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## (Trans)forming the Provocation Defense

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## (TRANS)FORMING THE PROVOCATION DEFENSE

Morgan Tilleman\*

“My family, some who are with me here tonight, always loved and supported Angie. We understood that she was born in a boy’s body but she was a woman. So many transgender people do not receive that love, acceptance and support.”

—Monica Zapata<sup>1</sup>

### I. GREELEY, COLORADO: JULY 17, 2009

Sometime in 2008, Angie Zapata, then eighteen, met a thirty-two-year-old man on a social networking site called Moco Space,<sup>2</sup> and they began to chat.<sup>3</sup> Later that year, in mid-July, she met that man, Allen Ray Andrade, in person for a date.<sup>4</sup> A few days later, Angie’s sister, Monica Zapata, found Angie’s body in Angie’s apartment, stiff and “covered with a bloodstained blanket.”<sup>5</sup> She had been beaten to death with fists and a fire extinguisher.<sup>6</sup>

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\* JD Candidate, Northwestern University School of Law, 2011. BA, Indiana University, 2007. Thanks to my family for putting up with drafting at Thanksgiving and for their unflagging support of everything I do. Special thanks to Terra White and Kirk Watkins for their editorial assistance and thoughtful comments.

<sup>1</sup> *Angie Zapata’s Story Honored by Family and GLAAD*, GLAADBLOG (April 29, 2009), <http://glaadblog.org/2009/04/29/angie-zapatas-story-honored-by-family-and-glaad-2/>. This Comment is for Angie Zapata and for her family, whose strength, love, and character have inspired and awed me throughout the project of writing it.

<sup>2</sup> Sharon Dunn, *Andrade: Stunned Victim or Homophobic Killer?*, GREELEY TRIB. (Apr. 17, 2009), <http://www.greeleytribune.com/article/20090417/NEWS/904169867>.

<sup>3</sup> DeeDee Correll, *Colo. Transgender Woman’s Slaying is Tried as Hate Crime*, L.A. TIMES, Apr. 19, 2009, at A3.

<sup>4</sup> *Id.*

<sup>5</sup> Melanie Asmar, *Who Was Angie Zapata? Her Murderer’s Trial Didn’t Tell the Whole Story*, DENVER WESTWORD (May 28, 2009), <http://www.westword.com/2009-05-28/news/who-was-angie-zapata-her-murderer-s-trial-didn-t-tell-the-whole-story/>.

<sup>6</sup> Dan Frosch, *Murder and Hate Verdict in Transgender Case*, N.Y. TIMES, Apr. 23, 2009, at A20.

Angie Zapata was not an ordinary homicide victim, however. She was “a teenage girl in every sense but the biological one,” according to her sister.<sup>7</sup> When Angie was at her sister’s store, men “would make excuses to hover [around her],” drawn by her “stunning” appearance.<sup>8</sup> Angie, who was born Justin David Zapata, began presenting her gender as female full-time in high school.<sup>9</sup> Her family and friends supported her as she grew towards adulthood as a woman.<sup>10</sup> Angie Zapata was transgender, and the trial of Allen Andrade, her killer, revolved around whether that fact partially justified her murder.<sup>11</sup>

## II. THEORIES OF THE ZAPATA CASE

Less than a week after Angie Zapata’s death, police in Colorado arrested Allen Andrade when he was found using Monica Zapata’s car and credit card.<sup>12</sup> During questioning after his arrest, Andrade told police “he had attacked [Angie] upon discovering that she was biologically a man” following sexual activity with her.<sup>13</sup> Melanie Asmar filled in the gaps between Angie and Allen Andrade’s first meeting and Angie’s brutal murder.

After their initial meeting in person, Angie spent three days with Andrade before leaving to watch her sister’s children on July 16, 2008.<sup>14</sup> According to his statements to the police, Andrade spent that day by himself in Angie’s apartment, where he increasingly suspected that she was not, in fact, “female.”<sup>15</sup> He claimed in the affidavit that he forced the issue with Angie that night, and that she responded, “I am all woman.”<sup>16</sup> He claimed he asked for proof, which she refused; he then reached for her crotch, where he felt Angie’s penis.<sup>17</sup> According to the affidavit, Andrade responded by punching Angie until she fell to the floor, at which point he hit her over the head with a fire extinguisher twice.<sup>18</sup> After she fell to the

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<sup>7</sup> Correll, *supra* note 3, at A3.

<sup>8</sup> *Id.*

<sup>9</sup> Asmar, *supra* note 5.

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

<sup>11</sup> For an overview of the theories advanced by both the prosecution and defense see *infra* text accompanying notes 21–30.

<sup>12</sup> Sharon Dunn, *Key Question: When Did Andrade Know?*, GREELEY TRIB., Apr. 16, 2009, at A1.

<sup>13</sup> Frosch, *supra* note 6, at A20.

<sup>14</sup> Asmar, *supra* note 5.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

floor, Andrade covered her body with a blanket.<sup>19</sup> Then, because he “heard gurgling sounds” coming from Zapata, he returned and struck her face with the fire extinguisher one more time.<sup>20</sup>

The brutal details of the crime were clear, but prosecutors and defense attorneys suggested very different motives for the killing of Angie Zapata. Prosecutors painted a picture of a brutal killer motivated by hatred and prejudice who plotted the death of a transgender woman.<sup>21</sup> Given that Andrade had confessed to police, his defense team chose to argue that he had acted “in the heat of passion” upon unexpectedly discovering that Angie had male genitalia.<sup>22</sup> In the words of Bradley Martin, one of Andrade’s lawyers, “You will hear him say, ‘It happened so fast and so hard, I couldn’t stop [the beating].’”<sup>23</sup> Andrade’s lawyers based their defense on Andrade’s sudden, unexpected awareness of Angie Zapata’s anatomical sex. One of his attorneys, Annette Kundelius, told potential jurors at jury selection, “When [Andrade] learned Angie was in fact Justin, he immediately reacted. He had been deceived, and he reacted. He reacted, he lost control, he was outside of himself.”<sup>24</sup> Andrade’s defense relied on two critical points: first, that Angie “deceived” him about her “real” sex or gender; and second, that this “deception” reasonably caused Allen Andrade to lose control.

Prosecutors argued that Andrade did not learn that Angie was transgender in the manner he claimed; Weld County Deputy District Attorney Brandi Nieto told potential jurors, “You’re going to learn the defendant knew for quite some time that Angie was biologically male.”<sup>25</sup> Instead, prosecutors argued, Andrade learned that Zapata was transgender more than a day earlier when he went to traffic court with her. There, the clerk referred to Zapata as Justin, not Angie.<sup>26</sup> Pointing out that the name ought to have made Zapata’s transgender status obvious, Nieto concluded, “[Killing Zapata] was not a snap decision.”<sup>27</sup> Prosecutors painted Andrade as animated by his prejudice, transphobia, and homophobia. At trial, they

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Monte Whaley, *Transgender Victim, Man Had Hours of Texts, Talk*, DENVER POST, Apr. 17, 2009, at B-02.

<sup>22</sup> Jim Spellman, *Transgender Murder, Hate Crime Conviction a First*, CNN.COM (Apr. 22, 2009), <http://www.cnn.com/2009/CRIME/04/22/transgender.slaying.trial/index.html>.

<sup>23</sup> Whaley, *supra* note 21, at B-02.

<sup>24</sup> Dunn, *supra* note 12, at A1.

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

<sup>26</sup> Correll, *supra* note 3, at A3.

<sup>27</sup> *Id.*

entered transcripts of jail phone calls between Andrade and an unidentified woman, where he told her, “It is not like I went up to a schoolteacher and shot her in the head or killed a straight law-abiding citizen.”<sup>28</sup> In another phone conversation admitted into evidence, Andrade said, “Gay things need to die.”<sup>29</sup> Capturing the theory of bigotry put forth by the prosecution, Nieto summarized the case: “[Andrade] makes it clear there is a difference between killing someone who’s homosexual and someone who’s not. He knew for some time [that Angie] was transgender, and he brutally killed her because of it.”<sup>30</sup>

After hearing both theories, twelve Colorado jurors took only two hours to convict Allen Andrade of first-degree murder.<sup>31</sup> This is the first known case in which an “anti-transgender murder was prosecuted as a hate crime,” according to Crystal Middlestadt of the Colorado Anti-Violence Program.<sup>32</sup> The hate crime enhancement to Andrade’s conviction added three years to his sentence, a first anywhere in the United States.<sup>33</sup> Zealous prosecutors, strong evidence (including a confession), and a sympathetic victim<sup>34</sup> combined in the aftermath of Angie Zapata’s death to see justice done. The Andrade trial might suggest that the law, as written, will protect transgender people—especially now that the Matthew Shepard Hate Crimes Prevention Act of 2009 is federal law.<sup>35</sup> In many cases, however, the evidence will not be as strong.

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<sup>28</sup> Frosch, *supra* note 6, at A20.

<sup>29</sup> *Id.*

<sup>30</sup> Dunn, *supra* note 2.

<sup>31</sup> Sharon Dunn, *Andrade Guilty, Sentenced to Life in Murder of Angie Zapata*, GREELEY TRIB. (Apr. 23, 2009), <http://www.greeleytribune.com/article/20090423/NEWS/904229934>.

<sup>32</sup> Karen Auge, *A Milestone in Battling Hate Crimes*, DENVER POST, Apr. 23, 2009, at A-06.

<sup>33</sup> Monte Whaley, *Lifetime in Prison in Transgender Death*, DENVER POST, Apr. 23, 2009, at A-01.

<sup>34</sup> Angie Zapata’s family was a constant presence in the courtroom and media, mourning the loss of a daughter or sister—and all of them were supportive of her life as a transgender woman. For Maria Zapata’s reaction to the verdict, see Dunn, *supra* note 31 (quoting from Zapata’s address to the judge after the verdict). For the reaction from Angie Zapata’s mother, family, and friends, see Asmar, *supra* note 5 (recounting interviews with family and friends of Angie Zapata in the aftermath of the trial).

<sup>35</sup> Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2190 (2009) (the “Matthew Shepard Act”) (providing for federal assistance in cases involving bias-motivated acts). Under the new law, the federal government has significantly enhanced powers to intervene in hate crimes prosecution.

The hate crimes legislation would give the federal government authority to prosecute violent crimes of antigay bias when local authorities failed to act. It would also allocate \$5 million a year to the Justice Department to provide assistance to local communities in investigating hate

Angie's murder and Allen Andrade's trial are an exception; many transgender people die alone and their killers are never found. In 2008, the Gay and Lesbian Alliance Against Defamation documented twenty-one killings of transgender people.<sup>36</sup> Angie's murder is notable only for the fact that it was solved. Other victims have not been so lucky. In February 2008, Simmie Williams, Jr. was shot to death in Fort Lauderdale, Florida; Jaylynn L. Namauu was stabbed to death in Hawaii in July; Nihia "Nikki" Williams was shot and left to die in a dumpster behind her house in Louisville, Kentucky, just over a month later.<sup>37</sup> These names join a long and growing list of almost 300 transgender people whose killings have been documented by Transgender Day of Remembrance since 1970.<sup>38</sup> The experiences of transgender people across America suggest that more needs to be done to protect them.

### III. DEFINING TRANSGENDER

Some simplification, however fraught with political and definitional difficulty, is necessary for the purposes of this Comment. To begin with, it is important to recognize the difference between sex and gender. Relatively standard definitions of both make the distinction clear: "*Sex* refers to the classification of being either male or female and is usually determined by the external genitalia. *Gender* refers to the culturally determined *behavioral, social, and psychological* traits that are typically associated with being male or female."<sup>39</sup> While not capturing the infinite complexity

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crimes, a process that can sometimes strain police resources. And it would allow the department to assist in the inquiry and local prosecution if requested.

Carl Hulse, *House*, 281-146, *Votes to Define Antigay Attacks as Hate Crimes*, N.Y. TIMES, October 9, 2009, at A1 (commenting on the version of the bill passed by the House of Representatives, which substantively reflects the language eventually signed into law). It remains to be seen whether or not the Justice Department will use its newfound power to intervene in hate crimes prosecution.

<sup>36</sup> *The Angie Zapata Murder: Violence Against Transgender People Resource Kit*, GAY AND LESBIAN ALLIANCE AGAINST DEFAMATION, <http://www.glaad.org/page.aspx?pid=572> (last visited Oct. 5, 2010).

<sup>37</sup> *Statistics and Other Info*, TRANSGENDER DAY OF REMEMBRANCE (Sept. 13, 2010), [http://www.transgenderdor.org/?page\\_id=192](http://www.transgenderdor.org/?page_id=192).

<sup>38</sup> *Id.*

<sup>39</sup> MILDRED L. BROWN & CHLOE ANNE ROUNSLEY, *TRUE SELVES* 19 (1996). Academics and clinicians in the field have also developed much more nuanced definitions of both sex and gender. Julie A. Greenberg begins with eight factors, including "[g]enetic or chromosomal sex" and "[h]ormonal sex." Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 270-291 (1999) (exploring the physiological and psychological variations of sex and gender, particularly in their relation to the law).

of the human condition, these definitions will at least clarify the understanding of what transgender means for the remainder of this Comment.

There is a broad spectrum of gender identity, much of which falls well outside the subject of this Comment.<sup>40</sup> Transgender, however, is often used as an “umbrella term” for those with gender identities outside of simply male/man or female/woman.<sup>41</sup> This Comment is concerned with a discrete subset of gender possibilities outside the norm: people who present as a gender that does not fully conform with their anatomical sex characteristics. For example, Angie Zapata presented as a female but had male sex organs. Similarly, some trans men present as male but have female sex organs. Not all transgender people desire to have sex reassignment surgery—which reshapes the external genitalia to conform with an individual’s gender identity—and thus there is a community which will persist in not conforming to the gender/sex expectations of a heteronormative society. Even for those transgender people who do have sex reassignment surgery or surgeries, many non-sex characteristics—such as facial shape, voice, and stature—are not changed by surgery.<sup>42</sup> Angie Zapata was a pre-operative transsexual because she had not undergone sex reassignment surgery before she was murdered; she was also transgender, and would remain so after any surgery.<sup>43</sup> Although scholars, journalists, and commentators use different terms in referring to individuals whose gender presentation does not match their anatomical sex, this Comment will use the term transgender to signify all people whose presented gender (clothing, hair, carriage, etc.) does not conform to their anatomical sex at birth.<sup>44</sup>

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<sup>40</sup> In addition to transgender people who feel strongly that their physical sex does not match their gender identity—whether transgender women or transgender men—there are also numerous other “others.” To consider only a few examples, there are intersex people, who identify as neither fully male nor fully female, and people with additional chromosomes beyond XX or XY. For a more in-depth discussion of the intersection of law and gender, see Greenberg, *supra* note 39, at 270–78.

<sup>41</sup> Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 *LAW & SEXUALITY* 123, 142 (2001).

<sup>42</sup> *Id.* Professor Weiss puts it eloquently: “An identity cannot be created by surgical means.” *Id.*

<sup>43</sup> See generally *id.* at 142–43.

<sup>44</sup> Some cited sources differ in their terminology. While the distinctions and commonalities between trans men or trans women, transgender people, and transsexuals are important to much scholarship on gender identity, the legal argument made here applies to everyone whose gender identity differs in some way from their anatomical sex. References in quoted sources which use other terminology are read here to include the broadest possible range of subjects, corresponding with this Comment’s definition of transgender.

## IV. THE PROVOCATION DEFENSE

Traditionally, the provocation defense has been used by defendants charged with murder in situations where it is understandable that they might be in an abnormal mental state.<sup>45</sup> This Part will explore the traditional application of the provocation defense before examining the development of the gay panic defense as a specific form of the provocation defense. It will then discuss how the gay panic framework has been extended to cases with transgender murder victims.

In essence, the provocation defense is simple: when a defendant kills in the heat of passion, what would normally be considered murder—absent mental turmoil—is mitigated to manslaughter. The defense is generally justified by looking at the mental state of the actor.<sup>46</sup> Killing with premeditation is found to be more morally offensive than killing without premeditation or killing in a reason-clouding rage.<sup>47</sup> To use the common law provocation defense, the defendant must show that the killing was motivated by legally adequate provocation, which did *in fact* cause a heat of passion, which had not receded by the time of the killing.<sup>48</sup> These common law features are incorporated into most state provocation statutes.<sup>49</sup> Generally, the legal adequacy of provocation is determined using the reasonable person standard, under which provocation is “considered legally adequate if the reasonable person in the defendant’s shoes would have been provoked into a heat of passion.”<sup>50</sup>

The Model Penal Code (MPC) diverges from the objectivity of the reasonable person standard to incorporate consideration of the defendant’s subjective mental state via the extreme emotional disturbance test. The MPC prescribes that “a homicide which would otherwise be murder is [mitigated if] committed under the influence of an extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.”<sup>51</sup> The MPC offers this gloss: “The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in

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<sup>45</sup> The full history and theory of the provocation defense is well outside the scope of this Comment. For an overview, see generally Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982).

<sup>46</sup> See generally *id.*

<sup>47</sup> *Id.* at 436–43.

<sup>48</sup> Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133, 140 (1992). See generally WAYNE R. LAFAYE, CRIMINAL LAW §15.2(b), at 777 (4th ed. 2003).

<sup>49</sup> Mison, *supra* note 48, at 140.

<sup>50</sup> See Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 500 (2008).

<sup>51</sup> MODEL PENAL CODE § 210.3(1)(b) (2001).



the actor's situation under the circumstances as he believes them to be."<sup>52</sup> Under both the prevailing reasonable person standard and the MPC approach, however, the ultimate arbiter of adequate provocation is the fact-finder, not the defendant.

#### A. GAY PANIC: A MODEL?

In a groundbreaking comment published in 1992, Robert B. Mison outlined an argument for judicial invalidation of what was then a frequently employed variation of the provocation defense: the so-called homosexual advance defense.<sup>53</sup> He asked a simple question: "Should a nonviolent sexual advance in and of itself constitute sufficient provocation to incite a reasonable man to lose his self-control and kill in the heat of passion?"<sup>54</sup> The stories he recounted stretch the outer limit of plausibility.

Mison looked first at the words of judges. He recounted the story of Broward County, Florida Circuit Judge Daniel Futch, who presided over a criminal trial arising out of the beating of Daniel Wan by a group of men who called Wan "faggot" while kicking him and "[throwing] him against a moving vehicle."<sup>55</sup> At a pretrial hearing, Judge Futch "jokingly asked the prosecuting attorney, 'That's a crime now, to beat up a homosexual?'"<sup>56</sup> Later, Mison turns from judges to criminals. He recounts the story of *Schick v. State*, where a younger man, hitchhiking with an older man, asks the older man where he can find someone to perform oral sex.<sup>57</sup> The older man offers to do it and the two buy cigarettes together before consummating the act in a dark baseball field.<sup>58</sup> Then, the young man "kicks [the older man], stomps on him, takes his money, and leaves the victim to die."<sup>59</sup> After a trial where the younger man claimed that the older man's "homosexual advance" had caused him to lose all self-control, the jury found the defendant guilty only of voluntary manslaughter.<sup>60</sup> Mison

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<sup>52</sup> *Id.*

<sup>53</sup> See Mison, *supra* note 48, at 136.

<sup>54</sup> *Id.* at 133–34.

<sup>55</sup> *Id.* at 163 (citing Suzanne Bryant, Nat'l Lesbian & Gay Law Ass'n, Remarks before the A.B.A. Judicial Conduct Subcommittee (Sept. 22, 1989)).

<sup>56</sup> *Id.*

<sup>57</sup> Mison, *supra* note 48, at 134–35; see *Schick v. State*, 570 N.E.2d 918, 921–22 (Ind. Ct. App. 1991).

<sup>58</sup> *Schick*, 570 N.E.2d at 921–22.

<sup>59</sup> Mison, *supra* note 48, at 135.

<sup>60</sup> *Id.* (citing *Schick*, 570 N.E.2d at 922).

documented several more cases<sup>61</sup> in which a provocation defense based on homosexual advances was allowed—including one where the evidence suggested that the defendant had intended to rob gay men,<sup>62</sup> and another in which “homosexual paraphernalia” belonging to the victim, found under lock and key away from the crime scene, was admitted to substantiate a homosexual provocation defense.<sup>63</sup>

The basic legal claim underlying the homosexual panic defense common at the time Mison wrote, almost twenty years ago, is as follows: a reasonable man<sup>64</sup> would be insulted and enraged by a nonviolent homosexual advance and his anger would constitute legally sufficient provocation.<sup>65</sup> Mison succinctly diagnoses the defendant’s goal in using the homosexual advance defense:

In seeking to avail himself of the provocation defense the defendant hopes that the typical American juror—a product of homophobic and heterocentric American society—will evaluate the homosexual victim and homosexual overture with feelings of fear, revulsion, and hatred. The defendant’s goal is to convince the jury that his reaction was only a reflection of this visceral societal reaction; the reaction of a “reasonable man.”<sup>66</sup>

When Mison was writing, the connection between the homosexual panic defense and widespread revulsion and bigotry in larger society was practically undeniable; since that time, however, societal attitudes towards homosexuality have been slowly changing.<sup>67</sup> There has also been an outpouring of legal scholarship that has been almost uniformly critical of the legal and moral underpinnings of the homosexual panic defense.<sup>68</sup>

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<sup>61</sup> See generally *People v. Saldivar*, 497 N.E.2d 1138 (Ill. 1986); *Schick*, 570 N.E.2d at 918; *Commonwealth v. Doucette*, 462 N.E.2d 1084 (Mass. 1984); Mison, *supra* note 48, at 167–70 (citing *Mills v. Shepherd*, 445 F. Supp. 1231 (W.D.N.C. 1978)).

<sup>62</sup> Mison, *supra* note 48, at 167–68 (citing *Mills*, 445 F. Supp. at 1231).

<sup>63</sup> *Saldivar*, 497 N.E.2d at 1138.

<sup>64</sup> The defendant in a homosexual panic defense situation is almost inevitably male; in 1992, Mison failed to find a single example of a reputed lesbian panic defense. Mison, *supra* note 48, at 135 n.7.

<sup>65</sup> *Id.* at 155–58.

<sup>66</sup> *Id.* at 158.

<sup>67</sup> See ALISON G. KELEHER & ERIC R.A.N. SMITH, EXPLAINING THE GROWING SUPPORT FOR GAY AND LESBIAN EQUALITY SINCE 1990, at 1 (2008), <http://www.polsci.ucsb.edu/faculty/smith/equality.pdf>. “[F]rom 1973 through 1991, 70 to 78 percent of the public thought that sexual relations between two adults of the same sex were always wrong. Then acceptance of gays and lesbians began to grow. By 2004, the number saying that homosexual relations were always wrong had fallen to 57 percent.” *Id.*

<sup>68</sup> See, e.g., Mison, *supra* note 48; Christina Pei-Lin Chen, Comment, *Provocation’s Privileged Desire: The Provocation Doctrine, “Homosexual Panic,” and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL’Y 195 (2000); Kara S.

Noting the improvement in attitudes towards homosexuals as well as potential problems with a ban on the gay panic defense,<sup>69</sup> one prominent legal scholar has even advocated against attempts to restrict use of the gay panic defense in the courtroom.<sup>70</sup> Additionally, thirty states and the District of Columbia have enacted hate crimes laws that explicitly sanction felonies committed in part because of bias against homosexuality<sup>71</sup>—now joined by the federal government.<sup>72</sup> The increasing intervention by state and federal law against entrenched homophobic violence has not, however, led to the disappearance of anti-gay violence or the killing of homosexuals. If lesbians, gay men, and bisexuals are not safe despite an improving legal environment, what hope do transgender people have?

#### B. TRANS PANIC: PUTTING THE “T” IN MITIGATION

While the gay panic defense has a history dating back at least to the early twentieth century,<sup>73</sup> documentation of murders of transgender people date back only to the 1970s.<sup>74</sup> As transgender people have become increasingly visible, their presence in courts has become more marked. Courts, which only recently struggled to incorporate the possibility of same-sex attraction, must now also handle transgender victims and defendants claiming they killed in a state of trans panic.<sup>75</sup> In many ways, the trans

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Suffredini, Comment, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 2001. *But see* Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995) (responding to Mison and arguing that Mison’s arguments suggest a wholesale repeal of the provocation doctrine rather than merely a rejection of the homosexual panic defense, as Mison argued).

<sup>69</sup> See *infra* text accompanying notes 181–182; Mison, *supra* note 48, at 174–78.

<sup>70</sup> Lee, *supra* note 50, at 521–57.

<sup>71</sup> Nat’l Gay and Lesbian Task Force, *Hate Crime Laws in the U.S.*, July 14, 2009, [http://www.thetaskforce.org/downloads/reports/issue\\_maps/hate\\_crimes\\_7\\_09\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/hate_crimes_7_09_color.pdf).

<sup>72</sup> Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2190 (2009).

<sup>73</sup> Lee, *supra* note 50, at 482–83.

<sup>74</sup> TRANSGENDER DAY OF REMEMBRANCE, *supra* note 36. Perhaps the first case to generate popular interest is the murder of Brandon Teena, who was killed by two men accused of raping the trans man. Rogers Worthington, *Deadly Deception; Teena Brandon’s Double Life May Have Led to a Triple Murder*, CHI. TRIB., January 17, 1994, at TEMPO-1. Teena’s death inspired the film *Boys Don’t Cry*. Roger Ebert, *Boys Don’t Cry*, ROGEREBERT.COM (Oct. 22, 1999), <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19991022/REVIEWS/910220302/1023>.

<sup>75</sup> In addition to Angie Zapata, the murders of Gwen Araujo and Lateisha Green attracted significant media attention. See Kate Linthicum, *Conviction in Killing of Transgender Woman*, L.A. TIMES, July 18, 2009, at A11. See generally Wyatt Buchanan, *Transgender Killings an Investigative Quagmire*, S.F. CHRON., Sept. 15, 2005, at A1. There are

panic defense is similar to gay panic; both assert that the defendant had his heterosexuality or masculinity so existentially challenged by the victim that the defendant acted without reason.<sup>76</sup> Trans panic defenses add an additional claim, however, which is critical to this Comment's analysis: they assert that the victim misled the defendant. Describing the trans panic defense used in the Gwen Araujo<sup>77</sup> trial, Victoria L. Steinberg writes:

Above all, defense counsel argued that Araujo's commission of "sexual fraud" constituted sufficient provocation . . . . While burying Araujo, one defendant said that "he could not believe that someone could ever be so deceitful. By being deceitful, he meant having sex with someone who thought it [sic] was a woman, not simply presenting as a woman when the person was actually a man."<sup>78</sup>

This closely parallels the claims made by Allen Andrade in his defense—that he was shocked by the "revelation" of Zapata's anatomical sex.

In both the Araujo and Zapata cases, the defendants claimed they had been deceived about the victim's "sex." In his trial for murdering Angie Zapata, Andrade's defense team told the jury, "He had been deceived, and he reacted."<sup>79</sup> Andrade claimed he was convinced that Angie was female until immediately before he killed her; when he learned about her anatomical sex, he flew into a rage. Gwen Araujo's killers made similar claims, asserting that they were deceived. One of the accused's lawyers told the jury, "This crime didn't occur because Mike [the defendant] had a bias. It happened because of the discovery of what Eddie [Gwen] had done . . . . This is a case that tells a story about . . . the tragic results when that deception and betrayal were discovered [by the defendant]."<sup>80</sup> In both

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undoubtedly other trials (given that the violent killing of almost 300 transgender people has been documented in the last forty years) but many, if not most, escape meaningful media attention.

<sup>76</sup> For an overview of the gay panic defense, see *supra* text accompanying notes 53–66. For an overview of the trans panic defense, see Victoria L. Steinberg, Book Review, *A Heat of Passion Offense: Emotions and Bias in "Trans Panic" Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 499, 520 (2005) (reviewing MARTHA NUSSBAUM, *HIDING FROM HUMANITY* (2004)).

<sup>77</sup> Gwen Araujo was murdered in 2002 after a group of young men with whom she had engaged in oral sex discovered that she was anatomically male. She was supposedly beaten with "a can and a skillet" and strangled to death. See generally Kelly St. John, *Defense in Araujo Trial Gives Final Argument*, S.F. CHRON., June 3, 2004, at B1.

<sup>78</sup> Steinberg, *supra* note 76, at 520 (citing Memorandum of Law from Michael P. Thorman to Alameda Super. Ct. in Support of Motion to Set Aside Hate Clause Allegation and Information Pursuant to Penal Code § 995, Points and Authorities in Support Thereof at 7–9, *People v. Magidson*, No. H-33728C (Super Ct. Cal. June 25, 2003)). Here, Steinberg quotes from the defense attorney's written assertion of the trans panic defense.

<sup>79</sup> Dunn, *supra* note 12, at A1.

<sup>80</sup> Vicki Haddock, 'Gay Panic' Defense in Araujo Case, S.F. CHRON., May 16, 2004, at E1.

cases, the defense suggested that the killer thought he was intimate with a woman/female. Thus, the revelation that, from the defendant's perspective at least, they had been intimate with a trans woman—decidedly *not* a person with the anatomical sex in which heterosexuality dictated that the defendant be interested—would be shocking.

Existing legal scholarship on trans panic defenses in murder cases is scant. The literature criticizing trans panic defenses includes a book review which argues that courts should not give jury instructions based on the trans panic defense<sup>81</sup> and a student comment calling for the legislative abolition of gay and trans panic defenses in California.<sup>82</sup> On the other hand, one commentator argues that “sexual misrepresentation,” including the situations involving transgender people considered here, should constitute adequate provocation for the provocation defense to apply.<sup>83</sup> Given that trans panic defenses are already being asserted in criminal courtrooms and that many thousands of Americans identify as transgender,<sup>84</sup> it is important for the criminal law to keep pace with cultural change.

In its present form, the trans panic defense is often asserted explicitly—the defendant argues that he was extraordinarily provoked and that he should be punished more leniently because of his state of mind.<sup>85</sup> Other defendants do not explicitly argue for leniency; they instead seek to impeach the victim's humanity and diminish the sympathy that jurors feel for the victim.<sup>86</sup> The trans panic defense strategy, whether explicit or

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<sup>81</sup> Steinberg, *supra* note 76, at 520.

<sup>82</sup> David L. Annicchiarico, Comment, *Consistency, Integrity and Equal Justice: A Proposal to Rid California Law of the LGBT Panic Defense*, 5 *DUKEMINIER AWARDS* 121 (2006). Annicchiarico addresses the trans panic defense in issuing a compelling call for a legislative ban on defenses related to “LGBT panic” in California. He references the murder of Gwen Araujo but does not make a distinction between trans and gay panic—nor does his argument address assertions of deception related to sex or gender by defendants.

<sup>83</sup> Bradford Bigler, *Sexually Provoked: Recognizing Sexual Misrepresentation as Adequate Provocation*, 53 *UCLA L. REV.* 783 (2006).

<sup>84</sup> Olyslager and Conway estimate that up to 1 in 500 people are transsexual and 1 in 100 people are transgender. In the United States, this would indicate 600,000 transsexual people and 3,000,000 transgender people. FEMKE OLYSLAGER & LYNN CONWAY, *ON THE CALCULATION OF THE PREVALENCE OF TRANSSEXUALISM* 23 (2007), <http://ai.eecs.umich.edu/people/conway/TS/Prevalence/Reports/Prevalence%20of%20Transsexualism.pdf>.

<sup>85</sup> This is the argument made in the Araujo case. See generally Haddock, *supra* note 80, at E1.

<sup>86</sup> Allen Andrade's defense team utilized this tactic, referring to Angie Zapata by her legal male name, Justin. Dunn, *supra* note 2. This less explicit appeal to juror bias is a major worry for Professor Lee, whose work suggests that defense lawyers will increasingly use these “coded” arguments if an explicit provocation defense is denied. See Lee, *supra* note 50, at 522–31.

implicit, “resonate[s] with juries that harbor biases, misinformation, or confusion about transgendered individuals.”<sup>87</sup>

As a legal matter, the trans panic defense fails to prove that transgender victims offer legally adequate provocation; indeed, the “sexual deception” alleged in nearly all trans panic defenses is not culpable under most states’ rape laws.<sup>88</sup> Additionally, rejecting the trans panic defense comports with a principled commitment to recognize the autonomy of individuals with respect to their gender. Ensuring that the trans panic defense is no longer welcome anywhere in the United States will require a wide range of strategies: legislative enactments in some states, judicial action in others, and aggressive action by prosecutors everywhere.

#### V. TRANS PANIC AS INADEQUATE PROVOCATION

The unfortunate fact is that trans panic sometimes works in the courtroom. Perhaps the most egregious example of an explicit and successful trans panic defense is the 1997 trial of William Palmer, who, after meeting Chanelle Pickett in a bar, beat and choked her for eight minutes, killing her.<sup>89</sup> The jury acquitted Palmer of the three more serious charges—first-degree murder, second-degree murder, and voluntary manslaughter—finding him guilty only of assault and battery.<sup>90</sup> Thus Palmer, who claimed that he reacted to Pickett’s anatomical sex being revealed, was convicted only for attacking Pickett, not killing her.<sup>91</sup> As transgender activist Nancy Nangeroni said at the time, “It really speaks to the fact that being transsexual means being less of a person . . . . Rich, white boy kills poor black transsexual girl, and the white boy gets a slap on the wrist.”<sup>92</sup>

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<sup>87</sup> Steinberg, *supra* note 76, at 521.

<sup>88</sup> Cf. Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 830–31 (1988).

<sup>89</sup> Francie Latour, *Sibling Decries Murder Acquittal; Verdict is Assault in Transsexual’s Death*, BOS. GLOBE, May 3, 1997, at B1.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* Palmer’s lawyers suggested that he did not kill Pickett, and that she died, instead, of a cocaine overdose. The medical examiner refuted that speculation, testifying that “the levels of cocaine found in [Pickett’s] body were too low to have contributed significantly to [her] death.” *Id.*

<sup>92</sup> *Id.* Nangeroni’s blunt but truthful assessment of the Palmer trial recognizes that race, ethnicity, and class are always intertwined with sex, gender, and gender identity. Angie Zapata was an Hispanic trans woman killed by a white man, for example. The ties between sex and gender markers, on one hand, and race, ethnicity and class, on the other, are beyond the scope of this Comment, however.

While the reduction in sentence achieved by Palmer is more dramatic than in many other uses of the trans panic defense,<sup>93</sup> the outlines of his defense are similar to those which still occur. His three-year sentence is an outlier, but any mitigation is a boon to a defendant facing a murder charge.<sup>94</sup> Securing even an outside chance to be convicted of manslaughter rather than murder would be a success for a defendant facing evidence like that presented against Angie Zapata's killer.

Although they have been effective in the courtroom, trans panic defenses fail to assert a legally sufficient provocation, and thus should be rejected at trial. Courts generally allow mitigation defenses only in cases where the facts support a cognizable and legally adequate claim of provocation.<sup>95</sup> All varieties of the trans panic defense fail to prove that the defendant was provoked in a way that is cognizable as legally sufficient.

The trans panic defense seeks to assert that the transgender victim provoked a murderous attack on him- or herself. There are two possible routes for making this claim: a claim of justification<sup>96</sup> or a claim of excuse.<sup>97</sup> Reviewing the history of provocation defenses, Professor Dressler points out, "All of the common law forms of 'adequate provocation' have one thing in common; they all involve unlawful conduct by the provoker."<sup>98</sup> These categories originally included finding a spouse committing adultery *in delicto* and seeing a friend or family member being assaulted.<sup>99</sup> In contrast, contemporary understandings of provocation are based in an objective consideration of the defendant's mental state. Modern

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<sup>93</sup> Angie Zapata's killer was convicted of first-degree murder, and the killers of Gwen Araujo of manslaughter. Dunn, *supra* note 31; Henry K. Lee, 2 *Guilty in 2nd Degree in Araujo Slaying*, S. F. CHRON. Sept. 13, 2005, at A1.

<sup>94</sup> Latour, *supra* note 89, at B1.

<sup>95</sup> See generally Dressler, *supra* note 45, at 429–32.

<sup>96</sup> See generally Note, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021, 1024–36 (1958) (exploring the common law analysis underlying traditional categories of sufficient provocation).

<sup>97</sup> See MODEL PENAL CODE § 210.3(1)(b) (2001) (explaining that "extreme mental or emotional disturbance" which influence a killer can mitigate murder to manslaughter); see, e.g., Crane v. State, 685 S.E.2d 314, 317 (Ga. Ct. App. 2009) (finding that "engaging [defendant] in a dangerous road race and threatening to kill him; throwing an object at [defendant's] truck; . . . forcibly striking the window two or three times; and taunting [defendant] to shoot . . . supplied sufficient provocation to excite the passion necessary for voluntary manslaughter").

<sup>98</sup> Dressler, *supra* note 45, at 439. Adultery has been decriminalized, so perhaps a more accurate reading is historically unlawful behavior gives rise to adequate provocation.

<sup>99</sup> *Id.* See also Regina v. Mawgridge, Kel. J. 119, 128, reprinted in 84 Eng. Rep. 1107, 1111 (Q.B. 1707) (finding that throwing a bottle at accused was not adequate provocation because it was "justifiable and lawful").

provocation doctrine places the reasonable man in the defendant's situation and asks whether the reasonable man would be provoked.<sup>100</sup> In both cases, however, the primary consideration is objective: would a reasonable person be adequately provoked to kill?<sup>101</sup>

Trans panic defenses often leave the exact provocation unstated, but the defense seems to break down into three possible "triggers," each of which could constitute the source of adequate provocation: (1) the victim's anatomical sex, (2) the revelation of the victim's anatomical sex, and (3) the victim's alleged act of "sexual deception."<sup>102</sup> None of these three triggers constitutes legally adequate provocation.

#### A. ANATOMICAL SEX

The first alleged trigger for the trans panic defense is the difference between the victim's anatomical sex and gender presentation. Claiming this difference as the basis for adequate provocation does not meet the general requirement that the victim *act* in provoking a murderous reaction.<sup>103</sup> Araujo's killer implicitly claimed that Araujo's identity—that of a person who felt herself female despite having male genitalia—was in and of itself sufficient to provoke a response.<sup>104</sup> This claim moves beyond the mainstream of provocation law to baldly state that transgender people's anatomical sex *qua* sex is provocation without any action.<sup>105</sup>

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<sup>100</sup> See generally Dressler, *supra* note 45. Some states and the Model Penal Code add a secondary subjective consideration; they place the reasonable man in the defendant's situation *as he saw it* and ask if the provocation was sufficient. See DEL. CODE ANN. tit. 11, § 632(2) (2009); HAW. REV. STAT. § 707-702 (2009); MONT. CODE ANN. § 45-5-103; UTAH CODE ANN. § 76-5-205.5(4) (2009); MODEL PENAL CODE § 210.3(1)(b) (2001).

<sup>101</sup> For both approaches, the threshold issue is whether provocation was legally sufficient. The difference is in how that threshold is crossed—by a specific occurrence (under the common law approach) or by the determination of the defendant's state of mind (under the MPC approach).

<sup>102</sup> Steinberg, *supra* note 76, at 508.

<sup>103</sup> MARTHA NUSSBAUM, HIDING FROM HUMANITY 128–29 (2004).

<sup>104</sup> See Steinberg, *supra* note 76, at 509.

<sup>105</sup> It might alternatively be claimed that the juxtaposition of sex and gender presented to the killer is the source of claimed provocation. To view the trigger in this way may not accurately reflect the whole of trans identity, but in either case, the claimed provocation is inherent to the trans victim. Whether the killer claims that he (or she) was provoked by the victim's sex or its contrast with the victim's gender presentation, the victim *does* nothing to the killer. Only by claiming that transgender identity is a form of deception at all times could the killer argue that his (or her) victim *did* anything to provoke a murderous rage. This argument, while undoubtedly intelligible, must be rejected if transgender people are taken as acceptable in society.



The implications of accepting transgender people's anatomical sex as provocation are broad and troubling. As Victoria L. Steinberg writes, "To expand the definition of sufficient provocation to include a person's characteristics would open the door to justifying mitigation for murder of anyone that a killer . . . dislikes, feels uncomfortable interacting with, or finds disgusting."<sup>106</sup> If distaste or disapproval of a person's gender identity is sufficient to excuse murder by the provocation defense, then other kinds of strong disapproval may also justify a provocation defense. In the past, claims of provocation with their roots in disgust of Jews, African Americans, or the physically handicapped were regularly accepted.<sup>107</sup> Today, however, such defenses are found to be morally repugnant and are not admitted in court.<sup>108</sup> Rejection of claims of provocation by "Jewishness" or race flows from a recognition that such provocation stems not from reason but from prejudice; the reasonable person is generally taken to represent our better urges as a society, not just as a representation of the feelings of an "ordinary" person.<sup>109</sup>

Here, some point to hate crimes laws that express society's disapproval as implying that courts must reject gay panic defenses.<sup>110</sup> The federal hate crimes law, enacted in 2009, is important as a statement of principle, but does not alone overcome the persistence of the trans panic defense. In New York, Dwight DeLee was prosecuted under hate crime statutes for the killing of LaTeisha Green, a trans woman, but was only found guilty of manslaughter, not murder.<sup>111</sup> Green was at a house party with her brother,

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<sup>106</sup> Steinberg, *supra* note 76, at 508.

<sup>107</sup> NUSSBAUM, *supra* note 103, at 134.

<sup>108</sup> *Id.*

<sup>109</sup> Lee, *supra* note 50, at 506. This argument encapsulates the force of history that mitigates in favor of ending use of the trans panic defenses.

<sup>110</sup> Scott D. McCoy, Note, *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629 (2001) (arguing that allowing gay panic defenses is philosophically inconsistent with a hate crime law which expresses societal sentiment that crimes motivated by sexual orientation are in some way more culpable than the same criminal act without prejudice as a motivating factor). McCoy does not address trans panic defenses, but his logic seems to easily extend to hate crimes laws which are inclusive of gender identity.

<sup>111</sup> Jim O'Hara, *Hate-Crime Killer Receives 25-Year Term*, POST-STANDARD (Syracuse, N.Y.), August 19, 2009, at A6. There is a tortured logic to the coexistence of gay or trans panic defenses and hate crimes laws. The combination recognizes the historic prejudice faced by LGBT people while also recognizing a diminished mental state—the very purpose claimed for provocation defenses. In essence, DeLee's conviction says: We understand that he acted under extreme emotional disturbance which was a response to Green's gender identity or sexuality and thus cannot hold him accountable for *murder*, but we also find his disgust antisocial and want to combat it by enhancing his manslaughter penalty.

where several other guests shouted homophobic slurs at her. Later, she was outside the party in a car with her brother when DeLee approached the car and fired a single shot from a .22-caliber rifle, killing her.<sup>112</sup> New York has a hate crimes law that includes sexual orientation, but does not cover gender identity.<sup>113</sup> Prosecutors successfully contended that, because of the homophobic slurs, the killing was related to Green's sexuality and tried the case as a hate crime.<sup>114</sup> The case was only the second in the United States in which hate crimes statutes were used in the prosecution of a crime against a transgender person.<sup>115</sup>

Many of the trans panic defenses documented in the media claim that the killer was provoked by the transgender victim's anatomical sex. Allowing transgender people's existence—which inherently includes inconsistency between gender and anatomical sex—to constitute adequate provocation is counter to the general requirement that provocation be an affirmative act by the victim<sup>116</sup> and opens the door to other characteristic-motivated provocation defenses. The claim that transgender people's anatomical sex is a provocation has no legal validity; the victim does nothing to provoke a response, let alone a murderous one.

#### B. REVELATION OF ANATOMICAL SEX

Defendants using a trans panic defense often claim, whether implicitly or explicitly, that the victim's *revelation* of his or her anatomical sex—which does not strictly conform with his or her gender presentation—constitutes adequate provocation. Known cases do not include such revelations, and even were a revelation to occur, it would constitute a speech act that courts ought to protect, not cast as provocation.<sup>117</sup> In the cases considered here, the victims did not proactively reveal their own anatomical sex to their killers. Angie Zapata pointedly refused to answer questions about her anatomical sex and Allen Andrade groped her to confirm his suspicion that she had a penis.<sup>118</sup> The “revelation” in the

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It is not clear from limited media coverage whether DeLee's attorneys made any explicit trans panic claims in his defense, but the situation is certainly one in which LaTeisha Green's gender identity could subconsciously influence jurors in deciding on which charge to convict.

<sup>112</sup> Linthicum, *supra* note 75, at A11.

<sup>113</sup> N.Y. PENAL LAW § 485.05 (McKinney 2009).

<sup>114</sup> Linthicum, *supra* note 75, at A11.

<sup>115</sup> *Id.*

<sup>116</sup> NUSSBAUM, *supra* note 103, at 128–29.

<sup>117</sup> See *infra* text accompanying notes 121–124.

<sup>118</sup> See *supra* text accompanying notes 15–17.

Araujo case was even less voluntary: “[T]he defendants harassed Araujo to determine her sex, ultimately throwing her to the ground and pulling off her clothing to reveal her genitals.”<sup>119</sup> If, for purposes of argument, a transgender person’s affirmative revelation of anatomical sex could constitute adequate provocation, that situation has yet to arise in a publicized case.<sup>120</sup>

Even in the hypothetical situation in which a transgender person affirmatively reveals his or her anatomical sex and thereby contributes to another person’s murderous rage, that revelation should not constitute adequate provocation. Instead, it should be read as a speech act—what Nan Hunter calls “expressive identity.”<sup>121</sup> Conceived of as speech, the revelation of a transgender person’s anatomical sex becomes political as well as personal.<sup>122</sup> Political statements are generally not read as adequate provocation, unless they also incorporate fighting words.<sup>123</sup> Indeed, were a court to allow the mere statement that one’s gender and anatomical sex do

<sup>119</sup> Steinberg, *supra* note 76, at 509.

<sup>120</sup> Recognizing that truth is often stranger than fiction, this Comment does not suggest such a situation is impossible—merely improbable. Trans people are generally cautious about revealing such information casually, and for good reason. Transgender people were the victims of 12% of bias crimes against the LGBT community in 2007. NAT’L COALITION OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE UNITED STATES 5 (2008), *available at* [http://www.ncavp.org/common/document\\_files/Reports/2008 HV Report smaller file.pdf](http://www.ncavp.org/common/document_files/Reports/2008%20HV%20Report%20smaller%20file.pdf). Other considerations suggest that, were such an improbability to occur, that such a revelation would still not constitute adequate provocation. *See infra* Part V.C.

<sup>121</sup> Nan Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000) (arguing that for groups whose identity is central to a political claim—for example, transgender people claiming equal protection—there is case law suggesting that identity itself is expressive speech).

Are transgender people’s identities intentional enough to constitute expressive speech? It has never been tested at trial or on appeal, but a well-developed identity politics, recognizing the inherently political nature of personal status, suggests that they may be. Further consideration of this issue is well outside the scope of this Comment, however.

<sup>122</sup> *Id.* at 4–6.

<sup>123</sup> *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 562 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include . . . ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”). A statement like those envisioned as constituting provocation here—“I am transgender,” or “I may appear female to you but I have male genitalia”—does not analogize to well-known fighting words, which directly insult the listener. In *Cohen v. California*, the Supreme Court limited the reach of “fighting words” by requiring that they “could reasonably have [been] regarded . . . as a direct personal insult” or as “intentionally provoking a given group to hostile reaction.” 403 U.S. 15, 20 (1971). Statements of transgender identity are far from this standard, however it might be interpreted.

not align in the typical way to serve as adequate provocation, essentially, it would be declaring that all openly transgender people provoke the reasonable person to a murderous rage merely by their existence.<sup>124</sup>

Past cases suggest that defendants seeking to use the trans panic defense proactively seek out information regarding their victims' anatomical sex, rendering the revelation of that information inadequate provocation because the victim does not act towards the defendant. Even were there to be a situation in which a transgender person revealed their anatomical sex and was killed as a result, considerations of speech and identity politics suggest that the only just response would be for courts to find the genital revelation inadequate provocation.

Claims that the anatomical sex of a transgender person constitutes adequate provocation fail because the victim does not *act*. Recognizing a person's innate or chosen characteristics as legally cognizable adequate provocation leads to an absurd and undesirable result: the institutionalization of bias as legitimization for violent crime. Even if the argument attempts to shift the alleged provocation from a transgender person's existence to his or her revelation of their gender identity, the same concerns apply; recognizing the revelation of one's transgender status as adequate provocation makes living as a transgender person adequate provocation as well. The allegation that a transgender person's "sexual deception" constitutes adequate provocation, however, is not so obviously deficient. It offers perhaps the most viable path to a successful provocation defense in trans panic cases, although it fails just as claims stemming from the victim's gender identity do.

### C. SEXUAL DECEPTION

The third and ultimate legal claim made in trans panic defenses is that the transgender victim committed a vaguely defined sexual fraud in failing to reveal their anatomical sex to the defendant.<sup>125</sup> This fraud allegedly provides the adequate provocation that substantiates the trans panic defense and secures mitigation to manslaughter. The defendants accused of murdering Angie Zapata and Gwen Aruajo both explicitly claimed that they had been deceived.<sup>126</sup> The alleged deception was crucial for the

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<sup>124</sup> This Comment cannot and does not prove the political import of transgender people's existence. However, combating the trans panic defense is an inherently political act, concerned with society's understanding of gender identity and its respect for that identity. Making political claims may be difficult, but is unavoidable when making identity-based arguments, as here. Hunter, *supra* note 121, at 4–6.

<sup>125</sup> Steinberg, *supra* note 76, at 510–11.

<sup>126</sup> See *supra* text accompanying notes 22–24, 80–81.

provocation claimed by these male defendants. From their perspective, sexual intimacy with a person perceived as female was acceptable, but sexual intimacy with anyone with male anatomical sex characteristics was an affront sufficient to provoke a homicidal rage.<sup>127</sup> Being induced into a sexual act by a person they perceive as female (but who is, for them, “actually” male because of anatomical sex) is the alleged trigger for adequate provocation.

Allegations of fraud are serious business, and they arise surprisingly frequently in other sexual contexts.<sup>128</sup> To substantiate the claim of adequate provocation by sexual deception or sexual fraud<sup>129</sup> central to the trans panic defense, defendants must first show that there is in fact fraud, and second, they must demonstrate that the fraud alleged is legally blameworthy.<sup>130</sup> As this section will demonstrate, neither fraud nor deception as alleged in the trans panic defense constitute legally adequate provocation.

The claim of fraud presupposes the existence of a “material fact that one has a duty to reveal” and harm done by a misrepresentation of that fact.<sup>131</sup> For the claims made about sexual misrepresentation in the trans panic defense to constitute fraud, both the transgender person’s gender and anatomical sex must be material to the decision to engage in the sexual act, and the transgender person must have a duty to reveal that fact to their killer.<sup>132</sup> Since neither of these propositions is true, as argued below, it follows that there is no sexual fraud or deception when a transgender person does not reveal their anatomical sex to a sexual partner.

A person’s anatomical sex is not a material fact capable of being misrepresented in most sexual relationships, including those which give rise

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<sup>127</sup> In the one well-documented case involving a transgender man, Brandon Teena, the claims of the defendants are much less clear; they were accused of raping Teena in the weeks preceding his death, and records of their exact defenses in court are scant. See Worthington, *supra* note 74, at TEMPO-1.

<sup>128</sup> See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 49 (1998) (reviewing the legal treatment of deception across a broad spectrum of sexual encounters).

<sup>129</sup> The distinction between sexual fraud and sexual misrepresentation is blurry at best. Since much of the contemporary application of the trans panic defense is at the level of appealing to bias rather than legal argumentation, the precise distinction does not affect the analysis that follows. Deception, misrepresentation, and fraud are, in this context, interchangeable.

<sup>130</sup> Cf. Chamallas, *supra* note 88, at 830–33 (suggesting that rape by fraud is not prosecuted because courts are reluctant to become judges of which frauds are material to consent and because “the man who lies to get his way is less blameworthy than one who resorts to physical force”).

<sup>131</sup> Steinberg, *supra* note 76, at 511.

<sup>132</sup> *Id.*

to assertions of the trans panic defense. Either the transgender person's genitals are irrelevant to the sexual act or acts that occur, or the transgender person's genitals are exposed to his or her sexual partner in the course of sex acts. In neither the Zapata nor the Araujo case was there genital-to-genital contact or even exposure of the transgender person's genitals.<sup>133</sup> Although people may make assumptions about the anatomical sex of those with whom they have sexual interactions that do not involve genital contact, the anatomical sex of an oral sex partner, for example, is immaterial to *the contemplated sex act*. Either the sexual act is consummated without both parties' genitals being involved—as is frequently the case when oral sex is performed on a male, where the female (or trans woman's) genitals are not involved in the act—or the sexual act involves genital contact, in which case no deception regarding anatomical sex is possible because the genitals of both participants are exposed.

The trans panic defense necessarily implies that transgender people deceive their sexual partners even when the transgender person's genitals are not involved in the sexual act. This “leads inevitably to the conclusion that a person has a duty to reveal their genitals, or verbally communicate the nature of their biological sex to one with whom they are intimate.”<sup>134</sup> One of the defendants in the Araujo case made just such a claim: “[A] heterosexual male has a right to . . . choose the gender of his partners . . . Eddie [Gwen] Araujo took away that choice by deception.”<sup>135</sup> Leaving aside the fact that Gwen Araujo's gender *was* female, one party's preferences do not impose any obligation on others to voluntarily disclose their anatomical sex, any more than a person is obligated to disclose any other relevant genital characteristic. For example, although this seems likely to be less important today than in the past,<sup>136</sup> society persists in valuing female virginity.<sup>137</sup> Despite that subjective value, the condition of a

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<sup>133</sup> Andrade claimed that he received oral sex from Zapata, but no other sexual contact, including any where Zapata's genitals would be touched or even visible, occurred. See Correll, *supra* note 3, at A3. One juror recounted that Araujo had anal sex with her killers. Brian Kluepfel, *Left Hanging*, EAST BAY EXPRESS (May 11, 2005), <http://www.eastbayexpress.com/eastbay/left-hanging/Content?oid=1077790>. She also insisted that her genitals not be touched during sexual acts. Haddock, *supra* note 80, at E1.

<sup>134</sup> Steinberg, *supra* note 76, at 511.

<sup>135</sup> Kelly St. John, *Nature of Killing Focus at End of Araujo Case*, S. F. CHRON., June 1, 2004, at B1.

<sup>136</sup> See, e.g., David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 465–66 (2000) (noting that seduction in breach of promise to marry, a crime which was in part defined by the loss of the female's virginity, “probably has become much less common” in contemporary America).

<sup>137</sup> See, e.g., DANIEL L. CHEN, GENDER VIOLENCE AND THE PRICE OF VIRGINITY: THEORY AND EVIDENCE OF INCOMPLETE MARRIAGE CONTRACTS 2 (2005), *available at*

woman's hymen, which is commonly but erroneously perceived as a signifier of her virginity,<sup>138</sup> would not constitute adequate provocation even if that condition did not align with her professed virginity.<sup>139</sup> Further, were courts to implicitly impose such a standard by finding that failure to reveal one's anatomical sex constituted adequate provocation, it would encounter substantial difficulties in defining sex.<sup>140</sup>

Courts have been hesitant to intrude into the historically private zone of consensual sexual interactions when considering claims of fraud.<sup>141</sup> They have refused to consider fraud or misrepresentation regarding birth control use<sup>142</sup> and prior homosexual experience.<sup>143</sup> The existing policy seems both practical and wise; the creation of judicial standards for revealing personal information in the context of romantic or sexual relations is fraught with difficulty. Because a person's anatomical sex is not material information prior to genital contact, at which point a person's anatomical sex is necessarily revealed, failure by a transgender person to disclose their anatomical sex cannot be legally recognized as fraud. Nor is there any duty to give notice about one's genitals.

In considering the intersection of fraud, misrepresentation, deception, and sex, rape law offers a rich source of legal theory. There may be a trend towards greater acceptance of tort claims arising from deception in intimate relationships, but the criminal law is much less open to claims of rape by fraud.<sup>144</sup> There are several general situations, however, in which fraud used to secure consent is legally culpable: fraudulent medical treatment, fraud as

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[http://home.uchicago.edu/~dlc/papers/GenderViolence\\_PriceOfVirginity.pdf](http://home.uchicago.edu/~dlc/papers/GenderViolence_PriceOfVirginity.pdf) (noting that asymmetrical values of virginity, which place a greater value on female virginity, persist across time and income changes).

<sup>138</sup> Cf. SALLY E. PERLMAN ET AL., CLINICAL PROTOCOLS IN PEDIATRIC AND ADOLESCENT GYNECOLOGY 131 (2004).

<sup>139</sup> While the concept of rape by fraud or deception perpetrated by women has undoubtedly not received the same degree of attention as that perpetrated by males, Professor Falk's survey of cases of rape by fraud does not mention virginity. Falk, *supra* note 128, at 49–76 (collecting a representative selection of cases where convictions were obtained for rape by fraud).

<sup>140</sup> Although the popular conception of sex is of a binary, male–female divide, the reality is much more complicated. There are intersex people, who are born with some male and some female characteristics, as well as those with non-standard chromosomes. What to disclose, and how, would be a major problem. See generally Greenberg, *supra* note 39.

<sup>141</sup> Steinberg, *supra* note 76, at 512.

<sup>142</sup> *Id.* (citing *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618, 619 (Cal. Ct. App. 1980) (rejecting a misrepresentation claim about the use of birth control)).

<sup>143</sup> See *Woy v. Woy*, 737 S.W.2d 769, 773–74 (Mo. Ct. App. 1987) (finding wife had no duty to reveal lesbian sexual activity engaged in prior to heterosexual marriage).

<sup>144</sup> Chamallas, *supra* note 88, at 830–31.

to the defendant's identity, and sexual scams involving sex as a means to secure a career (usually in entertainment).<sup>145</sup> Each of these categories is connected by a theory of "fraud in the factum," where the victim is deceived as to the nature of the act.<sup>146</sup> If these fact patterns appeared in sexual relationships in which a transgender person commits fraud, the victim would have a justified claim of sexual fraud which would constitute adequate provocation. A transgender doctor who induces consent by pretending to be offering medical treatment while in fact committing a sex act would be guilty of rape by fraud.<sup>147</sup> This scenario, however, bears no resemblance to the fact patterns that lead to the trans panic defense. Merely failing to disclose anatomical sex is not fraud in the factum.<sup>148</sup>

The claims of "sexual deception" made by defendants asserting a trans panic defense bear more resemblance to the theoretical concept of fraud in the inducement than they do to fraud in the factum. From the killer's perspective, a transgender victim may have induced consent to a sexual encounter through deception about their anatomical sex.<sup>149</sup> As Martha Chamallas succinctly explains, however, "[f]alse promises of marriage, false representations of sterility, or false professions of love will not vitiate the deceived party's consent, even if the consenting party would never have agreed to the encounter if the truth were told."<sup>150</sup> Even if one accepts that a transgender person *does* deceive a sexual partner about his or her anatomical sex, the consent obtained thereby would be valid because the transgender person's genitals are not integral to consent for sex acts that do not involve those genitals.<sup>151</sup> Anatomical sex is not involved in consent to

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<sup>145</sup> Falk, *supra* note 128, at 49–76 (collecting a representative selection of cases where convictions were obtained for rape by fraud).

<sup>146</sup> Chamallas, *supra* note 88, at 831 n.224. "Fraud in the factum typically denotes a situation in which the victim consents to the doing of act X and the perpetrator of the fraud, in the guise of doing act X, actually does act Y." *Id.*

<sup>147</sup> Fraudulent medical treatment is perhaps an archetype of rape by fraud. *See generally* Falk, *supra* note 128, at 52–58 (outlining cases of rape by doctors achieved through fraud).

<sup>148</sup> Consenting to "sex act X with a woman" rather than "sex act X with a trans woman who possesses male genitals" would not be fraud in the factum, however discordant it might be for a presumably heterosexual person. Fraud in the factum is focused on lack of consent to the *sex act*. If a man (or woman) consented to a sex act with a transgender person, the anatomical sex of the transgender person is irrelevant for considerations of fraud in the factum.

<sup>149</sup> Indeed, Andrade and Araujo's killers both made similar claims. *See supra* text accompanying notes 22–24, 79.

<sup>150</sup> Chamallas, *supra* note 88, at 832.

<sup>151</sup> ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 215 (3d ed. 1982) ("[C]onsent induced by fraud is as effective as any other consent . . . if the deception relates not to the thing done but merely to some collateral matter . . ."). For example, if a man



non-genital sex acts, and sex acts involving a transgender person's genitals would necessarily disclose the nature of those genitals. Given the immateriality of anatomical sex to consent for non-genital sex acts, the lack of duty to disclose anatomical sex generally, and the well-established rape law principle that misrepresentation is not generally legally culpable, the trans panic defense does not demonstrate that "sexual deception" or "sexual fraud" is adequate provocation. Instead, it merely demonstrates the obvious—that sexual relations are complicated.<sup>152</sup>

There is one serious scholarly defense of what is essentially a provocation by rape claim in trans panic defenses. In expounding a theory of provocation based on sexual misrepresentation, Bradford Bigler puts forth a three-part test for determining when sexual misrepresentation is legally cognizable as provocation: first, the defendant and victim must have engaged in sexual activity; second, the misrepresentation must obscure a fact which would be material to consent; and third, the misrepresented fact would "be likely to cause a reasonable person a severe mental or emotional crisis upon discovery."<sup>153</sup> He argues that the triggering provocation in cases where rape leads to a heat of passion is the lack of consent.<sup>154</sup>

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consents to receive oral sex from a trans woman, her transgender identity does not impact his consent to oral sex. His consent is not voided by the fact that he was deceived about something unrelated to the act, including the anatomical sex of his partner.

<sup>152</sup> Professors Falk and Chamallas are critical from a feminist perspective of rigid or rote application of the distinction between fraud in the factum and fraud in the inducement. Falk, *supra* note 128, at 171–72; Chamallas, *supra* note 88, at 832. Professor Falk summarizes this objection, writing, "Diversity of opinion [exists] regarding the appropriate parameters of legally effective consent in cases of rape by fraud." She explains that "commentators' suggestions . . . are more expansive than the traditional factum-inducement dichotomy and, thereby, offer greater protection to potential victims." Falk, *supra* note 128, at 171. Following this line of reasoning to one possible extreme leads to Bigler's conclusions regarding sexual deception. *See infra* text accompanying notes 153–159. Following this line of reasoning while criticizing the heterosexual privilege and male privilege inherent in claims of trans panic might suggest rejecting claims of trans panic despite skepticism of the "factum-inducement dichotomy". Falk suggests defining rape by fraud starting from the "coerciveness of fraud." Falk, *supra* note 128, at 171–72. It is not clear whether or not the specific facts of any trans panic claim would constitute coercive fraud after this redefinition of rape. In any case, these theoretical considerations do not represent the current state of rape law. Further analysis along these lines is outside the scope of this Comment.

<sup>153</sup> Bigler, *supra* note 83, at 820. The author concedes the great difficulty of defining a "sexual act" and leaves such determination to a case-by-case fact-finding outside the scope of the comment. *Id.* at 821.

<sup>154</sup> *Id.* at 823. This seems to be right on its face; the presence or absence of force in a sexual act does not, in itself, render the act "bad" or morally reprehensible. *Id.* at 823 n. 181.

Starting with the premise that sexual acts obtained by fraud ought to be legally culpable,<sup>155</sup> the argument then generalizes from rape law to sexual misrepresentation.<sup>156</sup> According to Bigler, “[s]exual identity cases . . . seem to straddle fraud in the inducement and fraud in fact.”<sup>157</sup> On one hand, the defendant consented to a sex act, which was then consummated; Bigler suggests this is fraud in inducement. On the other hand, Bigler writes, “[T]he nature of the sex to which the deceived party consents (for example, heterosexual sodomy in the case of Araujo) is fundamentally different than the act in which the defendant actually engaged (here, homosexual sodomy);” he suggests this is fraud in the factum.<sup>158</sup> In order for there to be more than fraud in the inducement—for Bigler’s thesis to hold—transgender people must *be legally defined* by their anatomical sex rather than their self-identified gender. In short, Allen Andrade’s attorneys must have been correct when they referred to Angie Zapata as Justin.<sup>159</sup>

The crux of both Bigler’s theory of sexual misrepresentation and of the trans panic defense is that transgender people cannot escape their birth sex. Birth sex, however, is not as clear as the lay observer might believe. “Recent medical literature indicates that approximately one to four percent of the world’s population may be intersexed and have either ambiguous or noncongruent sex features.”<sup>160</sup> Even if it were advisable to use the courts to mandate disclosure of anatomical sex, this minority of people would be at risk; a disgruntled sexual partner could point to “ambiguous or noncongruent sex features” and claim they had been deceived regarding the “true” biological sex of their intersex partner. Further, the argument that a transgender person is defined not by their gender but by their anatomical sex denies their experience and even their personhood.<sup>161</sup> Additionally, by arguing for a genital-based provocation, both trans panic defenses and the

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<sup>155</sup> *Id.* at 823 n.183 (citing criticisms of rape law, including Falk, *supra* note 128, for the proposition that obtaining consent by fraud should be morally culpable).

<sup>156</sup> If, as the theory of rape by fraud asserts, obtaining consent based on a material misrepresentation is rape, then some of the categories of misrepresentation (“sexual identity” and “sexual health”) constitute adequate provocation insofar as they are, actually, categories of *rape*. This implication, however, is left unexplored. *See id.* at 820–30.

<sup>157</sup> *Id.* at 800.

<sup>158</sup> *Id.* at 800–01.

<sup>159</sup> Dunn, *supra* note 2.

<sup>160</sup> Greenberg, *supra* note 39, at 267.

<sup>161</sup> *See generally* Hasan Shafiqullah, *Shape-shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN’S L.J. 195 (1997) (arguing that the law should support self-actualization by trans people).

theory of sexual misrepresentation privilege one form of gender identification—*anatomical sex*—over many others.<sup>162</sup>

#### VI. GENDER AUTONOMY AND THE TRANS PANIC DEFENSE

The government assigns legal gender or sex to people at birth. The sex recorded on a birth certificate is a powerful identifier and follows people through life. It is so important that some courts have refused to grant changes even in the face of evidence that the original attribution was incorrect.<sup>163</sup> There is broad agreement that some uses of a government-maintained gender classification are legitimate while others are not; police officers and firefighters are now judged on merit rather than gender, while compulsory draft registration and the right to marry are still based on meeting specific gender restrictions.<sup>164</sup> As Professor Weiss argues, “[T]ranssexual people insist that they have the need and the right to determine their own gender.”<sup>165</sup> She asserts a privacy claim on behalf of transgender people not just for Brandeis’s famous “right to be let alone,”<sup>166</sup> but also as for the right to exist as autonomous sexual beings.<sup>167</sup> A meaningful right to privacy confers on individuals the right to define their own gender. This “undoubtedly raises administrative problems for the legal systems . . . . However, it is no answer to say that administrative convenience is superior to personhood, that since we cannot fit these transsexual people into our pet theory of gender, they must accommodate

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<sup>162</sup> Jillian Todd Weiss diagnoses the complexity inherent to perceptions of gender:

There are many markers of gender, and of these, genitalia is the least significant for purposes of daily functioning in society. Our perception of gender . . . is based on a conglomeration of numerous factors, including but not limited to visual cues such as gait, body and facial characteristics, body language, and dress; auditory cues such as voice and vocabulary; and cultural cues such as interpersonal style, profession, job title, social status, and economic status. If there is a greater number of factors associated with femininity, we see a female, if there is a greater number of factors indicating masculinity, we see a male.

Weiss, *supra* note 41, at 179.

<sup>163</sup> *Id.* at 167 n.139.

<sup>164</sup> *Id.* at 168. The strict gender boundaries erected around marriage may be slowly crumbling, but the vast majority of Americans are still restricted from marrying any person who is not legally considered to be of the opposite sex.

<sup>165</sup> *Id.*

<sup>166</sup> *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>167</sup> Weiss, *supra* note 41, at 169–70. As Professor Weiss writes, “Privacy does not reside in our actions, but in our selves. A ‘private’ life refers to the idea that each of us has our own individual, i.e., private, self, which we are allowed to create as we will, within the strictures of proper government power,” and which cannot be otherwise abridged by the polity. *Id.* at 170.

their identity to our . . . notions of reality.”<sup>168</sup> Exposing transgender people to the risk of mitigation by trans panic as a consequence of their actualization of deeply held gender identities is an unfair, cruel burden to place upon a group which already suffers under the burden of transphobia and homophobia.

#### VII. RESPONDING TO TRANS PANIC IN THE COURTROOM

Faced with the legally insufficient, morally suspect trans panic defense, what is to be done? There are two major responses available to combat the trans panic defense: legislative bans or changes to jury instructions. Critics of the gay panic defense have largely called for it to be judicially or legislatively banned.<sup>169</sup> Following this prohibitory instinct, California became the first state in the nation to ban “panic” defenses based in homophobia or transphobia in 2006.<sup>170</sup> The statute, A.B. 1160,<sup>171</sup> is simple but powerful; it codifies disapproval of panic defenses.<sup>172</sup> Specifically, it reads:

In any criminal trial or proceeding, upon the request of a party, the court shall instruct the jury substantially as follows: “Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation.”<sup>173</sup>

Such a jury instruction “activates the notion of bias in the minds of the jurors, hopefully prompting them to examine the extent to which prejudice may be factoring into their decisions.”<sup>174</sup> The combination of public policy disapproval of panic defenses and an affirmative instruction provides a strong disincentive against the use of trans panic defenses. Legislative action like California’s has the advantage of “uniformity and

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<sup>168</sup> *Id.* at 181.

<sup>169</sup> See Lee, *supra* note 50, at 549–50. “A critic of the gay panic defense might contend that the simplest way to deal with the problem would be for the legislature to pass a statute stating that a non-violent homosexual advance does not constitute legally adequate provocation.” *Id.*

<sup>170</sup> Press Release, Transgender Law Center, Gwen Araujo Justice for Victims Act Becomes Law!, (September 28, 2006), available at <http://transgenderlawcenter.org/new/index.php/updates/press-releases/gwen-araujo-justice-for-victims-act-becomes-law>.

<sup>171</sup> CAL. PENAL CODE § 1127h (West 2010).

<sup>172</sup> Section 2(g) of A.B. 1160 reads: “It is against public policy for a defendant to be acquitted of a charged offense or convicted of a lesser included offense based upon an appeal to the societal bias that may be possessed by members of a jury.” 2006 Cal. Legis. Serv. 550 (West).

<sup>173</sup> PENAL § 1127h.

<sup>174</sup> Annicchiarico, *supra* note 82, at 146.

consistency.”<sup>175</sup> Additionally, there is no longer jury discretion to reduce verdicts unilaterally or an argument on appeal about the trial judge’s refusal to instruct on voluntary manslaughter.<sup>176</sup> A legislative ban on the use of trans panic defenses has the additional salutary effect of signaling the polity’s opposition to the underlying arguments being made by potential defendants.<sup>177</sup>

In states where political forces prevent the adoption of a statute like A.B. 1160, it may still be possible to change jury instructions to combat trans panic defenses. Existing jury instructions on provocation offer an invitation for jurors to insert their personal reaction to transgender people in the criminal justice system through use of the reasonable person standard.<sup>178</sup> Open-ended “heat of passion” instructions also leave the door open for defense attorneys to prompt the subconscious biases of jurors.<sup>179</sup> A potential solution is to instruct jurors that the reasonable person is one who “would not kill based on . . . transgender revelation.”<sup>180</sup> The adoption of these instructions, or others similar to them, across the country could dramatically reduce the use and effectiveness of the trans panic defense.

Writing about gay panic defenses, Professor Cynthia Lee raises an important objection to simply banning explicit provocation defenses based on homosexual advances. She argues that such bans are counterproductive. “Attempts to ban the argument . . . from the criminal courtroom will not work because defense attorneys will find more subtle ways to get the same idea across to the jury.”<sup>181</sup> Further, she points to research on race and implicit bias and argues that having gay panic defenses aired in the courtroom where the prosecution can aggressively counter them will produce less-biased outcomes than any legislative or judicial ban.<sup>182</sup>

While the danger from coded appeals to anti-gay or anti-trans bias is apparent, the either/or choice that is implicit in Professor Lee’s proposals for combating the gay panic defense seems to be false. If defense attorneys attempt to use subtle triggers for jurors’ latent biases against transgender

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<sup>175</sup> Lee, *supra* note 50, at 550.

<sup>176</sup> Annicchiarico, *supra* note 82, at 142.

<sup>177</sup> *Id.* This would be a further statement in those states with transgender-inclusive hate crimes laws.

<sup>178</sup> For example, California’s instructions read: “The heat of passion which will reduce a homicide to manslaughter must be such a passion as would be aroused in the mind of an ordinarily reasonable person in the same circumstances.” Cal. Jury Instructions, Criminal § 8.42.

<sup>179</sup> Annicchiarico, *supra* note 82, at 145.

<sup>180</sup> *Id.* at 146.

<sup>181</sup> Lee, *supra* note 50, at 522.

<sup>182</sup> *Id.* at 536–49.

people, a legislative ban on trans panic defenses does not prevent prosecutors from responding.<sup>183</sup> One common example of this subtle appeal to anti-trans bias was on display in the Angie Zapata trial; defense lawyers consistently attempted to remind juror of Angie's earlier life as a boy. Angie's family consistently countered this tactic: "Family members and friends echoed repeatedly, 'my sister,' 'Angie,' one by one on the stand... as public defenders Annette Kundelius and Brad Martin questioned them about 'Justin.'"<sup>184</sup> The family's response—using Angie's name and female pronouns—is one effective response; jurors cannot help but identify with grieving family members, and those family members' acceptance of Angie as transgender likely played a role in the first-degree murder conviction. Prosecutors also actively countered bias-motivated arguments in their statements.<sup>185</sup>

Not every family will be as sympathetic as the Zapatas—many transgender people are still rejected by their families. Prosecutors, however, are always present in the criminal courtroom and can play a critical role in combating trans panic defenses regardless of whether there is legislative action or new jury instructions for provocation. Already, prosecutors have begun to educate each other on combating bias defenses; Fulton County, Georgia District Attorney Paul Howard hosted perhaps the first ever conference for prosecutors on responding to gay panic defenses. A year later, San Francisco District Attorney Kamala Harris hosted a similar conference, "Defeating the 'Panic Defense'" at the Hastings College of Law in July 2006.<sup>186</sup>

Removing trans panic defenses from American courtrooms will take a concerted effort by activists, lawyers, and citizens. Where possible, legislative bans like that in California or jury instruction revisions should be made. Even in the absence of political will at the state level, however, judges and prosecutors can work to ensure that cases in which they are involved are not decided based on a legally insufficient, morally suspect trans panic defense.

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<sup>183</sup> Prosecutors in the Zapata trial were aggressive in countering explicit and implicit appeals to transphobia. *See supra* text accompanying notes 25–30.

<sup>184</sup> Sharon Dunn, *Angie Zapata's Friends, Family Take the Stand*, GREELEY TRIB. (Apr. 18, 2009), <http://www.greeleytribune.com/article/20090418/NEWS/904189952>.

<sup>185</sup> *See supra* text accompanying notes 25–30.

<sup>186</sup> Zak Szymanski, *Harris Announces 'Panic Defense' Conference*, BAY AREA REP. (Mar. 30, 2006), <http://www.ebar.com/news/article.php?sec=news&article=690>. The San Francisco conference benefited from the presence of Alameda County Deputy District Attorney Chris Lamiero, who prosecuted Gwen Arujo's killers.

VIII. CONCLUSION: A RADICALLY INCLUSIVE PROVOCATION  
JURISPRUDENCE

The trans panic defense, whether advanced in the courtroom or in legal academia, eventually rests on the false claim that a transgender victim is defined by their anatomical sex, irrespective of the gender that he or she felt inside. In addition to being morally suspect, the trans panic defense lacks legal merit. Neither a transgender person's gender identity nor the revelation thereof constitutes adequate provocation for a mitigation defense. Similarly, a transgender person's refusal to affirmatively disclose their anatomical sex—what defendants call fraud—does not constitute adequate provocation. Finally, the trans panic defense constitutes a state-sanctioned injury to transgender people's right of gender self-determination. As a legal theory, the trans panic mitigation defense is indefensible and should be rejected.

As transgender legal scholar Jillian Todd Weiss eloquently writes:

There is a substantial and growing body of evidence supporting the theory that physical sex and psychological gender are not always congruent. The transsexual citizens of our country, a substantial number of them, have turned their lives upside down because there is an incongruity between their physical sex and psychological gender. Our law must reflect that reality. The failure of the law to accord any meaning to the transsexual peoples' claim is a theoretical model which denies their personhood, their essential humanity.<sup>187</sup>

Since there is no legal ground to support the trans panic defense, the legal system is obligated to respect transgender victims of horrific violence. Whether through legislative action or zealous prosecution, states across America should follow California's lead and work to consign the trans panic defense to the dustbin of history.

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<sup>187</sup> Weiss, *supra* note 41, at 185–86.