

Criminal Responsibility, Diminished Capacity, and the Gay Panic Defense

Barry W. Wall, MD

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In October 1998, Matthew Shepard, a gay man, left a straight bar in Laramie, Wyoming, with two men he thought were gay, Aaron McKinney and Russell Henderson. Shepard did not know that these two men were pretending to be gay. McKinney and Henderson drove Shepard to a remote area, and after the gay man made a sexual advance, he was robbed, pistol-whipped, tied to a fence post on a rural road, and left to die. At McKinney's murder trial in November 1999, the presiding judge ruled that "gay panic" could not be used in Mr. McKinney's defense at trial. The judge told defense lawyers that the gay panic defense was essentially a temporary insanity or diminished capacity defense, neither of which is recognized by Wyoming law.¹ Gay rights activists viewed the ruling as a moral and political victory. In addition to bringing national attention to gay hate crimes, the Shepard case cast light on the gay panic defense, the legal strategy of a defendant requesting to be at least partially excused for criminal conduct by portraying himself as the victim of a homosexual advance. Although the strategy failed in the Shepard case, the defense has been raised in some cases across the United States since the 1960s with varying degrees of success.²⁻⁵ Although it raises moral, political, and social issues, the use of the gay panic defense is most relevant to forensic psychiatry because of its relation-

ship to diminished capacity and criminal responsibility evaluations.

This article first presents the legal concept of provocation and its relationship to diminished capacity and criminal responsibility. Then, it outlines the gay panic defense, including characteristics of the outdated clinical term "acute homosexual panic." It will present examples of the application of the gay panic defense in case law and explore arguments for and against its use. The paper concludes by arguing that the gay panic defense is inadequate to justify diminished capacity or criminal responsibility and that forensic psychiatrists should resist providing unjustified clinical support to this concept when performing these evaluations.

Provocation, Diminished Capacity, and Self-Defense

In early Anglo-American common law, all killings were presumed to be the consequence of "malice aforethought," or premeditation, and the punishment was death.^{6,7} However, common law evolved so that certain circumstances could create a "diminished capacity" on the part of the defendant to conform his behavior to the law, and thus allow a defendant to be more leniently punished for a homicide committed in this context.⁸ The concept of provocation permits the victim's actions to be considered a factor in determining the degree of guilt of the defendant: a violent reaction by a defendant was

Dr. Wall is Clinical Assistant Professor of Psychiatry and Human Behavior, Brown University School of Medicine, Providence, RI, in private practice in Providence, and Director, Forensic Service, Eleanor Slater Hospital, Cranston, RI. Address correspondence to: Barry Wall, MD, 184 Waterman St., Providence, RI 02906.

thought to be understandable under certain circumstances. For example, if a killing occurred in the heat of passion, it can be partially excused because the victim provoked this behavior in the defendant.^{2, 9}

Ultimately, determining whether a particular act constituted provocation to commit homicide became a question of fact for the jury to decide under the Model Penal Code.^{2, 10} It is generally agreed that for murder to be reduced to manslaughter, a reasonable man must have had "adequate provocation, [t]he killing must have been in the heat of passion, . . . [i]t must have been a sudden heat of passion. . . [and] [t]here must have been a causal connection between provocation, the passion, and the fatal act."¹¹

In contrast to provocation, self-defense is a complete defense to murder. Unlike diminished capacity, a successful self-defense strategy against a murder charge results in acquittal instead of mitigation of the charge to manslaughter. A killing committed in self-defense is deemed justified rather than excused.^{8, 12}

The Gay Panic Defense

The gay panic defense is a hybrid of two ideas: the legal concept of provocation and an ill-defined clinical concept termed homosexual panic.^{2, 4} A defendant using this defense would report that he was provoked by the victim's homosexual advance and that he was either compelled to act in self-defense against this aggressive act or because the suggestion of a homosexual encounter, although itself not aggressive, was so reprehensible that all self-control was lost and he was driven to violence.^{1, 2} Although this argument includes the behavior of a "reasonable man," it has also been suggested that, in some cases, the defendant is gay or has latent homosexual tendencies, or that the defendant's disgust or irrational dislike of gay persons stems from recollections of homosexual abuse earlier in life.⁴

In all cases involving a sexual advance, as a matter of law, the judge may choose whether to instruct the jury to consider such an advance sufficient provocation for killing. If the judge chooses to instruct the jury to consider a sexual advance sufficient provocation, whether it is in fact sufficient is left to be determined by the jury. However, if the judge decides that a sexual advance is insufficient provocation to kill as a matter of law, the gay panic defense cannot be used at trial.² Although the sexual advance in a gay panic defense may be, in and of itself, nonviolent, some

juries have found that such a sexual advance constituted sufficient provocation to cause a reasonable man to lose self-control,² so that the defense can be used as part of a diminished capacity defense to mitigate murder to manslaughter.³ In other cases, the gay panic defense has been used as an insanity defense in which the sexual advance allegedly triggers a psychotic reaction in the defendant, causing the defendant to lose the capacity temporarily to distinguish right from wrong.^{5, 13}

Homosexual Panic

Although defense attorneys rely on the concept of gay panic as a defense, it is not a diagnostic classification in the DSM-IV and has not been recognized in the DSM since 1952.^{4, 14} Homosexuality was eliminated from the DSM as a diagnostic category in 1973.¹⁵

Acute homosexual panic was originally conceptualized in 1920 by psychiatrist Edward J. Kempf, and is also known as Kempf's disease, described as the sudden onset of "feverish panic or agitated furore, amounting sometimes to temporary manic insanity, which breaks out when a repressed homosexual finds himself in a situation in which he can no longer pretend to be unaware of the threat of homosexual temptations."^{16, 17} The concept of homosexual panic was based on Sigmund Freud's bisexual theory of sexual development, as well as the concept of latent homosexuality.¹⁷

There is scant literature on homosexual panic as a disorder outside of Kempf's case studies of 19 persons suffering from acute homosexual panic. Of note in these cases, there were no violent reactions nor was sudden panic described in any legal defenses.¹⁶ The patients did not have excessive anxiety because they were victims of sexual advances, and they did not react physically against alleged attackers. Self-injurious behavior, including suicide attempts, were the only types of violence reported. It would appear that, even at a time of less social acceptance of homosexuality than our own, the anxiety that Kempf's cases had about their sexual desires led them to feel helpless, passive, and hopeless.

Ovesey introduced the concept of pseudohomosexual anxiety, where a heterosexual man experiences panic and fears that he is homosexual, yet has no actual signs of homosexual arousal or behavior.^{17, 18} These men have difficulty with their sexual performance with women, or feel powerless in their non-

sexual conflicts with other men. Case studies of heterosexual men experiencing pseudohomosexual anxiety generally document vivid dreams or fantasies, some of which are violent, but do not consistently support or document criminal acts against gay men.¹⁸

Given that the available data are limited, and the data that do exist generally do not suggest violence, a legal defense, such as the gay panic defense, that argues that being the recipient of homosexual advances is likely to result in extreme violence is unsupported.⁵

Case Examples of the Gay Panic Defense

All case reports found in the literature consisted of straight defendants using the gay panic defense after they killed because of the sexual advances by presumably gay men. Some defenses were successful, others were not.

The first report of homosexual panic in case law was in 1967 in *People v. Rodriguez* (1967).¹⁹ In pleading insanity, the defendant claimed that the victim had grabbed him from behind as he was urinating in an alley, and that the resulting violent assault by the defendant against the victim resulted from "acute homosexual panic brought on him by the fear that the victim was molesting him sexually." The jury rejected the defendant's insanity defense and found him guilty of second-degree murder.^{5, 28}

In *Schick v. State* (1991),²⁰ the defendant, who was intoxicated and had a broken-down car, was hitchhiking when he accepted a ride from the victim. They drove around ostensibly looking for women with whom to have sex. The defendant asked, "Where can I get a blow job?" The victim said, "I can handle that." After stopping at a convenience store to purchase cigarettes, they drove to a baseball field at a local school. In a dark area, the victim pulled down his pants and attempted to embrace the defendant. The defendant became enraged, beat him, took his money, and left him to die. Before leaving the scene, he returned to the victim's car to wipe off his fingerprints. At trial, the defendant claimed that the sexual advance provoked him to lose his self-control and kill the victim. The prosecution did not object to this defense. The judge instructed the jury to consider voluntary manslaughter, and the defendant was found guilty of voluntary manslaughter.

In *State v. Wallace* (2000),²¹ the defendant took a pistol from his grandmother's home and put it in his pants pocket before he walked to the woods with the

victim to smoke marijuana. The defendant claimed that he was groped by the victim while urinating, and his immediate reaction was to turn and fire the weapon. Although the victim was shot from the back in the back of the head, and although evidence indicated that the victim was not shot at close range, the defendant was convicted of manslaughter instead of first degree murder at a jury trial.

Not all gay panic defense cases are successfully used to mitigate responsibility. In the Matthew Shepard case, the judge ruled as a matter of law that the defense could not be used at trial. In *State v. Volk* (1988),²² a homosexual advance did not support instruction for "heat of passion manslaughter." In *Commonwealth v. Halbert* (1991),²³ the behavior of a gay victim who had placed his hand on the defendant's knee was determined to be "insufficient to support a finding of reasonable provocation."

These examples illustrate that a gay panic defense can be used by defendants in many different contexts. Interestingly, there was not a single case report of a female defendant invoking the gay panic defense after killing an alleged lesbian victim. Similarly, there were no case reports of "straight panic" where a defendant resorted to violence while rebuffing a heterosexual advance. Anecdotally, the success of the use of the gay panic defense in court seems to be waning.²⁴ However, even when the gay panic defense is unsuccessful, discussing an alleged homosexual advance on the part of the victim in front of a jury is believed to negatively prejudice the case in nonspecific ways.²⁴

Characteristics of Hate Crimes

The legal rights of defendants to use all means available at trial to defend themselves is juxtaposed with the rights of lesbians and gay men with regard to hate crimes. At a time when defendants seek to mitigate or escape punishment with the use of the gay panic defense, many hate crimes statutes heighten punishment for perpetrators if an attack is motivated by, among other factors, sexual orientation. Many state and local governments have enacted laws and ordinances to track and prosecute hate-motivated crimes.³

Several organizations track the annual reported incidence of anti-gay violence, victimization, and defamation in varying areas of the United States. For example, the National Coalition of Anti-Violence Programs is a network of 25 programs that reports antihomosexual violence in 13 distinct cities, states,

or regions of the United States. Of the 2,017 hate crimes reported by these programs in 1999, 29 were murders, 65 were sexual assault/rape, 92 were robbery/burglary/theft, and 704 were assault/attempted assault.²⁵ Although the reporting of hate crimes against lesbians and gays probably underestimates actual incidence rates and is subject to the same logistical difficulties as the reporting of hate crimes in general, the data indicate that hate crimes against gays and lesbians are widespread and significant.^{3, 25}

Arguments For and Against the Use of the Gay Panic Defense

Defense attorneys have several arguments in favor of the use of the gay panic defense. First, it may be the only defense available for the defendant, and the use of a provocation-based defense to mitigate culpability should not be denied because the victim was a gay person in a heterocentric society.^{1, 9} Second, it has been argued that an intimidating sexual advance may be reminiscent of a previous abusive homosexual relationship. The defendant could reasonably believe that his life was in danger at the time of the incident because something that the victim said or did was reminiscent of past danger. Consequently, abuse defenses are argued to be a necessary and integral part of explaining a defendant's behavior in committing a crime.²⁶ Third, the defendant's symptoms, such as the ability to understand and perceive reality under certain circumstances, could raise questions about his ability to possess the required criminal intent. Under the reasonable person standard, the fairest way to decide whether the defendant reasonably believed deadly force was necessary is to present to the jury all that the defendant believed at the time. This can only be accomplished by allowing the jury to hear of all symptoms experienced by the defendant.^{26, 27} Fourth, juries may sympathize more with a defendant who claims to have killed because of confusion and rage experienced during a homosexual attack than from a defendant who merely claims to have difficulty generally controlling his violent behavior.⁴ Finally, it has been argued that because men are more prone to violence than women, the male-oriented focus of the gay panic should be allowed, because men will be men, and typically react more violently.⁹

Other attorneys and political opponents of the gay panic defense, in turn, raise several arguments against the use of this defense. First, it is argued that the gay panic defense capitalizes on potential homophobia

among jury members, who may blame the victim for his sexual orientation,^{2, 28} or by judges who may allow the use of the defense, in part because of homophobia, which can adversely impact a case.²⁹ Second, what Alan Dershowitz has called the abuse excuse places the victim on trial, and if the jury thinks that "he had it coming," it could disregard the rules of self-defense and acquit the defendant or reduce the charges.³⁰ Third, in allowing the defense, the judicial system reinforces and institutionalizes crimes against gays and lesbians instead of expecting self-control and tolerance from members of society.⁴ For example, one court upheld its prohibition of same-sex solicitation by using the fighting words doctrine, implying that a reasonable man would be expected to react violently to a request for homosexual sex.^{31, 32} Opponents argue that judges should hold as a matter of law that the gay panic defense is not sufficient provocation to incite a reasonable man to kill. Murderers who are also homophobic should be held fully criminally responsible, rather than being at least partially excused.² Arguing that a homosexual advance renders the ordinarily reasonable and law-abiding person incapable of controlling his actions encourages irrational and/or exploitative violence that the criminal justice system is designed to deter and punish.²

Integration of Gay Panic Defense Characteristics into Mental Status at Offense Evaluations

Gay panic can be used in insanity or diminished capacity defenses, as an alternative theory to self-defense, or alone as a theory of voluntary manslaughter.^{2, 6} There are few examples of gay panic used as a mental disease or defect as part of an insanity defense (see *People v. Rodriguez*¹⁹), although none resulted in acquittals by reason of insanity. Most cases use gay panic as part of a diminished capacity evaluation. In evaluating the gay panic defense in light of diminished capacity and criminal responsibility evaluations, it is useful to compare the characteristics, clinical and otherwise, associated with each of these findings, as well as with gay hate crimes themselves.

Characteristics of Successful Insanity Findings

Characteristics of successful insanity findings suggest that certain clinical symptoms and diagnostic categories influence a not guilty by reason of insanity acquittal. For instance, clear evidence of psychosis at the time of evaluation, bizarre behavior at the time of

arrest, and a diagnosis consistent with psychosis appear to influence professional opinions of insanity. It has also been suggested that poor reality testing, lowered intelligence, and a high level of impairment are characteristics associated with successful insanity pleas.^{6, 33, 34}

Characteristics of Successful Diminished Capacity Verdicts

There is no extensive research on characteristics of successful diminished capacity verdicts, and there is not thought to be a discrete population of offenders.⁶ Evidence of significant drug or alcohol intoxication or withdrawal, dementia, organic personality, and psychosis at the time of the offense may be legally relevant and may make a diminished capacity assertion possible.⁶

Characteristics of Gay Hate Crimes

Anecdotal reports indicate that attacks against homosexuals are particularly brutal.³ According to one sociological study, "[a]n intense rage is present in nearly all homicide cases involving gay male victims. A striking feature. . . is their gruesome, often vicious nature. Seldom is the homosexual victim simply shot. He is more apt to be stabbed a dozen or more times, mutilated and strangled."³⁵ The gruesome character of many of these murders is believed to indicate the intensity of the hatred felt by the perpetrators against gay men and lesbians.² For example, in 1992, a Navy airman murdered his shipmate, a Navy seaman. The seaman had recently revealed to his commander that he was gay and wanted an administrative discharge. Others on the ship heard of his sexual orientation and impending discharge. On the day of the murder, the airman and a friend noticed the victim walking toward a park, and they followed him into a restroom. The defendant knelt the victim in the groin and then punched him repeatedly in the face and neck while holding his head. He then brought the victim down to the floor, stomping on his face and chest with his feet. The victim was so disfigured that his mother could only recognize him by the tattoos on his arms.³

Another noted characteristic of gay hate crimes is the frequency with which defendants actively seek out opportunities to commit violent acts. Perpetrators will often plan to travel some distance to search out victims with whom they would otherwise not have come into contact.³

Moral justification is sometimes used to justify

hate crimes.³ For example, the violent language in a commonly quoted biblical passage creates the impression that violence is a justifiable consequence of homosexual behavior: "If a man also lie with mankind, as he lieth with a woman, both of them have convicted an abomination: they shall surely be put to death; their blood shall be upon them."^{2, 36}

Although not all of these characteristics occur in all hate crimes against lesbians and gay men, each is thought to represent a significant expression of the phenomenon.³ However, gruesome and brutal execution of a crime, deliberate search for victims, and implicit moral justification for violence are not characteristics traditionally associated with successful insanity or diminished capacity verdicts. Some psychotic and insane defendants may commit gruesome crimes, deliberately search out victims who may be a part of their delusional system, and think that they are morally justified based on their delusional beliefs. However, there is a distinct difference between insane mentally ill defendants and individuals who commit crimes based on prejudice. Persons who commit crimes because they are acting out their bigotry and anger are not psychotic, and they know what they are doing. When judges allow the gay panic defense to be considered by the jury at trial, the idea that it is justifiable to react violently against gays based on prejudice and anger is reinforced. The gay panic defense should be rejected by forensic evaluators because there is no clinical basis for such a lack of control. Homophobic attitudes better account for the defendant's actions in such cases, and forensic examiners should not elevate criminal and prejudiced behavior to syndrome status.

Conclusion

The gay panic defense springs from both the legal concept of provocation and the outdated clinical term "homosexual panic." This legal defense argues that being the recipient of a homosexual advance is likely to result in extreme violence and should offer at least partial excuse of the defendant. Although some recent court decisions have allowed for a reasonable man to be found to have diminished capacity for the killing of a gay man because of a homosexual advance, there is little empirical evidence to justify excusing or mitigating criminal behavior on the basis of anxiety stemming from a nonviolent homosexual advance. Consequently, forensic evaluators should be wary of advocating for the potential relevance of gay

panic because there is poor evidence to support its existence, and the anecdotal characteristics of gay hate crimes are not consistent with known characteristics that are associated with criminal responsibility or diminished capacity. As society becomes more tolerant of homosexuality, it is possible that the application of the gay panic defense by defense lawyers will abate. In the interim, the poorly understood relationship between being the recipient of a homosexual advance and the carrying out of criminal behavior should not be elevated to the status of a syndrome or excuse by forensic evaluators.

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