

## GAY PANIC, GAY VICTIMS, AND THE CASE FOR GAY SHIELD LAWS

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*In a highly publicized “gay panic” case, Brandon McInerney shot and killed Larry King in their middle school classroom. King was a self-identified gay student who sometimes wore jewelry and eye makeup to school and, according to those who knew him, was possibly transgender. Tried as an adult for first-degree murder, McInerney asserted a heat of passion defense based upon King’s alleged sexual advances. The jury deadlocked, with a majority accepting McInerney’s defense.*

*Drawing largely upon qualitative empirical research, this Article uses the Larry King murder case as a prism through which to view the doctrinal, theoretical, and policy bases of the gay panic defense while also examining broader issues concerning violence against LGBTQ victims. Our research reveals one overriding theme common to violent crimes against such victims: the murder case against the killer, Brandon McInerney, evolved into a prosecution of the victim, Larry King. Many jurors blamed King, and the school officials who “allowed” King to defy sex and gender norms, for the murder; one juror went so far as to characterize King’s behavior as “deviant.” We believe that the jurors reached this conclusion largely because the defense offered evidence, including evidence of King’s feminine mannerisms and attire,*

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*that had a strong tendency to inflame the jurors' prejudices. For example, the defense introduced a photograph of King holding a green prom dress, even though the photograph was of little or no probative value.*

*To prevent future gay panic cases from evolving into trials of the victims, we propose a "gay shield" rule of evidence: in cases where the defendant asserts a gay panic defense, the law should limit the trial judge's ability to admit evidence designed to incite prejudicial responses among jurors. Building upon the law and policy underlying rape shield statutes, gay shield laws would seek to protect crime victims from being revictimized at trial.*

*"The entire trial was about Larry. It wasn't about Brandon or what Brandon did. Everything was always about Larry. How he dressed, how he acted. The trial focused SO MUCH on [Larry's] sexual orientation."*<sup>1</sup>

Joy Epstein  
Assistant Principal  
E.O. Green Middle School

*"You all know [Larry King] had a long history of deviant behavior."*<sup>2</sup>

Juror # 11, in a post-trial  
letter to the Ventura County  
District Attorney

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<sup>1</sup> Interview with Joy Epstein, Assistant Principal, E.O. Green Middle School, in Oxnard, Cal. (June 9, 2013) [hereinafter Epstein Interview].

<sup>2</sup> Letter from Lisa S., Juror No. 11, to Gregory D. Totten, Dist. Attorney, Ventura Cnty. (Sept. 28, 2011) (copy on file with authors) [hereinafter Lisa S. Letter].

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## INTRODUCTION

In the highest-profile “gay panic”<sup>3</sup> case since the Matthew Shepard killing,<sup>4</sup> fourteen-year-old Brandon McInerney shot and killed Larry King, his fifteen-year-old classmate, in an Oxnard, California middle school classroom.<sup>5</sup> King was a self-identified gay<sup>6</sup> student who sometimes wore jewelry and makeup to school and, according to those who knew him, was possibly transgender.<sup>7</sup> His classmates, including

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<sup>3</sup> We use the term “gay panic” rather than the more neutral term “unwanted sexual advance” because this defense, which asserts that the defendant killed in response to a sexual advance, nearly always arises in the context of a self-identified straight male defendant who has killed a male victim who the defendant perceived to be gay. See Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 564 (2008). Although this Article focuses on the gay panic defense, which was the key issue in the Larry King murder case, we also discuss “trans panic,” a related concept sometimes used in cases where the homicide victim was transgender. See *infra* note 155 and accompanying text.

<sup>4</sup> See *infra* notes 247–48 and accompanying text.

<sup>5</sup> The facts in the Introduction are developed more fully in Part I below. See *infra* notes 28–131 and accompanying text.

<sup>6</sup> We use the term “gay” to encompass all sexual orientation minorities. We refer to the larger community of sexual orientation and gender identity minorities as LGBTQ (lesbian, gay, bisexual, transgender, and queer/questioning).

<sup>7</sup> One unconfirmed report stated that he called his mother from the group home to tell her that he wanted a sex-change operation. See Ramin Setoodeh, *Young, Gay and Murdered: Kids Are Coming out Younger, but Are Schools Ready to Handle the Complex Issues of Identity and Sexuality? For Larry King, the Question Had Tragic Implications*, NEWSWEEK, July 28, 2008, at 41.

McInerney, relentlessly bullied King. When King retaliated by twice pretending to flirt with McInerney, McInerney told King's friends to "say goodbye" to King. McInerney came to school the next day with a loaded gun, and shot King twice in the back of the head while King was seated during class.

McInerney was charged as an adult with first-degree premeditated murder. At his trial, the jury deadlocked. A majority found that McInerney was not guilty of premeditated murder, but rather had acted in the heat of passion and was, therefore, guilty of voluntary manslaughter. Following a battle over whether to retry McInerney, he pled guilty to second-degree murder. He was sentenced to twenty-one years of confinement, at the end of which he will be nearly thirty-nine years old.<sup>8</sup>

Larry King's death garnered nationwide attention.<sup>9</sup> Ellen DeGeneres engaged in an emotional discussion of Larry King on her television show.<sup>10</sup> *Newsweek* featured him on its cover.<sup>11</sup> And documentary filmmaker Marta Cunningham released a widely praised film entitled *Valentine Road* on the case.<sup>12</sup>

We use the Larry King murder<sup>13</sup> as a case study for a close examination of the theoretical, doctrinal, and policy issues surrounding the gay panic defense. Apart from its political and cultural implications, the King case raises core criminal defense issues infused by underlying

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See *infra* note 39 for a definition of the term transgender. Throughout this Article, we refer to Larry King using masculine pronouns because those involved with the case consistently referred to King as male. Of course, we will never be able to know how King would have self-identified had he grown older and explored his sexual identity.

<sup>8</sup> *Brandon McInerney Sentenced to 21 Years, Lawyer Says He's Sorry for Killing Classmate*, 89.3 KPCC (Dec. 19, 2011), <http://www.scpr.org/news/2011/12/19/30409/brandon-mcinerney-sentenced-21-years-lawyer-says-h>. It is possible, however, that McInerney will be released when he is thirty-five if he is found suitable for parole as a Youth Offender under legislation that postdated his sentencing. See *infra* note 131.

<sup>9</sup> See, e.g., Rebecca Cathcart, *Boy's Killing, Labeled a Hate Crime, Stuns a Town*, N.Y. TIMES, Feb. 23, 2008, at A11; Jens Erik Gould, *The Lawrence King Case: In Court, Has the Bullied Become the Bully?*, TIME, Aug. 25, 2011, <http://content.time.com/time/nation/article/0,8599,2090287,00.html>. In addition to our own interviews, we also quote some of those who were interviewed in the film *VALENTINE ROAD* (Bunim-Murray Productions 2013). For one review of the film, see Neil Genzlinger, *Point-Blank Perspectives on a Fatal Bullying Case*, N.Y. TIMES, Oct. 7, 2013, at C1.

<sup>10</sup> See *The Ellen DeGeneres Show* (NBC television broadcast Feb. 29, 2008), available at <https://www.youtube.com/watch?v=PeM9w3L4H6I>.

<sup>11</sup> The July 28, 2008 *Newsweek* cover featured photographs of King and E.O. Green Middle School with the title, *Young, Gay and Murdered*, and the subtitle, *At 10, Larry King Declared He Was Gay. At 15, a Classmate Shot Him Dead. A Tale of Bullying, Sexual Identity, and the Limits of Tolerance*. Setoodeh, *supra* note 7.

<sup>12</sup> *VALENTINE ROAD*, *supra* note 9.

<sup>13</sup> We refer to the case as "the Larry King murder case" rather than the "Brandon McInerney murder case" because—as with the Matthew Shepard case—the case came to be known in the public eye by the name of the victim rather than the name(s) of the killer(s).

homophobia and (possibly) transphobia.<sup>14</sup> And the case has implications beyond the gay panic defense, including issues that potentially arise whenever an LGBTQ person is the target of a violent crime.

Our analysis draws largely upon interviews with those involved in the King case. We have spent over two years speaking with various participants in the King case, including the lead prosecutor, teachers, school officials, jurors, and the director of the documentary film on the King case.<sup>15</sup> We also examined court filings and other documents and primary sources.

During our research, one overriding theme became clear: the murder case against the killer, Brandon McInerney, evolved into a prosecution of the victim, Larry King. Before, during, and after the trial, Larry King was blamed for his own death. The press and defense counsel consistently cast King as the bully and McInerney as the victim—a characterization that a number of jurors came to accept. Many jurors blamed King, and the school officials who “allowed” King to defy sex and gender norms, for the murder; one juror went so far as to characterize King’s behavior as “deviant” in a letter to the district attorney.<sup>16</sup> Another juror expressed strong sympathy for the defendant, stating that, “[t]he system totally failed Brandon.”<sup>17</sup> The career homicide prosecutor termed the trial “[t]he nadir” of her career, largely because of the defense’s successful demonization of King.<sup>18</sup>

It was apparent from our study that the murder trial of Brandon McInerney—like the trials of many who have asserted the gay and trans panic defenses—hinged to a substantial degree on the victim’s sexual identity and/or gender expression. We found that during the Larry King murder case the trial judge allowed the defense to employ rhetoric and introduce evidence that had a strong tendency to inflame the jurors’

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<sup>14</sup> See *infra* Part II.

<sup>15</sup> There is no trial transcript; because of the hung jury, there were no post-trial motions requiring a transcript, and because of the plea bargain, there were no appeals. We, therefore, rely largely on statements by those who either observed or participated in the trial. We briefly spoke to defense counsel on the telephone, but they declined to be interviewed for this Article. In addition to our own interviews, we quote some of those who were interviewed in the film *VALENTINE ROAD*, *supra* note 9.

<sup>16</sup> This is the way that we interpret this language in the letter: the juror specifically stated that her description of Larry King did not reference his sexual orientation but rather his “deviant behavior” and “behavior disorder.” We believe she is referring to Larry’s gender nonconforming behavior. See Lisa S. Letter, *supra* note 2 and accompanying text.

<sup>17</sup> Interview with Karen McElhaney and Rosalie Black, in Northridge, Cal. (July 18, 2013) [hereinafter McElhaney & Black Interview].

<sup>18</sup> Interview with Maeve Fox, Assistant Dist. Attorney, Ventura Cnty., in Ventura, Cal. (Aug. 17, 2012) [hereinafter Fox Interview]. At the time of the McInerney trial, Fox had been prosecuting homicide cases for ten years. *Id.* Although King was described throughout the trial as “gay,” Fox told us that based upon her discussions with those who knew Larry that she believed he may have been transgender. *Id.*

prejudices. The defense repeatedly used derogatory code words for gay and transgender people, commenting that King “pranced” about the school and “flaunted” his sexual orientation. The defense stated that it was not asserting a gay panic defense, but proceeded to do so throughout the trial. For example, in a particularly remarkable piece of testimony, the defense expert psychologist told the jury, “[o]f course, if a boy comes on to another boy, that would be like the *ultimate humiliation*.”<sup>19</sup>

To prevent the revictimization of victims from occurring at trial, we propose that legislatures adopt “gay shield” laws that would limit the types of evidence in gay panic cases. Such revictimizations have long occurred in rape cases, ultimately leading to the enactment of rape shield laws designed to prevent victim blaming. We propose an analogous law—limiting judges’ abilities to admit evidence designed to incite homo/transphobia among jurors—for cases where the defendant asserts the heat of passion defense based upon an alleged unwanted same-sex sexual advance. Although our focus is upon the Larry King murder, and upon the gay panic defense asserted in that case, our proposal could also be a model for similar shield laws in other instances of violence against LGBTQ persons, including “trans panic” cases.

To place our proposal into context, we first focus on the gay panic defense as perhaps the most visible context in which defendants attempt to blame the LGBTQ victim. In purely legal terms, the Larry King murder case reveals the dangers when the defense is allowed to use this tactic. This was a highly unusual heat of passion case given the overwhelming evidence of premeditation and deliberation—evidence that would ordinarily give rise to liability for first-degree premeditated murder.<sup>20</sup> And it is nearly inconceivable that the judge would have allowed the defendant to argue heat of passion based on an unwanted sexual advance in any situation other than a straight male reacting to an alleged advance by a male whom the defendant perceived to be gay.<sup>21</sup> That the judge allowed the defense to argue heat of passion on the facts in the case shows the degree to which (1) gay panic remains entrenched in the law and (2) judges are apt to allow the defense even in cases where the evidence supporting the defense is extremely thin. For this reason, the law should shield the victims in these cases from being demonized at trial.

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<sup>19</sup> Interview with Donald Hoagland in VALENTINE ROAD, *supra* note 9, at 57:50.

<sup>20</sup> See Fox Interview, *supra* note 18 (the career prosecutor told us that she had never seen a heat of passion defense asserted in remotely analogous circumstances).

<sup>21</sup> This is the context in which an unwanted sexual advance as provocation nearly always arises. For an overview of this debate, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.07, at 524–34 (6th ed. 2012).

We make our gay shield law proposal at a particularly opportune time, when cases involving violence against LGBTQ people are under increasing scrutiny. In particular, the American Bar Association has recently proposed eliminating the gay panic defense and the related trans panic defense.<sup>22</sup> And the California legislature has enacted legislation abolishing these defenses.<sup>23</sup> As discussed below, whether the defenses should be completely abolished, or whether such bans would be effective, are issues that are subject to substantial debate.<sup>24</sup>

Leaving this debate aside for now, it is clear that a vast majority of the states will continue to apply the gay panic defense.<sup>25</sup> And even in states that abolish the defense, counsel may be able to avoid the proscription by labeling the defense as other than “gay panic;” in fact, in the King murder case, the defense claimed that it was not asserting “gay panic” at all but rather that McInerney had been provoked by King’s alleged “sexual harassment.”<sup>26</sup> In addition, experience shows that the defense may be able to introduce evidence designed to anti-LGBTQ sentiments even in cases where the court has explicitly barred the gay panic defense.<sup>27</sup>

Part I of this Article provides essential context for the King murder, including King’s and McInerney’s backgrounds, the murder, the pre-trial and trial proceedings, and the plea bargain and sentencing. Part II of this Article provides a brief overview of the law of homicide applicable to the trial. Part III examines the history of the gay panic defense, and examines the heat of passion defense asserted in the Larry King murder case. Part IV provides our proposal for a “gay shield” law that would limit the evidence used in trials where the defendants assert a gay panic defense.

## I. A GAY VICTIM CASE STUDY: THE LARRY KING MURDER

In this Part, we present a narrative of the events surrounding the King murder case. We present the story chronologically, and in more detail than might be expected in an Article that examines distinct legal

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<sup>22</sup> ABA, GAY AND TRANS PANIC DEFENSES RESOLUTION (2013) [hereinafter ABA RESOLUTION], available at <http://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>.

<sup>23</sup> Assemb. Comm. Pub. Safety, A.B. 2501, 2014 Leg., Reg. Sess. (Cal. 2014); see Parker Marie Molloy, *California Becomes First State to Ban Gay, Trans ‘Panic’ Defenses*, ADVOCATE (Sept. 29, 2014, 3:19 PM), <http://www.advocate.com/crime/2014/09/29/california-becomes-first-state-ban-gay-trans-panic-defenses>.

<sup>24</sup> See *infra* notes 166–84 and accompanying text.

<sup>25</sup> As discussed in Part IV, *infra*, our proposal could form the basis for similar proposals in cases of violence against LGBTQ persons, including trans panic cases.

<sup>26</sup> See *infra* note 197.

<sup>27</sup> See *infra* notes 195, 253.

issues. But the detail is important because it illuminates the questions and themes, particularly “blame the victim,” that course through the story.

A. *The Victim and the Defendant*

On February 12, 2008, McInerney, who had turned fourteen the month before, shot his classmate, King, who was fifteen.<sup>28</sup> Both were eighth-grade students at E.O. Green Middle School in Oxnard, California.

King was born in 1993. He was multiracial, and was described as part Latino and part African American.<sup>29</sup> At the time of his death, he was a quite small teenager and had already led a very troubled life.<sup>30</sup> Press reports indicate that, while a toddler, King was removed from his biological parents because of neglect.<sup>31</sup> Gregory and Dawn King subsequently adopted King.<sup>32</sup> For the four months prior to his death, King had been living in a group home for abused and neglected children and adolescents after he alleged that his adoptive father was physically abusing him.<sup>33</sup>

Starting in third grade, King developed an interest in women’s clothing and makeup. Reports indicate that the Kings were not comfortable with King’s emerging sexuality and gender expression. Gregory King denied that he had abused Larry, but schoolteachers and staff told us that Gregory King had kicked Larry and called him a “faggot.”<sup>34</sup> Larry King’s educational and behavioral problems led to his designation as a special education student.<sup>35</sup>

At E.O. Green Middle School, King drew attention for his feminine dress and mannerisms, and there is substantial evidence that King

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<sup>28</sup> Jim Dubreuil & Denise Martinez-Ramundo, *Boy Who Shot Classmate at Age 14 Will Be Retried as Adult*, ABC NEWS (Oct. 5, 2011), <http://abcnews.go.com/US/eighth-grade-shooting-larry-king-brandon-mcinerney-boys/story?id=14666577>.

<sup>29</sup> See Gould, *supra* note 9; Interview with Averi Laskey in VALENTINE ROAD, *supra* note 9, at 34:35.

<sup>30</sup> See Setoodeh, *supra* note 7, at 40, 42.

<sup>31</sup> See *id.* at 42. According to one report, he was being raised by a single mother who abused drugs. He was removed from the home and adopted by the Kings when he was two. See *id.*

<sup>32</sup> *Id.*

<sup>33</sup> Greg King denied the charge. *Id.* at 43. Teachers and friends said they saw bruises on his body. Interview with Averi Laskey in VALENTINE ROAD, *supra* note 9, at 24:33; Interview with Traci Carroll in VALENTINE ROAD, *supra* note 9, at 24:45.

<sup>34</sup> Interview with Susan Crowley, in Oxnard, Cal. (June 17, 2013) [hereinafter Crowley Interview].

<sup>35</sup> See Interview with Shirley Brown in VALENTINE ROAD, *supra* note 9, at 40:24. The district created an Individualized Educational Program (IEP) for King and he was supervised by a special education teacher.



suffered ongoing and severe bullying by his classmates.<sup>36</sup> Students were required to wear uniforms; for two weeks beginning in January 2008, King “accessorized” his uniform with stiletto shoes, a purse, pink boots, earrings, and makeup.<sup>37</sup> At some point, King announced he would prefer to be called “Leticia,” a statement that would prove crucial to McNerney’s defense. Some teachers complained about King’s behavior, but Assistant Vice Principal Joy Epstein confirmed with school district officials that King’s attire did not violate any school rules.<sup>38</sup>

Testimony at trial would demonstrate that several teachers and staff remained extremely uncomfortable with King’s emerging homosexuality and/or transgender identity.<sup>39</sup> Some teachers agreed that King was largely to blame for his death, both in trial testimony and in out-of-court statements. For example, Shirley Brown said King asked her what to do about “his situation.” She said she told him “nothing, keep it private.” She also said, “Larry shouldn’t have expressed himself so openly.” Brown continued, “I relate to Brandon because I can see myself in that very same position. I don’t know if I would have taken a gun but a good swift kick in the butt might have worked really well.”<sup>40</sup> She later added, “I’ve been teaching for thirty years. Junior high school boys are homophobic. I was convinced that the boys would take it into

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<sup>36</sup> See, e.g., Neal Broverman, *Mixed Messages*, ADVOCATE (Mar. 27, 2008, 11:00 PM), <http://www.advocate.com/news/2008/03/14/mixed-messages>. The bullying of LGBTQ students is, of course, widespread, and has been the subject of substantial scholarly literature. See, e.g., Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385 (2012). For example, Susan Crowley, King’s seventh grade special education teacher, said that King complained to her daily that kids teased him. Crowley Interview, *supra* note 34.

<sup>37</sup> Interview with Averi Laskey in VALENTINE ROAD, *supra* note 9, at 34:05; Interview with Samantha Cline in VALENTINE ROAD, *supra* note 9, at 36:40; Interview with James Bing in VALENTINE ROAD, *supra* note 9, at 36:40; Interview with Joy Epstein in VALENTINE ROAD, *supra* note 9, at 37:15.

<sup>38</sup> Epstein Interview, *supra* note 1.

<sup>39</sup> For a discussion of terminology, see Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77 (2014). According to Lee and Kwan, “Sex is the term used to refer to one’s physical or biological attributes;” “Gender, in contrast, is the term used to refer to the way a person presents himself or herself to the world;” and

It is increasingly common . . . for the term “transgender” to be used as an umbrella term that encompasses a wide range of gender nonconforming individuals, including transvestites (men who like to wear women’s clothing for erotic pleasure), cross-dressers (men and women who dress in clothing usually worn by the opposite gender), and transsexuals (individuals who undergo or seek to undergo sex reassignment surgery to align their bodies with their gender identity).

*Id.* at 87–89 (footnotes omitted); see Julie A. Greenberg, *Defining Male And Female: Intersexuality And The Collision Between Law And Biology*, 41 ARIZ. L. REV. 265, 271–74 (1999); Morgan Tilleman, Comment, *(Trans)forming the Provocation Defense*, 100 J. CRIM. L. & CRIMINOLOGY 1659, 1663–64 & n.39–41 (2010). As noted above, *supra* note 7, King described himself as a gay male, and that is also how he was described during the trial. Some people believed, however, that he truly identified as a woman who was attracted to men. See Fox Interview, *supra* note 18.

<sup>40</sup> Interview with Shirley Brown in VALENTINE ROAD, *supra* note 9, at 38:30, 39:45.

their own hands since we did not.” She said she warned the principal that “if he didn’t do something, the boys in this school are going to take [King] behind a shed and beat him to death.”<sup>41</sup> As our discussion of the trial shows below, negative views of King’s behavior and the school’s response were themes that resonated with many jurors.

Like King, Brandon McNerney came from a troubled background. His parents, Kendra and Bill McNerney, separated when McNerney was six years old, their marriage the victim of drug abuse (hers and his) and domestic violence (his).<sup>42</sup> By 2004, after his mother entered rehabilitation for methamphetamine addiction, McNerney had moved in with his grandfather and his father, who abused McNerney. By eighth grade, McNerney had begun associating with a tough beach crowd. McNerney’s friends appeared to have included white supremacists who aggressively guarded their patch of sand against non-whites; indeed, Oxnard, California is known for having a number of active white supremacist groups.<sup>43</sup> During this period, his grades plummeted and he was removed from an English honors class and transferred into the same class that King attended.<sup>44</sup>

McNerney’s interest in Nazism surfaced during this period.<sup>45</sup> Prosecutor Maeve Fox concluded that McNerney was a “neophyte” as a white supremacist but that this belief system “gave him the freedom and a moral viewpoint [that allowed him] to do what he did.”<sup>46</sup> At the trial, the state introduced this evidence to support its theory that the murder was an anti-gay hate crime.

Otherwise, and unlike King, McNerney attracted little attention at E.O. Green. As teacher Susan Crowley recalled, “I never heard the name Brandon until the day Larry was shot.”<sup>47</sup>

### B. *The Homicide*

Not surprisingly, the state and defense portrayed different versions of the events and statements that preceded McNerney’s killing of King.<sup>48</sup> The defense focused on King’s actions. A day or two before the shooting, as Valentine’s Day approached, some of King’s friends

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<sup>41</sup> *Id.* at 41:22.

<sup>42</sup> See Interview with James Bing in VALENTINE ROAD, *supra* note 9, at 22:50, 32:15; Interview with Kendra McNerney in VALENTINE ROAD, *supra* note 9, at 22:50, 32:15.

<sup>43</sup> See VALENTINE ROAD, *supra* note 9, at 1:01:20.

<sup>44</sup> Setoodeh, *supra* note 7.

<sup>45</sup> See Steve Chawkins, *Neo-Nazi Ideas Blamed in Gay Teen’s Slaying*, L.A. TIMES, July 22, 2009, at A6.

<sup>46</sup> Fox Interview, *supra* note 18.

<sup>47</sup> Crowley Interview, *supra* note 34.

<sup>48</sup> See David Alan Perkiss, Comment, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons From the Lawrence King Case*, 60 UCLA L. REV. 778, 778–88 (2013).

reportedly dared one another to ask students they had crushes on to “be my Valentine.” At trial, there was defense testimony that King had done this, approaching McInerney on the basketball court in front of his friends.<sup>49</sup>

Forensic psychologist Donald Hoagland, a defense witness who was also interviewed in the *Valentine Road* film, saw this incident, which McInerney relayed to Hoagland and the jury heard about second-hand through Hoagland’s testimony, as a key motivation for McInerney’s actions. What King did to McInerney was an extreme form of sexual harassment, Hoagland said on film and on the witness stand. According to McInerney via Hoagland, King came onto the basketball court, interrupted the game, and asked to be McInerney’s valentine—the ultimate humiliation. Hoagland said that this incident “was very disturbing to all the boys,” despite the fact Hoagland was not present for the alleged event. Hoagland concluded that McInerney was thinking that he needed to get rid of King, “to get rid of the scourge that had come upon the school.”<sup>50</sup>

The state’s case, of course, presented a very different picture—one that placed King’s actions in context and characterized them as an understandable response to bullying. In papers filed a year after the shooting, the prosecution contended that King and McInerney had an acrimonious relationship for months prior to the shooting. The prosecutor, Maeve Fox, said that McInerney and King sparred with “typical 8th grade, back-and-forth insults; some sexual, some not.”<sup>51</sup> Witnesses said King was usually not the aggressor. But after months of teasing by McInerney and other male students who called him “faggot,” King had begun to retort, according to prosecutors. Fox told us that “the worst thing” that King did to McInerney was to say “[l]ove you,” possibly in the hall and maybe (again, the evidence is controverted) to blow him a kiss.<sup>52</sup> Fox said the gesture might have even been a mocking one.

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<sup>49</sup> Averi, one of King’s classmates and friends, also repeated this story in *Valentine Road*, but no one testified at trial that they had actually heard or witnessed King say this. Interview with Averi Laskey in *VALENTINE ROAD*, *supra* note 9, at 13:00. The jury heard about this alleged incident only through Dr. Hoagland’s second-hand testimony about what McInerney relayed to him. See Interview with Donald Hoagland in *VALENTINE ROAD*, *supra* note 9, at 57:45.

<sup>50</sup> Interview with Donald Hoagland in *VALENTINE ROAD*, *supra* note 9, at 57:45. This evidence seems facially objectionable on many grounds. First, Hoagland was not at the school that day, and is relating what others told him and speculating as to “the boys” state of mind. Further, Hoagland is testifying as to the ultimate issue—McInerney’s state of mind—something that, at least theoretically, expert witnesses are not permitted to do. See *infra* notes 60, 99, 228.

<sup>51</sup> This was part of the prosecution’s brief filed in opposition to the defense motion to remove the case to juvenile court. Catherine Saillant, *Details in Gay Student’s Slaying Revealed*, L.A. TIMES, Feb. 12, 2009, at B3.

<sup>52</sup> Fox Interview, *supra* note 18.

The day before the shooting, the two boys were bickering during seventh period. When King left, a student heard McInerney say, "I'm going to shoot him." Just after that class, another student heard King say "I love you" to McInerney as they passed in a hallway. The same student then heard McInerney say he was "going to get a gun and shoot" King. A few minutes later, prosecutors alleged, McInerney told one of King's friends: "[s]ay goodbye to your friend Larry because you're never going to see him again."<sup>53</sup> There is no evidence that anyone told King about McInerney's threats.

On February 12, the day of the shooting, McInerney's father prepared to drive McInerney to school.<sup>54</sup> As the two left their home and began to walk towards the car, McInerney realized that he had forgotten the gun that he had planned to use to kill King. McInerney went back into the house to retrieve it. He concealed the gun in a towel and stuffed it in his backpack. At some point while in school, he withdrew the towel-wrapped gun and stuffed it into his pants.<sup>55</sup>

When King arrived at school on February 12, teachers noticed that he was not wearing any of the feminine accessories or makeup that he had worn in the past. There also appears to be no evidence that King and McInerney had any interactions that day; King arrived late to class after having been in the Assistant Principal's office.<sup>56</sup>

Though the evidence is disputed as to the exact timing, the shooting occurred fifteen to twenty minutes<sup>57</sup> into Dawn Boldrin's English class.<sup>58</sup> McInerney watched the back of King's head for a number of minutes before firing the first shot.<sup>59</sup>

Forensic psychologist Don Hoagland, the defense expert, testified that McInerney was consumed by feelings of humiliation, but had a chance to reconsider. Hoagland also said that, when King was called out of the class [a third version of where King was when class started], McInerney began to have second thoughts. McInerney was fingering the gun in his sweatshirt pocket, thinking, "[m]aybe I won't do this."<sup>60</sup>

According to Hoagland, the tipping point for McInerney was when King returned to class and allegedly said, "I've changed my name to

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<sup>53</sup> Saillant, *supra* note 51.

<sup>54</sup> Interview with Dan Swanson in VALENTINE ROAD, *supra* note 9, at 1:07:50; Interview with Donald Hoagland in VALENTINE ROAD, *supra* note 9, at 1:07:50.

<sup>55</sup> Steve Chawkins, *Psychologist Questioned in Oxnard Teen's Murder Trial*, L.A. TIMES, Aug. 16, 2011, <http://articles.latimes.com/2011/aug/16/local/la-me-gay-student-20110816>.

<sup>56</sup> See Interview with Donald Hoagland in VALENTINE ROAD, *supra* note 9, at 1:08:27. There was some speculation that the two may have had a verbal altercation that day, but no one appears to have witnessed that conversation.

<sup>57</sup> Steve Chawkins, *Teen to Stand Trial in Gay Boy's Killing*, L.A. TIMES, July 23, 2009, at A4.

<sup>58</sup> The class was held in the computer lab that day.

<sup>59</sup> Interview with Jeff Kay in VALENTINE ROAD, *supra* note 9, at 1:14:50.

<sup>60</sup> Interview with Donald Hoagland in VALENTINE ROAD, *supra* note 9, at 1:08:30. Again, this evidence only came in through Hoagland and was of highly questionable admissibility.

Leticia.” Significantly, King did not direct this comment to McInerney, but to another student. When McInerney heard that statement, according to Hoagland, “it obliterated any reserve or strength that he had. That took it to another level. This guy who is doing these things to me is now calling himself by a girl’s name.”<sup>61</sup>

Shortly afterwards, McInerney fired a shot into the back of King’s head. Teacher Dawn Boldrin said that, after she heard the shot, she turned around and said to McInerney, “[w]hat the hell are you doing?”<sup>62</sup> McInerney then shot King *again* in the back of the head, put the gun down, and ran out of the classroom. King died two days later, on February 14, 2008, after surviving two days on life support.<sup>63</sup>

Maeve Fox, the prosecutor, told us that police officers had interrogated 200 students in the school auditorium shortly after the shooting “so we knew how the shooting went down and that Brandon had declared his intentions days prior to the shooting.” She continued, “Brandon planned out every single step in the process. It was such a thoroughly planned attack. There was *so much* premeditation in what he did.” Since King wasn’t wearing any makeup, earrings, or heels that day, “he wasn’t doing anything that day that Brandon could have objected to. It just shows how set he was on doing what he had decided to do.”<sup>64</sup>

Shortly after the shooting, police apprehended McInerney in a neighborhood near the school. Oxnard Police Officer Joe Tinoco stated that McInerney “calmly allowed police to take him into custody, telling them, ‘I’m the one who did it.’” He apologized repeatedly for the killing. “He said, ‘I’m sorry, I did it, officer. I shot him.’”<sup>65</sup> A video of the interrogation shows McInerney as a tall and athletically built young man.<sup>66</sup> Bail for McInerney was set at \$770,000; he remained in Ventura County Juvenile Hall through his trial.<sup>67</sup>

### C. *The Pre-Trial Proceedings and Charging Decision*

By February 16, Ventura County prosecutors had charged McInerney as an adult with premeditated murder, and included hate

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<sup>61</sup> *Id.* at 1:08:15.

<sup>62</sup> Interview with Dawn Boldrin in VALENTINE ROAD, *supra* note 9, at 3:53.

<sup>63</sup> Cathcart, *supra* note 9.

<sup>64</sup> Fox Interview, *supra* note 18.

<sup>65</sup> Catherine Saillant, *Officers Say Teen Slaying Suspect Apologized*, L.A. TIMES, July 21, 2009, at A4. Jurors McElhaney and Black found McInerney’s apology critical to their vote for voluntary manslaughter rather than murder. McElhaney & Black Interview, *supra* note 17.

<sup>66</sup> See VALENTINE ROAD, *supra* note 9, at 17:42.

<sup>67</sup> Catherine Saillant, *1,000 Gather in Tribute to Slain Oxnard Teen*, L.A. TIMES, Feb. 17, 2008, at B3; Neal Broverman, *McInerney Sentenced to 21 Years for Killing Gay Teen*, ADVOCATE (Dec. 19, 2011, 3:15 PM), <http://www.advocate.com/news/daily-news/2011/12/19/mcinerney-sentenced-21-years-killing-gay-teen>.

crime and use of a gun sentencing enhancements. The prosecutors subsequently obtained the court's approval to add a lying-in-wait allegation, which automatically transferred the case to adult court.<sup>68</sup> If convicted of premeditated murder with the use of a firearm or with murder by lying-in-wait,<sup>69</sup> McNerney faced a mandatory sentence of up to fifty-three years to life.<sup>70</sup> Had he been tried as a juvenile, he would have been released no later than the time he reached twenty-five years old, a sentence that the prosecutors' office believed would have been too lenient given the nature of the crime.<sup>71</sup>

One early theme that emerged was that school officials could and should have prevented the killing. McNerney's first attorney, public defender William Quest, laid out an argument that focused on the school officials' behavior. Quest argued that administrators "should have moved aggressively to quell rising tensions between the two boys" but "were so intent on nurturing King as he explored his sexuality, allowing him to come to school wearing feminine makeup and accessories, that they downplayed the turmoil that his behavior was causing on campus."<sup>72</sup> "Brandon is not some crazed lunatic," Quest said. "This was a confluence of tragic events that could have been stopped. If there is partial blame in other places, let's not throw away Brandon for the rest of his life."<sup>73</sup> Quest also turned the rhetoric towards a school

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<sup>68</sup> Chawkins, *supra* note 57.

<sup>69</sup> In our interview, Fox observed that King's killing was the best fit for a lying-in-wait allegation that she had seen in her fourteen years as a homicide prosecutor. Fox Interview, *supra* note 18. Many states, including California, deem killings while lying-in-wait to be first-degree murder. *See, e.g.*, CAL. PENAL CODE § 189 (West 2014); MICH. COMP. LAWS ANN. § 750.316 (West 2004 & Supp. 2014); W. VA. CODE ANN. § 61-2-1 (West 2010 & Supp. 2013). As a juvenile, McNerney was not eligible for the death penalty. *Roper v. Simmons*, 543 U.S. 551, 570-71 (2005). In addition, in *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012), the Court held that *all* mandatory sentences of life without parole (LWOP) for persons who were juveniles at the time of the offense constitute "cruel and unusual punishment" under the Eighth Amendment.

<sup>70</sup> Cathcart, *supra* note 9; Saillant, *supra* note 67.

<sup>71</sup> Interview with Maeve Fox in VALENTINE ROAD, *supra* note 9, at 20:28. Fox said, "How do you take someone that puts two bullets in back of the head, how is that an act of juvenile delinquency? The juvenile justice system is not equipped to deal with someone like that. This was a cold-blooded execution." Telephone Interview with Maeve Fox, Assistant Dist. Attorney, Ventura Cnty. (July 17, 2014) [hereinafter Fox Telephone Interview]. In addition, according to Fox, in a case like McNerney's, where the relevant statutory guidelines require juveniles to be tried as adults, CAL. WELF. & INST. CODE §§ 602, 707(b) (West 2014), prosecutors have little discretion in this regard. Proposition 21, the Gang Violence and Juvenile Crime Prevention Act, requires that someone fourteen years or older charged with murder with special circumstances be tried as an adult. Lying-in-wait is one of the twenty-three legally specified special circumstances that can accompany a murder charge and automatically transfers a juvenile into the adult criminal justice system. *See* Ernie Grimm, *Does the DA Have No Choice?*, SAN DIEGO READER (Mar. 15, 2001), <http://www.sandiegoreader.com/news/2001/mar/15/does-da-have-no-choice>.

<sup>72</sup> Catherine Saillant, *School Blamed in Killing of Gay Student*, L.A. TIMES, May 8, 2008, at B1.

<sup>73</sup> *Id.*

official, calling Assistant Principal Joy Epstein “a lesbian vice principal with a political agenda.”<sup>74</sup>

Scott Wippert and Robyn Bramson subsequently replaced Quest as McNerney’s attorneys, at the request of McNerney’s family.<sup>75</sup> At the preliminary hearing, Wippert repeatedly suggested that King provoked violent behavior by flirting with McNerney while dressed in women’s shoes and accessories; he “sexually harassed” McNerney “by openly declaring his affection for him and humiliating him with his attention.” “Did you ask about Larry making sexual overtures to other boys?” Wippert asked one detective.<sup>76</sup>

On August 26, 2009, McNerney pleaded not guilty to first-degree murder, a hate crime enhancement, and the use of a gun charge. Wippert and Bramson filed a motion to dismiss the lying-in-wait charge, calling it “prosecutorial vindictiveness.”<sup>77</sup> The judge denied the motion, and the case was scheduled for trial.<sup>78</sup>

#### D. *The Trial*<sup>79</sup>

The trial began on July 5, 2011, more than three years after King’s death, and lasted for nine weeks. The jury included nine women and three men. Maeve Fox said that before the trial began, she feared the jury would include people who believe juveniles should not be tried as adults, as well as those who are homophobic.<sup>80</sup> Regarding the first, she said that “[t]hey’ll want to be on the jury so bad that they’ll lie in jury selection.” As to the second group, she said, “I’m really afraid of the stealth homosexual haters.” She continued, “I believe they’re going to

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<sup>74</sup> Setoodeh, *supra* note 7, at 43.

<sup>75</sup> Rachel Charman, *Lawrence King Murder Suspect Fires Public Defenders*, PINK NEWS (Oct. 16, 2008, 10:31 AM), <http://www.pinknews.co.uk/2008/10/16/lawrence-king-murder-suspect-fires-public-defenders>. McNerney’s preliminary hearing was set for March 8, 2009 but delayed when his father, Bill McNerney, was found dead that morning; he sustained a head injury from an alcohol-related fall in his home. Catherine Saillant, *Father of Teen Accused in Oxnard School Slaying Is Dead*, L.A. TIMES, Mar. 19, 2009, at A9.

<sup>76</sup> Saillant, *supra* note 65.

<sup>77</sup> Raul Hernandez, *McInerney Pleads Not Guilty to All Charges*, VENTURA COUNTY STAR (Aug. 27, 2009, 10:16 AM), <http://www.vcstar.com/news/2009/aug/27/mcinerney-pleads-not-guilty-to-all-charges>. The California Supreme Court affirmed the denial of that motion. Raul Hernandez, *State Supreme Court Rejects McInerney Appeal to be Tried in Juvenile Court*, VENTURA COUNTY STAR (Jan. 21, 2010, 5:31 PM), <http://www.vcstar.com/news/2010/jan/21/state-supreme-court-rejects-mcinerney-appeal-to>.

<sup>78</sup> Raul Hernandez, *Judge Grants Delay in Murder Trial of Teen McInerney*, VENTURA COUNTY STAR (May 7, 2010, 1:41 PM), <http://www.vcstar.com/news/2010/may/07/judge-grants-delay-in-murder-trial-of-teen>.

<sup>79</sup> Without a trial transcript, the *Ventura County Star* and *L.A. Times* stories are (along with interviews of those who attended the trial) the closest we have to a step-by-step account of the trial.

<sup>80</sup> Interview with Maeve Fox in VALENTINE ROAD, *supra* note 9, at 56:35.

present some kind of a 'gay panic' defense. That somehow, King, based on what he did or said, had provoked McInerney into doing what he did."<sup>81</sup>

The state and the defense offered jurors markedly different portraits of McInerney and King. Fox described King as a shy, effeminate student who had recently come out of his shell to assert his sexuality and paid a price for it at the hands of a classmate with white supremacist tendencies. Wippert portrayed King as the aggressor, flirting and taunting McInerney so relentlessly that it triggered their fatal clash.

Fox began by showing a series of photographs of McInerney when he was arrested, including one of him with no shirt that showed he was a tall, athletic, young man. "She described McInerney as a popular kid who was goofy and well liked in school by day and spent his nights in a 'terribly dysfunctional' home where drugs and violence were commonplace. He was skilled in the use of firearms and had studied martial arts."<sup>82</sup> By contrast, she said King was a "cherubic-faced," small kid, "[s]light and 'very effeminate,'" who had been harassed for years because of his sexuality.<sup>83</sup> Fox said students would testify about McInerney's threats to King the day before the shooting. She noted that McInerney had "easy access to guns in his house, such as the .22 [caliber handgun] that he used in the crime."<sup>84</sup> Fox also called McInerney a neophyte white supremacist whose backpack contained "Nazi and 'white power' drawings . . . along with a copy of Hitler's '*Mein Kampf*.'"<sup>85</sup>

McInerney's lead attorney, Scott Wippert, told the jury the evidence would show that what happened should not have happened, "it was an unnecessary tragedy because a 14-year-old boy was emotionally pushed over the edge [and] . . . sexually harassed by Larry King."<sup>86</sup> Wippert said King was a known problem at school for harassing other boys sexually and making inappropriate remarks. He had been warned about making sexual advances as early as the fifth grade and part of his goals a counselor had set for him recently included not making sexual advances on people, he said.<sup>87</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> Zeke Barlow, *Attorneys Argue Over Who Was the Aggressor in Brandon McInerney Trial*, VENTURA COUNTY STAR (July 5, 2011, 7:08 PM), <http://www.vcstar.com/news/local-news/crime/lawyers-give-opening-statements-in-brandon-case>.

<sup>83</sup> Catherine Saillant, *Slaying Trial First Focuses on the Victim*, L.A. TIMES, July 6, 2011, at AA1.

<sup>84</sup> Barlow, *supra* note 82.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* This version of the facts resonated strongly with several jurors. See McElhaney & Black Interview, *supra* note 17 ("He was just a kid. . . . He should have been punished as a child.").

<sup>87</sup> Barlow, *supra* note 82.



He dismissed the prosecution's allegation that McInerney was acting out of white supremacist beliefs. "There was no hate crime, just the frustration of an adolescent with nowhere to turn, he told the jury. 'Why would a student complain when everyone knows about it and no one is going to do anything about it?' he posited."<sup>88</sup>

Wippert said that "a psychologist [Hoagland would] testify that McInerney was in a dissociative state at the time of the shooting, not in touch with the reality of what he was doing."<sup>89</sup> As he spoke, co-counsel Robyn Bramson wept.<sup>90</sup>

While King's [attire] was disruptive to the classes and to other students, Wippert said little was done to address it, and King was acting as a bully. It was King, not McInerney, who was the aggressor in the relationship, he argued. McInerney grew up in a house where his father shot his mother, then married her and gave her bullets in her Christmas stocking as a joke. He was taken to drug houses when he was a child and his father, who has since died, beat him for fun, Wippert said. "This is a very troubled young man pushed to the edge," Wippert said of his client. "He was pushed there by a young man who repeatedly targeted him with unwanted sexual advances."<sup>91</sup>

McInerney reached an "emotional breaking point" and saw no other way to stop the sexual harassment by King, Wippert said. His own violent and dysfunctional family offered no help, and school officials had made it clear that King was permitted to flaunt his sexuality, even if it was disruptive, the defense attorney said.<sup>92</sup>

On the fifth day of trial, Assistant Principal Joy Epstein and former teacher Dawn Boldrin testified about the school's response to concerns about King's attire. Epstein consulted with an administrator after King started wearing women's accessories to school in late January 2008, including "high-heeled boots, earrings and eye makeup."

Epstein was told that, by law, as long as the 15-year-old student wore the school's uniform, [which he did,] he was entitled to embellish as he pleased. "They said we had to protect his civil rights and his equal rights," Epstein said. "We could not discriminate between a boy or a girl wearing those items to school."<sup>93</sup>

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<sup>88</sup> Saillant, *supra* note 83.

<sup>89</sup> *Id.*

<sup>90</sup> Barlow, *supra* note 82.

<sup>91</sup> *Id.*

<sup>92</sup> Saillant, *supra* note 83.

<sup>93</sup> Catherine Saillant, *Oxnard Teen, Slain in Shooting, Was Allowed to Wear Women's Accessories to School, Official Testifies*, L.A. TIMES, July 12, 2011, <http://articles.latimes.com/print/2011/jul/12/local/la-me-gay-shooting-20110712>.

After administrators met to discuss the issue and enlisted the district's guidance, "Assistant Principal Sue Parsons sent an email to the school's staff informing them not to make an issue of King's attire."<sup>94</sup>

When Dawn Boldrin took the stand, the defense displayed a large photograph she took of King, smiling broadly and holding the lime-green chiffon gown she had given him, a hand-me-down from her daughter.<sup>95</sup> Boldrin said that she was not concerned that her gift might further inflame "problems at the school related to King's attire because she told King that he couldn't wear the floor-length gown to school. 'I didn't see anything inappropriate about him enjoying that dress outside of school,' Boldrin said."<sup>96</sup>

The defense later called psychologist Donald Hoagland to the stand. Hoagland testified about McInerney's "humiliation" at what he called King's "come-on" to him.<sup>97</sup> This testimony powerfully influenced the jury. "McInerney was a bright [student] driven [to the] brink by a long history of violence at home," Hoagland said. "[I]n the end, teasing from the victim, whose cross-dressing [behavior McInerney viewed] as in-your-face provocation," pushed McInerney over the edge.<sup>98</sup>

Hoagland then opined that, when McInerney heard King telling a girl that he'd changed his name to Leticia, "[h]e snapped' . . . and entered a 'dissociative state' that lasted until he fled the classroom and was caught by police minutes later." "It was a transient period of dissociation," Hoagland said in response to skeptical questioning from Fox.<sup>99</sup>

At this juncture, it is critical to note that the heat of passion defense cannot succeed if the defendant had "cooled off" during the period between the provocation and the killing, or if a reasonable person would have "cooled off" in the circumstances. Indeed, if too much time passes between the provocation and the killing, then a trial court will deem the defendant to have "cooled off" as a matter of law and will not allow the jury to consider the provocation defense.<sup>100</sup> The passage of time will not obviate the defense, however, if there is a "rekindling" of the heat of passion.<sup>101</sup> That is why the testimony that King said, "Call me Leticia" (or words to that effect), and that McInerney heard these words, proved

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<sup>94</sup> *Id.*

<sup>95</sup> Catherine Saillant, *Trial of Teen Charged with Killing Gay Classmate Grows Heated*, L.A. TIMES, July 30, 2011, <http://articles.latimes.com/print/2011/jul/30/local/la-me-gay-slaying-20110730> (Saillant refers to "King's increasingly flamboyant dress and behavior").

<sup>96</sup> *Id.*

<sup>97</sup> Chawkins, *supra* note 55.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* Once again, this testimony seems very close to reaching a conclusion as to an ultimate jury issue: whether McInerney was acting in the heat of passion at the time of the killing.

<sup>100</sup> 17A CAL. JUR. 3D *Criminal Law: Crimes Against the Person* § 95 (2014).

<sup>101</sup> See WAYNE R. LAFAVE, CRIMINAL LAW § 15.2(d), at 830 (5th ed. 2010).

critical to the defense. As discussed in the next section, however, we could locate no California heat of passion case where the victim's allegedly provocative actions or statements were not directed at the defendant or a person closely associated with the defendant.<sup>102</sup>

In her closing statement, Fox acknowledged that jurors might feel sympathy for McInerney, given his dysfunctional and violent home life. But she reminded them that the law does not allow for sympathy.<sup>103</sup> She called the case a "tragedy on all levels," but argued that factually McInerney's fatal shooting of King was first-degree murder.<sup>104</sup> "What possible chance did the boy have against this defendant?" Fox asked. "He was killed by someone who was full of hatred."<sup>105</sup>

In his closing, also three hours long, Wippert emphasized his client's age at the time of the shooting, his tumultuous home life, the teachers' concerns about the growing tension after King started appearing at school in feminine attire, and the administration's failure to respond to those concerns.<sup>106</sup> "This is a boy. He was 14," Wippert said. "He wasn't a man at a bar that somebody tried to pick up, and he waited outside to kill them."<sup>107</sup> Wippert also suggested that the prosecution's hate crime allegation was unsubstantiated, so it was trying to bolster it by portraying McInerney as a "white supremacist monster."<sup>108</sup> Wippert agreed that King was troubled, "but . . . [s]o was Brandon. The grown-ups failed. Everywhere. In both of their lives."<sup>109</sup>

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<sup>102</sup> Cf. *Commonwealth v. Carr*, 580 A.2d 1362 (Pa. Super. Ct. 1990) (holding that the victims' lesbian lovemaking was not adequate provocation to support the defendant's heat of passion defense because it was not behavior directed at the defendant); see *infra* notes 146–53 and accompanying text.

<sup>103</sup> Catherine Saillant, *Background No Excuse for Shooting Classmate, Prosecutor Says*, L.A. TIMES, Aug. 26, 2011, <http://articles.latimes.com/print/2011/aug/26/local/la-me-0826-gay-slaying-20110826>.

<sup>104</sup> *Id.*

<sup>105</sup> Here is an excerpt of Fox's closing statement:

Mr. Wippert asked you to use your heart and thirty-nine times he's reminded you that the defendant was a fourteen-year-old boy. We talked about the fact that it's going to be difficult and that your emotions come in but you have to check them at the door. The law requires you to do that. There is absolutely no way that the facts of this case could ever be voluntary manslaughter because no reasonable average person would ever do what the defendant did. It's really sad. It's tragic, it's awful, but it's also a done deal.

VALENTINE ROAD, *supra* note 9, at 1:09:34.

<sup>106</sup> Wippert's closing statement explicitly appealed to the jurors' emotions:

He did not pull a Columbine, he did not go and shoot everyone he could. He shot King because he didn't know what else to do to make him stop. He's not a murderer. When you make this decision, use your common sense, use your heart and soul. And remember that he's fourteen.

*Id.* at 1:09:15.

<sup>107</sup> Saillant, *supra* note 103. This appears to be a reference to the Matthew Shepard case. See *infra* notes 193, 251–52 and accompanying text.

<sup>108</sup> Saillant, *supra* note 103. Our interviews with jurors speak to Wippert's success with this approach. McElhaney & Black Interview, *supra* note 17. It may be that the jurors regarded Nazism

Wippert ended his argument “by asking jurors to consider the mind-set of a 14-year-old boy and the humiliation that King was inflicting on McInerney with his aggressive flirtations.” He said that teachers had protested to the administration about King’s behavior, to no avail. “Remember the boy who couldn’t cry,” said Wippert,” referring to McInerney, who was dressed in a lavender shirt and slacks. “He wasn’t allowed to cry. He was a 14-year-old-boy who shot Larry King because he didn’t know what else to do to make it stop.”<sup>110</sup>

In her rebuttal, Fox said the defense’s arguments that McInerney was somehow provoked to kill King by his aggressive flirtations or that his troubled childhood excused the shooting did not hold water. She asked the jury to set aside any anti-gay bias they might have against King. “This victim, even in death, has been degraded and subjected to inappropriate character assassination,” she said. “No reasonable person of any age would ever have reacted the way the defendant did.”<sup>111</sup>

#### E. *Jury Deliberations*

The jury had three choices: first-degree premeditated murder;<sup>112</sup> second-degree murder;<sup>113</sup> and voluntary manslaughter based upon a heat of passion mitigating defense.<sup>114</sup> The hate crime enhancement would have provided the judge with the discretion to add one, two, or three years to the sentence.<sup>115</sup> Significantly, in California, the state has the burden of proving beyond a reasonable doubt that the defendant did not act in the heat of passion.<sup>116</sup>

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as embracing only white supremacist and anti-Semitic views, not necessarily hatred toward other groups such as LGBTQ people. Jurors Black and McElhaney recalled testimony to the effect that McInerney apparently had African-American friends and concluded, as a result, that he was not a racist and, therefore, rejected the hate crime charge even though that charge was based upon the victim’s sexual orientation and not his race. *Id.*; see Zeke Barlow, *Friend: Brandon McInerney Said He ‘Was Going to Bring a Gun’ to School*, VENTURA COUNTY STAR (July 7, 2011, 6:58 PM), [http://www.vcstar.com/news/local-news/crime/no-headline-mcinerney\\_day\\_3](http://www.vcstar.com/news/local-news/crime/no-headline-mcinerney_day_3). In fact, the prosecutor did not raise the issue of King’s race during voir dire because it was not relevant to the hate crime allegation. Fox Telephone Interview, *supra* note 71.

<sup>109</sup> Saillant, *supra* note 103.

<sup>110</sup> Catherine Saillant, *Deliberations Begin in Slaying of Gay Student*, L.A. TIMES, Aug. 27, 2011, <http://articles.latimes.com/2011/aug/27/local/la-me-gay-slaying-20110827>.

<sup>111</sup> Saillant, *supra* note 103.

<sup>112</sup> At the time, the basic sentence was twenty-five to life, with an additional twenty-five years for the use of a gun, for a range of fifty to life in prison. See *supra* note 70 and accompanying text.

<sup>113</sup> The basic sentence for second-degree murder is fifteen years to life. CAL. PENAL CODE § 190.5 (West 2014). An additional sentence of twenty-five years to life applies for killing someone with a gun. CAL. PENAL CODE § 12022.53 (West 2012 & Supp. 2014).

<sup>114</sup> The sentence is three, six, or eleven years. CAL. PENAL CODE § 193 (West 2014).

<sup>115</sup> CAL. PENAL CODE § 422.75(a) (West 2010 & Supp. 2014).

<sup>116</sup> JUDICIAL COUNCIL OF CAL. ADVISORY COMM. ON CRIMINAL JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS: CALCRIM No. 511, at 234–36 (2014),

Although juries do not determine prison sentences, and generally are unaware of those sentences, the defense repeatedly implored the jury to not send McInerney away for life—thus making the jury aware of the potential consequences of a murder conviction.<sup>117</sup> At least some of the jury also apparently and mistakenly believed that a finding that McInerney committed a hate crime would substantially increase the sentence.<sup>118</sup>

After seventeen hours of deliberations, the jurors said they could not agree whether to convict McInerney of murder or voluntary manslaughter. Judge Campbell then declared a mistrial.<sup>119</sup> Seven jurors favored a voluntary manslaughter conviction and five a conviction for first- or second-degree murder.<sup>120</sup>

Continuous and sensational press coverage, often portraying McInerney as a victim, may have contributed to the jury's reluctance to convict him. As noted above, King's murder had quickly become a national story and his "behavior" the cause of—and justification for—his murder.<sup>121</sup> But if King was dead, McInerney was very much alive, a scared, "baby-faced"<sup>122</sup> teen with his life on the line and in front of the jury every day.<sup>123</sup>

#### F. *Plea Deal and Sentencing*

Prosecutors immediately pledged to retry McInerney. "We will consider the fact that this was a very significantly split jury," said Chief

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available at [http://www.courts.ca.gov/partners/documents/calcrim\\_juryins.pdf](http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf). In some states, a defendant has the burden of proving such a defense by a preponderance of the evidence. See, e.g., *State v. Snyder*, 750 So. 2d 832, 838 (La. 1999) (citing *State v. Lombard*, 486 So. 2d 106, 111 (La. 1986)).

<sup>117</sup> See Fox Interview, *supra* note 18.

<sup>118</sup> *Id.* In fact, the enhancement would have been at most three years. See *supra* note 115.

<sup>119</sup> Catherine Saillant, *Mistrial Declared in Slaying of Gay Oxnard Teen*, L.A. TIMES, Sept. 2, 2011), <http://articles.latimes.com/2011/sep/02/local/la-me-0902-gay-student-20110902>.

<sup>120</sup> Thomas Watkins, *Mistrial Declared in CA Gay Student Killing Trial*, YAHOO NEWS (Sept. 2, 2011), <http://news.yahoo.com/mistrial-declared-ca-gay-student-killing-trial-231913063.html>.

<sup>121</sup> See Setoodeh, *supra* note 7. Locally, reporters at the *Los Angeles Times* and particularly Oxnard's hometown newspaper, the *Ventura County Star*, followed the case from King's murder through McInerney's plea agreement and sentencing. The *Star* alone ran dozens of stories and monitored hundreds of reader comments on each phase of the case. With King dead, reporters at both newspapers mined King's disruptive home life, his earlier minor brushes with the law, the makeup and earrings he wore, and his alleged "flirting" with McInerney. The message: King was troubled, "different," and, therefore, raised difficult issues for his classmates and school officials.

<sup>122</sup> Catherine Saillant, *Oxnard Officers Say Teen Slaying Suspect Admitted Killing, Apologized*, L.A. TIMES, July 21, 2009, <http://articles.latimes.com/2009/jul/21/local/me-king21>.

<sup>123</sup> News stories that recounted a childhood caught in the swirl of his parents' violence, alcohol, and drugs may have built sympathy for the defendant. After his father died following an alcohol-related fall, "[t]he local blogosphere exploded" with comments, often questioning the appropriateness of trying the teen as an adult. Saillant, *supra* note 75.

Assistant District Attorney James Ellison. “There are obviously very strong reactions on both sides and we will consider all those in how we proceed.”<sup>124</sup> Little more than a month after the verdict, Ventura County prosecutors announced that they would drop the hate crime allegation but still planned to retry McNerney as an adult for first-degree murder.<sup>125</sup>

The prosecutors’ decision to retry the case was controversial. As for the new case, one juror stated: “[i]t was overcharged and an abuse of power, and I don’t think a new jury will see it any different.”<sup>126</sup> And the LGBTQ community itself was conflicted, principally because of the underlying juvenile justice issues and the pain caused to those involved in the case. A spokeswoman for the Gay, Lesbian & Straight Education Network said the prosecutors should have made a plea deal instead. “Brandon McNerney killed Larry King and should go to jail for his crime,” said Eliza Byard. “However, the first trial subjected everyone—especially Larry and Brandon’s peers—to a painful spectacle that accomplished nothing.”<sup>127</sup>

On November 21, 2011, McNerney agreed to plead guilty to second-degree murder and voluntary manslaughter with the use of a gun and serve twenty-one years in addition to the time that he had already spent in confinement.<sup>128</sup> In return, prosecutors agreed not to go forward with a second trial, which could have resulted in a life sentence.<sup>129</sup> McNerney was sentenced in mid-December 2011, and was

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<sup>124</sup> Catherine Saillant & Richard Winton, *Retrial in Gay Teen Killing Poses Challenges*, L.A. TIMES, Sept. 3, 2011, <http://articles.latimes.com/print/2011/sep/03/local/la-me-gay-student-20110903>.

<sup>125</sup> The L.A. Times story called this move “a significant shift in legal strategy” and “puzzling because in the first trial both prosecutors and defense attorneys acknowledged homophobia as a central issue.” Catherine Saillant & Richard Winton, *Brandon McNerney Will Be Retried in Killing of Gay Classmate*, L.A. TIMES, Oct. 6, 2011, <http://articles.latimes.com/2011/oct/06/local/la-me-gay-murder-20111006>. At the time, prosecutors declined to comment publicly on the reasons for dropping the hate crime charge, but one juror said that none of the twelve panelists in the original trial believed the shooting was a hate crime. The inclusion of the hate crime charge may have damaged the prosecution’s credibility among jurors. Prosecutor Maeve Fox characterized the hate crime charge as “right morally” but also said that tactically “it was stupid and I regret it.” Fox Interview, *supra* note 18. Fox and others concluded after the trial that the evidence supporting the hate crime allegation was contested, and that this aspect of the trial may have led some jurors to question other, much stronger aspects of the state’s case.

<sup>126</sup> Saillant & Winton, *supra* note 125. This juror is likely Lisa Smith, the juror who wrote District Attorney Gregory Totten, objecting to the fact that prosecutors wrote her after the trial. See Lisa S. Letter, *supra* note 2.

<sup>127</sup> Saillant & Winton, *supra* note 125.

<sup>128</sup> See Zeke Barlow et al., *Brandon McNerney Accepts Plea Deal in Murder Trial; Will Serve Nearly 25 Years*, VENTURA COUNTY STAR (Nov. 21, 2011, 6:58 PM), <http://www.vcstar.com/news/2011/nov/21/mcinerney-trial>. Sentencing was stayed on the murder conviction.

<sup>129</sup> Catherine Saillant, *Gay Teen’s Killer Takes 21-Year Deal*, L.A. TIMES, Nov. 22, 2011, at AA1. The Times story reports that some jurors believed the district attorney’s office was being overly harsh in trying McNerney as an adult and several had begun wearing “Save Brandon” bracelets.

transferred from a juvenile facility to a California state prison when he turned eighteen.<sup>130</sup> The sentence provided for a term that would keep McInerney in prison until he is nearly thirty-nine years old. Under recent revisions to California juvenile offender parole laws, however, he could be freed at age thirty-five if found suitable for parole.<sup>131</sup>

## II. GAY PANIC AND THE LAW OF INTENTIONAL HOMICIDES

In order to understand the context of the gay panic defense in the King murder case, we need to first define the legal principles applicable to intentional killings. Understanding the elements of first-degree murder, second-degree murder, and voluntary manslaughter is essential to any analysis of the case. Homicide crimes are divided into two categories: intentional and nonintentional.<sup>132</sup> For example, a pre-planned deliberate killing is an “intentional” homicide.<sup>133</sup> Such killings are punished as first-degree murder in most states, such as California, where homicide law is based upon common law principles.<sup>134</sup>

### A. Murder

The defense in the King case did not argue—and could not have argued given the facts in the case—that McInerney did not intend to kill King. Using a deadly weapon against a vital body part is quintessential proof of an intentional killing, and McInerney admitted that he shot

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*Id.* Again, a sentence of life without parole for a juvenile is not possible today. *See supra* note 69 and accompanying text.

<sup>130</sup> Zeke Barlow & Cheri Carlson, *Much Has Changed Since King's Death Four Years Ago, But Enough?*, VENTURA COUNTY STAR (Feb. 12, 2012, 5:00 AM), <http://www.vcstar.com/news/2012/feb/12/much-has-changed-since-kings-death-four-years>.

<sup>131</sup> Catherine Saillant, *Student Gets 21 Years for Shooting Gay Classmate*, L.A. TIMES, Dec. 19, 2011, <http://articles.latimes.com/2011/dec/19/local/la-me-gay-slaying-20111220>. Several jurors were again in court for the sentencing hearing wearing “Save Brandon” bracelets. Under the recently passed Senate Bill 260, qualifying juvenile offenders are eligible for a parole hearing earlier under new guidelines. S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013).

<sup>132</sup> A third category, felony murder, does not apply to the King murder case and we will not discuss it here.

<sup>133</sup> Sentences for intentional homicides are death, LWOP, or twenty-five years to life. CAL. PENAL CODE § 190 (West 2014).

<sup>134</sup> Other states follow Model Penal Code (MPC) principles or some hybrid of the MPC and common law. DRESSLER, *supra* note 21, § 31.02[D][1], at 500. Unintended homicides include extremely reckless killings, sometimes termed “depraved heart” murder, which usually is punished as second-degree murder. In most common law jurisdictions, killings committed negligently rather than extremely recklessly are punished as involuntary manslaughter. *See id.* § 31.02[D][2], at 501–02.

King in the head.<sup>135</sup> So for our purposes, the law of intentional killings governs.

In California, as in most common law states, an intentional killing occurs when the defendant has the goal of killing the victim or when the defendant knows that the defendant's act or omission will almost certainly lead to the victim's death.<sup>136</sup> For example, a jury could find that a stab wound to the chest during a bar fight is an intentional, even if unplanned, killing. Absent other facts, such a killing would constitute second-degree murder. (Some of the jurors in the King murder case apparently supported a second-degree murder conviction.)

If additional facts show that the defendant "premeditated and deliberated" the killing—planned and thought the killing over beforehand—then the murder is raised to first-degree. An intentional killing can also be lowered to voluntary manslaughter, which is punished less severely than murder. If convicted of voluntary manslaughter, McNerney's sentence would have been up to eleven years,<sup>137</sup> as opposed to a sentence of up to life for first-degree murder using a gun.<sup>138</sup>

Brandon McNerney was charged with first-degree murder, which required the jury to find that McNerney acted willfully (intentionally) with premeditation and deliberation.<sup>139</sup> The defense essentially conceded that McNerney intentionally killed King.<sup>140</sup> As discussed in detail in Part III, there was substantial evidence that McNerney premeditated and deliberated Larry King's death. The prosecutor went so far as to include a "lying-in-wait" allegation, a particular kind of

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<sup>135</sup> *Id.* § 31.03[B][1], at 502.

<sup>136</sup> *Id.*

<sup>137</sup> CAL. PENAL CODE § 193 (West 2014). If the jury had found that McNerney also committed a hate crime, the sentence would have been increased by one to three years. CAL. PENAL CODE § 422.75 (West 2010 & Supp. 2014).

<sup>138</sup> Fox Telephone Interview, *supra* note 71.

<sup>139</sup> As the judge instructed the jury:

The word "deliberate," which relates to how a person thinks, means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" relates to when a person thinks and means considered beforehand. One premeditates by deliberating before taking action.

Jury Instructions, *People v. McNerney*, No. 2008005782 (Cal. Super. Ct. 2011) [hereinafter McNerney Jury Instructions] (copy on file with authors) (based on California Jury Instructions Criminal (CALJIC) No. 8.20 (Fall 2008 Revision)).

<sup>140</sup> The defense did not and could not argue that someone other than McNerney killed King—there were numerous witnesses to the shooting, and McNerney confessed to the shooting upon his arrest. Nor could the defense argue that the killing was accidental—the act of putting a gun to the back of someone's head and pulling the trigger twice shows a deliberate intention to kill. See DRESSLER, *supra* note 21, § 31.03[B][1], at 502–03.



aggravating circumstance that, in many states, including California, raises the murder to first degree.<sup>141</sup>

## B. *Voluntary Manslaughter*

### 1. Definition and Theory

One of the principal bases for a voluntary manslaughter conviction is “heat of passion,” also known as “provocation.” This is a partial defense; if the jury accepts the defense, the defendant is not acquitted, but rather the crime is lowered from murder to voluntary manslaughter.<sup>142</sup>

McInerney’s defense at trial was that he acted in the heat of passion and that, therefore, the jury should find him liable for voluntary manslaughter rather than murder. As developed at the trial, this was an elaborate defense that focused principally upon King’s actions—actions that the defense repeatedly termed “sexual harassment”—in the days leading up to and on the day of the killing. The defense also emphasized McInerney’s age, family background, and the purported failure of school officials to change King’s behavior. At its core, the defense theory was that the victim engaged in behavior that was so provocative that it led the defendant to kill the victim while in the “heat of passion.”

There is disagreement over the theoretical basis for the provocation defense. Some argue that provocation is a “justification defense,” such as self-defense, in that the victim was responsible for causing his own death. Others argue that it is an “excuse” defense, such as insanity, demonstrating that the defendant acted with reduced culpability.<sup>143</sup> As our discussion of the trial showed, both theories seemed to be at play in

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<sup>141</sup> CAL. PENAL CODE § 189 (West 2014). As noted *supra* note 69, in California such an allegation also automatically renders a juvenile eligible for trial as an adult. CAL. WELF. & INST. CODE § 602 (West 2008 & Supp. 2014).

<sup>142</sup> See CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 18 (2003).

<sup>143</sup> California Penal Code section 195 itself labels the defense as an excuse defense. For an excellent overview of this debate, see DRESSLER, *supra* note 21, § 31.07[C][1], at 531–34. Dressler concludes that the dominant modern view is that “the anger or other emotion of a provoked defendant is justifiable or, at least, excusable; the homicide is wholly unjustifiable, but partially excusable.” *Id.* § 31.07[C][2][b], at 533; see also Joshua Dressler, Essay, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959 (2002); Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27 (2009). Others have argued that heat of passion is a justification defense, or some combination of justification and excuse. See Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1047–55 (2011). As we discuss in the next Part, some of the jurors in the King case clearly considered that McInerney was justified in shooting King because those jurors considered King to be the aggressor. See *infra* notes 183–85, 235 and accompanying text.

the King murder case—according to some jurors, King brought on his own death by his (as one juror termed it) “deviant” behavior;<sup>144</sup> according to others, McInerney’s actions were excusable because it was reasonable for him to be enraged by King’s flirtations.<sup>145</sup>

Here are portions of the heat of passion defense jury instructions that the judge gave in the Larry King murder case:

The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily *reasonable person* in the same circumstances. A defendant is not permitted to set up [his] . . . own standard of conduct and to justify or excuse [himself] . . . because [his] . . . passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] . . . were such as also would have aroused the passion of the ordinarily *reasonable person* faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time. . . .

If there was provocation, whether of short or long duration, but of a nature *not normally sufficient* to arouse passion, . . . and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.

Neither fear [nor] revenge . . . constitute[s] the heat of passion referred to in the law of manslaughter.<sup>146</sup>

The instructions present a fairly typical outline of the provocation defense in states such as California, where the defense is applied broadly rather than narrowly.<sup>147</sup> Under this approach, the provocation defense requires that the jury find several elements:

- (1) a legally adequate provocation (“the provocation must be of the character and degree as naturally would excite and arouse the passion”);
- (2) the defendant must have been acting “under the influence of that sudden quarrel or heat of passion” at the time of the killing; and
- (3) a reasonable person would have been acting in the heat of passion in these circumstances (“The heat of passion [would] reduce a homicide to manslaughter . . . in the mind of an ordinarily *reasonable person* in the same circumstances”).

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<sup>144</sup> See Lisa S. Letter, *supra* note 2.

<sup>145</sup> See McElhaney & Black Interview, *supra* note 17.

<sup>146</sup> McInerney Jury Instructions, *supra* note 139 (based on CALJIC Nos. 8.42 & 8.44 (Fall 2013) (emphasis added)).

<sup>147</sup> *Id.*

In addition, as the instructions make clear, acting out of a desire for revenge as payback does not constitute acting in the heat of passion. As the instructions state, a defendant who “act[s] deliberately and from choice, whether the choice is reasonable or unreasonable,” is guilty of murder rather than voluntary manslaughter.

## 2. The “Reasonable Person”

Taken together, the above jury instructions reflect generally accepted common law principles<sup>148</sup> that ask the jury to apply an objective, reasonable person standard (usually termed the “reasonable person” approach to provocation). The criminal law has long struggled with whether to add subjective characteristics to this test. The general rule in common law states is that the reasonable person is truly an objective test.<sup>149</sup>

But the facts of the King killing sorely test our understanding of the “reasonable person.”

The law in California—as controversial and misguided as it may be—requires that a person tried as an adult be held to the standards of the generic “reasonable” person, not to the standards of the reasonable person of \_\_\_\_ age.<sup>150</sup> So the key question in the Larry King murder case is whether the concept of a “reasonable” person includes the sex, sexual orientation, and gender identities of the victim and the defendant. That is, should the jury have considered, as part of its reasonableness

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<sup>148</sup> See DRESSLER, *supra* note 21, § 31.07[B][2][b][i], at 526. The California approach to the heat of passion defense is a liberal one in that it allows the defense in circumstances when a provocation instruction would not be given in states that follow a narrow approach that limits the defense to certain specific categories of provoking incidents. Traditionally, these included (1) violent assault or battery, (2) mutual combat, (3) seeing a serious felony committed against a close relative, (4) illegal arrest, and (5) seeing a spouse (originally limited to a husband witnessing his wife) commit adultery. See *id.* § 31.07[B][2][a], at 525. The MPC uses a much broader approach to this type of defense than either of the common law approaches. The MPC’s extreme emotional disturbance defense does not require any actual provocation for the murder to be mitigated to manslaughter. *Id.* at § 31.10[C][3][b]. Although the MPC has been very influential nationwide, a number of states that have modeled their penal codes on the MPC have reverted to the common law approach to voluntary manslaughter, principally based upon the view that the MPC extreme emotional disturbance defense allows the defense in too many cases—especially those involving domestic violence against women. See Nikolette Y. Clavel, Note, *Righting the Wrong and Seeing Red: Heat of Passion, the Model Penal Code, and Domestic Violence*, 46 NEW ENG. L. REV. 329 (2012).

<sup>149</sup> See DRESSLER, *supra* note 21, § 10.04[D][2][d], at 134.

<sup>150</sup> As a general principle, juveniles tried in adult court are to be held accountable to adult standards. See Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 503 (2012); see also DRESSLER, *supra* note 21, § 31.07[B][2][b][ii], at 529 (courts are generally unwilling “to subjectivize the ‘reasonable/ordinary person’ standard when the factor in question is used to assess the level of self-control to be expected of the defendant”).

determination, that McInerney was a heterosexual male and that King identified as a gay male (and may have been, as at least one juror seems to have believed, transgender)?<sup>151</sup>

### 3. The “Cooling Off” Period

There is another key aspect to the heat of passion defense that goes to the core of McInerney’s defense—the “cooling off” period. Here is the King case jury instruction on this component of the defense:

Where the influence of the sudden quarrel or heat of passion has ceased to obscure the mind of the accused, and *sufficient time has elapsed* for angry passion to end and for reason to control [his] . . . conduct, it will no longer . . . reduce the killing to voluntary manslaughter.

The question, as to whether the cooling period has elapsed and reason has returned, is not measured by the standard of the accused, but the *duration of the cooling period is the time it would take the average or ordinarily reasonable person to have cooled the passion*, and for that person’s reason to have returned.<sup>152</sup>

Under California law, then, the provocation defense will be unsuccessful if (1) the defendant had “cooled off” between the time of the provoking incident or incidents or (2) if sufficient time elapsed for a “reasonable person” to have “cooled off” even if the particular defendant had not cooled off. Because all or nearly all (depending on one’s view of the facts, as discussed in Part III below) of King’s alleged provocative behavior occurred prior to the day of the killing, the “cooling off” element played a key role in McInerney’s trial. It is important to note that California law is unusually relaxed among common law jurisdictions with respect to the cooling off period.<sup>153</sup>

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<sup>151</sup> See Lisa S. Letter, *supra* note 2 (“You all know the victim had a long history of deviant behavior. Yes, I said deviant. Not his sexual orientation—deviant behavior.”).

<sup>152</sup> McInerney Jury Instructions, *supra* note 139 (based on CALJIC No. 8.43 (Fall 2013) (emphasis added)).

<sup>153</sup> See *People v. Berry*, 556 P.2d 777 (Cal. 1976).

4. Gay Panic as Heat of Passion<sup>154</sup>

To evaluate why the Larry King murder trial turned out as it did, we need first to understand the particular version of provocation argued to the jury here: the gay panic defense. This Section first surveys the background of the gay panic defense, examining the views of the principal critics of the defense. The Section then examines how the gay panic defense played out during the Larry King murder trial.

We also note that a related defense, termed “trans panic,” sometimes arises when the homicide victim was transgender. “Trans panic” usually arises where a heterosexual male is involved in a sexual encounter with a person who presents as female but has male genitalia.<sup>155</sup> Although there was substantial speculation that Larry King was transgender, King’s case does not fit the “trans panic” scenario. Instead, the defense portrayed McInerney’s alleged outrage at King’s dress and behavior as aggravating factors in an unwanted same-sex sexual advance (i.e., gay panic) case.

The gay panic defense is, needless to say, controversial. Some argue that the defense appropriately reflects a defendant’s lowered culpability. Under this view, the heat of passion defense assumes that the defendant should be partially excused because violent behavior is understandable—if not justified—in certain circumstances.<sup>156</sup> And, if the emotions of a reasonable person (almost always a reasonable man in this context) would be inflamed by an unwanted gay sexual advance, then the law should take this reality into account.<sup>157</sup> Others argue that the provoking party’s behavior partly justifies the killing.<sup>158</sup>

Opponents counter that this argument assumes that it is reasonable to be homophobic; unwanted sexual advances rarely lead to heat of passion claims in circumstances other than a gay male allegedly hitting

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<sup>154</sup> Gay panic can be raised to support four different defenses: provocation, diminished capacity, insanity, and self-defense. ABA, GAY AND TRANS PANIC DEFENSES REPORT 1–2 (2013) [hereinafter ABA REPORT], available at <http://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>; Lee, *supra* note 3, at 491–99; see Peter Nicolas, “They Say He’s Gay”: The Admissibility of Evidence of Sexual Orientation, 37 GA. L. REV. 793, 815–16 (2003); Yvonne Zylan, *Passions We Like . . . and Those We Don’t: Anti-Gay Hate Crime Laws and the Discursive Construction of Sex, Gender, and the Body*, 16 MICH. J. GENDER & L. 1, 44 (2009); Teresa Marie Garmon, Note, *The Panic Defense and Model Rules Common Sense: a Practical Solution for a Twenty-First Century Ethical Dilemma*, 45 GA. L. REV. 621, 625 (2011).

<sup>155</sup> See Lee & Kwan, *supra* note 39, at 105; Tilleman, *supra* note 39, at 1686; Bradford Bigler, Comment, *Sexually Provoked: Recognizing Sexual Misrepresentation as Adequate Provocation*, 53 UCLA L. REV. 783, 798 (2006).

<sup>156</sup> See *supra* note 143.

<sup>157</sup> See Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 754–55 (1995).

<sup>158</sup> See *supra* note 143.

on a straight male.<sup>159</sup> And our legal system does not accept race panic, religion panic, or heterosexual panic as culpability-reducing defenses to violence.<sup>160</sup>

Much of the discussion over the gay panic defense necessarily occurs in a relative vacuum; there are few published judicial decisions analyzing the defense.<sup>161</sup> We are left with a discussion principally based upon anecdotal reports of trials where the defense was allowed (such as the King case) or was not allowed but there was no reported decision (such as the Matthew Shepard case).<sup>162</sup> We, therefore, rely largely on those anecdotal accounts of gay panic cases and the scholarly analyses of them.

Although a detailed history of the gay panic defense is beyond the scope of this Article,<sup>163</sup> it is important to provide a brief background of the defense in order to provide the context for our “gay shield law” proposal. The use of the gay panic defense in the criminal justice system started with a long-held view that homosexuality is a psychological disorder.<sup>164</sup> The American Psychiatric Association did not formally remove homosexuality from the *Diagnostic and Statistical Manual of Psychiatric Disorders* until 1973.<sup>165</sup> In this framework, a straight male who was subjected to an unwanted advance by a mentally ill person could fairly easily assert heat of passion.

Over time, the gay panic defense has been sporadically successful in criminal cases when based on provocation.<sup>166</sup> Scholars have theorized that it has been successful because juries may believe that it is reasonable for a heterosexual man to react violently to a nonviolent homosexual advance and that, “[i]f the average heterosexual man would react

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<sup>159</sup> Lee, *supra* note 3, at 535. For example, homicide cases involving claims of lesbian panic are rarely seen. *Id.* at 488. Mison reported finding no cases of “lesbian panic.” Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 135 n.7 (1992).

<sup>160</sup> Casey Charles, *Panic in the Project*, 18 LAW & LITERATURE 225, 233 (2006).

<sup>161</sup> Appellate courts generally write on the issue when a trial judge has denied a defense request to argue voluntary manslaughter based on gay panic and the defendant has been convicted and appeals. Because of double jeopardy considerations, in cases where the defense was successful, the prosecution cannot appeal and ask for a new trial where the defense would be excluded. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 25.3, at 1222–26 (5th ed. 2009).

<sup>162</sup> See, e.g., Dave Cullen, *Overruled*, SALON (Oct. 28, 1999, 12:00 PM), [http://www.salon.com/1999/10/28/laramie\\_4](http://www.salon.com/1999/10/28/laramie_4).

<sup>163</sup> For excellent historical overviews, see Lee, *supra* note 3 and Mison, *supra* note 159.

<sup>164</sup> Garmon, *supra* note 154, at 631.

<sup>165</sup> *Id.*; see also 81 Words, THIS AM. LIFE (Jan. 18, 2002), <http://www.thisamericanlife.org/radio-archives/episode/204/81-words>.

<sup>166</sup> Garmon, *supra* note 154, at 634.

violently to a gay man's sexual advance, then arguably such a response is reasonable."<sup>167</sup>

Nearly twenty years ago, Professor Joshua Dressler wrote the article that asserts the most widely-cited modern argument in favor of allowing a defendant to argue provocation in cases of a "nonviolent homosexual advance."<sup>168</sup> Responding to Robert Mison's article advocating the complete abolition of the defense,<sup>169</sup> Dressler asserts that the heat of passion in such cases is not, contrary to Mison's claim, simply based on homophobia. Dressler begins with the assumption that a reasonable male—which he defines as the "ordinary" male—is different from a reasonable female in responding to sexual advances,<sup>170</sup> and then argues that a heterosexual male may be reasonably provoked when subjected to a homosexual advance: "if the sexual advance is homosexual in nature, and the recipient of the advance is exclusively heterosexual, the fact that the advance is homosexual in character will be a reason for the recipient's angry reaction."<sup>171</sup> Dressler concludes that the killer's "distaste" for homosexual acts could mean that it was reasonable for a heterosexual male to be provoked by a gay advance even if the killer was not homophobic.<sup>172</sup>

In the article that led to Dressler's piece in response, Robert Mison asserts that the gay panic defense is both a "misguided application of provocation theory and a judicial institutionalization of homophobia."<sup>173</sup> Mison opines that, by allowing the defense, the judiciary is reinforcing and institutionalizing violent prejudice at the expense of norms of self-control and tolerance.<sup>174</sup> The defense creates a lower standard of protection against violence for a particular class of victims.<sup>175</sup> For these reasons, trial judges should hold that homosexual advances are, as a matter of law, insufficient provocation to incite a reasonable person to kill and should not allow the defense to go to the jury in such circumstances.<sup>176</sup>

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<sup>167</sup> Lee, *supra* note 3, at 505; *id.* at 482–85 (the original argument was that the reason for the attack was the defendant's own latent, disavowed, homosexual desires, which became unmanageable and turned into violence, a view that is no longer widely accepted).

<sup>168</sup> Dressler, *supra* note 157.

<sup>169</sup> Mison, *supra* note 159, at 177–78.

<sup>170</sup> Dressler, *supra* note 157, at 735–36.

<sup>171</sup> *Id.* at 755.

<sup>172</sup> *Id.* at 756 ("A person may find homosexual conduct distasteful, but not hate homosexuals or want harm to befall them in their personal lives.").

<sup>173</sup> Mison, *supra* note 159, at 136.

<sup>174</sup> *Id.* at 158 ("In seeking to avail himself of the provocation defense the defendant hopes that the typical American juror—a product of homophobic and heterocentric American society—will evaluate the homosexual victim and homosexual overture with feelings of fear, revulsion, and hatred. The defendant's goal is to convince the jury that his reaction was only a reflection of this visceral societal reaction: the reaction of a 'reasonable man.'").

<sup>175</sup> *Id.* at 136.

<sup>176</sup> *Id.*

In her article examining the gay panic defense, Cynthia Lee makes an important contribution that seeks to find a middle ground.<sup>177</sup> Professor Lee objects to simply banning provocation defenses based on homosexual advances.<sup>178</sup> Her principal argument is that a ban would be counterproductive.<sup>179</sup> Defense attorneys will find more subtle ways to get the same idea across to the jury.<sup>180</sup> And, as Lee and Kwan argue in their article on trans panic, if the jury is faced with only murder or acquittal as options, then it may acquit in the absence of a manslaughter instruction.<sup>181</sup> The argument is that prosecutors should aggressively counter gay panic arguments and that such an approach will produce a less biased outcome than any legislative or judicial ban.<sup>182</sup>

Ultimately, we determined not to revisit the debate over the abolition of the defense. We do believe, however, that the defense in its current form entails substantial risks. For example, although we find Professor Lee's arguments persuasive in many respects, we are less sanguine than she about the effectiveness of prosecutorial counter-strategies. In the King case, for example, the prosecutor sought to counter the gay panic argument at every turn, characterizing the defense as gay panic and admonishing the jurors not to let possible bias towards King affect their decision.<sup>183</sup> And the judge specifically instructed the jury to not allow prejudice based upon various factors, including the sexual orientation and gender identity of the victim, to affect the outcome.<sup>184</sup>

Nonetheless, it was abundantly clear from our interviews with the jurors, and from their public statements, that Larry King's sexual orientation and identity strongly affected the outcome of the trial.<sup>185</sup> In this light, the best remedy is a legislative limitation on the evidence offered in support of "gay panic," as we propose in Part IV below.

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<sup>177</sup> Lee, *supra* note 3. For a variation on Lee's proposed approach, see Perkiss, *supra* note 48, at 784 (arguing that instead of banning the defense, prosecutors should be allowed to employ expert psychological testimony to combat the gay panic defense).

<sup>178</sup> Lee, *supra* note 3, at 476–77.

<sup>179</sup> *Id.* at 522. For an analysis of Lee's approach, see Tilleman, *supra* note 39, at 1686.

<sup>180</sup> Lee, *supra* note 3, at 522.

<sup>181</sup> See Lee & Kwan, *supra* note 39.

<sup>182</sup> *Id.*

<sup>183</sup> See Saillant, *supra* note 103; Zeke Barlow, *Defense Rests, Closing Arguments Could Begin This Week in McInerney Trial*, VENTURA COUNTY STAR (Aug. 22, 2011, 6:58 PM), <http://www.vcstar.com/news/local-news/crime/defense-rests-in-brandon-mcinerney-murder-trial>.

<sup>184</sup> "Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim . . . or defendant based upon his or her . . . gender identity, or sexual orientation." CAL. PENAL CODE § 1127h (West 2004 & Supp. 2014). According to the prosecutor, the judge gave this instruction in the Larry King murder trial. See Lee & Kwan, *supra* note 39.

<sup>185</sup> See *supra* notes 18–21 and accompanying text.



## 5. The Future of the Gay Panic Defense

We might ask whether times have sufficiently changed, since this debate began over twenty years ago, that the gay panic defense might be seen as outdated. The advances in gay rights, including the U.S. Supreme Court's decisions in *Lawrence v. Texas*<sup>186</sup> (holding sodomy laws unconstitutional) and *United States v. Windsor* (holding the Defense of Marriage Act unconstitutional),<sup>187</sup> the repeal of "Don't Ask, Don't Tell,"<sup>188</sup> and the rapid advance in same-sex marriage rights,<sup>189</sup> could lead us to question whether, in today's society, any "reasonable" man would kill in response to a gay advance.

Many have long argued for a complete abolition of the gay panic defense.<sup>190</sup> This position seems to be gaining some momentum. In 2013, the American Bar Association unanimously approved a resolution calling for legislatures to ban the gay and trans panic defenses.<sup>191</sup> And the California legislature has enacted legislation banning these defenses.<sup>192</sup>

As others have noted, however, a complete ban of the defense might be counterproductive. Even if the defense were abolished, the defense could argue gay panic through the back door, as occurred in the Matthew Shepard case.<sup>193</sup> And banning the defense would deprive the

<sup>186</sup> 539 U.S. 558 (2003).

<sup>187</sup> 133 S. Ct. 2675 (2013).

<sup>188</sup> See generally Michelle Benecke, *Turning Points: Challenges and Successes in Ending Don't Ask, Don't Tell*, 18 WM. & MARY J. WOMEN & L. 35 (2011).

<sup>189</sup> *History and Timeline of the Freedom to Marry in the United States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage> (last updated Jan. 16, 2015).

<sup>190</sup> Mison, *supra* note 159, at 177–78; cf. Lee, *supra* note 3, at 476–77.

<sup>191</sup> Here is the ABA resolution advocating abolition of the gay and trans panic defenses:

RESOLVED, That the American Bar Association urges federal, tribal, state, local and territorial governments to take legislative action to curtail the availability and effectiveness of the "gay panic" and "trans panic" defenses, which seek to partially or completely excuse crimes such as murder and assault on the grounds that the victim's sexual orientation or gender identity is to blame for the defendant's violent reaction. Such legislative action should include: . . .

(b) Specifying that neither a non-violent sexual advance, nor the discovery of a person's sex or gender identity, constitutes legally adequate provocation to mitigate the crime of murder to manslaughter, or to mitigate the severity of any non-capital crime.

ABA RESOLUTION, *supra* note 21. The resolution also urges adoption of anti-bias jury instructions of the sort required in California, which state, "Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim . . . or defendant based upon his or her . . . gender identity, or sexual orientation." ABA REPORT, *supra* note 154, at 13 & n.102 (citing CAL. PENAL CODE § 1127h (West 2004 & Supp. 2014)). For an analysis of this proposal, see Lee & Kwan, *supra* note 39.

<sup>192</sup> See *supra* note 23.

<sup>193</sup> Lee, *supra* note 3, at 525. The judge barred use of the gay panic defense after opening statements, which included a provocative portrayal of Shepard as a sexual harasser and

jury of an alternative to a murder conviction, thus perhaps leading to more acquittals in gay panic cases.<sup>194</sup>

In addition, banning the defense might simply lead defense counsel to shift tactics. In the Larry King case, for example, the defense repeatedly asserted that its defense was “sexual harassment,” not gay panic. If a judge were to accept that distinction, then gay panic could be asserted in substance if not in form—as happened in the King case.<sup>195</sup>

Whatever one’s position on whether the defense should be abolished—and on that point we are agnostic for the purposes of this Article—our view is that the gay panic defense will remain the law in the vast majority of states.<sup>196</sup> As the King case shows, juries remain willing to accept inflammatory portrayals of gay victims as wrongdoers.<sup>197</sup>

Perhaps changes in societal norms have even made the issue more complex; jurors today may understand that they should not explicitly reveal their anti-gay biases during voir dire, but may still act on those biases during deliberations.<sup>198</sup> This may well have occurred during voir dire for the King murder trial jury. As the prosecutor told us:

[I] stood in front of the panel, raising [my] hands as if [I were] holding something, and said: “Pretend I’m holding a picture of two men kissing. Think about it; give me your reaction on a scale. How far up the meter do your emotions go?” [I described a scale ranging]

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methamphetamine user. Nonetheless, the defense subsequently used the testimony of two witnesses to depict Shepard as sexually aggressive and concluded that Shepard “deserved the beating he got.” *Id.* The defense further relied on the “stereotypical images of gay men as sexual deviants and sexual provocateurs.” *Id.*

<sup>194</sup> See Lee & Kwan, *supra* note 39.

<sup>195</sup> Maeve Fox, the prosecutor in the case, made this exact point in response to a question asking for her views on the California legislation abolishing the defense. According to Fox, the legislation may prove to have little practical impact because defense counsel can simply label the gay panic defense as something else; in the Larry King case, for example, the defense stated that it was simply asserting a “sexual harassment” defense while arguing gay panic in substance. Fox Telephone Interview, *supra* note 71. Some jurors latched on to King’s alleged “sexual harassment” when voting to find McInerney not guilty of murder based on provocation. See Mary McNamara, *Review: ‘Valentine Road’ Offers Clear-Eyed View of Larry King Murder*, L.A. TIMES, Oct. 6, 2013, <http://articles.latimes.com/2013/oct/06/entertainment/la-et-st-valentine-road-20131007> (some jurors believed “that Larry had contributed to his death by sexually harassing Brandon while the school did nothing” and one said that “[Brandon] was just solving a problem”). It is hard to imagine that jurors would have characterized King’s alleged flirtations with McInerney as “sexual harassment” had the jury not viewed King as gay and McInerney as straight. See *supra* note 21 and accompanying text.

<sup>196</sup> See *infra* Part IV.

<sup>197</sup> For another example, in the trial of Joseph Biedermann, the jury accepted the argument that gay panic justified the killing of the victim, whom the defendant stabbed sixty-one times. See Garmon, *supra* note 154, at 625–26.

<sup>198</sup> Indeed, the prosecutor believes that this may well have happened in the Larry King murder case. Fox Telephone Interview, *supra* note 71.

from finding the imaginary image “completely inoffensive” to “completely disgusting.”<sup>199</sup>

Gauging facial reactions, the prosecutor believes that she got honest responses from the first few jurors she questioned but, as is often the case with voir dire, “by the time, you reach the rest of them, they know it’s coming. They could gauge the reaction [I wanted].” She continued, “Some people were honest and admitted that the idea of two men kissing ‘makes me want to throw up.’” But others were not candid, perhaps because they wanted to be on the jury in a high profile case.<sup>200</sup>

Based both on the King murder trial and the other gay panic cases we studied, we believe that the defense will continue to be asserted. And even if the defense were formally abolished, evidence evoking gay panic may come in either because a judge deems it relevant (as in the Matthew Shepard case)<sup>201</sup> or because the defense labels it something other than a gay panic defense (as in the Larry King case). Further, evidence in support of the defense is likely to be highly inflammatory. Finally, even if a prosecutor seeks to minimize the impact of anti-gay rhetoric by careful questioning during voir dire, such questioning may be of minimal help. Before turning to our proposal for a “gay shield” law that would prevent the victim from being placed on trial, we examine use of the gay panic defense in the King case to illustrate the dangers that occur when the defense is raised.

### III. GAY PANIC IN THE LARRY KING MURDER CASE

Our criminal trial process went seriously awry during the Larry King murder trial. In the words of Assistant Principal Joy Epstein, who attended the trial, “The entire trial was about Larry. It wasn’t about Brandon or what Brandon did. Everything was always about Larry. How he dressed, how he acted. The trial focused SO MUCH on [Larry’s] sexual orientation.”<sup>202</sup> This Part examines how the trial of Brandon McInerney essentially turned into a trial of Larry King, laying the groundwork for our gay shield proposal.

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See, e.g., Lee, *supra* note 3, at 525–29.

<sup>202</sup> Epstein Interview, *supra* note 1. Epstein’s own sexual orientation became an issue in the case. See Setoodeh, *supra* note 7, at 45–46.

A. *Evidence of Premeditation and Deliberation*

As discussed in Part II above, the defense did not contest that McInerney intended to kill King when he shot King twice in the back of the head, pausing briefly between shots.<sup>203</sup> So the principal issue for the jury was whether the defendant's liability for this intentional killing—which alone would constitute second-degree murder<sup>204</sup>—should be raised to first-degree murder based upon premeditation and deliberation or mitigated to voluntary manslaughter based upon heat of passion.

Premeditated murder and voluntary manslaughter based on heat of passion are two fundamentally different crimes, at least in theory. The “deliberation” required for first-degree murder requires some period (however short) during which the defendant coolly and calmly reflected upon the killing. Heat of passion, on the other hand, requires that the defendant be in a state of heightened emotion at the time of the killing.<sup>205</sup> Recall, however, that even a defendant who had premeditated and deliberated a killing can be found to have acted in the heat of passion if there was a rekindling of the passion immediately prior to the killing.

The prosecution clearly adduced substantial evidence that McInerney premeditated and deliberated King's death. Under California law, this element requires some prior thought, though the law is imprecise as to the amount of time required for proof of premeditation beyond a reasonable doubt.<sup>206</sup> The California jury instruction reads:

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.<sup>207</sup>

There was uncontested and overwhelming evidence admitted at trial that McInerney thought the killing over beforehand, even articulating his intention an entire day before the shooting:

- (1) The day before the killing, McInerney said to a fellow student, “I’m going to shoot [King];”<sup>208</sup>

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<sup>203</sup> See *supra* notes 135, 140 and accompanying text.

<sup>204</sup> DRESSLER, *supra* note 21, § 31.02[D][2], at 501.

<sup>205</sup> *Id.* § 31.07[B][1], at 524.

<sup>206</sup> See CALJIC No. 8.20 (Fall 2008 Revision).

<sup>207</sup> *Id.*

<sup>208</sup> Saillant, *supra* note 51.

- (2) The day before the shooting, McInerney said to another student, I'm "going to get a gun and shoot [King];"<sup>209</sup>
- (3) The day before the shooting, McInerney said to a third student, "Say goodbye to your friend Larry because you're never going to see him again;"<sup>210</sup>
- (4) The day of the shooting, McInerney retrieved a gun from the house to use to shoot King;<sup>211</sup>
- (5) The day of the shooting, as McInerney was walking towards the car that his father would use to drive him to school, McInerney realized that he had forgotten to bring the gun and walked back into the house to retrieve it, wrapped it in a towel, and placed it in his backpack;<sup>212</sup>
- (6) McInerney sat in class and watched the back of King's head for a number of minutes prior to the shooting;<sup>213</sup> and
- (7) McInerney shot King in the back of the head once, paused for a long enough time for the teacher to say to him "what the hell are you doing[?],"<sup>214</sup> and then fired a second shot into the back of King's head.<sup>215</sup>

In addition, there was evidence from which the jury could have concluded that, during the class in which the killing occurred, McInerney lied to his teacher about having completed his computer assignment so that he would be moved to a chair immediately behind King.<sup>216</sup> Also, the fact that King was not wearing any feminine attire that day reinforces the notion that McInerney had decided to kill King that day regardless of King's actions or behavior.

Despite all this, a majority of the jury found that McInerney had not premeditated and deliberated the killing. Although we are leaving for another day the subject of jury nullification in this case, it is clear based upon juror interviews that a number of them either fundamentally misunderstood the judge's instructions on the law of premeditation or deliberately determined to ignore those instructions. As one juror said, "I do not think it was first-degree murder, however, it was premeditated."<sup>217</sup>

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Chawkins, *supra* note 55.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Setoodeh, *supra* note 7.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* The evidence conflicted on this point. See *supra* notes 58–59 and accompanying text.

<sup>217</sup> Interview with Diane Michaels in VALENTINE ROAD, *supra* note 9, at 1:13:50.

### B. *Evidence of Heat of Passion*

Like many states, California does not limit the provoking behavior to any specific set of categories. At common law, “words alone” do not constitute a legally adequate provocation,<sup>218</sup> and this is still the law in most common law states.<sup>219</sup> Under California law, however, verbal taunting can constitute legally adequate provocation.<sup>220</sup> Even in California, however, words alone are seldom sufficient; the most common circumstance when words alone can suffice is the revelation of adultery.<sup>221</sup>

In fact, we were able to locate only one published California decision upholding provocation based upon “mere words.” That case, *People v. Berry*,<sup>222</sup> is a 1976 California Supreme Court case that is often used to illustrate the law’s evolution towards a broader provocation defense and that has some important parallels to the Larry King murder. In *Berry*, the defendant and victim were newlyweds in a troubled marriage. The provocation defense was based upon two weeks of the wife’s “taunting” of the husband with stories of her feelings for and infidelity with another man.<sup>223</sup> During this period, the defendant twice choked his wife. After the second incident—during which the victim was rendered unconscious and later hospitalized—the husband moved out of their apartment. Three days later he went back to the apartment and waited overnight for his wife. When she returned the next day and saw her husband there, she said to him, “I suppose you have come here to kill me.”<sup>224</sup> After a brief conversation, the victim started to scream; the defendant then strangled her to death with a telephone cord. The trial judge denied the defendant’s request for a provocation instruction, and the jury convicted him of first-degree premeditated murder.

On appeal, the California Supreme Court reversed, holding that the defendant should have been allowed to assert a heat of passion defense. The court noted that words are a sufficient basis for provocation in California, and relied heavily on the testimony of the defense expert witness to establish the provocative nature of the victim’s words. That witness, a psychiatrist, testified that at the time of the killing the defendant “was in a state of uncontrollable rage, completely under the sway of passion.”<sup>225</sup> The psychiatrist also testified that the victim—who

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<sup>218</sup> DRESSLER, *supra* note 21, § 31.07[B][2][b][i], at 526.

<sup>219</sup> *Id.*

<sup>220</sup> See *People v. Berry*, 556 P.2d 777, 780 (Cal. 1976) (citing *People v. Valentine*, 169 P.2d 1, 13–15 (Cal. 1946)).

<sup>221</sup> See, e.g., *id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 779.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 780.

he of course had never met—was suicidal and had provoked her own killing.<sup>226</sup>

In a particularly important holding relevant to the King case, the state in *Berry* argued that the killing could not have been in the heat of passion, as a matter of law, because the defendant waited in the apartment for twenty hours, planning and premeditating the killing. The temporal remove from the provoking behavior would normally render the heat of passion defense unavailable because the law deems a defendant to have “cooled off” when sufficient time passes between the provocation and the killing. The court ruled, however, that upon retrial a jury could find that the victim’s screaming immediately prior to the killing invoked (or rekindled) the previous provocations.

The *Berry* decision has been subject to substantial criticism, largely due to the degree to which the court accepted the defense psychiatrist’s testimony that essentially blamed the victim.<sup>227</sup> Again, there are substantial parallels between the King murder case and *Berry*, for the defense expert in the King murder case essentially reached the same conclusion on a fundamental issue that normally should be reserved for the jury.<sup>228</sup>

The *Berry* case lurked behind the King murder trial from the beginning. It was the only case that the defense cited in its motion asking the judge to allow the defense to argue provocation.<sup>229</sup> As noted above, when the trial judge was considering whether to allow McNerney’s heat of passion defense, the judge remarked, “if I don’t [allow it,] someone upstairs might disagree with me.”<sup>230</sup> This clear reference to appeals courts flagged the specter (in the judge’s mind) of a prolonged trial that resulted in a murder conviction only to be reversed on appeal because of the trial judge’s failure to give the heat of passion instruction.

At this point, it is critical to note that the heat of passion defense at common law required proof that the victim engaged in provoking behavior directed to the defendant or to a defendant’s close family member.<sup>231</sup> Although the move has been away from a narrow,

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<sup>226</sup> See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71, 117 (1992).

<sup>227</sup> See *id.* at 121–25.

<sup>228</sup> As in the King murder case, the psychiatrist’s testimony came perilously close to providing a conclusion on an issue that was ultimately for the jury. See FED. R. EVID. 704(b) (“In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.”); *supra* notes 50, 60, 99.

<sup>229</sup> Memorandum of Points and Authorities in Support of the Court Instructing the Jury on Voluntary Manslaughter at 5, *People v. McNerney*, No. 2008005782 (Cal. Super. Ct. Aug. 23, 2011) (copy on file with authors).

<sup>230</sup> Fox Interview, *supra* note 18.

<sup>231</sup> See LAFAVE, *supra* note 101, § 15.2(b), at 820–21.

“categorical” approach to provocation,<sup>232</sup> heat of passion defenses are nearly always raised based upon provocative behavior directed at the defendant or someone closely associated with the defendant.<sup>233</sup> Every gay panic case that we found—except the Larry King case—followed this pattern.<sup>234</sup>

With respect to allegedly provocative conduct that King directed at McInerney, the defense adduced the following evidence:

- (1) King’s blowing of a kiss to McInerney at one point and possibly saying “love you” to him;<sup>235</sup> and
- (2) The testimony of the defense psychologist that it was reasonable for a fourteen-year-old boy to “snap” and respond violently in McInerney’s situation.

The defense psychiatrist also testified that McInerney told him that King had asked McInerney to “be my Valentine,” though no witnesses testified that they heard this statement. Both before and during the trial, the defense repeatedly characterized King’s behavior towards McInerney as “sexual harassment” and “bullying.”

In addition, the defense adduced the following evidence in support of the heat of passion defense, even though this alleged behavior was not directed towards McInerney:

- (1) King’s occasional use of feminine attire during the timeframe leading up to the killing, in particular King’s use of makeup and his jewelry and shoes;<sup>236</sup>
- (2) King’s possession of the green prom dress that his teacher gave him;<sup>237</sup>
- (3) King’s history since fifth grade of “sexually harassing” other boys by making flirtatious comments;<sup>238</sup>

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<sup>232</sup> See CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 345–46 (3d ed. 2014).

<sup>233</sup> Even the broader approach to provocation requires that the provocation be directed to the defendant or someone associated with the defendant, usually a close family member. See LAFAYE, *supra* note 101, § 15.2(b)(7), at 826.

<sup>234</sup> The only case we found where the provocation was not directed at the defendant was *Vujosevic v. Rafferty*, 844 F.2d 1023 (3d Cir. 1988), where the alleged gay advance was directed to the defendant’s friend.

<sup>235</sup> Fox Interview, *supra* note 18. Apparently, the judge also allowed the uncorroborated testimony of the defense psychologist that King had said to McInerney on the day of the killing, “What’s up, baby?” A number of jurors seemed to accept the characterization that King was “sexually harassing” and “bullying” McInerney. See Lisa S. Letter, *supra* note 2 (“[I]t is my firm belief that this young man reacted to being bullied and being the target of Larry King’s sexual harassment.”).

<sup>236</sup> Chawkins, *supra* note 55.

<sup>237</sup> Saillant, *supra* note 95.

<sup>238</sup> Barlow, *supra* note 82.



- (4) King's "flaunting" of his sexuality;<sup>239</sup>
- (5) King's "parading" around school while wearing feminine attire;<sup>240</sup> and
- (6) King's statement to a fellow student (not McInerney) the day of the shooting, "Call me Leticia" or "I've changed my name to Leticia," while McInerney was sitting eight to ten feet away.<sup>241</sup>

The next Section examines whether, as a matter of law, it was appropriate for the judge to allow the heat of passion defense on these facts.

### C. *Heat of Passion as Legally (Un)Justified in the King Case*

Should the trial judge have allowed the heat of passion defense in the King murder case? Under established law, the answer is "no" because: (1) there was no legally adequate provocation, and (2) even if there was a legally adequate provocation, McInerney "cooled off" as a matter of law. We found no judicial decisions holding that a gay panic/heat of passion defense should be allowed where the provocation was, as the defense alleged in the King case, a non-sexually explicit advance. There was no evidence that King's alleged advances towards McInerney were remotely sexually explicit in nature.

Under prevailing law, the defense in a homicide case should very rarely be allowed to argue provocation based upon "gay panic."<sup>242</sup> Any gay panic defense should require that the defendant adduce evidence of a sexually explicit advance, which will usually [or always] be physical in nature. No one, of whatever age, should be able to argue heat of passion based upon flirtatious comments like "love you," or "be my Valentine."

The prevailing law in most common law jurisdictions is that mere words are legally insufficient provocation.<sup>243</sup> The two exceptions that seem to exist are when (1) the victim uses words that are informational (almost always, the revelation of adultery) or (2) the victim makes an unwanted gay sexual advance.<sup>244</sup> The *Berry* case falls into the first

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<sup>239</sup> Saillant, *supra* note 83.

<sup>240</sup> Fox Interview, *supra* note 18; Interview with Marta Cunningham, in Culver City, Cal. (May 13, 2013).

<sup>241</sup> Interview with Donald Hoagland in VALENTINE ROAD, *supra* note 9, at 1:08:15.

<sup>242</sup> See, e.g., Alexis Kent, Comment, *A Matter of Law: The Non-Violent Homosexual Advance Defense is Insufficient Evidence of Provocation*, 44 U.S.F. L. REV. 155, 156 (2009) (claiming courts should require "a violent act on the part of the victim before giving a jury the manslaughter instruction").

<sup>243</sup> DRESSLER, *supra* note 21, § 31.07[B][2][b][i], at 526 ("[O]ne common law rule that has persisted in most non-Model Penal Code jurisdictions is that 'words alone' do not constitute adequate provocation.").

<sup>244</sup> See LAFAVE, *supra* note 101, § 15.2(b)(6), at 824.

category, with the wife's revelation of adultery as the classic example of this sort of provocation.<sup>245</sup>

Gay panic as a form of "mere words" provocation is usually limited to overt sexual overtures that are extremely verbally explicit—requesting specific sexual acts—in nature. Without this limitation, gay panic exists as a special exception to even the broadest common law limitations on the provocation defense. Gay panic, when allegedly provoked by a physical advance and not merely a verbal advance, would also qualify; indeed, such an advance could fall within the traditional common law provocation categories of assault or battery.<sup>246</sup>

With one exception discussed below, all of the high-profile gay panic cases we reviewed, including those reported in the press but where there was no written opinion on the issue, involved direct sexual overtures. The vast majority also involved direct physical contact.

Consider *Schick v. State*,<sup>247</sup> which Mison discusses in his article. In that case, the defendant successfully argued heat of passion where the provocation was both explicitly sexual and physical; according to the defense, the defendant hitched a ride with the victim, during which the victim offered to perform oral sex on the defendant. Later, after the two had gotten out of the car, the victim pulled down his pants and underwear and attempted to embrace the defendant. The defendant beat the victim to death.<sup>248</sup> In another case, the successful provocation defense was based upon the victim's explicit request that the defendant take money in exchange for sex.<sup>249</sup> In a third case, the victim made a sexually explicit advance towards the defendant's friend, and the defendant then participated in beating the victim.<sup>250</sup>

The press has reported on similar cases. In the most highly publicized gay panic case in U.S. history, the defendants attempted to assert provocation based upon alleged sexually explicit advances and touching (licking an ear and grabbing the crotch) by the victim, Matthew Shepard, whom they murdered in 1998.<sup>251</sup> The judge in that case denied the defendants' request to argue heat of passion based upon

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<sup>245</sup> See *People v. Ambro*, 505 N.E.2d 381, 382–83 (Ill. App. Ct. 1987).

<sup>246</sup> See LAFAVE, *supra* note 101, § 15.2(b)(1), at 821.

<sup>247</sup> 570 N.E.2d 918, 921–22 (Ind. Ct. App. 1991); see Mison, *supra* note 159, at 134–35 (citing *Schick*).

<sup>248</sup> *Schick*, 570 N.E.2d at 921–22.

<sup>249</sup> *Mills v. Shepherd*, 445 F. Supp. 1231 (W.D.N.C. 1978) (victim allegedly offered the defendant money in exchange for sex; defendant convicted of voluntary manslaughter).

<sup>250</sup> *Vujosevic v. Rafferty*, 844 F.2d 1023 (3d Cir. 1988).

<sup>251</sup> The Shepard case continues to fascinate, and to generate controversy. See STEPHEN JIMENEZ, *THE BOOK OF MATT: HIDDEN TRUTHS ABOUT THE MURDER OF MATTHEW SHEPARD* (2013). For one review of the book, see James Kirchick, *Book Review: 'The Book of Matt,' by Stephen Jimenez*, WALL ST. J., Oct. 22, 2013, <http://online.wsj.com/news/articles/SB10001424052702304410204579143612270644276>.

“gay panic,”<sup>252</sup> though the defense nonetheless managed to raise the issue before the jury.<sup>253</sup>

In two unpublished California decisions, the defendants again asserted a gay panic form of provocation based upon explicit sexual advances.<sup>254</sup> In one case, the defendant alleged that the victim had pushed the defendant onto a bed and explicitly suggested that the two have oral sex.<sup>255</sup> In another, the defense asserted that the victim asked the defendant for oral sex, grabbed the defendant and threw him on the bed, got on top of the defendant and grabbed his genitals, and later tried to place his penis in the defendant’s face.<sup>256</sup>

The only case we have located where gay panic was not based upon a sexually explicit physical advance was the Scott Amedure case, also known as the *Jenny Jones Show* case.<sup>257</sup> Amedure had appeared on the show as a surprise secret admirer of another show guest, Jonathan Schmitz. Three days after appearing on the show, Amedure left a suggestive note at Schmitz’s home, and Schmitz then went to Amedure’s home and shot and killed him. At his first trial, Schmitz argued gay panic as a basis for diminished capacity, which the jury accepted, reducing the crime from first-degree to second-degree murder.<sup>258</sup> When that conviction was overturned on appeal, Schmitz was retried for second-degree murder and asserted gay panic as a basis for voluntary manslaughter. The jury rejected the defense and convicted him of second-degree murder.<sup>259</sup> In our research, this case seems to be a true

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<sup>252</sup> See Michael Janofksy, *Judge Rejects ‘Gay Panic’ as Defense in Murder Case*, N.Y. TIMES, Nov. 2, 1999, <http://www.nytimes.com/1999/11/02/us/judge-rejects-gay-panic-as-defense-in-murder-case.html>.

<sup>253</sup> See Lee, *supra* note 3, at 525–27. Both ultimately pleaded guilty to murder; each received two consecutive terms of life without parole in order to avoid possible death sentences. See Julie Cart, *Killer of Gay Student Is Spared Death Penalty; Courts: Matthew Shepard’s Father Says Life in Prison Shows ‘Mercy to Someone Who Refused to Show Any Mercy’*, L.A. TIMES, Nov. 5, 1999, at A1.

<sup>254</sup> For a fuller discussion of these cases, see Kent, *supra* note 242, at 164–72.

<sup>255</sup> *People v. Cain*, No. D036023, 2002 WL 1767583, at \*3 (Cal. Ct. App. July 31, 2002) (discussing how the victim allegedly said, “[y]ou know you want it, you want to suck my dick”). One commentator suggests that, having heard the gay panic evidence, the jury convicted the defendant of second-degree murder as a result of jury compromise given that there was strong evidence of premeditation that would ordinarily give rise to first-degree murder. Kent, *supra* note 242, at 167. Query whether the same dynamic was at play in the Larry King case, where at least some of the jurors appear to have voted for second-degree murder.

<sup>256</sup> *People v. Estrada*, No. D036756, 2002 WL 31319735 (Cal. Ct. App. Oct. 17, 2002). The jury rejected the defendant’s heat of passion argument and convicted him of second-degree murder.

<sup>257</sup> See LEE, *supra* note 142, at 67–68.

<sup>258</sup> See *id.* at 68.

<sup>259</sup> See *id.* at 67–69. The defendant also received a heat of passion instruction in the first trial, though on appeal the court noted that that defense would have likely failed because of the amount of “cooling off” time (several hours) that had passed between the final provocation and the killing. *People v. Schmitz*, 586 N.W.2d 766, 771 n.4 (Mich. Ct. App. 1998) (“Appellate defense counsel acknowledged during oral argument that it was unlikely that the jury would have found defendant guilty of the lesser offense of voluntary manslaughter, primarily because of the temporal delay

outlier in terms of the thinness of the evidence upon which the judge allowed the defense to argue heat of passion.<sup>260</sup>

Further, we also found no judicial decisions where the defendant was allowed to argue gay panic in circumstances where, as in the King case, the killing occurred a day after the last provoking incident directed at the defendant. We also found no cases—reflected in judicial decisions or press reports—where the alleged heat of passion was based upon “rekindling” that was not directed at the defendant or someone closely connected to the defendant.<sup>261</sup> (Recall that King said “call me Leticia” to another student, not to McInerney, while McInerney was eight to ten feet away; there is no evidence that King even knew that McInerney overheard the statement, much less that King intended for McInerney to overhear the statement.) Based upon these facts, under the circumstances McInerney cooled off as a matter of law. For this additional reason, the heat of passion instruction was not justified in this case.

Why, then, did the judge in the Larry King case allow the gay panic defense? It is likely that the defendant’s age and family background played some role, even though these sorts of subjective factors typically are not factored into the objective “reasonable person” test.<sup>262</sup> Further, the public “humiliation” theme that McInerney asserted has parallels to the Scott Amedure case.

Still, we found no California case allowing heat of passion based upon simple flirtations, much less upon flirtations that contained no sexual content. At bottom, it seems likely that the judge took the path of least resistance. The judge in the King case had an extremely contentious relationship with the defense counsel, who at one point went so far as to seek to disqualify the judge on the grounds of bias.<sup>263</sup> It was a highly publicized and politicized case, with the local press criticizing the prosecution for charging McInerney as an adult.<sup>264</sup> Fearing a possible reversal, the judge simply allowed the defense to argue heat of passion without relying upon any authority that would justify the defense in these circumstances.

But, as they say, hard cases make bad law. The heat of passion defense was not legally justified in the Larry King murder case and

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(several hours) between any provocation by Amedure and the shooting.”), *abrogated on other grounds by* People v. Bell, 702 N.W.2d 128 (Mich. 2005).

<sup>260</sup> See *supra* notes 232–51 and accompanying text; see also Lee, *supra* note 3, at 496–97.

<sup>261</sup> See Scott D. McCoy, Note, *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 641–42 (2001).

<sup>262</sup> DRESSLER, *supra* note 21, § 31.07[B][2][b][ii], at 528–29.

<sup>263</sup> See Steve Chawkins, *Alleging Bias, Defense Wants Judge Removed From Oxnard Teen’s Slaying Case*, L.A. TIMES, Aug. 19, 2011, <http://articles.latimes.com/print/2011/aug/19/local/la-me-gay-student-20110819>; Barlow, *supra* note 82.

<sup>264</sup> See, e.g., *supra* notes 9–12, 70 and accompanying text.

should not have been allowed. In future gay panic cases, if trial judges allow the defense at all, they should require the defense to show sexually explicit advances and, in the vast majority of cases, unwanted physical contact.

#### IV. THE CASE FOR GAY SHIELD LAWS

Once the judge in the Larry King case allowed heat of passion based upon gay panic, the door opened to a broad range of defense evidence that the judge deemed relevant and admissible. During the trial, both the content and rhetorical nature of that evidence clearly led many, if not most, of the jurors to view Larry King as the villain. We first review the dangers raised by the admission of such evidence, again using the King trial as a case study. We then offer our proposal for a “gay shield” law.

##### A. *Gay Panic, Gay Victims, and Inflammatory Evidence*

Commentators have long observed that the gay panic defense leads to the admission of evidence of the victim’s sexuality and sexual expression and can inflame and prejudice juries and judges. As Mison aptly noted, “[t]he introduction of highly prejudicial and often irrelevant evidence in homosexual-advance cases also diverts the fact finders’ attention.”<sup>265</sup> As discussed above, the most fundamental form of anti-gay bias that the gay panic defense elicits for the jury is the idea that the gay victim is to blame.<sup>266</sup>

Further, judges allow the abuse of the defense. There are examples of cases involving the gay panic defense in which judges have explicitly expressed their own anti-gay biases.<sup>267</sup> At the preliminary hearing in one gay murder case, the trial judge made jokes such as: “[t]hat’s a crime now, to beat up a homosexual?”<sup>268</sup> When the prosecutor responded that it was, the judge replied: “[t]imes really have changed.”<sup>269</sup> Even though that judge was removed from the case, there are other cases where the judges were not removed.<sup>270</sup>

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<sup>265</sup> Mison, *supra* note 159, at 169; *see* Lee, *supra* note 3, at 513.

<sup>266</sup> Kara S. Suffredini, Note, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 308 (2001); *see also* Mison, *supra* note 159, at 161; *supra* note 197 and accompanying text.

<sup>267</sup> Suffredini, *supra* note 266, at 305.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

Judges may not even be aware of their own biases. Judges tend to admit evidence in gay panic cases that would never be admitted in a provocation case involving a straight victim. Consider this piece of evidence from the King murder case: a photograph of King, smiling broadly while holding in front of him a green hand-me-down prom dress that teacher Dawn Boldrin had given him and that the judge allowed the defense to display to the jury.<sup>271</sup> The photograph was of little or no probative value—there was no evidence that McInerney ever saw the dress or even knew that King possessed it. What is the point of this evidence? To marginalize and demonize King; to suggest that he *chose* to be gay and/or transgender; that he was *permitted* to exhibit his nonconforming sexual orientation and/or gender identity; that because he self-identified as gay and did not conform to gender stereotypes, he was a sexual predator. Under this construct, King deserved to suffer the consequences of his choice. No judge would entertain the argument that a jury could find that a man made an unwelcome sexual advance towards a woman based upon the bare fact that the man engaged in behavior that identified him as heterosexual.<sup>272</sup>

Finally, juries are also susceptible to the abuse of gay panic defense. There have been examples of the jury reducing the defendant's culpability not only when the defendant has failed to produce any evidence of homosexual solicitation, but also when there was strong evidence to suggest that the defendant actually preyed on the gay victim.<sup>273</sup> This defense also suggests that all homosexual advances, even verbal ones, are equal to a sexual attack.<sup>274</sup> Certainly this was the core theme of McInerney's defense.

The demonization of Larry King permeated the case. Even the press picked up on the defense rhetoric; one *Los Angeles Times* story referred to "King's increasingly flamboyant dress and behavior."<sup>275</sup> *Newsweek* stated that "[l]egally, [school officials] couldn't stop [King] from wearing girls' clothes,"<sup>276</sup> even though King never wore female clothes to school but always wore the required school uniform for boys.<sup>277</sup> The magazine also described King's "Prince-like bouffant" hair, noted that "[h]e thought nothing of chasing the boys around the school in [his stiletto heels], teetering as he ran," and stated that King would "sidle up to the popular boys' table and say in a high-pitched voice, 'Mind if I sit here?'"<sup>278</sup>

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<sup>271</sup> Saillant, *supra* note 95.

<sup>272</sup> Thanks to our colleague Mark Cammack for this observation.

<sup>273</sup> Suffredini, *supra* note 266, at 307.

<sup>274</sup> *Id.*

<sup>275</sup> Saillant, *supra* note 95.

<sup>276</sup> Setoodeh, *supra* note 7, at 43.

<sup>277</sup> Fox Interview, *supra* note 18.

<sup>278</sup> Setoodeh, *supra* note 7, at 41, 43.

Jurors accepted the defense's characterization of King's actions as "sexual harassment" and "taunting."<sup>279</sup> After the trial, a juror referred to King's "bullying" of McInerney and King's "deviant" behavior.<sup>280</sup> ABC's *Nightline*<sup>281</sup> program gathered six jurors for a group interview. In the lead-in to that interview, reporter Terry Morgan observed, that, given King's "bullying," "defenders of the classmate who shot [King] say the killer was also a victim." During the broadcast, jurors all displayed their "Save Brandon" wristbands, indicating their sympathy with the murderer rather than the victim.<sup>282</sup>

It is hard to imagine that a teenage girl who said "love you" to a teenage boy, or vice versa, in a school hallway would be characterized as a bully and sexual harasser. In light of anti-bullying efforts around the country, it is also difficult to reconcile schools' anti-bullying stances with the jurors' apparent willingness to accept the proposition that McInerney's violence against King was reasonable because King did not conform to sexual orientation and gender norms.<sup>283</sup> Finally, it is also hard to imagine that the jurors' views of King could have become so negative without the inflammatory evidence and rhetoric that the defense employed.

One way to mitigate the potential prejudice is to revise the evidentiary rules that apply in these cases. How would this work? There are several possibilities. Mison, for example, suggests forbidding the admission of the victim's sexual orientation into evidence.<sup>284</sup> This approach, however, would be extremely difficult to implement. For one thing, the defense will often easily be able to introduce this evidence through the back door, as it did in the Matthew Shepard case.<sup>285</sup> For another, in cases such as the King case, the basic evidence will make the victim's sexual orientation readily apparent to the jury. A victim's social

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<sup>279</sup> Interview with Donald Hoagland in VALENTINE ROAD, *supra* note 9, at 57:50; McElhaney & Black Interview, *supra* note 17; see Zeke Barlow, *Psychologist Says Recent Talks Gave Him New Insights on Brandon McInerney*, VENTURA COUNTY STAR (Aug. 16, 2011, 5:58 PM), <http://www.vcstar.com/news/local-news/crime/prosecutor-maintains-mcinerney-told-his-he-was><http://www.vcstar.com/news/local-news/crime/psychologist-testifies-about-recent-with-brandon>.

<sup>280</sup> Lisa S. Letter, *supra* note 2.

<sup>281</sup> *Nightline: 8th Grade Shooting: Jurors Speak Out* (ABC television broadcast Oct. 5, 2011), available at <http://abcnews.go.com/Nightline/video/execution-style-killing-classroom-14669728>. This report appeared before prosecutors abandoned their efforts to retry McInerney and struck a plea agreement.

<sup>282</sup> *Id.*

<sup>283</sup> See, e.g., IT GETS BETTER PROJECT, <http://www.itgetsbetter.org> (last visited Mar. 7, 2015); *Anti-Bullying Resources*, GLSEN, <http://glsen.org/article/anti-bullying-resources> (last visited July 24, 2014); *Bullying and LGBT Youth*, STOPBULLYING.GOV, <http://www.stopbullying.gov/at-risk/groups/lgbt> (last visited Mar. 7, 2015).

<sup>284</sup> For a discussion of the evidentiary aspects of this issue, see Nicolas, *supra* note 154.

<sup>285</sup> See Lee, *supra* note 3, at 555; *supra* note 193.

life, relationship history, and similar factors will likely lead a jury to speculate, and even conclude, that the victim was LGBTQ.

In addition, in the King case the hate crime allegation required that the state itself introduce evidence that King self-identified as gay. Hate crimes laws,<sup>286</sup> such as the federal Hate Crimes Prevention Act (HCPA),<sup>287</sup> actually require the jury to consider the victim's sexual orientation.<sup>288</sup> The coexistence of the gay panic defense and hate crimes statutes allows for inconsistency in the criminal justice system because one mitigates the crime and the other aggravates its punishment based upon proof of the victim's sexual orientation or gender identity.<sup>289</sup> This sort of whiplash occurred during the King murder case, when the prosecution needed to show that McNerney perceived King as gay in order for the state to invoke the hate crime enhancement.

Assuming that a ban on the introduction of the victim and LGBTQ is unworkable, what steps might we take to avoid the revictimization of the victim at trial? The next section examines rape shield laws to draw lessons from how those laws operate and how analogous laws might operate in gay panic cases.

### B. *The Lesson from Rape Shield Laws*

Instead of an outright ban on the gay panic defense, we propose a new evidentiary rule.<sup>290</sup> Such a rule would be analogous to but broader than rape shield laws in their intent and design. Consider the injustices that led to the adoption of rape shield laws. The notorious quotation by Judge Cowen in the 1838 case of *People v. Abbot*—“[W]ill you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia?”—encapsulates the historical (and

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<sup>286</sup> Garmon, *supra* note 154, at 643.

<sup>287</sup> *Id.* This act added federal protection for crimes based on gender identity or sexual orientation by including those categories in existing hate crime laws. At least thirty states and the District of Columbia have included sexual orientation within their hate crimes statutes. See *State Hate Crimes Laws*, HUM. RTS. CAMPAIGN, [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/hate\\_crimes\\_laws\\_022014.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/hate_crimes_laws_022014.pdf) (last updated June 19, 2013).

<sup>288</sup> Garmon, *supra* note 154, at 643.

<sup>289</sup> *Id.* at 643–44; see McCoy, *supra* note 261, at 661 (noting inconsistency between gay panic defense and hate crime charge).

<sup>290</sup> Such rules should not run afoul of constitutional due process restrictions. See, e.g., *Montana v. Egelhoff*, 518 U.S. 37, 61–62 (1996) (O'Connor, J., dissenting) (affirming states' discretion in determining evidentiary rules in criminal trials). Rape shield laws have generally been upheld in the face of constitutional challenges, including Sixth Amendment challenges. See Helim Kathleen Chun & Lindsey Love, *Rape, Sexual Assault & Evidentiary Matters*, 14 GEO. J. GENDER & L. 585, 594 (2013); Shawn J. Wallach, Note, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485, 497–98 (1997).



persistent) view that a rape victim who wore certain attire and/or had a reputation for sexual promiscuity is less credible than a virginal one.<sup>291</sup> Not surprisingly, at the time of Judge Cowen's decision and for many years to come, a rape victim's past sexual conduct was admissible evidence in a rape trial because as Judge Cowan explained, it spoke to her "general moral character."<sup>292</sup> The practice of putting a rape victim's chastity on trial was commonplace and the reasoning two-fold: past sexual behavior could prove a woman was unchaste, and an unchaste woman was a dishonest one.<sup>293</sup>

Past sexual experience was admissible not only to show consent, then, but also to attack the victim's credibility. The judicial system has traditionally treated rape as a special sort of crime, focusing only marginally on the defendant's actions and instead scrutinizing the victim.<sup>294</sup> The parallel to the gay panic defense is obvious; certainly, in the King murder case, the jury scrutinized King's behavior as much as, or more than, it scrutinized McNerney's behavior.

As sexual mores relaxed in the 1960s and the women's movement gained momentum in the 1970s, attitudes toward rape victims began to change. Rape victims were reluctant to report their rapes for fear of being revictimized by the system; law enforcement agencies and women's organizations began calling for change, paving the way for rape law reform.<sup>295</sup> In 1974, Michigan became the first jurisdiction to enact a rape shield law; the federal government and the remaining forty-nine states quickly followed, most within several years.<sup>296</sup>

Many people believe that rape shield laws are primarily designed to prevent damage to the victim's reputation, to protect her identity, or to encourage more victims to report their rapes. The laws' most important purpose, however, is not protecting the victim; rather, it is helping to ensure that prejudice does not undermine the factfinding process.<sup>297</sup>

During rape trials, the defense may seek to offer evidence relating to the victim's (1) sexual history with the defendant, (2) sexual history with other persons, and (3) general reputation for lack of chastity or promiscuity.<sup>298</sup> Although shield laws take many different forms, most such laws seek to exclude evidence falling into the last two categories,

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<sup>291</sup> I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 836 (2013) (quoting *People v. Abbot*, 19 Wend. 192, 195 (N.Y. Sup. Ct. 1838)).

<sup>292</sup> *Abbot*, 19 Wend. at 197–98.

<sup>293</sup> Capers, *supra* note 291.

<sup>294</sup> Wallach, *supra* note 290, at 485–86.

<sup>295</sup> *Id.* at 489.

<sup>296</sup> Leah DaSilva, Note, *The Next Generation of Sexual Conduct: Expanding the Protective Reach of Rape Shield Laws to Include Evidence Found on MySpace*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 211, 219 (2008).

<sup>297</sup> Amanda Paulson, *Is the Rape-Shield Law Working?*, CHRISTIAN SCI. MONITOR (Mar. 25, 2004), <http://www.csmonitor.com/2004/0325/p12s02-usju.html>.

<sup>298</sup> See DRESSLER, *supra* note 21, § 33.07[B], at 591.

unless the evidence relates to potentially exculpatory physical evidence.<sup>299</sup> These laws, thus, allow evidence of the victim's sexual history with the defendant, and relevant physical evidence, often subject to a probative value versus prejudicial impact balancing test.<sup>300</sup>

Michigan's rape shield law is representative of this approach. This law, which became the basis for the federal law and most state laws, provides:

Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

- (a) Evidence of the victim's past sexual conduct with the actor[, or]
- (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.<sup>301</sup>

The federal rape shield law, Federal Rule of Evidence 412, similarly prohibits "(1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition."<sup>302</sup> The rule also provides that, in criminal cases, the court may admit evidence relating to: (1) "specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;" (2) "specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor;" and (3) "evidence whose exclusion would violate the defendant's constitutional rights."<sup>303</sup>

All rape shields are built on the exclusion of evidence concerning the victim's past sexual conduct. Evidence once routinely admitted, such as testimony about the victim's reputation (that she was a "loose" woman, for instance, or that she dressed provocatively) and evidence of past sexual behavior not related to the rape accusation, such as the victim's number of sexual partners, is barred by rape shield laws. Of course, the terms "past" and "sexual conduct" are open to interpretation, so jurisdiction-specific law governs whether the rape

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<sup>299</sup> See LAFAVE, *supra* note 101, § 17.5(c), at 929.

<sup>300</sup> Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 81 (2002) (citing MICH. COMP. LAWS ANN. § 750.520j (West 1991)).

<sup>301</sup> *Id.*

<sup>302</sup> FED. R. EVID. 412.

<sup>303</sup> *Id.*

shield applies to a particular piece of evidence; evidence must be deemed past sexual conduct and fall outside an enumerated exception in order to be barred by the governing rape shield.<sup>304</sup>

Studies done over the past two decades show that a victim's promiscuity or perceived promiscuity has the effect of biasing jurors against the victim.<sup>305</sup> Even today, a woman who is not seen as "chaste" by the jury faces a nearly insurmountable degree of prejudice, and rape shield laws that allow the categorical admission of sexual history evidence reinforce that prejudice.<sup>306</sup>

In addition to evidence of sexual history, at least eight states disallow to some degree evidence of the victim's attire.<sup>307</sup> These statutes are designed to prevent defense attempts to instill prejudice in the jury based upon the victim's clothing or appearance. As one commentator observed in the context of rape trials, "clothing may appear to the viewer as a metaphor for character or as an indicator of deception."<sup>308</sup> Oregon's statute is representative:

Sexual offense cases; relevancy of victim's past behavior or manner of dress.

- (1) Notwithstanding any other provision of law, in a prosecution for [various sex offenses or], in a prosecution for an attempt to commit one of those crimes . . . , the following evidence is not admissible:
  - (a) Reputation or opinion evidence of the past sexual behavior of an alleged victim or a corroborating witness; or
  - (b) *Reputation or opinion evidence presented for the purpose of showing that the manner of dress of an alleged victim incited*

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<sup>304</sup> For an overview of exceptions, see Anderson, *supra* note 300, at 85–121.

<sup>305</sup> See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 70 (1971). Some of the above exceptions undercut the effectiveness of rape shield laws. Take, for instance, prior sexual conduct with the defendant. This categorical admission of prior sexual contact between the victim and defendant reinforces the outdated notion that a woman "can't be raped" by an intimate partner or former partner. In fact, intimate partners—spouses, ex-spouses, boyfriends, or ex-boyfriends—commit sixty-two percent of adult rapes. More to the point, research shows that jurors are often biased against rape victims who have had past sexual contact with the defendant. For these women, then, rape shield laws may offer little protection. Anderson, *supra* note 300, at 129–30.

<sup>306</sup> For an in-depth analysis of the issue, see HELEN BENEDICT, *VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES* (1992).

<sup>307</sup> The National District Attorneys Association maintains a list of current rape shield laws. See *Rape Shield Statutes*, NAT'L DISTRICT ATT'YS ASS'N, <http://www.ndaa.org/pdf/NCPCA%20Rape%20Shield%202011.pdf> (last updated Mar. 2011). Alabama, California, Florida, Georgia, New Hampshire, New Jersey, Oregon, and Wisconsin have these provisions. See *id.*

<sup>308</sup> Alinor C. Sterling, *Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women's Clothing in Rape Trials*, 7 *YALE J.L. & FEMINISM* 87, 112–13 (1995). Certainly Larry King's attire was used by the defense in exactly the same way in this case.

*the crime or . . . , indicated consent to the sexual acts that are alleged.*<sup>309</sup>

In cases of violence against LGBTQ victims—including but not limited to homicides—clothing, accessories, and mannerisms can likewise inflame the jury and tend to cast the victim as the wrongdoer. To avoid that result, we propose that states adopt “gay shield” laws.<sup>310</sup>

### C. *Proposed Gay Shield Law*

If the legislature had adopted a rule of evidence expressly limiting this kind of inflammatory evidence, then the defense’s ability to blame Larry King for his own death may have been substantially limited. We label this a “gay shield” law because our proposal arises in the context of the gay panic defense. Here is our proposed rule:

Crimes of violence; defense of unwanted sexual advance or overture;  
admissibility of evidence relating to the victim.

Notwithstanding any other provision of law, in a case involving a crime of violence towards a person where a defense is based in whole or in part upon an alleged unwanted sexual advance or overture by the victim, the following evidence is not admissible:

- (a) Specific instances or patterns of the victim’s other sexual conduct;
- (b) Evidence of the victim’s sexual orientation or gender expression or identity presented for the purpose of showing that such orientation, expression, or identity incited or was otherwise related to the crime; or
- (c) Reputation or opinion evidence presented for the purpose of showing that the victim’s other sexual conduct or the victim’s sexual orientation or gender expression or identity incited or was otherwise related to the killing.

### Definitions.

“Crimes of violence” includes crimes of threatened or actual physical injury caused to the victim.

“Other sexual conduct” includes, but is not limited to, the

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<sup>309</sup> OR. REV. STAT. § 40.210 (2011) (emphasis added).

<sup>310</sup> As noted above, our proposal could also serve as a model for trans panic cases.

victim's sexual behavior other than the sexual behavior with respect to the crime alleged and the victim's general reputation for promiscuous behavior.

"Sexual orientation or gender expression or identity" includes any evidence that may connote for the factfinder that the victim was of a certain sexual orientation, had a nonconforming gender identity or exhibited a nonconforming gender expression, including but not limited to, the victim's appearance, manner of dress or speech, or mannerisms.<sup>311</sup>

The rule would not require a blanket ban on the introduction of evidence relating to sexual orientation or gender identity; as we argue above, such a rule would be difficult to implement. But, as explained more fully in the next Section, it would bar such evidence where it is used as a basis for a defense to the crime.<sup>312</sup>

We believe that the proposed rule would serve a critical function in gay panic cases. It would apply to all such defenses to homicide, including heat of passion, diminished capacity, insanity, and self-defense—though gay panic arise in heat passion cases far more often than in connection with the other defenses. The statute would also apply to other crimes of violence, such as assault and battery.

Judges in cases such as the King case need statutory support for the exclusion of inflammatory evidence relating to the victim's sexual orientation and gender identity, including such evidence relating to dress and mannerisms. As one judge stated:

There will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a homosexual or bisexual person offensive[;] . . . our criminal justice system must take the necessary precautions to assure that people are convicted based on evidence of guilt, and not on the basis of some inflammatory personal trait.<sup>313</sup>

Judges in such cases often accede to defense requests to admit such evidence for fear that excluding the evidence might lead to reversal. And such a statutory provision could also provide judges with the ammunition they need to exclude inflammatory evidence under the probative value versus prejudicial impact balancing required by such rules as Federal Rule of Evidence 403.<sup>314</sup>

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<sup>311</sup> This definition is partly drawn from Federal Rule of Evidence 412(a) advisory committee's note. See FED. R. EVID. 412 advisory committee's note; Nicolas, *supra* note 154, at 803.

<sup>312</sup> Admittedly, such a rule would require limiting instructions, which often prove ineffective. See Dressler, *supra* note 157, at 761.

<sup>313</sup> State v. Ford, 926 P.2d 245, 250 (Mont. 1996); see Nicolas, *supra* note 154, at 845 (discussing *Ford*).

<sup>314</sup> FED. R. EVID. 403; CAL. EVID. CODE § 352 (West 2011 & Supp. 2014). For a discussion of relevant provisions of the Federal Rules of Evidence, see Nicolas, *supra* note 154, at 799–800.

The analogy between gay shield laws and rape shield laws has its limits, of course. In rape cases, evidentiary shield laws seek both to protect the complaining witness from the humiliation of cross-examination concerning her sexual history and reputation and to ensure that the factfinding process is not undermined by such prejudicial evidence. In gay panic cases, the former does not apply since the victim is deceased. A gay shield law would meet the second goal, however, by excluding evidence that could provoke homophobic and transphobic responses among the jurors.

Further, in rape cases, the defense may seek to offer evidence of the victim's reputation or promiscuity to show that the defendant honestly and reasonably believed that the victim consented—a complete defense in most jurisdictions.<sup>315</sup> Such evidence is excluded under most rape shield statutes. Similarly, in gay panic cases, the defense may seek to offer evidence not merely to show that the defendant was LGBTQ, but to show that the victim exhibited certain mannerisms or behavior, or dressed in certain ways, in order to inflame the jury. Jurors' lack of comfort with LGBTQ people in general could then be compounded by evidence that the victim was a non-“mainstream” LGBTQ person. Once evidence of the victim's sexual orientation is admitted, it is irrelevant and prejudicial that he or she was viewed by witnesses as a “flamboyant,” “cross-dressing,” “swishy,” “butch,” “fem,” or any other particular “type” of sexual minority. As we explain in the next Section, such inflammatory evidence was indeed admitted during the Larry King murder case—and had a substantial impact on the jurors.

We readily concede that our gay shield law proposal could be subject to criticism. For one thing, rape shield laws have had mixed success at best. In addition to the gaping holes that some of the legislated exceptions leave in the rape shield exclusions, there are other problems with the laws' effectiveness. The empirical data suggests that the laws have had little effect overall.<sup>316</sup> Michigan, which enacted the very first rape shield law, saw no evidence that rape shield statutes increased the number of reported sexual assaults; rather, any increase in reporting was attributed to changes in public attitudes toward sex and sexual assault.<sup>317</sup> Other studies have found no correlation between changes in rape laws and convictions.<sup>318</sup>

Additionally, studies of jury behavior reveal that juries view evidence through the lens of a narrative that makes sense to them, filling

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<sup>315</sup> See DRESSLER, *supra* note 21, § 33.05, at 585.

<sup>316</sup> Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1031–32 (2008).

<sup>317</sup> *Id.* at 1032.

<sup>318</sup> *Id.* at 1030–31 (citing CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 160 (1992)).

in gaps and converting evidence to fit that narrative.<sup>319</sup> As Professor I. Bennett Capers has noted, the story is based on personal experience, beliefs, popular culture, and worldview—many factors that may bear no resemblance to the actual evidence. In a rape trial, then, the inadmissibility of a victim's sexual history does not mean sexual history is not considered; rather, a history is constructed in the minds of the jurors to fit the narrative they have created about the accuser, the accused, and the incident.<sup>320</sup> Jurors are less likely to find that a rape occurred when the accuser is a black woman, and overwhelmingly more likely to find guilt when the defendant is black and the victim is white. When both the accuser and the accused are white, jurors are less likely to find that a rape occurred.<sup>321</sup>

Racial stereotypes of both men and women, then, influence jury behavior as much as the evidence that rape shield laws seek to exclude. As one scholar noted, “[r]acialized and marginalized women, who are less valued and less credible in a society characterized by racism, are, by definition, less readily identified as ‘ideal victims’ and more easily stigmatized as ‘bad’ or ‘undeserving’ victims (if their victim claims are heard at all).”<sup>322</sup> Rape shield laws have questionable efficacy when the accuser is not an “ideal victim,” meaning white, middle class, and a seemingly “good girl.”

We acknowledge that, in an analogous way, gay shield laws might primarily assist the prosecution in cases involving “good boy” victims. It is hard not to notice, for example, the difference between the public perceptions of Larry King (the multiracial, small, effeminate victim with adoptive parents) and Matthew Shepard (the cute white college boy with articulate parents who used his case to launch a nationwide gay rights campaign).<sup>323</sup> We also acknowledge that it is unclear whether such laws would be effective; to enforce such laws, judges and prosecutors would have to be ever vigilant in combating defense efforts to demonize the victim by other methods.

Yet, we believe that gay shield laws would have powerful expressive value that could and should change the tenor of trials where gay panic is

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<sup>319</sup> Capers, *supra* note 291, at 860–61.

<sup>320</sup> *Id.* at 862.

<sup>321</sup> *Id.* at 862–63.

<sup>322</sup> Melanie Randall, *Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming*, 22 CAN. J. WOMEN & L. 397, 410 (2010).

<sup>323</sup> See Brian L. Ott & Eric Aoki, Essay, *The Politics of Negotiating Public Tragedy: Media Framing of the Matthew Shepard Murder*, 5 RHETORIC & PUB. AFF. 483 (2002), available at [http://www.academia.edu/187654/The\\_Politics\\_of\\_Negotiating\\_Public\\_Tragedy\\_Media\\_Framing\\_of\\_the\\_Matthew\\_Shepard\\_Murder](http://www.academia.edu/187654/The_Politics_of_Negotiating_Public_Tragedy_Media_Framing_of_the_Matthew_Shepard_Murder); Giovanna Shay & J. Kelly Strader, *Queer (In)Justice: Mapping New Gay (Scholarly) Agendas*, 102 J. CRIM. L. & CRIMINOLOGY 171, 180 (2012) (reviewing JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2011)).

argued.<sup>324</sup> Such laws would send the message that it is not legally acceptable to play on jury prejudices, any more than it would be with respect to the victim's other characteristics such as race or religion. And in cases such as the King case, a gay shield law would give the trial judge a legal basis for excluding such inflammatory and marginally relevant evidence such as the green prom dress. Although Rule 403 and state equivalents in theory address this concern, in practice that has not happened. Prosecutors and trial judges need an additional tool at their disposals.

Our second concern with the enactment of gay shield laws has to do with limiting the evidence available to a criminal defendant. The state has enormous power in any criminal trial, and we are highly sensitive to the risks attendant to any proposal that would tie a defendant's hands in any way.<sup>325</sup>

But in cases involving violence against LGBTQ people, the deck seems stacked in the defendants' favor in ways that are not usually present in criminal cases. The potential for incitement of jurors' prejudices is simply too great. It should never happen, in a provocation case, that inflammatory defense evidence leads a juror to conclude that a self-identified gay, gender nonconforming victim is a "deviant."

#### D. *Applying the Gay Shield Law to the King Case*

Let us return to the gay panic defense as a prime example of cases of violence against LGBTQ victims. In that context, we examine the Larry King murder case to determine how the gay shield law would operate in a gay panic case. The issue arises in two contexts: first, the threshold determination that there is a legally adequate basis for the defense; second, the factfinder's assessment of whether the defendant reasonably acted in the heat of passion.

Gay panic is grounded in an unwanted sexual advance theory. In that context, the "reasonable" person becomes subjectified to the extent that the parties' sexual orientations become relevant. As Professor Dressler explains, it is the "ordinary" heterosexual male's response to the perceived gay advance that lies at the heart of the gay panic defense.<sup>326</sup> As we argued above, in this context it is impracticable to

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<sup>324</sup> For an excellent analysis of the expressive power of criminal legislation, see Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858 (2014) (studying the expressive nature of hate crimes statutes).

<sup>325</sup> As Lee and Kwan put it, "many progressive scholars warn against wholehearted support of measures that make it easier for the State to incarcerate individuals, because such reforms often end up disproportionately harming poor people and people of color." Lee & Kwan, *supra* note 39, at 80 n.8.

<sup>326</sup> See *supra* notes 168–72 and accompanying text.



exclude evidence of the victim's sexual orientation.<sup>327</sup> And of course the details of the alleged advance—the words used, the physical setting, and any physical contact—are relevant to the threshold showing. Beyond those factors, however, the evidence should correspond only to the provocation itself.

As to the threshold legal showing, is important to remember that the heat of passion defense, even in states that follow the “reasonable person” approach, is a quite limited partial defense. Recall that the defense has four elements: (1) the defendant was actually provoked, (2) a reasonable person would have been provoked, (3) the defendant did not “cool off,” and (4) and reasonable person would not have cooled off. If any of the elements is not met, then the defense fails.

The defendant must initially adduce evidence of a legally adequate provoking incident or series of incidents; if a judge finds that, as a matter of law, no reasonable person would respond with violence to the alleged provocation, then the defense must be excluded. “Mere words” continues to be a disfavored basis in any common law heat of passion jurisdiction.<sup>328</sup> And though gay panic remains an exception to that general rule, the “mere words” underlying a gay panic defense must be grounded in explicit sexual advances, as we explain above.<sup>329</sup>

Given the requirements that both the provocation be legally adequate and the response be reasonable, it follows both as a matter of law and policy that inflammatory and prejudicial evidence should be excluded in the interest of ensuring accurate factfinding—the key goal underlying rape shield laws. If a victim acts or dresses in ways that evoke moralistic responses to gay or transgender stereotypes, those facts have nothing to do with whether there was a legally adequate provocation or whether the defendant's response was reasonable—unless it is reasonable to be homophobic or transphobic. It is one thing to say, as Professor Dressler argues, that a reasonable or “ordinary” heterosexual male may find “the thought of participating in a homosexual act [to be] physically (as distinguished from morally) repulsive.”<sup>330</sup> It is quite another to say that it would be reasonable for such a defendant to find the victim's sexual history, mannerisms, dress, or attire sufficiently repulsive to constitute a legally adequate basis for provocation. Dressler's distinction between physical and moral repulsion is instructive here; the former, but not the latter, could provide the basis for arguing heat of passion based upon a direct gay sexual advance.

Yet it was *moral* repulsion that lay at the heart of Brandon McInerney's defense. Larry King never suggested that the two engage in

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<sup>327</sup> See *supra* notes 186–202 and accompanying text.

<sup>328</sup> See *supra* notes 244–45 and accompanying text.

<sup>329</sup> See *supra* note 248 and accompanying text.

<sup>330</sup> Dressler, *supra* note 157, at 755.

any sexual acts; he never even made an advance that, on its face, was remotely sexual in nature. But the facts that King was a gay-identified, gender nonconforming person—standing alone—appeared to sway a substantial number of the jurors. Why? Because the judge allowed the defense to make that argument: King’s “deviant” behavior both excused and justified McNerney’s response according to the jurors. As a legal matter, this was error. Given the still relatively narrow scope of legally “adequate” provocations, only evidence directly relevant to a sexual advance should be admissible. Nothing else.

Let us reexamine the specific evidence admitted in the King case. The defense repeatedly played upon King’s sexual orientation and gender presentation. King was “permitted” to “flaunt” his sexuality. King was “permitted” to “parade” and “sashay” around school while defying gender norms. In the same vein, the defense also repeatedly blamed school officials for not straightening King out—both literally and metaphorically.

Evidence that King was a very out, gay self-identified person, had feminine mannerisms, and engaged in some gender nonconforming behavior no doubt profoundly affected the jury.<sup>331</sup> The judge should not have permitted this evidence and this rhetoric in our view. Once the judge allowed the defense to present the very weak (as a matter of law) heat of passion defense, however, the judge was then very lax in controlling the evidence admitted to support the defense.

There are substantial dangers from such an approach to the admissibility of inflammatory evidence. Trials involve competing narratives. As Professors Buell and Griffin have observed, “[f]actfinders tend to overweigh character, and narrative expectations aggravate that tendency.”<sup>332</sup> In the King murder trial, the evidence that King exhibited behavior that some jurors found disturbing, even immoral, undoubtedly affected their determinations of McNerney’s state of mind—the only real factual issue in the case.

The facts that Larry King occasionally wore eye makeup, earrings, and girls’ boots to school should not have been admissible on the issue whether the defendant was reasonably provoked any more than the facts that a rape victim used a certain style of makeup, or wore revealing or otherwise “provocative” clothing, should be admissible. Or, in a self-

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<sup>331</sup> See Interview with Diane Michaels in *VALENTINE ROAD*, *supra* note 9, at 1:12:45 (“Where are the civil rights of the one being taunted by another person who’s cross dressing?”); Interview with Karen McElhaney in *VALENTINE ROAD*, *supra* note 9, at 1:13:05 (“It was the high heels. I think it was the makeup. The behavior.”); Lisa S. Letter, *supra* note 2; McElhaney & Black Interview, *supra* note 17 (that Larry was perceived as gay made McNerney’s embarrassment and anger understandable). In the context of the Lisa S. Letter, the juror appeared to be referring to King’s transgender identity.

<sup>332</sup> Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 *LAW & CONTEMP. PROBS.* 133, 162 (2012).

defense case involving, say, a victim of a minority race or ethnicity, evidence that the victim wore a certain style of clothing or a certain hairstyle that might evoke negative racial or ethnic stereotypes.

In this context, evidence of King's dress and mannerisms—to say nothing of the fact that he merely possessed a green prom dress—should have been excluded. And defense counsel and witnesses should not have been permitted to compound the prejudice by using incendiary language stating that King “pranced” about the school and “flaunted” his sexual orientation. Of course, McInerney did not testify at his trial, but if he had these pieces of evidence should have also been inadmissible during his testimony. What King did and said would be relevant and admissible as to the adequacy of the provocation, but nothing else about King should be.

Even though current rules of evidence require balancing probative value against prejudicial impact when assessing the admissibility of evidence, such rules have not proven adequate in cases involving victims in gay panic cases. Gay shield rules of evidence could prove to be an important way to ensure fair and accurate outcomes in such cases.

#### CONCLUSION

Criminal trials require a delicate balance between the need to allow a full and fair defense and the need to avoid shifting blame to the victim. As the career homicide prosecutor in the King case told us, “Larry was a true innocent.”<sup>333</sup> In most homicide cases, according to the prosecutor, the victim was involved in drug-dealing or other criminal activities, or was otherwise engaged in some sort of violent or wrongful behavior. Larry King did none of these things. He sought to be who he was, suffered bullying as a consequence, and defended himself by flirting with a bully. And he was murdered for it.

In cases of heat of passion based upon gay panic, judges should strictly apply the law and deny the defense request to assert the defense in all but the most clear-cut cases involving aggressively sexual unwanted advances. And in cases where such a defense is asserted, legislatures should adopt laws that forbid introduction of evidence that the victim did not conform to sexual orientation or gender identity norms. The fact that a majority of the jurors concluded that King brought on his own death is both senseless and tragic. These measures should help prevent a recurrence of this tragedy.

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<sup>333</sup> Fox Interview, *supra* note 18, at 1.