

A HEAT OF PASSION OFFENSE: EMOTIONS AND BIAS IN “TRANS PANIC” MITIGATION CLAIMS

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HIDING FROM HUMANITY. By Martha C. Nussbaum. Princeton: Princeton University Press. 2004. Pp. 413.

Abstract: In *Hiding from Humanity: Disgust, Shame, and the Law*, Martha C. Nussbaum critically examines the role of emotions in our legal system. Nussbaum combines insights from child psychology, history, sociology, and legal theory to determine whether shame and disgust are reliable foundations on which to base law. She concludes that these two emotions serve as repositories of unreasonableness, mediums for abuse of minorities, and reflections of a society's current anxieties. Thus, they form a portrait of current prejudices and vulnerabilities, and should not constitute the basis for mitigation. This Book Review applies Nussbaum's analysis to the case of Gwen Araujo, a transgendered woman killed by four of her friends. In that case, defendants attempted to mitigate the punishment for their brutal killing through a heat of passion argument called a “trans panic defense.” An examination of the provocation, emotion, and reasonableness elements of a heat of passion claim reveals that trans panic defenses never justify this type of mitigation. Nussbaum fails to address violence against transgendered individuals; however, her insights about emotion illustrate why courts should decline to instruct on manslaughter when defendants argue a trans panic defense.

INTRODUCTION

On the night of October 3, 2002, four young men found out that their friend, Gwen Araujo, was biologically male.¹ They kned her in

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¹ See *Dateline NBC: Profile: Without Mercy: The Life and Death of Gwen Eddie Araujo Jr., Victim of Transgender Violence* (NBC News television broadcast, Mar. 21, 2004), available at 2004 WL 65701394 [hereinafter *Without Mercy*]. Araujo began to reveal her identity as a woman in 1999 and asked others to call her Gwen, or sometimes Lida. See *id.* Her mother and family were supportive when she told them about her identity as female; she planned to

the face, slapped, kicked, and choked her, beat her with a can and a metal skillet, wrestled her to the ground, tied her wrists and ankles, strangled her with a rope, and hit her over the head with a shovel.² She begged for mercy, offered money in a desperate attempt to buy her freedom, and said her last words: "Please don't, I have a family."³ Her killers buried her in a shallow grave and went to McDonald's for breakfast.⁴

One man pled guilty and testified against his friends.⁵ Another disclaimed any role in Araujo's murder, asserting that he only helped to bury her.⁶ The remaining two defendants argued that if guilty, their crime was the lesser offense of manslaughter because they killed in a heat of passion.⁷ This attempt to mitigate their crime pointed a public

have sex reassignment surgery someday. *See id.* After Araujo's death, her mother successfully petitioned the court to change her name from Eddie to Gwen Amber Rose Araujo, saying, "I made a promise to her and I fulfilled my promise. I only wish in my lifetime I had called her Gwen more often." *See* Ben Aguirre Jr., *Slain Transgender Teen's Name Legally Changed to Gwen*, OAKLAND TRIB., July 3, 2004, available at 2004 WL 79863115.

² *See* 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. filed June 25, 2003) (on file with author) [hereinafter *Hate Clause Memo*]. This memorandum of law was filed on behalf of defendant Magidson; Michelle Locke, *Transgender Murder Trial Seen as a Civil Rights Case*, MONTEREY COUNTY HERALD, June 6, 2004 [hereinafter Locke, *Transgender Murder*]; Michelle Locke, *Jury Ponders Case of Slain Transgender Teen*, CONTRA COSTA TIMES, June 4, 2004, at 4 [hereinafter Locke, *Jury Ponders*]; Michelle Locke, *Defense Claims Araujo Slaying Was in Surprise*, MONTEREY COUNTY HERALD, June 3, 2004, [hereinafter Locke, *Defense Claims*]; Christopher Curtis, *Araujo Trial: Defense Confronts Key Witness*, Apr. 28, 2004, PLANET OUT, at <http://www.planetout.com/news/article.html?2004/04/28/2>.

³ Ivan Delventhal, *Witness Tells of Assault on Araujo*, OAKLAND TRIB., Apr. 27, 2004; Yomi S. Wronge, *Witness Says Victim Offered Cash to Suspect*, SAN JOSE MERCURY NEWS, Mar. 18, 2003, at 1.

⁴ *See* *Murder Trial Starts in Teen's Slaying*, L.A. TIMES, Apr. 15, 2002, at B8. The details are more gruesome than described here. *See* *Hate Clause Memo*, *supra* note 2, at 5-8. After suspecting for some time that Gwen may have male genitals, the young men harassed her at a friend's party and told a female friend to take Gwen into the bathroom to find out her biological sex. *See id.* After the men's friend came out of the bathroom screaming, "It's a fucking man," the men violently wrestled Gwen to the ground and pulled off her clothing, revealing male genitals. *See id.* at 7. Burying Araujo, one defendant said that he was so angry, "he could still kick her a couple of times." Michelle Locke, *Araujo's Death Was Violent*, *Witness Says*, CONTRA COSTA TIMES, Apr. 28, 2004, at 4.

⁵ *See* Curtis, *supra* note 2.

⁶ *See* Kelly St. John, *Prosecutor Calls 3 Defendants Equally Guilty in Teen's Death*, S.F. CHRON., June 2, 2004, at B5.

⁷ *See* CAL. PENAL CODE § 192 (West 1999); *see also* St. John, *supra* note 6.

spotlight on the "trans panic" defense, a variation of the gay panic and homosexual advance defenses.⁸

Gay panic and homosexual advance arguments attempt to mitigate punishment for murder by categorizing as manslaughter a killing precipitated by either a perceived sexual advance or the revelation or perception that another person is a homosexual.⁹ Traditionally, gay panic defenses used a diminished capacity argument, claiming that a defendant's latent homosexuality caused his violent reaction to a gay man's advance.¹⁰ In contrast, homosexual advance defenses typically take the form of heat of passion arguments.¹¹ A defendant invoking a trans panic defense utilizes a heat of passion framework, claiming that his violent acts were triggered by the revelation that another person, sometimes with whom he has been sexually involved, is transgendered.¹²

Judges should decline to instruct juries on manslaughter when a trans panic defense is used because that defense does not fulfill the elements of a heat of passion claim.¹³ A close look at the defense as it was put forward in the first Araujo trial proves that it never fulfills the

⁸ See generally Christina Pei-Lin Chen, Note, *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) (offering a legal and historical background and critical analysis of homosexual panic and sexual advance defenses); Kelly St. John, *Mistrial in Transgender Case*, S.F. CHRON., June 23, 2004, at A1.

⁹ See Chen, *supra* note 8, at 210. The author outlines the origins of the nonviolent homosexual advance defense and its shift from homosexual panic as an insanity defense to homosexual advance as a provocation defense. See *id.* at 201-16.

¹⁰ See Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 L. & SEXUALITY 81, 82 (1992), Kara S. Suffredini, *Pride and Prejudice: The Homosexual Panic Defense*, B.C. THIRD WORLD L.J. 279, 287-88 (2001).

¹¹ See Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV., 133, 136-41 (1992).

¹² See Vicki Haddock, 'Gay Panic' Defense in Araujo Case, S.F. CHRON., May 16, 2004, at E1. This Book Review defines "transgendered" (trans) as all gender nonconforming people, including pre- and post-operative transsexual people, feminine men and masculine women, and intersexed people. See Jennifer L. Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5, 5 n.2 (2000). For a further description of transgender identity, its difference from and intersection with issues of sexuality, see Mary Coombs, *Characteristics of Transgenderism*, 8 UCLA WOMEN'S L.J. 219, 237-242 (1998).

¹³ See *People v. Cole*, 95 P.3d 811, 850-51 (Cal. 2004); *People v. Breverman*, 960 P.2d 1094, 1106-07 (Cal. 1998); *Hate Crime Memo*, *supra* note 2, at 11-13. A Wyoming judge made headlines with his decision to disallow an instruction based on a "gay panic" type of defense in the Matthew Shepard case. See Press Release, Human Rights Campaign, *Judge Throws Out "Blame the Victim" Defense*, Nov. 1, 1999, available at http://www.hrc.org/Content/ContentGroups/News_Releases/1999/JUDGE_THROWS_OUT__BLAME_THE_VIC_TIM_DEFENSE.htm.

legal elements of a heat of passion claim.¹⁴ To understand why the two are incompatible, one must examine the emotion-based elements of heat of passion defenses alongside the pattern of facts put forward in a standard “trans panic” argument.¹⁵

Emotions were central to Araujo’s case, as defense counsel’s heat of passion claim turned on the defendants’ emotional reaction to discovering that their friend Gwen—with whom three of them had been sexually intimate—had male genitals.¹⁶ One lawyer explained that the men acted out of “shame and humiliation, shock and revulsion.”¹⁷ Feelings of having been duped grounded defendants’ framing of the case as a “story about deception and betrayal.”¹⁸

Such emotions have long played a central role in some areas of our legal tradition. In *Hiding from Humanity*, Martha Nussbaum examines that role, focusing on ways in which emotions reflect society’s evaluation of what constitute important benefits and harms.¹⁹ Specifically, Nussbaum examines shame and disgust, and concludes that these emotions, central to the defense in Araujo’s case, should not form the basis for legal defenses.²⁰

This Book Review explains why mitigation for trans panic defenses is not legally justifiable, and concludes that courts should discourage their use by refusing to instruct juries on manslaughter based on trans panic heat of passion arguments.²¹ Part I scrutinizes Nussbaum’s analysis of the structure of emotions and their place in mitigation doctrines. Part II uses Nussbaum’s analysis to examine the compatibility of trans panic defenses with the elements of California’s heat of passion defense. Part III explains why it is imperative that courts

¹⁴ See *Cole*, 95 P.3d at 851; *Breverman*, 960 P.2d at 1106–07; *Hate Crime Memo*, *supra* note 2, at 11–13. A heat of passion defense cannot be pieced together out of many insufficient elements; each element must be proved. See *Breverman*, 960 P.2d at 1124 (Kennard, J., dissenting).

¹⁵ See *Breverman*, 960 P.2d at 1106–07.

¹⁶ See *Hate Clause Memo*, *supra* note 2, at 7. This Book Review defines “defense counsel” as the two lawyers representing defendants who used a heat of passion argument to attempt mitigation to manslaughter.

¹⁷ *Killer Acted Out of “Shame,”* GRAND RAPIDS PRESS, Apr. 16, 2004, at A2.

¹⁸ See Jamison Green, *Seeking Justice for Gwen Araujo*, PLANET OUT, at <http://www.planetout.com/people/columns/green/archive/20040420.html> (last visited Nov. 14, 2004).

¹⁹ See MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY* 22, 36 (2004).

²⁰ See *id.* at 13–15.

²¹ See *Cole*, 95 P.3d at 850–51; *Breverman*, 960 P.2d at 1106–07; *Commonwealth v. Carr*, 580 A.2d 1362, 1363–65 (Pa. Super. Ct. 1990); *Hate Crime Memo*, *supra* note 2, at 11–13.

begin to curb legally deficient attempts to mitigate punishment in cases of violence against transgendered people.

I. ARGUING EMOTION: THE LEGAL FUNCTION AND STRUCTURE OF EMOTIONS

Nussbaum begins with the seemingly benign task of differentiating emotions from feelings.²² Unlike "bodily forces" such as hunger, emotions necessarily incorporate beliefs.²³ Strong emotions require a valuation of some object (usually related to one's own well-being) and a belief about that object.²⁴ Anger, for example, involves a belief that an object one values has been harmed.²⁵ Similarly, pity entails a belief that a person or an object that one cares about is suffering.²⁶

Nussbaum points out that because one person's feeling about an object may shift constantly and may differ from others' feelings, legal analysis rightly focuses judgments of reasonableness on the thoughts involved in emotion rather than the bare feelings.²⁷ Because beliefs underlie emotions, people's emotions shift when mistaken beliefs are exposed or when one changes his valuation of an object.²⁸ Like an individual, a culture may judge the reasonableness of emotional reactions differently over time.²⁹ Nussbaum invites legal thinkers to consider that the average man can be unreasonable, and that certain emotions are structurally and functionally prone to serving as repositories of man's unreasonableness.³⁰ The role of these shifty emotions within the law should be scrutinized with skepticism.³¹

Nussbaum's depiction of an emotion as a two-part entity, comprised of both an object and a valuation of that object, may seem a novel concept to many readers.³² In the doctrines of self-defense and

²² See NUSSBAUM, *supra* note 19, at 24–31.

²³ *Id.* at 25–26.

²⁴ See *id.* at 27, 29.

²⁵ See *id.* at 27.

²⁶ See *id.*

²⁷ See NUSSBAUM, *supra* note 19, at 27–28.

²⁸ See *id.* at 34–35. For example, sexism-based hate and racism-based fear are not simply unreasoned urges; they can be overcome by new factual understandings of the actions of women and minorities. See *id.* at 35.

²⁹ See *id.* at 34–37.

³⁰ See *id.* at 36–37.

³¹ See NUSSBAUM, *supra* note 19, at 36–37.

³² See *id.* at 31.

mitigation, however, legal doctrine recognizes and relies heavily on this two-pronged definition of emotion.³³ Nussbaum explains:

[I]n general we do not condone any homicide not committed in self-defense. We hold that the reasonable person would never actually take the law into his own hands in a situation of provocation. But we do want to give public and legal recognition to the fact that reasonable people become enraged at certain types of damages to themselves or their loved ones, and we therefore build into the legal doctrine a reduction for those who commit a violent act under such circumstances. The homicidal act is not justified, but it is partially excused, in the sense that a lesser punishment is given for it. The reason is not simply that the person's emotion is comprehensible. It is that the emotion itself, though not the act chosen under its influence, is appropriate.³⁴

Significantly, even appropriate, intense emotion does not warrant mitigation unless that emotion is based on reasonable beliefs about a situation.³⁵

Thus, three emotion-based considerations aid evaluation of whether a given situation warrants mitigation: (1) does society value the object of the harm or threat to which the defendant reacted;³⁶ (2) was the defendant's resulting emotion appropriate;³⁷ and (3) was the defendant's reaction based on a reasonable belief about a situation?³⁸ Because these questions involve normative evaluations, they illustrate how "[t]he situations in which perpetrator emotion mitigates murder change inevitably with societal mores."³⁹

Courts may use this three-step reasoning to examine the appropriateness of a manslaughter instruction in a given case. For example, in *Commonwealth v. Carr*, a defendant argued for mitigation based on

³³ See *id.* at 37–45.

³⁴ *Id.* at 39.

³⁵ See *id.* at 42–43. In California, it is well settled that passion alone cannot mitigate punishment: "no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless . . . the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man." *People v. Logan*, 164 P. 1121, 1122–23 (Cal. 1917). This Review focuses on California law, where Araujo's case took place.

³⁶ See NUSSBAUM, *supra* note 19, at 46–47.

³⁷ See *id.* at 36–37.

³⁸ See *Logan*, 164 P. at 1122–23; NUSSBAUM, *supra* note 19, at 42.

³⁹ See Megan Sullaway, *Psychological Perspectives on Hate Crime Laws*, 10 PSYCHOL. PUB. POL'Y & L. 250, 269 (2004); see also NUSSBAUM, *supra* note 19, at 47.

disgust and revulsion when charged with shooting two lesbian women because he saw them being intimate with one another.⁴⁰ The court rejected the heat of passion argument, stating, "[The law] does not recognize homosexual activity between two persons as legal provocation sufficient to reduce an unlawful killing . . . from murder to voluntary manslaughter."⁴¹ The court found that mitigation is inappropriate when the defendant has reacted only to another person's sexuality or to a threat to his own sense of appropriate sexual behavior.⁴² Thus, the court's evaluation did not end with a finding that the defendant felt strong emotions; rather, the court looked to the content of those emotions—the threat he felt and the beliefs he held about his situation—to evaluate the reasonableness of his actions.⁴³ The court stated that having witnessed the women's intimacy, a "reasonable person would simply have discontinued his observation and left the scene; he would not kill the lovers."⁴⁴

Just as the *Carr* court held that homosexual activity is insufficient provocation, courts should find that the claimed provocation in trans panic defenses is insufficient as a matter of law.⁴⁵ Nussbaum's analysis of shame and disgust adds support to the conclusion that a trans panic defense, by definition, does not warrant instruction on manslaughter because its constituent parts do not satisfy the elements of heat of passion claims.⁴⁶ Interestingly, although Nussbaum's book discusses sexuality and gender dynamics within mitigation doctrine, it mentions neither trans panic defenses nor transgendered people in any context.⁴⁷ The omission is emblematic of the blind spot occupied by transgendered individuals in our culture; even this scholar, whose work relates directly to the foundations of bias against the trans community, over-

⁴⁰ See *Commonwealth v. Carr*, 580 A.2d 1362, 1363–64 (Pa. Super. Ct. 1990).

⁴¹ *Id.* at 1364–65.

⁴² See *id.*

⁴³ See *id.*; see also NUSSBAUM, *supra* note 19, at 39–40.

⁴⁴ See *Carr*, 580 A.2d at 1364.

⁴⁵ See *id.*

⁴⁶ See *People v. Breverman*, 960 P.2d 1094, 1106–07 (Cal. 1998); *Hate Crime Memo*, *supra* note 2, at 11–13; NUSSBAUM, *supra* note 19, at 13–15.

⁴⁷ See NUSSBAUM, *supra* note 19, at 35, 46–48, 130–34. Nussbaum discusses at length the idea that being homosexual is insufficient provocation. See *id.* at 130–34. Similarly, she discusses and rejects the legitimacy of violence stemming from threats to one's masculinity. See *id.* at 35, 46–48, 298–99. Nowhere does Nussbaum introduce the concept of transgender identity or the violence perpetrated against members of the transgender community. See *id.* at 35, 46–48, 130–34, 298–99.

looked their implications for a population that desperately needs the benefit of her insights.⁴⁸

II. WHAT HAPPENS IN THE HEAT OF PASSION?

Although jurisdictions differ as to the amount of evidence required to instruct on lesser included offenses, in California, a trial judge is only required to instruct the jury as to lesser included offenses when there is substantial evidentiary support for those offenses.⁴⁹ California courts define substantial evidence in this context as "evidence from which a jury composed of reasonable [persons] could . . . conclude . . . that the lesser offense, but not the greater, was committed."⁵⁰ In a murder trial, to justify giving voluntary manslaughter instructions, there must be substantial evidence, not simply some evidence, of heat of passion.⁵¹ Further, because malice is presumed when circumstances of a killing suggest intent to kill, heat of passion and provocation must be affirmatively demonstrated.⁵²

California courts state that for an intentional, unlawful homicide to constitute voluntary manslaughter as a heat of passion crime, there must be substantial evidence of the following five elements: 1) that the killer's reason was actually obscured; 2) by a provocation; 3) which aroused a strong passion;⁵³ 4) sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection; and 5) there must be insufficient time between provocation and fatal blow for passion to subside and reason to return.⁵⁴

⁴⁸ Compare *id.*, with Dylan Vade, *No Issue of Sexual Deception*, S.F. CHRON., May 30, 2004, at E3 (connecting Araujo's fate to the larger issue of transphobia), and Patrick Letellier, *2003 Exceeds Others in Transgender Killings*, PLANET OUT, Nov. 26, 2003, at <http://www.planetout.com/news/article.html?2003/11/26/4> (detailing statistics of violence perpetrated upon members of the transgendered community).

⁴⁹ See *People v. Cole*, 95 P.3d 811, 850–51 (Cal. 2004); *Breverman*, 960 P.2d at 1106–07 (Cal. 1998); *People v. Kanawyer*, 113 Cal. App. 4th at 1233, 1245, 1247 (Cal. Ct. App. 2003).

⁵⁰ See *Breverman*, 960 P.2d at 1106 (quoting *Carr*, 502 P.2d 513). In another case, the court found that the trial judge properly refused to instruct the jury on involuntary manslaughter because defendant was able to describe the crimes in detail and act in a cold, calculating manner during the crimes, so that no reasonable jury could have found defendant guilty of involuntary manslaughter. *People v. Haley*, 96 P.3d 170, 190–91 (Cal. 2004).

⁵¹ See *People v. Williams*, 46 Cal. Rptr. 2d 730, 734 (Cal. App. 2d 1995).

⁵² See *People v. Seden*, 518 P.2d 913, 923 (Cal. 1974).

⁵³ "Strong passion" is defined as any violent, intense, high-wrought or enthusiastic emotion other than revenge. See *People v. Gutierrez*, 28 Cal. 4th 1083, 1144 (Cal. 2002), *cert. denied*, 538 U.S. 1001 (2003).

⁵⁴ See *Breverman*, 960 P.2d at 1106.

The provocation, passion, and reasonableness requirements are linchpins of any heat of passion claim to mitigation.⁵⁵ Sufficient provocation ensures that the defendant's reaction was based on a reasonable belief about his situation.⁵⁶ Requiring that the defense articulate a particular passion allows the factfinder to evaluate the appropriateness of the defendant's emotion.⁵⁷ The reasonableness requirement invites an inquiry into how highly society values the type of harm or threat to which the defendant reacted.⁵⁸ The Araujo case, examined through Nussbaum's emotion analysis, illustrates that trans panic defenses do not fulfill these three elements of a heat of passion claim.⁵⁹

A. Reaction to Inaction: Insufficient Provocation

To warrant a heat of passion instruction, evidence must exist that the victim provoked the defendant; absent such evidence, a heat of passion instruction as to voluntary manslaughter is not justified.⁶⁰ In California, the jury usually decides, as a question of fact, whether a particular provocation was sufficient to arouse an ordinarily reasonable person's passion.⁶¹ However, the court may resolve the question where the provocation is sufficiently slight or sufficiently great.⁶² Al-

⁵⁵ See NUSSEBAUM, *supra* note 19, at 37–38.

⁵⁶ See *id.* at 42.

⁵⁷ See *id.* at 36–37.

⁵⁸ See *id.* at 46–47.

⁵⁹ See *id.* at 36–37, 42, 46–47. In Araujo's case, elements apart from these three are also lacking; serious doubts exist regarding the lack of a cooling off period. See *Hate Clause Memo*, *supra* note 2, at 8. At least one defendant drove from the site of the attack to his house to get shovels for the assault, and drove back. See *id.*; see also *Without Mercy*, *supra* note 1. Prior to the attack, the men talked about what they might do to a "man who pretended to be a woman," creating doubt about a lack of premeditation or malice aforethought, which can be shown from either express evidence of deliberate purpose to kill or by inferences made from other proof. See *People v. Golsh*, 219 P. 456, 457–58 (Cal. Ct. App. 1923); *Hate Clause Memo*, *supra* note 2, at 5.

⁶⁰ See *People v. Steele*, 47 P.3d 225, 239 (Cal. 2002), *cert. denied*, 537 U.S. 1115 (2003).

⁶¹ See *People v. Valentine*, 169 P.2d 1, 11 (Cal. 1946); *People v. Fenenbock*, 46 Cal. App. 4th 1688, 1705 (Cal. Ct. App. 1996).

⁶² See *Fenenbock*, 46 Cal. App. 4th at 1705. The court may decide the issue when reasonable jurors could not differ on the issue of adequacy. See *id.* However, courts find some provocation insufficient as a matter of law without reference to the jury's consensus on its adequacy. See *People v. Cole*, 95 P.3d 811, 850–51 (Cal. 2004); *Commonwealth v. Carr*, 580 A.2d 1362, 1364–65 (Pa. Super. Ct. 1990). Therefore, the adequacy of the claimed provocation should be evaluated as compared to other provocations which the courts have taken up and deemed sufficient or insufficient as a matter of law. See *Cole*, 95 P.3d at 850–51; *Carr*, 580 A.2d at 1364–65.

though no specific type of provocation is required, some types of provocation have been deemed insufficient as a matter of law.⁶³

As Nussbaum suggests, courts judging whether provocation is sufficient implicitly look for a threat or harm to some core value that is worthy of either protection or extreme reaction.⁶⁴ Thus, typical examples of sufficient provocation include the murder of a family member, a threat to one's own life, or an intense quarrel.⁶⁵ If no core value exists, provocation is insufficient, a situation found in *People v. Fenenbock*, where mitigation was denied when the defendant claimed that his panic was triggered by harm to a child with whom he had no close personal bond.⁶⁶

In Araujo's case, the defense did not explicitly define its claimed provocation, but implied three triggers: Araujo's biological sex itself, the revelation of that sex, and Araujo's act of "deception" arguably perpetuated on defendants.⁶⁷ The first provocation claimed, Araujo's biological sex, does not constitute sufficient provocation. By definition, heat of passion requires first an action by the victim, followed by defendant's violent reaction.⁶⁸ When the victim is "just being there," and the defendant reacts to a feeling about that person (or even about himself), the defendant is the first aggressor.⁶⁹

To expand the definition of sufficient provocation to include a victim's characteristics would open the door to justifying mitigation for murder of anyone that a killer merely dislikes, feels uncomfortable interacting with, or finds disgusting.⁷⁰ Nussbaum reminds readers that

⁶³ See *Cole*, 95 P.3d at 850–51; *People v. Kanawyer*, 113 Cal. App. 4th at 1233 (Cal. App. 3d, 2003).

⁶⁴ See *Fenenbock*, 46 Cal. App. 4th at 1705; NUSSBAUM, *supra* note 19, at 46–47. In California, verbal provocation may be sufficient, so provocation must not rest on its form, but with its effect on the defendant. See *People v. Berry*, 556 P.2d 777, 780 (Cal. 1976).

⁶⁵ *Fenenbock*, 46 Cal. App. 4th at 1705. The court provides examples: "In previous cases, the murder of a family member, a sudden and violent quarrel, and infidelity of a wife or paramour have been held to constitute legally adequate provocation for voluntary manslaughter." *Id.* (citations omitted). "On the other hand, neither simple trespass nor simple assault constitute provocation sufficient to reduce the killing to manslaughter." *Id.* (citations omitted).

⁶⁶ *Id.*

⁶⁷ See NUSSBAUM, *supra* note 19, at 128–29; *Without Mercy*, *supra* note 2, at 11–13 (explicitly arguing that "deceit" was the provocation, though using language implicitly suggesting an array of possible triggers).

⁶⁸ See *People v. Breverman*, 960 P.2d 1094, 1106 (Cal. 1998); NUSSBAUM, *supra* note 19, at 39.

⁶⁹ See NUSSBAUM, *supra* note 19, at 128–29.

⁷⁰ See *id.* at 128–29, 133–34. Similarly, "[b]eing disgusting to look at is not an invitation to violence," no matter how an aggressor reacts. *Id.* at 128.

disgust defenses in cases of violence against Jews, blacks, or people with disabilities are not entertained today, but were readily accepted in the past.⁷¹ At times, our legal system and other governments have tolerated mitigation in the context of violence reacting to disability, religion or race.⁷² Today's tolerance of disgust defenses against gay and transgendered individuals highlights cultural anxiety around gender and sexuality boundary-crossing.⁷³ Allowing the fact of being transgendered to qualify as sufficient provocation reifies this anxiety.⁷⁴

Similarly, revealing one's biological sex does not constitute sufficient provocation.⁷⁵ Again, California law states that to be sufficient, provocation must be caused by the victim.⁷⁶ In Araujo's case, the defendants harassed Araujo to determine her sex, ultimately throwing her to the ground and pulling off her clothing to reveal her genitals.⁷⁷ Defense counsel suggested that the revelation had a particularly intense impact on these young men because they were immature and "unhealthy."⁷⁸ California case law, however, clearly disallows personal vulnerabilities or preexisting states of mind to bear on the evaluation of a person's reaction.⁷⁹ For this reason, the prosecution

⁷¹ See *id.* at 134.

⁷² See *id.* at 107–115; see also Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1265, 1301 (pointing out that "the claimed provocation of the 'black rage' defense has been largely dismissed, and thereby rendered irrational," although "emotionally driven, racist policies" remain in place and actively inform our laws).

⁷³ See NUSSBAUM, *supra* note 19, at 133–34. Again, though NUSSBAUM laments that "as a society, we are conflicted about the disgust issue as applied to homosexuals," she fails to mention those issues as applied to transgendered people. See *id.* at 134. Disgust aimed at transgendered people evidence society's current discomfort with challenges to policed gender boundaries. See Patience W. Crozier, *Forcing Boys to be Boys*, B.C. THIRD WORLD L.J. 123, 133–36 (2001).

⁷⁴ See NUSSBAUM, *supra* note 19, at 128–29.

⁷⁵ See *People v. Lee*, 971 P.2d 1001, 1007 (Cal. 1999); NUSSBAUM, *supra* note 19, at 39–40; Locke, *Transgender Murder*, *supra* note 2.

⁷⁶ See *Lee*, 971 P.2d at 1007; *Breverman*, 960 P.2d at 1106. Defendant's own thoughts triggered by another's action cannot constitute sufficient provocation because they are not acts of the victim. See *People v. Kanawyer*, 113 Cal. App. 4th at 1233, 1247 (Cal. App. 3d. 2003).

⁷⁷ See *Hate Clause Memo*, *supra* note 2, at 6–7. In the beginning of this encounter, the men made it clear that they were touching her to find out whether she was a man or a woman, she said of their unwanted physical touching and their comments, "I'm not going to let you molest me" and refused to answer their questions about her gender. See *id.* at 6.

⁷⁸ See Kelly St. John, *Expert Backs 'Panic' Defense*, S.F. CHRON., May 25, 2004, at B1.

⁷⁹ See *Logan*, 164 P. at 1122. In another case of an unhealthy defendant, "evidence that he was intoxicated, that he suffered various mental deficiencies, that he had a psychological dysfunction due to traumatic experiences in the Vietnam War, and that he just 'snapped' . . . may have satisfied the subjective element of heat of passion, but it did not

reminded jurors that the provocation "did not flow from Eddie Araujo. The provocation flowed from within [the defendants]. They were the source of their own provocation."⁸⁰

Above all, defense counsel argued that Araujo's commission of "sexual fraud" constituted sufficient provocation.⁸¹ Rather than her transgender identity, the defense claimed that Araujo's "deception and betrayal," provoked the men's reaction.⁸² 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 that it was a woman, not simply presenting as a woman when the person was actually a man."⁸³ However, such "sexual fraud" also falls short of sufficiency.

The inconsistent language used by reporters and attorneys to describe "sexual fraud" belies its lack of definition.⁸⁴ Perhaps defense counsel intended the term to mean a wrongful act similar to so-called "heart balm" crimes: common law sexual torts including seduction, alienation of affections, and breach of promise to marry.⁸⁵ California, however, abolished such "amatory torts" in 1939.⁸⁶ More recently, the meaning of "sexual fraud" has shifted to encompass actions such as concealing a sexually transmitted disease or falsely stating that one is

satisfy the objective, reasonable person requirement" because the victim must cause the provocation. See *People v. Steele*, 47 P.3d 225, 239 (Cal. 2002), *cert. denied*, 537 U.S. 1115 (2003).

⁸⁰ See Locke, *Jury Ponders*, *supra* note 2.

⁸¹ See Locke, *Defense Claims*, *supra* note 2.

⁸² See Haddock, *supra* note 12; see also *Hate Clause Memo*, *supra* note 2, at 6.

⁸³ See *Hate Clause Memo*, *supra* note 2, at 9. Much of the memo reveals a shocking disrespect of the victim and misunderstanding of her self-identity. See *id.* The memo uses the pronoun "it" to describe Araujo, and describes her as "actually a man," "a man who presented as a woman," and "acting as if he were a she." *Id.* The media also misrepresented Araujo's identity, with headlines such as *Boy May Have Been Slain Over Cross-Dressing*, from SAN JOSE MERCURY NEWS, Oct. 19, 2002, available at <http://www.mercurynews.com/mld/mercurynews/news/4320907.htm?1c>.

⁸⁴ See Locke, *Defense Claims*, *supra* note 2. Sometimes the phrase is used to mean the revelation of Araujo's gender, described above as insufficient provocation; one attorney said "the sudden discovery that she was biologically male was a sexual violation of the type 'so deep, it's almost primal.'" See *id.*

⁸⁵ See *Askew v. Askew*, 28 Cal. Rptr. 2d 284, 290-91 (Cal. Ct. App. 1994) (citing Jane E. Larson, *Women Understand So Little, They Call My Good Nature Deceit*, 93 COLUM. L. REV. 374, 394, n.85 (1993)).

⁸⁶ See CAL. CIV. CODE § 43.5 (West 1982).

taking birth control or is infertile.⁸⁷ Yet, these claims too are rejected almost universally by courts on both policy and privacy grounds.⁸⁸

Fraud refers to a phenomenon wherein one misrepresents a material fact that one has a duty to reveal; typically, the party alleging fraud must show that actual harm resulted. Of course, Araujo did not misrepresent her gender to the men; they knew her as a woman, and she both identified and lived as a woman.⁸⁹ Nonetheless, defendants relentlessly accused Araujo of "deception" and "sexual fraud."⁹⁰

Though the defendants might not have known Araujo's biological sex, fraud and deceit also require a person to misrepresent a fact that he or she has a duty to reveal.⁹¹ In fact, one defendant argued that the duty to reveal one's biological sex exists, stating, a "heterosexual male has a right to . . . choose the gender of his partners . . . Eddie Araujo took away that choice by deception."⁹²

However, allowing this type of sexual fraud to constitute sufficient provocation 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.⁹³ This creates both

⁸⁷ See Dan Subotnik, *Sue Me, Sue Me, What Can You Do Me? I Love You*, 47 FLA. L. REV. 311, 396, 398, 406 (1995) (presenting a thorough critique of sexual fraud, including a helpful questionnaire).

⁸⁸ See Hooper v. Moser, 2003 WL 22401283, at *2 (Tenn. Ct. App. Oct. 22, 2003); see also *Askew*, 28 Cal. Rptr. 2d at 960–61.

⁸⁹ See *Hate Clause Memo*, *supra* note 2, at 3, 6; *Without Mercy*, *supra* note 1.

⁹⁰ See *Hate Clause Memo*, *supra* note 2, at 6, 9. There is a so-called "sexual fraud statute" which is generally not applicable in trans panic defense cases, because it requires that sex was induced by fear. See CAL. PENAL CODE § 266c (West 2004). The statute was put into place after a case of extraordinary facts, not likely to be repeated. See Andy Grieser, *Sex Under Duress*, 2 A.B.A. J. E-REP. 9 (Feb. 7, 2003), available at www.westlaw.com.

⁹¹ See *Charpentier v. L.A. Rams Football Co., Inc.*, 89 Cal. Rptr. 2d 115, 123 (Cal. Ct. App. 1999).

⁹² See Kelly St. John, *Nature of Killing Focus at End of Araujo Case*, S.F. CHRON., June 1, 2004.

⁹³ See *Charpentier*, 89 Cal. Rptr. 2d at 123. Transgendered people are popularly expected to reveal their sex, while others are not; trans advocates question this disparity. See Vade, *supra* note 48.

After being rejected by someone who claimed to have been deceived, Vade wishes he had said: *You deceived me*. All this time I thought you were just a cute transgender guy. You really should have told me you are a nontransgender person. I cannot believe that you did not tell me what your genitalia look like. I cannot go through with this. I would have never come over to your place had I known.

Id. Of Araujo, he says:

Gwen Araujo was being herself, openly and honestly. No, she did not wear a sign on her forehead that said "I am transgender, this is what my genitalia

a logistical conundrum (defining "sex" for the purposes of revelation) and serious policy concerns (determining when and how a person must reveal that "sex").⁹⁴ California courts are reluctant to recognize fraud in situations that require an assessment of the parties' intimate relationship.⁹⁵ In *Stephen K. v. Roni L.*, the California appellate court rejected a misrepresentation claim based on plaintiff's reliance on his partner's false claim that she took birth control pills.⁹⁶ The court found:

Claims such as those presented . . . in this case arise from conduct so intensely private that the courts should not be asked to nor attempt to resolve such claims. . . . [A]lthough Roni may have lied and betrayed the personal confidence reposed in her by Stephen, the circumstances and the highly intimate nature of the relationship wherein the false representations may have occurred, are such that a court should not define any standard of conduct therefor.⁹⁷

Courts should similarly refuse to suggest the existence of a duty to reveal one's genitals (or one's biological sex however defined).⁹⁸ Such a revelation would also arise during "intensely private conduct" and in "highly intimate" circumstances.⁹⁹ Barring the existence of a duty to reveal one's sex, courts should not base mitigation instructions on an imagined breach of this contrived duty.¹⁰⁰

A final element of fraud is a showing that actual damage resulted.¹⁰¹ Statutorily and logically, fraud without harm is not actionable.¹⁰² For example, one is not required to disclose one's birth con-

look like." But her killers didn't wear a sign on their foreheads saying, "We might look like nice high school boys, but really, we are transphobic and are planning to kill you." That would have been a helpful disclosure.

Id.

⁹⁴ See *Woy v. Woy*, 737 S.W.2d 769, 773-74 (Mo. Ct. App. 1987) (holding that a wife had no duty to reveal to her husband a lesbian relationship she engaged in before marriage). See generally ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* (2000) (detailing problems inherent in defining sex).

⁹⁵ See *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618, 619 (Cal. App. 2d 1980).

⁹⁶ See *id.*

⁹⁷ See *id.* at 619-20.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *Woy*, 737 S.W.2d 769, 773-74 (Mo. Ct. App. 1987).

¹⁰¹ See *Lovejoy v. AT & T Corp.*, 14 Cal. Rptr. 3d 117, 122, 125 (Cal. Ct. App. 2004).

¹⁰² See *id.*; see also *Charpentier v. L.A. Rams Football Co., Inc.*, 89 Cal. Rptr. 2d 115, 123 (Cal. Ct. App. 1999).

trol use or infertility, in part because courts are unwilling to recognize "wrongful birth" as harm for the purpose of proving fraud.¹⁰³ In trans panic cases, the sole harms implicated by defendants' arguments are surprise and a destabilization of their sexual identity and masculinity.¹⁰⁴ The *Carr* court found the defendant's heat of passion claim deficient, in part because Carr suffered no harm or threat beyond an affront to his ideas about sexuality.¹⁰⁵ Similarly, a court should not identify as actual harm a threat to defendants' perception of their own sexuality by allowing "sexual fraud" to constitute sufficient provocation.¹⁰⁶

Even if a court does uphold a duty to reveal one's genitals, recognize the breach of that duty as sexual fraud, and find that a resulting consensual sexual encounter was actual harm, one must still ask whether such "sexual fraud" constitutes sufficient provocation.¹⁰⁷ Perceived "deceit" occurs in many intimate relationships; one person may lie about her age, another about his marital status.¹⁰⁸ The law does not recognize these types of deceit as paths to mitigating punishment for murder.¹⁰⁹

B. *I Second-Guess That Emotion*

To prove heat of passion under California law, sufficient provocation must arouse "any violent, intense, high-wrought or enthusiastic emotion."¹¹⁰ However, a complete exception to this "any emotion" standard exists for revenge.¹¹¹ The creation of this exception suggests

¹⁰³ See *Barbara A. v. John G.*, 193 Cal. Rptr. 422, 429 (Cal. Ct. App. 1983); *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618, 620–21 (Cal. Ct. App. 1980).

¹⁰⁴ See *Hate Clause Memo*, *supra* note 2, at 7; Kelly St. John, *Witness Tells How She Learned Transgender Teen Was Male*, S.F. CHRON, Apr. 21, 2004 at B5; St. John, *Panic Defense*, *supra* note 79.

¹⁰⁵ See 580 A.2d at 1364–65.

¹⁰⁶ See *id.*

¹⁰⁷ See *Lovejoy*, 14 Cal. Rptr. 3d at 122, 125; *Woy v. Woy*, 737 S.W. 2d 769, 773–74 (Mo. Ct. App. 1987); *Stephen K.*, 164 Cal. Rptr. at 619; *Vade*, *supra* note 48.

¹⁰⁸ See *Subotnik*, *supra* note 87, at 406; *Haddock*, *supra* note 12.

¹⁰⁹ See *Woy*, 737 S.W. 2d at 773–74; *Stephen K.*, 164 Cal. Rptr. at 619. One might also ask whether courts would entertain fraud claims based on the non-revelation of one's race, religion, disability, or ethnicity. See Michelle Locke, *Activists Put Araujo Case Under Close Watch*, CONTRA COSTA TIMES, June 7, 2004, at 4 (quoting Shannon Minter, legal director of the National Center for Lesbian Rights).

¹¹⁰ See *People v. Breverman*, 960 P.2d 1094, 1106–07 (Cal. 1998) (citations omitted).

¹¹¹ See *People v. Gutierrez*, 52 P.3d 572, 609 (Cal. 2002), *cert. denied*, 538 U.S. 1001 (2003); *People v. Logan*, 175 Cal. 45, 49 (1917); *Nussbaum*, *supra* note 19, at 13–15. California courts are not explicit about why revenge constitutes an absolute exception, except to say that it is a deliberate, sometimes belated, emotion suggesting premeditated, rea-

that a court might disqualify other emotions from comprising appropriate passions under heat of passion. Nussbaum's inquiry into disgust and shame suggests that another exception for these two emotions should exist in the context of trans panic defenses.¹¹²

To shore up the emotion requirement of its heat of passion claim, defense counsel relied heavily on a dramatic account of the night of Araujo's killing.¹¹³ A motion detailed two defendants' immediate reactions to the revelation of Araujo's biological sex, claiming that the "news provoked emotional reactions."¹¹⁴ One defendant appeared "disillusioned" and had a "look in his eyes . . . like his illusion as to normality and the way things are supposed to be had been shattered."¹¹⁵ He acted as if he had heard "the craziest news you could ever hear."¹¹⁶ A second defendant cried, and "throughout all the events was very emotional."¹¹⁷ While killing Araujo, he exclaimed, "I can't be fucking gay, I can't be fucking gay."¹¹⁸ Defense counsel claimed that the men acted out of "shame and humiliation, shock and revulsion."¹¹⁹ Reliance on shame and disgust is typical of trans panic defenses; Nussbaum, however, argues that these two emotions are merely signs of a legally deficient argument for heat of passion mitigation.¹²⁰

1. Disgust

Nussbaum advances structural, historical, and experiential reasons why disgust should never form the basis of law, especially in mitigation contexts.¹²¹ "The ideational content of disgust is that the self

soned punishment. See *People v. Daniels*, 802 P.2d 906, 932 (Cal. 1991). One might argue that the men in Araujo's case acted out of revenge; the men had suspicions that Araujo might have male genitalia, and talked extensively prior to her murder about what they might do to a man who "pretended to be a woman." *Hate Clause Memo*, *supra* note 2, at 5; St. John, *supra* note 92. That prior conversation may indicate malice. *Hate Clause Memo*, *supra* note 2, at 5; St. John, *supra* note 92. Malice can be shown from either express evidence of deliberate purpose to kill or by inferences made from other proof. See *People v. Smith*, 104 P.2d 510, 514 (Cal. 1940).

¹¹² See *Gutierrez*, 52 P.3d at 609; NUSSBAUM, *supra* note 19, at 13–15.

¹¹³ See *Hate Clause Memo*, *supra* note 2, at 2–9; St. John, *supra* note 92.

¹¹⁴ See *Hate Clause Memo*, *supra* note 2, at 7 (citations omitted).

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *Killer Acted Out of "Shame," supra* note 17.

¹²⁰ See NUSSBAUM, *supra* note 19, at 13–15; Vade, *supra* note 48.

¹²¹ See NUSSBAUM, *supra* note 19, at 13–15. Before reaching her conclusion, she surveys the spectrum of academic discourse regarding disgust, and situates her argument

will become base or contaminated" by ingesting offensive material.¹²² In turn, a fear of contamination typically involves anxiety around some boundary violation or a violation of accepted categories.¹²³ The defendants in Araujo's case made clear that their well-policed gender and sexuality boundaries were threatened, resulting in a feeling that "the way things are supposed to be had been shattered."¹²⁴ The defendants' illusion that their gender and sexuality was impenetrable, stable, and immovable was challenged by Araujo's transgender identity.¹²⁵

Furthermore, social psychology links disgust to human beings' refusal to accept our own animal nature.¹²⁶ Professor William Miller states that "the basis for all disgust is *us*—that we live and die and that the process is a messy one emitting substances and odors that make us doubt ourselves and fear our neighbors."¹²⁷ Nussbaum explains that resistance to vulnerabilities often leads a powerful majority to project disgust onto minority groups in order to insulate itself from contamination.¹²⁸

History, too, provides ample evidence that laws and behaviors resulting from a disgust justification are oppressive at best, torturous at worst.¹²⁹ Over time, American society has propagated, and later re-

among these disparate voices. *See id.* at 75–84. Authors of every political persuasion have weighed in, and many consider disgust an important means of identifying what is bad in society, and therefore what should be regulated. *See, e.g., id.* at 82. These authors differ greatly on why disgust is a reliable emotion around which to construct laws. *See id.* at 75–84. Some claim that disgust illuminates social norms, while others argue that disgust functions as a warning signal, pointing out what behavior may be destructive to our humanity. *Compare id.* at 78, *with id.* at 86 (presenting popular arguments on both sides of this debate).

¹²² NUSSBAUM, *supra* note 19, at 88.

¹²³ *See id.* at 93–94.

¹²⁴ *See Hate Clause Memo, supra* note 2, at 7; Kelly St. John, *Witness Tells How She Learned Transgender Teen was Male*, S.F. CHRON., Apr. 21, 2004 at B5; St. John, *supra* note 78.

¹²⁵ *See Hate Clause Memo, supra* note 2, at 7; Kelly St. John, *Witness Tells How She Learned Transgender Teen was Male*, S.F. CHRON., Apr. 21, 2004 at B5; St. John, *supra* note 78.

¹²⁶ *See* NUSSBAUM, *supra* note 19, at 89.

¹²⁷ WILLIAM I. MILLER, *THE ANATOMY OF DISGUST* xiv (1997).

¹²⁸ *See* NUSSBAUM, *supra* note 19, at 97. Nussbaum reminds us that as early as elementary school, we learned to create a hierarchy on the playground by attributing "cooties," often perceived as little bugs, to the kids we didn't let into the popular group. *See id.* *generally* Ahmad, *supra* note 72 (placing racial violence in the framework of heat of passion defenses and the normalization of racially-based violence through irrational national policies).

¹²⁹ *See id.* at 101–02. Nussbaum painstakingly describes many vivid examples of this phenomenon, including Nazi portrayal of Jews as slimy, disgusting parasites infesting the "clean body" of the German machine-like ideal, and an effort by an anti-gay referendum

pudiated, laws that project disgust onto disfavored minorities, including Jews, African Americans, women, and gay men.¹³⁰ Mitigation in trans panic defenses cases amounts to an acceptance of violence against transgendered people founded in disgust.¹³¹ Thus, with negligible representation and protection in our legal system, transgendered people find disgust for them reified in the law.¹³²

Nussbaum also discredits disgust because it has no place in laws intended to engender shared and articulable values, such as mitigation.¹³³ It is almost impossible to convince someone who is not disgusted by something that that thing is, in fact, disgusting.¹³⁴ One might discuss the properties of the offensive object, or attempt to assimilate it with an object that your listener already finds disgusting, but one is likely to fail in this effort.¹³⁵ By contrast, anger and indignation are emotions that can be easily brought out in one person by another, in part because values underlying these emotions can be shared and fully communicated.¹³⁶ Where articulable values exist, a society can promulgate laws based on an acceptance or rejection of those values; where emotions indicate only one person's unique self-reflection or biases, we may be more wary of basing laws on those emotions.¹³⁷

Lastly, according to Nussbaum, disgust is suspect because it is based on "magical thinking" rather than wrongdoing.¹³⁸ It does not respond to changing amounts of risk, and does not correlate to real sources of harm.¹³⁹ Instead, the feared harm giving rise to disgust is

campaign to convince people that gay men eat feces and drink blood. *See id.* at 107–15, 150.

¹³⁰ *See id.* at 134. Nussbaum points out that laws restricting private, consensual homosexual activities are based on disgust rather than actual harm. *See id.* at 148–151. Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of a Georgia statute outlawing sodomy), with *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning that decision).

¹³¹ *See Hate Crime Memo*, *supra* note 2, at 7; NUSSBAUM, *supra* note 19, at 88; Haddock, *supra* note 12; St. John, *supra* note 78.

¹³² *See Hate Crime Memo*, *supra* note 2, at 7; NUSSBAUM, *supra* note 19, at 88; Haddock, *supra* note 12; St. John, *supra* note 78.

¹³³ *See* NUSSBAUM, *supra* note 19, at 39, 101.

¹³⁴ *See id.*

¹³⁵ *See id.* Similarly, one may describe to a friend the erotic love felt for a partner without being able to convince that friend to love the partner in the same way. *See id.*

¹³⁶ *See id.*

¹³⁷ *See id.* at 102–03, 122.

¹³⁸ *See* NUSSBAUM, *supra* note 19, at 102–03, 122.

¹³⁹ *See id.* at 102.

imagined.¹⁴⁰ Such logic, based on irrational fears of contamination and constructive, not actual, harm is at best a shaky foundation on which to base a claim for mitigation.¹⁴¹ The "harm" to the defendants in Araujo's case is an imagined wrong.¹⁴² Their comments during and after the crime, such as "I can't be . . . gay," illustrate that the primary perceived threat was one to their sexuality.¹⁴³ Mitigation typically addresses a violent reaction to concrete harm or threat, whereas disgust reveals a sense that an act, object, or person is a pollutant, and "[w]e would be better off if this contamination were kept far away from us."¹⁴⁴

2. Shame

In the Araujo case, a psychologist testifying for the defense explained that an "unhealthy" young man is likely to panic when confronted with the personal and public shame of learning about a sexual partner's transgender identity.¹⁴⁵ However, the defendants' claimed "shame and humiliation" should not constitute qualifying emotions for the purpose of heat of passion.¹⁴⁶ Shame is closely connected to a vain wish for omnipotence and an unwillingness to accept one's neediness.¹⁴⁷ Like disgust, shame reflects both a desire to hide from imperfections and a wish to be perfect, whole, and impenetrable.¹⁴⁸ Gay men's sexuality, for example, may threaten an insecure straight man's fantasy of impenetrability and immovable heterosexual-

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 102–03. John Stuart Mill wrote:

[W]ith regard to the merely contingent, or . . . constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual . . . the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom . . . [T]here are many who consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their feelings.

JOHN STUART MILL, ON LIBERTY 80-81 (Elizabeth Rapaport ed., Hackett Pub. Co., 5th prtg. 1978) (1859). Such outrage alone cannot justify regulation of the inadvertently offending conduct. See *id.*

¹⁴² See NUSSBAUM, *supra* note 19, at 102.

¹⁴³ See St. John, *supra* note 79; *Hate Clause Memo*, *supra* note 2, at 7.

¹⁴⁴ See NUSSBAUM, *supra* note 19, at 122–23.

¹⁴⁵ See St. John, *supra* note 79.

¹⁴⁶ See NUSSBAUM, *supra*, note 19, at 36–37, 129; *Killer Acted Out of "Shame," supra* note 17.

¹⁴⁷ See NUSSBAUM, *supra* note 19, at 15.

¹⁴⁸ See *id.* at 17, 184–85.

ity.¹⁴⁹ Laws should not sanction "[heterosexual] male loathing of the male homosexual," a loathing that too often presents itself through violence.¹⁵⁰

Perhaps most importantly, both shame and disgust react to a whole person or a characteristic rather than a discrete action.¹⁵¹ To the extent that one's dislike of another person is related to a vulnerability in his own personality or identity, it is illogical and unfair to mitigate punishment for his violent acts towards that other person.¹⁵² Mitigation is most appropriately understood as a way for judges and juries to partially forgive a person's violent reaction to a harmful or threatening action; it should not be a means of lessening punishment based on a reaction to one's own or another's character.¹⁵³ Insofar as shame and disgust reflect a person's wishes for perfection, impenetrability, stable gender boundaries, or unchanging sexual orientation, shame and disgust reactions amount to a portrait of the bias of a particular day.¹⁵⁴

C. *A Few Unreasonable Men*

Trans panic defenses likewise fail to fulfill a third heat of passion element: reasonableness. Heat of passion claims require that the claimed provocation be sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.¹⁵⁵ A defendant may not generate his own standard of conduct to justify his actions unless the jury also finds that the facts and circumstances were sufficient to arouse the passions of an ordinarily reasonable man.¹⁵⁶ Defense counsel in Araujo's case simply ignored

¹⁴⁹ See *id.* at 113–14.

¹⁵⁰ See *id.* Nussbaum calls heterosexual male loathing of the male homosexual the "central locus of disgust" in contemporary American culture. See *id.* at 13.

¹⁵¹ See *Commonwealth v. Carr*, 580 A.2d 1362, 1364–65 (Pa. Super. Ct. 1990); Nussbaum, *supra* note 19, at 106, 229.

¹⁵² See Nussbaum, *supra* note 19, at 128–29.

¹⁵³ See *id.* at 39, 128–29.

¹⁵⁴ See *id.* at 13–17, 93–94, 184–85.

¹⁵⁵ See *People v. Breverman*, 960 P.2d 1094, 1106 (Cal. 1998); *People v. Berry*, 556 P.2d 777, 781 (Cal. 1976).

¹⁵⁶ See *People v. Logan*, 164 P. 1121, 1122 (Cal. 1917). "Thus no man of extremely violent passion could so justify or excuse himself if the exciting cause be not adequate, nor could an excessively cowardly man justify himself unless the circumstances were such as to arouse the fears of the ordinarily courageous man." *Id.*

this rule when they argued that the defendants' emotional immaturity exacerbated their reaction.¹⁵⁷

The reasonableness element of the heat of passion doctrine invites an inquiry into whether the value threatened or harmed by a particular provocation is one to which society expects a reasonable person to react violently.¹⁵⁸ In trans panic defense cases, one must therefore ask whether a threat to one's sexuality reasonably triggers an aggressive reaction.¹⁵⁹ Many reject the idea that a homicidal reaction to a challenge to an individual's sexuality is a reasonable one; the reasonableness requirement of heat of passion claims allows a court to consider just that.¹⁶⁰

Nussbaum points out that over time, the law has shifted as to which core values may justifiably be protected by mitigation doctrines.¹⁶¹ For example, until the late 1970s, the law generally held that marital infidelity could provoke a reasonable man to homicidal rage; mitigation in this scenario protected a sense of "manly honor."¹⁶² Today, although most people judge infidelity as morally wrong, and something that a reasonable man would be angry about, few would condone a homicidal reaction.¹⁶³ This expresses a societal shift away from accepting a violent reaction to the wrongful "taking" of one's wife.¹⁶⁴ The honor or ownership threatened by infidelity is no longer

¹⁵⁷ See *id.*; see also Yomi S. Wronge, *Judge Declares Mistrial in Araujo Murder Case*, CONTRA COSTA TIMES, June 23, 2004, at 4. Even a defense witness psychologist testified that a "male who is more mature" than the defendants would know that to "go for a walk or even to hit the wall could be a more appropriate response." St. John, *supra* note 78. Recall also that the judge in *Carr* suggests that a reasonable person would have "left the scene" if upset about same-sex intimacy. See 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990).

¹⁵⁸ See *Breverman*, 19 Cal. 4th at 163; NUSSBAUM, *supra* note 19, at 43.

¹⁵⁹ See *Breverman*, 19 Cal. 4th at 163; NUSSBAUM, *supra* note 19, at 43.

¹⁶⁰ See NUSSBAUM, *supra* note 19, at 132. See generally Mison, *supra* note 11 (assessing the reasonable requirement as it pertains to homosexual provocation defenses).

¹⁶¹ See NUSSBAUM, *supra* note 19, at 46–47.

¹⁶² See *id.* at 46–47, 63. "When wives were legally the property of their husbands, contemporary law allowed that 'adultery is the highest invasion of property' and therefore 'if the husband shall stab the adulterer . . . this is bare manslaughter' (not murder)." See Sul-laway, *supra* note 39, at 269 (quoting J.J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845–84 (1999)).

¹⁶³ See NUSSBAUM, *supra* note 19, at 47.

¹⁶⁴ See *id.* In California, mitigation is still allowed when there is sufficient evidence of a continuous pattern of provocative conduct by the victim during the course of a romantic relationship which culminates in a passionate outburst; however, mere "sexual jealousy" will not fulfill the sufficient provocation requirement of heat of a passion defense. See *People v. Borchers*, 325 P.2d 97, 102 (Cal. 1958). In 1994, picketing, editorializing, and judicial disciplinary proceedings followed an adultery case in which the judge allowed voluntary manslaughter, commenting that nothing could provoke an "uncontrollable rage" greater

unanimously understood to comprise a core value that society deems worthy of protection by mitigation doctrines.¹⁶⁵

Defendants arguing trans panic defenses point to their heterosexuality and masculinity as the core values threatened by the victim.¹⁶⁶ Shouting "I can't be fucking gay, I can't be fucking gay . . ." as he killed Araujo, one man put words to his deep homophobia, and the fear that his sexuality might be other than he believed.¹⁶⁷ One defendant tellingly said that his "illusion as to normality and the way things are supposed to be had been shattered."¹⁶⁸ To comfort another defendant, the woman who discovered Araujo's biological sex appealed directly to his masculinity, saying "[T]his is not your fault. You were a football player."¹⁶⁹ Araujo's identity shook the men's fragile confidence in their masculinity and sexuality, thereby shaking their entire world view.¹⁷⁰

To define sexuality or masculinity as core values to which a reasonable person might react with extreme violence is a dangerous proposition.¹⁷¹ A court endorses this valuation of sexuality and masculinity when it instructs a jury on manslaughter based on defendants' violent reaction to a threat to their identity, as opposed to their life, physical well-being, or family.¹⁷² Given that shame and disgust are typically repositories of unreasonableness, the court should consider the reasonable man standard for heat of passion not in terms of the average man reacting to these emotions, but the rational man—for

than adultery, and that not many men "would have the strength to walk away without inflicting some corporal punishment." See NUSSBAUM, *supra* note 19, at 46. The public outcry exemplifies a societal rejection of adultery heat of passion defenses. See *id.*

¹⁶⁵ See NUSSBAUM, *supra* note 19, at 63.

¹⁶⁶ See *Hate Clause Memo*, *supra* note 2, at 7; St. John, *supra* note 92.

¹⁶⁷ See *Hate Clause Memo*, *supra* note 2, at 7. He also said, "I'm not gay. I don't like men." St. John, *supra* note 104. Again, the men's ignorance about transgender identity was key to their understanding of the situation. See Vade, *supra* note 48. Araujo identified as a woman, and one's understanding of one's sexuality may change over time; only defendant's narrow view of gender and sexuality allowed him to believe that intimacy with her implied that he was gay. See *id.*

¹⁶⁸ See *Hate Clause Memo*, *supra* note 2, at 7.

¹⁶⁹ See St. John, *supra* note 106.

¹⁷⁰ See *id.*; see also *Hate Clause Memo*, *supra* note 2, at 7.

¹⁷¹ See Mison, *supra* note 11, at 159–61.

¹⁷² See NUSSBAUM, *supra* note 19, at 127; Mison, *supra* note 11, at 159–61. Nussbaum explains that though the standard for sufficient provocation shifts over time, it "always involves some serious aggression and harm done to the defendant by the victim," such as bodily assault or domestic abuse. See NUSSBAUM, *supra* note 19, at 127.

whom it is unreasonable to react violently to a threat to his sexuality.¹⁷³

III. A PASSIONATE APPEAL FOR JUSTICE

One defense attorney in Araujo's case explicitly asked jurors not to think of their verdict as a message to society.¹⁷⁴ Yet, the trans panic defense inevitably reifies harmful stereotypes about transgendered individuals.¹⁷⁵ The defense bolsters a common myth that transgendered people are deceiving the world about their true self, rather than struggling to understand and communicate their identity in a safe environment.¹⁷⁶ Just as harmful a message, trans panic communicates the idea that one may protect one's masculinity or perception of his or her sexuality at all costs.¹⁷⁷

Sadly, trans panic defenses do resonate with juries that harbor biases, misinformation, or confusion about transgendered individuals.¹⁷⁸ In 1998, a Boston jury acquitted William Palmer of murder and manslaughter.¹⁷⁹ Palmer had picked up a woman named Chanelle Pickett in a bar, and when he found out that she had male genitals, he beat and throttled her for more than eight minutes, ultimately killing

¹⁷³ See *Commonwealth v. Carr*, 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990); NUSSBAUM, *supra* note 19, at 36.

¹⁷⁴ Kelly St. John, *Prosecutor Calls 3 Defendants Equally Guilty in Teen's Death*, S.F. CHRON., June 2, 2004, at B5. Another asked female jurors to put themselves in a "different mindset," and think about how their sons or nephews might have reacted. L.A. Chung, *In Transgender Case, Don't Ask Jurors to Think Like Defendants*, SAN JOSE MERCURY NEWS, June 4, 2004, at C2. Chung wholly rejects this suggestion, saying:

In an era when we try 14-year-olds for murder and expect them to know right from wrong like adults, [women] are now asked to think like 24-year-old men who are in a state of arrested emotional development. So should I give a pass to men for just acting like boys? From this woman's point of view: Don't insult me.

See *id.*

¹⁷⁵ See Press Advisory, *5 Facts Missing from Discussions About the Murder of Gwen Araujo*, TRANSGENDER LAW CENTER (May 17, 2004), at <http://www.transgenderlawcenter.org> [hereinafter *5 Facts*].

¹⁷⁶ See Vade, *supra* note 48; *5 Facts*, *supra* note 175.

¹⁷⁷ See Chen, *supra* note 8, at 225. Some activists note that if women were allowed to react with violence to unwanted sexual advances by heterosexual men the way "gay panic" allows straight men to react to gay men, "the world would have far fewer heterosexual men." Haddock, *supra* note 12; see also Mison, *supra* note 11, at 160-61.

¹⁷⁸ See Haddock, *supra* note 12.

¹⁷⁹ See *id.*

her.¹⁸⁰ When Pickett was sentenced to just two years for assault and battery, one transgender activist said: "I've seen people get more jail time for abusing animals . . . we've been judged expendable."¹⁸¹

Such a tragic story of the trans panic defense "successfully" exploiting a transphobia arguably present in every jury today illuminates perhaps the strongest argument against the use of trans panic defenses. The "average" man today may feel uncomfortable or unfamiliar with the issues faced by transgendered individuals; for this reason the court should not confuse him with the reasonable man.¹⁸² Nussbaum's rejection of disgust and shame as bases for mitigation goes to another central reason why trans panic mitigation attempts should fail: when emotions communicate an individual's own unique discomforts, vulnerabilities, and judgments about other people, they are not justifiable bases for law.¹⁸³

It is not surprising that Nussbaum fails to address the trans panic defense, given that transgendered people occupy a near-total blind spot in our society and legal system.¹⁸⁴ Only a handful of states statutorily and expressly prohibit discrimination against transgendered individuals.¹⁸⁵ In only three states have courts interpreted Title VII sex discrimination to include transgendered people.¹⁸⁶ Public and private employers are free to discriminate against trans individuals in the vast majority of states.¹⁸⁷ This bleak legal and legislative reality for the

¹⁸⁰ See *id.*; see also Kevin Rothstein, *Travesty of Justice: When Is a Murder Not a Murder? When the Victim Is Transsexual*, BOSTON PHOENIX, May 1997, available at <http://www.bostonphoenix.com/archive/1in10/97/05/MURDER.html>.

¹⁸¹ See Haddock, *supra* note 12.

¹⁸² See *id.* (explaining that few jurors will know someone personally who is transgender, which is likely to work in favor of panic defenses in this context); see also NUSSBAUM, *supra* note 19, at 133–34.

¹⁸³ See NUSSBAUM, *supra* note 19, at 101–03, 229.

¹⁸⁴ Compare *id.* at 35, 46–48, 130–34, 298–99 (discussing the implications of gender and sexuality dynamics in mitigation and other law), with Vade, *supra* note 48 (highlighting the prevalence and implications of violence against transgendered people), and Letellier, *supra* note 49 (same).

¹⁸⁵ See *U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity Or Expression*, TRANSGENDER LAW & POLICY INSTITUTE, available at <http://www.transgenderlaw.org/ndlaws/index.htm> (last visited Jan. 26, 2005) [hereinafter *U.S. Jurisdictions*].

¹⁸⁶ See *id.* The states are Massachusetts, New Jersey, and New York. The Court of Appeals for the Sixth Circuit originally held the same, but later amended its decision to narrow its holding. See *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *U.S. Jurisdictions*, *supra* note 185.

¹⁸⁷ See *The State of the Workplace for Lesbian, Gay, Bisexual, and Transgender Americans 2003*, HUMAN RIGHTS CAMPAIGN FOUNDATION 33–37 (2004), available at http://www.hrc.org/Content/ContentGroups/Publications1/State_of_the_Workplace/SOTW_03.pdf.

trans community reflects and reinforces a general lack of safety: tragic statistics of violence against transgendered people prove a dire need to address transphobia through both public education and protective laws.¹⁸⁸ The trans panic defense hinders all attempts at justice for trans individuals, as it institutionalizes misunderstanding and bias against them even in the context of brutal victimization.

CONCLUSION: MANSLAUGHTER, MEET MISTRIAL

The jury in Araujo's case deadlocked, and a retrial is scheduled.¹⁸⁹ Post-deliberation interviews suggest that the jury may have rejected the trans panic defense, but was reportedly unable to choose between first- and second-degree murder.¹⁹⁰ Yet, the facts and circumstances of Araujo's case illustrate the urgent need for judges to disallow further use of trans panic defenses.¹⁹¹

The dignity of the court—as well as the individual parties—is at stake in the decision to reject trans panic defenses. As shown in this Book Review, trans panic arguments leave at least three elements of heat of passion defense unfulfilled. When basic elements of a defense lack the required substantial evidence, it follows that the court should protect both judicial resources and the integrity of the proceedings by declining to entertain the defense or base instructions on it.¹⁹² When the court entertains a manslaughter instruction based on trans panic reasoning, it tolerates a claim that is legally without merit, while fueling a type of victim-blaming too familiar to the gay, lesbian, bisexual, and transgender communities.¹⁹³

¹⁸⁸ See Letellier, *supra* note 48; Mick Meenan, *Marine Kills Trans Prostitute in L.A.*, GAY CITY NEWS, Dec. 30, 2004, at http://www.gaycitynews.com/gcn_353/marinekilltrans.html; *Remembering Our Dead*, GENDER.ORG, at <http://www.gender.org/remember/index.html> (last visited Jan. 25, 2005).

¹⁸⁹ Sue Hutchison, *Deadlocked Jury Sent a Message of Hope*, SAN JOSE MERCURY NEWS, June 29, 2004, at AE1; Kelly St. John, *Mistrial in Transgender Case*, S.F. CHRON., June 23, 2004, at A1; Press Release, *HRC Strongly Disappointed and Saddened at Araujo Mistrial*, HUMAN RIGHTS CAMPAIGN FOUNDATION, June 22, 2004, available at http://www.hrc.org/Content/ContentGroups/News_Releases/20042/HRC_Strongly_Disappointed_and_Saddened_at_Araujo_Mistrial.htm. For updates about the status of the case, see the website of the Transgender Law Center, at <http://www.transgenderlawcenter.org>.

¹⁹⁰ Hutchison, *supra* note 189; Josh Richman, *Panel Didn't Buy Defense 'Gay Panic' Argument*, OAKLAND TRIB., June 23, 2004, available at 2004 WL 79862309.

¹⁹¹ *People v. Breverman*, 960 P.2d 1094, 1106-07 (Cal. 1998); NUSSBAUM, *supra* note 19, at 13-15; Locke, *supra* note 109.

¹⁹² See *People v. Cole*, 95 P.3d 811, 850-51 (Cal. 2004); *People v. Kanawyer*, 113 Cal. App. 4th at 1233, 1245-47 (Cal. Ct. App. 2003).

¹⁹³ See Ben Aguirre Jr., *Fundamentalists Come from Kansas to Protest Araujo trial*, OAKLAND TRIB., Apr. 18, 2004, available at 2004 WL 73090553. Members of a fundamentalist church

Trans panic claims focus unwarranted scrutiny on the victim's character and lifestyle, which may both traumatize the victim's family and distract jurors from their duty to judge the defendants' actions.¹⁹⁴ Whether or not a trans panic defense succeeds, judicial and media attention given to the argument plays a dynamic role in the legal system and the court of public opinion.¹⁹⁵ The rejection of this legally unviable argument will be one step toward justice and dignity for Araujo, and for the trans community's many victims.¹⁹⁶

protested Araujo's trial and regretted passing up a chance to disrupt her funeral. *See id.* The church believes that Araujo, and "fags and fag-enablers" are to blame for any harm that comes to them. *See WBC to Picket Funeral of Cross-Dressing Teen Pervert Eddie Araujo*, GODHATESAMERICA.COM, Oct. 21, 2002, at <http://www.godhatesamerica.com/ghfmir/flers/flierarchive.html>.

¹⁹⁴ *See Commonwealth v. Carr*, 580 A.2d 1362, 1363–65 (Pa. Super. Ct. 1990); *Breverman*, 19 Cal.4th at 163; *see also* Hutchison, *supra* note 189. Araujo's mother lamented that "[e]veryone is focusing on [Gwen's] lifestyle and not the murder . . . It's not a lesbian, it's not a gay thing. It was his life, and life was hard for him." Jeremiah Hall, *Remembering Gwen*, ADVOCATE, Nov. 22, 2002, available at http://www.advocate.com/html/stories/877/877_araujo.asp.

¹⁹⁵ *See* NUSSBAUM, *supra* note 19, at 12.

¹⁹⁶ *See* Letellier, *supra* note 48; Public Announcement, *Three Things to Do Coming Out of the Gwen Araujo Mistrial*, TRANSGENDER LAW CENTER (June 23, 2004).