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THE COMPLEX USES OF SEXUAL ORIENTATION IN CRIMINAL COURT

ABBE SMITH*

INTRODUCTION: CHANGING TIMES OR NOT

Times may or may not be changing for gay people¹ in the criminal justice system—and for the import of sexual orientation in criminal law. It depends on the nature of the case and, more importantly, exactly whose sexual orientation we are talking about.

Signs of positive change include the recent high profile Matthew Shepard² and Diane Whipple³ cases, in which gay and lesbian homicide victims were mourned not only by the gay community, but also by the entire country.⁴ It was no doubt helpful that both Shepard and Whipple presented very appealing images of gay people: each was young, attractive, white and college educated— “wholly innocent victims.”⁵

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1. Not to unduly simplify an increasingly complex sexual landscape, but with the intent of lessening the reader's burden, the term “gay people” here includes gay, lesbian, bisexual, transgendered and transsexual people.

2. See Frank Rich, *Summer of Matthew Shepard*, N.Y. TIMES, July 3, 1999, at A11 (indicating that the murder of Matthew Shepard prompted a wave of positive acceptance of homosexuality in popular and political culture).

3. See Anna Gorman, *Mauling Death Creates an Activist Law: To Honor Her Late Partner, Sharon Smith Presses Rights Issues for Gays and Lesbians*, L.A. TIMES, Mar. 18, 2002, at B1 (noting the mauling death of Diane Whipple led her surviving partner to press for the right for same-sex partners to sue in wrongful death actions).

4. Both cases received national press coverage. There have already been three television movies about the Shepard case. See Michael Medved, *TV Focuses on One 'Hate Crime,' Forgets Another*, USA TODAY, Jan. 31, 2001, at 15A (stating that violence against gays has received increased television coverage).

5. Neither could be described as “flamboyantly gay.” Neither was said to be predatory or promiscuous. Although there was a suggestion that Shepard had made a sexual advance on one of his assailants, this never seemed credible and was largely kept from the jury. See Michael Janofsky, *Judge Rejects 'Gay Panic' As Defense in Murder Case*, N.Y. TIMES, Nov. 2, 1999, at A14 (noting that the concept of the “gay panic

Notwithstanding the history of homophobia in the criminal courts⁶—as a result of which gay, lesbian and transgendered complainants have often not been regarded as victims at all, or were discouraged from going forward because of their sexual orientation⁷—it was unsurprising that both the Shepard and Whipple cases resulted in murder convictions.⁸

It will be interesting to watch the upcoming prosecution of Darrell D. Rice, who was recently charged with capital murder in the 1996 slaying of Julianne Williams and Laura Winans at a secluded campsite

defense” does not exist in any state’s statutes). Both could be poster children for the gay rights movement, along with Mark Bingham, who died a hero on September 11. See Jon Barrett, *This is Mark Bingham*, *ADVOCATE*, Jan. 22, 2002, at 40 (recounting the life of thirty-one-year-old former rugby player and Flight Ninety-Three passenger Mark Bingham, whom the magazine selected as Person of the Year); Andrew Sullivan, *Right Turn: What Conservatives Should Learn From 9/11*, *NEW REPUBLIC*, Dec. 17, 2001, at 22 (noting that openly gay Bingham has been widely seen as a September 11 hero). Meanwhile, the case of Billy Jack Gaither—a thirty-nine-year-old working-class gay man who was brutally killed in Alabama by a younger man who claimed Gaither had propositioned him—received relatively little national press. See *Accomplice Convicted in Killing*, *N.Y. TIMES*, Aug. 6, 1999, at A15 (reporting that Charles M. Butler was convicted of murder for Gaither’s death). Cf. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 88 (1999) (noting that poor and nonwhite gays have always fared worse than middle-class white gays in the criminal justice system).

6. See generally ESKRIDGE, *supra* note 5, at 86-90 (discussing the historical lack of procedural protections for gays in criminal court); NAT’L LAW. GUILD, *SEXUAL ORIENTATION AND THE LAW* 12.25-12.28 (Roberta Achtenberg ed., 2001) (suggesting a connection between historical underreporting of violence against gays and indifference and hostility by those who administer the law); see also Richard Goldstein, *Queer on Death Row: In Murder Cases, Being Gay can Seal a Defendant’s Fate*, *VILLAGE VOICE*, Mar. 20, 2001, at 38 (arguing that a defendant’s homosexuality has been a factor in several murder trials ending in a death sentence); David E. Rovella, *Criminal Cases; Poll Elicits Fear of Rogue Jury*, *NAT’L L.J.*, Nov. 2, 1998, at A25 (reporting that seventeen percent of jurors responding to a national survey admitted they would not be fair if the case involved a homosexual).

7. Conventional wisdom had it that a gay complainant weakened the government’s case. See NAT’L LAW. GUILD, *supra* note 6, at 12.26-12.31 (discussing “secondary victimization” of lesbians and gays in the criminal justice system); RUTHANN ROBSON, *LESBIAN (OUT)LAW* 151 (1992) (noting the anti-gay and lesbian attitudes of court system personnel). As a public defender in Philadelphia in the 1980s, I saw prosecutors routinely reduce charges in serious cases—often encouraged by judges—whenever a gay complainant had prior arrests for solicitation. Since the spread of HIV/AIDS, the mere perception that a party is gay may give rise to different treatment in the criminal justice system. See, e.g., NAT’L LAW. GUILD, *supra* note 6, at 12.27 (noting that some alleged victims of crime who were perceived to be gay were made to undergo HIV tests).

8. See Michael Janofsky, *Man is Convicted in Killing of Gay Student*, *N.Y. TIMES*, Nov. 4, 1999, at A14 (reporting that Aaron J. McKinney was found guilty of the second-degree murder of Shepard); Evelyn Nieves, *Couple Guilty of all Charges in Fatal Attack by their Dog*, *N.Y. TIMES*, Mar. 22, 2002, at A1 (reporting that the jury convicted Marjorie Knoller and Robert Noel of all charges, including second-degree murder for Knoller, for the dog mauling of Whipple). *But see* Gorman, *supra* note 3, at B1 (indicating that same-sex partners traditionally have no right to bring suit in a wrongful death action).

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in Shenandoah National Park.⁹ Rice is alleged to have slashed the throats of the two women—who, like Shepard and Whipple, were young, white, college educated and had loving and supportive families—because of their gender and sexual orientation.¹⁰ Attorney General John Ashcroft, not generally known for his support of gay rights, used the stature of the United States Attorney's Office to personally announce Rice's indictment for capital murder, noting with favor the 1994 hate crimes law that will make it easier to introduce evidence of alleged bias.¹¹

Still, these developments may ultimately have little impact on what occurs in most criminal cases involving gay, lesbian or transgendered people. The truth is most alleged victims of crime and most alleged perpetrators do not look like Matthew Shepard, Diane Whipple, Julianne Williams, Laura Winans or September 11 victim/hero Mark Bingham.¹² Moreover, enhanced sympathy for gay victims does not necessarily translate into any sort of sympathy or identification with the gay accused.

Probably the vast majority of openly gay or transgendered people who wind up in criminal court are charged with solicitation or prostitution.¹³ Whether swept up by vice squads trying to keep neighborhoods "clean," or caught in the act of soliciting an undercover officer, these often "gender-bending" defendants comprise a large number of weekend arrests in most major cities.¹⁴ They are notoriously badly treated throughout the criminal justice system: police are nasty to them; marshals, court officers and other court personnel often mock them; it is the rare judge or magistrate

9. See Christopher Marquis, *Man is Charged in 2 Killings that U.S. Calls Hate Crime: U.S. Uses '94 Law in Hikers' Slayings*, N.Y. TIMES, Apr. 11, 2002, at A27 (noting that this is a high profile hate-motivated killing); Brooke A. Masters, *Gay Bias Charged in Deaths*, WASH. POST, Apr. 11, 2002, at A1 (indicating that the murders were hate crimes based on sexual orientation).

10. See Masters, *supra* note 9, at A1 (reporting that prosecutors quoted Rice as saying he "hates gays" and that the two women "deserved to die because they were lesbian whores").

11. See *id.* (describing that the evidence of bias will be Rice's prior attack on a female bicyclist in the same park).

12. See *Accomplice Convicted in Killing*, N.Y. TIMES, Aug. 6, 1999, at A15 (discussing the conviction for the murder of Billy Jack, a working class gay man whose case received little media attention).

13. See NAN D. HUNTER ET AL., *THE RIGHTS OF LESBIANS AND GAY MEN* 122-23 (3d ed. 1992) (noting that gays are especially vulnerable to solicitation and loitering statutes).

14. When I was a Philadelphia public defender assigned to weekend "midnight to eight" arraignments at the Police Administration Building, I often felt that the cross-dressing prostitutes were much more convincingly feminine (and attractive) than I was—especially as the night wore on.

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who treats these defendants with dignity or respect.¹⁵ They are treated badly from a systemic viewpoint as well. For example, in the District of Columbia there is a diversionary program for female prostitutes, through which an accused can avoid prosecution, and a diversionary program for male johns, but no such program for male prostitutes.¹⁶

The routine disrespect that gay, lesbian and transgendered defendants experience is reflected in a recent case in the District of Columbia Superior Court. The defendant, who was charged with simple assault and possession of a prohibited weapon (a kitchen knife), is biologically male but identifies as female. A piano teacher with no prior criminal record, the defendant is slightly built, pretty and has a good eye for clothing. She has considered herself female since she was a teenager, and she appears in all respects—looks, affect and manner—to be a woman. The incident arose out of an altercation with the defendant's boyfriend, who at that time was living with her. When the defendant told the boyfriend she thought it best for him to move out, the boyfriend went into a rage, destroying much of the defendant's living room and striking the defendant's face. When the police saw the condition of the defendant (who had visible injuries) and her apartment (which was a wreck), and observed the boyfriend smirking in the corner, they treated the defendant as the victim she was. They were kind—and even a little flirtatious. When, upon asking for identification, they discovered the defendant's gender, things changed dramatically. Suddenly, the police became hostile and abusive. They arrested the defendant—based on her acknowledgment that she picked up a knife to defend herself during the attack, and the boyfriend's claim that *he* was the victim. Although the case was ultimately dismissed for “want of prosecution” after the boyfriend failed to appear, it was a painful experience for the defendant, who will likely refrain from summoning the police for assistance in the future.¹⁷

15. See ESKRIDGE, *supra* note 5, at 88 (noting that drag queens, butch lesbians, and cross-dressers outside the middle class are historically the “most despised” people in criminal court); see also *Civil Rights for the Transgendered*, N.Y. TIMES, May 1, 2002, at A24 (explaining that transgendered people, “some of society's most vulnerable citizens,” are not only discriminated against by the court system, but also discriminated against in employment, housing, restaurants, stores, and are frequently the victims of hate crimes).

16. The lack of a diversionary program for gay people is a matter of practice, not law.

17. The case was handled by a post-graduate fellow in the E. Barrett Prettyman Fellowship Program at the *Georgetown University Law Center*, which I supervised. I have received the client's permission and “blessing” to write about her case.

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This is not an unusual story.¹⁸ Sexual orientation still matters in day-to-day criminal cases,¹⁹ with most of those involved in criminal law enforcement and administration not terribly enlightened about gender identity or sexual orientation. Most lawyers are probably not much better. Still, it would be far too easy to say that the “use and abuse” of sexual orientation in criminal law is rooted in ignorance or bigotry. The context in which the issue arises—the adversarial system—makes the whole matter more complex.

II. THE COMPLEX USES OF SEXUAL ORIENTATION AT TRIAL

The use of sexual orientation in a criminal case most often raises tactical and strategic questions, rather than ethical or doctrinal ones. Take, for example, the 1986 trial of Patsy Kelly Jarrett.²⁰ Jarrett was a North Carolina woman with no prior record who denied any knowledge of or involvement in a robbery and murder in upstate New York. A court-appointed lawyer who represented her decided it would be better to let the jury assume that she was the girlfriend of her male traveling companion (against whom there was substantial evidence) rather than have them know she was a lesbian.²¹ Despite the scant and troubling one-witness identification evidence by a retired factory worker (who, two days after the crime, could not state for certain the gender of the person he observed in a car, and could not describe any facial features),²² and Jarrett’s strong claim of innocence, she was convicted of all charges and has now served twenty-five years of a life sentence at Bedford Hills Prison.

The trial lawyer’s decision to hide—or at least not disclose—Jarrett’s sexual orientation was not motivated by the lawyer’s own bigotry or malice, but by a genuine concern (however misguided it seems now) that jurors might hold Jarrett’s homosexuality against

18. See ESKRIDGE, *supra* note 5, at 88 (noting that cross-dressers are arrested, beaten, and harassed by the police more often than other gay people).

19. See Amelia Craig Cramer & Amy Todd, *Sexual Orientation Bias in Arizona’s Legal System*, ARIZ. ATT’Y., Oct. 2000, at 37.

20. See *Jarrett v. Headley*, 802 F.2d 34, 36 (2d Cir. 1986) (holding that pre-trial identification procedures were unduly suggestive). I now represent Jarrett and have written about her case before. See Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 495-97 (2000) [hereinafter Smith, *Defending the Innocent*] (detailing my repeated attempts to free Jarrett); see also Karen Avenoso, *The Defense Never Rests*, BOSTON GLOBE, Feb. 2, 1997, (Magazine), at 14 (recounting my initial representation of Jarrett first as a New York University law student, and then as a lawyer).

21. See *Jarrett*, 802 F.2d at 36 (describing Jarrett’s relationship with her male companion as her “paramour”).

22. See *Jarrett v. Headley*, 633 F. Supp. 1403, 1403 (S.D.N.Y. 1986) (suggesting that Jarrett may well be an innocent victim of a mistaken identification).

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her. In Jarrett's lawyer's view—and Jarrett followed his advice—the jury would be more fair if they believed she was heterosexual.²³

Now, when Jarrett's only remedy is executive clemency,²⁴ her sexual orientation continues to pose strategic challenges. Although she still identifies as gay, Jarrett has become a devout Catholic and is celibate. Though she was formerly an open and proud lesbian, her sense of self now comes more from faith than from sexual orientation. More importantly, there is no source of public support for a wrongly convicted and imprisoned lesbian. There is plenty of support for gay victims, especially gay victims of violence.²⁵ But there is nothing for a lesbian or gay man accused or convicted of violence. Jarrett's lack of support in the gay community—which is partly the result of the gay community's lack of awareness about her case, as it is neither a capital case nor one that received any national press—resembles lesbian death row inmate Wanda Jean Allen's difficulty garnering support.²⁶ Being a convicted murderer seems to eclipse one's membership in the gay community.

The use of sexual orientation at trial becomes more complex when it appears to perpetuate or exploit homophobia.²⁷ For example, in

23. See *Jarrett*, 802 F.2d at 39 (referring to the homosexual experiences of Jarrett's travelling companion, but making no mention her being a lesbian).

24. See Smith, *Defending the Innocent*, *supra* note 20, at 504-07 (discussing the difficulties of obtaining clemency for Jarrett).

25. See generally GREGORY M. HEREK & KEVIN T. BERRIL, HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN (1992); GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 24 (1992) (discussing a violent anti-gay incident in 1972 that led to more public support for gay and lesbian victims of violence); CLAUDIA BRENNER, EIGHT BULLETS: ONE WOMAN'S STORY OF SURVIVING ANTI-GAY VIOLENCE 149-51 (1995) (detailing the response of the community and gay and lesbian activists to an anti-lesbian murder).

26. See Michael B. Shortnacy, *Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309, 341-44 (2001) (noting the issue made of Allen's sexual orientation during trial); see also *Allen v. Massie*, 202 F.3d 281 (10th Cir. 2000), *cert. denied*, 531 U.S. 1032 (2000) (denying defendant's petition for a rehearing); *Allen v. State*, 871 P.2d 79 (Okla. Crim. App. 1994), *cert. denied*, 513 U.S. 952 (1994) (reaffirming Allen's death sentence). Allen's post-conviction lawyer has noted the difficulties experienced organizing support for Allen's clemency petition from the gay and lesbian community in Oklahoma. See also Steven Presson, Remarks at the Symposium, *Homophobia in the Halls of Justice: Sexual Orientation Bias and its Implications Within the Legal System* at the American University Washington College of Law (Mar. 26, 2002) (transcript on file with the *American University Journal of Gender, Social Policy & the Law*) (chronicling the difficulties faced by homosexual defendants in the courts).

27. See Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788, 789-93 (1996) (discussing the criminal lawyer's duty to advocate on behalf of clients even if it means exploiting race); Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 17-27 (1994) (examining the ethics of exploiting race in advocacy); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 948-57 (2000) [hereinafter Smith, *Defending*

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the highly publicized trial in which New York police officers were alleged to have physically and sexually assaulted Haitian immigrant Abner Louima,²⁸ the defense theory came under sharp attack. The problem was that in defense counsel Marvyn Kornberg's opening statement on behalf of Officer Justin Volpe, who pled guilty mid-trial,²⁹ he suggested that Louima's internal injuries were the result not of police brutality but of consensual same-sex sex.³⁰

There was outcry about this defense from both the left and the right. Progressive commentators and gay rights advocates questioned the ethics of using a theory that perpetuated a stereotype that gays engage in rough or violent sex.³¹ Others decried the idea that Louima was gay or had engaged in gay sex as character assassination, insulting and "slanderous."³² Reverend Al Sharpton went so far as to

Defending] (discussing the exploitation of race, sex, sexual orientation, and ethnicity in criminal defense).

28. See generally Smith, *Defending Defending*, *supra* note 27, at 925. Louima accused Officer Volpe of shoving a broom handle into Louima's rectum in a Brooklyn precinct bathroom in 1997, causing massive internal injuries including a torn colon, lacerated bladder, and ruptured intestine. *Id.*; see also Mike McAlary, *The Last Cop Story*, *ESQUIRE*, Dec. 1997, at 118, 124 (detailing the horrific details of Louima's beating).

29. See McAlary, *supra* note 28, at 154 (reporting that Volpe asserted his innocence when charges were filed). He pled not guilty and publicly maintained innocence until his change of plea in the middle of trial on May 25, 1999. See David Barstow, *Hoping to Escape Life Term, Officer Admits Man's Torture*, *N.Y. TIMES*, May 26, 1999, at A1 [hereinafter Barstow, *Officer Admits Man's Torture*] (reporting that Officer Volpe pled guilty to violently sodomizing Abner Louima); see also Tom Morganthau et al., *A Police-Brutality Case Ends with a Guilty Plea*, *NEWSWEEK*, June 7, 1999, at 42 (indicating that the police officer never changed his story and then pled guilty mid-trial).

30. Kornberg said in the opening: "You will hear from a forensic pathologist and you will hear from other medical doctors that the injuries sustained by Mr. Louima are not, I repeat not, consistent with a nonconsensual insertion of an object into his rectum . . ." David Barstow, *Officer, Seeking some Mercy, Admits to Louima's Torture*, *N.Y. TIMES*, May 26, 1999, at A1.

31. See Jesse Green, *Gays and Monsters: The Way we Live Now*, *N.Y. TIMES*, June 13, 1999, (Magazine), at 13 (arguing that the defense theory that Louima had engaged in consensual anal sex earlier on the night of the incident played into the vilification of gays in public discourse); Laura Mansnerus, *When the Job Requires a Walk on the Ethical Line*, *N.Y. TIMES*, May 30, 1999, at D10 (quoting University of Pennsylvania law professor David Rudovsky, who called the defense "crazy"); see also *Gay Group Faults Defense*, *N.Y. TIMES*, May 7, 1999, at B6 (reporting that a group of gay rights advocates criticized Kornberg for suggesting that Louima's injuries were the result of consensual same-sex sex).

32. Reverend Al Sharpton threatened to file a complaint with the disciplinary agency that oversees lawyers, accusing Kornberg of "slandering" Louima, who is married and has two children. See David Barstow, *Brash Defense Lawyer Shrugs Off Attacks*, *N.Y. TIMES*, June 13, 1999, at A47 [hereinafter Barstow, *Brash Defense Lawyer*]. It is interesting that much of the outrage generated by the suggestion that Louima was injured during consensual homosexual sex was because Louima is not gay. This is an overreaction, at the very least. The idea that being called gay is at all comparable to being held down on a police precinct bathroom floor while being brutalized with a broom handle is both ludicrous and homophobic. It demeans the

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call it a “‘second rape.’”³³

One commentator suggested that the “outrage over the supposed slight shows that Kornberg was onto something”³⁴ larger than the refutation of medical evidence at trial. This commentator argued that, holding aside the implausibility of the defense, “it played cleverly on the expectation that a jury of ordinary Americans would still see homosexuality as vile, and see violence as normal in a homosexual act— *at least in preference to seeing sadism as normal in a heterosexual arrest*. How else explain a torn rectum and bladder?”³⁵

Still, the question of how else to explain a torn rectum and bladder remains within the province of adversarial advocacy. When an accused maintains innocence and insists on going to trial, as Volpe initially did, what else can a criminal defender do but fashion an appropriate defense? There is nothing unethical about using racial, gender, ethnic or sexual stereotypes in criminal defense.³⁶ It is simply

brutality Louima endured and it demeans gay people. Moreover, there is something naive about the insistence that Louima could not have had consensual anal sex *because he is married and has two children*. He would not have been the first married man to engage in extramarital sex, whether with a woman or a man. See, e.g., *Six Feet Under: Back to the Garden* (HBO television broadcast, Apr. 14, 2002) (portraying the discovery of a married man having sex with another man). Moreover, anal sex is not the sole province of male homosexual sex.

33. Mansnerus, *supra* note 31. Sharpton seemed to take particular offense on Louima’s behalf, calling the intimation of homosexuality “beyond the realm of any decency.” See also Barstow, *Brash Defense Lawyer*, *supra* note 32 (noting that Al Sharpton filed a complaint against the defense lawyer calling the use of homosexual sex theory a “bogus” claim).

34. Green, *supra* note 31.

35. *Id.* (emphasis added). In a thoughtful commentary about the continued vilification of gays in public discourse notwithstanding a veneer of increased tolerance, Jesse Green notes a number of recent cases in which “lawyers and hucksters” have “created around gayness a nimbus of culpability.” *Id.* He argues that Kornberg did the same with Louima:

If it could be suggested that Louima were gay (though he was at the club that evening indulging in archetypal straight behavior: flirting with other women while the wife stayed home), he might be deserving of the treatment he got, whoever may have done it, in love or fury.

The tactic failed, but not because it was despicable or even because it was a lie; what defeated Volpe was the testimony of other cops. Still, Kornberg’s easy recourse to assumptions about the violence and depravity of gayness—accompanied by a Seinfeldian *not-that-there’s-anything-wrong-with-that* shrug—proved that homosexuality is still America’s favorite goblin.

Id. at 13-14 (emphasis added).

36. I have previously argued, for example, that the ethical requirement of zealous advocacy trumps the “new ethic” of color- and gender-blind jury selection. See Abbe Smith, “Nice Work If You Can Get It”: “Ethical” Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523, 540 (1998) (noting that the law does not reflect a “color-blind” society and is thus susceptible to the use of racial and gender stereotyping in criminal defenses).

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an aspect of zealous advocacy.³⁷ Prejudice exists in the community and in the courthouse, and effective criminal defense lawyers recognize this as a fact of life.³⁸ Of course, most bias and prejudice works *against* the criminal accused, disproportionate numbers of whom are poor and nonwhite.³⁹

Questions could certainly be raised—and many commentators raised them at the time⁴⁰—about the soundness of the strategy of suggesting same-sex sex as the source of Louima's injuries. The scant evidentiary support for the theory, Louima's essential credibility, and the sophistication of the New York jury pool—which would recognize a red herring, and a homophobic one at that—all weighed against this defense. This is no doubt why Volpe eventually pled guilty.⁴¹

37. Lord Brougham provided the classic statement of the ideal of zealous advocacy:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

2 TRIAL OF QUEEN CAROLINE 8 (London, Shackell & Arrowsmith 1820-21).

The first codification of the requirement of zeal in this country was in 1908. See ANN. MODEL RULES OF PROF'L CONDUCT 41-52 (2d ed. 1992) (discussing the history of Rule 1.3 and whether it requires zealous advocacy); see also MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1996) ("A lawyer shall represent his client zealously within the bounds of law."). But see MODEL CODE OF PROF'L RESPONSIBILITY EC 7-10 (1996) ("The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."); MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (1996) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized by a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.").

For discussions of zealous advocacy with an emphasis on criminal defense, see MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 65-86 (1990); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 11-12 (1988); Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 184 (1983-84); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

38. See Ellen Yaroshefsky, *Balancing Victims' Rights and Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 135, 152 ("A courtroom is a laboratory of life . . . [and] each lawyer's wish to win may lead him or her to exploit prevailing cultural biases.").

39. See generally DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 5, 169-78 (1999) (arguing that race and class bias operates in every aspect of the criminal justice system).

40. See, e.g., Mansnerus, *supra* note 31 (quoting prominent defense lawyer David Rudovsky who called the defense theory "crazy").

41. See generally Morganthau, *supra* note 29, at 42 ("Volpe last week stunned the city by changing his plea to 'guilty.'").

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A more mundane example of the exploitation of bias relating to sexual orientation in advocacy—or, at the very least, of insensitivity to those with a nontraditional sexual identity—occurred in a recent case handled by the Georgetown Criminal Justice Clinic. In the case, the Clinic represented a male client who was alleged to have assaulted a transgendered person—someone who was biologically male but identified as female. Notwithstanding the female identification of the complaining witness, in cross-examination defense counsel pointed out that the witness was biologically male, and consistently referred to the witness as “sir” instead of “ma’am.” Though this may have been unseemly, it was an entirely appropriate defense strategy.

In a similar vein, the first felony case I ever tried (making it forever memorable) involved a woman accused of stabbing her former female lover. Although the prosecution contended that my client attacked the complainant for poking fun of the defendant’s clothes—in particular her “yellow pants”⁴²—the defense was a version of battered women’s self-defense.⁴³ The defendant, who had no prior criminal record, claimed that she grabbed a knife to protect herself from the complainant, whose reaction to the demise of the relationship included harassment, stalking and repeated threats. In the course of the trial, I did not refrain from pointing out the complainant’s larger and more muscular build, lack of children (my client had two) and tougher (no doubt read as “masculine”) demeanor generally. Although I was clearly playing into a “butch” stereotype—a stereotype that had little to do with the central matter of credibility, but did support the defendant’s “reasonable fear” of her larger, fiercer assailant—this seemed an appropriate part of the trial strategy. The defendant was found not guilty.

42. I was a relative newcomer to Philadelphia when I handled this case for the public defender’s office. When I first read the police reports and saw that my client was alleged to have stabbed the complainant after the complainant called her, “Yellow pants, yellow pants,” I was hopeful that perhaps “yellow pants” was a particularly offensive epithet in the City of Brotherly Love—along the lines of a racial epithet or an insult to your mother—goading even the most peaceful to lose control, or better, to reasonably fear attack. I was disappointed when it turned out that my client was simply wearing yellow pants.

43. See generally ANGELA BROWNE, WHEN BATTERED WOMEN KILL 75-87 (1987) (outlining the psychological condition that keeps women in abusive relationships and leads to violent acts); ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAW MAKING (2000) (exploring the legal implications of the battered woman defense); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991) (dismantling the theory that current criminal law doctrine cannot incorporate self defense claims of battered women who kill abusive men).

III. A QUESTION OF LAW, NOT ETHICS

In 1988, Claudia Brenner, the surviving victim of a would-be double homicide on the Appalachian Trail, asked me to represent her.⁴⁴ On May 13 of that year, a “mountain man”⁴⁵ named Stephen Roy Carr secretly followed Brenner and her lover Rebecca Wight as they were hiking and camping in Central Pennsylvania. After setting up camp, Brenner and Wight, believing themselves alone in a secluded spot, made love. Carr watched the two women have sex and afterward repeatedly fired his rifle at them, hitting Brenner and killing Wight.⁴⁶ Wight literally died in Brenner’s arms.⁴⁷

During pretrial hearings, the defendant made clear that he would raise a variation of “homosexual panic”⁴⁸ as his defense. In response to a prosecution motion in limine which sought to prevent Carr from raising this defense at trial, which I drafted, Carr spelled out his defense more fully. He argued that seeing two women have sex “provoked” him into shooting them, and that his psychosocial history (being abused and neglected as a child, being sexually assaulted by a man in prison, being routinely rejected by women and suspecting that his mother was a lesbian) was relevant to his defense of

44. See BRENNER, *supra* note 25 (detailing the story of female victim of a violent hate crime). The case is reported in *Commonwealth v. Carr*, 580 A.2d 1362 (Pa. Super. Ct. 1990). See generally Abbe Smith, *On Representing a Victim of Crime*, in *LAW STORIES* 155, 157-58 (Gary Bellow & Martha Minow eds., 1996) [hereinafter Smith, *On Representing a Victim of Crime*] (noting my hesitation to be a private counsel to a victim in litigation where the cards are already stacked against the criminal defendant).

45. See Abbe Smith, *On Representing a Victim of Crime*, *supra* note 44, at 157-58 (explaining the events leading to Claudia Brenner’s attack).

46. See BRENNER, *supra* note 25.

47. See *id.*

48. See NAT’L LAW. GUILD, *supra* note 6, at 12.29 (explaining that the premise of this defense is that it is reasonable for a person—generally a man—to “panic” when confronted by homosexuality, and to react violently in order to protect one’s heterosexuality). See generally Christina Pei-Lin Chen, *Provocation’s Privileged Desire: The Provocation Doctrine, “Homosexual Panic,” and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J. L. & PUB. POL’Y 195, 199-203 (2000) (analyzing the genesis and development of the homosexual panic defense); Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY 81 (1992); Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 159-61 (1992) (describing the weaknesses of the homosexual panic defense); see also Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 272 (1996) (discussing the role of “emotion” in criminal law and using the *Carr* case as an example). Cf. Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1637 (1998) (referring to “the threat that open deviance poses to the status of those who faithfully abide by dominant norms” and noting that “[m]erely rebuffing the odd homosexual advance isn’t enough to protect the homophobe from that sort of threat.”).

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provocation.⁴⁹

Commonwealth v. Carr had nothing to do with the defense lawyer's duty to mount a defense, however offensive the particular defense might be.⁵⁰ The defense lawyer's ethics were not at issue in the case. Instead, the case raised questions relating to the criminal law doctrine of provocation and the law of evidence. The criminal law question was whether merely observing a same-sex couple engage in sexual activity could cause a reasonable person to kill in a heat of passion, reducing murder to manslaughter. The evidentiary question was what evidence might an accused introduce at trial to establish that he might be likelier to react violently to witnessing same-sex sex.

The trial judge granted the prosecution motion to preclude what may have been the defendant's only defense.⁵¹ As a result, the defendant pled guilty to murder for a sentence of life without the possibility of parole, with the qualification that he be allowed to appeal the trial court's ruling on the motion in limine.

The trial judge was eloquent in his written ruling:

[The women] sought the solitudes of a location thought pristine. Many may frown upon what they did, but they broke no law and only pursued activities in which they had a right to engage.

Defendant, on the other hand, brought an attitude and disposition that would be considered evil in any civilized circumstance.

People seem to live constantly in eras when one group or another feels justified in ending human life for reasons thought to be sufficient. History is replete with examples of utmost cruelty being inflicted on those termed heretic, witches, sodomites, and the like. . . .

The victims . . . did not harm Defendant His murderous act cannot be mitigated by such trivial provocation.⁵²

The Pennsylvania Superior Court affirmed the trial court.⁵³

49. See *Commonwealth v. Carr*, 580 A.2d 1362, 1363-64 (Pa. Super. Ct. 1990) (holding that the appellant's "history of misfortunes" did not justify the acts for which he was accused).

50. See, e.g., ANN. MODEL RULES OF PROF'L CONDUCT 41-52 (2d ed. 1992) (providing that it is a lawyer's professional obligation to zealously defend the accused in all cases including capital murder).

51. See Smith, *On Representing a Victim of a Crime*, *supra* note 44, at 162-63 (acknowledging ambivalence about government motions in limine that preclude a defendant from putting on a defense— even though the defense has no basis in law).

52. *Commonwealth v. Carr*, no.CC-385-88, Court of Common Pleas, Adams County, Pennsylvania, *Opinion on Post-Verdict Motions*, Oscar F. Spicer, President Judge, at 13, 16 (quoted in Smith, *On Representing a Victim of a Crime*, *supra* note 44, at 166).

53. See *Carr*, 580 A.2d at 1364.

The sight of naked women engaged in lesbian love-making is not adequate

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CONCLUSION: THE VILLAINY AND VIRTUE OF ADVOCACY

It is always nice to be on the right side. No doubt I was at my most popular (at least in some circles) when I represented a heroic victim of anti-gay violence—Claudia Brenner—in the *Carr* case. Notwithstanding my own misgivings about the victims' rights movement⁵⁴ and the discomfort I experienced as a lifelong criminal defense lawyer representing a victim for the first time,⁵⁵ I felt good about my role in that case, and about the result. I believed in my client and in her cause—which was not to send Stephen Roy Carr to the death chamber,⁵⁶ but to make sure that the law fully recognized the seriousness of Carr's crime and held him accountable.

Likewise, it was gratifying to represent a transgendered client who was mistreated by the police and wrongly accused of assault once they discovered the client's "true" gender. Representing this client was entirely consistent with much of what motivates me to be a criminal defender: I was defending a marginalized member of a social minority (who also happened to be poor and black) who was a victim of ill treatment at the hands of the police.

Still, this is what defenders do in most cases, whether they are fighting against or exploiting prejudice and bigotry on behalf of an accused. By and large, the criminally accused are impoverished and marginalized members of a social, ethnic or racial minority.⁵⁷ As

provocation to reduce an unlawful killing from murder to voluntary manslaughter. It is not an event which is sufficient to cause a reasonable person to become so impassioned as to be incapable of cool reflection. A reasonable person would simply have discontinued his observation and left the scene; he would not kill the lovers [The law] does not recognize homosexual activity between two persons as legal provocation sufficient to reduce an unlawful killing of one or both of the actors by a third person from murder to voluntary manslaughter.

Id.

The appellate court also dismissed the suggestion that the accused's psychosocial history had any bearing on the doctrine of provocation holding that the "appellant's history of misfortunes are not events which are in any way related to the events which he claims establish a foundation for a manslaughter verdict." *Id.* at 1365.

54. See generally Yaroshefsky, *supra* note 38, at 141-45 (analyzing the conflict between protecting the victim and protecting the constitutional rights of the accused to defend themselves).

55. See generally Smith, *On Representing a Victim of a Crime*, *supra* note 44, at 152-54, 160-64.

56. See BRENNER, *supra* note 25, at 116, 169-73 (explaining that Brenner never sought the death penalty for Carr).

57. See generally JEFFREY REIMAN, . . . AND THE POOR GET PRISON: ECONOMIC BIAS IN AMERICAN CRIMINAL JUSTICE 92-94 (1996) (establishing that the American criminal justice system focuses primarily on individuals who are members of minority groups or who are impoverished); see also CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 143-203 (1992) (discussing the "underclass" and explaining that nonwhites are far more likely than whites to be members of the

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social mores change, and gays cease to be regarded as either bogeymen or narrow, one-dimensional caricatures,⁵⁸ the strategy of exploiting bias and prejudice will likely become less and less effective. In other words, as our society becomes more enlightened and accepting, so will criminal practice. There are some who believe that lawyers—and especially criminal trial lawyers, who are sometimes in the public light—ought to lead the way to this new day.⁵⁹ I do not think so. I think we ask enough already of those who defend the least popular and least powerful among us.⁶⁰

Criminal trial advocacy is a tricky business. The criminal lawyer shoulders the enormous burden of safeguarding another human being's life and liberty. The criminal lawyer routinely stands between his or her client and the purgatory we call criminal punishment.⁶¹ This is an honorable vocation⁶² and one that is essential to our adversarial system of justice.⁶³

underclass and almost always live in racially segregated neighborhoods).

58. See Bruce Bawer, *More Respect, but too Few Rights*, N.Y. TIMES, Jan. 26, 2001, at A19 (reporting that a Los Angeles Times survey conducted in June, 2000, found that seventy-four percent of respondents said they were comfortable around homosexuals, sixty-eight percent supported equal rights for gays in the workplace, and more than half said gay couples should have the same rights and benefits as straight couples); cf. Elizabeth Becker, *Wariness and Optimism Vie as Gays View New President*, N.Y. TIMES, Jan. 26, 2001, at A1 (reporting that the Republican party is becoming more hospitable to gays, but also noting that John Ashcroft, whom President George W. Bush had just nominated for Attorney General, has said he believes homosexuality is a sin).

59. See, e.g., Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 Geo. L.J. 2227, 2229 (2001) (discussing the criminal defense attorneys' discretion and responsibility in racial storytelling); Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1349 (1998) (contending that reforming the conduct of judges and attorneys requires the abandonment of the color blind canon of race neutrality); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063, 1074 (1997) (noting that the model code and the model rules recognize the need to use racial narratives in criminal defense theories); Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1306 (1995) (concluding that defense attorneys have a race-conscious responsibility to avoid constructs that construe racial identity in terms of deviance).

60. See Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1589 (1999) (criticizing Anthony Alfieri's work on race as wrongly focused on defense lawyers and hostile to advocacy on behalf of the accused).

61. See generally SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA (1998); TED CONOVER, NEWJACK (2000); WILBERT RIDEAU & RON WIKBERG, LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS (1992); SOL WACHTLER, AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR (1997) (describing the horrors of prison life).

62. See generally Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 462 n.117 (1999) (comparing the Biblical figure of Esther to the modern defense attorney). Both are lone defenders who take personal risks to stand up to a more powerful figure on behalf of someone else. *Id.*

63. See Smith, *Defending the Innocent*, *supra* note 20, at 511 (contending that when

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The chief tool of the defender is persuasion. Effective strategies of persuasion always involve playing on the sympathies and prejudices of an audience—at least to some degree.⁶⁴ This is how you move a judge or jury—how you get them to identify with the position you're advancing, or at least identify less with your opponent's position.

As the place of gay people in society and in criminal court changes and evolves, we should be mindful of the fact that adversarial advocacy has been both a boon and a burden to gays. The recent good press for gay victims like Matthew Shepard and Diane Whipple is a promising development. Perhaps times are truly changing. Still, gay peoples' experience in the criminal system—particularly gay defendants—is too often unpredictable, unsettling, and unpleasant. Those concerned about the treatment of gays in criminal court must recognize that there are no easy answers, but one comforting bedrock principle: gay people accused of crime are entitled to the same zealous, devoted, and hard-fought advocacy as everyone else.

one undertakes the representation of criminal defendants, he or she should avoid the issue of innocence because the truth "even when it supports innocence is often complicated and murky and may not make a very good story.").

64. See generally CLARENCE DARROW, *THE STORY OF MY LIFE* (1934) (contending that it is impossible for people to set aside their opinions without direct contradicting evidence); MICHAEL TIGAR, *EXAMINING WITNESSES* 5 (1993) (observing that a lawsuit is a "contest between two different stories.").