

PRIDE AND PREJUDICE: THE HOMOSEXUAL PANIC DEFENSE

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Abstract: Gays experience a disturbing paradox in American society today: while the gay rights movement enjoys increased visibility, gay-bashing is perhaps the most common and most rapidly increasing of hate-related crimes. The Homosexual Panic Defense (HPD) is based on the homosexual panic disorder, a scientific and medical explanation of, and justification for, the behavior of defendants who murder gay individuals. However, while used to justify some of the most frequent and heinous of hate crimes, the HPD has no uniform definition across cases and bears only a tenuous connection to the psychiatric disorder that legitimizes it. This Note explores the disassociation between the disorder and the defense, and argues that the HPD is not actually based on the psychiatric disorder, but rather on social and institutional prejudice against gays. This Note concludes that the HPD's use must, therefore, either be limited by the application of new evidentiary rules, using the rape-shield rules as a guide, or better yet, eliminated altogether.

Don't treat me like I am something that happened to you.

—Ani DiFranco¹

On March 6, 1995, Scott Amedure appeared with Jonathan Schmitz on the Jenny Jones talk show.² He revealed that he had a secret crush on Schmitz.³ Schmitz was not flattered; rather, he felt “embarrassed” and “humiliated.”⁴

Nor did Schmitz “take it lying down.”⁵ Three days after the taping, he visited a local bank, withdrew money from his savings account,

* Editor in Chief, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2000–2001). I thank Sundyna Jean Beaven for showing me that loving is courageous and worth the risk.

¹ Ani DiFranco, *Adam and Eve*, on DILATE (Righteous Babe Records 1996).

² See *People v. Schmitz*, 586 N.W.2d 766, 768 (Mich. Ct. App. 1998).

³ *Id.*

⁴ See *id.*

⁵ See *id.* I use this cliché to demonstrate that the value that American society assigns to sexual aggression pervades all aspects of our culture, including our most common linguistic expressions. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986) (discussing the effects of male and female sex roles, aggressive and passive, respectively, on rape law); see also discussion *infra* Part I.A (outlining the relationship between cultural sex roles and preju-

and purchased a shotgun.⁶ He then drove to Amedure's trailer.⁷ Standing at the door, Schmitz shot Amedure twice through the heart, killing him.⁸ He then left the trailer, dialed 911, and confessed to the shooting.⁹

Because Schmitz's deadly reaction stemmed from an appearance on a national talk show, *People v. Schmitz* is perhaps the most infamous case in which a defendant has asserted the Homosexual Panic Defense (HPD).¹⁰ In defense of his actions, Schmitz argued that the humiliation of being objectified by Amedure's homosexual affections drove him to kill.¹¹ Basically, he blamed Amedure; more specifically, he blamed Amedure's sexuality.¹² In so doing, he asked the jury to sympathize with his reaction to this homosexual crush.¹³ They sympathized.¹⁴ The jury found Schmitz guilty of the lesser offense of second-degree murder, despite the fact that the prosecution tried him for first-degree murder.¹⁵

Although the *Schmitz* case is an infamous example of the HPD's role in reducing culpability for anti-gay violence, the case is not unique.¹⁶ To the contrary, a troubling pattern has emerged from cases involving the HPD; from the inconsistent and inaccurate manner with which attorneys assert the defense, to the prejudices attorneys and judges explicitly rely on to decide whether to employ the defense, to

dice against gays). This cliché also reflects how our culture devalues sexual passivity, such as that attributed to women and gay men, while privileging aggression, perhaps even to the degree of justifying violence. See Estrich, *supra*, at 1091; see also discussion *infra* Part I.A.

⁶ *Schmitz*, 586 N.W.2d at 768.

⁷ *Id.*

⁸ See *id.*

⁹ *Id.*

¹⁰ See generally Robert G. Bagnall et al., Comment, *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, 497-515 (1984) (detailing case law involving the HPD).

¹¹ See *Schmitz*, 586 N.W.2d at 768; *Good Morning America: Defense Attorneys' Use of "Gay Panic" Defense in Matthew Shepard Murder Trial* (ABC television broadcast, Oct. 29, 1999) [hereinafter *Good Morning America*].

¹² See *Schmitz*, 586 N.W.2d at 768; *Good Morning America*, *supra* note 11.

¹³ See *Schmitz*, 586 N.W.2d at 768; Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance Defense as Insufficient Provocation*, 80 CAL. L. REV. 133, 136, 167 (1992) (arguing that the HPD attempts to garner jury sympathy by reinforcing anti-gay prejudices).

¹⁴ See *Schmitz*, 586 N.W.2d at 768.

¹⁵ See *id.*; see also Risky "Gay Panic" Defense Emerges at Murder Trial, CHI. TRIB., Oct. 27, 1999, at 10 (stating that Jonathan Schmitz's case was a perfect example of using the HPD to mitigate a murder conviction).

¹⁶ See generally Bagnall et al., *supra* note 10, at 497-515 (tracing the use of the HPD to mitigate murder).

the egregious violence that juries excuse when they are exposed to the defense, it is clear that when a judge allows a defendant to use the HPD, she allows that defendant to blame the victim, to solicit courtroom actors' anti-gay biases, and to further institutionalize in the legal system our society's prejudice against gays.¹⁷ Because "[t]here is reason to believe that gay-bashing is the most common and most rapidly increasing . . . [of] hate-related crimes in the United States," the continued use of the HPD raises disturbing questions concerning the extent to which the legal system—and the society it reflects and supposedly protects—is willing to condone prejudice and excuse violence against gays.¹⁸

This Note argues that the HPD is based on, reinforces, and perpetuates prejudice and violence against gays.¹⁹ Therefore, its use must either be limited by the application of new evidentiary rules or, better yet, eliminated altogether. Part I discusses the social perceptions of sex, gender, and sexuality that set the stage and scenery for the formulation and assertion of the HPD. Parts II and III relate the evolution of the HPD from its anemic roots as a psychological disorder to its reported debut as a robust legal defense. This evolution demonstrates that the defense as asserted and applied is not based on the psychiatric literature, but on anti-gay stereotypes and prejudices. Part IV details examples of the HPD's use, revealing its powerful seduction of courtroom actors' prejudices and its concomitant potential for abuse. Part V makes recommendations for the future of the defense, using the theories that fueled rape reform rules as a guide. Finally, this Note concludes that as the status of gays in this society improves, it becomes increasingly evident that the costs of the HPD exceed its benefits.

¹⁷ See Mison, *supra* note 13, at 133, 135–36, 162–63, 171; see also discussion *infra* Part IV.

¹⁸ EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 18 (1990); see Bagnall et al., *supra* note 10, at 498.

¹⁹ See Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 TUL. J.L. & SEXUALITY 81, 81 (1992).

I. WEAPONS OF CULTURAL GENOCIDE: SEX, SEXUALITY, AND GENDER

Our bodies are the battleground where a war to regulate and control gender expression is increasingly being fought.

—Riki Anne Wilchins²⁰

In her book, *The Epistemology of the Closet*, Eve Kosofsky Sedgwick states that the HPD “rests on the falsely individualizing and pathologizing assumption that hatred of homosexuals is so private and so atypical a phenomenon in this culture as to be classifiable as an accountability-reducing illness.”²¹ However, the widespread acceptance of this defense, she argues, in conjunction with the fact that comparable defenses have never been, and presumably never would be formally asserted in relation to other traditionally disadvantaged populations, suggests that hatred of gays is, to the contrary, actually more public and more typical than hatred of any other disadvantaged group.²² Thus, a basic understanding of the pervasive presence and particular manifestations of prejudice against gays in American society is necessary to appreciate the problems inherent in the formulation and use of the HPD.²³

A. *The Interpersonal Battle*

American culture and society is heterocentric.²⁴ That is, a heterosexual perspective permeates American understandings of sex, gender, and sexuality, and confines the realm of appropriate social interactions accordingly.²⁵ Thus, what it means to be male or female, a man or a woman, is the basic foundation upon which social relationships are built and from which flow acceptable, indeed legal, interactions.²⁶

²⁰ Riki Anne Wilchins, *Why We're Here*, Statement of Purpose at the Brandon Teena Vigil in Falls City, Nebraska on May 15, 1995, <http://www.ftm-intl.org/Hist/Bran/stmnt.riki.html> (last modified Aug. 5, 2000) (on file with author).

²¹ SEDGWICK, *supra* note 18, at 19.

²² See *id.* (stating that “race panic” and “gender panic” are not accepted as defenses to violence against people of color and women, respectively).

²³ See *id.* (arguing that the widespread acceptance of the HPD shows that hatred of gays is harder to find leverage against than hatred of any other group).

²⁴ See Mison, *supra* note 13, at 155.

²⁵ See Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 169–70, 179 (1996).

²⁶ See Julia A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 270 (1999); Valdes, *supra* note 25, at 169–70, 179. A discussion about the failure of these binary categories to reflect reality is beyond the scope

Heterocentrism envisions a rigid, binary system of sex, gender, and commensurate sexuality.²⁷ Accordingly, sex generally refers to an individual's status as either biologically male or female, while gender typically refers to an individual's social role as either masculine or feminine.²⁸ Males and females typically become men and women, respectively.²⁹ Men have a masculine social role, and women have a feminine social role.³⁰ It is fiercely debated whether these social roles construct, or are the result of, gender.³¹ However, viewed either way, as the embodiment of one's social role as determined by one's sex, gender is the social performance of one's sex.³²

An integral part of this performance is sexual behavior.³³ Heterocentrism presumes a sexuality commensurate with the binary system of sex and gender; it presumes that all men and women are heterosexual.³⁴ In this way, heterosexuality is compulsory.³⁵ That is, part of one's gender, part of the performance of one's sex, part of what it means to be a man or a woman is an attraction to, and only to, and sexual behavior with, and only with, members of the other biological sex and gender.³⁶

Compulsory heterosexuality is a form of social control; it confines, regulates, and reproduces the realm of cognizable sexes, genders, and sexuality.³⁷ Thus, gay men,³⁸ who do not conform to this heterosexual compulsion, but rather step outside the cognizable

of this Note. See Greenberg, *supra*, at 275. However, for an excellent deconstruction of sex and gender, see generally *id.*

²⁷ See Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321, 1332-33 (1998); Greenberg, *supra* note 26, at 271, 274; Hasan Shafiqullah, *Shape-Shifters, Masqueraders & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN'S L.J. 195, 196 (1997); Valdes, *supra* note 25, at 164-66, 169.

²⁸ See Cain, *supra* note 27, at 1332-33; Greenberg, *supra* note 26, at 271, 274; Valdes, *supra* note 25, at 164-66; Shafiqullah, *supra* note 27, at 196.

²⁹ See Cain, *supra* note 27, at 1332-33; Greenberg, *supra* note 26, at 275, 278; Valdes, *supra* note 25, at 164-66; Shafiqullah, *supra* note 27, at 196.

³⁰ See Valdes, *supra* note 25, at 166.

³¹ See Shafiqullah, *supra* note 27, at 217-19.

³² See Valdes, *supra* note 25, at 164, 168.

³³ See *id.* at 168.

³⁴ See *id.* at 168-70.

³⁵ See *id.* at 169-70.

³⁶ See *id.* at 166, 169-70.

³⁷ See Valdes, *supra* note 25, at 168-69.

³⁸ This Note focuses on the social and legal experiences of gay men because a perusal of the case law involving the HPD suggests that it is not asserted to defend women who react violently to lesbian solicitations. See Comstock, *supra* note 19, at 89-90. For a discussion of the HPD's gender exclusive assertion, see *infra* Part III.B.6.

boundaries for sex and gender by being sexually attracted to, and by engaging in sexual behaviors with, members of their same sex and gender, are out of control.³⁹ As such, they are stereotyped as sex-crazed predators who "may plausibly be accused of making sexual advances to strangers."⁴⁰

This cultural stereotype sets the stage for the assertion of the HPD.⁴¹ According to the heterocentric system, men are sexually aggressive, and women are passive and chaste.⁴² Thus, it is acceptable, indeed expected, that men will "hit on"⁴³ women, and concomitantly, that women will be "hit on" by men.⁴⁴ However, it is unacceptable for men to "hit on," or to be "hit on" by, other men.⁴⁵ Moreover, such behavior is both individually and systemically terrifying, because it relegates the objectified man into the passive, female role in the interaction, and in so doing, makes him the target of the gay man's predatory urges.⁴⁶ This interaction destabilizes both the social role of the objectified man, as well as the entire heterocentric system of sex and gender relations.⁴⁷ Because this system demands that heterosexual men be aggressive in all sexual interactions—that they not "take it lying down"—American culture and society seems to suggest, if not demand, that it is both appropriate and necessary for a man, in responding to gay male attentions, to reestablish and reaffirm both his individual social role and the stability of the entire heterocentric sys-

³⁹ See Valdes, *supra* note 25, at 170, 179; James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, 1006 (1997) (conceptualizing sexual minorities as "gender outlaws" because they violate socially prescribed gender roles).

⁴⁰ Gregory M. Herek & Kevin T. Berrill, *Implications for Policy*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 95 (Gregory M. Herek & Kevin T. Berrill eds., 1992); see SEDGWICK, *supra* note 18, at 19; Valdes, *supra* note 25, at 170, 179.

⁴¹ See SEDGWICK, *supra* note 18, at 19–20.

⁴² See Estrich, *supra* note 5, at 1091; Valdes, *supra* note 25, at 169–70, 179.

⁴³ This is another cliché that demonstrates the premium that American culture places on power, control, aggression and perhaps, violence in sexual encounters. Valdes, *supra* note 25, at 170, 179.

⁴⁴ See Comstock, *supra* note 19, at 99 (implying that heterosexual solicitation is so common as to be invulnerable to legal attack).

⁴⁵ See *id.* (noting the sharp contrast between the court's approval of violence against gays in response to homosexual solicitations and the freedom with which heterosexual men can solicit women).

⁴⁶ See Herek & Berrill, *supra* note 40, at 295; Valdes, *supra* note 25, at 169–70; Mison, *supra* note 13, at 158.

⁴⁷ See Valdes, *supra* note 25, at 179 (noting that the universe of appropriate social interactions conceives of "active" males).

tem.⁴⁸ By pressuring men to engage in this degree of social role policing in their interpersonal interactions, society appears to create a universalizing assumption “that violence, often to the point of homicide, is a legitimate response to any [homo]sexual advance[,] whether welcome or not.”⁴⁹

B. *The Institutional Battle*

Although this propensity for violence against gays suggests that gays would be well served to seek protection from the law, such is not, in fact, entirely the case.⁵⁰ Surprisingly, perhaps, the heterocentric prejudice and fear directed toward gays interpersonally is institutionalized in the legal system.⁵¹ For example, the United States Supreme Court reads the Federal Constitution to protect extended as well as nuclear families, but neither the Constitution, nor a single state, recognizes gay marriage.⁵² Although the possibility of gay marriage flowed from a recent landmark decision in Vermont—a case in which the state supreme court held that gays are entitled to the benefits and obligations of marriage under the Common Benefits Clause of the Vermont Constitution—the court declined to recognize that gays have a right to call their unions “marriages.”⁵³ Furthermore, the fact that Congress created an act to relieve states from having to give full faith and credit to gay marriages performed in neighboring states *before* any states recognized these unions, and titled it the *Defense of Marriage Act*, demonstrates that fear as well as prejudice is institutionalized in the legal system.⁵⁴

⁴⁸ See *id.* at 169–70, 179 (stating that the man’s role is to actively manage and protect subordinates for the benefit of all).

⁴⁹ See SEDGWICK, *supra* note 18, at 19.

⁵⁰ See Mison, *supra* note 13, at 150.

⁵¹ See *id.*

⁵² NAT’L GAY AND LESBIAN TASK FORCE, SPECIFIC ANTI-SAME-SEX MARRIAGE LAWS IN THE U.S., <http://www.ngltf.org/downloads/marriagemap0201.pdf> (last modified Jan. 2001); see, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 495–97, 499–500 (1977) (finding unconstitutional an East Cleveland housing ordinance that limited occupancy to members of a single family in such a way as to disqualify appellant, who resided with her son and two grandsons who were first cousins); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding a Connecticut law prohibiting the use of contraceptives violated the right to marital privacy that falls within the penumbra of the specific guarantees of the Bill of Rights).

⁵³ See *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (leaving it to the Vermont legislature to decide whether to grant gays “marriage,” or an institution by another name with equivalent benefits and obligations).

⁵⁴ See Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. 1999) and 28 U.S.C. § 1738C (Supp. 1998)).

Sodomy laws are further evidence of the legal system's prejudice against gays.⁵⁵ The 1986 Supreme Court decision in *Bowers v. Hardwick* disparagingly declined to extend the Federal Constitutional right to privacy to "homosexual sodomy," stating that a claim to such a right is "at best, facetious."⁵⁶ Despite the fact that the Court was ruling on an appeal from a conviction under Georgia's sodomy statute—a statute that Georgia has since overturned—*Bowers* has yet to be overruled.⁵⁷ Furthermore, despite this significant reversal in Georgia, thirteen states maintain statutes that criminalize sodomy.⁵⁸ Five of these states exclusively prohibit same-sex sodomy.⁵⁹

In addition to devaluing gay relationships, the legal system embodies a deadly ambivalence toward the increasing frequency and brutality of violence against gays. The juxtaposition of the Hate Crimes Statistics Act of 1990 (Statistics Act) with the proposed Hate Crime Prevention Act of 1999 (HCPA) is an example of alarming complacency toward, if not implicit support of, prejudice and violence against gays.⁶⁰

Congress enacted the Statistics Act as part of an effort to identify the frequency of hate crimes against particular victims.⁶¹ The Act was the first piece of federal legislation recognizing gay individuals as frequent hate crime targets, and it authorized the collection of data relating to crimes against them.⁶² However, when Congress enacted the Statistics Act, no legislation existed that enabled enhanced punishments for anti-gay hate crimes.⁶³ Although Congress later enacted legislation enhancing sentences for some hate crimes in 1994 (Sentencing Enhancement Act), the legislation only called for, but did not create, enhanced sentencing guidelines for hate crimes against gays.⁶⁴

Today, eleven years after enacting the Statistics Act, Congress still has not enacted legislation to enhance sentencing guidelines for anti-gay hate crimes. Although legislation to this effect—namely, the

⁵⁵ See Mison, *supra* note 13, at 151.

⁵⁶ See *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

⁵⁷ See *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).

⁵⁸ NAT'L GAY AND LESBIAN TASK FORCE, THE RIGHT TO PRIVACY IN THE U.S., <http://www.ngltf.org/downloads/sodomymap0101.pdf> (last modified Jan. 2001).

⁵⁹ *Id.*

⁶⁰ See generally Hate Crimes Statistics Act, 28 U.S.C. § 534 (Supp. 1998); S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999).

⁶¹ See Andrew M. Gilbert & Eric D. Marchand, Note, *Splitting the Atom or Splitting Hairs—The Hate Crimes Prevention Act of 1999*, 30 ST. MARY'S L.J. 931, 951 (1999).

⁶² See URVASHI VAID, VIRTUAL EQUALITY 11 (1995).

⁶³ See Gilbert & Marchand, *supra* note 61, at 951.

⁶⁴ See 28 U.S.C. § 994 (Supp. 1998); Gilbert & Marchand, *supra* note 61, at 958.

HCPA—has been repeatedly introduced in Congress, it was not first introduced until eight years after the Statistics Act and four years after the Sentencing Enhancement Act each took effect.⁶⁵ Moreover, thus far, it has failed several times, in its several forms, to pass.⁶⁶ Considering that federal lawmakers implicitly acknowledged violence against gays in the Statistics Act, their unwillingness to enact legislation that would discourage such violence is alarming.⁶⁷ When coupled with the violent interpersonal battles that gays face, the heterocentricism institutionalized in the legal system—most evident in the devaluation of gay relationships and perhaps, sanction of anti-gay violence—demonstrates an atmosphere primed for the successful formulation and assertion of the victim-blaming defense, the HPD.⁶⁸

II. HOMOSEXUAL PANIC—THE PSYCHIATRIC DISORDER

Cases in which homicide defendants are charged with the murder of a gay individual typically involve two complimentary defense theories that are usually asserted together.⁶⁹ One theory is self-defense.⁷⁰ Self-defense has been asserted successfully by homicide defendants who claim that they were the victims of an attempted homosexual rape.⁷¹

The other defense theory is the HPD.⁷² The HPD is based on a scientific and medical explanation of, and justification for, the behavior of defendants who murder gay individuals.⁷³ The basic theory of this defense posits that a homosexual solicitation can cause a latently gay defendant to “panic,” to become temporarily unable to distinguish right from wrong, and to severely beat or kill the solicitor.⁷⁴ Unlike self-defense, which has been a successful defense theory when the triggering action was an attempted rape, the HPD has proven successful even when the victim’s triggering action was as slight “as a non-

⁶⁵ See S. 622; H.R. 1082; S. 1529, 105th Cong. (1997); H.R. 3081, 105th Cong. (1997).

⁶⁶ See Gilbert & Marchand, *supra* note 61, at 972; Alan Fram, *Lawmakers Drop Hate-Crimes Bill*, ASSOCIATED PRESS, Oct. 8, 1999 (discussing the death of the HCPA of 1999 in the House-Senate Conference Committee).

⁶⁷ See 28 U.S.C. § 534 (Supp. 1998).

⁶⁸ See SEDGWICK, *supra* note 18, at 20; Mison, *supra* note 13, at 150.

⁶⁹ See Comstock, *supra* note 19, at 82.

⁷⁰ See Bagnall et al., *supra* note 10, at 498.

⁷¹ See *id.*

⁷² See Comstock, *supra* note 19, at 82.

⁷³ See *id.*

⁷⁴ See Bagnall et al., *supra* note 10, at 499.

violent verbal or gestural solicitation.”⁷⁵ As such, the defendant claims that his culpability should be mitigated both by the fact that the victim triggered the violent reaction and by the fact that the reaction itself was uncontrollable.⁷⁶

A. *The Homosexual Panic Disorder*

The advent of “homosexual panic” as a legal defense is a relatively recent phenomenon when compared to its existence as a psychiatric disorder.⁷⁷ Although research and documentation of the disorder is scant and sketchy, clinical psychiatrist Edward J. Kempf first coined the phrase “acute homosexual panic” in 1920.⁷⁸ Based on only nineteen case histories of soldiers and sailors that he studied in a government mental institution during and after World War I, Kempf defined the disorder as “a panic due to the pressure of uncontrollable sexually perverse cravings.”⁷⁹ He attributed the onset of the panic to the fact that his patients had been grouped together in same-sex environments for prolonged periods during the War.⁸⁰

According to Kempf, the disorder has “dual determinators”: the patient’s terror of his attraction to homosexuality coupled with his fear of heterosexuality.⁸¹ He noted that these fears are most apparent and least controllable in same-sex environments.⁸² However, the fear in these situations is not due to homosexual propositions or advances, rather, it is the result of aroused homosexual cravings that pose serious challenges to the patient’s self control.⁸³

Subsequent psychiatric dictionaries have lent support to Kempf’s findings.⁸⁴ For example, Robert J. Campbell’s *Psychiatric Dictionary* describes the panic state as typically triggered by “separation from a member of the same sex” to whom the patient has become “emotionally attached.”⁸⁵ Thus, according to the psychiatric literature, the conditions precipitating homosexual panic are “the overwhelming and

⁷⁵ *Id.*

⁷⁶ See SEDGWICK, *supra* note 18, at 19; Comstock, *supra* note 19, at 82.

⁷⁷ See Bagnall et al., *supra* note 10, at 499.

⁷⁸ See Comstock, *supra* note 19, at 82–84.

⁷⁹ EDWARD J. KEMPF, *PSYCHOPATHOLOGY* 477 (1920); Bagnall et al., *supra* note 10, at 499.

⁸⁰ See Bagnall et al., *supra* note 10, at 499.

⁸¹ See KEMPF, *supra* note 79, at 511.

⁸² See *id.* at 479–80.

⁸³ See *id.* at 479–80, 507.

⁸⁴ See ROBERT J. CAMPBELL, *PSYCHIATRIC DICTIONARY* 328 (6th ed. 1989).

⁸⁵ *Id.*

exclusive presence of members of [an individual's] own gender, or the absence of [such] a same-gender relationship to which [an individual has] become accustomed."⁸⁶

The onset of the panic itself includes periods of introspective brooding, self-punishment, suicidal assaults, withdrawal, and helplessness.⁸⁷ Patients demonstrate "passivity" and an "inability to be aggressive."⁸⁸ More pointedly, according to Burton Glick, author of an article summarizing the results of his survey of the available case studies on homosexual panic, patients are "unable to function *at all*."⁸⁹

Thus, according to this psychiatric literature, the homosexual panic disorder does not manifest as a single, passionate fit in which the patient is driven to brutally beat or kill another person.⁹⁰ In fact, not one of Kempf's cases included a report of violence by patients toward others because of a sexual advance.⁹¹ To the contrary, his patients lacked the ability to use such violence, resorting instead to self-punishments and suicide.⁹² Similarly, in his 1958 study on the fear of homosexuality in college students, Henry Harper Hart reported not only that none acted violently toward others, but also that all patients blamed *themselves* for their homosexual cravings.⁹³ Thus, the homosexual panic disorder is not a temporary, violent episode, but rather an on-going illness that is augmented by bouts of severe depression and withdrawal.⁹⁴ Notably, Hart concluded that accepting the homosexual cravings or engaging in homosexual behavior "often relieve[d] anxiety."⁹⁵

B. *The Acute Aggression Panic Disorder*

In his survey of the literature on the homosexual panic disorder, Glick notes that one of the primary sources of confusion in making a homosexual panic diagnosis, and a consequent misdiagnosis, stems

⁸⁶ Comstock, *supra* note 19, at 84.

⁸⁷ See KEMPF, *supra* note 79, at 491; Henry Harper Hart, *Fear of Homosexuality in College Students*, in *PSYCHOSOCIAL PROBLEMS OF COLLEGE MEN* 200, 205 (Bryant M. Wedge ed., 1958).

⁸⁸ Comstock, *supra* note 19, at 87–88.

⁸⁹ Burton S. Glick, *Homosexual Panic: Clinical and Theoretical Considerations*, 129 *J. NERVOUS & MENTAL DISEASE* 20, 21 (1959).

⁹⁰ See Comstock, *supra* note 19, at 87, 93.

⁹¹ See *id.* at 84.

⁹² See KEMPF, *supra* note 79, at 491.

⁹³ See Hart, *supra* note 87, at 203–07.

⁹⁴ See Comstock, *supra* note 19, at 87, 93.

⁹⁵ See Hart, *supra* note 87, at 203–07, 212.

from the failure of the psychiatric literature to clearly identify which instinctual drive underlies the disorder.⁹⁶ Generally, the two great instinctual drives are the sexual and the aggressive.⁹⁷ Glick explains that in a healthy personality, these drives are "fused and balanced," while in a psychotic personality, they are split or unbalanced.⁹⁸ Patients who suffer from a predominate sexual drive, such as those who endure overwhelming homosexual cravings, can be diagnosed appropriately as suffering from homosexual panic.⁹⁹ However, patients who suffer from a predominate aggressive drive, such as those who react violently to sexual advances, cannot.¹⁰⁰ Glick asserts that cases involving aggression implicate a different instinctual drive than the drive that underlies homosexual panic disorder, and they therefore should be understood to implicate a different disorder than homosexual panic.¹⁰¹ He labels this disorder "acute aggression panic."¹⁰²

Glick's observations make an important distinction on a point that the psychiatric literature muddles.¹⁰³ For example, "recent literature describes how the psychological theory of homosexual panic has been used by psychiatrists . . . to explain [violent] criminal activity."¹⁰⁴ Typical of these cases is a situation in which a man initially allows himself to be solicited or seduced by another man, but then suddenly turns upon the solicitor and beats or even kills him.¹⁰⁵ Psychiatrists assert that the overwhelming fury that characterizes the attacker's reactions in these scenarios cannot be attributed only to feelings of disgust, but must additionally be attributed to latent homosexual cravings or a comparable collapse of a heterosexual self-image.¹⁰⁶ They label this disproportionate anxiety "homosexual panic."¹⁰⁷

However, as Glick notes, these scenarios are better understood as implicating acute aggression panic because, although they involve the sexual drive, their primary symptom is a loss of control of the aggressive drive, and it is acute aggression panic disorder that describes this

⁹⁶ See Glick, *supra* note 89, at 26.

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *id.* (citing KEMPF, *supra* note 79).

¹⁰⁰ See *id.*

¹⁰¹ See Glick, *supra* note 89, at 26.

¹⁰² See *id.*

¹⁰³ See Comstock, *supra* note 19, at 88.

¹⁰⁴ Bagnall et al., *supra* note 10, at 500.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

predominance of the aggressive drive.¹⁰⁸ Moreover, regardless of the label given situations implicating aggression, these scenarios should not be confused with the homosexual panic disorder because the ability to aggress, particularly toward others, is noticeably absent in patients suffering from homosexual panic.¹⁰⁹

Glick's distinction finds support in some current psychiatric dictionaries that recognize the homosexual panic disorder.¹¹⁰ Campbell's *Psychiatric Dictionary* adopts this apt distinction, but it is grammatically embedded within the definition of homosexual panic disorder, perhaps contributing to, rather than clarifying, the confusion.¹¹¹ After listing the type of symptoms that Kempf recorded, such as depression and withdrawal, the *Psychiatric Dictionary* explains that "[s]ometimes, instead of overt sexual material, the anxiety is related to fears of . . . physical violence . . . [and] [s]uch an episode is termed *acute aggression panic*."¹¹²

However confused in the literature, Glick's distinction between the homosexual panic and acute aggression disorders is critical for two reasons.¹¹³ First, while violence triggered by one's disconcerting realization of a predisposition to homosexual desires may garner sympathy and reduce culpability in our heterocentric society, violence triggered by one's predisposition to aggress, even if directed toward another in relation to their homosexuality, is unlikely to elicit comparable sympathy.¹¹⁴ Second, Glick's distinction moots any discussion of violence and relative culpability with relation to the homosexual panic disorder.¹¹⁵ As he explains, while the disorder implicates anxiety over one's own homosexuality, it neither implicates anxiety over another's homosexuality, nor does it result in violence toward others.¹¹⁶ Unfortunately, however, this discussion is only *theoretically* moot.¹¹⁷ Functionally, it is alive and kicking: the evolution of the homosexual panic disorder into a legal defense has tended, with telling ease, to mimic, and

¹⁰⁸ See Glick, *supra* note 89, at 26 (citing KEMPF, *supra* note 79).

¹⁰⁹ See Comstock, *supra* note 19, at 87, 93; Glick, *supra* note 89, at 26.

¹¹⁰ See CAMPBELL, *supra* note 84, at 328.

¹¹¹ See *id.*

¹¹² *Id.*

¹¹³ See Comstock, *supra* note 19, at 89.

¹¹⁴ See *id.*

¹¹⁵ See KEMPF, *supra* note 79, at 477; Comstock, *supra* note 19, at 87, 93.

¹¹⁶ See KEMPF, *supra* note 79, at 477; Comstock, *supra* note 19, at 87, 93.

¹¹⁷ See Comstock, *supra* note 19, at 86–96.

perhaps rely on, its conflation in the psychiatric literature with the symptoms of acute aggression panic disorder.¹¹⁸

III. HOMOSEXUAL PANIC—THE LEGAL DEFENSE

The conflation of the homosexual panic and acute aggression disorders in the psychiatric literature fuels the use and abuse of the HPD in the legal system.¹¹⁹ Although it is used to justify some of the most frequent and heinous of hate crimes, the HPD has no uniform definition across cases and bears a tenuous connection to the psychiatric disorder that legitimizes it.¹²⁰ These problems belie a troubling lack of emphasis in the legal system on detecting and only defending bona fide instances of homosexual panic disorder.¹²¹

A. *The Definitional Inconsistencies*

The HPD is wrought with two specific definitional inconsistencies across cases.¹²² The first inconsistency concerns whether the defendant who raises the HPD must be a latent homosexual.¹²³ The second inconsistency involves whether the HPD is a form of insanity defense.¹²⁴

1. Latent Homosexuality

The consistent occurrence of inconsistent assertions of the HPD raises questions as to whether homosexual panic, as a legal defense, requires that a defendant be a latent homosexual, as does the disorder on which the defense is based.¹²⁵ The first reported judicial mention of the HPD in the 1967 case of *People v. Rodriguez* is typical of cases in which the defendant neglects to assert that he is a latent homosexual.¹²⁶ In *Rodriguez*, the seventeen-year-old defendant testified that he was urinating in an alley when an "old man," grabbed him from behind.¹²⁷ The defendant picked up a four-foot-long stick, at-

¹¹⁸ See *id.*

¹¹⁹ See *id.* at 86, 89.

¹²⁰ See SEDGWICK, *supra* note 18, at 19; Comstock, *supra* note 19, at 86–96; Herek & Berrill, *supra* note 40, at 295; Bagnall et al., *supra* note 10, at 502.

¹²¹ See Bagnall et al., *supra* note 10, 502–12.

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *id.* at 502.

¹²⁶ See 64 Cal. Rptr. 253, 255 (1967).

¹²⁷ *Id.* at 255.

tacked the old man, and eventually killed him.¹²⁸ The defendant pleaded not guilty, asserting that his actions were the result of an acute homosexual panic brought on by a fear that the old man was "trying to engage in a homosexual act."¹²⁹ However, while asserting a fear of the victim's homosexuality, the defendant failed to attribute this fear to his *own* latent cravings.¹³⁰ Nonetheless, the jury found the defendant guilty of second-degree murder.¹³¹

Similar to *Rodriguez*, the defendant in *State v. Thornton* substituted his disgust for and aversion to other individuals' homosexuality for an appropriate emphasis on his own latent homosexuality.¹³² The defendant stated that "[q]ueers and freaks upset [him] a lot" and that he tried "to stay away from them as much as possible."¹³³ Accordingly, when the victim put his hands around the defendant's waist, the defendant lost his temper and stabbed him to death.¹³⁴ In his confession the defendant stated, "I know that he was trying to queer me" and "[I] went out of my mind completely insane," although he equally admitted that the victim "had not made any threats" to him.¹³⁵ Thus, as in *Rodriguez*, the *Thornton* case made no direct reference to the defendant's latent orientation in attempting to establish the HPD.¹³⁶ Nonetheless, in deliberating between second-degree murder and the lesser offense of manslaughter, the jury convicted the defendant of the lesser offense.¹³⁷

Similar to *Rodriguez* and *Thornton*, the defendant in *Commonwealth v. Shelley* neglected to assert that he was a latent homosexual.¹³⁸ In *Shelley*, the defendant agreed to spend the night with the victim and to share his bed.¹³⁹ When the victim began to make "sexual advances," the defendant became "[u]pset[,] . . . jumped out of bed[,] and went downstairs to the kitchen for a drink."¹⁴⁰ He returned to the bedroom with a meat cleaver and a roasting fork, turned off the bathroom light

¹²⁸ *Id.*

¹²⁹ *See id.* at 254, 255.

¹³⁰ *See id.* at 255.

¹³¹ *See Rodriguez*, 64 Cal. Rptr. at 254.

¹³² *See* 532 S.W.2d 37, 40-41 (Mo. Ct. App. 1975); *see also Rodriguez*, 64 Cal. Rptr. at 255.

¹³³ *Thornton*, 532 S.W.2d at 40.

¹³⁴ *See id.*

¹³⁵ *Id.* at 40-41.

¹³⁶ *See id.*; *see also Rodriguez*, 64 Cal. Rptr. at 255.

¹³⁷ *See Thornton*, 532 S.W.2d at 41.

¹³⁸ *See* 373 N.E.2d 951, 953 (Mass. 1978); *see also Rodriguez*, 64 Cal. Rptr. at 255; *Thornton*, 532 S.W.2d at 40-41.

¹³⁹ *Shelley*, 373 N.E.2d at 953.

¹⁴⁰ *Id.*

to ensure that the victim could not see the weapons, and sat down on the bed.¹⁴¹ When the victim reached for him again, the defendant attacked, "repeatedly hitting him with a meat cleaver, stabbing him with the roasting fork, choking him, and finally jumping on his head."¹⁴² At trial, although the defendant emphasized that the victim's homosexual advances triggered his homosexual panic, he neglected to assert that these advances triggered a panic because he was a latent homosexual.¹⁴³ Unlike *Rodriguez* and *Thornton*, the jury in *Shelley* rejected the defendant's defense.¹⁴⁴

Conversely, the defendant in *People v. Parisie* was careful to attempt to establish that he was "a highly latent homosexual."¹⁴⁵ On the night of the murder, the victim offered a ride to the defendant.¹⁴⁶ The victim drove him past a lake, down a gravel road, and then parked.¹⁴⁷ The victim turned off the headlights and solicited the defendant, smiling and saying that "if the defendant refused he would have to walk."¹⁴⁸ At trial, the defendant pled not guilty, testifying that when his latent cravings were aroused, he "blew up, went crazy," and shot the victim.¹⁴⁹ The jury found Parisie guilty of murder.¹⁵⁰

Latent homosexuality is a fundamental component of the homosexual panic disorder.¹⁵¹ However, these cases exemplify that latent homosexuality is inconsistently included in defendant's assertions of the HPD.¹⁵² While troubling in and of itself, perhaps the most disturbing aspect of this inconsistency is that the inclusion of, or failure to include, a defendant's latent homosexuality in establishing the HPD seems to bear no clear correlation to the success or failure of a particular assertion of the HPD.¹⁵³

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ 373 N.E.2d at 952-53; *see also* State v. Thornton, 532 S.W.2d 37, 41 (Mo. Ct. App. 1975); *People v. Rodriguez*, 64 Cal. Rptr. 253, 254 (1967).

¹⁴⁵ *See* 287 N.E.2d 310, 314 (Ill. App. Ct. 1972); *see also Rodriguez*, 64 Cal. Rptr. at 255; *Shelley*, 373 N.E.2d at 953; *Thornton*, 532 S.W.2d at 40-41.

¹⁴⁶ *Parisie*, 287 N.E.2d at 313.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 313-14.

¹⁴⁹ *See id.* at 314.

¹⁵⁰ *Id.* at 315.

¹⁵¹ *See KEMPF*, *supra* note 79, at 511; Bagnall et al., *supra* note 10, at 502.

¹⁵² *See People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (1967); *Parisie*, 287 N.E.2d at 314; *Commonwealth v. Shelley*, 373 N.E.2d 951, 953 (Mass. 1978); *State v. Thornton*, 532 S.W.2d 37, 40-41 (Mo. Ct. App. 1975).

¹⁵³ *See Rodriguez*, 64 Cal. Rptr. at 254; *Parisie*, 287 N.E.2d at 314; *Thornton*, 532 S.W.2d at 41.

2. Legal Insanity

Similar to the inconsistent inclusion of a defendant's latent homosexuality in asserting the HPD, the assertion of the HPD as a form of insanity defense suffers from two deficiencies that suggest this use of the defense is inappropriate.¹⁵⁴ First, the psychiatric moorings of the HPD do not clearly indicate that the homosexual panic disorder can appropriately be understood as either a form of culpability-reducing mental illness or a type of legal insanity.¹⁵⁵ Second, the variant success of such inconsistent assertions exacerbates the already tenuous connection that the HPD bears to the disorder.¹⁵⁶

Mental illness is not synonymous with the "insanity" defense, and "[i]n order for mental illness to exonerate criminal behavior, the person must not be able to tell right from wrong *or* not understand the character of their actions."¹⁵⁷ However, individuals suffering from the homosexual panic disorder suffer *because* of the degree to which they are aware that homosexuality is "wrong."¹⁵⁸ Additionally, cases involving the HPD do not assert that defendants do not realize that stabbing their victims with meat cleavers, choking them, beating them with clubs, jumping on their heads, or shooting them would cause harm or death.¹⁵⁹ Thus, the nature of the homosexual panic disorder does not lend itself easily to being understood as the type of mental illness that should exonerate violence and murder.¹⁶⁰

Legal insanity requires a showing of "mental disease or defect."¹⁶¹ Mere psychological disturbance does not rise to the level of legal insanity.¹⁶² Although it is unclear whether the homosexual panic disorder is a mere psychological disturbance or a "mental disease or defect," defendants frequently assert the HPD as a form of insanity defense erratically and with erratic results.¹⁶³

For example, in *Parisie*, while the defendant attempted to assert the HPD as an insanity defense, his expert witnesses testified that ho-

¹⁵⁴ See KEMPF, *supra* note 79, at 511; Comstock, *supra* note 19, at 94.

¹⁵⁵ See Comstock, *supra* note 19, at 94.

¹⁵⁶ See *id.*; Bagnall et al., *supra* note 10, at 502–10; see also discussion *infra* Part III.B.

¹⁵⁷ Comstock, *supra* note 19, at 94.

¹⁵⁸ *Id.*

¹⁵⁹ See *People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (1967); *People v. Parisie*, 287 N.E.2d 310, 313–14 (Ill. Ct. App. 1972); *Commonwealth v. Shelley*, 373 N.E.2d 951, 953 (Mass. 1978); Comstock, *supra* note 19, at 94.

¹⁶⁰ See Comstock, *supra* note 19, at 94.

¹⁶¹ Bagnall et al., *supra* note 10, at 502.

¹⁶² *Id.*

¹⁶³ See *id.*; see also *infra* notes 164–169 and accompanying text.

homosexual panic is "not a mental defect . . . but a psychiatric disturbance."¹⁶⁴ The jury appropriately rejected Parisie's insanity defense and found him guilty of murder.¹⁶⁵ In contrast, in *Rodriguez* the defendant tried to assert the HPD as an insanity defense without even attempting to demonstrate that the HPD meets the "mental disease or defect" requirement for establishing legal insanity.¹⁶⁶ Like *Parisie*, the jury rejected Rodriguez's insanity plea and found him guilty of second-degree murder.¹⁶⁷ On the other hand, in *Shelley* the defendant explicitly attempted to establish that homosexual panic is a "mental defect or disease," yet the jury still rejected this insanity defense.¹⁶⁸ However, in stark contrast to these cases, the defendant in *Thornton* did not expressly assert that homosexual panic is a "mental disease or defect," but the jury nonetheless reduced Thornton's conviction from second-degree murder to manslaughter.¹⁶⁹

In sum, at first blush, the definitional inconsistencies in the assertion and success of the HPD across cases merely raise questions as to whether the HPD requires that a defendant be a latent homosexual—a critical element of the disorder on which the defense is based—and whether and how the HPD can be construed as a form of legal insanity.¹⁷⁰ However, something more fundamental than the details of the defense lurks in the shadow of these inconsistencies. More important than demanding that a defense that excuses such heinous crimes have a consistent formulation, is noting what the *failure* to demand such consistency suggests: that perhaps the legal system is not concerned about detecting bona fide instances of homosexual panic disorder, nor about demanding full accountability for unmitigated anti-gay violence.¹⁷¹

B. *The Disassociation of the Defense and the Disorder*

If examples of the inconsistent assertion and success of the HPD across cases belie the legal system's apathy toward detecting bona fide cases of homosexual panic disorder, then the disturbingly obvious dis-

¹⁶⁴ See 287 N.E.2d at 314, 325.

¹⁶⁵ See *id.* at 315.

¹⁶⁶ See *People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (1967).

¹⁶⁷ See *id.* at 254; see also *Parisie*, 287 N.E.2d at 315.

¹⁶⁸ See *Commonwealth v. Shelley*, 373 N.E.2d 951, 952–53 (Mass. 1978).

¹⁶⁹ See *State v. Thornton*, 532 S.W.2d 37, 40–41, 44 (Mo. Ct. App. 1975); see also *Rodriguez*, 64 Cal. Rptr. at 255; *Parisie*, 287 N.E.2d at 314; *Shelley*, 373 N.E.2d at 951, 952–53.

¹⁷⁰ See Bagnall et al., *supra* note 10, at 502.

¹⁷¹ See *id.* at 501–12.

association of the HPD, as asserted and applied, from the pivotal features of the underlying disorder on which it is based is cause for alarm.¹⁷² A general perusal of cases involving the HPD reveals that many of the characteristics that are indicative of homosexual panic disorder are either raised incorrectly or not raised at all in the assertion of the homosexual panic defense.¹⁷³

1. Dual Determinators

Defendants frequently assert the HPD without asserting both of the critical "dual determinators" of the psychiatric disorder.¹⁷⁴ As described above, defendants frequently fail to assert their latent homosexuality.¹⁷⁵ Indeed, this was the case from the moment of the legal defense's reported inception in *Rodriguez*.¹⁷⁶ Moreover, despite the primacy of this characteristic in the disorder, the defense has been successfully asserted without it, as was the case in *Thornton*.¹⁷⁷ This evinces a fundamental split between the defense and the disorder both because, as Kempf originally defined it, one of the disorder's "dual determinators" is the patient's terror of his own attraction to homosexuality, and because disgust or aversion to another's homosexuality has no role in the psychiatric disorder.¹⁷⁸

In addition to failing to assert their own latent homosexuality, defendants typically raise the HPD without establishing their aversion to heterosexuality.¹⁷⁹ In fact, most defendants are either heterosexually-identified or involved in heterosexual relationships.¹⁸⁰ Moreover, they tend to establish an allegiance to heterosexuality by describing their aversion to homosexuality.¹⁸¹ For example, in *Thornton*, the defendant's statements that "queers and freaks" upset him and that he tried "to stay away from *them* as much as possible" demonstrated both his aversion to homosexuality and his allegiance to heterosexuality.¹⁸²

¹⁷² See Comstock, *supra* note 19, at 86–96; Bagnall et al., *supra* note 10, at 501–12.

¹⁷³ See Comstock, *supra* note 19, at 86–96.

¹⁷⁴ See KEMPF, *supra* note 79, at 511; Comstock, *supra* note 19, at 91.

¹⁷⁵ See Comstock, *supra* note 19, at 90–91.

¹⁷⁶ See *People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (1967).

¹⁷⁷ See *State v. Thornton*, 532 S.W.2d 37, 41 (Mo. Ct. App. 1975).

¹⁷⁸ See KEMPF, *supra* note 79, at 511; Comstock, *supra* note 19, at 90.

¹⁷⁹ See KEMPF, *supra* note 79, at 511; Comstock, *supra* note 19, at 91.

¹⁸⁰ See Comstock, *supra* note 19, at 91.

¹⁸¹ See *Thornton*, 532 S.W.2d at 40; Comstock, *supra* note 19, at 91.

¹⁸² See 532 S.W.2d at 40 (emphasis added).

2. Long-Term Nature

Not only is the HPD frequently disassociated from the pivotal "dual determinators" of the disorder, but it is additionally typically asserted in a manner that fails to recognize the disorder's long-term nature.¹⁸³ "Nowhere in the literature is the panic described as a violent episode that begins and ends within minutes or hours," yet defendants persist in framing their crimes as temporary outbursts solely precipitated by the victim's homosexual solicitation, instead of establishing the disorder's requisite history of attachment to individuals of the same sex.¹⁸⁴ Again, such was the case in the HPD's debut in *Rodriguez*, in which, instead of offering evidence of an history of latent homosexual cravings or attachment to individuals of the same gender, the defendant testified that he thought the victim was trying to sexually molest him, and that this alleged assault triggered a "crazy" reaction.¹⁸⁵ Similarly, in *Parisie*, the defendant asserted that he "blew up" and "went crazy" at the moment when the victim allegedly made a sexual advance, without articulating an history of same-sex attraction as a precipitator to the outburst.¹⁸⁶

Furthermore, cases in which defendants do recognize the importance of establishing a long-term psychological illness in asserting the HPD are marred by a mischaracterization of the quality of the psychiatric problems involved in the homosexual panic disorder.¹⁸⁷ For example, in *Commonwealth v. Carr*, the defendant proposed to show a lengthy history of constant rejection by women and a consequent social withdrawal to explain why he became so impassioned as to shoot, at close range with a rifle, two women whom he had watched make love.¹⁸⁸ However, while recognizing the longevity of the disorder, the defendant's evidence failed to include any same-gender involvement, let alone attachment.¹⁸⁹

3. Voluntary Activity

In addition to neglecting the long-term nature of the disorder, defendants occasionally assert the HPD in defense of violence follow-

¹⁸³ See KEMPF, *supra* note 79, at 511; Comstock, *supra* note 19, at 93.

¹⁸⁴ See Comstock, *supra* note 19, at 93.

¹⁸⁵ See *People v. Rodriguez*, 64 Cal. Rptr. 235, 254-55 (1967).

¹⁸⁶ See *People v. Parisie*, 287 N.E.2d 310, 313-14 (Ill. App. Ct. 1972).

¹⁸⁷ See Comstock, *supra* note 19, at 93.

¹⁸⁸ See 580 A.2d 1362, 1363-64 (Pa. Super. Ct. 1990).

¹⁸⁹ See *id.*; Comstock, *supra* note 19, at 93.

ing voluntary homosexual activity, further contributing to the disassociation of the defense from the disorder.¹⁹⁰ Since a primary method for a patient suffering from bona fide homosexual panic disorder to achieve psychological relief is to admit their homosexual tendencies and, even better, to engage in homosexual behavior, voluntarily engaging in homosexual behaviors would incite relief, not violence.¹⁹¹ However, in *Shelley*, for example, the defendant attempted to establish the HPD by testifying that when the victim made a sexual advance he became "upset" and stabbed him to death, even though he had agreed not only to spend the night with the victim, but also to spend the night in his bed with him.¹⁹²

4. Self-Defense

Not only do defendants inappropriately assert the HPD in defense of their violent responses to voluntary same-sex activity, but they also use it to buttress independent pleas of self-defense.¹⁹³ Linking the HPD to self-defense is inappropriate, however, because individuals who suffer from bona fide homosexual panic disorder do not have the capacity to defend themselves.¹⁹⁴ After all, it is self-punishment, not self-defense, that is indicative of the homosexual panic disorder.¹⁹⁵ Despite the fact that this is a clear disassociation between the defense and the disorder, the defendant in *Rodriguez* testified that he clubbed the victim to death because he "thought [the victim] was trying to engage in a homosexual act."¹⁹⁶ Similarly, in *Thornton*, the defendant stated that he shot the victim because he thought that "[the victim] was trying to queer [him]."¹⁹⁷

By linking the HPD with self-defense, defendants not only distort a cardinal symptom of the homosexual panic disorder, but they also implicitly reject the firmer basis they would have in a legal defense based on acute aggression panic disorder.¹⁹⁸ In contrast to homosexual panic, violence is symptomatic of acute aggression panic disorder.

¹⁹⁰ See Comstock, *supra* note 19, at 92–93.

¹⁹¹ See KEMPF, *supra* note 79, at 477, 491, 498; Glick, *supra* note 89, at 27; Hart, *supra* note 87, at 203–07, 212.

¹⁹² See *Commonwealth v. Shelley*, 373 N.E.2d 951, 953 (Mass. 1978).

¹⁹³ See Comstock, *supra* note 19, at 92, 94–95.

¹⁹⁴ See *id.* at 94–95; Glick, *supra* note 89, at 21 (stating that patients are unable to function at all).

¹⁹⁵ See KEMPF, *supra* note 79, at 491; Comstock, *supra* note 19, at 95.

¹⁹⁶ See *People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (1967).

¹⁹⁷ See *State v. Thornton*, 532 S.W.2d 37, 41 (Mo. Ct. App. 1975).

¹⁹⁸ See Comstock, *supra* note 19, at 88–89.

der.¹⁹⁹ In his article, *Dismantling the Homosexual Panic Defense*, Professor Gary Comstock offers two theories for why defendants choose to inappropriately assert the HPD over asserting the more appropriate acute aggression panic disorder to mitigate anti-gay violence.²⁰⁰ First, he states that the psychiatric literature on acute aggression panic is even more scant than the literature discussing the homosexual panic disorder.²⁰¹ Second, and more pointedly, he suggests that defendants assume that juries will be more willing to sympathize with a defendant who kills a gay man out of rage than with one who claims that his actions are due to his inability to contain his aggression generally.²⁰²

5. Third Parties

In addition to inappropriately linking the HPD to independent pleas of self-defense, defendants occasionally raise the HPD when they were not even the object of the homosexual solicitation.²⁰³ For example, in *Vujosevic v. Rafferty*, the defendant and a friend were harassing a male stranger when the defendant walked away to urinate.²⁰⁴ When the defendant returned, his friend was beating the stranger.²⁰⁵ His friend told him that the stranger had made a sexual advance, and the defendant then joined in the deadly beating.²⁰⁶ At trial, the defendant testified that "something snapped in his head" when he learned of the sexual advance, causing him to join in the beating.²⁰⁷

Extending the HPD to these cases severely disassociates the defense from the disorder, because it is the patient's latent homosexuality, not another's sexuality, that is relevant to the disorder.²⁰⁸ The use of the HPD in these cases implies that the mere occurrence of a homosexual advance, irregardless of its implications for the defendant's sexuality, warrants the defendant's violent response.²⁰⁹ This sends the

¹⁹⁹ See KEMPF, *supra* note 79, at 477; Comstock, *supra* note 19, at 88; Glick, *supra* note 89, at 26.

²⁰⁰ See Comstock, *supra* note 19, at 89.

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See *id.* at 94-95; Mison, *supra* note 13, at 169.

²⁰⁴ See 844 F.2d 1023, 1025-26 (3d Cir. 1988).

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ *Id.*; see also *Wills v. State*, 636 P.2d 372, 373 (Okla. Crim. App. 1981) (defendant kicked and beat victim to death after victim allegedly made sexual advance to third party).

²⁰⁸ See KEMPF, *supra* note 79, at 479-80, 507, 511.

²⁰⁹ See Mison, *supra* note 13, at 170.

dangerous message that homosexual conduct, in and of itself, justifies anti-gay violence.²¹⁰

6. Gender-Exclusivity

The HPD is additionally disassociated from the disorder by the fact that only male defendants typically assert it.²¹¹ This is curious given that Kempf recorded homosexual panic in both male and female patients.²¹² Professor Comstock half-heartedly suggests a simple explanation: a lack of anti-lesbian murder by women.²¹³ While it is possible that there has yet to be an instance of comparable anti-lesbian murder, this seems implausible given that the homosexual panic disorder is a disorder to which both genders fall prey.²¹⁴

More likely, female defendants do not assert the HPD for the same reasons that male defendants do assert it—because its usefulness lies in its ability to seduce heterocentric prejudices and sympathies.²¹⁵ Considering the framework for permissible social relationships on which our heterocentric society is built, it is both conceivable and understandable for a man to react violently to a homosexual solicitation, because men are not supposed to be solicited.²¹⁶ However, part and parcel of this scheme that expects that men will not be solicited, is the expectation that women, in contrast, will be solicited.²¹⁷ Therefore, the HPD is more likely to be effective, and therefore more likely to be used, in rationalizing the violent responses of men than it is for women.²¹⁸ Comstock rightly argues that “[t]he soundness of the defense’s premise”—that the disorder causes murderous behavior—“should be challenged according to its inability to reflect the behavior of the universe of those who suffer from [it].”²¹⁹

²¹⁰ See Comstock, *supra* note 19, at 97; Mison, *supra* note 13, at 170.

²¹¹ See Comstock, *supra* note 19, at 89–90; Mison, *supra* note 13, at 169.

²¹² See KEMPf, *supra* note 79, at 506–11.

²¹³ See Comstock, *supra* note 19, at 89.

²¹⁴ See *id.* at 89–90.

²¹⁵ See SEDGWICK, *supra* note 18, at 19–20; Comstock, *supra* note 19, at 89–90.

²¹⁶ See SEDGWICK, *supra* note 18, at 19–20; Comstock, *supra* note 19, at 89; Valdes, *supra* note 25, at 179; Mison, *supra* note 13, at 155.

²¹⁷ See Comstock, *supra* note 19, at 99.

²¹⁸ See SEDGWICK, *supra* note 18, at 19–20; Comstock, *supra* note 19, at 89.

²¹⁹ Comstock, *supra* note 19, at 90.

7. Defense to Violence and Murder

The most glaring evidence of the disassociation of the HPD from its psychiatric roots lies in its very assertion and application as a culpability-reducing defense to violence and murder.²²⁰ Regardless of which aspects of the disorder are ignored or contradicted in any given case involving the HPD, each and every case alleges some degree of homosexual sexual solicitation by the victim and a gratuitous degree of violence by the defendant in response.²²¹ However, sexual propositions or advances by others are not causal elements within the clinical definition of the homosexual panic disorder.²²² Furthermore, patients that are clinically diagnosed with the disorder are *self-punishing*, if they able to function *at all*.²²³ Thus, the homosexual panic disorder seems hardly suitable as a basis for a legal explanation or justification for anti-gay violence.²²⁴ The consistent application of the HPD to violent fact patterns evinces a fundamental split between the construction of the HPD and the clinical understanding of the homosexual panic disorder on which it is supposedly based.²²⁵

In sum, the relationship of the HPD to the psychiatric disorder is tenuous at best.²²⁶ The various points of departure between the legal defense and the clinical disorder, when coupled with the legal system's failure to demand a consistent definition of the defense across cases, suggests that the HPD is barely rooted, if at all, in the bona fide homosexual panic disorder.²²⁷ This begs the question: if the defense is not rooted in the psychiatric literature, then what *is* it based in? Perhaps the answer lies, at least in part, in Eve Kosofsky Sedgwick's postulation that the HPD rests on the incorrect but socially pervasive perception that violence against gays is so atypical as to be seen as an illness, yet so understandable as to be excusable.²²⁸

²²⁰ See *id.* at 86.

²²¹ See Comstock, *supra* note 19, at 86; Bagnall et al., *supra* note 10, at 502.

²²² See Comstock, *supra* note 19, at 84; Hart, *supra* note 87, at 203-07; Bagnall et al., *supra* note 10, at 502.

²²³ See KEMPF, *supra* note 79, at 491; Glick, *supra* note 89, at 21; Hart, *supra* note 87, at 205.

²²⁴ See KEMPF, *supra* note 79, at 491; Comstock, *supra* note 19, at 86; Hart, *supra* note 87, at 203-07.

²²⁵ See Comstock, *supra* note 19, at 86-89.

²²⁶ See *id.* at 86-96.

²²⁷ See *id.*

²²⁸ See SEDGWICK, *supra* note 18, at 19.

IV. THE (AB)USE OF THE DEFENSE

The likelihood that the HPD is rooted more in social and institutional prejudice than in medicine and science suggests that its use carries an enormous potential for abuse.²²⁹ Furthermore, this potential easily leads to propensity for abuse, because just as the disassociated and inconsistent use of the HPD suggests that it is rooted in anti-gay bias, this very same bias suggests that the defense can, and will, be blatantly abused.²³⁰ Thus, the disassociation of the defense from the psychiatric disorder and its inconsistent application across cases is both an indication and a product of the HPD's survival and capitalization on the conflation of interpersonal fear, disgust, and hatred of gays within a legal system that historically devalues them.²³¹ Indeed, examples of the strategic, normalizing approaches of attorneys who rely on the defense, of the explicit biases of judges who allow the defense, and of the egregious violence that juries excuse when they are instructed to consider the defense, buttress the notion that the use of the HPD, while always inherently questionable, is sometimes blatantly abusive.²³²

A. Abuse by Attorneys

Noting the HPD's illegitimate basis in the homosexual panic disorder, Professor Comstock argues that the HPD is a "strategy of legal defense that [relies] almost exclusively on the anti-gay/lesbian biases of judges and jurors"²³³ This implies that defense attorneys assert the HPD because they hope that the defense will seduce other courtroom actors' prejudices and sympathies away from the brutalized victim and toward the defendant.²³⁴ It also implies that defense attorneys may do so even when they, themselves, do not believe that the defendant, in fact, suffers from a bona fide case of homosexual panic disorder.²³⁵ While every defendant has a Constitutional right to an adequate defense, such questionable use—and perhaps, abuse—of the HPD not only calls into question the integrity of the defense, but also

²²⁹ See *id.*; Comstock, *supra* note 19, at 86–96; Bagnall et al., *supra* note 10, at 502; Mison, *supra* note 13, at 167.

²³⁰ See SEDGWICK, *supra* note 18, at 19, 20.

²³¹ See *id.* at 20; see also discussion *supra* Parts I, III.

²³² See Comstock, *supra* note 19, at 81, 86–96; see also discussion *infra* Part IV.A-C.

²³³ Comstock, *supra* note 19, at 81, 86–96.

²³⁴ See *id.*; Mison, *supra* note 13, at 161–62.

²³⁵ See Comstock, *supra* note 19, at 81, 86–96; Mison, *supra* note 13, at 161–62.

accrues the great moral cost of further extending an already slippery slope of legally-sanctioned violence against gays.²³⁶

The statements of a defense attorney in an interview during a homicide case in Minnesota verify that such strategic abuse of the HPD does, indeed, occur.²³⁷ He is quoted as saying that "[he] would have loved former Marines, former servicemen [on the jury], because there's a strong element of antagonism toward homosexuals in groups like that."²³⁸ He also noted that his use of the HPD worked as he had planned, stating that the jury was "thrown off balance" when he claimed the defendant's assault was a reaction to homosexual advances.²³⁹

Furthermore, attorneys' reliance on the HPD, and its commensurate bias, inside of the courtroom, threatens to extend the alarming abuse of the HPD to scenarios outside of the legal system and beyond situations involving assault or murder.²⁴⁰ For example, in 1982, Ohio's Attorney General responded to the State Youth Services Director's inquiry about the employment of gays by concluding that homosexual panic may justify consideration of a job applicant's sexual orientation.²⁴¹ Relying on illegitimate legal interpretations of the psychiatric disorder, he stated that "knowledge that an employee has other than heterosexual orientation may result in what psychologists term homosexual panic—a combination of fear and hostility. . . . In 15–20% of youths [this] fear of sexual molestation may manifest itself in a 'will kill if approached' attitude."²⁴² Thus, he granted permission to condition the acceptance of gay job applicants on a finding that their homosexuality will not cause panic.²⁴³ This normalizing application of the HPD suggests that it may be available as both an impetus for and a justification of broad-based anti-gay bias whenever an individual is even aware that another individual is gay.²⁴⁴

²³⁶ See U.S. CONST. amend. VI; Comstock, *supra* note 19, at 86–96; Bagnall et al., *supra* note 10, at 513–14; Mison, *supra* note 13, at 167, 172.

²³⁷ See Peter Freiberg, *Blaming the Victim: New Life for the "Gay Panic" Defense*, ADVOC. (L.A.), May 24, 1988, at 12.

²³⁸ *Id.*

²³⁹ See *id.*

²⁴⁰ See Bagnall et al., *supra* note 10, at 514.

²⁴¹ See *id.* at 512.

²⁴² See *id.* (quoting an opinion by the Ohio Attorney General. Op. Att'y Gen. of Ohio No. 82–078 (Sept. 30, 1982)).

²⁴³ See Bagnall et al., *supra* note 10, at 512.

²⁴⁴ See *id.*; Mison, *supra* note 13, at 170.

B. Abuse by Judges

Judges, like attorneys, also abuse the HPD.²⁴⁵ Despite the HPD's tenuous connection to its psychiatric roots and its inconsistent application as, and unclear compatibility with, legal insanity, "[n]o court has barred the defense . . . [using the reasoning that] it rests on an untenable psychological theory, or [that] it is an unwarranted extension of the insanity defense."²⁴⁶ Rather, the consistent allowance of an inconsistent defense suggests that anti-gay bias works in tandem with judicial discretion in fostering judicial decisions that allow the use, and abuse, of the defense.²⁴⁷

Examples of cases involving the HPD in which judges have explicitly expressed their own anti-gay biases abound.²⁴⁸ In one instance, at a pre-trial hearing to review the facts of an anti-gay murder, Circuit Judge Daniel Futch jokingly asked the prosecutor, "That's a crime now, to beat up a homosexual?"²⁴⁹ When the prosecutor responded, "Yes, sir. And it's a crime to kill them," the judge replied, "Times really have changed."²⁵⁰ Although Judge Futch was ultimately removed from the case, this was not the result in a case in San Francisco.²⁵¹ In that case, California Superior Court Judge Daniel Weinstein presided over an entire trial involving the HPD, without a jury, and ultimately pronounced the defendant guilty of manslaughter.²⁵² However, he tainted his ruling with anti-gay bias, stating that the victim "had 'contributed in large part to his own death' by his 'reprehensible conduct'" because the victim allegedly solicited his killer hours before he was murdered.²⁵³ Similarly, in another case, Judge Jack Hampton imposed only a thirty-year sentence on the defendant, instead of the maximum sentence of life imprisonment, for the murders of two gay men.²⁵⁴ He stated that he did not "much care for

²⁴⁵ See Mison, *supra* note 13, at 163; see also discussion *supra* Part IV.A.

²⁴⁶ Bagnall et al., *supra* note 10, at 501; see Comstock, *supra* note 19, at 86–96.

²⁴⁷ See Bagnall et al., *supra* note 10, at 515; Mison, *supra* note 13, at 163.

²⁴⁸ See *infra* notes 249–255 and accompanying text.

²⁴⁹ See Mison, *supra* note 13, at 163 (citing Suzanne Bryant, National Lesbian & Gay Law Association, Remarks Before the A.B.A. Judicial Conduct Subcommittee 4 (Sept. 22, 1989)).

²⁵⁰ See Bryant, *supra* note 249.

²⁵¹ See Mison, *supra* note 13, at 163 n.211; Robert Lindsey, *After Trial, Homosexuals Say Justice is Not Blind*, N.Y. TIMES, Mar. 21, 1988, at A17.

²⁵² Lindsey, *supra* note 251, at A17.

²⁵³ *Id.*

²⁵⁴ See Panel to Examine Remarks by Judge on Homosexuals, N.Y. TIMES, Dec. 21, 1988, at A16.

queers cruising the streets," that "[t]hese two guys . . . wouldn't have been killed if they hadn't been cruising the street picking up teen-age boys," and that he "put prostitutes and gays at about the same level . . . [and would] be hard put to give somebody life for killing a prostitute."²⁵⁵

Although judicial bias does not definitively flow from judicial discretion, the disparity in outcomes between cases in which judges articulate explicit biases against gays and cases in which they do not is noteworthy. For example, in a case in Washington, D.C., Judge H. Carl Moultries requested an advisory letter from the San Francisco District Attorney's office before allowing the defendant to assert the HPD.²⁵⁶ After receiving the opinion, the judge requested that the defendant be given extensive psychological testing.²⁵⁷ Although the defendant had requested confinement for psychiatric treatment, Judge Moultries instead sent the defendant to jail for six to twenty years following the testing.²⁵⁸ Thus, because judges are not immune to the cultural devaluation of gays, nor to attorneys' efforts to elicit these prejudices, broad judicial discretion in cases involving the HPD exacerbates the inconsistent and inappropriate use, and abuse, of the defense.²⁵⁹

C. Abuse by Juries

Like attorneys and judges, juries are susceptible to the abuse of the HPD.²⁶⁰ The U.S. Constitution makes an attempt to counteract juror prejudices by requiring that jurors represent a cross-section of the community.²⁶¹ However, this requirement cannot completely nullify the psychological imprint of anti-gay bias that pervades American culture and the very communities from which jurors come to join the jury box.²⁶² Homosexuality is a topic that implicates deep-seated personal values, biases, and prejudices.²⁶³ Jurors are particularly susceptible to these biases when attorneys and judges elicit and reinforce anti-

²⁵⁵ *Id.*

²⁵⁶ See Comstock, *supra* note 19, at 100-01.

²⁵⁷ See *id.* at 101.

²⁵⁸ See *id.*

²⁵⁹ See Mison, *supra* note 13, at 158, 163.

²⁶⁰ See *id.* at 162-63; see also discussion *supra* Part IV.A-B.

²⁶¹ See U.S. CONST. amend VI; Taylor v. Louisiana, 419 U.S. 522, 527-28 (1975) (holding that the Sixth Amendment requires petit jury be selected from representative cross-section of community); Mison, *supra* note 13, at 162-63.

²⁶² See Mison, *supra* note 13, at 162-63.

²⁶³ See *id.* at 162.

gay stereotypes through their use of the HPD.²⁶⁴ When the HPD seduces jurors' biases, jurors are more likely to excuse or exculpate anti-gay violence.²⁶⁵

One anti-gay stereotype that the HPD reinforces for jurors is the notion that gay men are sexual predators.²⁶⁶ Jurors under the spell of this stereotype have reduced defendants' culpability not only when the defendant has failed to produce any evidence of a homosexual solicitation, but also when strong evidence suggests that the defendant preyed on the gay victim.²⁶⁷

In *Mills v. Shepard*, for example, the defendant raised the HPD, alleging that his actions were in response to an uninvited homosexual solicitation.²⁶⁸ He admitted that he voluntarily accompanied the victim to an isolated spot after meeting him in a gay bar.²⁶⁹ He also admitted that he "pushed [the victim] out of his car, chased him . . . , knocked him down, kicked him, pulled his pants down to hinder pursuit, took [his] jewelry . . . , left him lying near the [creek in which the body was later found], and drove home" in the victim's car.²⁷⁰ He further admitted bragging to his roommates that he had "rolled a queer."²⁷¹ However, despite this strong evidence that the defendant preyed on the victim, the jury reduced his culpability on account of the homosexual solicitation, finding the defendant guilty of voluntary manslaughter rather than murder or felony-murder.²⁷²

Another anti-gay perception that the HPD triggers in jurors is that a homosexual advance, even if merely verbal, is equivalent to a sexual attack.²⁷³ Arguably, a mere advance does not necessitate a violent or murderous response, even if made by an individual with a different sexual orientation than the individual solicited.²⁷⁴ Lois Reckitt of the National Organization of Women quips, "I am a lesbian and I have been approached by men in straight bars. In discouraging their advances, I have never found it necessary to try to kill them. I [say]

²⁶⁴ See *id.* at 162–63; see also discussion *supra* Part IV.A-B.

²⁶⁵ See Mison, *supra* note 13, at 162–63.

²⁶⁶ See SEDGWICK, *supra* note 18, at 19.

²⁶⁷ See *Mills v. Shepard*, 445 F. Supp. 1231, 1234 (W.D.N.C. 1978); Comstock, *supra* note 19, at 97; Bagnall et al., *supra* note 10, at 499.

²⁶⁸ See 445 F. Supp. at 1232; Mison, *supra* note 13, at 168.

²⁶⁹ See *Shepard*, 445 F. Supp. at 1234.

²⁷⁰ *Id.*; see Mison, *supra* note 13, at 168.

²⁷¹ *Shepard*, 445 F. Supp. at 1234.

²⁷² See *id.* at 1232; Mison, *supra* note 13, at 168.

²⁷³ See Comstock, *supra* note 19, at 97; Bagnall et al., *supra* note 10, at 499.

²⁷⁴ See Comstock, *supra* note 19, at 99.

‘no.’”²⁷⁵ However, the notion “[t]hat a sexual advance made by a gay man does itself pose a danger meriting retaliation appears to be a bias shared by some judges and jurors.”²⁷⁶ The implications of using the HPD to seduce this manifestation of anti-gay bias are twofold. First, if a mere verbal solicitation is equivalent to an attack, then this implies that it is not the victim’s advance *per se* that poses the threat; rather, the threat is the victim’s assertion of their homosexual orientation, or their homosexual identity, in and of itself.²⁷⁷ Second, it implies that a disproportionate, violent response to a homosexual solicitation is more acceptable than the solicitation itself.²⁷⁸

The most fundamental form of anti-gay bias that the HPD elicits for jurors is the notion that the gay victim is to blame for his own demise.²⁷⁹ This notion is integral to the HPD; the defense, notably unlike the disorder, rests on the basic premise that the victim’s homosexuality triggered the defendant’s panic.²⁸⁰ Thus, in the high-profile *People v. Schmitz* case, Schmitz blamed Amedure’s homosexual “ambush” for his violent actions.²⁸¹ Although strong evidence suggested that Schmitz’s actions were premeditated—he withdrew money, purchased a gun, took it to Amedure’s home, and shot him—the jury returned a verdict finding him guilty not of first-degree murder, as he was charged, but of the lesser offense of second-degree murder.²⁸²

Moreover, in cases in which the victim’s homosexuality is in dispute, this victim-blaming aspect of the HPD is more subtle, yet also more sinister, because it places the victim, rather than the defendant, on trial.²⁸³ For example, in *State v. Rivera*, the defendant claimed that the victim made a sexual advance, and a defense-generated “minitrial” developed as to whether or not the victim was even a homosexual.²⁸⁴ The victim’s wife and friends testified that the victim was heterosexual, and thus unlikely to make a sexual advance.²⁸⁵ This dispute inappropriately shifted the trial away from the defendant, since the char-

²⁷⁵ *Id.* at 99–100.

²⁷⁶ *Id.* at 97.

²⁷⁷ *See id.*

²⁷⁸ *See id.*

²⁷⁹ *See* Mison, *supra* note 13, at 171–72.

²⁸⁰ *See* Bagnall et al., *supra* note 10, at 499; Mison, *supra* note 13, at 171–72.

²⁸¹ 586 N.W.2d 766, 768 (Mich. Ct. App. 1998).

²⁸² *See id.* at 768–69.

²⁸³ *See* *State v. Rivera*, 733 P.2d 1090, 1100 (Ariz. 1987); Mison, *supra* note 13, at 171–72.

²⁸⁴ *See* *Rivera*, 733 P.2d at 1100; Mison, *supra* note 13, at 168.

²⁸⁵ *See* *Rivera*, 733 P.2d at 1100; Mison, *supra* note 13, at 168–69.

acteristics of the defendant establish the presence of the homosexual panic disorder, particularly the primary requirements that the *defendant* have long-term, latent homosexual cravings.²⁸⁶

Given the HPD's power to seduce the deep-seated, anti-gay personal values and prejudices of all courtroom actors, it is a strategy of legal defense that harbors enormous potential for abuse.²⁸⁷ Inconsistent precedent and a critical disassociation from the disorder on which the HPD is based further exacerbate this problem.²⁸⁸ Thus, either new evidentiary rules must limit the damage of this defense, or the defense must be eliminated altogether.

V. RESTRICTING THE HPD'S USE

If American culture and society seems to suggest that violence against gays is a warranted, if not necessary, response to a homosexual solicitation, then the question that follows is whether, and to what degree, society is willing to excuse this violence against gays when it occurs.²⁸⁹ Attorneys' express attempts to manipulate the HPD to capitalize on and normalize anti-gay prejudice buttress the HPD's powerful appeal to judges' and jurors' biases.²⁹⁰ The resulting inconsistent, inappropriate, and yet successful assertions of the HPD, especially in egregious cases of violence against gays, demonstrate that our legal system is not only capable, but *willing* to excuse violence against gays.²⁹¹ "Thus gays risk becoming fair game for assaults," and such crimes against them serve as their perpetrators' own defenses.²⁹² However, "[anti-gay] bias is less operative and requirements for proof more stringent in the higher courts."²⁹³ This inverse correlation suggests that systemic reform to curb the abuses of the HPD is possible.

Several options exist to alleviate the problems inherent in the use of the HPD. The most obvious option is to eliminate the defense altogether.²⁹⁴ Several reasons urge this solution. First, the HPD is based

²⁸⁶ See *Rivera*, 733 P.2d at 1100; Comstock, *supra* note 19, at 90–91, 93; Mison, *supra* note 13, at 168.

²⁸⁷ See Comstock, *supra* note 19, at 81; Mison, *supra* note 13, at 167.

²⁸⁸ See Comstock, *supra* note 19, at 81; Mison, *supra* note 13, at 167; see also discussion *supra* Part III.

²⁸⁹ See Bagnall et al., *supra* note 10, at 499; see also discussion *supra* Part I.

²⁹⁰ See Mison, *supra* note 13, at 167; see also discussion *supra* Part IV.

²⁹¹ See discussion *supra* Part III.

²⁹² See Bagnall et al., *supra* note 10, at 514–15.

²⁹³ Comstock, *supra* note 19, at 100.

²⁹⁴ See Bagnall et al., *supra* note 10, at 515.

on scant and sketchy psychiatric literature.²⁹⁵ Second, to the extent that such literature exists, typical formulations of the HPD do not comport with, and indeed, frequently establish symptoms that are the inverse of the symptoms defined under the disorder.²⁹⁶ Third, perhaps because the HPD bears little relation to the disorder on which it is predicated, the HPD is inconsistently asserted and applied across cases.²⁹⁷ Fourth, because the HPD bears but a tenuous connection to the psychiatric disorder and is inconsistently asserted, it also embodies a tremendous propensity for seducing courtroom actors' biases.²⁹⁸ Finally, our legal system does not accept "race panic," "gender panic," or "heterosexual panic" as culpability-reducing defenses to violence against people of color, women, and homosexuals.²⁹⁹ "In fact, our legal system frequently deals more seriously with acts of violence directed against minority groups than with acts of violence generally."³⁰⁰ Thus, the HPD—homophobia under the guise of an uncommon disorder turned common defense—should neither be an accepted nor an acceptable defense to violence against gays.³⁰¹

If the legal system accepts the HPD as a defense to anti-gay violence, then it should demand that the defense conform to the psychiatric disorder from which it supposedly gains its legitimacy.³⁰² In particular, the fact that psychologists and psychiatrists disagree as to whether the disorder is a mere psychological disturbance or a "mental defect or disease" rising to the level of legal insanity leads to inconsistent applications of the HPD and counsels against permitting the assertion of the HPD as a form of insanity defense until the psychiatric underpinnings of the disorder are more clearly defined.³⁰³ Furthermore, although the psychiatric literature underlying the HPD is scant and sketchy, the defense should, in the very least, consistently include the elements that are clearly defined as primary to the disorder, such

²⁹⁵ See Comstock, *supra* note 19, at 89.

²⁹⁶ See discussion *supra* Part III.B.

²⁹⁷ See discussion *supra* Part III.

²⁹⁸ See Mison, *supra* note 13, at 167; see also discussion *supra* Parts III, IV.

²⁹⁹ SEDGWICK, *supra* note 18, at 19.

³⁰⁰ Bagnall et al., *supra* note 10, at 515.

³⁰¹ See SEDGWICK, *supra* note 18, at 19.

³⁰² See Bagnall et al., *supra* note 10, at 513–14.

³⁰³ See *id.* (stating that courts lack the expertise to resolve the disagreements between psychiatric experts in this area).

as the disorder's "dual determinators" and its long-term, rather than momentary, nature.³⁰⁴

The benefits of conforming the HPD to the disorder are several. First, requiring that the defense have a firm basis in the elements of the disorder promotes legitimacy and consistency in the defense's application, while discouraging the inconsistencies that result from and enable the unconstrained biases of attorneys, judges, and juries.³⁰⁵ Second, asserting the defense in accordance with the elements of the disorder alleviates the victim-blaming tendency of the HPD by shifting the focus of the trial from the victim's sexuality to the characteristics of the defendant.³⁰⁶ Finally, conforming the HPD to the psychiatric disorder would likely result in the appropriate dismissal of all but the bona fide cases involving the disorder, since violence in response to a homosexual solicitation is highly inconsistent with the disorder.³⁰⁷

In addition to conforming the HPD to the homosexual panic disorder, another method by which to alleviate the propensity for bias in the application of the HPD is to limit the amount of judicial discretion involved in allowing the defense.³⁰⁸ Rape-law reform in the form of rape-shield statutes is a useful guide, because rape cases are similar to cases involving anti-gay violence in that both implicate deep-seated personal values, seduction of cultural stereotypes, and victim-blaming.³⁰⁹

As in scenarios involving violence against gays, our "male-dominated legal system [originally] viewed rape as 'different' from other crimes because of a set of historical attitudes about women and sexuality[,]" including "a double standard for male and female sexuality" and a cultural distinction between "good," chaste women and "bad," promiscuous women.³¹⁰ These cultural stereotypes fueled the notion that unchaste women were less likely to be victims of consensual sex, because they were more likely to consent to sexual en-

³⁰⁴ See KEMPF, *supra* note 79, at 511; Comstock, *supra* note 19, at 84, 86–96; Glick, *supra* note 89, at 27; Bagnall et al., *supra* note 10, at 514.

³⁰⁵ See discussion *supra* Parts III.A, IV.

³⁰⁶ See Comstock, *supra* note 19, at 97–100; Mison, *supra* note 13, at 170–71; *see also supra* notes 279–286 and accompanying text.

³⁰⁷ See Comstock, *supra* note 19, at 86 (deeming use of the HPD in cases of violence against gays "inappropriate").

³⁰⁸ See Bagnall et al., *supra* note 10, at 514; *see also* discussion *supra* Part IV.B.

³⁰⁹ See Estrich, *supra* note 5, at 1091; Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 791–93; Mison, *supra* note 13, at 162.

³¹⁰ Galvin, *supra* note 309, at 791–92.

counters.³¹¹ Therefore, rape trials often focused on the chastity of the victim, her moral worth, and her concomitant likelihood to consent to a sexual encounter.³¹² Accordingly, defense attorneys engaged in an exposition of the victim's past sexual conduct, character assassinations, and insinuations that the victim's appearance or conduct provoked the rape.³¹³ Empirical evidence supported suspicions that "jurors misused evidence of unchaste" and "victim-precipitating" conduct to support their subscription to cultural attitudes about women and rape, and to reduce the culpability of, or simply to acquit, male defendants.³¹⁴ In response to this social and legal bias and a changing moral climate, the rape-reform movement generated rape-shield legislation to "allow for the introduction of constitutionally compelled sexual conduct evidence while at the same time protecting the complainant and the fact-finding process against its irrelevant and prejudicial uses."³¹⁵ The ultimate goal was to strike a compromise between inflexible legislative rules and broad judicial discretion, without compromising the rights of either the defendant or the victim.³¹⁶

Although rape-reform remains a work in progress, it is a useful model for efforts to cure the ills of the courtroom biases that are attendant to the use of the HPD.³¹⁷ Like cases involving rape, cases involving violence against gays involve victims whose sexuality is culturally and legally devalued.³¹⁸ While women who dress provocatively are seen as unchaste, men who engage in homosexual behavior are stereotyped as sexual predators.³¹⁹ In either scenario, defense attorneys' efforts to trigger these cultural stereotypes in the jury box are likely to take the form of victim-blaming and elicitation of sympathy for the defendant.³²⁰ Furthermore, efforts to prove that a victim is homosexual, and impliedly likely to make a homosexual advance, involve the introduction of irrelevant and prejudicial evidence, such as prior homosexual activities and sexual paraphernalia, in the same way that efforts to suggest a rape victim's consent in the case at bar by

³¹¹ See *id.* at 792.

³¹² See *id.* at 792-93.

³¹³ See *id.* at 792-94.

³¹⁴ *Id.* at 796.

³¹⁵ See Galvin, *supra* note 309, at 798, 808.

³¹⁶ *Id.*

³¹⁷ See Estrich, *supra* note 5, at 1093 (discussing pros and cons of rape-reform legislation).

³¹⁸ See Galvin, *supra* note 309, at 791; Valdes, *supra* note 25, at 170.

³¹⁹ See Galvin, *supra* note 309, at 794-95; Herek & Berrill, *supra* note 40, at 295.

³²⁰ See Galvin, *supra* note 309, at 794-96; Mison, *supra* note 13, at 163, 167, 171.

demonstrating her sexual promiscuity in general frequently tainted rape cases before the advent of rape-shield statutes.³²¹ Moreover, in both types of cases, judges, who are not immune to cultural biases, wield great discretion in deciding both what evidence to exclude and the scope of permissible questioning.³²² Thus, legislation that imposes appropriate restraints on judicial discretion and refines the inconsistent assertion and application of the HPD in cases involving violence against gays is a viable method for balancing the rights of the defendant and the victim while reducing the pervasive influence of American social, cultural, and institutional anti-gay biases.³²³

CONCLUSION

Assuming, for the moment, that socially impermissible behavior, such as engaging in homosexuality, is synonymous with immoral behavior, "it is morally questionable to suggest that there is less societal harm in the [v]ictim's death merely because he acted immorally."³²⁴ Yet, this suggestion is exactly what the homosexual panic defense implies. The stakes are simple and profound; they are life and death. In the *Schmitz* case, the jury sentenced Johnathon Schmitz to a kind of death within life—he went to prison. Scott Amedure died. Both fell victim to the heterosexism and commensurate homophobia that permeates American society.

In *Burdens on Gay Litigants and Bias in the Court System*, Robert G. Bagnall, Patrick C. Gallagher, and Joni L. Goldstein surmise that "[t]he fact that the [HPD] has not been rejected out of hand by the courts and legislatures may suggest that it appeals to the [anti-gay] bias of many individuals"³²⁵ Indeed, anti-gay bias is pervasive; it extends from the social interactions in which violence against gays occurs to the legal institutions in which gays seek protection and redress.³²⁶ Ironically, this anti-gay bias is not only the *cause* of, but it is the *excuse* for anti-gay violence.³²⁷ The legal system has mangled the homosexual panic disorder in order to create the HPD, such that the

³²¹ See Galvin, *supra* note 309, at 794–95 (discussing the introduction of contraceptive use in rape trials); Mison, *supra* note 13, at 169.

³²² See Galvin, *supra* note 309, at 794–96, 800; see also discussion *supra* Part IV.B.

³²³ See Galvin, *supra* note 309, at 808; see also discussion *supra* Parts I, III.A, IV.B.

³²⁴ Mison, *supra* note 13, at 171–72 & n.279 (citing Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 446 (1982)).

³²⁵ Bagnall et al., *supra* note 10, at 515.

³²⁶ See discussion *supra* Part I.

³²⁷ See Bagnall et al., *supra* note 10, at 501.

HPD bears only a tenuous connection to the scant psychiatric literature on which it is based.³²⁸ It is hardly surprising or unpredictable that the HPD is the legal embodiment of the same social prejudice that it was created to justify.³²⁹ The HPD's disassociation from the homosexual panic disorder, its inconsistent assertion and application across cases, and its solicitation of the express prejudices of defense attorneys, judges, and jurors alike, suggest that its use is misuse.³³⁰

However, "[j]ust because a society is heterocentric does not mean it has to tolerate or encourage violent homophobic acts."³³¹ Indeed, although the cultural devaluation of gays that is institutionalized in the legal system appears unyielding, recent years have witnessed a trend coupling the decriminalization of homosexual behavior with the first successful case demanding equal access for same-sex couples to the rights, obligations, and benefits of marriage.³³² Because these positive changes are occurring at the same time that violence against gays is also on the rise, American society may be primed to scrutinize, limit, and better yet, eliminate the use of the HPD as a plausible defense to these gratuitous crimes.³³³

³²⁸ See Comstock, *supra* note 19, at 81 (stating HPD relies almost exclusively on anti-gay bias); see also discussion *supra* Part III.

³²⁹ See Comstock, *supra* note 19, at 81; see also discussion *supra* Parts I, III.

³³⁰ See Bagnall et al., *supra* note 10, at 515; see also discussion *supra* Parts III.A, IV.

³³¹ Mison, *supra* note 13, at 173.

³³² See *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999); see also *supra* note 53 and accompanying text.

³³³ See SEDGWICK, *supra* note 18, at 18.