THAT the Pennsylvania Bar Association support Pennsylvania House Bill 1582, Printer’s Number 1734, and any similar legislation which would prohibit the use of any LGBTQ+ panic defense (previously known as and introduced under “gay panic” and “trans panic” defenses) in this Commonwealth.

THAT the Pennsylvania Bar Association’s President and Legislative Department communicate this position to the Pennsylvania General Assembly, the legal profession, and the public in such manner as they deem appropriate for purposes of implementing this Recommendation.

Report

House Bill 1582, Printer’s Number 1734 (“HB 1582”), would amend 18 Pa.C.S. § 2301 (“Definitions”) to alter the definition of Serious Provocation as follows, with new language in brackets:

"Serious provocation." Conduct sufficient to excite an intense passion in a reasonable person. [The term does not include the discovery, knowledge or potential disclosure of a victim's actual or perceived gender identity or expression or sexual orientation, including circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant or if the defendant and victim had a romantic or sexual relationship.]\(^1\)

The Pennsylvania Bar Association should support this legislation on several grounds. The panic defenses first came into broad public view after the killing of Matthew Shepard in 1998. Aaron McKinney claimed that he had beaten and tortured Shepard because Shepard made a pass at him and he was “in a rage” and therefore less culpable. In 2020, Professor W. Carsten Andresen published research analyzing use of the gay and trans panic defenses in 104 instances (though we caution that because it is a defense, it may show up infrequently in published opinions since prosecutors have limited options when a defense is effective). Professor Andresen found that across the United States, Pennsylvania had the second-highest concentration of cases where murder defendants used the gay panic defense – second only to Texas.\(^2\) He also found that defendants who used the gay panic defense were able to have their charges reduced in 32.7% – nearly one third – of cases, “even though the majority of these homicides include incredible violence.”\(^3\) In October 2009, Congress passed the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249 et seq., and on October 28, 2009, President Barack Obama signed the legislation into law.\(^4\)

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\(^1\)https://www.legis.state.pa.us/CFDOCS/Legis/PRJ/Public/btCheck.cfm?txtType=PDF&sessYr=2021&sessInd=0&billBody=H&billTyp=B&billNbr=1582&pn=1734.


\(^3\)See id. at 2.

\(^4\)James Byrd Jr. was murdered by three white men in Jasper, TX, on June 7, 1998. Two of the men were avowed white supremacists; the murderers offered Byrd a ride and instead took him to a remote area where they tortured and degraded
Matthew Shepard’s murder and the trial of his killers illustrates the gay panic defense. One paradigmatic case of the trans panic defense is the killing of Islan Nettles in New York. Ms. Nettles, who was transgender, was walking in Harlem with a friend on August 17, 2013, when James Dixon approached her and made a pass at her. In his videotaped confession, he said that he found out she was trans, he felt that his “pride was at stake” and beat her to death, fracturing her nose, jaw, eye socket, and skull. He was not indicted until 2015, and was permitted to enter a plea to manslaughter and was sentenced to twelve years in prison over the objection of prosecutors who sought a longer sentence. He was never charged with murder.

In Pennsylvania in 2017, Marcus Jones raised the defense when tried for killing a woman after learning that she was trans. "During the trial, which was held before [Judge Susan I.] Schulman and was not a jury trial, Jones’ defense attorney raised the “trans-panic” defense as a motive.” Charles Sargent used the trans panic defense in his 2018 trial for the murder of Diamond Williams. In 2011, Raymond Armstrong attempted to use the gay panic defense in his trial for the killing of Anthony Williams.

In addition to the impact on justice for these crimes, the publicity associated with the trials and the assertions of the defense – even when unsuccessful – are impossible to separate from questions about equality under the law.

For transgender people, for the criminal justice system to entertain arguments that the mere fact of their bodies can be so alarming that they constitute a provocation “sufficient to excite an intense passion in a reasonable person” is horrifying and alienating. It conveys the unmistakable message that the legal system allows transgender people who report an assault to be blamed for the violence inflicted upon them. Islan Nettles, for instance, did nothing to her murderer – he approached and flirted with her.

These defenses continue to be presented and will persist, absent legislation. One member of our Committee who has practiced criminal law saw the defense asserted in recent years in the courtroom. A defendant had solicited oral sex from a transgender woman. He then beat her until she was unconscious, stomped on her head repeatedly, and stole her purse. Although she survived, she was paralyzed and had significant brain damage and intellectual and emotional disabilities as a result of the attack. The defense asserted that this was a provocation scenario, that he had acted in self-defense because she had sexually assaulted him by not providing him with her full identity and medical history, and that the prosecution had failed to establish the identity of the victim. Shortly thereafter, word spread quickly in the transgender community as to what had happened at trial. It emerged that the defendant was a known “bad john” among transgender sex workers.

Under the Rules of Professional Conduct,

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and

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confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

R.P.C., Preamble Para. 6.

We should reasonably expect that individuals cope with information about the identity and characteristics of others – including racial heritage, religious beliefs, gender identity and sexual orientation – without violence. For defendants and their lawyers to argue, and judges and juries to accept or even be allowed to consider, that it is “reasonable” to attack and perhaps kill someone after discovering that they were attracted to someone who is transgender will undermine, rather than “further the public’s understanding of and confidence in the rule of law and the justice system.”

For this reason and others discussed herein, the Pennsylvania Bar Association should join the American Bar Association and many other state bar associations in calling for legislation in Pennsylvania and at the federal level putting the panic defenses in the past. Use of the defenses is inconsistent with a lawyer’s duties under the ethical rules and, as the ABA observed, “[s]uccessful gay and trans panic defenses constitute a miscarriage of justice.”

I. Support for the Legislation Prohibiting the LGBTQ+ Panic Defense comports with the PBA’s Mission
Support for legislation prohibiting the panic defenses furthers the following principles of the PBA’s Mission:

- to propound the precepts of the rule of law;
- to advance the science and art of jurisprudence;
- to support and promote a diverse and inclusive system of justice;
- to support and promote the equal administration of justice for all and that no one on account of poverty be denied their legal rights;
- and to secure proper legislation in support of all these purposes.

Support for legislation that prohibits the panic defenses furthers the PBA’s Mission in a number of important ways. First, it promotes a diverse and inclusive system of justice by preventing killers from trying to blame their violent actions on the LGBTQ+ identity of the person they attacked. Second, support for legislation that prohibits the panic defenses promotes the equal administration of justice by preventing defenses based on stereotypes and animosity against LGBTQ+ people and ensuring that jurors are never asked for tacit approval of second-class status for LGBTQ+ crime victims, and of the notion that annihilating violence is a reasonable person’s response to encountering members of the LGBTQ+ community. Third, support for legislation that prohibits the panic defenses would reduce the volume of further litigation over the validity of such defenses. Courts and the legal profession will be

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less likely to become engaged in disputes that further alienate the LGBTQ+ community—thus supporting and promoting civility and professionalism in the practice of law. Fourth, support for legislation that prohibits the panic defenses continues the PBA’s legacy of promoting justice and fairness to all, thus honoring the PBA’s legacy. Finally, support for legislation that prohibits the panic defenses will help to secure proper legislation in support of the aforementioned goals of the PBA.

Accordingly, the LGBTQ+ Rights Committee urges that the Pennsylvania Bar Association support HB 1582 or similar legislation clarifying that discovery, knowledge or potential disclosure of a victim’s actual or perceived gender identity or expression or sexual orientation does not constitute conduct sufficient to excite an intense passion in a reasonable person, nor does an unwanted romantic or sexual advance constitute such conduct.

Respectfully submitted,
Marricia O'Donnell McLaughlin
Thomas Ude
Co-Chairs, LGBTQ+ Rights Committee
April 27, 2022

Approved by the Board of Governors, May 11, 2022.
Approved by the House of Delegates, May 13, 2022.
INTRODUCED BY SANCHEZ, SCHLOSSBERG, KINSEY, GUENST, FRANKEL, HANBIDGE, N. NELSON, CONKLIN, ISAACSON, KENYATTA, HOWARD, FREEMAN, O'MARA, STURLA, SIMS, ZABEL, HILL-EVANS, WEBSTER, BOYLE, CIRESI, MALAGARI, SHUSTERMAN, WARREN, McCLINTON, INNAMORATO AND KRAJEWSKI, JUNE 8, 2021

AN ACT

1 Amending Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes, in general provisions relating to offenses involving danger to the person, further providing for definitions.

2 The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

3 Section 1. The definition of "serious provocation" in section 2301 of Title 18 of the Pennsylvania Consolidated Statutes is amended to read:

4 § 2301. Definitions.

5 Subject to additional definitions contained in subsequent provisions of this article which are applicable to specific chapters or other provisions of this article, the following words and phrases, when used in this article shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

6 * * *
"Serious provocation." Conduct sufficient to excite an intense passion in a reasonable person. The term does not include the discovery, knowledge or potential disclosure of a victim's actual or perceived gender identity or expression or sexual orientation, including circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant or if the defendant and victim had a romantic or sexual relationship.

Section 2. This act shall take effect in 60 days.