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Jordan Blair Woods

University of Arkansas School of Law, Fayetteville

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FRAMING LEGISLATION BANNING THE “GAY AND TRANS PANIC” DEFENSES

Jordan Blair Woods *

INTRODUCTION

Since the 1960s, criminal defendants who have attacked (and in most cases killed) lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) victims have relied on the “gay and trans panic” defenses in order to avoid conviction or to receive lesser punishment.¹ Contrary to what the name suggests, the gay and trans panic defenses are not freestanding legal defenses.² Rather, over time, defendants have invoked gay and trans panic concepts to support one

* Associate Professor of Law, University of Arkansas School of Law, Fayetteville. The Author is thankful for the helpful discussions and suggestions from Beth Colgan, Erin Collins, Laurent Sacharoff, and Beth Zilberman. The Author is also grateful for the excellent research assistance from Hannah Hines and the University of Arkansas School of Law library staff, and especially Cathy Chick and Steven Probst. Thank you to the editors and staff at the *University of Richmond Law Review* for their careful edits, insightful suggestions, and work.

1. For simplicity, this Article often uses the phrase “gay and trans panic,” even though different terms (for instance, “acute homosexual panic” or “homosexual panic”) have been used to describe the concept over time. As discussed in *infra* Part III, scholars date the first explicit mention of the gay and trans panic defenses in a published court decision to the 1967 California case of *People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967). See Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 491 & n.81, 494–95 (2008). Cases in which the gay and trans panic defenses are raised typically involve a defendant who kills an LGBTQ victim. *Id.* at 475.

2. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1279 (2011) (stating that “the ‘gay panic’ defense is not an independently recognized defense”); Lee, *supra* note 1, at 490.

of three well-established legal defenses:³ (1) provocation,⁴ (2) insanity⁵ (or diminished capacity,⁶) and (3) self-defense⁷ (or imperfect self-defense).⁸ Depending on which of these defenses gay and trans panic concepts are being used to support, if successfully raised, a defendant who attacked or killed a LGBTQ victim could receive a lesser charge or sentence, or avoid conviction and punishment altogether.⁹

This Article, prepared for the *University of Richmond Law Review* symposium commemorating the fiftieth anniversary of the

3. Lee, *supra* note 1, at 475. Since first recorded in 1967, cases in over half of the states have been documented in which defendants have used gay and trans panic ideas to support one of these three freestanding defenses. JORDAN BLAIR WOODS, BRAD SEARS & CHRISTY MALLORY, MODEL LEGISLATION FOR ELIMINATING THE GAY AND TRANS PANIC DEFENSES 2 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/2016-Model-GayTransPanic-Ban-Laws-final.pdf> [<https://perma.cc/U5WT-WL2Y>].

4. Although specific formulations of the provocation defense differ across jurisdictions, the general idea is that the defendant intentionally killed another person “pursuant to provocation sufficient to cause both the defendant and a hypothetical reasonable person to act in the heat of passion.” Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated*, 66 N.C. L. REV. 283, 302 (1988). In jurisdictions that follow the Model Penal Code, manslaughter is the proper charge for heat of passion killings when “committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.” MODEL PENAL CODE § 210.3(1)(b) (1985). For an in-depth discussion of feminist critiques of the provocation defense see generally Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273 (2015).

5. One common formulation of the insanity defense focuses on whether defendants, by virtue of their mental illness, lacked the capacity to understand the nature or wrongfulness of their acts at the time of the offense. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 341 (1996). Another common formulation of the insanity defense focuses on whether defendants, by virtue of their mental illness, lacked the ability to control their behavior at the time of the offense. *Id.*

6. Unlike insanity, diminished capacity is a partial defense recognized in some jurisdictions which permits “the fact-finder to consider a sane defendant’s mental abnormality when it assesses his degree of criminal liability.” See Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 828 (1977).

7. Under the traditional approach to self-defense, a non-aggressor is justified in using “a reasonable amount of force against another person if she honestly and reasonably believes that: (1) she is in imminent or immediate danger of unlawful bodily harm from her adversary, and (2) the use of such force is necessary to avoid such danger.” Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Narrative Conception of Reasonableness*, 81 MINN. L. REV. 367, 377 (1996). Jurisdictions differ on whether the definition of reasonableness for self-defense is based on an objective, subjective, or a hybrid objective-subjective standard of reasonableness. *Id.* at 381.

8. Unlike self-defense, imperfect self-defense is a partial defense recognized in some jurisdictions “under which a defendant who makes an honest, but unreasonable, mistake about the need for deadly force has a defense to murder but not to manslaughter.” Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1660–61 (2019).

9. WOODS, SEARS & MALLORY, *supra* note 3, at 2.

Stonewall Riots of 1969, uses the Stonewall Riots as an opportunity to analyze and theorize the political dimensions of legislation banning the gay and trans panic defenses.¹⁰ As a moment of resistance to state violence against LGBTQ people, the Stonewall Riots are a useful platform to examine the historical and current relationship between the state¹¹ and the gay and trans panic defenses.¹² Drawing on original readings of medical literature, this Article brings the historical role of the state in the growth of gay and trans panic to the surface and discusses how gay and trans panic ideas blur the distinction between state and private violence.¹³ As explained below, prominent psychiatrists who created and honed gay and trans panic ideas over time worked for and conducted research in state-run hospitals and prisons.¹⁴

Since 2014, nine states have enacted legislation banning the gay and trans panic defenses, and more states are considering similar

10. This Article focuses on legislation banning the gay and trans panic defenses. Judicial bans on the gay and trans panic defenses are beyond the scope of this Article.

11. This Article often uses “the state” as a general phrase to refer to government and its branches.

12. The Stonewall Riots of 1969 were most obviously an immediate act of resistance to police officers who raided a bar that was a place of belonging for New York City’s LGBTQ community, especially those at the margins (for instance, LGBTQ people of color, transgender people, and LGBTQ street kids). See DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* (2004); Terence Kissack, *Freaking Fag Revolutionaries: New York’s Gay Liberation Front, 1969–1971*, 62 *RADICAL HIST. REV.* 104, 109 (1995). Although the Stonewall Riots are remembered as a major moment of LGBTQ resistance to the police, it is important to recognize literature documenting earlier moments of LGBTQ resistance to the police. See JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970*, at 49–50 (2d ed. 1998); MARTIN DUBERMAN, *STONEWALL, THE DEFINITIVE STORY OF THE LGBTQ RIGHTS UPRISING THAT CHANGED AMERICA* 121 (1993); MARC STEIN, *THE STONEWALL RIOTS: A DOCUMENTARY HISTORY* 8 (2019); Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City 1960–1980*, 12 *COLUM. HUM. RTS. L. REV.* 159, 160 (1980) (“In the early sixties, [police] harassment of homosexual citizens was quite common.”); David Alan Sklansky, *“One Train May Hide Another”*: Katz, *Stonewall*, and the Secret Subtext of *Criminal Procedure*, 41 *U.C. DAVIS L. REV.* 875, 878 (2008) (“There is widespread awareness that the police systematically harassed gay men and lesbians in the 1950s and 1960s.”). Importantly, scholars have also discussed how judges played a key role in justifying police surveillance and crackdowns against homosexuality based on stereotypes of gay men as sexual predators in the mid-twentieth century. See generally GARY DAVID COMSTOCK, *VIOLENCE AGAINST LESBIANS AND GAY MEN* 153–56 (1991); Anna Lvovsky, *Cruising in Plain View: Surveillance and the Unique Insights of Antihomosexual Policing*, *J. URB. HIST.* 2 (2017).

13. Scholars have criticized sodomy laws on similar grounds. See, e.g., Kendall Thomas, *Beyond the Privacy Principle*, 92 *COLUM. L. REV.* 1431, 1435 (1992) (arguing that “the law against homosexual sodomy has been vexed from its inception by a persistent and pervasive practice of homophobic violence on the part of public officials and private citizens alike”).

14. See *infra* Part I and Section II.B.

legislation.¹⁵ Advocates who oppose these bans have largely centered their critiques on the view that eliminating the gay and trans panic defenses violates the due process rights of defendants who kill LGBTQ victims.¹⁶ Although it is important to take due process arguments seriously, these considerations do not fully capture the stakes of recognizing the gay and trans panic defenses under the substantive criminal law.¹⁷ Because of its individualized focus, the due process lens treats gay and trans panic cases as incidents involving private violence perpetrated by one individual against another, and in so doing, neglects the historical role of the state in the growth of gay and trans panic as a concept and defense strategy.¹⁸

First introduced as a medical concept in 1920 by Edward J. Kempf—a prominent psychiatrist at federally created and federally run St. Elizabeths Hospital in Washington, D.C.¹⁹—gay and

15. See *Gay/Trans Panic Defense Bans*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/img/maps/citations-panic-defense-bans.pdf> (showing that California, Connecticut, Hawaii, Illinois, Maine, Nevada, New Jersey, New York, and Rhode Island have eliminated the gay and trans panic defenses through legislation) [<https://perma.cc/RQ8S-P4VN>]; Alexandra Holden, *The Gay/Trans Panic Defense: What It Is, and How To End It*, A.B.A. (July 10, 2019), <https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/> (discussing legislative efforts to ban the gay and trans panic defense in Washington, New Mexico, Texas, Minnesota, Pennsylvania, Massachusetts, and the District of Columbia) [<https://perma.cc/JMY5-3B2M>]. At the federal level, the Equality Act, which has been introduced in Congress, also bans the gay and trans panic defense. *Id.*

16. See WOODS, SEARS & MALLORY, *supra* note 3, at 15; see also Phillip Van Slooten, *D.C. Council Holds Hearing on Hate Crime Prosecution, Panic Defense Bills*, WASH. BLADE (Oct. 24, 2019), <https://www.washingtonblade.com/2019/10/24/dc-council-holds-hearing-on-hate-crimes-prosecution-panic-defense-bills/> (noting that the president of the National Association of Criminal Defense Lawyers recently testified on due process grounds against a bill before the D.C. Council that would ban the gay and trans panic defenses) [<https://perma.cc/8U6D-29QE>].

17. A more thorough discussion of due process arguments against banning the gay and trans panic defenses will be provided in *infra* Part IV.

18. This historical role of the state in the growth of gay and trans panic as a medical concept and defense strategy is discussed in *infra* Part I and Section II.B. Related to the point involving the individualized focus of the due process legal framework, Elizabeth Stanko has argued that “in using the legal framework to define criminal violence, criminologists usually embrace the tacit assumption that the law’s violence (the use of legitimate violence by the state) is not as problematical and subject to scrutiny as the use of violence by individuals.” Elizabeth A. Stanko, *Challenging the Problem of Men’s Individual Violence*, in *JUST BOYS DOING BUSINESS? MEN, MASCULINITIES, AND CRIME* 32, 33 (Tim Newburn & Elizabeth A. Stanko eds., 1994); see also, Rosemary Cairns Way, *Incorporating Equality into the Substantive Criminal Law: Inevitable or Impossible?*, 4 J.L. & EQUALITY 203, 239 (2005) (“The criminal law functions by narrowing its focus on particular acts, particular actors and particular moments in time.”).

19. See *infra* Part I.

trans panic ideas operated within a broader state agenda to regulate and control “sexual deviance.” This agenda enabled and legitimized state violence against LGBTQ people, including draconian medical treatments that the state forced or pressured LGBTQ people to undergo (for instance, electric shock therapy, hydrotherapy,²⁰ and drug therapy).²¹ This Article examines how in the 1940s and 1950s, prominent psychiatrists who worked for and conducted research in state-run hospitals and prisons advanced new definitions of “gay and trans panic” that more aggressively blamed LGBTQ victims for the violence they experienced and demonized them as sexual aggressors.²² These new definitions fell in line with a then-growing consensus in the United States psychiatric profession that homosexuality (which was then generally understood to include gender nonconformity)²³ was a mental disease.²⁴ In the 1960s, defendants who killed LGBTQ victims started to take advantage of these stigmatizing definitions of gay and trans panic in order to support legal defenses of insanity, self-defense, and provocation.²⁵ In this regard, gay and trans panic ideas not only legitimized state violence against LGBTQ people, but also excused and justified²⁶ violence in ways that blurred the distinction between state and private violence.²⁷

20. SARAH A. LEAVITT, ST. ELIZABETHS IN WASHINGTON, D.C.: ARCHITECTURE OF AN ASYLUM 108–09 (2019) (“Hydrotherapy used specifically designed baths to submerge patients in either hot or cold water for several hours to either shock or calm them.”).

21. See *infra* Section II.B.

22. See *id.*

23. The idea that “gender identity” was distinct from biological sex assigned at birth did not emerge until researchers advanced this idea in the 1950s. See Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 82 (2006).

24. See *infra* Section II.A.

25. See *infra* Part III.

26. Because gay and trans panic concepts have been used over time to support the free-standing defenses of provocation, insanity, and self-defense, it is difficult to classify these strategies as either justifications or excuses. Lee, *supra* note 1, at 489.

27. See *infra* Part III. Instructive on this point, Mark Ungar has advanced a typology that recognizes three categories of state violence against LGBTQ people: (1) “legal” violence, (2) “semilegal” violence, and (3) extrajudicial violence. Mark Ungar, *State Violence and LGBTQ Rights*, in VIOLENCE AND GLOBALIZATION’S PARADOX POLITICS 48, 48 (Kenton Worcester et al. eds., 2002). For “legal” violence, “[t]he courts, the prisons, and other government institutions allow discriminatory and violent practices against individuals in their charge.” *Id.* For “semi-legal” violence, police agencies are armed with laws that “encourage and allow them to carry out unaccountable” violence against LGBTQ people. *Id.* at 48–49. For extrajudicial violence, LGBTQ people are a primary target of “killings, torture, hate crimes, and harassment” by non-state actors. *Id.* For this third category, Ungar explains that “[t]hrough rarely sponsored by the state, such activities are often directed by off-duty

The position of the state in the historical growth of gay and trans panic as a concept has not been a central focus in legal scholarship.²⁸ Bringing this history to the surface is important because it shows how deeply rooted forms of state violence against LGBTQ civilians can arise from state-run institutions and evolve into continued state-condoned and state-legitimized violence.²⁹ This history also demonstrates why the gay and trans panic defenses do much more damage than simply legitimize bad and discredited science.³⁰ Rather, allowing criminal defendants to rely on gay and

officials and either ignored or tacitly encouraged by a government with a constitutional responsibility to do the opposite.” *Id.*

28. There is a robust body of legal scholarship that discusses the gay and trans panic defenses more generally. *See, e.g.*, Robert G. Bagnall et al., *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984); Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY 81 (1992); Joshua Dressler, *When Heterosexual Men Kill Homosexual Men: Reflections on Provocation Law, Sexual Advances, and the Reasonable Man Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995); Lee; *supra* note 1; Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77 (2014); Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133 (1992); J. Kelly Strader et al., *Gay Panic, Gay Victims, and the Case for Gay Shield Laws*, 36 CARDOZO L. REV. 1473 (2015); Aimee Wodda & Vanessa R. Panfil, “Don’t Talk to Me About Deception”: *The Necessary Erosion of the Trans* Panic Defense*, 78 ALB. L. REV. 927 (2015); 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 (2013).

29. Ungar, *supra* note 27, at 50. On this point, it is important to recognize literature that makes parallel arguments that connect contemporary racialized violence in state institutions (i.e., mass incarceration) to historical systems of subordination that include slavery and debt peonage. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 13 (2010) (“Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure that the subordinate status of a group defined largely by race.”); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 43 (2003) (discussing connections between the rise of incarceration as “the primary mode of state-inflicted punishment” and “new conditions [that] reflected the rise of the bourgeoisie as the social class whose interests and aspirations furthered new scientific, philosophical, cultural, and popular ideas”); Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 844 (1997) (stressing that “but for the fruits of slavery and entrenched racism, African Americans would not find themselves disproportionately represented in the criminal justice system”); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1449 (2012) (noting “the multiple ways that women of color were situated within a variety of overlapping structures that singularly and jointly constituted the contours through which surveillance and social punishment take place”); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 19 (2019) (“Prison abolitionists look back to history to trace the roots of today’s carceral state to the racial order established by slavery and look forward to imagine a society without carceral punishment.”); *see also* Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. (forthcoming 2020), (manuscript at 6–11) (on file with author) (providing an overview of abolition theory).

30. Lee, *supra* note 1, at 484–85 (“The idea that homosexuality, latent or otherwise, is a mental illness has long been discredited.”).

trans panic strategies leaves space for antiquated ideas of sexual deviance to thrive in the criminal justice system today.

In spite of the recent wave of legislative bans, the gay and trans panic defenses are still available defense strategies in federal court and in most state courts today. This result is worrisome given the widespread inequalities that LGBTQ people, and especially the most marginalized segments of the LGBTQ population (those who are people of color, transgender or gender nonconforming, homeless, undocumented, and living with HIV), experience in the criminal justice system.³¹ LGBTQ people, and especially intersectionally marginalized LGBTQ people, are disproportionately victims of violence perpetrated by civilians, law enforcement, and correctional staff and inmates.³² Research further shows that anti-LGBTQ juror biases influence jury deliberation and outcomes in criminal cases,³³ including cases in which defendants raise gay and trans panic defenses.³⁴

In light of the state’s historical role in the growth of gay and trans panic ideas as well as the ongoing inequalities that the gay and trans panic defenses continue to present for LGBTQ people today, this Article lays an early theoretical foundation for a politi-

31. See generally JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2011); Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667 (2017).

32. See ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, *SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12*, at 18 (2013) (“Inmates who identified their sexual orientation as gay, lesbian, bisexual, or other reported high rates of inmate-on inmate sexual victimization and staff sexual misconduct.”); SANDY E. JAMES ET AL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, NAT’L CTR. FOR TRANSGENDER EQUAL.* 12–13 (Dec. 2016), <https://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [<https://perma.cc/N33V-9UPC>]. See generally DOUG MEYER, *VIOLENCE AGAINST QUEER PEOPLE: RACE, CLASS, GENDER, AND THE PERSISTENCE OF ANTI-LGBT DISCRIMINATION* (2015); CHRISTY MALLORY ET AL., WILLIAMS INST., *DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY* (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf> [<https://perma.cc/C8B7-FDLU>].

33. See generally Jordan Blair Woods, *LGBTQ in the Courtroom: How Sexuality and Gender Identity Impact the Jury System*, in *CRIMINAL JURIES IN THE 21ST CENTURY: CONTEMPORARY ISSUES, PSYCHOLOGICAL SCIENCE, AND THE LAW* 61, 61–83 (Cynthia J. Najdowski & Margaret C. Stevenson eds., 2019) (providing an overview of research on the relevant challenges linked to sexuality and gender identity in criminal cases).

34. See, e.g., Sarah E. Malik & Jessica Salerno, *Moral Outrage Drives Biases Against Gay and Lesbian Individuals in Legal Judgments*, *JURY EXPERT*, Nov. 2014, at 1, 3; Jessica Salerno et al., *Excusing Murder? Conservative Jurors’ Acceptance of the Gay-Panic Defense*, 21 *PSYCHOL. PUB. POL’Y & L.* 24, 24, 26, 30 (2015). This point will be discussed in greater detail *infra* Part III.

cal framework that justifies banning the gay and trans panic defenses through legislation.³⁵ This political framework balances the traditional justifications for punishment (retribution, deterrence, incapacitation, and rehabilitation)³⁶ with two cornerstone values: (1) state accountability towards LGBTQ people and communities (as well as other marginalized populations), and (2) equality³⁷ under the substantive criminal law.³⁸ As this Article discusses, upholding these values requires an analysis of how the state has treated LGBTQ people in the past and what that treatment says about whether the state is fulfilling what ought to be a baseline normative commitment to respect LGBTQ civilians, and not sponsor, excuse, justify, or condone violence against them.³⁹ In the context of the gay and trans panic defenses, maintaining this normative commitment recognizes that it is necessary to prioritize the demands of state accountability and equality for LGBTQ people under the substantive criminal law over defendants' due process interest in presenting every legal strategy that might benefit their case.

Two caveats are in order. First, this Article is not asserting a causal claim between the violence that LGBTQ victims in gay and trans panic cases experience and the role of the state in the growth

35. See *infra* Part IV.

36. See Stephanos Bibas, *Small Crimes, Big Injustices*, 117 MICH. L. REV. 1025, 1036 (2019) (identifying “retribution, deterrence, incapacitation, and rehabilitation/reform” as “four traditional justifications for punishment”); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 69–76 (2005) (providing an overview of contemporary sentencing purposes).

37. As discussed in further detail *infra* Part IV, the conception of equality that this Article envisions for this political framework is consistent with the substantive principle of equality rather than the formal principle of equality. See Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 750 (2002) (“On the formal view, inequality consists of treating people differently across an irrelevant criterion; on the substantive view, the injury is subordinating one group to another.”).

38. It is beyond the scope of this Article to explain how penal codes would change in contexts that do not involve the gay and trans panic defenses when equality is prioritized as a value under the criminal law. As discussed further in *infra* Part IV, however, theoretical perspectives on criminal law tend to neglect equality as an underlying value of the substantive criminal law and place primacy on the traditional justifications for punishment. Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1452 (2016) (noting that “[c]riminal law theorists often aim to promote one or another justification for punishment . . . [b]ut equality *per se* is all but invisible in much substantive criminal law scholarship”). *But see* Butler, *supra* note 29 (making the case for affirmative action in criminal law).

39. Thomas, *supra* note 13, at 1477 (recognizing “that one of the first duties of the state is to protect citizens from whom its powers derive against random, unchecked violence by other citizens, or by government officials”).

of gay and trans panic as a concept and criminal defense. This Article is also not asserting a one-dimensional, causal claim that medical definitions of gay and trans panic historically shaped and continue to mold stigmatizing attitudes towards LGBTQ people in the public, legal, and political spheres.⁴⁰ It is difficult to create this directional story and these causal arguments are unnecessary to establish the claims presented in this Article. Rather, the main goal of this Article is to bring the historical connections between the state and gay and trans panic to the surface in order to show why the state has a distinct responsibility today to ban criminal defenses that rely on those stigmatizing concepts.

Second, this Article does not argue that the state is the only actor to blame for the growth of gay and trans panic as a medical concept and criminal defense. Instead, this Article demonstrates that the state is a key player in this story. As explained below, the state had a central role in supporting several prominent doctors who advanced stigmatizing definitions of gay and trans panic as part of a broader state and social agenda to regulate and control “sexual deviance.”⁴¹ It is important not to lose sight of these historical connections when considering how the state should respond to the gay and trans panic defenses today.⁴²

This Article proceeds in four parts. Part I begins by discussing the origins of gay and trans panic as a medical concept in 1920. Part II describes how prominent psychiatrists who worked in state-run hospitals and prisons advanced new meanings of “gay and trans panic” between the 1940s and 1950s that placed the blame on LGBTQ victims for the violence they experienced and stigmatized LGBTQ people as sexual aggressors. These alternative definitions were consistent with a then-growing consensus in the

40. This relationship is likely symbiotic in the sense that prevailing medical attitudes towards LGBTQ people at the time both embodied and shaped how LGBTQ people were treated and viewed in other domains, including the legal, public, and political domains. Foucault’s position on the symbiotic relationship between knowledge and power is instructive on this point. See Michel Foucault, *Two Lectures, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS BY MICHEL FOUCAULT 1972–1977*, at 78–108 (Colin Gordon ed., Colin Gordon et al., trans., 1972). Legal scholars have made similar arguments in the context of reproduction. See, e.g., Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 267 (1992) (“In each culture, norms and practices of the community, including those of family, market, medicine, church, and state, combine to shape the social relations of reproduction.”).

41. See *infra* Part II.

42. See *infra* Part IV.

United States psychiatric profession that homosexuality was a mental disease. Part III then discusses how criminal defendants, starting in the 1960s, relied on these shifting conceptions of gay and trans panic as an ideological hook to legally justify and excuse acts of violence against LGBTQ people. Finally, Part IV explains why it is misguided to distance this history from defendants' reliance on gay and trans panic strategies today. Based on this idea, the analysis lays the groundwork for a normative political framework that justifies legislation banning the gay and trans panic defenses.

I. THE ORIGINS OF "GAY AND TRANS PANIC" (1920)

In 1920, Edward J. Kempf coined the term "acute homosexual panic"⁴³ as a psychosis based on case histories of nineteen World War I veterans who had been admitted to St. Elizabeths Hospital in Washington, D.C.⁴⁴ The fact that Kempf worked as a clinical psychologist at St. Elizabeths Hospital⁴⁵ is an important link between the origins of gay and trans panic and the state.

In 1855, Congress established St. Elizabeths Hospital (initially called the Government Hospital for the Insane⁴⁶) as a psychiatric hospital that was federally run and administered.⁴⁷ The hospital's initial mandate was to house individuals, most of whom were active members of the military and veterans,⁴⁸ under the jurisdiction of the federal government and judged to be mentally ill.⁴⁹ By 1925, the hospital had approximately four thousand patients and fifty physicians.⁵⁰ Illustrating the influence of the hospital, each of the

43. Burton S. Glick, *Homosexual Panic: Clinical and Theoretical Considerations*, 129 J. NERVOUS & MENTAL DISEASE 20, 21 (1959) (noting that Kempf was "apparently the originator of the term *acute homosexual panic*").

44. See generally EDWARD J. KEMPF, PSYCHOPATHOLOGY 477–515 (1920).

45. *Id.* at vii.

46. Surya Kanhouwa & Kenneth Gorelick, *A Century of Pathology at Saint Elizabeths Hospital, Washington, DC*, 121 ARCHIVES OF PATHOLOGY & LABORATORY MED. 84, 84 (1997).

47. Arthur D. Hill, Book Note, *Insanity and the Criminal Law*, 37 HARV. L. REV. 167, 167 (1923). St. Elizabeths Hospital remained federally run until its hospital function was transferred to the District of Columbia government in 1987. LEAVITT, *supra* note 20, at 16.

48. LEAVITT, *supra* note 20, at 56 ("Over the century-long association with the military, usually more than half of St. Elizabeths patients at any given time were veterans."); Martin Summers, "Suitable Care of the African When Afflicted with Insanity": Race, Madness, and Social Order in Comparative Perspective, 84 BULL. HIST. MED. 58, 62 (2010).

49. LEAVITT, *supra* note 20, at 56.

50. W.A. White, *The New Saint Elizabeths Hospital*, 80 AM. J. PSYCHIATRY 503, 504 (1924).

five superintendents during the hospital's first century in operation were leaders in the mental health field and were elected to serve as president of the American Psychiatric Association (“APA”).⁵¹

Scholars have explored historical connections between scientific research conducted in St. Elizabeths Hospital and the use of medicine to control and mistreat racial, ethnic, sexual, and gender minorities who were perceived as threatening to the social order in the United States.⁵² Published studies reveal that as early as the 1920s, doctors at St. Elizabeths Hospital characterized homosexuality as a biological “deficiency” and identified homosexuality as a cause for delusions and hallucinations of male veteran patients who did not conform to traditional masculine norms.⁵³ As discussed later in more detail, over the course of decades, hundreds if not thousands of LGBTQ patients at St. Elizabeths Hospital were subjected to draconian medical treatments intended to “cure” their “deviant” sexualities and gender identities, including electric shock, hydrotherapy, and insulin therapy.⁵⁴

51. LEAVITT, *supra* note 20, at 94; MATTHEW GAMBINO, HASTINGS CTR. REPORT, FEVERED DECISIONS: RACE, ETHICS, AND CLINICAL VULNERABILITY IN THE MALARIAL TREATMENT OF NEUROSYPHILIS, 1922–1953, at 40 (July–Aug. 2015), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/hast.451> [<https://perma.cc/59BR-GCZ4>]. Moreover, due to its top reputation, many leading medical practitioners and scholars conducted research while working at or visiting St. Elizabeths Hospital. LEAVITT, *supra* note 20, at 118.

52. LEAVITT, *supra* note 20, at 108 (“Race, gender and sexual orientation prejudices on the part of the staff . . . informed the treatment plans”). With regard to race, scholars have called attention to how the misguided ideology of St. Elizabeths Hospital doctors who equated mental abnormality in white individuals with normality in black individuals influenced the management of black bodies at the hospital in its early decades. Summers, *supra* note 48, at 86. Since opening in 1855, St. Elizabeths Hospital did not exclude African Americans from being admitted, although the hospital remained segregated by race until 1954. LEAVITT, *supra* note 20, at 83. Scholars and commentators have described how racism among doctors and staff shaped the treatment of African American patients in St. Elizabeths Hospital. LEAVITT, *supra* note 20, at 83; GAMBINO, *supra* note 51, at 40. In addition, the available historical evidence suggests that for much of its history, African American patients were more often assigned to manual labor within the hospital whereas white patients had opportunities to work as carpenters, tailors, and seamstresses. LEAVITT, *supra* note 20, at 89. *See also, e.g.*, John E. Lind, *Phylogenetic Elements in the Psychoses of the Negro*, 4 PSYCHOANALYTIC REV. 303 (1917) (“The Negro, studied judiciously by those who are competent, appears to be at a much lower cultural level than the Caucasian.”). John Lind worked a psychiatrist at St. Elizabeths Hospital. Matthew Gambino, “*The Savage Heart Beneath the Civilized Exterior*”: Race, Citizenship, and Mental Illness in Washington D.C., 1900–1940, DISABILITY STUD. Q. (Summer 2008).

53. *See, e.g.*, S.A. Silk, *The Compensatory Mechanism of Delusions and Hallucinations*, 77 AM. J. INSANITY 523, 530 (1921).

54. LEAVITT, *supra* note 20, at 20, 110; Andrew Giambrone, *LGBTQ People Suffered Traumatic Treatments at St. Elizabeths Hospital for the Mentally Ill*, WASH. CITY PAPER (May 31, 2018, 6:00 AM), <https://www.washingtoncitypaper.com/news/article/21007233/find>

It is noteworthy that gay and trans panic has its origins in psychological research from the 1920s. The 1920s were a distinct period in which psychological theories emerged as a significant paradigm to explain crime, including then-criminalized homosexuality.⁵⁵ After World War I, physicians documented many cases in which returning soldiers had developed neurotic disorders during combat as a result of psychological trauma (commonly known as “shell shock”).⁵⁶ As then-prevailing theories of phrenology and anthropometry⁵⁷ were unable to explain these problems, medical experts in psychology, psychiatry, and psychoanalysis assumed a leading role in creating new theories and responses.⁵⁸ Illustrating connections to the state, thousands of veterans suffering from “shell shock” were admitted and treated by doctors at St. Elizabeths Hospital after World War I.⁵⁹

In 1920, Kempf described “acute homosexual panic” in a way that differs in two significant respects from how gay and trans panic is typically understood in criminal cases today.⁶⁰ First, the driving impulse underlying Kempf’s conception was distinct from the driving impulse of today’s defendants who claim gay and trans panic to cause harm on LGBTQ people. Kempf characterized ho-

ependent-scholars-uncover-the-traumatic-treatments-lgbtq-people-suffered-at-st-elizabeths [https://perma.cc/N5NJ-WAZG]. It is impossible to know the exact number of LGBTQ patients who were admitted to St. Elizabeths Hospital because of their sexual orientation and gender identities because many records have been destroyed. *Id.* Unlike African American patients, the available historical evidence does not suggest that LGBTQ patients were segregated in St. Elizabeths Hospital. LEAVITT, *supra* note 20, at 83.

55. Woods, *supra* note 31, at 685.

56. RUTH LEYS, TRAUMA: A GENEALOGY 2 (2000). See generally Otto Van der Hart et al., *Somatoform Disassociation in Traumatized World War I Combat Soldiers: A Neglected Clinical Heritage*, 1 J. TRAUMA & DISSOCIATION 33 (2000).

57. Phrenology is “the study of the shape of the skull and its relation to character traits.” Cooper Ellenberg, *Lie Detection: A Changing of the Guard in the Quest for Truth in Court?*, 33 LAW & PSYCHOL. REV. 139, 140 (2009). Anthropometry is “the measurement of body parts for the purpose of understanding human variation.” Cary Federman, *A “Morphological Sphinx”: On the Silence of the Assassin Leon Czolgosz*, 2 J. THEORETICAL & PHIL. CRIMINOLOGY 100, 125 (2010).

58. Eli Zaretsky, *Psychoanalysis, Vulnerability, and War*, in FIRST DO NO HARM: THE PARADOXICAL ENCOUNTERS OF PSYCHOANALYSIS, WARMAKING, AND RESISTANCE 177, 180 (Adrienne Harris & Steven Botticelli eds., 2010) (noting that after the start of World War I, “psychiatrists increasingly turned toward psychological explanations” to explain shell shock); Woods, *supra* note 31, at 685 & n.100.

59. LEAVITT, *supra* note 20, at 56.

60. Lee, *supra* note 1, at 475–76, 483, 488; Peter Nicolas, *“They Say He’s Gay”: The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793, 810 (2003) (noting that there are several ways in which the concept of gay panic as used in criminal cases today differs from how Edward Kempf described the term).

homosexual panic as a psychosis “due to the pressure of uncontrollable perverse sexual cravings.”⁶¹ He described that this condition affected “latent homosexuals,” which was a Freudian concept that posited that for some individuals who thought of themselves as heterosexual, homosexual desires remained in their repressed unconscious and were capable of shaping human behavior under certain conditions.⁶² Kempf was especially concerned about the alleged prevalence of homosexual panic in environments where men and women were segregated for long periods of time, such as military camps and ships, prisons, schools, and asylums.⁶³

Second, the potential for violence in Kempf’s conception of acute homosexual panic was largely inward—namely, self-harm—rather than outward harm in the form of unwanted sexual advances towards others. In Kempf’s view, acute homosexual panic was rooted in a person’s co-existing fear of their own homosexuality coupled with a fear of heterosexuality.⁶⁴ Kempf argued that this tension did not necessarily trigger homicidal or violent reactions. In fact, none of the case histories in his scientific research involved such violence.⁶⁵ Rather, typical symptoms included depression, anxiety, and suicidal impulses.⁶⁶

Nonetheless, Kempf still defined heterosexuality as the norm and placed primacy on traditional norms of sex, sexuality, and gender.⁶⁷ Kempf’s treatment recommendations for “acute homosexual panic” illustrate these points. He stressed that the future of a soldier or sailor diagnosed with “acute homosexual panic” is the “most insecure”⁶⁸ without “fortunate sexual adjustment,”⁶⁹ which in Kempf’s view “require[d] controls and reenforcement [sic] to overcome dangers and become refined.”⁷⁰ Kempf further emphasized that society should “encourage [sic] and promote the development of heterosexual potency in order to prevent biological abortions

61. KEMPF, *supra* note 44, at 477.

62. See Leon Salzman, *The Concept of Latent Homosexuality*, 17 AM. J. PSYCHOANALYSIS 161, 162, 164 (1957).

63. KEMPF, *supra* note 44, at 477.

64. *Id.* at 511.

65. Nicolas, *supra* note 60, at 810.

66. KEMPF, *supra* note 44, at 511.

67. STEPHEN TOMSEN, VIOLENCE, PREJUDICE, AND SEXUALITY 107 (2009).

68. KEMPF, *supra* note 44, at 515.

69. *Id.*

70. *Id.* at 719.

through fear of the responsibilities of heterosexuality—pregnancy, labor, parenthood.”⁷¹

The scientific community did not pay much attention to “acute homosexual panic” in the decades after Kempf introduced the term in 1920.⁷² As the next Part explores, this left space for medical experts to advance alternative meanings of the concept that stigmatized LGBTQ people as sexual aggressors and placed the blame on them for the violence that they experienced.

II. THE STATE AGENDA TO REGULATE “SEXUAL DEVIANCE” AND NEW DEFINITIONS OF GAY AND TRANS PANIC (1940S–1950S)

This Part looks to medical literature in the 1940s and 1950s to advance two key points. First, the analysis shows that several prominent psychiatrists at state-run hospitals and prisons in the 1940s and 1950s advanced new definitions of gay and trans panic consistent with how the concept is largely understood in criminal cases today—namely, as violent situations triggered by the unwanted sexual advances of LGBTQ people.⁷³ These stigmatizing conceptions of gay and trans panic fell in line with a then-growing consensus in the United States psychiatric profession that homosexuality (which was then generally understood to include gender nonconformity)⁷⁴ was a mental illness. Second, supported by this pathological model of homosexuality, these newly emerging and stigmatizing definitions of gay and trans panic offered legal and social justifications for prominent psychiatrists at state-run hospitals and prisons to apply brutal and dangerous medical interventions on LGBTQ patients. In this regard, gay and trans panic ideas

71. *Id.* at 719–20.

72. Glick, *supra* note 43, at 27; *id.* at 20 (recognizing that only one paper had been dedicated to the topic of homosexual panic since 1939 and 1959); Ben Karpman, *Mediate Psychotherapy and the Acute Homosexual Panic (Kempf's Disease)*, 98 J. NERVOUS & MENTAL DISEASE 493, 494 (1943) (noting that “no one, so far as I know, has taken up the problem of acute homosexual panic since Kempf first formulated it in 1920”).

73. Lee, *supra* note 1, at 476 (“More recently, the term ‘gay panic’ has been deployed to refer to the alleged loss of self-control provoked in a heterosexual man by a gay man’s unwanted sexual advance.”); see also Christina Pei-Lin Chen, Note, *Provocation's Privileged Desire: The Provocation Doctrine, “Homosexual Panic,” and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 195, 200 (2000) (“In short, homosexual panic evolved from an internally induced psychological disorder with external symptoms to become predominantly characterized as an immediate and irrational reaction to real, external stimuli.”).

74. See Ben-Asher, *supra* note 23, at 82 (noting that the idea that “gender identity” was distinct from biological sex assigned at birth did not emerge until the 1950s).

provided an ideological justification for state violence against LGBTQ people.

A. *Growing Pathologization of Homosexuality*

Before developing both of these points, for contextual purposes this section summarizes important developments regarding the treatment of LGBTQ people in medicine and law during the 1940s and 1950s. In 1941, Hervey Cleckley released groundbreaking research that offered the first clinical profile of the “psychopath.”⁷⁵ “Forensic psychologists soon applied and honed this profile to [examine] connections between psychopathology and crime.”⁷⁶

Many prominent psychiatrists applied new ideas of psychopathy to redefine then-criminalized homosexuality as a mental disease that could not be cured.⁷⁷ Their views soon became the dominant way of understanding homosexuality in the United States psychiatric profession,⁷⁸ reflected by the inclusion of homosexuality as a mental disorder in the APA’s Diagnostic and Statistical Manual of Mental Disorders (“DSM”) between 1952 and 1973.⁷⁹ During this period, several prominent psychiatrists who specialized in homosexuality released published works that advanced this pathological view.⁸⁰

There were significant parallels between the increasing hostility towards LGBTQ people in the psychiatric profession and the law.⁸¹ In the 1940s and 1950s, every state criminalized same-sex sex, and many localities prohibited certain gender nonconforming expression, such as cross-dressing.⁸² “Between 1946 and 1959 . . . twenty-

75. HERVEY M. CLECKLEY, *THE MASK OF SANITY: AN ATTEMPT TO REINTERPRET THE SO-CALLED PSYCHOPATHIC PERSONALITY* 238–55 (1941) (introducing and describing a clinical profile of the psychopath).

76. Woods, *supra* note 31, at 687–88.

77. *Id.* at 688.

78. RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 28 (1981).

79. *Id.* at 39, 40.

80. See, e.g., EDMUND BERGLER, *HOMOSEXUALITY: DISEASE OR WAY OF LIFE?* (1956); IRVING BIEBER, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY OF HOMOSEXUALS* (1962); CHARLES W. SOCARIDES, *THE OVERT HOMOSEXUAL* (1968).

81. Woods, *supra* note 31, at 689.

82. See William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 660–63.

nine states enacted sexual psychopath laws.”⁸³ These laws generally took two forms. First, any person who was charged with a crime and found by a jury to be a “sexual psychopath” could be handed over to a state’s department of public health, perhaps indefinitely, until that person was “cured.”⁸⁴ Second, a civil variation allowed for the “psychiatric commitment of sexual psychopaths, perhaps indefinitely, regardless of whether they were charged with a crime.”⁸⁵ Although broadly written to apply to many different types of crimes, sexual psychopath laws were most heavily enforced against gay men.⁸⁶ Medical experts who adopted the view that homosexuality was a mental illness commonly testified as expert witnesses in these cases.⁸⁷

There were also important parallels in the 1940s and 1950s between the growing psychiatric consensus that homosexuality was a mental disease, public attitudes towards homosexuality, and the rise of early lesbian and gay social movements. Many scholars describe World War II as a catalyst for the growth of visible lesbian and gay communities in United States cities,⁸⁸ although several neighborhoods like Greenwich Village in New York City (where the Stonewall Inn is located) had a strong lesbian and gay presence even before the war.⁸⁹ Migration brought about by the war, as well as industrialization, opened new possibilities for lesbians and gays to congregate in city neighborhoods.⁹⁰ By the 1950s, relocation to city neighborhoods was a common phenomenon.⁹¹ Many LGBTQ

83. *Id.*

84. Estelle B. Freedman, *Uncontrolled Desires: The Response to the Sexual Psychopath, 1920–1960*, in *FEMINISM, SEXUALITY, AND POLITICS: ESSAYS BY ESTELLE B. FREEDMAN* 121, 132 (2006).

85. *Id.*

86. *See id.* at 132; Bernard C. Glueck, Jr., *An Evaluation of the Homosexual Offender*, 41 *MINN. L. REV.* 187, 195 (1957) (“The practical fact of the matter would seem to be that most of the sodomy laws, and the special sex psychopath laws, are designed primarily for the control of the persistent homosexual offender.”).

87. J. PAUL DE RIVER, *THE SEXUAL CRIMINAL: A PSYCHOANALYTICAL STUDY* 245–54 (1949) (offering guidance to medical experts who are called as expert witnesses in cases involving sex crimes).

88. *See generally* ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* (1990).

89. GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890–1940*, at 237 (1994).

90. BÉRUBÉ, *supra* note 88, at 245–46.

91. Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *CULTURE, SOCIETY AND SEXUALITY: A READER* 143, 156 (Peter Aggleton & Richard Parker eds., 1999).

people embraced the freedom, anonymity, and safety in numbers that city life provided.⁹²

At the same time, lesbian and gay mobilization also emerged with the formation of the Mattachine Society and the Daughters of Bilitis in the 1950s.⁹³ These early lesbian and gay social movement groups prioritized refuting the dominant psychiatric view that homosexuality was a mental disease and eliminating the stigma of disease attached to homosexuality.⁹⁴ In addition to creating public forums, these organizations released publications that allowed dissenting medical experts to present research that challenged the prevailing psychiatric view that homosexuality was a mental illness.⁹⁵

Scholars have connected the strong public opinion during the mid-twentieth century that homosexuality was a mental disease to a wave of moral panic about sex crimes that swept across the United States immediately after World War II.⁹⁶ “Once the war concluded, Americans faced the challenge of returning to normalcy both inside and outside of the home.”⁹⁷ Strengthening traditional family values was one means by which people attempted to return to normalcy.⁹⁸ The prioritization of family values fed anxieties about populations that were perceived to threaten those values, including gay men.⁹⁹

Illustrating overlap between medicine and law enforcement, in the late 1930s prominent forensic psychiatrist J. Paul de River was hired by the Los Angeles Police Department (“LAPD”) as the first official police psychiatrist in a United States police department.¹⁰⁰ De River created the LAPD’s Sex Offense Bureau and consulted on

92. BÉRUBÉ, *supra* note 88, at 245.

93. D’EMILIO, *supra* note 12, at 2.

94. BAYER, *supra* note 78, at 67–100 (discussing challenges to the psychiatric profession in lesbian and gay social movements from the 1950s to the 1970s).

95. *Id.* at 73–75.

96. It is important to recognize that the medicalization of homosexuality at times also operated as a way for researchers and members of the public who held more favorable attitudes towards homosexuality to criticize its criminalization and incarceration of LGBTQ civilians. *See, e.g.*, Glueck, *supra* note 86, at 193; Julian L. Woodward, *Changing Ideas on Mental Illness and Its Treatment*, 16 AM. SOC. REV. 443, 445 (1951).

97. Woods, *supra* note 31, at 689.

98. *See* BÉRUBÉ, *supra* note 88, at 258.

99. *Id.*

100. Eugene D. Williams, *Introduction to DE RIVER*, *supra* note 87, at xiii; *Sex Crimes Clinic Opens: Chief David Starts Classification and Control Bureau*, L.A. TIMES, July 30, 1938.

thousands of crime scenes with a sexual component.¹⁰¹ Illustrating the stigma attached to then-criminalized homosexuality, de River argued that any homosexual who refused treatment was “a criminal in the true sense as he has no regard or respect for existing laws, made or enforced by the majority of our society.”¹⁰²

The “Lavender Scare” of the 1950s is one of the most vivid examples of the overlap between increasing hostility towards LGBTQ people in medicine, law, and the state.¹⁰³ In the wake of anticommunism, there was an organized effort in the federal government and the military to remove and persecute lesbian and gay employees and active service members.¹⁰⁴ Several prominent psychiatrists consulted with federal investigators and testified during congressional hearings.¹⁰⁵ A 1950 Senate subcommittee report on “Employment of Homosexuals and Other Sex Perverts in the Government” noted a consensus among psychiatrists that homosexuality was evidence of a personality “flaw” and recommended that “overt homosexuals . . . be considered as proper cases for medical and psychiatric treatment.”¹⁰⁶ As a result of heightened investigations and screens, more than 1000 federal employees either resigned or were terminated, and over 2000 active service members were discharged from the military during the early 1950s for allegations relating to homosexuality.¹⁰⁷

Increasing hostility towards homosexuality in the medical, legal, political, and public spheres facilitated the same forms of state violence against LGBTQ people that triggered the Stonewall

101. Williams, *supra* note 100, at xiii.

102. J. PAUL DE RIVER, CRIME AND THE SEXUAL PSYCHOPATH 82 (1958).

103. D’EMILIO, *supra* note 12, at 52; Mary Ziegler, *What Is Sexual Orientation*, 106 KY. L.J. 61, 68 (2018) (“Because homosexuals were sick and morally weak, McCarthy argued that they were far more likely to endorse Communism or fall prey to blackmail schemes.”).

104. See generally DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT (2004). It is important to note that efforts to remove lesbians and gays in the federal government and the military also occurred in the late 1940s, before the Lavender Scare in the 1950s. D’EMILIO, *supra* note 12, at 44–45.

105. *Employment of Homosexuals and Other Sex Perverts in Government*, Subcomm. on Investigations, S. Comm. on Expenditures in Exec. Dep’t, S. DOC. NO. 241, at 2 (2d Sess. 1950) (“A number of eminent physicians and psychiatrists, who are recognized authorities on this subject, were consulted and some of these authorities testified before the subcommittee in executive session.”).

106. *Id.* at 3.

107. JOHNSON, *supra* note 104, at 166. As scholars have discussed, it is impossible to know the exact number of lesbian and gay federal employees who were affected by this purge because many agencies did not keep records of the dismissals. *Id.*; see also D’EMILIO, *supra* note 12, at 44.

Riots—namely, police mistreatment and abuse. As the next section discusses, this overlap also enabled other forms of state violence in the form of brutal and dangerous medical treatments intended to change LGBTQ people’s sexual orientation and gender identities.¹⁰⁸

B. *New Definitions of Gay and Trans Panic*

With the growing pathological model of homosexuality in the 1940s and 1950s, medical experts advanced new definitions of gay and trans panic that demonized LGBTQ people as sexual aggressors and shifted the blame on them for the violence they experienced in state institutions and society more generally. Illustrating connections to the state, several prominent psychiatrists that advanced these alternative definitions worked at state-run hospitals and prisons. These psychiatrists subjected both involuntarily and voluntarily committed LGBTQ patients who were diagnosed with gay and trans panic, or blamed for the violent responses of others due to gay and trans panic, to various draconian medical treatments. Common examples included drugs and chemicals to induce vomiting, electric shock, hydrotherapy, castration, hysterectomy, clitoridectomy, and lobotomy.¹⁰⁹ Towing the line between state and private violence, pressure to undergo these treatments not only came from doctors in state institutions and judges, but also from family and community members after LGBTQ peoples’ sexual orientations or gender identities became known to others.¹¹⁰

In 1943, Dr. Benjamin Karpman—an influential clinical psychologist who worked with Edward J. Kempf at federally run St. Elizabeths Hospital¹¹¹—published one of the few articles dedicated

108. D’EMILIO, *supra* note 12, at 18; William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961*, 24 FLA. ST. U. L. REV. 703, 715 (1997); Freedman, *supra* note 84, at 130; Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 801–02 (2017).

109. Lori Messinger, *A Historical Perspective*, in SEXUAL ORIENTATION AND GENDER EXPRESSION IN SOCIAL WORK PRACTICE 25 (Deana F. Morrow & Lori Messinger eds., 2006); George, *supra* note 108, at 801–02.

110. See D’EMILIO, *supra* note 12, at 18 (noting that after the spread of sexual psychopath laws between the 1940s and 1960s, “some families committed their gay members to asylums”); Eskridge, *supra* note 108, at 715.

111. Benjamin Karpman, *From the Autobiography of a Bandit: Toward the Psychogenesis of So-Called Psychopathic Behavior*, 36 J. CRIM. L. & CRIMINOLOGY 305, 305 (1946) (noting that Karpman was associated with St. Elizabeths Hospital “for over twenty-five years as a Senior Medical Officer and Psychotherapist”).

to “acute homosexual panic” between the 1920s and 1960s.¹¹² The timing of Karpman’s publication is important because it connects shifting definitions of “gay and trans panic” to emerging concepts in psychopathy that stigmatized LGBTQ people as mentally ill “sexual deviants.” In the 1940s and 1950s, Karpman emerged as a leader in applying new concepts of psychopathy to sex offenses, including then-criminalized homosexuality.¹¹³ During this period, an increasing number of lesbians and gays were admitted and treated for homosexuality in St. Elizabeths Hospital (sometimes for indefinite periods), including under the District of Columbia’s “sexual psychopath” law.¹¹⁴

Karpman’s 1943 article focused on a case study of a thirty-four-year-old male who worked as an engineer and was married to a woman.¹¹⁵ The case narrative described the man as depressed, unable to sleep, and worried about his financial condition and his family.¹¹⁶ Eventually, he became introverted, talked to himself, could not perform sexually in his marriage, and expressed “pathological sex trends.”¹¹⁷ Those trends included saying that he was a woman and having hallucinations of seeing naked men dancing who, at times, did sexual things to him.¹¹⁸ The patient tried to commit suicide after he was committed to St. Elizabeths Hospital.¹¹⁹

112. See generally Karpman, *supra* note 72. Karpman noted that Kempf had only provided the “bare outlines” of “acute homosexual panic” and that “because the field is so promising, it seems desirable to take up the further study of it in detail.” *Id.* at 494.

113. See BENJAMIN KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES 203–30 (1954) (discussing overt and latent homosexuality); *id.* at 609–13 (discussing homosexuality). See generally Benjamin Karpman, *The Sexual Psychopath*, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 194 (1951); Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 YALE J.L. & HUMAN. 163, 193–96 (2008) (describing Karpman as a leading figure in the study of psychopathy and its relationship to crime).

114. LILLIAN FADERMAN, THE GAY REVOLUTION: THE STORY OF THE STRUGGLE 4–5 (2015) (discussing how under the Miller Act, a “sexual psychopath . . . could be committed to the criminal ward of the District of Columbia’s St. Elizabeth’s psychiatric hospital”); LEAVITT, *supra* note 20, at 20; Winfred Overholser, *Some Problems of the “Criminal Insane” at Saint Elizabeth’s Hospital*, 22 MED. ANNALS D.C. 347, 349 (1953) (“Congress in enacting the Miller Act denominated St. Elizabeths Hospital . . . as a place of treatment”); see also, e.g., Charles Francis & Pate Felts, *Archive Activism: Vergangenheitsbewältigung!*, QED, Spring 2017, at 28, 29 (discussing the case of Thomas H. Tattersall, a “self-admitted homosexual” who was admitted to St. Elizabeths Hospital after being fired from his job at the Department of Commerce for the crime of homosexuality and administered repeated “insulin shock therapy” sessions).

115. Karpman, *supra* note 72, at 494.

116. *Id.*

117. *Id.*

118. *Id.* at 494, 502.

119. *Id.* at 494–95.

Karpman became involved in the case after the man’s wife threatened to report the hospital ward physician to the superintendent if more was not done for her husband.¹²⁰

Similar to Kempf, Karpman explained the patient’s mental condition in terms of his latent homosexuality conflicting with feelings of guilt from his conscience.¹²¹ Unlike Kempf, however, Karpman linked those feelings of guilt to not only the patient’s same-sex fantasies, but also to the patient’s alleged unwanted sexual advances towards others.¹²² In his analysis of the patient’s “[p]anic and [p]sychotic [t]rends,”¹²³ Karpman stressed that the patient’s “homosexual trend” appeared not only in his same-sex fantasies, but also in his wife’s statement that the patient had been accused of sexually approaching a male sailor.¹²⁴ Karpman further described that the patient would wander about at night and “hang around the beds of other patients.”¹²⁵ On one occasion, another male patient knocked out two of the patient’s teeth after assuming that he came to his bed for “homosexual purposes.”¹²⁶

It is important to acknowledge that the role of the unwanted sexual advance in Karpman’s diagnosis of the patient was different from how unwanted sexual advances are used to support gay and trans panic defenses today. Karpman used the sexual advance as evidence of the patient’s mental condition as opposed to the mental state of the person who reacted violently. Nonetheless, Karpman’s research embodies an important shift to link the concept of homosexual panic with sexual advances towards others.

Later medical research went one step further to connect the meaning of gay and trans panic with the mental state of both latent homosexuals and heterosexuals who reacted violently to the alleged unwanted sexual advances of openly LGBTQ people. In 1951, Russell Dinerstein and Bernard Glueck, Jr.—forensic psychiatrists who worked at the psychiatric clinic at Sing Sing Prison operated by the State of New York—published an article that characterized

120. *Id.* at 495.

121. *Id.* at 493, 503.

122. *Id.* at 502–03.

123. *Id.* at 501.

124. *Id.* at 502–03.

125. *Id.* at 503.

126. *Id.*

“homosexual panic” as a male inmate’s violent mental state triggered by the unwanted sexual advance of a gay man.¹²⁷ The fact that Dinerstein and Glueck worked at the psychiatric clinic at Sing Sing Prison is an important element that connects the state to these shifting conceptions of gay and trans panic that more aggressively demonized LGBTQ people.

Dinerstein and Glueck’s association of “homosexual panic” with violent reactions triggered by the unwanted sexual advances of gay men stems from the specific institutional context in which their research focused—prison.¹²⁸ Dinerstein and Glueck stressed that “acute anxiety attacks” rooted in “homosexual conflicts” raised security concerns for the entire prison community.¹²⁹ Ironically, Glueck’s later published work indicates that his concerns about housing gay men in prisons was actually part of his broader critique of using the criminal law to incarcerate gay men.¹³⁰ Nonetheless, his research accepted a pathological definition of homosexuality and advocated for applying invasive medical treatments on gay men, such as electroshock therapy.¹³¹

Unlike Kempf’s research, Dinerstein and Glueck recognized that the prison community included both “overt homosexuals” and “latent homosexual[s].”¹³² With regard to “homosexual panic,” Dinerstein and Glueck described that it was a “common occurrence in prison for an overt homosexual to make a sexual approach” to a “latent homosexual.”¹³³ In their view, this situation “produces a rather severe disturbance in the individual who is approached” and can often result in “violence and assaultiveness.”¹³⁴ Dinerstein and Glueck further described that the propositioned men often asserted that they were “not homosexuals” and felt “completely justified in physically warding off such attacks.”¹³⁵ Consistent with stereotypes of gay men as sexual predators, the researchers noted the

127. Russell H. Dinerstein & Bernard C. Glueck, Jr., *Sub-Coma Insulin Therapy in the Treatment of Homosexual Panic States*, 1951 PROC. AM. PRISON ASS’N 86, 87–89.

128. Glueck also makes this point in a separate publication. See Glueck, *supra* note 86, at 208–09.

129. Dinerstein & Glueck, *supra* note 127, at 86.

130. Glueck, *supra* note 86, at 205–07.

131. *Id.* at 209.

132. Dinerstein & Glueck, *supra* note 127, at 87, 89. Dinerstein and Glueck described “latent homosexuals” as people “who may have homosexuality as a problem but ha[ve] never been consciously aware of it.” *Id.*

133. *Id.* at 87.

134. *Id.*

135. *Id.* at 88.

possibility that an “overt homosexual may have some awareness that another man might be a suitable partner” in prison based on “some intangible insight.”¹³⁶

Another important development in Dinerstein and Glueck’s research is that it recognized an additional variation of homosexual panic—when “overt homosexual[s]” make an unwanted sexual advance “to an inmate who is not homosexual” (overt or latent).¹³⁷ The researchers noted that “[t]olerance and understanding” were “rare attributes” in prison and that the approached man “usually becomes extremely violent, and feels no hesitation in striking back.”¹³⁸ They stressed that such fights are a serious security concern for prison management because they “can quickly flare up.”¹³⁹

Dinerstein and Glueck’s recommendations for responding to “homosexual panic” in prison, which were informed by the results of their intervention program at Sing Sing Prison, reveal important connections between gay and trans panic ideas and state violence.¹⁴⁰ Consistent with the emerging psychiatric consensus that homosexuality was a mental illness, the researchers described overt homosexuality as a “type of disorder.”¹⁴¹ They further noted that because treatments for overt homosexuality were “notoriously unsuccessful,” they “handle[d] the problem” by isolating openly gay men (especially effeminate ones) from the prison population.¹⁴² The men were then referred for psychiatric evaluation.¹⁴³

In two ways, this response placed the blame on openly gay men for the violence they experienced in prison and framed them as a security threat.¹⁴⁴ First, this response demonized gay men as suffering from an incurable mental illness. Second, this response accepted the idea that violence was an understandable response to “overt homosexuals” in prison given the lack of tolerance in prison towards those who had this incurable “disorder.”

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See id.* at 86, 89, 91.

141. *Id.* at 87.

142. *Id.*

143. *Id.* at 89.

144. Comstock, *supra* note 28, at 97 (“The justification for self-defense in these incidents is not the physical threat posed by the ‘advance,’ but the sexual identity of the victim.”).

For latent homosexuals, Dinerstein and Glueck described that their therapeutic program involved “situational manipulation, physical therapy, and psychotherapy.”¹⁴⁵ While participating in the program, inmates would be separated from the general population and put into a prison hospital ward for several weeks.¹⁴⁶ Treatment consisted of giving them small doses of insulin, three times a day, for one and one-half to two hours before meals as well as a sedative during the day and night.¹⁴⁷ While in the program, the inmates would undergo psychological therapy to “talk about the causes of their upset.”¹⁴⁸ The researchers noted that over a course of a year, they treated approximately thirty inmates.¹⁴⁹

In sum, as the psychiatric profession and the law became more hostile towards LGBTQ people in the 1940s and 1950s, medical experts in state-run institutions advanced stigmatizing definitions of gay and trans panic that demonized LGBTQ victims as sexual aggressors and shifted the blame on LGBTQ people for the violence they experienced. As the next Part discusses, these new definitions of gay and trans panic provided an ideological hook for criminal defendants in the 1960s to legally justify and excuse the violence they committed against LGBTQ victims.¹⁵⁰

III. “GAY AND TRANS PANIC” AS LEGAL JUSTIFICATION AND EXCUSE FOR VIOLENCE AGAINST LGBTQ PEOPLE (1960S–PRESENT)

The lack of a cohesive scientific definition of gay and trans panic in the psychiatric profession made it easier for criminal defendants and defense attorneys in the 1960s to take advantage of more stigmatizing interpretations of the concept in order to legally justify and excuse violence against LGBTQ victims.¹⁵¹ In this regard, gay

145. Dinerstein & Glueck, *supra* note 127, at 89.

146. *Id.* at 90.

147. *Id.*

148. *Id.*

149. *Id.* Dinerstein and Glueck discussed that many inmates were scared of being transferred to state hospitals because the inmates had heard stories of the hospitals’ poor conditions. *Id.* at 89.

150. The analysis in this section focuses on cases involving the “gay and trans panic” defenses that emerged between the 1960s and 1970s. For more recent examples of cases involving gay and trans panic defenses, see Wodda and Panfil, *supra* note 28, at 943–56.

151. Bagnall et al., *supra* note 28, at 502 (noting that “there is no agreed-upon definition of homosexual panic as a legal defense in criminal trials”); Comstock, *supra* note 28, at 89 (“Attorneys have chosen . . . to lend their own interpretations to and shape homosexual

and trans panic ideas not only justified state violence against LGBTQ people in the form of draconian medical treatments. Rather, these stigmatizing ideas—advanced by doctors who worked for and conducted research in state-run hospitals and prisons—also blurred the distinction between state and private violence.

One caveat is necessary before developing these points. In general, discussions of the gay and trans panic defenses appear in appellate court opinions, and those cases usually involve defendants’ unsuccessful uses of the defenses or cases in which defendants are challenging their convictions on other grounds. If the defendant is acquitted, the defendant will not appeal, and the government cannot appeal.¹⁵² Given the limitations of available historical records, especially at the trial court level,¹⁵³ it is impossible to know how frequently the gay and trans panic defenses were used or successful in the past.¹⁵⁴ For these reasons, available appellate court opinions in which discussions of gay and trans panic defenses appear may not be entirely representative.¹⁵⁵ At the same time, this Article is not making any causal arguments that rely on those cases. The decisions still provide important insight into how defendants relied on medical expertise to support the defenses over time.

Most scholars date the first published court decision to explicitly mention gay and trans panic concepts to the 1967 California case of *People v. Rodriguez*.¹⁵⁶ As early as the 1950s, however, defendants charged with murder constructed legal defenses based on the

panic to the needs of their clients.”).

152. Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 267 (1996) (“[W]hen a defendant is acquitted by a judge or jury, the prosecution may not appeal.”).

153. WOODS, SEARS & MALLORY, *supra* note 3, at 5 (noting that “most cases in which defendants successfully raise gay and trans panic defenses never result in a court opinion”).

154. Wodda & Panfil, *supra* note 28, at 943–56 (noting that “it is difficult to determine exactly how often the gay panic defense has been used and, when used, how ‘successful’ it has been”).

155. Salerno et al., *supra* note 34, at 25 (noting that statistics from appellate court cases “might underrepresent the true number of jury trials in which the gay-panic defense is invoked successfully, because defendants who are successful at trial will not have convictions to appeal”).

156. 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967); Bagnall et al., *supra* note 28, at 499 n.4 (“The first reported judicial mention of homosexual panic came in *People v. Rodriguez*.”); Lee, *supra* note 1, at 491 (“Beginning in 1967, male defendants charged with murdering gay men began to utilize the concept of homosexual panic”); Perkiss, *supra* note 28, at 796 (“Commentators have identified *People v. Rodriguez* as the first reported judicial mention of homosexual panic.”).

idea that LGBTQ victims made unwanted sexual advances towards them.¹⁵⁷ It does not appear, however, that defendants in these earlier decisions relied on newly emerging definitions of gay and trans panic that more aggressively stigmatized LGBTQ people or on mental health professionals as expert witnesses to support panic claims. Rather, defendants rooted their legal strategies in the law of assault and self-defense, specifically describing the alleged sexual advances as “homosexual assaults.”¹⁵⁸

As discussed previously, the idea that homosexuality was a mental disease became the dominant view in the United States psychiatric profession during the late 1950s and 1960s.¹⁵⁹ At the same time, lesbian and gay mobilization and lesbian and gay neighborhoods became more increasingly visible.¹⁶⁰ These developments had important connections to public opinion about homosexuality in the late 1960s. For instance, in 1967—only two years before the Stonewall Riots—CBS News aired a forty-five-minute special called *The Homosexuals*.¹⁶¹ The special stressed within its first thirty seconds the “growing public concern about homosexuals in society [and] about their increasing visibility.”¹⁶² Based on the results of a commissioned survey into public attitudes towards homosexuality, the special reported that “2 out of 3 of Americans look upon homosexuals with disgust, discomfort or fear; 1 out of 10 says hatred; [and] a vast majority believe that homosexuality is an illness.”¹⁶³ The special further reported that “Americans consider homosexuality more harmful to society than adultery, abortion, or prostitution.”¹⁶⁴

Paralleling these developments, published court decisions started to emerge in the 1960s in which defendants who killed

157. See, e.g., *People v. Nash*, 338 P.2d 416, 417–18 (Cal. 1959) (en banc); *Burns v. State*, 87 So. 2d 681, 684–85 (Miss. 1956).

158. See, e.g., *Edmonds v. U.S.*, 260 F.2d 474, 475–76 (D.C. Cir. 1958) (per curiam) (involving a defendant who killed a gay male victim and argued self-defense based on the contention that the victim made a series of “homosexual advances” towards the defendant); *Burns*, 87 So. 2d at 685 (involving a defendant who killed a gay male victim and argued self-defense based on the contention that the victim attempted “homosexual assault upon him”).

159. BAYER, *supra* note 78, at 29.

160. See *supra* Section II.A.

161. CBS NEWS REPORTS, *The Homosexuals*, 1967, <https://www.youtube.com/watch?v=zWNEdoXo0Yg> [<https://perma.cc/4RU9-AUJJ>].

162. *Id.* at 0:20–0:25.

163. *Id.* at 6:40–6:53.

164. *Id.* at 0:30–0:42.

LGBTQ victims turned to the law of insanity to construct legal defenses. Unlike earlier “homosexual assault” cases, defendants relied on more aggressive definitions of gay and trans panic that characterized LGBTQ people as sexual aggressors, in line with the ideas being advanced by prominent psychiatrists who worked for state-run institutions.¹⁶⁵ Illustrating the centrality of medical expertise in these cases, defendants relied on psychiatrists as expert witnesses to provide testimony in support of their gay and trans panic claims.¹⁶⁶

For instance, in *People v. Stoltz*, a 1961 California appellate case, the victim had picked up the defendant and another man who were hitchhiking together.¹⁶⁷ According to the defendant, the three men then stopped at a point along the river to drink whisky, when the victim allegedly made a sexual advance on both men.¹⁶⁸ After allegedly rejecting the victim’s advances, the defendant then picked up a piece of wood and repeatedly hit him in the head.¹⁶⁹ The defendant admitted that he knew the wood “was big enough to break [the victim’s] head open.”¹⁷⁰ The other man then struck the victim twice more on the head and took the victim’s wallet and keys. The victim suffered a fractured skull from the blows and died soon after.¹⁷¹

The defendant claimed that he struck the victim because he was frightened by the victim’s sexual advances.¹⁷² The defense called a psychiatrist and neurologist as an expert witness, who testified that it was in his professional opinion that the defendant’s violent conduct was “performed while in a state of panic or extreme fear.”¹⁷³ Illustrating the overlap between stigmatizing attitudes towards LGBTQ people in the medical and legal domains, the wit-

165. *See supra* Section II.B.

166. *See, e.g.*, *People v. Rodriguez*, 64 Cal. Rptr. 253, 254–55 (Cal. Ct. App. 1967); *People v. Parisie*, 287 N.E.2d 310, 314 (Ill. App. Ct. 1972); *Commonwealth v. Doucette*, 462 N.E.2d 1084, 1097 (Mass. 1984); *Commonwealth v. Shelley*, 373 N.E.2d 951, 953 (Mass. 1978); *State v. Thornton*, 532 S.W.2d 37, 44 (Mo. Ct. App. 1975); *Fitzgerald v. State*, 601 P.2d 1015, 1021 (Wyo. 1979).

167. 16 Cal. Rptr. 285 (Cal. Ct. App. 1961).

168. *Id.* at 287.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* The appellate court decision does not explicitly mention whether the defendant argued self-defense or insanity at trial.

173. *Id.*

ness specifically testified that “panic reaction to a homosexual situation is recognized in the field of psychiatry.”¹⁷⁴ The prosecution called another psychiatrist in rebuttal who refuted the defense expert witness’s testimony.¹⁷⁵ Ultimately, the jury sided with the prosecution and convicted the defendant of murder, robbery, and grand theft.¹⁷⁶

People v. Rodriguez, the 1967 case in which gay and trans panic concepts are first explicitly mentioned in a published court decision, also illustrates defendants’ increasing reliance on stigmatizing medical norms to support gay and trans panic defenses.¹⁷⁷ In *Rodriguez*, the defendant relied on the concept of “acute homosexual panic” to raise the insanity defense.¹⁷⁸ The defendant, who was seventeen years old at the time of the crime, killed an elderly man by bludgeoning him in the head with a club, causing the victim to fall and hit his head.¹⁷⁹ The defendant testified he was urinating in an alley when the elderly victim grabbed him from behind.¹⁸⁰ The defendant claimed that he became frightened, picked up a nearby stick, and hit the man, thinking that he was “trying to engage in a homosexual act.”¹⁸¹

Although the jury in *Rodriguez* rejected the insanity defense and convicted the defendant of murder,¹⁸² the case illustrates the introduction of medical terminology (“acute homosexual panic”) to reframe “homosexual assaults” in terms of the defendant’s mental condition.¹⁸³ With the legitimacy of medical expertise, defendants could root their defense strategies in terms of insanity law. Lending support to this idea, *Rodriguez* embodies a turn to rely on medical professionals as expert witnesses to determine whether a defendant who killed an LGBTQ victim acted as a result of “acute

174. *Id.*

175. *Id.*

176. *Id.*

177. 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967); *see also* Lee, *supra* note 1, at 491 & n.81; Perkiss, *supra* note 28, at 796.

178. *Rodriguez*, 64 Cal. Rptr. at 255.

179. *Id.* at 254–55.

180. *Id.* at 255.

181. *Id.*

182. *Id.* at 254.

183. *Id.* at 255.

homosexual panic.”¹⁸⁴ In *Rodriguez*, both the defense and prosecution called doctors to testify as expert witnesses who presented conflicting opinions about whether the defendant acted as a result of “acute homosexual panic.”¹⁸⁵

Later decisions reveal how medical experts at trial specifically defined “homosexual panic” in terms of a perpetrator’s loss of self-control. Although these cases involved insanity defenses, the emphasis on the defendant’s loss of self-control is consistent with how the gay and trans panic defenses are typically understood when used to support provocation defenses today.¹⁸⁶ For instance, in *People v. Parisie*, an Illinois appellate case from 1972, the defendant raised the insanity defense based on “homosexual panic.”¹⁸⁷ The jury rejected the defense and found the defendant guilty of murder.¹⁸⁸ At trial, both the prosecution and the defense called doctors to testify as expert witnesses.¹⁸⁹ The experts for each side gave conflicting professional opinions on whether the defendant acted under “homosexual panic.”¹⁹⁰

Consistent with the Model Penal Code, Illinois law at the time recognized the insanity defense on two grounds.¹⁹¹ First, if due to

184. *Id.* To be clear, this Article does not argue that reliance on medical experts in criminal cases involving LGBTQ defendants or victims was a new phenomenon. Medical professionals commonly testified as expert witnesses in cases involving the enforcement of “sexual psychopath” laws between the 1940s–1960s. See DE RIVER, *supra* note 87, at 245–54.

185. *Rodriguez*, 64 Cal. Rptr. at 255.

186. Chen, *supra* note 73, at 203 (noting that under the current provocation rubric, “the homosexual advance itself provokes the understandable loss of normal self-control that incites uncontrollable homicidal rage in any reasonable person, regardless of homosexual tendencies”).

187. 287 N.E.2d 310, 313 (Ill. App. Ct. 1972). In *Parisie*, the defendant shot another man and left him on an isolated country road. *Id.* The victim died after being taken to the hospital. *Id.* The defendant testified that before the incident, the victim offered him a lift. *Id.* The victim then drove to a remote area out of town and parked on a gravel road. *Id.* According to the defendant, the victim then made a sexual advance, smiled, and said that “if the defendant refused he would have to walk.” *Id.* at 313–14. The defendant testified that he “blew up, went crazy” and vaguely remembered struggling with the defendant and hearing gunshots. *Id.* at 314. The next thing that he remembered was being in the victim’s car in a parking lot. *Id.* When the police found the defendant in the parking lot, he also had the victim’s “driver’s license and credit cards in his own wallet,” and the victim’s cigarette lighter, and wallet. *Id.* at 313.

188. *Id.* at 315.

189. *Id.* at 314–15.

190. *Id.*

191. MODEL PENAL CODE § 4.01(1) (outlining the elements of “mental disease or defect excluding responsibility” under the Model Penal Code).

a mental disease or mental defect, the defendant “lack[ed] substantial capacity . . . to appreciate the criminality of his conduct.”¹⁹² Second, if due to mental disease or defect, the defendant “lack[ed] substantial capacity . . . to conform his conduct to the requirements of law.”¹⁹³

One of the psychiatrists called by the defense offered general testimony on “homosexual panic” as a psychological concept.¹⁹⁴ In response to a hypothetical question based on the same facts as the defendant’s personal background and the incident in question, the psychiatrist testified that it was possible that the “hypothetical individual suffered” from “acute ‘homosexual panic.’”¹⁹⁵ The psychiatrist further testified that this “hypothetical individual” was “unable to conform, and unable to control the given impulse” to cause harm because of his “homosexual panic” at the time of the incident,¹⁹⁶ consistent with the second legal grounds for insanity mentioned above.

In more recent decades, claims of gay and trans panic to support insanity or diminished capacity defenses have become less common. Rather, defendants have found greater success in using gay and trans panic ideas to support provocation defenses.¹⁹⁷ Scholars posit that one likely reason for this change is the decline of the prevailing psychiatric view that homosexuality was a mental illness in the 1970s,¹⁹⁸ reflected by the deletion of homosexuality from the DSM in 1973.¹⁹⁹ Scholars have also surmised that jurors could be more sympathetic to the idea that a straight man would be provoked to react violently to an unwanted sexual advance by a gay man, and less sympathetic to the view that those defendants are legally insane.²⁰⁰

192. *Parisie*, 287 N.E.2d at 313–14 (citing ILL. REV. STAT. ch. 38, § 6-2 (1967)).

193. *Id.*

194. *Id.* at 314.

195. *Id.*

196. *Id.*

197. Chen, *supra* note 73, at 202 (noting that insanity and diminished capacity formulations of gay and trans panic strategies became problematic after homosexuality was deleted from the DSM in 1973); Lee, *supra* note 1, at 478, 498 (“Gay panic arguments linked to claims of mental defect have largely been unsuccessful, whereas gay panic arguments linked to claims of provocation have been relatively successful.”).

198. See, e.g., Lee, *supra* note 1, at 498.

199. See BAYER, *supra* note 78, at 40.

200. Lee, *supra* note 1, at 505. As discussed in the next Part, empirical research supports this idea. See Salerno et al., *supra* note 34, at 24.

Even after this shift away from insanity to provocation, published appellate court opinions show that defendants still rely on medical experts to support their claims of gay and trans panic. Consider the following three examples. In *State v. Ritchey*, the Supreme Court of Kansas in 1973 rejected a defendant’s challenge that the trial court had abused its discretion in denying a motion requesting that the court appoint a psychiatrist to evaluate him for the purposes of preparing a provocation defense based on claims of gay and trans panic.²⁰¹ In 1989, a California appellate court rejected a defendant’s challenge that the trial court had abused its discretion in denying expert testimony from a psychiatrist and psychologist claiming that because of the defendant’s “particular background he was capable of reacting with abnormal rage and disgust to a homosexual advance.”²⁰² In *State v. Bodoh*, a Wisconsin appellate court in 2001 rejected a defendant’s challenge that his counsel was ineffective for not requesting a psychological evaluation that, in the defendant’s view, would have supported his claim of gay panic to support his provocation defense.²⁰³

In sum, even if it is proper to initially characterize the violence involved in gay and trans panic cases as private acts of violence, these acts assume a different meaning in the criminal process when perpetrators are able to take advantage of stigmatizing medical ideas that characterize LGBTQ victims as sexual aggressors and place the blame on them for the violence. The historical roots of “gay and trans panic” do not lie in the substantive criminal law. Rather, these ideas are vestiges of a broader state and social agenda dating back to at least the early twentieth century that empowered medical experts to regulate and control “sexual deviance.”²⁰⁴ The state had a direct role in supporting doctors in its own institutions who not only embraced the pathological model of homosexuality, but also redefined gay and trans panic in ways that placed the blame on LGBTQ people for the violence they experienced in state institutions and society more broadly. Therefore, al-

201. 573 P.2d 973, 974–75 (Kan. 1977).

202. Ken Cody, *Last Gasp for Public Defense*, S.F. SENTINEL, Apr. 6, 1989, at 10, 10; Philip Hager, *Convicted Killer’s ‘Homosexual Panic’ Defense Rejected*, L.A. TIMES (Oct. 14, 1989), <https://www.latimes.com/archives/la-xpm-1989-10-14-mn-261-story.html> [https://perma.cc/G5ZW-VF7R].

203. 2001 Wisc. App. LEXIS 890, at *2–3 (2001) (per curiam).

204. Wodda & Panfil, *supra* note 28, at 941 (noting that gay and trans panic defenses “employ[] a ‘deviance’ frame”).

lowing gay and trans panic claims to be recognized under the substantive criminal law leaves space for outmoded ideas of sexual deviance to continue to thrive in the criminal justice system today. The remainder of this Article turns to discuss this point.

IV. TOWARDS A POLITICAL FRAMEWORK FOR LEGISLATION BANNING THE GAY AND TRANS PANIC DEFENSES

It is misguided to distance the history discussed above, and especially the role of the state in the growth of gay and trans panic in medicine and law, from how the gay and trans panic defenses are treated under the criminal law today. Based on this idea, this Part provides an early foundation for a political framework that justifies banning the gay and trans panic defenses through legislation. The analysis below connects the goals of this political framework to current radical and critical criminal justice perspectives that challenge the pervasive, structural criminal justice inequalities rooted in racial, class, gender, and sexual hierarchies. The analysis further discusses due process critiques of these legislative bans as well as the debate over whether these bans effectively combat anti-LGBTQ juror biases.

In federal court and in most state courts today, the gay and trans panic defenses are still available legal strategies for defendants who assault or kill LGBTQ victims. In recent decades, some lower courts have limited or prohibited the gay and trans panic defenses.²⁰⁵ Improvements in public attitudes towards homosexuality and advancements in the legal treatment of LGBTQ people, and lesbians and gays in particular, are likely reasons for this judicial

205. Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375, 1392 (2010) (noting that the gay panic defense “is now received skeptically by many courts”); Am. Bar Ass’n, Res. 113A, at 9 (2013), <http://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf> (“Courts have increasingly been skeptical of gay panic arguments to support defense claims of insanity or provocation.”) [<https://perma.cc/MSM7-LTBX>]; see, e.g., *Davis v. State*, 928 So. 2d 1089 (Fla. 2005) (per curiam) (“This Court has not previously recognized that a nonviolent homosexual advance may constitute sufficient provocation to incite an individual to lose his self-control and commit acts in the heat of passion, thus reducing murder to manslaughter.”); *Ritchey*, 573 P.2d 973 (affirming that the deceased victim’s same-sex sexual advances were not legally sufficient provocation); *State v. Lewis*, 685 So. 2d 1130 (La. Ct. App. 1996) (rejecting provocation defense based on the victim’s same-sex sexual advances); *State v. Volk*, 421 N.W.2d 360, 365 (Minn. Ct. App. 1988) (holding that a defendant’s disgust towards a homosexual advance is not sufficient legal provocation); *Commonwealth v. Carr*, 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990) (holding that “the sight of naked women engaged in lesbian lovemaking is not adequate provocation”).

pushback.²⁰⁶ But even in states where individual trial and intermediate appellate courts have curbed them, the gay and trans panic defenses are still widely available.

The political framework that this Article envisions for legislation banning the gay and trans panic defenses balances the traditional justifications for punishment with two cornerstone values: (1) state accountability towards LGBTQ people and communities (as well as other marginalized populations), and (2) equality under the substantive criminal law. As discussed below, upholding these values requires an analysis of how the state has treated LGBTQ people in the past and what that treatment says about whether the state is currently fulfilling what ought to be a baseline normative commitment to respect LGBTQ civilians, and not sponsor, excuse, justify, or condone violence against them.²⁰⁷ In the context of the gay and trans panic defenses, maintaining this normative commitment means that it is necessary to prioritize the demands of state accountability and equality for LGBTQ people under the substantive criminal law over defendants’ due process interest in presenting every legal strategy that might benefit their case.

Theoretical perspectives on criminal law tend to overlook equality as an underlying value of the substantive criminal law and place primacy on the traditional justifications for punishment (i.e., retribution, deterrence, incapacitation, and rehabilitation).²⁰⁸ The conception of equality that this Article envisions for this political framework is consistent with the principle of substantive equality, not formal equality.²⁰⁹ In this regard, this Article is not arguing that lawmaking bodies should ban the gay and trans panic defenses in order to ensure that violence against LGBTQ people is punished in the same way as similar violence against non-LGBTQ people. In addition, this political framework is not motivated by a

206. See ALAN YANG, NAT’L GAY & LESBIAN TASK FORCE FOUND., FROM WRONGS TO RIGHTS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY, 1973–1999, at 23 (1999) (“The striking trend in public opinion during the 1990’s is that all groups became more accepting of homosexuality.”); Paul R. Brewer, *The Shifting Foundations of Public Opinion About Gay Rights*, 65 J. POL., 1208, 1208 (2003) (emphasizing that “public attitudes about homosexuality changed dramatically over the course of the 1990s”).

207. Thomas, *supra* note 13, at 1477 (recognizing “that one of the first duties of the state is to protect citizens from whom its powers derive against random, unchecked violence by other citizens, or by government officials”).

208. Bierschbach & Bibas, *supra* note 38, at 1452; Way, *supra* note 18, at 203–04.

209. Sullivan, *supra* note 37, at 750 (“On the formal view, inequality consists of treating people differently across an irrelevant criterion; on the substantive view, the injury is subordinating one group to another.”).

desire for harsher punishment of defendants who perpetrate violence against LGBTQ victims. Rather, this Article's claim is that the gay and trans panic defenses embody and perpetrate unjust sexual and gender hierarchies that are rooted in outdated sexual deviance concepts that stigmatize and subjugate LGBTQ people. Maintaining equality for LGBTQ people under the substantive criminal law demands that the state reject these unjust sexual and gender hierarchies, which the state had a hand in creating, and are infused in the gay and trans panic defenses.²¹⁰

Placing primacy on the cornerstone values of state accountability and substantive equality under the criminal law helps to align the goals of legislation banning the gay and trans panic defenses with current radical and critical criminal justice perspectives that challenge the pervasive, structural criminal justice inequalities rooted in racial, class, gender, and sexual hierarchies.²¹¹ These important perspectives describe how mass incarceration has taken its harshest toll on people and communities of color and contextualize mass incarceration within a broader historical pattern of state subjugation of Black, poor, and other marginalized communities of color.²¹² At the same time, these perspectives explain how the criminal justice system has provided little protection or redress for

210. Scholars have raised similar arguments about the tensions between principles of formal equality and racial and gender equality in the criminal justice system. *See, e.g.*, Butler, *supra* note 29, at 844 ("In the criminal justice system . . . there is tension between the ideal of formal equality and the reality of white supremacy, historic and present."); Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 406 (2015) (discussing how in the context of domestic violence, "[i]n contrast to liberal feminism, which targets differential treatment as the source of women's inequality and demands formal equality from the state, dominance feminism identifies women's powerlessness relative to men as the cause of their subordination and supports state interventions that correct this power imbalance").

211. *See, e.g.*, DAVIS, *supra* note 29; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13 (2011); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Roberts, *supra* note 29; *Manifesto for Abolition*, ABOLITION, <https://abolitionjournal.org/frontpage> [<https://perma.cc/RZF4-YL9P>].

212. *See, e.g.*, DAVIS, *supra* note 29, at 15 ("While a relatively small proportion of the population has ever directly experienced life inside prison, this is not true in poor black and Latino communities. Neither is it true for Native Americans or for certain Asian-American communities."); Akbar, *supra* note 211, at 412 ("Contemporary racial justice movements are not simply arguing the state has created a fundamentally unequal criminal legal system. They are identifying policing, jail, and prison as the primary mode of governing black, poor, and other communities of color in the United States, and pointing to law as the scaffolding."); McLeod, *supra* note 211, at 1185 ("Alongside imprisonment's general structural brutality, abolition merits further consideration as an ethical framework because of the racial subordination inherent in both historical and contemporary practices of incarceration and

crime victims from the most intersectionally marginalized communities.²¹³ They further critique the effectiveness of incarceration and advocate for restorative and transformative solutions that better address the needs of victims, offenders, communities, and broader society.²¹⁴

Consistent with these ideas, the law and legal systems often fail to protect LGBTQ victims who are most vulnerable to being blamed for the violence they experience through the gay and trans panic defenses—namely, those who are transgender, people of color, poor, or marginalized in other ways.²¹⁵ For instance, in 2019 alone, advocates tracked twenty-six known killings of transgender and gender nonconforming people in the United States who were fatally shot or killed by other violent means.²¹⁶ Almost all of the victims were transgender women of color, and black transgender women in particular.²¹⁷

The types of unjust hierarchies that current radical and critical criminal law perspectives seek to eliminate are infused in the gay and trans panic defenses. In prioritizing equality as a value of substantive criminal law, legislation banning the gay and trans panic defenses rejects the idea that convictions should be avoided and

punitive policing.”).

213. See, e.g., Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 751 (2007) (“The domestic violence system treats victims with increasing amounts of paternalism and disdain.”); Harris, *supra* note 211, at 17 (“[S]cholars and activists committed to ending domestic violence and violence against sexual minorities have become increasingly disenchanting with the criminal justice system, and increasingly aware of its insidious role in the decimation of poor black and brown communities.”).

214. See, e.g., DAVIS, *supra* note 29, at 20–21 (“Effective alternatives involve both transformation of the techniques for addressing ‘crime’ and of the social and economic conditions that track so many children from poor communities, and especially communities of color, into the juvenile system and then on to prison.”); Roberts, *supra* note 29, at 46 (“Rejecting the carceral paradigm, black feminist abolitionists have proposed community-based transformative justice responses that address the social causes of violence and hold people accountable without exposing them to police violence and state incarceration.”).

215. See sources cited *supra* note 31 and accompanying text.

216. *Violence Against the Transgender Community in 2019*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019> [<https://perma.cc/8A9C-ML3A>]. It is important to underscore that existing data sources distort our understanding of homicide trends involving transgender and gender nonconforming people in the United States because of the lack of formal data collection efforts. See Rebecca L. Stotzer, *Data Sources Hinder Our Understanding of Transgender Murders*, 107 AM. J. PUB. HEALTH 1362, 1362 (2017).

217. Elliot Kozuch, *HRC Mourns Yahira Nesby, Black Trans Woman Killed in Brooklyn*, HUMAN RIGHTS CAMPAIGN (Dec. 21, 2019), [https://www.hrc.org/blog/hrc-mourns-yahira-nesby-black-trans-woman-kill\(ed\)-in-brooklyn](https://www.hrc.org/blog/hrc-mourns-yahira-nesby-black-trans-woman-kill(ed)-in-brooklyn) (“[Yahira] Nesby’s death is at least the 25th known transgender or gender non-conforming person killed this year.”) [<https://perma.cc/3J8A-XDNZ>]; *Violence Against the Transgender Community in 2019*, *supra* note 216.

punishment should be reduced based on antiquated sexual deviance concepts that stigmatize LGBTQ victims. It is possible to reject these unjust hierarchies through legislation banning the gay and trans panic defenses while pursuing restorative and transformative strategies to respond to violence committed against LGBTQ victims. Illustrating these points, the National Coalition of Anti-Violence Programs advocates for restorative justice models as an alternative response to incarceration for anti-LGBTQ hate violence,²¹⁸ but also recommends prohibiting the gay and trans panic defenses on the grounds that they “shift the blame for . . . inexcusable attacks back to the victim.”²¹⁹

This political framework that stresses state accountability and substantive equality under the criminal law also demonstrates why due process concerns do not fully capture what is at stake in gay and trans panic cases. The individualized focus of existing due process critiques treats gay and trans panic cases as incidents that involve private violence perpetrated by one civilian against another, and in so doing, neglects the historical role of the state in the origins and growth of gay and trans panic in medicine and law.²²⁰ Moreover, these due process critiques overlook the unjust structural hierarchies that the gay and trans panic defenses embody and perpetuate in criminal justice contexts.²²¹

In spite of their limited scope, due process arguments are important to take seriously. With regard to constitutional due process protections, the United States Supreme Court is currently considering in *Kahler v. Kansas* whether the Eighth and Fourteenth

218. NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST THE LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER COMMUNITIES IN THE UNITED STATES IN 2009, at 44 (2010), https://avp.org/wp-content/uploads/2017/04/2011_NCAVP_HV_Reports.pdf [<https://perma.cc/A54T-94LN>].

219. *Id.* at 45.

220. Scholars advocating for a greater focus on equality in substantive criminal law have raised a similar critique about the individualized nature of the focus of criminal law more generally. *See, e.g.,* Way, *supra* note 18, at 239 (“The criminal law functions by narrowing its focus on particular acts, particular actors and particular moments in time.”).

221. Canadian legal scholars have raised similar concerns about the tensions between due process and racial inequality in the Canadian criminal justice system. As Kent Roach has argued, “[n]ot all systems of systemic racism . . . invite more due process.” Kent Roach, *Systemic Racism and Criminal Justice Policy*, 15 WINDSOR Y.B. ACCESS TO JUST. 236, 237 (1996). In raising this point, Roach stressed that “[a]boriginal women do not receive the equal protection of the law when they are victims of crime.” *Id.* He further stressed the “[p]olice shootings of black men in Toronto and the failure of the criminal justice system to convict the shooters.” *Id.*

Amendments permit states to abolish the insanity defense.²²² The Court’s decision could affirm the broad authority of states to define the elements of crimes and defenses in their respective penal codes.²²³ This reasoning would lend support to the idea that states could constitutionally prohibit the gay and trans panic defenses through legislation.

Alternatively, the Court in *Kahler* could constitutionally require states to recognize freestanding criminal defenses with deep historical roots in the substantive criminal law (for instance, provocation, insanity, and self-defense).²²⁴ If the Court goes in this direction, the constitutional arguments for banning the gay and trans panic defenses through legislation could become more complicated. At the same time, legislation banning the gay and trans panic defenses is different from the insanity defense bans in *Kahler* in two significant ways.

First, legislation banning the gay and trans panic defenses does not eliminate any freestanding criminal defense. As explained previously, the gay and trans panic defenses are not freestanding defenses.²²⁵ Rather, these legislative bans narrowly restrict the circumstances under which certain defendants are entitled, as a matter of law, to raise those freestanding defenses. Defining the circumstances under which defendants can raise established free-

222. 410 P.3d 105 (Kan. 2018) (per curiam), *cert. granted sub nom.*, *Kahler v. Kansas*, 139 S. Ct. 1318 (2019).

223. See *State v. Casey*, 71 P.3d 351, 355 (Ariz. 2003) (recognizing the “legislature’s constitutional authority to define crimes and defenses”); *Mont. Cannabis Indus. Ass’n v. State*, 368 P.3d 1131, 1157 (Mont. 2016) (“The State, pursuant to its police powers, may define . . . what constitutes a defense . . . to a state prosecution.”); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 502 (1989) (“The legislature’s most direct way to control abuse of defenses derives from its power to define the substantive criminal law.”). For a more thorough critique of the due process arguments against banning the gay and trans panic defenses, see WOODS, SEARS & MALLORY, *supra* note 3, at 16–20, and Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. (forthcoming 2020) (on file with author).

224. 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 11, at 63 n.1 (1984) (“Most of the defenses recognized today, and in some cases their precise formulation, have not changed in more than 300 years.”); Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 967 (2019) (stressing that “the creation of self-defense and other affirmative defenses . . . all derive from the common law”). The first reported use of gay and trans panic by a criminal defendant, however, only dates back to 1967. Lee, *supra* note 1, at 491 & n.81.

225. See *supra* Part III.

standing defenses is something that lawmaking bodies have customarily done and continue to do when shaping their own penal codes.²²⁶

Second, legislation banning the gay and trans panic defenses does not eliminate criminal defenses with deep historical roots in the common law (for instance, provocation, insanity, or self-defense). Dating back to only the mid-twentieth century,²²⁷ the gay and trans panic defenses are relatively recent in origin compared to the much longer history of the substantive criminal law. Constitutionally, the extent to which a criminal defense is deeply rooted in history and tradition is a key factor under one of the United States Supreme Court's methods for evaluating whether a criminal defense is "a fundamental principal of justice" under the Due Process Clause.²²⁸

Even if not constitutionally protected or required, legislation banning the gay and trans panic defenses still implicates important due process interests of criminal defendants. Specifically, these legislative bans prompt questions about whether, as a policy matter, the substantive criminal law should be structured in a way that allows defendants to present every legal strategy that could potentially strengthen their case. There are also important fairness considerations in allowing the state to benefit from legislation banning the gay and trans panic defenses when the state contributed to the growth of these defenses in the past. One might argue that it is unfair to encourage legislation that benefits the state in this fashion at the expense of disadvantaging future criminal defendants, who unlike the state, had no direct role in the growth of gay and trans panic as a concept.

Framing the stakes of legislation banning the gay and trans panic defenses in political terms helps to answer these questions by shifting the focus of the debate to core political questions about the relationship between the state and LGBTQ civilians. Specifically, this framing places primacy on whether the state is fulfilling what ought to be a baseline normative commitment to respect LGBTQ civilians, and more specifically, not sponsor, excuse, justify, or condone violence against them.²²⁹ How LGBTQ people are

226. See sources cited *supra* note 223.

227. See *supra* Section II.B.

228. *Montana v. Egelhoff*, 518 U.S. 37, 42–44 (1996) (plurality opinion).

229. Thomas, *supra* note 13, at 1477.

recognized and treated as victims under the substantive criminal law exemplifies the relationship between the state and LGBTQ civilians. Therefore, even if the state benefits from legislation banning the gay and trans panic defenses when it was a “bad” actor in the past, those benefits are ultimately politically desirable. These legislative bans reconfigure the relationship between the state and LGBTQ people under the substantive criminal law in ways that further LGBTQ inclusion and equality.

Of course, the state is not the only actor responsible for the growth of gay and trans panic ideas in the medical and criminal justice domains. The historical analysis presented in this Article, however, shows that the state is a central player in this story and illustrates a need to hold the state accountable for its role in enabling gay and trans panic concepts to thrive. Legislation banning the gay and trans panic defenses holds the state accountable for how doctors and staff in public institutions treated members of the public, and LGBTQ patients in particular. In line with this notion of accountability, the United States Supreme Court and several lower courts have held that public hospitals, including public hospital doctors and staff, are state actors subject to constitutional requirements.²³⁰

Finally, the focus on state accountability and substantive equality under the criminal law informs the scholarly debate over whether formal bans against the gay and trans panic defenses can effectively combat anti-LGBTQ juror biases. Although research is sparse, the leading empirical study on the gay and trans panic defenses lends support to the notion that jurors could be more sympathetic to the idea that a straight man would react violently to an unwanted sexual advance by a gay man.²³¹ The study specifically

230. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 70 (2001) (holding that state hospital employees are state actors subject to Fourth Amendment restrictions); *Chudacoff v. Univ. Med. Cntr.*, 649 F.3d 1143, 1150 (9th Cir. 2011) (stressing that “there is no dispute that the operation of [a public] hospital is state action” (quoting *Woodbury v. McKinnon*, 447 F.2d 839, 842 (5th Cir. 1971))); *Jones v. Nickens*, 961 F. Supp. 2d 475, 486 (E.D.N.Y. 2013) (finding employees of a public hospital to be “state actors for the purposes of Section 1983”); *Lewellen v. Schneck Med. Ctr.*, No. 4:05-cv-00083-JDT-WGH, 2007 U.S. Dist. LEXIS 60358, at *19 n.10 (S.D. Ind. 2007) (“A county-owned public hospital, like a public school or a municipal park, is a state actor.”); *Brandt v. Saint Vincent Infirmary*, 701 S.W.2d 103 (Ark. 1985) (“Public hospitals are prohibited from acting arbitrarily and capriciously under the Equal Protection Clause and Due Process Clause of the 14th Amendment to the United States Constitution.”); *Feyz v. Mercy Mem’l Hosp.*, 719 N.W.2d 1, 8 (Mich. 2006) (stressing that “public hospitals are state actors implicating adherence to constitutional requirements”).

231. See Salerno et al., *supra* note 34, at 24, 32. The study involved a multiethnic sample

examined the connection between gay and trans panic provocation defenses and jurors' political orientation.²³² It found that conservative participants were significantly less punitive when the defendant claimed to have acted out of gay and trans panic compared to the non-gay-and-trans-panic scenario.²³³ Facts involving gay and trans panic, however, did not sway liberal jurors.²³⁴ The researchers explained these differences in terms of the participants' moral outrage.²³⁵ They hypothesized that conservative jurors were less morally outraged towards a defendant who killed in response to a same-sex sexual advance than in response to reasons that did not involve gay and trans panic.²³⁶ Conversely, in their view, the same-sex sexual advance did not reduce liberal jurors' moral outrage towards that defendant.²³⁷

Scholars and advocates have argued that gay and trans panic defenses invite jurors to draw upon their own anti-LGBTQ biases when evaluating evidence and making decisions.²³⁸ Simply put, jurors' own anti-LGBTQ biases could lead them to conclude that violence is a reasonable reaction to LGBTQ victims, and especially LGBTQ victims who allegedly make sexual advances towards the defendants.²³⁹ Other scholars and commentators who are sympathetic to LGBTQ victims, however, have argued that formal legislative and judicial bans on the gay and trans panic defenses could make it more difficult to combat explicit and implicit anti-LGBTQ

of seventy-four men and women who were eligible for jury service. *Id.* at 27. The researchers randomly assigned participants to evaluate either a gay panic scenario that involved a victim's same-sex sexual advance or a provocation scenario that did not have gay panic-related facts. *Id.* at 27–28.

232. *Id.* at 24.

233. *Id.* at 32.

234. *Id.*

235. *Id.*

236. *Id.* at 27.

237. *Id.*

238. *See, e.g.*, Am. Bar Ass'n, *supra* note 205, at 7 (stressing that the gay and trans panic defenses "seek to exploit jurors' bias and prejudice").

239. *See, e.g., id.* at 7 ("The defense implicitly urges the jury to conclude that bias against gay or transgender individuals is reasonable, and that a violent reaction is therefore an understandable outcome of that bias."); Mison, *supra* note 28, at 158 (stressing that "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"); Strader et al., *supra* note 28, at 1517 ("[T]he 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.").

juror bias.²⁴⁰ From this perspective, the more effective way to combat anti-LGBTQ bias in gay and trans panic cases would be for prosecutors to force anti-LGBTQ biases to come out into the open in court and then aggressively reject those biases during both jury selection and in front of the judge and jury at trial.²⁴¹

This debate over whether banning the gay and trans panic defenses can effectively combat anti-LGBTQ juror biases on the ground raises several issues that require future empirical study. For instance, it is uncertain whether these bans are more or less effective in combating anti-LGBTQ juror biases among certain jurors (for instance, from particular demographic or geographic backgrounds). It is also unclear whether allowing prosecutors to combat anti-LGBTQ juror biases in open court actually prevents jurors from relying on their own implicit or explicit anti-LGBTQ biases when evaluating evidence and making decisions in gay and trans panic cases. These issues prompt further questions about the importance of expanding protections to prohibit sexual orientation and gender identity discrimination during jury selection²⁴² as well

240. Lee, *supra* note 1, at 475 (“When gay panic arguments are forced to take a covert turn—when they are not explicit or out in the open—they may actually be more effective than they would be if out in the open.”); Lee & Kwan, *supra* note 28, at 122 (“[A] legislative ban is a big hammer when a gentle nudge might be a more effective way to get jurors to do the right thing.”). It is important to acknowledge that in more recent work, Cynthia Lee has argued in favor of formal prohibitions on the gay and trans panic defenses. See generally, Lee, *supra* note 223. These important critical arguments about the effectiveness of these formal prohibitions in combating anti-LGBTQ juror biases in gay and trans panic cases are included in Lee’s earlier scholarship on the gay and trans panic defenses.

241. Lee, *supra* note 1, at 559 (“To limit the effectiveness of gay panic defense strategies, I offer two suggestions to prosecutors: (1) during voir dire, request questions designed to identify closet homophobes, and (2) make the possibility of sexual orientation bias salient throughout the trial.”); Lee & Kwan, *supra* note 28, at 122 (discussing specific tactics for prosecutors to humanize transgender victims when the trans panic defense is raised in particular cases).

242. Peremptory strikes of jurors based on sexual orientation and gender identity are legal in most states. Julia C. Maddera, Note, *Batson in Transition: Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression*, 116 COLUM. L. REV. 195, 203, 206 (2016). In *Batson v. Kentucky*, the United States Supreme Court held that discrimination on the basis of race in jury selection is unconstitutional and violates the Equal Protection Clause. 476 U.S. 79, 100 (1986). The Ninth Circuit has extended *Batson* protections to peremptory strikes based on sexual orientation. See, e.g., *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 484–86 (9th Cir. 2014). See generally Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407 (2014) (discussing anti-LGBT bias in voir dire); Kathryn M. Young, *Outing Batson: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 WILLAMETTE L. REV. 243 (2011) (discussing anti-LGBT bias in voir dire).

as designing best practices for questioning prospective jurors during voir dire to identify and strike jurors who may hold anti-LGBTQ biases.²⁴³

In spite of these uncertainties, the more important point is that issues of anti-LGBTQ juror bias in gay and trans panic cases involve problems in how the criminal law is applied as opposed to inequalities in the substantive criminal law itself.²⁴⁴ Focusing on the political dimensions of legislation banning the gay and trans panic defenses broadens the inquiry to consider those equality issues and their relationship to state accountability. As discussed above, the historical roots of gay and trans panic do not lie in the substantive criminal law. Rather, these concepts are vestiges of a broader state and social agenda dating back to the late-nineteenth and early twentieth centuries that embraced medicine to regulate and control “sexual deviance” in ways that demeaned and stigmatized LGBTQ people.²⁴⁵ Legislation banning the gay and trans panic defenses takes this history into account by rejecting antiquated notions of sexual deviance and their ability to shape when freestanding defenses are legally recognized under the substantive criminal law.

CONCLUSION

There are various ways that states could go about enacting legislation banning gay and trans panic defense strategies.²⁴⁶ In 2016, the Williams Institute released the following comprehensive model legislation that rejects gay and trans panic strategies to support the freestanding defenses of provocation, insanity (or diminished capacity), and self-defense (or imperfect self-defense):

Section 101. Restrictions on the Defense of Provocation. For purposes of determining sudden quarrel or heat of passion, the provocation was not objectively reasonable if it resulted from the discovery of,

243. Woods, *supra* note 33, at 69–70 (describing different questioning methods proposed by scholars and advocates to identify prospective jurors who hold anti-LGBTQ biases during voir dire).

244. Cf. Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1059 (2005) (noting in the context of juror biases on the basis of gender that “[i]t is not merely jurors applying the law who might favor male values; it is the law itself”).

245. Wodda & Panfil, *supra* note 28, at 941 (noting that gay and trans panic defenses “employ[] a ‘deviance’ frame”).

246. See, e.g., Am. Bar Ass’n, *supra* note 205; WOODS, SEARS & MALLORY, *supra* note 3, at 22; Strader et al., *supra* note 28, at 1524–25.

knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.

Section 102. Restrictions on the Defense of Diminished Capacity. A defendant does not suffer from reduced mental capacity based on the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.²⁴⁷

Section 103. Restrictions on the Defense of Self-Defense. A person is not justified in using force against another based on the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.²⁴⁸

Notably, language similar to this model legislation appears in recent legislation banning the gay and trans panic defenses in California,²⁴⁹ Hawaii,²⁵⁰ Illinois,²⁵¹ Maine,²⁵² Nevada,²⁵³ New Jersey,²⁵⁴ New York,²⁵⁵ and Rhode Island.²⁵⁶

Putting aside the issue of specific statutory language, on a more fundamental level, this Article illustrated the importance of ana-

247. This language could be used to restrict either insanity or diminished capacity defenses.

248. WOODS, SEARS & MALLORY, *supra* note 3, at 22.

249. CAL. PENAL CODE § 192(f)(1).

250. HAW. REV. STAT. § 707-702(2).

251. 720 ILL. COMP. STAT. 5/9-1(c) (first degree murder); *id.* at 5/9-2(b) (second degree murder).

252. ME. STAT. tit. 17-A, § 38 (mental abnormality); *id.* § 108-3 (physical force in defense of a person); *id.* § 201-4 (murder).

253. S.B. 97 § 1-2, 2019 Leg., 80th Sess. (Nev. 2019) (to be codified at NEV. REV. STAT. § 193, __).

254. A1796, 218th Leg., 2d. Ann. Sess. (N.J. 2020) (to be codified at N.J. STAT. ANN. § 2C:11-4, __).

255. N.Y. PENAL LAW § 125.25(1)(a)(ii) (murder in the second degree); *id.* § 125.26(3)(a)(ii) (aggravated murder); *id.* § 125.27(2)(a)(i) (murder in the first degree).

256. 12 R.I. GEN. LAWS § 12-17-17 (restrictions on the defense of provocation); *id.* § 12-17-18 (restrictions on the defense of diminished capacity); *id.* § 12-17-19 (restrictions on the defense of self-defense).

lyzing and providing a theoretical account of the political dimensions of legislation banning the gay and trans panic defenses. The analysis of this Article brought to the surface how the state was a key player in the origin and growth of gay and trans panic as a medical concept and criminal defense. In light of this history and continued violence against LGBTQ people, a political framework that emphasizes values of state accountability and equality under the substantive criminal law illustrates why legislation banning the gay and trans panic defenses is both justified and necessary.