GAY PANIC AND THE CASE FOR GAY SHIELD LAWS

J. Kelly Strader, Molly Selvin, and Lindsey Hay

Abstract

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

Drawing largely upon qualitative empirical research, this article uses the Larry King murder case as a prism though which to view the doctrinal, theoretical, and policy bases of the gay panic defense. Our research reveals one overriding theme: The murder case against the killer, Brandon McInerney, evolved into a prosecution of the victim, Larry King. Many jurors blamed King, and the school officials who “allowed” King to defy sex and gender norms, for the murder; one juror went so far as to characterize King’s behavior as “deviant.” We believe that the jurors reached this conclusion largely because the defense offered evidence that had a strong tendency to inflame the jurors’ prejudices. For example, the defense introduced a photograph of King holding a green prom dress, even though the photograph was of little or no probative value.

To prevent future gay panic cases from evolving into trials of the victims, we propose a “gay shield” rule of evidence: When a judge allows the jury to consider a defense based upon an unwanted sexual advance by an LGBTQ person, the law should limit the trial judge’s ability to admit evidence designed to incite homo/transphobia among jurors. Building upon the law and policy underlying rape shield statutes, gay shield laws would seek to protect the crime victim from being re-victimized at a trial where the accused asserts the gay panic defense.

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The entire trial was about Larry. It wasn't about Brandon or what Brandon did. Everything was always about Larry. How he dressed, how he acted. The trial focused so much on [Larry's] sexual orientation.

Joy Epstein, Assistant Principal, E.O. Green Middle School

You all know [Larry King] had a long history of deviant behavior.

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

INTRODUCTION

In the highest-profile “gay panic” case since the Matthew Shepard killing, fourteen-year-old Brandon McInerney shot and killed Larry King, his fifteen-year-old classmate, in an Oxnard, California middle school classroom. King was a self-identified gay student who sometimes wore jewelry and makeup to school and, according to those who knew him, was

* J. Kelly Strader, Professor of Law, Southwestern Law School, Los Angeles; J.D., University of Virginia School of Law; M.I.A., Columbia University; A.B., College of William & Mary. Molly Selvin, Associate Dean for Interdisciplinary Programs, Southwestern Law School, Los Angeles; Associate Editor, THE JOURNAL OF LEGAL EDUCATION; Ph.D. (American Legal History), M.A.; B.A., University of California, San Diego. Lindsey Hay, J.D. candidate Southwestern Law School, Los Angeles; M.A. (Forensic Psychology), Argosy University; B.A., Smith College. We presented this paper at the Association of American Law Schools 2014 Midyear Meeting: Workshop on Sexual Orientation and Gender Identity Issues. We would like to thank the Workshop Planning Committee (Mary Anne C. Case, Barbara J. Cox, Saru M. Matambanadzo, Clifford J. Rosky, and Kenji Yoshino) for selecting our paper and the Criminal Issues Program participants (Kim S. Buchanan, Leigh Goodmark, and Jordan Woods) for their input during the workshop. Thanks also to Mark Cammack, Bennett Capers, Catherine Carpenter, Cynthia Lee, Ellen Podgor, Gowri Ramachandran, and Jordan Woods, for enormously helpful comments on earlier drafts of this paper. Finally, thanks to Mary Kaasa and Yasha Rastegari for their excellent research assistance.

1 Interview by Lindsey Hay with Joy Epstein, in Oxnard, CA (June 9, 2013) [hereinafter Epstein interview].

2 Letter from Lisa S. (Juror No. 11) to Gregory D. Totten, District Attorney, Ventura County (Sept. 28, 2011) (copy on file with authors) [hereinafter Lisa S. letter].

3 We use the term “gay panic” rather than the more neutral term “unwanted sexual advance” because this defense – which asserts that the defendant killed in response to a sexual advance – nearly always arises in the context of a gay male victim and straight male defendant. See Cynthia Lee, The Gay Panic Defense, 42 U.C. DAVIS L. REV. 471, 564 (2008) [hereinafter Lee, Gay Panic Defense]. We also discuss “trans panic,” a related concept sometimes used in cases where the victim was transgender. See infra at note 150 and accompanying text.

4 See infra notes 231-33 and accompanying text.

5 The facts in the Introduction are developed more fully in Part II below. See infra notes 26-128 and accompanying text.

6 We use the term “gay” to encompass all sexual orientation minorities. We refer to the larger community of sexual orientation and gender identity minorities as LGBTQ (lesbian, gay, bisexual, transgender, and queer/questioning).
possibly transgender. His classmates, including McInerney, relentlessly bullied King. When King retaliated by twice pretending to flirt with McInerney, McInerney told King’s friends to “say goodbye” to King. McInerney came to school the next day with a loaded gun, and shot King twice in the back of the head while King was seated during class.

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

Larry King’s death garnered nationwide attention. Ellen DeGeneres engaged in an emotional discussion of Larry King on her television show. Newsweek featured him on its cover. And documentary filmmaker Marta Cunningham released a widely praised film entitled Valentine Road on the case.

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7 One report stated that he called his mother from the group home to tell her that he wanted a sex-change operation. See Ramin Setoodeh, Young, Gay and Murdered, NEWSWEEK, July 28, 2008, at 43.
8 Brandon McInerney Sentenced to 21 Years, ASSOCIATED PRESS, Dec. 19, 2011, http://www.scpr.org/news/2011/12/19/30409/brandon-mcinerney-sentenced-21-years-lawyer-says-h/. It is possible, however, that McInerney will be released when he is thirty-five if he is found suitable for parole as a Youth Offender under legislation that post-dated his sentencing. See infra note 128.
9 See, e.g., Rebecca Cathcart, Boy’s Killing, Labeled a Hate Crime, Stuns a Town, N.Y. TIMES, Feb. 23, 2008, at A11; Jens Erik Gould, The Lawrence King Case: In Court, Has the Bullied Become the Bully?, TIME, Aug. 25, 2011, http://content.time.com/time/nation/article/0,8599,2090287,00.html. In addition to our own interviews, we also quote some of those who were interviewed in the film VALENTINE ROAD (Bunim-Murray Productions 2013). For one review of the film, see Neil Genzlinger, Point-Blank Perspectives on a Fatal Bullying Case, N.Y. TIMES, Oct. 6, 2013, http://www.nytimes.com/2013/10/07/arts/television/valentine-road-on-hbo-follows-a-students-killing.html?_r=0.
10 See The Ellen DeGeneres Show (NBC television broadcast Feb. 29, 2008), available at https://www.youtube.com/watch?v=PeM9w3L4H6I.
11 The July 28, 2008 NEWSWEEK cover featured photographs of King and E.O. Green Middle School, with the title, Young, Gay and Murdered, and the subtitle, At 10, Larry King Declared He Was Gay. At 15, a Classmate Shot Him Dead. A Tale of Bullying, Sexual Identity, and the Limits of Tolerance. Seetodeh, supra note 7.
12 VALENTINE ROAD, supra note 9.
GAY PANIC AND THE CASE FOR GAY SHIELD LAWS

Drawing largely upon qualitative empirical research, we use the Larry King murder\textsuperscript{13} as a case study for a close examination of the theoretical, doctrinal, and policy issues surrounding the gay panic defense. We have spent over two years interviewing various participants in the King case, including the lead prosecutor, teachers, school officials, jurors, and the director of the documentary film on the King case.\textsuperscript{14} We have also examined court filings and other documents and sources. Apart from its political and cultural implications, the case raises a core criminal defense issue infused by underlying homophobia and (possibly) transphobia.\textsuperscript{15}

During our research, one overriding theme became clear: The murder case against the killer, Brandon McInerney, evolved into a prosecution of the victim, Larry King. Before, during, and after the trial, Larry King was blamed for his own death. The press and defense counsel consistently cast King as the bully and McInerney as the victim – a characterization that a number of jurors came to accept. Many jurors blamed King, and the school officials who “allowed” King to defy sex and gender norms, for the murder; one juror went so far as to characterize King’s behavior as “deviant” in a letter to the district attorney.\textsuperscript{16} Another juror expressed strong sympathy for the defendant, stating that “the system completely failed

\textsuperscript{13} We refer to the case as “the Larry King murder case” rather than the “Brandon McInerney murder case” because – as with the Matthew Shepard case – the case came to be known in the public eye by the name of the victim rather than the name(s) of the killers.

\textsuperscript{14} There is no trial transcript; because of the hung jury, there were no post-trial motions requiring a transcript, and because of the plea bargain, there were no appeals. We therefore rely largely on statements by those who either observed or participated in the trial. We briefly spoke to defense counsel on the telephone, but they declined to be interviewed for this article. At the time of this writing, we are making arrangements to speak with McInerney. In addition to our own interviews, we also quote some of those who were interviewed in the film VALENTINE ROAD, supra note 9.

\textsuperscript{15} See infra Part II.

\textsuperscript{16} This is the way that we interpret this language in the letter: the juror specifically stated that her description of Larry King did not reference his sexual orientation but rather to his “deviant behavior” and “behavior disorder.” We believe she is referring to Larry’s transgender identification. See Lisa S. letter, supra note 2 and accompanying text.
Brandon.”17 The career homicide prosecutor termed the trial “the nadir of [her] career,” largely because of the defense’s successful demonization of King.18

It was apparent from our study that the murder trial of Brandon McInerney – like the trials of many who have asserted the gay and trans panic defenses – hinged to a substantial degree on victim’s sexual identity and/or gender expression. We found that during the Larry King murder case the trial judge allowed the defense to employ rhetoric and introduce evidence that had a strong tendency to inflame the jurors’ prejudices. The defense repeatedly used derogatory code words for gay and transgender people, commenting that King “pranced” about the school and “flaunted” his sexual orientation. The defense claimed that it was not asserting a gay panic defense, but proceeded to do so throughout the trial. For example, in a particularly remarkable piece of testimony, the defense expert psychologist told the jury, “Of course, if a boy comes on to another boy, that would be like the ultimate humiliation.”19

To prevent a re-victimization of the victim from occurring at trial, we propose that legislatures adopt “gay shield” laws that would limit the types of evidence in gay panic cases. Such re-victimizations have long occurred in rape cases, ultimately leading to the enactment of rape shield laws designed to prevent victim-blaming. We propose an analogous law for cases of violent crime where the victim is LGBTQ. When a judge allows the jury to consider a defense based upon an unwanted sexual advance by a LGBTQ person, the law should limit the judge’s ability to admit evidence designed to incite homo/transphobia among jurors.

17 Interview by Selvin-Hay with Karen McIhaney and Rosalie Black, in Northridge, CA (July 18, 2013) [hereinafter McIhaney & Black interview].
18 Interview by Strader-Selvin with Maeve Fox, Assistant District Attorney, Ventura County, in Ventura, CA (Aug. 17, 2012) [hereinafter Fox interview]. At the time of the McInerney trial, the prosecutor has been prosecuting homicide cases for ten years. Id.
19 Donald Hoagland in VALENTINE ROAD, supra note 9, at 57:50 [hereinafter Hoagland in VALENTINE ROAD].
To place our proposal in context, we first provide a detailed analysis of the gay panic defense as a form of the heat of passion defense. In purely legal terms, the Larry King murder case was a highly unusual heat of passion case given the overwhelming evidence of premeditation and deliberation, which would ordinarily give rise to liability for first-degree premeditated murder.\(^{20}\) And it is nearly inconceivable that the judge would have allowed the defendant to argue heat of passion based on an unwanted sexual advance in any situation other than a straight male reacting to an alleged advance by a gay male.\(^{21}\) That the judge allowed the defense to argue heat of passion on the facts in the case shows the degree to which (1) gay panic remains entrenched in the law and (2) judges are apt to allow the defense even in cases where the evidence supporting the defense is extremely thin. For this reason, it is imperative that the law shield the victims in these cases from being demonized at trial.

We make our gay shield law proposal at a particularly opportune time, when the gay panic defense is under increasing scrutiny. The American Bar Association has recently proposed eliminating this defense and the related trans-panic defense.\(^{22}\) And the California Legislature is considering a bill that would abolish these defenses.\(^{23}\) As discussed below, whether the defenses should be completely abolished is the subject of substantial debate.\(^{24}\) Leaving the debate aside for now, it is clear that a vast majority of the states will continue to apply the gay panic

\(^{20}\) The career prosecutor told us that she had never seen a heat of passion defense asserted in remotely analogous circumstances. See Fox interview, supra note 18.

\(^{21}\) See Joshua Dressler, Understanding Criminal Law § 31.07 (6th ed. 2012) [hereinafter Dressler, Understanding].


\(^{24}\) See infra notes 161-179 and accompanying text.
defense. In those states, the defense – and the evidence supporting the defense – should be narrowly applied to avoid outcomes like that in the Larry King murder case.

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

I. A GAY PANIC CASE STUDY: THE LARRY KING MURDER

In this section, we present a narrative of the events surrounding the King murder case. We present the story chronologically, and in more detail than might be expected in an article that examines distinct legal issues. But the detail is important because it illuminates the questions and themes, particularly “blame the victim,” that course through the story.

A. The Victim and the Defendant

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

King was born in 1993. He was multi-racial, and was described as part Latino and part African-American. At the time of his death in a middle school classroom, he was a quite small

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25 As discussed in Part IV, infra, our proposals also apply to assertions of the trans panic defense.
27 See Gould, supra note 9; Averi Laskey interview in VALENTINE ROAD, supra note 9, at 34:35 [hereinafter Averi in VALENTINE ROAD].
teenager and had already led a very troubled life. Press reports indicate that, while a toddler, King was removed from his biological parents because of neglect. Gregory and Dawn King subsequently adopted King. For the four months prior to his death, King had been living in a group home for abused and neglected children and adolescents after he alleged that his adoptive father was physically abusing him.

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

At E.O. Green Middle School, King drew attention for his feminine dress and mannerisms, and there is substantial evidence that King suffered ongoing and severe bullying by his classmates. Students were required to wear uniforms; for two weeks beginning in January 2008, King “accessorized” his uniform with stiletto shoes, a purse, pink boots, earrings and

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28 See Setoodeh, supra note 7, at 40, 42.
29 According to one report, he was being raised by a single mother who abused drugs. He was removed from the home and adopted by the Kings when he was two. See id. at 42.
30 Id.
31 Id. at 43. Teachers and friends said they saw bruises on his body. Averi in VALENTINE ROAD, supra note 27, at 24:33; Traci Carroll interview in VALENTINE ROAD, supra note 9, at 24:45.
32 Interview by Lindsey Hay with Susan Crowley, in Oxnard, CA (June 17, 2013) [hereinafter Crowley interview].
33 The district created an Individualized Educational Program (IEP) for King and he was supervised by a special education teacher.
34 See, e.g., Neal Broverman, Mixed Messages, THE ADVOCATE, March 27, 2008, http://www.advocate.com/news/2008/03/14/mixed-messages. The bullying of LGBTQ students is, of course, widespread, and has been the subject of substantial scholarly literature. See, e.g., Ari Ezra Waldbaum, Tormented: Antigay Bullying in Schools, 84 TEMPLE L. REV. 385 (2012). For example, Susan Crowley, King’s seventh grade special education teacher, said that King complained to her daily that kids teased him. Crowley interview, supra note 32.
makeup.\textsuperscript{35} At some point, King announced he would prefer to be called “Leticia,” a statement that would prove crucial to McInerney’s defense. Some teachers complained about King’s behavior, but Assistant Vice Principal Joy Epstein confirmed with school district officials that King’s attire did not violate any school rules.\textsuperscript{36} Testimony at trial would demonstrate that several teachers and staff remained extremely uncomfortable with King’s emerging homosexuality and/or transgender identity.\textsuperscript{37} Some teachers agreed that King was largely to blame, both in trial testimony and in out-of-court statements. For example, Shirley Brown said King asked her what to do about “his situation.” She said she told him “nothing, keep it private.” She also said, “Larry shouldn’t have expressed himself so openly.” Brown continued, “I relate to Brandon because I can see myself in that very same position. I don’t know if I would have taken a gun but a good swift kick in the butt might have worked really well.”\textsuperscript{38} She later added, “I’ve been teaching for thirty years. Junior high school boys are homophobic. I was convinced that the boys would take it into their own hands since we did not.” She said she warned the principal that “if he didn’t do something, the boys in

\textsuperscript{35} Averi in VALENTINE ROAD, supra note 27, at 34:05; Samantha Cline interview in VALENTINE ROAD, supra note 9, at 36:40; James Bing interview in VALENTINE ROAD, supra note 9, at 36:40 [hereinafter Bing in VALENTINE ROAD]; Joy Epstein interview in VALENTINE ROAD, supra note 9, at 37:15.

\textsuperscript{36} Epstein interview, supra note 1.

\textsuperscript{37} We use the term “sex” to refer to a person’s biological classification, usually determined by external genitalia; “gender” to refer to the social construction of a person as “male” or “female;” and “transgender” as an “umbrella” term referring to a person whose biological sex is different from the gender with which they identify. See Cynthia Lee & Peter Kwan, The Trans Panic Defense: Masculinity, Heteronormativity, And The Murder Of Transgender Women, 66 HASTINGS L.J. (forthcoming 2014) (citing Mary Kristen Kelly (Transforming Traditional Interpretations of Title VII: “Because of Sex” and the Transgender Dilemma, 17 DUKE J. GENDER L. & POL’Y 219, 221 (2010)); Julie A. Greenberg, Defining Male And Female: Intersexuality And The Collision Between Law And Biology, 41 ARIZ. L. REV. 265, 271-74 (1990); Morgan Tilleman, Comments, (Transforming the Provocation Defense, 100 J. CRIM. L. & CRIMINOLOGY 1659, 1664 & nn. 39-41 (2010). Although King identified as “gay,” some speculated that he truly identified as a woman who was attracted to men.

\textsuperscript{38} Shirley Brown interview in VALENTINE ROAD, supra note 9, at 38:30, 39:45.
this school are going to take [King] behind a shed and beat him to death.”³⁹ As our discussion of the trial shows below, this was a theme that resonated with many jurors.

Like King, Brandon McInerney came from a troubled background. His parents, Kendra and Bill McInerney, separated when McInerney was six years old, their marriage the victim of drug abuse (hers and his) and domestic violence (his).⁴⁰ By 2004, after his mother entered rehabilitation for methamphetamine addiction, McInerney had moved in with his grandfather and his father, who abused McInerney. By eighth grade, McInerney had begun associating with a tough beach crowd. McInerney’s friends appear to have included white supremacists who aggressively guarded their patch of sand against non-whites; indeed, Oxnard, California is known for having a number of active white supremacist groups.⁴¹ During this period, his grades plummeted and he was removed from an English honors class and transferred into the same class that King attended.⁴²

McInerney’s interest in Nazism surfaced during this period.⁴³ Prosecutor Maeve Fox concluded that McInerney was a “neophyte” as a white supremacist but that this belief system “gave him the freedom and a moral viewpoint [that allowed him] to do what he did.”⁴⁴ At the trial, the state introduced this evidence to support its anti-gay hate crime theory.

Otherwise, and unlike King, McInerney attracted little attention at E.O. Green. As Susan Crowley recalled, “I never heard the name Brandon until the day Larry was shot.”⁴⁵

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³⁹ Id. at 41:22.
⁴⁰ See Bing in VALENTINE ROAD, supra note 35, at 22:50, 32:15; Kendra McInerney interview in VALENTINE ROAD, supra note 9, at 22:50, 32:15.
⁴¹ See VALENTINE ROAD, supra note 9, at 1:01:20.
⁴² Setoodeh, supra note 7.
⁴⁴ Fox interview, supra note 18.
⁴⁵ Crowley interview, supra note 32.
B. The Homicide

Not surprisingly, the state and defense portrayed different versions of the events and statements that preceded McInerney’s killing of King.\(^\text{46}\) The defense focused on King’s actions. A day or two before the shooting, as Valentine’s Day approached, some of King’s friends reportedly dared one another to ask a student they had a crush on to “be my Valentine.” At trial, there was defense testimony that King had done this, approaching McInerney on the basketball court in front of his friends.\(^\text{47}\)

Forensic psychologist Donald Hoagland, a defense witness who was also interviewed in the Valentine Road film, saw this incident – which McInerney relayed to Hoagland and the jury heard about second-hand through Hoagland’s testimony – as a key motivation for McInerney’s actions. What King did to McInerney was an extreme form of sexual harassment, Hoagland said on film and on the witness stand. According to McInerney via Hoagland, King came onto the basketball court, interrupted the game and asked to be McInerney’s valentine – the ultimate humiliation. Hoagland said that this incident “was very disturbing to all the boys.” McInerney was thinking that he needed to get rid of King, “to get rid of the scourge that had come upon the school.”\(^\text{48}\)

The state’s case, of course, presented a very different picture – one that placed King’s actions in context and characterized them as an understandable response to bullying. In papers

\(^{46}\) See David Alan Perkiss, A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons From the Lawrence King Case, 60 UCLA L. REV. 778, 788 (2013).

\(^{47}\) Averi, one of King’s classmates and friends, also repeated this story in Valentine Road, but no one testified at trial that they had actually heard or witnessed King say this. Averi in VALENTINE ROAD, supra note 27, at 13:00. The jury heard about this alleged incident only through Dr. Hoagland’s second-hand testimony about what McInerney relayed to him. See Hoagland in VALENTINE ROAD, supra note 19, at 57:45.

\(^{48}\) Id. at 57:45. This evidence seems facially objectionable on many grounds; Hoagland was not at the school that day, and is relating what others told him and speculating as to “the boys’” state of mind. And Hoagland is testifying as to the ultimate issue – McInerney’s state of mind – which at least theoretically expert witnesses are not permitted to do. See infra notes 58, 97, 214.
filed a year after the shooting, the prosecution contended that King and McInerney had an acrimonious relationship for months prior to the shooting. The prosecutor, Maeve Fox, said that McInerney and King sparred with “typical eighth grade, back-and-forth insults; some sexual, some not.” Witnesses said King was usually not the aggressor. But after months of teasing by McInerney and other male students who called him “faggot,” King had begun to retort, according to prosecutors. Fox told us that “the worst thing” that King did to McInerney was to say “love you,” possibly in the hall and maybe (again, the evidence is controverted) to blow him a kiss. Fox said the gesture might have even been a mocking one.

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

On February 12, the day of the shooting, McInerney’s father prepared to drive McInerney to school. As the two left their home and began to walk towards the car, McInerney realized that he had forgotten the gun that he had planned to use to kill King. McInerney went back into

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49 This was part of prosecution’s brief filed in opposition to the defense motion to remove the case to juvenile court. Catherine Saillant, Details in Gay Student’s Slaying Revealed, L.A. TIMES, Feb. 12, 2009, http://articles.latimes.com/2009/feb/12/local/me-king-mcinerney12 [hereinafter Saillant, Details].
50 Fox interview, supra note 18.
51 Saillant, Details, supra note 49.
52 Dan Swanson interview in VALENTINE ROAD, supra note 9, at 1:07:50; Hoagland in VALENTINE ROAD, supra note 19, at 1:07:50.
the house to retrieve it. He concealed the gun in a towel and stuffed it in his backpack. At some point while in school, he withdrew the towel-wrapped gun and stuffed it into his pants.53

When King arrived at school on February 12, teachers noticed that he was not wearing any of the feminine accessories or makeup that he had worn in the past. There also appears to be no evidence that King and McInerney had any interactions that day; King arrived late to class after having been in the Assistant Principal’s office.54

Though the evidence is disputed as to the exact timing, the shooting occurred fifteen to twenty minutes55 into Dawn Boldrin’s English class.56 McInerney watched the back of King’s head for a number of minutes before firing the first shot.57

Forensic psychologist Don Hoagland, the defense expert, testified that McInerney was consumed by feelings of humiliation, but had a chance to reconsider. Hoagland also said that, when King was called out of the class [a third version of where King was when class started], McInerney began to have second thoughts. McInerney was fingering the gun in his sweatshirt pocket, thinking, “Maybe I won’t do this.”58

According to Hoagland, the ultimate tipping point for McInerney was when King returned to class and allegedly said, “I’ve changed my name to Leticia.” Significantly, King did not direct this comment to McInerney but to another student. When McInerney heard that statement, according to Hoagland, “it obliterated any reserve or strength that he had. That took it

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54 See Hoagland in VALENTINE ROAD, supra note 19, at 1:08:27. There was some speculation that the two may have had a verbal altercation that day, but no one appears to have witnessed that conversation.
56 The class was held in the computer lab that day.
57 Jeff Kay interview in VALENTINE ROAD, supra note 9, at 1:14:50.
58 Hoagland in VALENTINE ROAD, supra note 19, at 1:08:30. Again, this evidence only came in through Hoagland and was of highly questionable admissibility.
to another level. This guy who is doing these things to me is now calling himself by a girl’s name.”

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

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

Shortly after the shooting, police apprehended McInerney in a neighborhood near the school. Oxnard Police Officer Joe Tinoco stated that McInerney “calmly allowed police to take him into custody, telling them, ‘I’m the one who did it.’” He apologized repeatedly for the killing. “He said, ‘I’m sorry, I did it, officer. I shot him.’” A video of the interrogation shows

59 Id. at 1:08:15.
60 Dawn Boldrin interview in VALENTINE ROAD, supra note 9, at 3:53.
61 Cathcart, supra note 9.
62 Fox interview, supra note 18.
McInerney as a tall and athletically built young man.\textsuperscript{64} Bail for McInerney was set at $770,000; he remained in Ventura County Juvenile Hall through his trial.\textsuperscript{65}

C. The Pre-Trial Proceedings and Charging Decision

By February 16, Ventura County prosecutors had charged McInerney as an adult with premeditated murder, and included hate crime and use of a gun sentencing enhancements. The prosecutors subsequently obtained the court’s approval to add a lying-in-wait allegation, which automatically transferred the case to adult court.\textsuperscript{66} If convicted of premeditated murder with the use of a firearm or with murder by lying-in-wait,\textsuperscript{67} McInerney faced a mandatory sentence of up to fifty-three years to life.\textsuperscript{68} Had he been tried as a juvenile, he would have been released no later than the time he reached twenty-five years old, a sentence that the prosecutors’ office believed would have been too lenient given the nature of the crime.\textsuperscript{69}

\textsuperscript{64} See VALENTINE ROAD, supra note 9, at 17:42.


\textsuperscript{66} Chawkins, Teen to Stand Trial, supra note 55.

\textsuperscript{67} In our interview, Fox observed that King’s killing was the best fit for a lying-in-wait allegation that she had seen in her fourteen years as a homicide prosecutor. Fox interview, supra note 18. Many states, including California, deem killings while lying-in-wait to be first-degree murder. See, e.g., CAL. PEN. CODE § 189 (West 2014); MICH. COMP. LAWS ANN. § 750.316 (West 2004 & Supp. 2014); W. VA. CODE ANN. § 61-2-1 (West 2010 & Supp. 2013). As a juvenile, McInerney was not eligible for the death penalty. Roper v. Simmons, 543 U.S. 551, 570-71 (2005). In addition, in Miller v. Alabama, 132 S. Ct. 2455, 2458 (2012), the Court held that all mandatory sentences of LWOP for persons who were juveniles at the time of the offense constitute “cruel and unusual punishment” under the Eighth Amendment.


\textsuperscript{69} Fox interview, supra note 18. Fox said, “How do you take someone that puts two bullets in back of the head, how is that an act of juvenile delinquency? The juvenile justice system is not equipped to deal with someone like that. This was a cold-blooded execution.” Telephone Interview by Molly Selvin with Maeve Fox, Ventura County Assistant District Attorney (July 17, 2014) [hereinafter Fox telephone interview]. In addition, according Fox, in a case like McInerney’s, where the relevant statutory guidelines require juveniles to be tried as adults, Welfare and Institutions Code secs. 602 and 707b, prosecutors have little discretion in this regard. Proposition 21, the Gang Violence and Juvenile Crime Prevention Act, requires that someone 14 years or older charged with murder with special circumstances be tried as an adult. Lying-in-wait is one the 23 legally specified special circumstances that can accompany a murder charge and automatically transfers a juvenile into the adult criminal justice system. Ernie Grimm, Does the DA Have No Choice?, SAN DIEGO READER, Mar. 15, 2001, available at http://www.sandiegoreader.com/news/2001/mar/15/does-da-have-no-choice/#.
One early theme that emerged was that school officials could and should have prevented the killing. McInerney’s first attorney, public defender William Quest, laid out the argument focusing on school officials’ behavior. Quest argued that administrators “should have moved aggressively to quell tensions between the two boys” but “were so intent on nurturing King as he explored his sexuality, allowing him to come to school wearing feminine makeup and accessories, that they downplayed the turmoil that his behavior was causing on campus.”

“But Brandon is not some crazed lunatic,” Quest said. “This was a confluence of tragic events that could have been stopped. If there is partial blame in other places, let’s not throw away Brandon for the rest of his life.”

Quest also turned the rhetoric towards a school official, calling Assistant Principal Joy Epstein “a lesbian vice principal with a political agenda.”

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

On August 26, 2009, McInerney pleaded not guilty to first-degree murder, a hate crime enhancement, and the use of a gun charge. Wippert and Bramson filed a motion to dismiss the

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71 Id.
72 Setoodeh, supra note 7, at 43.
74 Id.
lying-in-wait charge, calling it “prosecutorial vindictiveness.” The judge denied the motion, and the case was scheduled for trial.

D. The Trial

Trial began on July 5, 2011, more than three years after King’s death, and lasted for nine weeks. The jury included nine women and three men. Maeve Fox said that before the trial began, she feared the jury would include people who believe juveniles should not be tried as adults, as well as those who are homophobic. Regarding the first, she said that “[t]hey’ll want to be on the jury so bad that they’ll lie in jury selection.” As to the second group, she said, “I’m really afraid of the stealth homosexual haters.” She continued, “I believe they’re going to present some kind of a ‘gay panic’ defense. That somehow, King, based on what he did or said, had provoked McInerney into doing what he did.”

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

Fox began by showing a series of photographs of McInerney when he was arrested, including one of him with no shirt that showed he was a tall, physically fit young man. She

77 Without a trial transcript, the VENTURA COUNTY STAR and L.A. TIMES stories are (along with interviews of those who attended the trial) the closest we have to a step-by-step account of the trial.
78 Maeve Fox interview in VALENTINE ROAD, supra note 9, at 56:35.
79 Id.
described McInerney as “a popular kid who was goofy and well liked in school by day and spent his nights in a ‘terribly dysfunctional’ home where drugs and violence were commonplace. He was skilled in the use of firearms and had studied martial arts.” By contrast, she said King was a cherubic-faced, small kid, slight and “very effeminate,” who had been picked on for years because of his sexuality. Fox said students would testify about McInerney’s threats to King the day before the shooting. She noted that McInerney had easy access to guns in his house, such as the .22 caliber that he used in the crime. Fox also called McInerney a neophyte white supremacist whose backpack contained Nazi and “white power” drawings, along with a copy of Hitler’s Mein Kampf.

McInerney’s lead attorney, Scott Wippert, told the jury the evidence would show that what happened should not have happened: “It was an unnecessary tragedy because a 14-year-old boy was emotionally pushed over the edge . . . sexually harassed by Larry King.” Wippert said King was a known problem at school for harassing other boys sexually and making inappropriate remarks. He had been warned about making sexual advances as early as the fifth grade, and part of the goals a counselor had set for him recently included not making sexual advances, he said.

He dismissed the prosecution’s allegation that McInerney was acting out of white supremacist beliefs. There was no hate crime, just the frustration of an adolescent with nowhere

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82 Barlow, Attorneys Argue, supra note 80.
83 Id.
84 Id. This version of the facts resonated strongly with several jurors. From jurors McIhaney and Black: “He was just a kid . . . He should have been punished as a child.” McIhaney & Black interview, supra note 17.
85 Barlow, Attorneys Argue, supra note 80.
to turn, he told the jury. “Why would a student complain when everyone knows about it and no one is going to do anything about it?” he asked. 86

Wippert said that a psychologist [Hoagland] would testify that McInerney was in a dissociative state at the time of the shooting, not in touch with the reality of what he was doing. 87 As he spoke, co-counsel Robyn Bramson wept.88

While King’s attire was disruptive to the classes and to other students, Wippert said little was done to address it, and King was acting as a bully. It was King, not McInerney, who was the aggressor in the relationship, he argued. McInerney grew up in a house where his father shot his mother, then married her and gave her bullets in her Christmas stocking as a joke. He was taken to drug houses when he was a child and his father, who has since died, beat him for fun, Wippert said. “This is a very troubled young man pushed to the edge,” Wippert said of his client. “He was pushed there by a young man who repeatedly targeted him with unwanted sexual advances.”89

McInerney reached an “emotional breaking point” and saw no other way to stop the sexual harassment by King, Wippert said. His own violent and dysfunctional family offered no help, and school officials had made it clear that King was permitted to “flaunt” his sexuality, even if it was disruptive, the defense attorney said.90

On the fifth day of trial, Assistant Principal Joy Epstein and former teacher Dawn Boldrin testified about the school’s response to concerns about King’s attire. Epstein consulted with an administrator after King started wearing women’s accessories to school in late January 2008,
including high-heeled boots, earrings, and eye makeup. Epstein was told that, by law, as long as the student wore the school’s uniform, which he did, he was entitled to embellish as he pleased. “They said we had to protect his civil rights and his equal rights,” Epstein said. “We could not discriminate between a boy or a girl wearing those items to school.”91 After administrators met to discuss the issue and enlisted the district’s guidance, Assistant Principal Sue Parsons sent the email to the school’s staff informing them not to make an issue of King’s attire.92

When Dawn Boldrin took the stand, the defense displayed a large photograph she took of King, smiling broadly and holding the lime-green chiffon gown she had given him, a hand-me-down from her daughter.93 Boldrin said that she was not concerned that her gift might further inflame problems at the school related to King’s attire because she told King that he should not wear the floor-length gown to school. “I didn't see anything inappropriate about him enjoying that dress outside of school,” Boldrin said.94

The defense later called psychologist Donald Hoagland to the stand. Hoagland testified about McInerney’s “humiliation” at what he called King’s “come-on” to him.95 This testimony powerfully influenced the jury. McInerney was a bright kid driven to the brink by a long history of violence at home, Hoagland said. In the end, teasing from the victim, whose cross-dressing he viewed as in-your-face provocation, pushed McInerney over the edge.96

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92 Id.
93 Id.
94 Chawkins, Psychologist, supra note 53.
95 Id.
Hoagland then opined that, when McInerney heard King telling a girl that he’d changed his name to Leticia, “he snapped” and entered a “dissociative state” that lasted until he fled the classroom and was caught by police minutes later. “It was a transient period of dissociation,” Hoagland said in response to skeptical questioning from Fox.97

At this juncture, it is critical to note that the heat of passion defense cannot succeed if the defendant had “cooled off” from the provocation or if a reasonable person would have “cooled off” in the circumstances. Indeed, if too much time passes between the provocation and the killing, then a trial court will deem the defendant to have “cooled off” as a matter of law and will not allow the jury to consider the provocation defense.98 The passage of time will not obviate the defense, however, if there is a “rekindling” of the heat of passion.99 That is why the testimony that King said, “Call me Leticia” (or words to that effect), and that McInerney heard these words, proved critical to the defense. As discussed in the next section, however, we could locate no California heat of passion case where the victim’s actions or statements not directed at the defendant or a person closely associated with the defendant.100

In her closing statement, Fox acknowledged that jurors might feel sympathy for McInerney, given his dysfunctional and violent home life. But she reminded them that the law does not allow for sympathy.101 She called the case a “tragedy on all levels,” but argued that factually McInerney’s fatal shooting of King was first-degree murder. “What possible chance

97 Id. Once again, this testimony seems very close to reaching a conclusion as to an ultimate jury issue: whether McInerney was acting in the heat of passion at the time of the killing.
98 17A CAL. JUR. 3D Criminal Law: Crimes Against the Person § 95 (2014).
99 See WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 830 (5th ed. 2010) [hereinafter LAFAVE, PRINCIPLES].
100 Cf., Commonwealth v. Carr, 580 A.2d 1362 (Pa. 1990) (holding that the victims’ lesbian lovemaking was not adequate provocation to support the defendant’s heat of passion defense because it was not behavior directed at the defendant). See infra notes 141-148 and accompanying text.
did the boy have against this defendant?” Fox asked. “He was killed by someone who was full of hatred.”

In his closing, also three hours long, Wippert emphasized his client’s age at the time of the shooting, his tumultuous home life, the teachers’ concerns about the growing tension after King started appearing at school in feminine attire, and the administration’s failure to respond to those concerns. “This is a boy. He was fourteen,” Wippert said. “He wasn’t a man at a bar that somebody tried to pick up, and he waited outside to kill them.” Wippert also suggested the prosecution was portraying McInerney as a “white supremacist monster” to buttress an unsupported hate crime allegation. Wippert agreed that King was troubled, “but so was Brandon. The grown-ups failed. Everywhere. In both of their lives.”

Wippert ended his argument “by asking jurors to consider the mind-set of a fourteen-year-old boy and the humiliation that King was inflicting on McInerney with his aggressive

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102 Here is an excerpt of Fox’s closing statement:

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

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

103 Wippert’s closing explicitly appealed to the jurors’ emotions: “He did not pull a Columbine, he did not go and shoot everyone he could. He shot King because he didn’t know what else to do to make him stop. He’s not a murderer. When you make this decision, use your common sense, use your heart and soul. And remember that he’s fourteen.” Id. at 1:09:15.

104 Saillant, Background No Excuse, supra note 101. This appears to be a reference to the Matthew Shepard case. See infra notes 188, 231-233 and accompanying text.

105 Saillant, Background No Excuse, supra note 101. Our interviews with jurors speak to Wippert’s success with this approach. McElhaney & Black interview, supra note 17. It may be that the jurors regarded Nazism as embracing only white supremacist and anti-Semitic views, not necessarily hatred toward other groups such as LGBTQ people. Jurors Black and McElhaney recalled testimony to the effect that McInerney apparently had African-American friends and concluded, as a result, that he was not a racist and therefore rejected the hate crime charge even though that charge was based upon the victim’s sexual orientation and not his race. Id; see Zeke Barlow, Friend: Brandon McInerney Said He ‘Was Going to Bring a Gun’ to School, VENTURA COUNTY STAR, July 7, 2011, http://www.vcstar.com/news/local-news/crime/no-headline-mcinerney_day_3. In fact, the prosecutor did not raise the issue of King’s race during voir dire because it was not relevant to the hate crime allegation. Fox telephone interview, supra note 69.

106 Saillant, Background No Excuse, supra note 101.
flirtations.” Teachers had protested to the administration, but no one stopped King’s increasingly audacious behavior with boys on campus, Wippert said. “Remember the boy who couldn’t cry,” said Wippert, gesturing to the silent defendant, who was dressed in a lavender shirt and slacks. “He wasn’t allowed to cry. He was a fourteen-year-old-boy who shot Larry King because he didn’t know what else to do to make it stop.”

Fox characterized as smoke screens the arguments that McInerney was somehow provoked into the shooting by King’s aggressive flirtations or that his hellish childhood excused the shooting. She urged jurors to set aside any bias they might have against King because he had told kids he was gay. “This victim, even in death, has been degraded and subjected to inappropriate character assassination,” she said. “No reasonable person of any age would ever have reacted the way the defendant did.”


108 Saillant, Background No Excuse, supra note 101.
E. Jury Deliberations

The jury had three choices: first-degree premeditated murder,\textsuperscript{109} second-degree murder,\textsuperscript{110} and voluntary manslaughter based upon a heat of passion mitigating defense.\textsuperscript{111} The hate crime enhancement would have provided the judge with the discretion to add one, two or, three years to the sentence.\textsuperscript{112} Significantly, in California the state has the burden of proving beyond a reasonable doubt that the defendant did not act in the heat of passion.\textsuperscript{113}

Although juries do not determine prison sentences, and generally are unaware of those sentences, the defense repeatedly implored the jury to not send McInerney away for life – thus making the jury aware of the potential consequences of a murder conviction.\textsuperscript{114} At least some of the jury also apparently and mistakenly believed that a finding that McInerney committed a hate crime would substantially increase the sentence.\textsuperscript{115}

After seventeen hours of deliberations, the jurors said they could not agree whether to convict McInerney of murder or voluntary manslaughter. Judge Campbell then declared a mistrial.\textsuperscript{116} Seven jurors favored a voluntary manslaughter conviction and five a conviction for first- or second-degree murder.\textsuperscript{117}

\textsuperscript{109} At the time, the basic sentence was twenty-five to life, with an additional twenty-five years for the use of a gun, for a range of fifty to life in prison. \textit{See supra} note 68 and accompanying text.

\textsuperscript{110} The basic sentence for second-degree murder is fifteen years to life. \textsc{Cal. Pen. Code} \textsection 190.5 (West 2014); an additional sentence of twenty-five years to life applies for killing someone with a gun. \textsc{Cal. Pen. Code} \textsection 12022.53 (West 2012 \& Supp. 2014).

\textsuperscript{111} The sentence is three, six, or eleven years. \textsc{Cal. Pen. Code} \textsection 193 (West 2014).

\textsuperscript{112} \textsc{Cal. Pen. Code} \textsection 422.75(a) (West 2010 \& Supp. 2014).

\textsuperscript{113} Judicial Council of California Criminal Jury Instructions [CALCRIM] No. 511 (2011), \textit{available at} http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf. In some states, a defendant has the burden of proving such a defense by a preponderance of the evidence. \textit{See, e.g.}, \textsc{State v. Snyder}, 750 So.2d 832, 838 (La. 1999) (citing \textsc{State v. Lombard}, 486 So.2d 106, 111 (La. 1986)).

\textsuperscript{114} \textit{See} Fox interview, \textit{supra} note 18.

\textsuperscript{115} \textsc{McHaney} & \textsc{Black} interview, \textit{supra} note 17.


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

F. Plea Deal and Sentencing

Prosecutors immediately pledged to retry McInerney. “We will consider the fact that this was a very significantly split jury,” said Chief Assistant District Attorney James Ellison. “There are obviously very strong reactions on both sides and we will consider all those in how we proceed.”

Little more than a month after the verdict, Ventura County prosecutors announced that they would drop the hate crime allegation but still planned to retry McInerney as an adult for first-degree murder.

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


120 News stories that recounted a childhood caught in the swirl of his parents’ violence, alcohol, and drugs may have built sympathy for the defendant. After his father died following an alcohol-related fall, “the local blogosphere exploded” with comments, often questioning the appropriateness of trying the teen as an adult. Saillant, Father of Teen, supra note 73.


122 The LA Times story called this move “a significant shift in legal strategy” and “puzzling because in the first trial both prosecutors and defense attorneys acknowledged homophobia as a central issue.” Catherine Saillant & Richard Winton, Brandon McInerney Will Be Retried in Killing of Gay Classmate, L.A. TIMES, Oct. 6, 2011, http://articles.latimes.com/2011/oct/06/local/la-me-gay-murder-20111006 [hereinafter Saillant & Winton, McInerney Will Be Retried]. At the time, prosecutors declined to comment publicly on the reasons for dropping the hate crime charge, but one juror said that none of the twelve panelists in the original trial believed the shooting was a hate crime. The inclusion of the hate crime charge may have damaged the prosecution’s credibility among jurors. Prosecutor Maeve Fox characterized the hate crime charge as “right morally” but also said that tactically “it was stupid and I regret it.” Fox interview, supra note 18. Fox and others concluded after the trial that the evidence supporting the hate crime allegation was contested, and that this aspect of the trial may have led some jurors to question other, much stronger aspects of the state’s case.
The prosecutors’ decision to retry the case was controversial. As for the new case, one juror stated: “It was overcharged and an abuse of power, and I don’t think a new jury will see it any different.” And the LGBTQ community itself was conflicted, principally because of the underlying juvenile justice issues and the pain caused to those involved in the case. A spokeswoman for the Gay, Lesbian & Straight Education Network said the prosecutors should have made a plea deal instead. “Brandon McInerney killed Larry King and should go to jail for his crime,” said Eliza Byard. “However, the first trial subjected everyone — especially Larry and Brandon’s peers — to a painful spectacle that accomplished nothing.”

On November 21, 2011, McInerney agreed to plead guilty to second-degree murder and voluntary manslaughter with the use of a gun and serve twenty-one years in addition to the time that he had already spent in confinement. In return, prosecutors agreed not to go forward with a second trial, which could have resulted in a life sentence. McInerney was sentenced in mid-December 2011, and was transferred from a juvenile facility to a California state prison when he turned eighteen. The sentence provided for a term that would keep McInerney in prison until

123 Saillant & Winton, McInerney Will Be Retried, supra note 122. This juror is likely Lisa Smith, the juror who wrote District Attorney Gregory Totten, objecting to the fact that prosecutors wrote her after the trial. See Lisa S. letter, supra note 2.
124 Saillant & Winton, McInerney Will Be Retried, supra note 122.
126 Catherine Saillant, Gay Teen’s Killer Takes 21-Year Deal, L.A. TIMES, Nov. 22, 2011, http://articles.latimes.com/2011/nov/22/local/la-me-1122-gay-shooting-20111122. The Times story reports that some jurors believed the district attorney’s office was being overly harsh in trying McInerney as an adult and several had begun wearing “Save Brandon” bracelets. Id. Again, a sentence of life without parole for a juvenile is not possible today. See supra note 67 and accompanying text.
he is nearly thirty-nine years old. Under recent revisions to California juvenile offender parole laws, however, he could be freed at age thirty-five if found suitable for parole.128

II. GAY PANIC AND THE LAW OF INTENTIONAL HOMICIDES

In order to understand the context of the gay panic defense in the King murder case, we need to first define the legal principles applicable to intentional killings. Understanding the elements of first-degree murder, second-degree murder, and voluntary manslaughter is essential to any analysis of the case. Homicide crimes are divided into two categories: intentional and non-intentional.129 For example, a pre-planned deliberate killing is an “intentional” homicide.130 Such killings are punished as first-degree murder in most states, such as California, where homicide law is based upon common law principles.131

A. Murder

The defense in the King case did not argue – and could not have argued given the facts in the case – that McInerney did not intend to kill King. Using a deadly weapon against a vital body part is quintessential proof of an intentional killing, and McInerney admitted that he shot King in the head.132 So for our purposes, the law of intentional killings governs.

In California, like most common law states, an intentional killing occurs when the defendant has the goal of killing the victim or when the defendant knows that the defendant’s act

129 A third category, felony murder, does not apply to the King murder case and we will not discuss it here.
130 Sentences for intentional homicides are death, LWOP, or twenty-five years to life. CAL. PEN. CODE § 190 (West 2014).
131 Other states follow Model Penal Code (MPC) principles or some hybrid of the MPC and common law. DRESSLER, UNDERSTANDING, supra note 21, § 31.02 500. Unintended homicides include extremely reckless killings, sometimes termed “depraved heart” murder, which usually is punished as second-degree murder. In most common law jurisdictions, killings committed negligently rather than extremely reckless are punished as involuntary manslaughter. See id. § 31.02 501.
132 Id. § 31.03 502.
or omission will almost certainly lead to the victim’s death. For example, a jury could find that a stab wound to the chest during a bar fight is an intentional, even if unplanned, killing. Absent other facts, such a killing would constitute second-degree murder. (Some of the jurors in the King murder case apparently supported a second-degree murder conviction.)

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

Brandon McInerney was charged with first-degree murder, which required the jury to find that McInerney acted willfully (intentionally) with premeditation and deliberation. The defense essentially conceded that McInerney intentionally killed King. As discussed in detail in Part II, there was substantial evidence that McInerney premeditated and deliberated Larry King’s death. The prosecutor went so far as to include a “lying-in-wait” allegation, a particular

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133 Id.
134 CAL. PEN. CODE §193 (West 2014). If the jury had found that McInerney also committed a hate crime, the sentence would have been increased by one to three years. CAL. PEN. CODE § 422.75 (West 2010 & Supp. 2014).
135 Fox telephone interview, supra note 69.
136 As the judge instructed the jury, “The word ‘deliberate’, which relates to how a person thinks, means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word ‘premeditated’ relates to when a person thinks and means considered beforehand. One premeditates by deliberating before taking action.” People v. McInerney Jury Instructions (copy on file with authors), based on California Jury Instructions: Criminal [CALJIC] 8.20 (Fall 2008 Revision) [hereinafter McInerney jury instructions].
137 The defense did not and could not argue that someone other than McInerney killed King—there were numerous witnesses to the shooting, and McInerney confessed to the shooting upon his arrest. Nor could the defense argue that the killing was accidental—the act of putting a gun to the back of someone’s head and pulling the trigger twice shows a deliberate intention to kill. See DRESSLER, UNDERSTANDING, supra note 21, § 31.03 502-03.
kind of aggravating circumstance that, in many states, including California, raises the murder to first-degree.  

**B. Voluntary Manslaughter**

1. **Definition and Theory**

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

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

There is disagreement over the theoretical basis for the provocation defense. Some argue that provocation is a “justification defense,” such as self-defense, in that the victim was responsible for causing his own death. Others argue that it is an “excuse” defense, such as insanity, demonstrating that the defendant acted with reduced culpability.

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140 California Penal Code section 195 (West 2014) itself labels the defense as an excuse defense. For an excellent overview of this debate, see Dressler, UNDERSTANDING, *supra* 21, § 31.07[C]. Dressler concludes that the dominant modern view is that “the anger or other emotion of a provoked defendant is justifiable or, at least,
of the trial showed, both theories seemed to be at play in the King murder case: according to
some jurors, King brought on his own death by his “deviant” behavior; according to others,
McInerney’s actions were excusable because it was reasonable for him to be enraged King’s
flirtations.

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

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

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

Neither fear [nor] revenge … constitute[s] the heat of passion referred to
in the law of manslaughter. . . .

The instructions present a fairly typical outline of the provocation defense in states such
as California, where the defense is applied broadly rather than narrowly. 142 Under this approach,
the provocation defense requires that the jury find several elements:

excusable; the homicide is wholly unjustifiable, but partly excusable.” See also Reid Griffith Fontaine, Adequate
(Non)Provocation and Heat of Passion as Excuse Not Justification, 43 U. Mich. J.L. Reform 27 (2009); Joshua
Dressler, Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject, 86 Minn. L. Rev. 959
(2002). Others have argued that heat of passion is a justification defense, or some combination of justification and
excuse. See Mitchell N. Berman & Ian P. Farrell, Provocation Manslaughter as Partial Justification and Partial
Excuse, 52 Wm. & Mary L. Rev. 1027, 1047-55 (2011). As we discuss in the next Part, some of the jurors in the
King case clearly considered that McInerney was justified in shooting King because those jurors considered King to
be the aggressor. See infra note 178-180, 221 and accompanying text.

141 McInerney jury instructions, supra note 136, based on CALJIC 8.42 & 8.44 (Fall 2013) (emphasis added).
(1) a legally adequate provocation (“the provocation must be of the character and degree as naturally would excite and arouse the passion”);

(2) the defendant must have been acting “under the influence of that heat of passion” at the time of the killing; and

(3) a reasonable person would have been acting in the heat of passion in these circumstances (“The heat of passion [would] reduce a homicide to manslaughter in the mind of an ordinarily reasonable person in the same circumstances”).

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

2. The “Reasonable Person”

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

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

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142 Id.

143 See DRESSLER, UNDERSTANDING, supra note 21, § 31.07 526. The California approach to the heat of passion defense is a liberal one in that it allows the defense in circumstances when a provocation instruction would not be given in states that follow a narrow approach that limits the defense to certain specific categories of provoking incidents. Traditionally, these included (1) violent assault or battery, (2) mutual combat, (3) seeing a serious felony committed against a close relative, (4) illegal arrest, and (5) seeing a spouse (originally limited to a husband’s witnessing his wife) commit adultery. See id. § 31.07 525. The MPC uses a much broader approach to this type of defense than either of the common law approaches. The MPC’s extreme emotional disturbance defense does not require any actual provocation for the murder to be mitigated to manslaughter. Id. § 31.10 534. Although the MPC has been very influential nation-wide, a number of states that have modeled their penal codes on the MPC have reverted to the common law approach to voluntary manslaughter, principally based upon the view that the MPC extreme emotional disturbance defense allows the defense in too many cases – especially those involving domestic violence against women. See Nikolette Y. Clavel, Note, Righting the Wrong and Seeing Red: Heat of Passion, the Model Penal Code, and Domestic Violence, 46 NEW ENG. L. REV. 329 (2012).

144 See DRESSLER, UNDERSTANDING, supra note 21, § 10.04 134.
The law in California – as controversial and misguided as it may be – requires that a person tried as an adult be held to the standards of the generic “reasonable” person, not to the standards of the reasonable person of ___ age.\textsuperscript{145} So the key question in the Larry King murder case is whether the concept of a “reasonable” person includes the sex, sexual orientation, and gender identities of the victim and the defendant? That is, should the jury have considered, as part of its reasonableness determination, that McInerney was a heterosexual male and that King identified as a gay male (and may have been, as at least one juror seems to have believed, transgender)?\textsuperscript{146}

3. The “Cooling Off” Period

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

Where the influence of the heat of passion has ceased to obscure the mind of the accused, and \textit{sufficient time has elapsed} for angry passion to end and for reason to control his conduct, it will no longer . . . reduce the killing to voluntary manslaughter.

The question, as to whether the cooling period has elapsed and reason has returned, is not measured by the standard of the accused, but the \textit{duration of the cooling period is the time it would take the average or ordinarily reasonable person to have cooled the passion}, and for that person’s reason to have returned.\textsuperscript{147}

Under California law, then, the provocation defense will be unsuccessful if (1) the defendant had “cooled off” between the time of the provoking incident or incidents or (2) if

\textsuperscript{145} As a general principle, juveniles tried in adult court are to be held accountable to adult standards. See Marsha Levick & Elizabeth-Ann Tierney, \textit{The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles be Far Behind?} 47 HARV. C.R.-C.L. L. REV. 501, 503 (2012). See also DRESSLER, \textit{UNDERSTANDING}, \textit{supra} note 21, § 31.07 529 (courts are generally unwilling “to subjectivize the ‘reasonable/ordinary person’ standard when the factor in question is used to assess the level of self-control to be expected of the defendant”).

\textsuperscript{146} See Lisa S. letter, \textit{supra} note 2 (“You all know the victim had a long history of deviant behavior. Yes, I said deviant. Not his sexual orientation – deviant behavior.”).

\textsuperscript{147} McInerney jury instructions, \textit{supra} note 136, based on CALJIC 8.43 (Fall 2013) (emphasis added).
sufficient time elapsed for a “reasonable person” to have “cooled off” even if the particular defendant had not cooled off. Because all or nearly all (depending on one’s view of the facts, as discussed in Part III below) of King’s alleged provocative behavior occurred prior to the day of the killing, the “cooling off” element played a key role in McInerney’s trial. It is important to note that California law is unusually relaxed among common law jurisdictions with respect to the cooling off period.148

4. Gay Panic as the Heat of Passion149

To evaluate why the Larry King murder trial turned out as it did, we need first to understand the particular version of provocation argued to the jury here: the gay panic defense. This section first surveys the background of the gay panic defense, examining the views of the principal critics of the defense. The section then examines how the gay panic defense played out during the Larry King murder trial. We also note that a related defense, termed “trans panic,” sometimes arises when the victim was transgender, but that defense was not argued in the Larry King murder case.150

The gay panic defense is, needless to say, controversial. Some argue that the defense appropriately reflects a defendant’s lowered culpability. Under this view, the heat of passion

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148 See People v. Berry, 18 Cal.3d 509 (1976).
150 “Trans panic” usually arises where a heterosexual male is in involved in a sexual encounter with a person who presents as female but has male genitalia. See Bradford Bigler, Comment, Sexually Provoked: Recognizing Sexual Misrepresentation as Adequate Provocation, 53 UCLA L. REV. 783, 798 (2006); Lee & Kwan, supra note 37 at []; Tilleman, supra note 37, at 1686. Although there was substantial speculation that Larry King was transgender, King’s case does not fit into the typical “trans panic” scenario. Instead, McInerney’s alleged outrage at King’s dress and behavior is closer to a variant of gay panic; instead of discovering that the victim’s sexual identity was other than perceived, McInerney responded to King’s refusal to follow sex and gender norms.
defense assumes that the defendant should be partially excused because violent behavior is understandable – if not justified – in certain circumstances.¹⁵¹ And, if the emotions of a reasonable person (almost always a reasonable man in this context) would be inflamed by an unwanted gay sexual advance, then the law should take this reality into account.¹⁵² Others argue that the provoking party’s behavior partly justifies the killing.¹⁵³

Opponents counter that this argument assumes that it is reasonable to be homophobic; unwanted sexual advances rarely lead to heat of passion claims in circumstances other than a gay male allegedly hitting on a straight male.¹⁵⁴ And our legal system does not accept race panic, religion panic, or heterosexual panic as culpability-reducing defenses to violence.¹⁵⁵

Much of the discussion over the gay panic defense necessarily occurs in a relative vacuum; there are few published judicial decisions analyzing the defense.¹⁵⁶ We are left with a discussion principally based upon anecdotal reports of trials where the defense was allowed (like the King case) or was not allowed but there was no reported decision (like the Matthew Shepard case).¹⁵⁷ We therefore rely largely on those anecdotal accounts of gay panic cases and the scholarly analyses of them.

¹⁵¹ See supra note 140.
¹⁵³ See supra note Error! Bookmark not defined.
¹⁵⁴ Lee, Gay Panic Defense, supra note 3, at 535. For example, homicide cases involving claims of lesbian panic are rarely seen. Id. at 488. Mison reported finding no cases of “lesbian panic.” Robert Mison, Comment, Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation, 80 CAL. L. REV. 133, 135 n.7 (1992).
¹⁵⁶ Appellate courts generally write on the issue when a trial judge has denied a defense request to argue voluntary manslaughter based on gay panic and the defendant has been convicted and appeals. Because of double jeopardy considerations, in cases where the defense was successful, the prosecution cannot appeal and ask for a new trial where the defense would be excluded. See WAYNE R. LAFACE ET AL, CRIMINAL PROCEDURE § 25.3 (5th ed. 2009).
Although a detailed history of the gay panic defense is beyond the scope of this article,\textsuperscript{158} it is important to provide a brief background of the defense in order to provide the context for our “gay shield law” proposal. The use of the gay panic defense in the criminal justice system started with a long-held view that homosexuality is a psychological disorder.\textsuperscript{159} The American Psychiatric Association did not formally remove homosexuality from the \textit{Diagnostic and Statistical Manual of Psychiatric Disorders} until 1973.\textsuperscript{160} In this framework, a straight male who was subjected to an unwanted advance by a mentally ill person could fairly easily assert heat of passion.

Over time, the gay panic defense has been sporadically successful in criminal cases when based on provocation.\textsuperscript{161} Scholars have theorized that the reason why it has been successful is that juries may believe that it is reasonable for a heterosexual man to react violently to a nonviolent homosexual advance and that, “[i]f the average heterosexual man would react violently to a gay man’s sexual advance, then arguably such a response is reasonable.”\textsuperscript{162}

Nearly twenty years ago, Professor Joshua Dressler wrote the article that asserts the most widely-cited modern argument in favor of allowing a defendant to argue provocation in cases of a “nonviolent homosexual advance.”\textsuperscript{163} Responding to Robert Mison’s article advocating the complete abolition of the defense,\textsuperscript{164} Dressler argues that the heat of passion in such cases is not, contrary to Mison’s claim, simply based on homophobia. Dressler begins with the assumption that a reasonable male – which he defines as the “ordinary” male – is different from a reasonable

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{158} For excellent historical overviews, see Lee, \textit{Gay Panic Defense, supra} note 3; Mison, \textit{supra} note 154.
\item \textsuperscript{159} Garmon, \textit{supra} note 149, at 631.
\item \textsuperscript{160} Id. \textit{See also} Alix Spiegel, \textit{81 Words} (This American Life radio broadcast, Jan. 18, 2002).
\item \textsuperscript{161} Garmon, \textit{supra} note 149, at 634.
\item \textsuperscript{162} Lee, \textit{Gay Panic Defense, supra} note 3, at 505. The original argument was that the reason for the attack was the defendant’s own latent, disavowed, homosexual desires, which become unmanageable and turned into violence, a view that is no longer widely-accept. \textit{Id.} at 482-85.
\item \textsuperscript{163} Dressler, \textit{Reflections, supra} note 152.
\item \textsuperscript{164} Mison, \textit{supra} note 154, at 177-78.
\end{enumerate}
\end{footnotesize}
female in responding to sexual advances,\textsuperscript{165} and then argues that a heterosexual male may be reasonably provoked when subjected to a homosexual advance: “[I]f the sexual advance is homosexual in nature, and the recipient of the advance is exclusively heterosexual, the fact that the advance is homosexual in character will be a reason for recipient’s angry reaction.”\textsuperscript{166} Dressler concludes that the killer’s “distaste” for homosexual acts could mean that it was reasonable for a heterosexual male to be provoked by a gay advance even if the killer was not homophobic.\textsuperscript{167}

In the article that led to Dressler’s piece in response, Robert Mison asserts that the gay panic defense is both a misguided application of the provocation theory and a judicial institutionalization of homophobia.\textsuperscript{168} Mison opines that, by allowing the defense, the judiciary is reinforcing and institutionalizing violent prejudice at the expense of norms of self-control and tolerance.\textsuperscript{169} The defense creates a lower standard of protection against violence for a particular class of victims.\textsuperscript{170} For these reasons, trial judges should hold that homosexual advances are, as a matter of law, insufficient provocation to incite a reasonable person to kill and should not allow the defense to go to the jury in such circumstances.\textsuperscript{171}

\textsuperscript{165} Dressler, Reflections, supra note 152, at 735-36.
\textsuperscript{166} Id. at 755.
\textsuperscript{167} Id. at 756 (“A person may find homosexual conduct distasteful, but not hate homosexuals or want harm to befall them in their personal lives.”).
\textsuperscript{168} Mison, supra note 154, at 158.
\textsuperscript{169} As Mison explains, “In seeking to avail himself of the provocation defense the defendant hopes that the typical American juror – a product of homophobic and heterocentric American society – will evaluate the homosexual victim and homosexual overture with feelings of fear, revulsion, and hatred. The defendant’s goal is to convince the jury that his reaction was only a reflection of this visceral societal reaction; the reaction of a ‘reasonable man.'” Id.
\textsuperscript{170} Id. at 136.
\textsuperscript{171} Id.
In her article examining the gay panic defense, Cynthia Lee makes an important contribution that seeks to find a middle ground.\textsuperscript{172} Professor Lee objects to simply banning provocation defenses based on homosexual advances.\textsuperscript{173} Her principal argument is that a ban would be counterproductive.\textsuperscript{174} Defense attorneys will find more subtle ways to get the same idea across to the jury.\textsuperscript{175} And, as Lee and Kwan argue in their article on trans panic, if the jury is faced with only murder or acquittal as options, then it may acquit in the absence of a manslaughter instruction.\textsuperscript{176} The argument is that prosecutors should aggressively counter gay panic arguments and suggests that approach will produce a less biased outcome than any legislative or judicial ban.\textsuperscript{177}

Ultimately, we determined not to restate the debate over the abolition of the defense. We do believe, however, that the defense in its current form entails substantial risks. For example, although we find Professor Lee’s arguments persuasive in many respects, we are less sanguine than she about the effectiveness of such counter-strategies. In the King case, for example, the prosecutor sought to counter the gay panic argument at every turn, characterizing the defense as gay panic and admonishing the jurors not to let possible bias towards King affect their decision.\textsuperscript{178} And the judge specifically instructed the jury to not allow prejudice based upon various factors, including the sexual orientation of the victim, to affect the outcome.\textsuperscript{179}

\begin{enumerate}
\item \textsuperscript{172} Lee, \textit{Gay Panic Defense}, supra note 3. For a variation on Lee’s proposed approach, see Perkiss, \textit{supra} note 46, at 784 (arguing that instead of banning the defense, prosecutors should be allowed to employ expert psychological testimony to combat the gay panic defense).
\item \textsuperscript{173} Lee, \textit{Gay Panic Defense}, supra note 3, at 476-77.
\item \textsuperscript{174} \textit{Id.} at 522. For an analysis of Lee’s approach, see Tilleman, \textit{supra} note 37, at 1686.
\item \textsuperscript{175} Lee, \textit{Gay Panic Defense}, supra note 3, at 522.
\item \textsuperscript{176} See Lee & Kwan, \textit{supra} note 37 at [].
\item \textsuperscript{177} See id.
\item \textsuperscript{179} “Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim . . . or defendant based upon his or her . . . gender identity, or sexual orientation.” \textsc{Cal. Pen. Code} \S 1127h
\end{enumerate}
Nonetheless, it was abundantly clear from our interviews with the jurors, and from their public statements, that Larry King’s sexual orientation and identity strongly affected the outcome of the trial. In this light, the best remedy is a legislative limitation on the evidence offered in support of “gay panic,” as we propose in Part IV below.

5. The Future of the Gay Panic Defense

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

Many have long argued for a complete abolition of the gay panic defense, and this position seems to be gaining some momentum. In 2013, the American Bar Association unanimously approved a resolution calling for legislatures to ban the gay and trans panic defenses. The California Legislature is considering a law that would ban both the gay and trans panic defenses.
As others have noted, however, a complete ban of the defense might be counter-productive. Even if the defense were abolished, the defense could argue gay panic through the back door, as occurred in the Matthew Shepard case. And banning the defense would deprive the jury of an alternative to a murder conviction, thus perhaps leading to more acquittals in gay panic cases.

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

Whatever one’s position on whether the defense should be abolished – and on that point we are agnostic for the purposes of this article – our view is that the gay panic defense will

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

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

ABA Res. 113A, supra note 21.

The resolution also urges adoption of anti-bias jury instructions of the sort required in California, which state, “Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim . . . or defendant based upon his or her . . . gender identity, or sexual orientation.” ABA Report, supra note 149, at 13 & nn. 102 (citing CAL. PEN. CODE § 1127h (West 2004 & Supp. 2014)). For an analysis of this proposal, see Lee & Kwan, supra note 37 at [].

187 Proposed California Assembly Bill 2501 (“AB2501”) seeks to modify Section 192 of the California Penal Code, which pertains to manslaughter. Assemb. B. 2501, 2014 Leg., Reg. Sess. (Cal. 2014). Currently, Section 192(a) defines voluntary manslaughter as “the unlawful killing of a human being without malice upon a sudden quarrel or heat of passion.” CAL. PEN. CODE § 192(a) (West 2014). AB2501 would add a subdivision to Section 192, modifying the definition of sudden quarrel or heat of passion to exclude the use of the gay and trans panic defenses.

188 Lee, Gay Panic Defense, supra note 3, at 525. The judge barred the use of the gay panic defense after opening statements, which included a provocative portrayal of Shepard as a sexual harasser and methamphetamine user. Nonetheless, the defense used the testimony of two witnesses to depict Shepard as sexually aggressive and concluded that Shepard “deserved the beating he got.” Id. The defense further relied on the stereotypical images of gay men as sexual deviants and provocateurs. Id.

189 See Lee & Kwan, supra note 37 at [].

190 Maeve Fox, the prosecutor in the case, made this exact point in response to a question asking for her views on the pending California proposal to abolish the defense. Fox telephone interview, supra note 69.
remain the law in the vast majority of states.\textsuperscript{191} As the King case shows, juries remain willing to accept inflammatory portrayals of gay victims as wrongdoers.\textsuperscript{192}

Perhaps changes in societal norms have even made the issue more complex: jurors today may understand that they should not explicitly reveal their anti-gay biases during voir dire, but may still act on those biases during deliberations.\textsuperscript{193} This may well have occurred during voir dire for the King murder trial jury. As the prosecutor told us, “I stood in front of the panel, raising my hands as if I were holding something, and said: ‘Pretend I’m holding a picture of two men kissing. Think about it; give me your reaction on a scale. How far up the meter do your emotions go?’ I described a scale ranging from finding the imaginary image ‘completely inoffensive’ to ‘completely disgusting.’”\textsuperscript{194} Gauging facial reactions, the prosecutor believes that she got honest responses from the first few jurors she questioned but, as is often the case with voir dire, “by the time, you reach the rest of them, they know it’s coming. They could gauge the reaction I wanted.” She continued, “Some people were honest and admitted that the idea of two men kissing ‘makes me want to throw up.’” But others were not candid, perhaps because they wanted to be on the jury in a high profile case.\textsuperscript{195}

Based both on the King murder trial and the other gay panic cases we studied, we believe that the defense will continue to be asserted. And even if the defense were formally abolished, evidence evoking gay panic may come in either because a judge deems it relevant (as in the Matthew Shepard case)\textsuperscript{196} or because the defense labels it something other than a gay panic

\textsuperscript{191} See Part IV, infra.
\textsuperscript{192} For another example, in the trial of Joseph Biedermann, the jury accepted the argument that gay panic justified the killing of the victim, whom the defendant stabbed 61 times. See Garmon, supra note 149, at 625-27.
\textsuperscript{193} Indeed, the prosecutor believes that this may well have happened in the Larry King murder case. Fox telephone interview, supra note 69.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} See, e.g., Lee, Gay Panic Defense, supra note 3, at 525-29.
defense (as in the Larry King case). Further, evidence in support of the defense is likely to be highly inflammatory. Finally, even if a prosecutor seeks to minimize the impact of anti-gay rhetoric by careful questioning during voir dire, such questioning may be of minimal help.

Before turning to our proposal for a “gay shield” law that would prevent the victim from being placed on trial, we examine use the gay panic defense in the King case to illustrate the dangers that occur when the defense is raised.

III. GAY PANIC IN THE LARRY KING MURDER CASE

Our criminal trial process went seriously awry during the Larry King murder trial. In the words of Assistant Principal Joy Epstein, who attended the trial, “The entire trial was about Larry. It wasn't about Brandon or what Brandon did. Everything was always about Larry. How he dressed, how he acted. The trial focused so much on [Larry’s] sexual orientation.”197 This section examines how the trial of Brandon McInerney essentially turned into a trial of Larry King, laying the groundwork for our gay shield proposal.

A. Evidence of Premeditation and Deliberation

As discussed in Part II above, the defense did not contest that McInerney intended to kill King when he shot King twice in the back of the head, pausing briefly between shots.198 So the principal issue for the jury was whether the defendant’s liability for this intentional killing – which alone would constitute second-degree murder199 – should be raised to first-degree murder based upon premeditation and deliberation or mitigated to voluntary manslaughter based upon heat of passion.

197 Epstein interview, supra note 1. Epstein’s own sexual orientation became an issue in the case. See Setoodeh, supra note 7, at 45-46.
198 See Part II supra note 132, 137 and accompanying text.
199 DRESSLER, UNDERSTANDING, supra note 21, § 31.02 501.
Premeditated murder and voluntary manslaughter based on heat of passion are two fundamentally different crimes, at least in theory. The “deliberation” required for first-degree murder requires some period (however short) during which the defendant coolly and calmly reflected upon the killing. Heat of passion, on the other hand, requires that the defendant be in a state of heightened emotion at the time of the killing. Recall, however, that even a defendant who had premeditated and deliberated a killing can be found to have acted in the heat of passion if there was a rekindling of the passion immediately prior to the killing.

The prosecution clearly adduced substantial evidence that McInerney premeditated and deliberated King’s death. Under California law, this element requires some prior thought, though the law is imprecise as to the amount of time required for proof of premeditation beyond a reasonable doubt. The California jury instruction reads, “If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.”

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

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

(2) The day before the shooting, McInerney said to another student, “I’m going to get a gun and shoot [King];”

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200 See id. § 31.07 524.
201 See CALJIC 8.20 (Fall 2008 Revision).
202 Id.
The day before the shooting, McInerney said to a third student, “Say goodbye to your friend Larry because you’re never going to see him again;”

The day of the shooting, McInerney retrieved a gun from the house to use to shoot King;

The day of the shooting, as McInerney was walking towards the car that his father would use to drive him to school, McInerney realized that he had forgotten to bring the gun and walked back into the house to retrieve it, wrapped it in a towel, and placed it in his backpack;

McInerney sat in class and watched the back of King’s head for a number of minutes prior to the shooting; and

McInerney shot King in the back of the head once, paused for a long enough time for the teacher to say to him “What the hell are you doing?”, and then fired a second shot into the back of King’s head.

In addition, there was evidence from which the jury could have concluded that, during the class in which the killing occurred, McInerney lied to his teacher about having completed his computer assignment so that he would be moved to a chair immediately behind King.203 Also, the fact that King was not wearing any feminine attire that day reinforces the notion that McInerney had decided to kill King that day regardless of King’s actions or behavior.

Despite all this, a majority of the jury found that McInerney had not premeditated and deliberated the killing. Although we are leaving for another day the subject of jury nullification in this case, it is clear based upon juror interviews that a number of them either fundamentally misunderstood the judge’s instructions on the law of premeditation or deliberately determined to ignore those instructions. As one juror said, “I do not think it was first-degree murder, however, it was premeditated.”204

203 Setoodeh, supra note 7. As discussed supra at notes 56-57 and accompanying text, the evidence conflicted on this point.
204 Diane Michaels in VALENTINE ROAD, supra note 9, at 1:13:50.
B. Evidence of Heat of Passion

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

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

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205 DRESSLER, UNDERSTANDING, supra note 21, § 31.07 226.
206 Id.
207 See People v. Berry, 18 Cal.3d 509, 515 (1976) (citing People v. Valentine, 169 P.2d 1, 13-15 (Cal. 1946)).
208 See, e.g., id.
209 Id.
210 Id. at 513.
211 Id. at 514.
telephone cord. The trial judge denied the defendant’s request for a provocation instruction, and the jury convicted him of first-degree premeditated murder.

On appeal, the California Supreme Court reversed, holding that the defendant should have been allowed to assert a heat of passion defense. The court noted that words are a sufficient basis for provocation in California, and relied heavily on the testimony of the defense expert witness to establish the provocative nature of the victim’s words. That witness, a psychiatrist, testified that at the time of the killing the defendant “was in a state of uncontrollable rage, completely under the sway of passion.” The psychiatrist also testified that the victim – who he of course had never met – was suicidal and had provoked her own killing.\textsuperscript{212}

In a particularly important holding relevant to the King case, the state in \textit{Berry} argued that the killing could not have been in the heat of passion, as a matter of law, because the defendant waited in the apartment for 20 hours, planning and premeditating the killing. The temporal remove from the provoking behavior would normally render the heat of passion defense unavailable because the law deems a defendant to have “cooled off” when time passes between the provocation and the killing. The court ruled, however, that upon retrial a jury could find that the victim’s screaming immediately prior to the killing invoked (or rekindled) the previous provocations.

The \textit{Berry} decision has been subject to substantial criticism, largely due to the degree to which the court accepted the defense psychiatrist’s testimony that essentially blamed the victim.\textsuperscript{213} Again, there are substantial parallels between the King murder case and \textit{Berry}, for the

\textsuperscript{213} See id., at 121-25.
defense expert in the King murder case essentially reached the same conclusion on a fundamental issue that normally should be reserved for the jury.\textsuperscript{214}

The \textit{Berry} case lurked behind the King murder trial from the beginning. It was the only case that the defense cited in its motion asking the judge to allow the defense to argue provocation.\textsuperscript{215} As noted above, when the trial judge was considering whether to allow McInerney’s heat of passion defense, the judge remarked, “If I don’t allow it, someone upstairs might disagree with me.”\textsuperscript{216} This clear reference to appeals courts flagged the specter (in the judge’s mind) of a prolonged trial that resulted in a murder conviction only to be reversed on appeal because of the trial judge’s failure to give the heat of passion instruction.

At this point, it is critical to note that the heat of passion defense at common law required proof that the victim engaged in provoking behavior directed to the defendant or to a defendant’s close family member.\textsuperscript{217} Although the move has been away from a narrow, “categorical” approach to provocation,\textsuperscript{218} heat of passion defenses are nearly always raised based upon provocative behavior directed at the defendant or someone closely associated with the defendant.\textsuperscript{219} Every gay panic case that we found – except the Larry King case – follows this pattern.\textsuperscript{220}

\textsuperscript{214} As in the King murder case, the psychiatrist’s testimony came perilously close to providing a conclusion on an issue that was ultimately for the jury. \textit{See supra} notes 48, 58, 97; Fed. R. Evid. 704 (“In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.”).
\textsuperscript{215} \textit{Brief for Defendant at 5, People v. McInerney, No. 2008005782 (Cal. Super. Ct. 2011) (copy on file with authors}).
\textsuperscript{216} Fox interview, \textit{supra} note 18.
\textsuperscript{217} \textit{See LAFAVE, PRINCIPLES, supra} note 99, at 820-21.
\textsuperscript{218} \textit{See CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW 345-46 (3d ed. 2014)}.\textsuperscript{219} Even the broader approach to provocation requires that the provocation be directed to the defendant or someone associated with the defendant, usually a close family member. \textit{See LAFAVE, Principles, supra} note 99, at 826.
\textsuperscript{220} The only case we found where the provocation was not directed at the defendant was \textit{Vujosevic v. Rafferty}, 844 F.2d 1023 (3d Cir. 1988), where the alleged gay advance was directed to the defendant’s friend.
With respect to allegedly provocative conduct that King directed at McInerney, the defense adduced the following evidence:

(1) King’s blowing of a kiss to McInerney at one point and possibly saying “love ya” or “I love you” to him;\(^{221}\) and

(2) The testimony of the defense psychologist that it was reasonable for a fourteen-year-old boy to “snap” and respond violently in McInerney’s situation.

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

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

(1) King’s occasional use of feminine attire during the timeframe leading up to the killing, in particular King’s use of makeup and his jewelry and shoes;

(2) King’s possession of the green prom dress that his teacher gave him;

(3) King’s history since fifth grade of “sexually harassing” other boys by making flirtatious comments;

(4) King’s “flaunting” of his sexuality;

(5) King’s “parading” around school while wearing feminine attire; and

(6) King’s statement to a fellow student (not McInerney) the day of the shooting, “Call me Leticia” or “I’ve changed my name to Leticia,” while McInerney was sitting eight to ten feet away.

\(^{221}\) Fox interview, supra note 18. Apparently, the judge also allowed the uncorroborated testimony by the defense psychologist that King had said to McInerney on the day of the killing, “What’s up, baby?” A number of jurors seemed to accept the characterization that King was “sexually harassing” and “bullying” McInerney. See Lisa S. letter, supra note 2 (“it is my firm belief that this young man reacted to being bullied and being the target of Larry King’s sexual harassment.”).
The next section examines whether, as a matter of law, it was appropriate for the judge to allow the heat of passion defense on these facts.

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

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

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

The prevailing law in most common law jurisdictions is that mere words are legally insufficient provocation. The two exceptions that seem to exist are when (1) the victim uses words that are informational (almost always, the revelation of adultery) or (2) the victim makes

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223 DRESSLER, UNDERSTANDING, supra note 21, § 31.07 526 (“one common law rule that has persisted in most non-Model Penal Code jurisdictions is that “words alone” do not constitute adequate provocation.”)
an unwanted gay sexual advance. The *Berry* case falls into the first category, with the wife’s revelation of adultery as the classic example of this sort of provocation.

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

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

Consider *Schick v. State*, which Mison discusses in his article. In that case, the defendant successfully argued heat of passion where the provocation was both explicitly sexual and physical; according to the defense, the defendant hitched a ride with the victim, during which the victim offered to perform oral sex on the defendant. Later, after the two had gotten out of the car, the victim pulled down his pants and underwear and attempted to embrace the defendant. The defendant beat the victim to death. In another case, the successful provocation defense was based upon the victim’s explicit request that the defendant take money in exchange

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224 See LAFAVE, PRINCIPLES, supra note 99, at 824.
226 See LAFAVE, PRINCIPLES, supra note 99, at 821.
228 Id.
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for sex. In a third case, the victim made a sexually explicit advance towards the defendant’s friend, and the defendant then participated in beating the victim.

The press has reported on similar cases. In the most highly publicized gay panic case in U.S. history, the defendants attempted to assert provocation based upon alleged sexually explicit advances and touching (licking an ear and grabbing the crotch) by the victim, Matthew Shepard, whom they murdered in 1998. The judge in that case denied the defendants’ request to argue heat of passion based upon “gay panic,” though the defense did manage to raise the issue before the jury.

In two unpublished California decisions, the defendants again asserted a gay panic form of provocation based upon explicit sexual advances. In one case, the defendant alleged that the victim had pushed the defendant onto a bed and explicitly suggested that the two have oral sex. In another, the defense asserted that the victim asked the defendant for oral sex, grabbed

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233 See Lee, Gay Panic Defense, supra note 3, at 525-27. Both ultimately pleaded guilty to murder; each received two consecutive terms of life without parole in order to avoid possible death sentences. See Julie Cart, Killer of Gay Student Is Spared Death Penalty; Courts: Matthew Shepard's father says life in prison shows "mercy to someone who refused to show any mercy," L.A. TIMES, Nov. 5, 1999, at A1.
234 For a fuller discussion of these cases, see Kent, supra note 222, at 164-72.
235 People v. Cain, No. D036023, 2002 WL 1767583 (Cal. Ct. App. July 31, 2002) (the victim allegedly said, “you know you want it, you want to suck my dick”). One commentator suggests that, having heard the gay panic evidence, the jury convicted the defendant of second-degree murder as a result of jury compromise given that there was strong evidence of premeditation that would ordinarily give rise to first-degree murder. Kent, supra note 222, at 167. Query whether the same dynamic was at play in the Larry King case, where at least some of the jurors appear to have voted for second-degree murder.
the defendant and threw him on the bed, got on top of the defendant and grabbed his genitals, and later tried to place his penis in the defendant’s face.236

The only case we have located where gay panic was not based upon a sexually explicit physical advance was the Scott Amedure case, also known as the Jenny Jones Show case.237 Amedure had appeared on the show as a surprise secret admirer of another show guest, Jonathan Schmitz. Three days after appearing on the show, Amedure left a suggestive note at Schmitz’s home, and Schmitz then went to Amedure’s home and shot and killed him. At his first trial, Schmitz argued gay panic as a basis for diminished capacity, which the jury accepted, reducing the crime from first- to second-degree murder.238 When that conviction was overturned on appeal, Schmitz was retried for second-degree murder and asserted gay panic as a basis for voluntary manslaughter. The jury rejected the defense and convicted him of second-degree murder.239 In our research, this case seems to be a real outlier in terms of the thinness of the evidence upon which the judge allowed the defense to argue heat of passion.240

Further, we also found no judicial decisions where the defendant was allowed to argue gay panic in circumstances where, as in the King case, the killing occurred a day after the last provoking incident directed at the defendant. And we found no cases – reflected in judicial decisions or press reports – where the alleged heat of passion was based upon “rekindling” that

237 See LEE, MURDER, supra note 139, at 67.
238 Id. at 68.
239 See id. at 67-69. The defendant also received a heat of passion instruction in the first trial, though on appeal the court noted that that defense would have likely failed because of the amount of “cooling off” time (several hours) that had passed between the final provocation and the killing. People v. Schmitz, 586 N.W.2d 766, 771 n.4 (Mich. Ct. Apps. 1998) (“Appellate defense counsel acknowledged during oral argument that it was unlikely that the jury would have found defendant guilty of the lesser offense of voluntary manslaughter, primarily because of the temporal delay (several hours) between any provocation by Amedure and the shooting”), abrogated on other grounds, People v. Bell, 702 N.W.2d 128 (Mich. 2005).
240 See supra notes 222-36 and accompanying text. See also Lee, Gay Panic Defense, supra note 3, at 496-97.
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was not directed at the defendant or someone closely connected to the defendant.241 (Recall that King said “call me Leticia” to another student, not to McInerney, while McInerney was eight to ten feet away; there is no evidence that King even knew that McInerney overheard the statement, much less that King intended for McInerney to over hear the statement.)

Based upon these facts, under the circumstances McInerney cooled off as a matter of law. For this additional reason, the heat of passion instruction was not justified in this case. Why did the judge in the Larry King case allow the gay panic defense? It is likely that the defendant’s age and family background played some role, even though these sorts of subjective factors typically are not factored into the objective “reasonable person” test.242 Further, the public “humiliation” theme that McInerney asserted has parallels to Scott Amedure case; perhaps the judges in both cases somehow sympathized with the defendants.

And yet, we found no California case allowing heat of passion based upon simple flirtations, much less upon flirtations that contained no sexual content. At bottom, it seems likely that the judge took the easy way out. The judge in the King case had an extremely contentious relationship with the defense counsel, who at one point went so far as to seek to disqualify the judge on the grounds of bias.243 It was a highly publicized and politicized case, with the local press criticizing the prosecution for charging McInerney as an adult.244 Fearing a possible reversal, the judge simply allowed the defense to argue heat of passion without relying upon any authority that would justify the defense in these circumstances.

242 DRESSLER, UNDERSTANDING, supra note 21, § 31.07 528-29.
244 See, e.g., supra notes 9-12, 68 and accompanying text.
But, as they say, hard cases make bad law. The heat of passion defense was not legally justified in the Larry King murder case and should not have been allowed. In future gay panic cases, if trial judges allow the defense at all they should require the defense to show sexually explicit advances and, in the vast majority of cases, unwanted physical contact.

IV. The Case for Gay Shield Laws

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

A. The Gay Panic Defense and Inflammatory Evidence

Commentators have long noted that the gay panic defense leads to the admission of evidence of the victim’s sexuality and sexual expression and can inflame and prejudice juries and judges. As discussed above, the most fundamental form of anti-gay bias that the gay panic defense elicits for the jury is the idea that the gay victim is to blame.

Further, judges allow the abuse of the defense. And there are examples of cases involving the gay panic defense in which judges have explicitly expressed their own anti-gay biases. At the preliminary hearing in one gay murder case, the trial judge made jokes such as:

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245 Lee, Gay Panic Defense, supra note 3, at 513; Mison, supra note 154, at 169 (“The introduction of highly prejudicial and often irrelevant evidence in homosexual-advance cases also diverts the fact finders' attention.”).
247 Suffredini, supra note 246, at 305.
“That’s a crime now to beat up a homosexual?” When the prosecutor responded that it was, the judge replied: “Times really have changed.” Even though that judge was removed from the case, there are other cases when the judges were not removed.

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

Finally, juries are also susceptible to the abuse of gay panic defense. There have been examples of the jury reducing the defendant’s culpability not only when the defendant has failed to produce any evidence of homosexual solicitation, but also when there was strong evidence to suggest that the defendant actually preyed on the gay victim. This defense also suggests that

248 Id.
249 Id.
250 Id. at 306.
251 Saillant, Trial of Teen, supra note 93.
252 Thanks to our colleague Mark Cammack for this observation.
253 Suffredini, supra note 246, at 307.
all homosexual advances, even verbal ones, are equal to a sexual attack.\textsuperscript{254} Certainly this was the core theme of McInerney’s defense.

The demonization of Larry King permeated the case. Even the press picked up on the defense rhetoric, one \textit{Los Angeles Times} story referring to “King’s increasingly flamboyant dress and behavior.”\textsuperscript{255} \textit{Newsweek} stated that “[l]egally, [school officials] couldn’t stop [King] from wearing girls’ clothes,”\textsuperscript{256} even though King never wore female clothes to school but always wore the required school uniform for boys.\textsuperscript{257} The magazine also described King’s “Prince-like bouffant” hair; noted that “[h]e thought nothing of chasing the boys around the school in [his stiletto heels], teetering as he ran;” and that King would “sidle up to the popular boys' table and say in a high-pitched voice, ‘Mind if I sit here?’”\textsuperscript{258}

Jurors accepted the defense’s characterization of King’s actions as “sexual harassment” and “taunting.”\textsuperscript{259} A juror after the trial referred to King’s “bullying” of McInerney and King’s “deviant” behavior.\textsuperscript{260} \textit{ABC’s Nightline}\textsuperscript{261} program gathered six jurors for a group interview. In the lead-in to that interview, reporter Terry Morgan observed, that, given King’s “bullying,” “even the killer was a victim.” During the broadcast, jurors all displayed their “Save Brandon” wristbands, indicating their sympathy with the murderer rather than the victim.\textsuperscript{262}

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\textsuperscript{254} Id. \\
\textsuperscript{255} Saillant, \textit{Trial of Teen}, supra note 93. \\
\textsuperscript{256} Setoodeh, \textit{supra} note 7, at 43. \\
\textsuperscript{257} Fox interview, \textit{supra} note 18. \\
\textsuperscript{258} Setoodeh, \textit{supra} note 7, at 41, 43. \\
\textsuperscript{260} Lisa S. letter, \textit{supra} note 2. \\
\textsuperscript{261} \textit{Nightline: Execution-Style Killing in Classroom} (ABC television broadcast Oct. 4, 2011), \textit{available at http://abcnnews.go.com/Nightline/video/execution-style-killing-classroom-14669728}. This report appeared before prosecutors abandoned their effort to retry McInerney and struck a plea agreement. \\
\textsuperscript{262} Id.
\end{flushright}
It is hard to imagine that a teenage girl who said “Love ya” to a teenage boy, or vice versa, in a school hallway would be characterized as bully and sexual harasser. In light of anti-bullying efforts around the country, it is difficult to reconcile schools’ anti-bullying stances with the jurors’ apparent willingness to access the proposition that McInerney’s violence against King was reasonable because King did not conform to sexual orientation and gender norms.

Finally, it is also hard to imagine that the jurors’ views of King could have become so negative without the inflammatory evidence and rhetoric that the defense employed.

One way to mitigate the potential prejudice is to revise the evidentiary rules in these cases. How would this work? There are several possibilities. Mison, for example, suggests forbidding the admission of the victim’s sexual orientation into evidence. This approach, however, would be extremely difficult to implement. For one thing, the defense will often easily be able to introduce this evidence through the back door, as it did in the Matthew Shepard case. For another, in cases like the King case, the basic evidence will make the victim’s sexual orientation readily apparent to the jury. A victim’s social life, relationship history, and similar factors will likely lead a jury to speculate, and even conclude, that the victim was LGBTQ.

In addition, in the King case the hate crime allegation required that the state itself introduce evidence that King self-identified as gay. Hate crimes laws, such as the federal

264 For a discussion of the evidentiary aspects of this issue, see Nicolas, supra note 149.
265 See Lee, Gay Panic Defense, supra note 3, at 555; supra note 188.
266 Garmon, supra note 149, at 643.
Hate Crimes Prevention Act (HCPA).\textsuperscript{267} actually require the jury to consider the victim’s sexual orientation.\textsuperscript{268} The coexistence of the gay panic defense and gay crimes statutes allows for inconsistency in the criminal justice system because one mitigates the crime and the other aggravates its punishment based upon proof of the victim’s sexual orientation or gender identity.\textsuperscript{269} This sort of whiplash occurred during the King murder case, when the prosecution needed to show that McInerney perceived King as gay in order for the state to invoke the hate crime enhancement.

Our view is that it is unrealistic to exclude evidence that the victim was LGBTQ. In the King case, for example, once the judge allowed the heat of passion defense, it would have been impossible to the jury to not at least speculate that King identified as gay even absent the hate crime charge. Evidence of a victim’s friends, romantic history, and social practices will often provide the jury with bases to speculate as to the victim’s sexual orientation or gender identity.

B. The Lesson from Rape Shield Laws

Instead of an outright ban on the gay panic defense, we propose a new evidentiary rule.\textsuperscript{270} Such a rule would be analogous to but broader than rape shield laws in their intent and design. Consider the injustices that led to the adoption of rape shield laws. The notorious quotation by Judge Cowen in the 1838 case of \textit{People v. Abbot} – “And will you not more readily infer assent

\textsuperscript{267} Id. This act added federal protection for crimes based on gender identity or sexual orientation by including those categories in existing hate crime laws. At least thirty states and the District of Columbia have included sexual orientation within their hate crimes statutes. \textit{See State Hate Crime Laws}, HRC.ORG, http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/hate_crimes_laws_022014.pdf (last updated June 19, 2013).
\textsuperscript{268} Garmon, supra note 149, at 643.
\textsuperscript{269} Id. at 644. \textit{See} McCoy, supra note 241, at 661 (noting inconsistency between gay panic defense and hate crime charge).
in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?” – encapsulates the historical (and persistent) view that a rape victim who wore certain attire and/or had a reputation for sexual promiscuity is less credible than a virginal one.\footnote{Bennett Capers, \textit{Real Women, Real Rape}, 60 UCLA L. REV. 826, 836 (2013).} Not surprisingly, at the time of Judge Cowen's decision and for many years to come, a rape victim's past sexual conduct was admissible evidence in a rape trial because as Judge Cowan explained, it spoke to her “general moral character.”\footnote{People v. Abbot, 19 Wend. 192, 195 (N.Y. Sup. Ct., 1838)} The practice of putting a rape victim’s chastity on trial was commonplace and the reasoning two-fold: past sexual behavior could prove a woman was unchaste, and an unchaste woman was a dishonest one.\footnote{Capers, supra note 271, at 836.}

Past sexual experience was admissible to show not only consent, then, but also to attack the victim’s very credibility. The judicial system has traditionally treated rape as a special sort of crime, focusing only marginally on the defendant’s actions and instead scrutinizing the victim.\footnote{Wallach, supra note 270, at 486.} The parallel to the gay panic defense is obvious; certainly this was the case in the King murder trial.

As sexual mores relaxed in the 1960s and the woman’s movement gained momentum in the 1970s, attitudes toward rape victims began to change. Rape victims were reluctant to report their rapes for fear of being re-victimized by the system; law enforcement agencies and women’s organizations began calling for change, paving the way for rape law reform.\footnote{Id. at 489} In 1974, Michigan became the first jurisdiction to enact a rape shield law; the federal government and remaining 49 states quickly followed, most within several years.\footnote{Leah DaSilva, \textit{The Next Generation of Sexual Conduct: Expanding the Reach of Rape Shield Laws to Include Evidence Found on MySpace}, 13 SUFFOLK J. TRIAL & APP. ADVOC. 211, 219 (2008).}
Many people believe the primary purpose of rape shield laws is to keep a victim from feeling her reputation will be publicly scrutinized, to protect her identity, or to encourage more victims to report their rapes. The laws’ most important purpose, however, is not protecting the victim; rather, it is keeping prejudice from getting in the way of an accurate verdict.277

Generally, rape shield laws exclude any evidence that does not pertain directly to the sexual assault case at hand. Michigan’s rape shield law, which became the basis for the federal law and most state laws, says:

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

(a) Evidence of the victim’s past sexual conduct with the actor, [or]

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.278

The federal rape shield law, or Federal Rule of Evidence 412, prohibits “(1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition.”279

All rape shields are built on the exclusion of evidence about the victim’s past sexual conduct. Evidence once routinely admitted, such as testimony about the victim’s reputation (that she was a “loose” woman, for instance, or that she dressed provocatively) and evidence of past sexual behavior not related to the rape accusation, such as the victim’s number of sexual partners, is barred by rape shield laws. Of course, the terms “past” and “sexual conduct” are

278 Michelle Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 GEO. WASH. L. REV. 51, 81 (2002) (citing MICH. COMP. LAWS ANN. § 750.520j (West 1991)).
279 Fed. R. Evid. 412.
open to interpretation, so jurisdiction-specific law governs whether the rape shield applies; evidence must be deemed past sexual conduct and fall outside an enumerated exception in order to be barred by the governing rape shield. 280

Studies done over the past two decades show that a victim’s promiscuity or perceived promiscuity has the effect of biasing jurors against the victim. 281 Even today, a woman who is not seen as “chaste” by the jury faces a nearly insurmountable degree of prejudice, and rape shield laws that allow the categorical admission of sexual history evidence reinforce that prejudice. 282

In addition to evidence of sexual history, at least eight states disallow to some degree evidence of the victim’s attire. 283 These statutes are designed to prevent defense attempts to instill prejudice in the jury based upon the victim’s clothing or appearance. As one commentator observed in the context of rape trials, “clothing may appear to the viewer as a metaphor for character or as an indicator of deception.” 284 Oregon’s statute is representative:

Sex offense cases; relevance of victim's past behavior or manner of dress.

(1) Notwithstanding any other provision of law, in a prosecution for [various sex offenses], or in a prosecution for an attempt to commit one of these crimes, the following evidence is not admissible:

280 For an overview of exceptions, see Anderson, supra note 278, at 85-121.
281 See HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 70 (Univ. of Chi. Press 1971). Some of the above exceptions essentially render rape shield laws meaningless. Take, for instance, prior sexual conduct with the defendant. This categorical admission of prior sexual contact between the victim and defendant reinforces the outdated notion that a woman “can’t be raped” by an intimate partner or former partner. In fact, intimate partners – spouses, ex-spouses, boyfriends, or ex-boyfriends – commit sixty-two percent of adult rapes. More to the point, research shows that jurors are often biased against rape victims who have had past sexual contact with the defendant. For these women, then, rape shield laws offer little protection. Anderson, supra note 278, at 129-30.
282 For an in-depth analysis of the issue, see HELEN BENEDICT, VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES (Oxford Univ. Press 1992).
284 Alinor C. Sterling, Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women’s Clothing in Rape Trials, 7 YALE J.L. & FEMINISM 87, 112-13 (1995). Certainly Larry King’s attire was used by the defense in exactly the same way in this case.
(a) Reputation or opinion evidence of the past sexual behavior of an alleged victim of the crime or a corroborating witness; or

(b) Reputation or opinion evidence presented for the purpose of showing that the manner of dress of an alleged victim of the crime incited the crime or indicated consent to the sexual acts alleged in the charge.\textsuperscript{285}

In cases of violence against LGBTQ victims – including but not limited to homicides – clothing, accessories, and mannerisms can likewise inflame the jury and tend to cast the victim as the wrongdoer. Let us reexamine the King case. The defense repeatedly played upon King’s sexual orientation and gender presentation. King was “permitted” to “flaunt” his sexuality according to the evidence the defense presented. King was “permitted” to “parade” and “sashay” around school while defying gender norms. In the same vein, the defense also repeatedly blamed school officials for not straightening King out – both literally and metaphorically.

Evidence that King was a very out LGBTQ person, had feminine mannerisms, and engaged in some cross-dressing behavior no doubt profoundly affected the jury.\textsuperscript{286} The judge should not have permitted this evidence and this rhetoric in our view. Once the judge allowed the defense to present the very flimsy (as a matter of law) heat of passion defense, however, the judge was then very lax in controlling the evidence admitted to support the defense.

There are substantial dangers from such an approach to the admissibility of inflammatory evidence. Trials involve competing narratives. As Professors Buell and Griffin have observed, “[f]actfinders tend to overweigh character, and narrative expectations aggravate that tendency.”\textsuperscript{287} In the King murder trial, the evidence that King exhibited behavior that some

\textsuperscript{285} OR. REV. STAT. § 40.210 (2011) (emphasis added).
\textsuperscript{286} See Lisa S. letter, supra note 2. In the context of the letter, the juror appeared to be referring to King’s transgender identity.
jurors found disturbing, even immoral, undoubtedly affected their determinations of McInerney’s state of mind – the only real factual issue in the case.

C. Proposed Gay Shield Law

If the legislature had adopted a rule of evidence expressly limiting this kind of inflammatory evidence, then the defense’s ability to blame Larry King for his own death may have been substantially limited. Here is our proposed rule:

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

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

(a) Specific instances or patterns of the victim’s other sexual conduct;

(b) Evidence of the victim’s sexual or gender expression presented for the purpose of showing that such expression incited or was otherwise related to the crime; or

(c) Reputation or opinion evidence presented for the purpose of showing that the victim’s other sexual conduct or the victim’s sexual or gender expression incited or was otherwise related to the killing.

**Definitions.**

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

“Other sexual conduct” includes, but is not limited to, the victim’s sexual behavior other than the sexual behavior with respect to the crime alleged and the victim’s general reputation for promiscuous behavior.

“Sexual or gender expression” includes any evidence that may connote for the fact finder that the victim was of a certain sexual orientation or gender identity, including but not limited to, the victim’s appearance, manner of dress or speech, or mannerisms.\(^{288}\)

\(^{288}\) This definition is partly drawn from Fed. R. Evid. 412(a) advisory committee’s note. See Nicolas, supra note 149, at 803.
The rule would not require a blanket ban introduction of evidence relating to sexual orientation or gender identity; as we argue above, such a rule would be difficult to implement. But it would bar such evidence where it is used as a basis for inciting the crime.\(^\text{289}\)

We believe that the proposed rule would serve a critical function in gay and trans panic cases. And it would apply to all such defenses, including heat of passion, diminished capacity, insanity, and self-defense – though gay and trans panic arise in heat passion cases far more often than in connection with the other defenses.

Judges in cases like the King case need statutory support for the exclusion of inflammatory evidence relating to the victim’s sexual orientation and gender identity, including such evidence relating to dress and mannerisms. As one judge stated, “[t]here will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a homosexual or bisexual person offensive[;] . . .our criminal justice system must take the necessary precautions to assure that people are convicted based on evidence of guilt, and not on the basis of some inflammatory personal trait.”\(^\text{290}\)

Judges in such cases often accede to defense requests to admit such evidence for fear that excluding the evidence might lead to reversal. And such a statutory provision could also provide judges with the ammunition they need to exclude inflammatory evidence under the probative value vs. prejudicial impact balancing required by such rules as Federal Rule of Evidence 403.\(^\text{291}\)

We readily concede that this approach would be subject to criticism. For one thing, rape shield laws have had mixed success at best. In addition to the gaping holes that some of the

\(^{289}\) Admittedly, such a rule would require limiting instructions, which often prove ineffective. See Dressler, Reflections, supra note 152, at 761.

\(^{290}\) State v. Ford, 926 P.2d 245, 250 (Mont. 1996), discussed in Nicolas, supra note 149, at 845.

legislated exceptions leave in the rape shield exclusions, there are other problems with the laws’
effectiveness. The empirical data suggests that the laws have had little effect overall. 292
Michigan, which enacted the very first rape shield law, saw no evidence that rape shield statutes
increased the number of reported sexual assaults; rather, any increase in reporting was attributed
to changes in public attitudes toward sex and sexual assault. 293 Other studies have found no
correlation between changes in rape laws and convictions. 294

Additionally, studies of jury behavior reveal that juries view evidence through the lens of
a narrative that makes sense to them, filling in gaps and converting evidence to fit that
narrative. 295 As Professor Bennett Capers had noted, the story is based on personal experience,
beliefs, popular culture, and worldview – many factors that may bear no resemblance to the
actual evidence. In a rape trial, then, the inadmissibility of a victim’s sexual history does not
mean sexual history is not considered; rather, a history is constructed in the minds of the jurors to
fit the narrative they have created about the accuser, the accused, and the incident. 296 Jurors are
less likely to find that a rape occurred when the accuser is a black woman, and overwhelmingly
more likely to find guilt when the defendant is black and the victim is white. When both the
accuser and the accused are white, jurors are less likely to find that a rape occurred. 297

Racial stereotypes of both men and women, then, influence jury behavior as much as the
evidence that rape shield laws seek to exclude. As one scholar noted, “Racialized and
marginalized women, who are less valued and less credible in a society characterized by racism,
are, by definition, less readily identified as ‘ideal victims' and more easily stigmatized as ‘bad’ or ‘undeserving’ victims (if their victim claims are heard at all).”\textsuperscript{298} Rape shield laws have questionable efficacy when the accuser is not an “ideal victim,” meaning white, middle class, and a seemingly “good girl.”

We acknowledge that gay shield laws might similarly primarily advantage “good boy” victims. It is hard not to notice, for example, the difference between the public perceptions of Larry King (the multi-racial, small, effeminate victim with adoptive parents) and Matthew Shepard (the cute white college boy with articulate parents who used his case to launch a nationwide gay rights campaign).\textsuperscript{299} We also acknowledge that it is unclear whether such laws would be effective; to enforce such laws, judges and prosecutors would have to be ever vigilant in combating defense efforts to demonize the victim by other methods.

Yet, we believe that gay shield laws would have powerful expressive value that could and should change the tenor of trials where gay panic is argued.\textsuperscript{300} Such laws would send the message that it is not legally acceptable to play on jury prejudices, any more than it would be with respect to the victim’s other characteristics such as race or religion. And in cases such as the King case, a gay shield law would give the trial judge a legal basis for excluding such inflammatory and marginally relevant evidence such as the green prom dress. Although Rule 403 and state equivalents in theory address this concern, in practice that has not happened.

Prosecutors and trial judges need an additional tool at their disposal.

\begin{itemize}
\item \textsuperscript{300} For an excellent analysis of the expressive power of criminal legislation, see Avlana Eisenberg, \textit{Expressive Enforcement}, 61 \textit{UCLA L. Rev.} 858 (2014) (studying the expressive nature of hate crimes statutes).
\end{itemize}
Our second concern with the enactment of gay shield laws has to do with limiting the evidence available to a criminal defendant. The state has enormous power in any criminal trial, and we are highly sensitive to the risks attendant to any proposal that would tie a defendant’s hands in any way.  

But in a gay panic case, the deck seems stacked in the defendant’s favor in ways that are not usually present in criminal cases. The potential for incitement of jurors’ prejudices is simply too great. It should never happen, in a provocation case, that inflammatory defense evidence leads a juror to conclude that a self-identified gay, gender non-conforming victim is a “deviant.”

**CONCLUSION**

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

In cases of heat of passion based upon gay panic, judges should strictly apply the law and deny the defense request to assert the defense in all but the most clear-cut cases involving aggressively sexual unwanted advances. And in cases where such a defense is asserted, legislatures should adopt laws that forbid introduction of evidence that the victim did not conform to gender norms or otherwise exhibited “gay” behavior. The fact that a majority of the

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301 As Lee and Kwan put it, “[p]rogressive scholars should be cautious when considering measures that make it easier for the State to incarcerate individuals charged with crimes without getting to the root of the problem reflected by those crimes.” Lee & Kwan, supra note 37 at [].
302 Fox interview, supra note 18.
jurors concluded that King brought on his own death is both senseless and tragic. These measures should help prevent a recurrence of this tragedy.