "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."³⁰¹

The *Egelhoff* plurality concluded that the defendant did not meet the heavy burden imposed under traditional due process: that the new statute offended a "fundamental principle of justice" and should therefore be struck down.³⁰² The plurality based its decision on historical practice, and found that the defense being displaced by that statute was not fundamental as it was too new, had not received sufficiently uniform and permanent allegiance across the states, and had itself displaced a lengthy

²⁹⁴ *Id.*; Lucas Grindley, *Why this Texas Man got Probation for Murdering Gay Neighbor*, THE ADVOCATE (Apr. 29, 2018, 1:16 PM), <https://www.advocate.com/crime/2018/4/29/why-texas-man-got-probation-murdering-gay-neighbor>.

²⁹⁵ Compton, *supra* note 291.

²⁹⁶ *Id.*

²⁹⁷ See, e.g., Ben Brachfeld, *Albany Lawmakers Weigh A Ban on the Gay and Trans Panic Defense*, GOTHAMIST (May 30, 2019, 2:54 PM), https://gothamist.com/2019/05/30/albany_gay_panic_defense.php.

²⁹⁸ 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.

²⁹⁹ 518 U.S. 37 (1996).

³⁰⁰ MONT. CODE ANN. § 45-2-2-3.

³⁰¹ *Egelhoff*, 518 U.S. at 54. (Ginsburg, J., concurring); *id.* at 50 n.4. (noting the plurality's "complete agreement" with the rationale of Justice Ginsburg's concurrence: that the statute could be upheld as being within the traditional broad discretion given to state legislatures to define the elements of criminal defenses). On their face, bans on the gay and trans panic defenses would likely be seen as an exercise of that particular form of state power. See *id.* (concluding that the law in *Egelhoff* appeared constitutional both as an evidentiary rule or as a modification of a definition of an element of a crime).

³⁰² *Id.* at 43 (internal quotations omitted).

common law tradition (supported by legitimate state policy justifications) rejecting inebriation as a criminal defense.³⁰³ 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 could 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.³⁰⁴

The holding in *Egelhoff* was recently reaffirmed in *Kahler v. Kansas*, a Supreme Court case examining whether states may restrict the impact of an insanity defense in criminal trials.³⁰⁵ In *Kahler*, the defendant argued that Kansas's insanity defense violated the Due Process Clause because it did not allow for the exoneration of defendants who lacked the ability to distinguish right from wrong, as some other states do. Rather, Kansas law provided that defendants could establish an insanity defense only by proving that as a result of mental disease or defect, they lacked the "culpable mental state" required to commit the crime—essentially, that they were unable to comprehend what they were doing when they committed the crime.³⁰⁶

A majority of the Court upheld the Kansas law, holding that "well-settled precedent" establishes that states enjoy broad discretion in creating rules on criminal liability, including "laying out either the elements of or the defenses to a crime"³⁰⁷ While the Court acknowledged that this principle is limited by the Due Process Clause, it also made clear that a violation occurs only when a state's rule "offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental."³⁰⁸ Additionally, the *Kahler* Court confirmed that the *Egelhoff* "historical practice" test is the "primary guide in applying that standard."³⁰⁹

Notably, the Court in *Kahler* held that this standard will always weigh in favor of the state in the insanity defense context, finding that "[n]o insanity rule in this country's heritage or history was ever so settled as to tie a State's hands centuries later."³¹⁰ The Court explained its reasoning further, noting that, "[d]efining the precise relationship between criminal culpability and mental illness . . . is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve. Which is all to say that it is a project for state governance, not constitutional law."³¹¹

After *Kahler*, state legislation restricting the availability of the gay and trans panic defenses as forms of the insanity defense would be presumed constitutional by courts considering challenges on due process grounds. Bans on the use of the gay and trans panic defenses in other circumstances, including to support a theory of provocation or self-defense, would most likely also survive judicial scrutiny under the *Egelhoff* analysis.

³⁰³ *Id.* at 51.

³⁰⁴ *Id.* at 55.

³⁰⁵ 589 U.S. ____ (2020).

³⁰⁶ KAN. STAT. ANN. § 22-3220.

³⁰⁷ *Kahler*, 589 U.S. at 6.

³⁰⁸ *Id.* (internal citations omitted); *see also Egelhoff*, 518 U.S. at 43 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

³⁰⁹ *Kahler*, 589 U.S. at 6.

³¹⁰ *Id.* at 24.

³¹¹ *Id.*

First, if a rule applied by courts in the 19th century is “of too recent vintage” to be deemed fundamental,³¹² then it is extremely unlikely that any court would find that the gay and trans panic defenses are fundamental—particularly given that the first judicial mention of the gay panic defense in the United States was in a case before the California Court of Appeal in 1961.³¹³ Second, if the Supreme Court held that the adoption of the displaced rule in *Egelhoff*—adopted by 80% of the states in the U.S. at the time—was insufficient to be considered a “fundamental principle of justice,”³¹⁴ then it is unlikely any court will hold that the gay and trans panic defenses have seen the requisite level of adoption. Defenders of these bans would likely be able to point to the defenses’ lack of codification in any state’s penal code, the limited number of opinions discussing them across several decades, and the flurry of activity by states in recent years to ban the defenses as support for a finding these bans have not and do not enjoy the type of uniform adoption that would raise constitutional concerns under *Egelhoff*.

Defenders of any bans on the defenses would, similar to the case in *Egelhoff*, also be able to demonstrate that state policy justifications for eliminating the defenses exist. 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*.”³¹⁵

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 LGBTQ 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.

³¹² *Egelhoff*, 518 U.S. at 51.

³¹³ *People v. Stoltz*, 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.

³¹⁴ *Egelhoff*, 518 U.S. at 48.

³¹⁵ *Id.* at 50–51.

In *Egelhoff*, the plurality spoke at length on the broad discretion of states to determine the evidentiary rules for state criminal trials and to define the elements of state crimes and defenses, holding that defendants do not have an absolute right to present relevant evidence in their defense.³¹⁶ And, in *Kahler*, the majority reaffirmed that principle by noting that even under the guarantees of the Due Process Clause, defendants are not entitled to “the particular insanity defense [they] would like.”³¹⁷ For these reasons, it is therefore unlikely that any due process challenges to state legislation eliminating the gay and trans panic defenses would be successful.

³¹⁶ See *id.* at 43 (quoting *Patterson v. New York*, 432 U.S. at 201–02) (“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.’”). 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 Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules”).

³¹⁷ *Kahler v. Kansas*, 589 U.S. ___, 24 (2020).

RECOMMENDATIONS FOR PROTECTING LGBTQ PEOPLE FROM VIOLENCE

In order to protect LGBTQ people from violence, we recommend that state legislatures adopt legislation to 1) prohibit use of the gay and trans panic defenses; 2) add sexual orientation and gender identity as protected characteristics in hate crimes laws; and 3) strengthen protections for survivors of intimate partner violence. We provide recommendations below that states may use to shape their legislation in these three areas.

In addition, states could further strengthen anti-violence protections for LGBTQ people by prohibiting bullying and harassment of LGBTQ youth,³¹⁸ improving relationships between law enforcement and LGBTQ communities,³¹⁹ and ensuring that service providers are willing and able to competently serve LGBTQ people.³²⁰

MODEL LANGUAGE TO ELIMINATE USE OF THE GAY AND TRANS PANIC DEFENSES

We recommend that state legislatures adopt legislation to prohibit use of the gay and transgender panic defenses. Currently, 39 states do not have such laws.³²¹

The model legislation below provides language and guidance that states may use in developing their own bills. Each state's bill should be tailored to the underlying defenses available in the state. For example, if the state does not recognize a diminished capacity defense, Section 103 of the recommended language should not be included in the bill.

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:

Section 101. Findings

(a) The Legislature finds the following:

1. LGBTQ people have historically been subjected to and continue to face widespread and persistent discrimination, stigma, and violence across the United States.

³¹⁸ STUART BIEGEL & SHEILA JAMES KUEHL, *SAFE AT SCHOOL: ADDRESSING THE SCHOOL ENVIRONMENT AND LGBTQ SAFETY THROUGH POLICY AND LEGISLATION* (2010), <https://nepc.colorado.edu/publication/safe-at-school>.

³¹⁹ See CHRISTY MALLORY, AMIRA HASENBUSH, & BRAD SEARS, WILLIAMS INST., *DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBTQ COMMUNITY* (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf>.

³²⁰ See *Supporting LGBTQ Survivors*, VAWNET.ORG, <https://vawnet.org/sc/improving-services-lgbtq-individuals> (last visited Mar. 24, 2021).

³²¹ See *supra* notes 182–185 and accompanying text.

2. Thousands of instances of hate violence and intimate partner violence against LGBTQ people have been documented by community organizations, state and federal law enforcement agencies, and the media.
3. LGBTQ people are three to four times more likely to experience violent victimization than non-LGBTQ people, including instances of rape, sexual assault, robbery, and aggravated or simple assault.
4. Transgender women of color face particularly high rates of violence. A 2019 report documented 157 homicides of transgender people between 2013–2019. Over 80% of the victims were transgender women of color.
5. Federal hate crimes data collected between 2011–2018 show that between 16% and 20% of all hate crimes victims were targeted because of their sexual orientation and between 0.5% to 2% were targeted because of their gender identity.
6. Existing data suggest that over half of LGBTQ victims and survivors knew their assailant prior to the attack.
7. Many LGBTQ people experience intimate partner violence and rates are elevated for marginalized communities within the LGBTQ population, including transgender people and lesbian or bisexual women. Sixty-one percent of bisexual women and 44% of lesbian women have experienced rape, physical violence, or stalking by an intimate partner. Over half (54%) of transgender people have experienced some form of intimate partner violence.
8. Existing laws are inadequate to protect LGBTQ people from violence.
9. Gay and transgender panic defenses are rooted in antiquated ideas that being LGBTQ is a mental illness and rely on the assumption that it is reasonable for an assailant to react violently to discovering the victim's sexual orientation or gender identity or to a romantic advance by an LGBTQ victim.
10. Continued use of gay and transgender panic defenses reinforce stereotypes and bias against LGBTQ people, and puts them at increased risk of violence.
11. As the Legislature has a compelling interest in prohibiting all forms of violence, including violence against LGBTQ people, it brings forth this legislation to end use of the gay and transgender panic defenses.

Section 102. 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 or belief 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 Diminished Capacity

A defendant does not suffer from reduced mental capacity based on the discovery of, knowledge or belief 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 104. Restrictions on the Defense of Self-Defense

A person is not justified in using force against another based on the discovery of, knowledge or belief 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.

ADDING SEX, SEXUAL ORIENTATION, AND GENDER IDENTITY TO HATE CRIMES LAWS

We recommend that state legislatures adopt legislation adding sex, sexual orientation, and gender identity to existing hate crimes laws, or pass new hate crimes laws that include these characteristics, plus other characteristics generally included in hate crimes laws (such as race, national origin, religion, disability, political affiliation, and age).

Of the 45 states with hate crimes laws, 18 do not include sex as a motivating factor, 12 do not include sexual orientation as a motivating factor, and 28 do not include gender identity as a motivating factor.³²²

Inclusion of sex, sexual orientation, and gender identity in state hate crimes laws

STATE/TERRITORY	SEX INCLUDED?	SEXUAL ORIENTATION INCLUDED?	GENDER IDENTITY INCLUDED?
Alabama	No	No	No
Alaska	Yes	No	No
Arizona	Yes	Yes	No
Arkansas	No hate crimes law	No hate crimes law	No hate crimes law
California	Yes	Yes	Yes
Colorado	No	Yes	Yes
Connecticut	Yes	Yes	Yes
Delaware	No	Yes	Yes
Florida	No	Yes	No
Georgia	Yes	Yes	No
Hawaii	Yes	Yes	Yes
Idaho	No	No	No
Illinois	Yes	Yes	Yes
Indiana	No hate crimes law	No hate crimes law	No hate crimes law
Iowa	Yes	Yes	No
STATE/TERRITORY	SEX INCLUDED?	SEXUAL ORIENTATION INCLUDED?	GENDER IDENTITY INCLUDED?

³²² See discussion *supra* note 168. The hate crimes laws of the District of Columbia and Puerto Rico include sex, sexual orientation, and gender identity as motivating factors. *Id.*

Kansas	No	Yes	No
Kentucky	No	Yes	No
Louisiana	Yes	Yes	No
Maine	Yes	Yes	No
Maryland	Yes	Yes	Yes
Massachusetts	No	Yes	Yes
Michigan	Yes	Yes	No
Minnesota	Yes	Yes	No
Mississippi	Yes	No	No
Missouri	Yes	Yes	No
Montana	No	No	No
Nebraska	Yes	Yes	No
Nevada	No	Yes	Yes
New Hampshire	Yes	Yes	Yes
New Jersey	Yes	Yes	Yes
New Mexico	Yes	Yes	Yes
New York	Yes	Yes	Yes
North Carolina	No	No	No
North Dakota	No hate crimes law	No hate crimes law	No hate crimes law
Ohio	No	No	No
Oklahoma	No	No	No
Oregon	No	Yes	Yes
Pennsylvania	No	No	No
Rhode Island	Yes	Yes	No
South Carolina	No hate crimes law	No hate crimes law	No hate crimes law
South Dakota	No	No	No
Tennessee	Yes	Yes	No
Texas	Yes	Yes	No
Utah	Yes	Yes	Yes
Vermont	Yes	Yes	Yes
Virginia	No	No	No
Washington	Yes	Yes	Yes
West Virginia	Yes	No	No
Wisconsin	No	Yes	No
Wyoming	No hate crimes law	No hate crimes law	No hate crimes law
District of Columbia	Yes	Yes	Yes
American Samoa	No hate crimes law	No hate crimes law	No hate crimes law
Guam	No hate crimes law	No hate crimes law	No hate crimes law
Northern Mariana Islands	No hate crimes law	No hate crimes law	No hate crimes law
Puerto Rico	Yes	Yes	Yes
U.S. Virgin Islands	No hate crimes law	No hate crimes law	No hate crimes law

The five states that do not have hate crimes laws are Arkansas, Indiana, North Dakota, South Carolina, and Wyoming.³²³

STRENGTHENING LAWS THAT ADDRESS INTIMATE PARTNER VIOLENCE

We recommend that states consider strengthening and broadening their intimate partner violence laws. Specifically, we recommend that North Carolina revise its intimate partner violence law to cover unmarried same-sex couples (consistent with the court’s decision in *M.E. v. T.J.*) by amending N.C. Gen. Stat. § 50B-1(b)(2) to read that a covered “personal relationship” exists when the parties “Are persons of the opposite sex or same sex who live together or have lived together.”

We further recommend that the 12 states that currently require unmarried current or former partners to live together or have lived together in the past revise their laws to omit that cohabitation requirement and instead apply to all dating or romantic partners (current and former), regardless of living situation. These states are: Florida, Georgia, Idaho, Indiana, Maryland, North Carolina, Ohio, South Carolina, Texas, Utah, Virginia, and Wisconsin.³²⁴

Finally, we recommend that all states amend their intimate partner laws to include language clarifying that the victim’s and perpetrator’s sex, sexual orientation, and gender identity must not be factors in the decision to grant or deny a claim for protection under the law.

³²³ *Id.* Similarly, the territories of American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands do not have hate crimes laws. *Id.*

³²⁴ See *Domestic Violence/Domestic Abuse Definitions and Relationships*, NAT’L CONFERENCE OF STATE LEGISLATURES (June 13, 2019), <https://www.ncsl.org/research/human-services/domestic-violence-domestic-abuse-definitions-and-relationships.aspx>. Although by its text, South Carolina’s intimate partner violence law applies only different-sex unmarried partners, the South Carolina Supreme Court has ruled that same-sex unmarried partners are entitled to the same protections. *Doe v. State*, 421 S.C. 490 (S.C. 2017).

CONCLUSION

LGBTQ people have historically faced—and are still subject to—widespread stigma, discrimination, and violence. Violence against LGBTQ people has been documented in a variety of sources including the media, hate crimes data, court cases, academic research, and reports by community-based organizations. Much of this violence is at the hands of someone well-known to the victim, including those with whom they have dating and romantic relationships. This violence can result in death, and even when victims survive, often has lasting effects on their physical, mental, and emotional health and well-being. One way states can combat the epidemic of violence against LGBTQ people is by passing laws that bar defendants from asserting the gay and trans panic defenses in court.

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