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## HOW TO GET AWAY WITH MURDER: THE “GAY PANIC” DEFENSE

*Omar T. Russo\**

### I. INTRODUCTION

In April of 2018, a jury found 69-year-old James Miller of Austin, Texas not guilty of murder for the 2015 slaying of his neighbor, Daniel Spencer.<sup>1</sup> The jury convicted Miller of criminally negligent homicide, a crime that earned him a mere six months in jail followed by ten years of probation.<sup>2</sup> During the night, Miller had invited Spencer, his 32-year-old neighbor, to his house where they drank and listened to music; the two were musicians.<sup>3</sup> Miller claims that he rejected a kiss from Spencer and that Miller stabbed Spencer in a panic.<sup>4</sup>

Miller’s defense counsel argued that he acted in self-defense, in a manner known unofficially as the “gay panic defense.”<sup>5</sup> The “gay

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<sup>1</sup> Jackie Salo, *Man Who Used ‘Gay Panic’ Defense for Killing Neighbor Avoids Prison*, N.Y. POST (Apr. 27, 2018), <https://nypost.com/2018/04/27/man-who-used-gay-panic-defense-for-killing-neighbor-avoids-prison/>.

<sup>2</sup> *Id.*

<sup>3</sup> Cleve R. Wootson, Jr., *A Former Police Employee Said He Killed a Man in ‘a Gay Panic’ – an Actual Legal Defense That Worked*, WASH. POST (Apr. 27, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/04/27/a-former-cop-said-he-killed-a-man-in-a-gay-panic-an-actual-legal-defense-that-worked/?noredirect=on&utm\\_term=.5aafde75b8f6](https://www.washingtonpost.com/news/post-nation/wp/2018/04/27/a-former-cop-said-he-killed-a-man-in-a-gay-panic-an-actual-legal-defense-that-worked/?noredirect=on&utm_term=.5aafde75b8f6).

<sup>4</sup> *Id.*

<sup>5</sup> A.B.A. RES. 113A, at 6 (2013), <https://lgbtbar.org/wp-content/uploads/sites/6/2014/02/Ga>

panic” defense stems from a phenomenon originally coined by psychotherapist Edward J. Kempf in 1920, who claimed that, in his studies of heterosexual-identifying males, they became agitated, enraged and panicked by their acute homosexual thoughts or ideas.<sup>6</sup> The psychological concerns described by Kempf were not out of touch with the times, given the classification of “homosexuality” as a medically-recognized disorder until 1973.<sup>7</sup>

Today, the gay panic defense is still used to influence jurors to mitigate a violent defendant’s conviction or sentence based on the premise that an individual of the same sex had a romantic interest in the defendant, which consequently, struck some panic within the defendant and caused the defendant to react violently.<sup>8</sup> The defense is based upon “homophobia and transphobia, and send[s] the wrong message that violence against LGBT people is acceptable.”<sup>9</sup>

In an era post-pathological homosexuality, cases such as the Texas murder of Daniel Spencer effectively move the focus from the defendant to the victim.<sup>10</sup> The defense puts the victim under a

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y-and-Trans-Panic-Defenses-Resolution.pdf. What will be referred to as the gay panic defense throughout this Note actually encompasses both that and the trans panic defense, in which similar justification is offered for crimes resulting in the discovery or assumption of a victim’s gender identity. “Gay panic defense” itself, for the purposes of the Note, will serve as an umbrella term comprising the two phenomena.

<sup>6</sup> EDWARD J. KEMPF, *PSYCHOPATHOLOGY* 477 (1920), <https://archive.org/details/39002086348753.med.yale.edu>. For the purposes of this Note, the word “homosexual” will be used scarcely to refer to the intimacy between two same-sex partners or their sexual orientation. The word today exists with undertones of hate and prejudice that linger from the days of Kempf, in which such intimacy was viewed as a legitimate medical condition. In describing marriage, intimacy or relationship, “[s]ubstitute the word ‘gay’ . . . and the terms suddenly become far less loaded, so that the ring of disapproval and judgement evaporates.” Jeremy W. Peters, *The Decline and Fall of the ‘H’ Word*, N.Y. TIMES (Mar. 21, 2014), <https://www.nytimes.com/2014/03/23/fashion/gays-lesbians-the-term-homosexual.html>. For the purposes of this Note, the terms LGBT, gay or trans will be used in place of the word homosexual, often, if not always in reference to the broader lesbian, gay, bisexual, transgender community. “LGBT” will be used to describe the broader community of lesbian, gay, bisexual, transgender and queer-identifying individuals. The word transgender is commonly understood to be an umbrella term encompassing a wide range of gender identities falling outside of the binary male and female categories.

<sup>7</sup> Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAVIORAL SCI. 565 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4695779>.

<sup>8</sup> *Gay/Trans Panic Defense*, LGBT B., <https://lgbtbar.org/what-we-do/programs/gay-and-trans-panic-defense> (last visited Apr. 4, 2019).

<sup>9</sup> JORDAN BLAIR WOODS ET AL., *MODEL LEGISLATION FOR ELIMINATING THE GAY AND TRANS PANIC DEFENSES* 3 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/2016-Model-GayTransPanic-Ban-Laws-final.pdf>.

<sup>10</sup> 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, 797 (2013).

microscope regarding his or her identity, rather than placing the defendant under the microscope for his or her own conduct. The jury's attention is effectively taken from the violent act and placed rather on who the victim was, and what about the victim could have in some way led to this chain of events. This course of action falls under the phenomenon of "victim-blaming," where attackers (often in sexual abuse cases, but not exclusively) assert that a victim has "contributed to the causation of her [or his] own rape."<sup>11</sup> Further, victim-blaming is not only used within the context of rape; the tactic is similarly employed in the context of domestic violence and has allowed for the expansion of the gay panic defense.<sup>12</sup> As such, in a society struggling to deprogram our victim-blaming mentality, the gay panic defense is able to flourish.

In order for the gay panic defense to work the way that it has, defendants have had to prove that "the victim's unwanted, nonviolent homosexual advance was characterized as an external stimulus causing the defendant's homicidal reaction."<sup>13</sup> To reach such an assumption, one must accept the premise that gays are, in some way, provocative by nature or in a position to cause great anxiety and distress that triggers one's sentiment that there exists no reasonable measure other than a violent or homicidal outburst.

The reality is that, throughout our institutions of government, LGBT persons are a "politically powerless minority group because they are grossly underrepresented in our nation's legislative bodies."<sup>14</sup> For decades, the LGBT community has suffered from social isolation and damnation as mentally ill.<sup>15</sup> Apart from the societal and political detriment suffered, members of the LGBT community suffered in private, as intimate conduct amongst gays was methodologically

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<sup>11</sup> Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1463 (1999).

<sup>12</sup> Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMP. L. REV. 645, 647 (2003) (discussing victim-blaming in the context of domestic violence criminal prosecutions and that "[j]ustification defenses are the most obvious examples of formal victim blaming doctrines in criminal law. The doctrines of self-defense, defense of others, and defense of property base justification of an intentional killing exclusively on the victim's behavior.").

<sup>13</sup> Perkiss, *supra* note 10, at 797.

<sup>14</sup> Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y. 385, 385 (2010).

<sup>15</sup> *Id.* at 385, 390-91.

criminalized in our country for most of its existence.<sup>16</sup> The notion that one's sexual identity or non-violent romantic gesture prompted justifiable murder is cause for great concern, considering what this means for victims in our criminal justice system.

The core issue that this Note seeks to address is that LGBT individuals face adversity in our courts in the form of prejudicial victim-blaming, having their sexuality or gender orientation used as justification for the violent attack perpetrated against him or her. It is well-established that LGBT people in this country face adversity at disproportionately high rates in terms of poverty, discrimination and violence.<sup>17</sup> Specifically, the prevalence of sexual and physical violence is significantly higher against LGBTs than their straight counterparts.<sup>18</sup> The disparity, and pervasive acts of oppression, are even greater where intersectionality of identities exists, such as race and ethnicity.<sup>19</sup> The gay panic defense, as the author will discuss, does immeasurable damage to our system of justice by promoting oppression against the LGBT community by endangering its already insecure fundamental rights.<sup>20</sup>

The basis for the gay panic defense is highly troublesome for reasons beyond the clear violence concerns; namely, its due process implications. In an era where gay conduct is protected from government intervention through some recognition of individuals' rights to privacy in personal sexual conduct, the gay panic defense is legally flawed.<sup>21</sup> While admittedly the courtroom is a place where one's privacy often takes the back burner in pursuit of justice, it is hard to imagine a society in which one's religion is somehow justification for panic-driven murder, or in similar analogy, one's racial background; assuming that logic is sound, how then can the sexual orientation or gender identity of an individual, something so

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<sup>16</sup> *Id.*

<sup>17</sup> Jordan Blair Woods, *LGBT Identity and Crime*, 105 CAL. L. REV. 667, 719 (2017).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 719-20 (describing the increased crime rates where an individual falls under either: more than one category under the LGBT umbrella or the LGBT umbrella and another historically disadvantaged or minority group).

<sup>20</sup> As of 2016, 4.1% of the United States population self-identified to fall somewhere along the LGBT spectrum, amounting to approximately 10 million Americans. Gary J. Gates, *In U.S., More Adults Identifying as LGBT*, GALLUP (Jan. 11, 2017), <https://news.gallup.com/poll/201731/lgbt-identification-rises.aspx>.

<sup>21</sup> *See infra* note 75 (discussing the protection of privacy rights enumerated in the Due Process Clause of the Constitution).

fundamental to one's being and so personal in nature, not violate the privacy protections established by the Supreme Court?<sup>22</sup>

Contemporarily, a defense of panic, based on arbitrary characteristics of another person, is illogical and poorly reflective of our current state of law, justice and societal opinion. The gay panic defense continues to perpetuate the inaccurate notion that LGBT people trigger fear in others; that an LGBT individual's unwanted and nonviolent romantic advances are justification for violence, or even murder. To bring the issue of a victim's sexual orientation to focus as a defense tactic is "like placing a woman's sexual promiscuity at issue to show consent to rape."<sup>23</sup>

Essentially, the gay panic defense should be prohibited in all courts across the country because victims' perceived or actual gender identities or sexual orientations should not serve as a defense or justification for violence. Trial courts throughout the country must recognize the delicate balancing test applied similarly under rape shield laws, measuring probative value against undue prejudice, which mostly prevents admission of a rape victim's sexual history.<sup>24</sup> While some have recognized the use of the gay panic defense, few have analyzed the statutory bans enacted in a handful of states, and the impact that bans or the defense could realistically have.

Although only California, Illinois, and Rhode Island have passed legislation to proactively ban the defense, similar legislation is pending at the federal level and in several states and the District of Columbia.<sup>25</sup> This Note blends decades of sociological and legal transitions, with regard to sexuality and gender, to set forth a comprehensive solution to one of the gay rights movement's contemporary struggles: the use of the gay panic defense. In Section II of this Note, the author examines the origin and development of the defense. Section III is devoted to the history of the LGBT community in the United States, and how deep-seated prejudice has pervaded the

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<sup>22</sup> See *infra* note 75.

<sup>23</sup> *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1548 n.187 (1989).

<sup>24</sup> As a result of public pressure, "rape shield laws" were passed to encourage women to come forward in reporting sexual assaults and "limited the admission of . . . prior sexual history [as] evidence at trial. As a result, both the reporting and prosecution of opposite-sex rape increased." Elizabeth J. Kramer, *When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293, 296 (1998) (arguing that rape shield laws, historically used to protect female victims on trial against their male abusers, should be used to protect male victims from male abusers).

<sup>25</sup> See *supra* note 8.

judicial system and allowed for a defense of this nature to make its way into our courts. Section III continues with an analysis of the country's high-profile LGBT rights cases and how they have changed the shape of LGBT bias. Section IV examines the phenomenon of victim-blaming and the use of the gay panic defense as another form of that dangerous issue. Section V discusses the current and pending state bans on the defense used in criminal proceedings. The author describes how other jurisdictions may enact similar legislation or take proactive steps to ban the defense. Finally, in Section VI, this Note concludes with policy recommendations that may provide adequate protection of LGBT persons in courts throughout the country.

## II. ORIGINS OF THE GAY PANIC DEFENSE

The gay panic defense is not a creation of the legislature or the courts, which is why it is considered, by most, an “unofficial” defense, hidden beneath the surface and used in conjunction with recognized legal defenses.<sup>26</sup> While the gay panic defense, itself, is unrecognized in any jurisdiction in the country, defendants typically inject it as an undertone of their defense in typically one of three recognized defenses: self-defense, provocation, or diminished capacity/insanity.<sup>27</sup>

The Model Penal Code (“MPC”), while not adopted by every jurisdiction in the country, is described as the “closest thing to being an American criminal code” because it encompasses the general ideas of cross-jurisdictional criminal law.<sup>28</sup> Self-defense, provocation, and diminished capacity/insanity are the main defenses typically available, under the MPC, to a criminal defendant charged with homicide.

Under section 3.04 of the MPC, self-defense is described, in relevant part, as:

the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting

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<sup>26</sup> See Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 475 (2008) (describing the unofficial strategy of the defense and that “[t]here is no officially recognized ‘gay panic’ defense, but many use the term to refer to defense strategies that rely on the notion that a criminal defendant should be excused or justified if his violent actions were in response to a (homo)sexual advance.”).

<sup>27</sup> A.B.A. RES. 113A, *supra* note 5, at 1.

<sup>28</sup> Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319 (2007).

himself against the use of unlawful force by such other person on the present occasion.<sup>29</sup>

The defense is limited in its applicability and, thus, is “not justifiable . . . unless the actor believe[s] that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat.”<sup>30</sup> Similarly, the use of such force is further limited when an actor can reasonably retreat by engaging in non-violent conduct to escape the circumstances; the retreat requirement does not apply, however, when a victim is in his or her home.<sup>31</sup>

Next, provocation often refers to a murder that was committed under extreme emotional disturbance. The MPC additionally requires that the disturbance have a reasonable explanation or excuse.<sup>32</sup> The MPC provides that criminal homicide constitutes manslaughter, as opposed to murder, when the homicide is “committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”<sup>33</sup>

Finally, the MPC permits the defense of mental disease or defect, which in practice treats the defendant as lacking requisite intent or responsibility (insanity or diminished capacity).<sup>34</sup> Section 4.01(1) of the MPC provides that:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.<sup>35</sup>

As applied to the gay panic defense, a defendant may claim that he acted in self-defense when he foresaw a sexual attempt by the victim. While it is possible that no evidence supports such a claim, or even evidence to the contrary, the very exposure of the victim’s sexuality through such testimony or extrinsic evidence allows for bias to pervade the jury box rather than the merits of the case. Similarly, a

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<sup>29</sup> MODEL PENAL CODE § 3.04(1) (AM. LAW. INST. 2018).

<sup>30</sup> *Id.* § 3.04(2)(b).

<sup>31</sup> *Id.* § 3.04(2)(b)(ii)(a).

<sup>32</sup> *Id.* § 210.3(1)(b).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* § 4.01(1).

<sup>35</sup> *Id.*



defendant may assert that he acted under extreme emotional disturbance, that his overwhelming fear of the gay victim produced this homicidal reaction. If one accepts the possibility that a juror may share a similar sentiment, then it follows that a juror may find gayness to be a reasonable explanation or excuse as required under the MPC. Lastly, under the insanity defense, a criminal defendant may assert a lapse of capacity to understand or appreciate the severity of his actions, that his fear and panic so clouded his judgment that murder no longer held the weight it normally would.

Successful use of the gay panic defense in any form has immeasurable consequences socially and to our criminal justice system. Allowing a defendant to receive any benefit for the violence he perpetrates against another, based solely on the victim's LGBT status or perceived status, worsens implicit bias of jurors and further implies that LGBT persons' lives are less valuable. Banning the use of the gay panic defense should not be considered a radical move, one that diminishes defendants' rights or narrows tactical advantages at trial, but rather a method of allowing our laws and protections to progress with society's evolving and accepting attitudes toward LGBT people.

The gay panic defense has survived decades, evolving over the years through improper and prejudicial litigation techniques rooted in homophobia.<sup>36</sup> The defense has grown out of "ideological fictions [that] work to support this prejudicial legal doctrine."<sup>37</sup> The first known use of the gay panic defense was the California case *People v. Rodriguez*,<sup>38</sup> where the defendant argued that he had been touched sexually by the victim while urinating in an alley.<sup>39</sup>

In *Rodriguez*, the defendant beat to death an elderly man with a tree branch after following him into his yard where he was emptying his garbage.<sup>40</sup> The defendant argued a different version of the case, that after his friends had stolen a woman's purse, he ran to urinate in an alley when he was grabbed by the victim from behind.<sup>41</sup> Fearing

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<sup>36</sup> Perkiss, *supra* note 10, at 797 (discussing the transition from the defense's roots in medical science to a contemporary legal defense).

<sup>37</sup> Casey Charles, *Panic in the Project: Critical Queer Studies and the Matthew Shepard Murder*, 18 LAW & LITERATURE 225, 230 (2006).

<sup>38</sup> *People v. Rodriguez*, 64 Cal. Rptr. 253 (1967).

<sup>39</sup> Perkiss, *supra* note 10, at 797 (citing *Rodriguez*, 64 Cal. Rptr. 253 (1967)).

<sup>40</sup> See *supra* note 38.

<sup>41</sup> *Rodriguez*, 64 Cal. Rptr. at 255.

the man was “trying to engage in a homosexual act,” the defendant picked up the branch and fatally beat the victim over the head.<sup>42</sup>

The inconsistencies in the story the defense told were striking at trial. An expert testified at trial that the defendant was not acting under “acute homosexual panic,” but was sane when he committed the murder.<sup>43</sup> The defendant was charged with murder in the first degree; however, the jury returned a guilty verdict for murder in the second degree because the gay panic defense had successfully mitigated the defendant’s actions.<sup>44</sup> This case opened the door for use of the gay panic defense as a mitigating factor for defendants’ violent actions.<sup>45</sup> Although the expert physician provided testimony as to the defendant’s sanity, which the jury accepted, the fear-based nature of the defendant’s alleged account of being touched while urinating ultimately led to a reduced conviction. Although the facts demonstrated the prosecutor’s account of the incident, and evidence contradicting the defendant’s was persuasive, the defense worked and the jury empathized with the defendant.

The consequences of the legal doctrine effectively established by *Rodriguez* have been amplified and carried into contemporary criminal proceedings. The gay panic defense is successful, not because the nation supports violence or murder, but rather because of the enduring societal intolerance for LGBT people. Today, reports show that overall acceptance of same-sex relationships is at an all-time high, with 75% of people claiming same-sex relations “should be legal” and 67% reporting their belief that “gay and lesbian relations” are “morally

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 254. *See also supra* note 32 (the defendant successfully mitigated his crime through the assertion that he was in some way provoked or under extreme emotional disturbance stemming from the victim’s sexuality).

<sup>45</sup> The mitigating factor is a topic of the law, which can have potentially impressive implications on a defendant’s case, most particularly with regard to sentencing. Mitigating factors are typically used in sentencing when “the severity of the punishment necessarily depends on the culpability of the offender.” *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). Put differently, when a defendant’s actions may be explained or to some degree justified, this is cause for consideration in sentencing and rulings by the judge. Mitigating factors are even statutory to a certain degree in most states. New York, for example, includes a catchall provision in the mitigating factor statute stating that a mitigating factor may include anything “concerning the crime, the defendant’s state of mind or condition at the time of the crime, or the defendant’s character, background or record that would be relevant to mitigation or punishment for the crime.” N.Y. CRIM. PROC. LAW § 400.27(9)(f) (McKinney 2018).

acceptable.”<sup>46</sup> However, the support revealed by such national polls is not uniform because such support drastically varies throughout regions, states and localities.<sup>47</sup> LGBT sentiment differs geographically, adding a layer of complexity in discerning true public support or opposition.<sup>48</sup> Additionally, given that these polls are self-reporting, they can fail to report true sentiment, and instead may reveal “an increasing reluctance to *admit* bias against queerfolk.”<sup>49</sup>

The defense attorney in one of the benchmark gay panic defense cases out of Illinois described the not guilty verdict as “anti-rape” rather than anti-gay, in a manner consistent with arguments of most gay panic defense ban opponents.<sup>50</sup> Defendant Joseph Biedermann walked free after being acquitted of first degree murder for stabbing his neighbor, Terrance Hauser, over sixty times.<sup>51</sup> The incident occurred in March of 2008, when the two men left a local tavern for Hauser’s apartment after Biedermann became too intoxicated and a bartender refused to serve Biedermann any more alcohol.<sup>52</sup> Biedermann testified that the two continued to drink at Hauser’s apartment where they eventually passed out.<sup>53</sup> When he woke up, Biedermann claimed, Hauser was on top of him with a sword at his neck, demanding that Biedermann undress and engage in sexual acts.<sup>54</sup> Thereafter, Biedermann admitted to using a dagger to stab Hauser in order to escape.<sup>55</sup> At trial, prosecutors asserted that Biedermann was far larger and less intoxicated than his victim, and that stabbing Hauser dozens of times clearly was unnecessary.<sup>56</sup>

Despite the extreme violence, and the “bloody overkill,” the defendant was, shockingly, acquitted based on the notion that

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<sup>46</sup> *Gay and Lesbian Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Apr. 4, 2019).

<sup>47</sup> Chan Tov McNamarah, *Sexuality on Trial: Expanding Pena-Rodriguez to Combat Juror Queerphobia*, 17 *DUKEMINIER AWARDS J. SEXUAL ORIENTATION & GENDER IDENTITY L.* 393, 397-99 (2018).

<sup>48</sup> *Id.* at 397.

<sup>49</sup> *Id.* at 397-98 (emphasis added).

<sup>50</sup> Eric Zorn, *Murder Defendant Gambles – and Wins*, CHI. TRIB. (July 17, 2009), <http://www.chicagotribune.com/news/ct-xpm-2009-07-17-0907160827-story.html>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Chicago Murder Acquittal Blamed on “Gay Panic”*, CRIME REP. (July 17, 2009), <https://thecrimereport.org/2009/07/17/chicago-murder-acquittal-blamed-on-gay-panic/>.

<sup>56</sup> *Id.*

“homosexual overtures are themselves sufficient provocation for acts of extreme violence.”<sup>57</sup> The political director of Equality Illinois claimed that the verdict was based “not on the facts but on deep seated anti-gay sentiment.”<sup>58</sup>

### III. A DEEPLY ROOTED LGBT BIAS IN THE LAW

Persecution of gays in the United States has existed since its colonial days.<sup>59</sup> In fact, in 1776 at the birth of the nation, gay male conduct was punishable by death in each of the thirteen colonies, pursuant to borrowed English law.<sup>60</sup> However, the late eighteenth century marked the start of a period of enlightenment, exploration and experimentation in the United States that is often unrecognized today.<sup>61</sup> Prior to World War II, a “gay world” thrived, especially in the New York metropolitan area.<sup>62</sup> This is a history somewhat buried beneath contemporaneous stories of two world wars, a volatile economy, and widespread national paranoia. As the nation’s general fear of outsiders grew, so too did its intolerance for those who would be regarded as “others” at home. As George Chauncey noted,

A battery of laws criminalized not only gay men’s narrowly “sexual” behavior, but also their association with one another, their cultural styles, and their efforts to organize and speak on their own behalf. Their social marginalization gave the police and popular vigilantes even broader informal authority to harass them; anyone discovered to be homosexual was threatened with loss of livelihood and loss of social respect. Hundreds of men were arrested each year in New York City alone for violating such laws.<sup>63</sup>

As anti-gay sentiment grew in the first half of the twentieth century, laws developed to reflect the national opinion. Through the

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Louis Crompton, *Homosexuals and the Death Penalty in Colonial America*, 1 J. HOMOSEXUALITY 277, 277 (1976).

<sup>60</sup> *Id.*

<sup>61</sup> GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, CULTURE AND THE MAKING OF THE GAY MALE WORLD 1890-1940*, at 1 (1994).

<sup>62</sup> *Id.* at 1-2.

<sup>63</sup> *Id.*

enforcement of sodomy laws, many states engaged in “witch hunts” of gay men, which served as a legal method of criminalizing “gay conduct.”<sup>64</sup> Such targeted laws were upheld by the nation’s highest court in the landmark case, *Bowers v. Hardwick*,<sup>65</sup> in which the Court upheld a Georgia statute forbidding sodomy.<sup>66</sup> The respondent argued that the statute criminalizing sodomy violated his constitutional rights to privacy and due process.<sup>67</sup> Ultimately, the Court ruled in favor of Georgia, thus validating the sodomy laws of that state and similar anti-sodomy statutes in other states that were used to criminalize gay men’s conduct across the country. The Court in *Bowers* reasoned in terms of morality, that it was not moved by the argument that the perceived immorality of gay conduct was insufficient to justify the anti-sodomy law, that in fact it was sufficient.<sup>68</sup> The Court further supported its reasoning that the law “is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”<sup>69</sup>

The issue surrounding the enforcement of sodomy laws would not be revisited by the Court until 2003, when it overturned its ruling in *Bowers* with its holding in *Lawrence v. Texas*.<sup>70</sup> In 1998, responding to a claim of weapons disturbance, police arrived at the home of John Geddes Lawrence (“Lawrence”).<sup>71</sup> Upon entering the apartment with guns drawn, the police encountered Lawrence engaging in consensual

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<sup>64</sup> Richard Weinmeyer, *The Decriminalization of Sodomy in the United States*, 16 AM. MED. ASS’N J. ETHICS 916, 916-917 (2014).

<sup>65</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>66</sup> Georgia’s sodomy statute, which particularly targeted gay men, stated the following:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one or more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

GA. CODE ANN. § 16-6-2 (1984).

<sup>67</sup> *Bowers*, 478 U.S. at 189.

<sup>68</sup> *Id.* at 196.

<sup>69</sup> *Id.* (reasoning that even though morality may have been the sole issue at stake in the case, laws are often born from morals, and that to undo such legislation where contrary to the Due Process Clause would be incredibly time consuming for the courts).

<sup>70</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>71</sup> *Id.* at 562-63.

sex with Tyron Garner.<sup>72</sup> The two men were arrested and taken into custody for violating a Texas statute prohibiting “deviate sexual intercourse.”<sup>73</sup> Lawrence appealed his conviction through the ranks of the Texas courts; each court rejected his argument that the statute violated the Fourteenth Amendment’s Equal Protection Clause.<sup>74</sup> The United States Supreme Court granted certiorari to answer the questions whether the Texas statute criminalizing the sexual intimacy of same-sex couples violated the Fourteenth Amendment, namely the provision for equal protection of the laws, and whether the convictions for “adult consensual sexual intimacy in the home” violated Lawrence’s interests in liberty and privacy under the Due Process Clause of the Fourteenth Amendment.<sup>75</sup>

The Supreme Court held that the Texas sodomy statute that formed the basis for the case served “no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”<sup>76</sup> The Court stated that the Due Process Clause of the Fourteenth Amendment provides individuals the “full right to engage in their conduct without intervention of the government,” effectively invalidating all state statutes similar to the Texas statute.<sup>77</sup> The ruling by the Court in *Lawrence* changed the legal landscape for the LGBT community; states were no longer permitted to interfere with the personal and private relationships of same-sex couples through the enforcement of criminal sodomy statutes.

Specifically, the Texas statute that landed *Lawrence* in the United States Supreme Court stated, in relevant part, that “[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.”<sup>78</sup> The conduct the statute describes as “deviate” is defined as, “any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object.”<sup>79</sup> The statute, while unenforceable because of the Court’s

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 563.

<sup>75</sup> *Id.* at 564.

<sup>76</sup> *Id.* at 578.

<sup>77</sup> *Id.*

<sup>78</sup> TEX. PENAL CODE ANN. § 21.06(a) (West 2003).

<sup>79</sup> *Id.* § 21.01.

ruling in *Lawrence*, remains on the books in Texas as a lingering reminder of the prejudice that sullied the State's institution of law.<sup>80</sup>

Similar to Texas's unpealed sodomy statute, anti-sodomy laws exist on the books in twelve states, despite the Supreme Court's invalidation of such laws, including: Alabama, Florida, Kansas, Louisiana, Michigan, Mississippi, North Carolina, Oklahoma, South Carolina, Texas and Utah.<sup>81</sup> While some argue that the states' anti-sodomy bans remain on the books merely because of the trouble it would take to detach consensual sodomy from aggravated sodomy (often contained in a single statute), others maintain that it is a "reflection of . . . overall homophobia."<sup>82</sup>

*Lawrence v. Texas* stands as a landmark case in the national progression of LGBT rights because of its dramatic implications on states' discriminatory anti-gay practices.<sup>83</sup> Society's understanding, tolerance and acceptance of LGBT people have allowed for the progression and expansion of LGBT rights in the United States over time. In *United States v. Windsor*,<sup>84</sup> the government appealed a Second Circuit decision that the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, was unconstitutional.<sup>85</sup> DOMA addressed the defining factor of marriage and spouses:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.<sup>86</sup>

The conflict in *Windsor* arose when the United States government refused to recognize Edie Windsor and Thea Spyer's marriage for tax purposes following Spyer's death, despite the fact that

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<sup>80</sup> Bobby Blanchard, *Why Does the Texas Criminal Code Still Ban "Homosexual Conduct"?*, TEX. TRIB. (Mar. 27, 2017), <https://www.texastribune.org/2017/03/27/why-does-texas-criminal-code-still-ban-homosexual-conduct/>.

<sup>81</sup> *12 States Still Ban Sodomy a Decade After Court Ruling*, USA TODAY (Apr. 21, 2014), <https://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025/>.

<sup>82</sup> *Id.*

<sup>83</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>84</sup> 133 S. Ct. 2675 (2013).

<sup>85</sup> *Id.* at 2679.

<sup>86</sup> 1 U.S.C. § 7 (1996).

the couple was married in Canada.<sup>87</sup> While the couple's domicile, New York, recognized the marriage that took place in Ontario, Canada, Edie Windsor was denied her surviving spouse federal estate tax exemption.<sup>88</sup>

Ultimately, the Court in *Windsor* upheld the Second Circuit's decision, declaring DOMA unconstitutional based on the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection Clause, which prohibits unequal protection of the laws by the federal government.<sup>89</sup> In analyzing DOMA's conflict with constitutional protections, the Court noted that "[w]hile the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved."<sup>90</sup> The Court reasoned that, "[u]nder DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound."<sup>91</sup>

Later, when the Supreme Court decided the case for marriage equality, *Obergefell v. Hodges*, it highlighted that the "right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."<sup>92</sup> Moreover, the Court held that maintaining exclusion of same-sex couples from marriage "conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser."<sup>93</sup> The Court took, perhaps, its most drastic leap in favor of gay rights in its ruling in *Obergefell* because it provided legal recognition of same-sex marriage, acknowledging the need for equality under the laws.

Although the Court's decisions in *Lawrence*, *Windsor*, and *Obergefell* represent a socially progressive advancement of LGBT rights in America, the existence of the gay panic defense is,

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<sup>87</sup> *Windsor*, 133 S. Ct. at 2679.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 2695.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 2679.

<sup>92</sup> *Id.* at 2603.

<sup>93</sup> *Id.* at 2601-02.



nevertheless, another hurdle standing in the way of progress and the achievement of equality for the community. The social, political, economic, and judicial impacts of homophobia have had dramatic implications on this country for virtually all of its existence.<sup>94</sup> However, evolution of law has slowly, but certainly not universally, begun to change the tides. In New York, the Third Department of the Appellate Division recently held that to accuse someone of being gay does not rise to the level of defamation *per se*.<sup>95</sup> When a man was accused of being gay, he sued the accuser alleging no economic damages, but simply that the accusation amounted to defamation *per se*.<sup>96</sup> The court held that being called gay is not so damaging as to amount to a claim of defamation, and that any decision to that effect is “inconsistent with current public policy and should no longer be followed.”<sup>97</sup> The court in *Yonaty v. Mincolla* reasoned that:

In light of the tremendous evolution in social attitudes regarding homosexuality . . . and the considerable legal protection and respect that the law of this state now accords lesbians, gays and bisexuals, it cannot be said that current public opinion supports a rule that would equate statements imputing homosexuality with accusations of serious criminal conduct or insinuations that an individual has a loathsome disease.<sup>98</sup>

The court recognized the clear shift in society’s tolerance for and, furthermore, acceptance of, LGBT persons within its communities, rather than as outsiders.

It is without question that the United States has made significant strides in remedying the extreme hardships faced by LGBT persons for decades. As with all social movements in our nation’s history, the Gay Rights Movement’s success has not been universal; problems persist and the struggle continues. Despite the public’s

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<sup>94</sup> HATE IN AMERICA: A TOWN ON FIRE (Peacock Productions 2016).

<sup>95</sup> *Yonaty v. Mincolla*, 945 N.Y.S.2d 774 (App. Div. 3d Dep’t 2012); *see also* Samuel Brenner, “Negro Blood in His Veins”: The Development and Disappearance of the Doctrine of Defamation Per Se By Radical Misidentification in the American South, 50 SANTA CLARA L. REV. 333, 340 (2010) (describing the fact that historically, common law courts have recognized specific categories of defamation, which are considered defamation *per se*, or “by itself,” among these were specifically: representations of criminal conduct, sexual misconduct, loathsome disease, or negative representations affecting one’s business, or profession).

<sup>96</sup> *Yonaty*, 945 N.Y.S.2d at 776.

<sup>97</sup> *Id.* at 777.

<sup>98</sup> *Id.* at 778-79.

evolving views toward LGBT persons, and the law's reluctant push in the same direction, gay and transgender individuals continue facing violence at disproportionately higher rates than any other group of people.<sup>99</sup> In comparing the rates of hate crimes committed against historically persecuted groups in the United States, LGBT people today exceed in the numbers by leaps and bounds.<sup>100</sup> Furthermore, the gay panic defense perpetuates the continued violence against LGBT persons by allowing a perpetrator to mitigate punishment, or avoid it entirely, solely on the basis of his or her victim's actual or perceived sexual orientation or gender identity.<sup>101</sup>

The discussion of the gay panic defense calls into question hate crimes and how the differing logic behind the two can be squared, if at all. Where, on one hand we have hate crime legislation throughout the country which protects classes of individuals, thus making the identity of the individual the very fact to be considered central; on the other hand, we have the proposed ban on gay panic defenses, which asserts that the violent defendant should not be able to introduce a victim's gender identity or sexual orientation. The contradiction is clear, we are seemingly aiming to pick and choose when and where it may be convenient to introduce the identity information of a victim, but the logic is not flawed as it may appear at first glance. In hate crimes, the focus on identity is to "specify the nature of the crime," whereas, asserting the gay panic defense uses identity to mitigate the offense.<sup>102</sup> It would be impossible to identify a hate crime without mention of the classification, whereas it is entirely possible to assert a defense without the use of the gender or sexual identity of the victim.

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<sup>99</sup> JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011), <https://www.ncgs.org/wp-content/uploads/2017/11/Injustice-at-Every-Turn-A-Report-of-the-National-Transgender-Discrimination-Survey.pdf>.

<sup>100</sup> See Haeyoun Park & Iaryna Mykhyalshyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html> ("L.G.B.T. people are twice as likely to be targeted as African-Americans, and the rate of hate crimes against them has surpassed that of crimes against Jews."); see also Tim Fitzsimons, *Anti-LGBTQ Hate Crimes Rose 3 Percent in '17, FBI Finds*, NBC NEWS (Nov. 14, 2018, 11:58 AM), <https://www.nbcnews.com/feature/nbc-out/anti-lgbtq-hate-crimes-rose-3-percent-17-fbi-finds-n936166> (explaining that 60 percent of over 1,200 separate incidents targeted gay men).

<sup>101</sup> WOODS ET AL., *supra* note 9.

<sup>102</sup> Interview with Professor Jeremy Wisniewski, Professor of Philosophy and Logic, Hartwick College, Oneonta, New York (Mar. 13, 2019).

To explore the logic, let us look to a racial analogy. It is unlikely that a jury would find that a person being black is sufficient reason to attack them, or even that their “blackness” struck fear in them. If, in the broader scheme of this all, “gayness” and blackness have the same status then, “that same reasoning should apply in defenses as well as hate crime identification. If sexual orientation and race are protected under hate crime law, the same reasoning demands that we include race and sex as likewise analogous when we consider defenses based on one or the other.”<sup>103</sup>

As a society, we readily decline to allow racial or religious bias to serve as a defense to criminal acts, and sexual orientation and gender are seemingly no different under the circumstances. According to Professor Wisniewski, “the logic of similarity should rule the treatment of similar cases.”<sup>104</sup> As it appears, the logic was sound to the lawmakers of several states, who have successfully implemented some version of the ban.

#### IV. THE GAY PANIC DEFENSE: PERMISSIVE VICTIM BLAMING

The gay panic defense is a method of shifting attention from the crime committed by the defendant to the victim. This “legal strategy which asks a jury to find that a victim’s sexual orientation or gender identity is to blame for the defendant’s violent reaction,” effectively shifts the defense from the defendant to the victim’s character or personal identity.<sup>105</sup> Such shift in focus in criminal trials is not a new phenomenon nor one isolated to the context of this defense. It is a “devaluing act where the victim of a crime, accident, or any type of abusive maltreatment is held as wholly or partially responsible for the wrongful conduct committed against them.”<sup>106</sup>

Courts and legislators have become increasingly aware of victim-blaming and the need to remedy the prejudicial impact of such

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Supra* note 8.

<sup>106</sup> *Victim Blaming Law and Legal Definition*, USLEGAL.COM, <https://definitions.uslegal.com/v/victim-blaming/> (last visited Apr. 4, 2019).

defense techniques.<sup>107</sup> In the context of rape cases, attempts to place blame on the victim often fail because of strictly enforced limitations on admissible evidence through application of rape shield laws.<sup>108</sup> The laws protect victims of sexual crimes from being subjected to questioning regarding their sexual history.<sup>109</sup> The idea behind rape shield laws is to encourage victims to come forward, rather than living in silence, and mitigate likely biases of jurors who are “unduly influenced and prejudiced” by hearing the details of a victim’s intimate past.<sup>110</sup>

In *Burton v. State*,<sup>111</sup> the court noted that “[a]rguments which are calculated to appeal to the jury’s prejudice or passion are improper because they pose a risk that the accused may be convicted for reasons wholly irrelevant to his guilt or innocence.”<sup>112</sup> In *Burton*, the defendant appealed a conviction for a sex crime against a minor.<sup>113</sup> The defendant argued that, during trial, the prosecutor made improper arguments that impacted the jury’s perception of him morally, that the verdict was based on the values and emotions of the jurors rather than the facts of the case.<sup>114</sup> The court held that the prosecutor’s argument was “not an improper appeal to community sentiment.”<sup>115</sup> The defendant’s argument rested upon the notion that, because of the prosecutor’s inflammatory remarks, used solely to invoke the passions of the jury, he was convicted, not because of the evidence presented or the prosecutor’s case.<sup>116</sup> The reasoning of that appeal is precisely what makes the gay panic defense work, improper and prejudicial pleas to biased jurors who feel more offended by the notion of gayness than violence or murder. While the *Burton* case is unassociated with the LGBT community and its efforts, the defendant’s argument reflects the

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<sup>107</sup> Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1607 (2009) (“In recent decades, legislators across the country have moved to eliminate victim-blaming elements from the law . . . to sharply limit the use of victim-blaming as the forensic tactic-of-choice for lawyers.”).

<sup>108</sup> See FED. R. EVID. 412.

<sup>109</sup> Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 990 (2008).

<sup>110</sup> *Id.*

<sup>111</sup> 46 P.3d 309 (Wyo. 2002).

<sup>112</sup> *Id.* at 314.

<sup>113</sup> *Id.* at 309.

<sup>114</sup> *Id.* at 314-15.

<sup>115</sup> *Id.* at 315.

<sup>116</sup> *Id.* at 309.

manner in which jurors' passions may be capitalized to bring a guilty verdict based on emotion and bias, rather than evidence, fact and law.

Critics of both rape shield laws and gay panic defense bans argue that defendants' Sixth Amendment rights are impeded by such limitations.<sup>117</sup> However, it is well-established that these Sixth Amendment protections have limits, and the invocation of such rights cannot "automatically and invariably outweigh countervailing public interests."<sup>118</sup> Above all, our judicial system rests upon a foundation of "fair and efficient administration of justice."<sup>119</sup> It is paramount that, in achieving justice, the victims' rights are brought into consideration; whether information may or may not be admissible depends on the "potential prejudice to the truth-determining function of the trial process [that] must also weigh in the balance."<sup>120</sup>

To allow a victim's sexual or gender identity to have any bearing on the crime committed against him or her is synonymous with the concept of victim-blaming; that the victim's identity or status is what caused the violence, rather than the defendant's own choices or impulses. It is to say, had the victim not been gay, he would not have been murdered. The focus in the criminal trial must be the facts of the case as to the accused, who is on trial, not the victim's sexual orientation or gender identity. Thus, gay panic defense bans should be universally implemented to protect LGBT victims in the same way that rape shield laws protect victims of sexual assault. Aside from the defense being antithetical to current social acceptance of the LGBT community, the gay panic defense is rooted in outdated victim-blaming exercises; it is a flawed, pervasive technique that has no place in our justice system.

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<sup>117</sup> U.S. CONST. amend. VI, which states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

<sup>118</sup> *Taylor v. Illinois*, 108 S. Ct. 646, 656 (1988).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

## V. CURRENT AND PENDING BANS

What this Note proposes is hardly impractical or impossible: states must proactively put an end to the use of the gay panic defense because of its detrimental impact on the legitimate function of the criminal justice system. The failure of the vast majority of states to enact legislation prohibiting gay panic defenses reflects uneasiness with adapting the law to the progressive evolution of our society.<sup>121</sup> Such legislation is feasible and possible as demonstrated by the legislation enacted in California, Illinois and Rhode Island which bans the gay panic defense.

### A. California

In 2014, California became the first state to ban use of the gay panic defense in criminal proceedings, proposing, in its bill to amend the Penal Code:

*For purposes of determining sudden quarrel or heat of passion . . . the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the*

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<sup>121</sup> See E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 40 (1985) (describing the theories of legal evolution).

The "social" approach to legal evolution . . . is characterized by the assertion that law is not an autonomous system, but an integral part of the social life of a community. In these theories, it is not so much the law that evolves, as it is society. As the language, culture, political system, and economic structure of society evolve, the law changes with them.

See also Larry D. Barnett, *Social Productivity, Law, And The Regulation of Conflicts of Interest in the Investment Industry*, 3 CARDOZO PUB. L., POL'Y & ETHICS J. 793, 795 (2006) (describing the intricate relationship between law and society).

[L]aw must support social life . . . when existing law fails to do so, the rules (and occasionally the concepts) of law change in order to furnish this support. Changes in law . . . occur because the evolution of law cannot be divorced from, but must reflect, the evolution of society.

*Id.*

defendant, or if the defendant and victim dated or had a romantic or sexual relationship.<sup>122</sup>

The bill limits a defendant's ability to assert provocation as a defense for murder in reaction to a romantic attempt or interaction by a member of the same sex under the laws of the state. Similar to the way rape shield laws protect victims of sexual crimes in criminal trials by limiting the defendant's admission of the victim's sexual history, the gay panic defense ban precludes a defendant from introducing a victim's sexual or gender identity in precisely the same manner.<sup>123</sup>

Ultimately, the gay panic defense ban that remains in effect today in California was likely made possible by an earlier act, The Gwen Araujo Justice for Victims Act, which preceded the current law by eight years having been enacted in 2006.<sup>124</sup> The Act was named in memory of a murder victim whose perpetrators attempted to employ the panic defense, asserting that their discovery that the victim was transgender instigated their homicidal reaction.<sup>125</sup> It sets forth gender and sexual orientation as protected categories under hate crimes and aimed to curtail defendants' abilities to "play upon bias in attempting to win acquittal or to seek a lesser charge."<sup>126</sup>

The Legislature expressed concerns with the use of "panic strategies" in defense of violent crimes and the notion of jurors acquitting violent defendants because of bias. The bill introduced a jury charge, available at a party's request:

Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation.<sup>127</sup>

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<sup>122</sup> Assemb. B. 2501, ch. 684 (Cal. 2014) (emphasis added), amending CAL. PENAL CODE § 192.

<sup>123</sup> Analogous to admission of rape victim's sexual past, the gay panic defense similarly makes little sense. If, for example a man murdered a woman, he could never defend himself by asserting that she was wildly promiscuous or that her non-violent sexuality struck panic in him. The two are logically parallel to one another.

<sup>124</sup> Assemb. B. 1160, ch. 550 (Cal. 2006).

<sup>125</sup> *Gwen Araujo and the Justice for Victims Act*, TRANSGENDER L. CTR. (June 9, 2010), <https://transgenderlawcenter.org/archives/339>.

<sup>126</sup> Assemb. B. 1160, *supra* note 124.

<sup>127</sup> *See supra* note 121.

The law that remains on the books today<sup>128</sup> constricts a defendant's tactical abilities by precluding any defense of provocation based upon actual or perceived gender identity or sexual orientation.<sup>129</sup> The ban was made possible, in part, with support from organizations such as Equality California, which argued that the bill would make it clear "that [violence] is never acceptable, and that there is no place for prejudice against people who are lesbian, gay, bisexual, or transgender."<sup>130</sup> The gay panic defense ban officially became law in 2014, despite arguments by California Attorneys for Criminal Justice that the ban "undermines core principles of the theory of manslaughter" by doing away with the reduction in crime from murder to manslaughter, a lesser charge, where the defendant kills as a result of provocation or "intense emotion."<sup>131</sup> In accordance with jurisprudence's progression with societal values, the law rejects the notion that one's differing sexual orientation or gender identity is cause for concern or panic resulting in a violent outburst. California's gay panic defense ban, however, when compared to that of the two subsequent states to follow its lead, falls short in terms of the protection it offers, in that it is too narrowly defined and does not account for all of the ways in which defendants can assert the gay panic defense. Focused only on instances in which the defendant asserts a provocation defense, the ban fails to address the possibility of the defendant's asserting some form of the gay panic defense through another means, namely insanity/diminished capacity, or self-defense.

## B. Illinois

Illinois followed California's lead, introducing two new provisions that limit the use of the defense:

Provided, however, that an action that does not otherwise mitigate first degree murder cannot qualify as a mitigating factor for first degree murder because of the discovery, knowledge, or disclosure of the victim's sexual orientation.<sup>132</sup>

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<sup>128</sup> See *supra* note 122.

<sup>129</sup> See *supra* note 119.

<sup>130</sup> Assemb. B. 1160, *supra* note 124.

<sup>131</sup> *Id.*

<sup>132</sup> S.B. 1761, 100th Gen. Assemb. (Ill. 2017).



Serious provocation is conduct sufficient to excite an intense passion in a reasonable person provided, however, that an action that does not otherwise constitute serious provocation cannot qualify as serious provocation because of the discovery, knowledge, or disclosure of the victim's sexual orientation.<sup>133</sup>

Illinois' statute essentially states that the discovery of a victim's sexual orientation or gender identity may not suffice for an assertion of the provocation defense and, more broadly, that any attempt to mitigate the crime of murder will fail if based solely upon similar discovery. With support from various public interest organizations and civil rights groups, the bill passed unanimously in both the State House and Senate and was subsequently signed into law by the Governor.<sup>134</sup> Illinois' law follows California's in that it prohibits provocation as a defense because of a victim's actual or perceived sexual orientation or gender identity, but the law has a broader scope than California's. In addition to prohibiting the use of provocation under such circumstances, Illinois also limits a defendant's ability to use the gay panic defense in any capacity to mitigate a charge of first degree murder. The Illinois law says that, unless there would be some applicable defense without the gay panic element, such a defense may not stand to mitigate the charge of first degree murder, constricting the criminal defendant's ability to escape justice for their crime.

### C. Rhode Island

In July of 2018, the Rhode Island Governor, Gina Raimondo, signed House Bill 7066 into law, which in addition to banning use of the gay panic defense, wholly amended criminal trial procedure.<sup>135</sup>

[P]rovocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived

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<sup>133</sup> *Id.*

<sup>134</sup> *Equality Illinois 2017 LGBTQ Legislative Agenda: Advancing and Defending LGBTQ Civil Rights*, EQUALITY ILL., <https://www.equalityillinois.us/2017-legis/> (last visited Apr. 4, 2019) (defining the complete agenda as "a package of bills to advance the civil rights protections of LGBTQ Illinoisans in the criminal justice system, improve representation on public boards and commissions and assist transgender Illinoisans").

<sup>135</sup> H.B. 7066, ch. 125 (R.I. 2018).

gender, gender identity, gender expression, or sexual orientation . . . . A defendant does not suffer from reduced mental capacity based solely on the discovery or, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation . . . . A person is not justified in using force against another based solely on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation.<sup>136</sup>

Rhode Island is a state that has no record of the defense's ever being used or attempted; however, the sponsors of the legislation voiced that the state "must specify that it is an invalid defense to ensure that it remains unused."<sup>137</sup> The Rhode Island statute, arguably, is the most encompassing law of the three states that have banned the gay panic defense. However, the law did not pass without resistance.<sup>138</sup> A Republican state representative, Justin Price, expressed concerns that such a ban would be harmful because it permits the withholding of information (the victim's sexual orientation or gender identity) from the jury and, thus, prevents them from making a sound decision.<sup>139</sup> Nevertheless, Rhode Island's statute bans the use of the "unrecognized" defense under each of the three official defenses through which it is typically brought: provocation, self-defense and diminished capacity.

#### D. Pending Legislation

Along with California, Illinois, and Rhode Island, similar legislation banning use of the gay panic defense is pending in New Jersey, Washington, and the District of Columbia.<sup>140</sup> Additionally, there is a pending federal bill that would prohibit such defenses in

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<sup>136</sup> *Id.*

<sup>137</sup> Katherine Gregg, *R.I. House Votes to End 'Gay or Trans' Panic Defense*, PROVIDENCE J. (May 22, 2018), <https://www.providencejournal.com/news/20180522/ri-house-votes-to-end-gay-or-trans-panic-defense>.

<sup>138</sup> Christianna Silva, *The "Gay Panic" Defense for Murder Could be on Its Way Out*, VICE NEWS (July 20, 2018), [https://news.vice.com/en\\_us/article/ywkp9m/the-gay-panic-defense-for-murder-could-be-on-its-way-out](https://news.vice.com/en_us/article/ywkp9m/the-gay-panic-defense-for-murder-could-be-on-its-way-out).

<sup>139</sup> *Id.*

<sup>140</sup> *See supra* note 8.

federal criminal cases.<sup>141</sup> The federal bill, in relevant part, states that “no nonviolent sexual advance or perception or belief, even if inaccurate, of the gender, gender identity or expression, or sexual orientation of an individual may be used to excuse or justify the conduct of an individual or mitigate the severity of an offense.”<sup>142</sup> This proposed legislation would be the broadest of the gay panic defense bans, as it widely prohibits the use of gay panic defense tactics on any level, for the reasons of excusing or justifying a defendant’s conduct. The proposed federal ban would offer the greatest level of protections to victims, and could serve as an influential model for the states to adopt and follow. While successfully passing this bill at the federal level would eliminate this defense tactic in federal courts, state courts would not be bound by the law and state legislatures must act to codify their own individual bans.<sup>143</sup>

## VI. CONCLUSION

Today, in every state except Rhode Island, Illinois, and California, the “gay panic” defense exists as a fully-functional (but unofficial) defense for violent crimes in state and federal court. By asserting the gay panic defense, often as an undertone to a defense of insanity, diminished capacity or provocation, defendants shift the focus of the trial from their crime to the perceived or actual sexual orientation or gender identity of the victim. The defense plays on implicit bias and latent homophobia to shield the defendant from responsibility due to inaccurate, but existing notions that gay and transgender people are innate predators or sexual deviants.

The defense is an outdated technique that capitalizes on lingering bias against the LGBT community by reducing a defendant’s perceived culpability or absolving offenders entirely. It is based on notions that LGBT victims are mentally ill, inferior, and frightening, despite the medical rejection of such notions and the ever-growing social progression contradicting such thought. Yet, the gay panic defense continues to insult the integrity of the criminal justice system.

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<sup>141</sup> Gay and Trans Panic Defense Prohibition Act of 2018, H.R. 6358, 125th Cong. (2018).

<sup>142</sup> *Id.*

<sup>143</sup> This is to say that at the federal level, as of this writing, the gay panic defense remains a permissible means through which to defend a case, and individual state bans have no bearing whatsoever on the defenses as used in federal courts proceedings. Similarly, the proposed federal legislation would impact only cases appearing in federal courts.

Furthermore, the admissibility of the defense harms LGBT people in the very forum in which they, as victims, should be able to seek justice and protection.

The fact is, defenses based on the discovery of a victim's minority status are rarely given validity in courts of law, but the defense of gay panic has been allowed to disrupt our judicial system. A defendant's discovery that his victim was Muslim, or Jewish, or Hispanic, or poor would never serve as a defense through which a defendant would evade justice and walk free.

Victims of violent crimes deserve justice; however, the gay panic defense often re-victimizes them and allows offenders to receive reduced convictions and sentences based on the victim's sexual orientation or gender identity. Modern society has progressed to a point where it is absurd to hinder our justice system because of an obstacle rooted in aversion and fear of gay and transgender citizens. To prohibit the defense would be a proactive effort by state legislators that ought to be inspired by and modeled on the fashion of the three states which have passed legislation banning the defense. The gay panic defense is an affront to LGBT people in this country and a weakness within the criminal justice system that must be managed by states taking the initiative to protect all of its citizens. As Americans, we must remember the observation of Dallin H. Oaks, that

[O]ur procedures are not the ultimate goals of our legal system. Our goals are truth and justice . . . truth and justice are ultimate values, so understood by our people, and the legal profession will not be worthy of public respect and loyalty if we allow our attention to be diverted from these goals.<sup>144</sup>

The complexities involved with transitioning our legal system to represent our social understandings as modern Americans may be arduous, but in order to reach the paramount goal of justice, we must remove this blemish that remains.

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<sup>144</sup> Dallin H. Oaks, *Ethics, Morality, and Professional Responsibility*, 1975 BYU L. REV. 591, 596, <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1039&context=lawreview>.