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## You Need to Calm Down: Examining the Origin and Eliminating the Future of the “Gay Panic” Defense

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## **You Need to Calm Down<sup>1</sup>: Examining the Origin and Eliminating the Future of the “Gay Panic” Defense<sup>2</sup>**

LAURA R. CONBOY†

### INTRODUCTION

“‘Gay Panic’ Defenses Are Banned in N.Y. Murder Cases” proudly proclaims a 2019 *New York Times* headline.<sup>3</sup> That

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1. TAYLOR SWIFT, *You Need to Calm Down*, on LOVER (Republic Records 2019); *see also* Taylor Swift, *You Need to Calm Down*, YOUTUBE (Jun. 17, 2019), <https://www.youtube.com/watch?v=Dkk9gvTmCXY> (Swift’s music video showcases many LGBTQ+ celebrities to address homophobia and transphobia and raises support for her Change.org petition. The petition advocates for the Senate to pass the Equality Act, protecting LGBTQ+ people from discrimination in their places of work, homes, schools, and other public accommodations.).

2. This Comment was written in Spring 2021. Following its completion, the climate around LGBTQ+ rights changed dramatically as a wave of anti-LGBTQ+ laws has swept the country such as Florida House Bill 1557 (“Don’t Say Gay”) and Texas Governor Greg Abbott’s directive to Texas health agencies equating gender affirming care to child abuse. *See* H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (effective July 1, 2022); Directive from Greg Abbott, Governor of Texas, to Jaime Masters, Texas Dep’t of Fam. & Protective Servs. (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf> [<https://web.archive.org/web/20220428182559/https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf>]. While this Comment does not discuss these recent developments, they only underscore the urgent need for the legal community to act to enshrine LGBTQ+ rights and protections.

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3. Michael Gold, *‘Gay Panic’ Defenses Are Banned in N.Y. Murder Cases*,

article heralds the ban as a civil rights victory, and it undoubtedly is; however, it also leaves a lingering question for readers: what civil rights failure allowed this defense to be legally permissible in New York until now? The article was published on June 19, 2019—almost exactly fifty years to the day from the Stonewall Riots in Greenwich Village in New York City.<sup>4</sup> In all the progress made for gay rights in the last half century, how was this indefensible defense able to persist?<sup>5</sup>

In simple terms, the “gay panic” defense is a legal strategy in which a cisgender,<sup>6</sup> heterosexual<sup>7</sup> person learns another person is Lesbian, Gay, Bisexual, Transgender, Questioning, Queer, or another marginalized gender or sexual orientation (LGBTQ+),<sup>8</sup> and upon learning that, flies into a murderous rage, caused by the shock of learning the

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N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/nyregion/gay-panic-ny.html>.

4. See *A Brief History of Civil Rights in the United States: LGBTQ Civil Rights, The Stonewall Riots*, GEO. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=592919&p=4182235> (Apr. 27, 2022, 4:24 PM) (“In 1969, a riot at the Stonewall Inn (later known as the Stonewall Riots) became a turning point. Though few records of the actual raid and riots that followed exist, the oral history of that time has been captured by the participants—both those who rioted and the police. The Stonewall Riots ignited after a police raid took place at the Stonewall Inn. The tension from ongoing harassment galvanized the LGBTQ community to riot for six days. The protest through the streets of New York City is memorialized [in] the annual Gay Pride parades that are now celebrated around the world.”).

5. See generally Devan N. Patel, Note, *The Indefensible “Gay Panic Defense,”* 46 J. LEGIS. 100 (2019).

6. See *Cisgender*, OXFORD ENGLISH DICTIONARY (3d ed. 2015) (defining cisgender as “[d]esignating a person whose sense of personal identity and gender corresponds to his or her sex at birth; of or relating to such persons. Contrasted with transgender”).

7. See *Heterosexual*, OXFORD ENGLISH DICTIONARY (3d ed. 2018) (defining heterosexual as “[s]exually or romantically attracted to, or engaging in sexual activity with, people of the opposite sex”).

8. Emanuella Grinberg, *What the “Q” in LGBTQ Stands For, and Other Identity Terms Explained*, CNN (June 14, 2019), <https://www.cnn.com/interactive/2019/06/health/lgbtq-explainer/>.

victim’s sexual orientation or gender identity.<sup>9</sup>

For clarity I will forgo the most widely known term “gay panic” for the more inclusive LGBTQ+ panic, except where historically necessary. I will also limit the focus to the term’s use in law concerning violence motivated by sexual orientation. This choice is made not to diminish the devastating prevalence of violence against all LGBTQ+ people—especially transgender people—but instead to focus this Comment and avoid over-simplifying queer identities in the law. The intersectionality of such queer identities and the impossibility of truly divorcing these identities when looking at a history of hate crimes does not go, and should not go, unacknowledged.

In this Comment, I will start by examining the history of the specific psychological term “gay panic” and its extrapolation to a legal defense strategy. I will next look at its continued legal application despite changing public opinion, as well as judicial decisions and legislative accomplishments. Finally, I will propose changes to the Federal Rules of Evidence limiting the ability to use the LGBTQ+ panic defense in court as a much-needed anti-homophobic stance from the legal community. While greater acceptance of the LGBTQ+ community is growing, the legal community still has a responsibility to act proactively to ensure the safety of the most vulnerable under the law.

#### I. BACKGROUND ON THE ORIGIN OF THE DEFENSE AND ITS USE IN LAW

In this Part, I will examine the origin of the term “gay panic” and its use in psychology, specifically the Diagnostic and Statistical Manual of Mental Disorders. Following this,

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9. LGBTQ+ “Panic” Defense, NAT’L LGBT BAR ASS’N, <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/> (last visited Mar. 16, 2022); Bill Daley, *As the Abbreviation Grows, What Does LGBTQIA Stand For?*, CHI. TRIB. (Jun. 8, 2017, 9:32 AM), [https://www.chicagotribune.com/lifestyles/ct\\_lgbtqia\\_letters\\_defined-htmlstory.html](https://www.chicagotribune.com/lifestyles/ct_lgbtqia_letters_defined-htmlstory.html).

I will analyze how the term was then extrapolated into legal arguments as a defense strategy for violent crimes against people in the LGBTQ+ community.

A. *Origin of the Term*

Throughout history, sexuality has always existed across a biological spectrum. In nature, many animals, including beetles, sheep, fruit bats, dolphins, and orangutans, show homosexual tendencies.<sup>10</sup> In human sexuality, gay peoples' existence and contributions predate the gay rights movement by several millennia. References to homosexuality can be found in ancient traditions across the world, spanning ethnicities, religions, and traditions, such as the Torah of Ancient Judaism, the New Testament of Christianity, the writings of Greek philosophers, and the ceremonial roles for LGBTQ+ people in Indigenous American nations.<sup>11</sup> If not exclusively homosexual, many famous historical figures expressed bisexual desires, such as Socrates, Alexander the Great, Lord Byron, Edward II, Hadrian, Julius Caesar, Michelangelo, Donatello, Leonardo da Vinci, Oscar Wilde, Vita Sackville-West, Alfonsina Storni, and Christopher Marlowe.<sup>12</sup>

Despite the widespread knowledge of a sexuality spectrum, the United States has historically restricted gay rights. In 1625, a ship master was executed in Virginia for sodomy, the earliest administration of anti-sodomy laws in

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10. See James Owen, *Homosexual Activity Among Animals Stirs Debate*, NAT'L GEOGRAPHIC (July 23, 2004), <https://www.nationalgeographic.com/science/article/homosexual-animals-debate>.

11. See *Genesis* 19:1–8; *Leviticus* 18:22, 20:13; 1 *Corinthians* 6:9–10; 1 *Timothy* 1:10; *Romans* 1:26–27; *Homosexuality*, STAN. ENCYC. PHIL. (Apr. 28 2020), <https://plato.stanford.edu/entries/homosexuality>; Johann Hari, *The Hidden History of Homosexuality in the US*, THE INDEP. (June 22, 2011, 12:00 AM), <https://www.independent.co.uk/news/world/americas/johann-hari-hidden-history-homosexuality-us-2300636.html>.

12. *Same Sex Couples – News and Information*, SEXUALDIVERSITY.ORG, <https://www.sexualdiversity.org/news/same/> (last visited Apr. 25, 2022).

the United States.<sup>13</sup> Although some American historical figures have been openly gay, such as President Grover Cleveland’s sister and de facto first lady in his first term, Rose “Libby” Cleveland, much of the LGBTQ+ history is based in speculation.<sup>14</sup> Explicit anti-gay legislation restricted many historical figures’ expressions of sexuality. Information surrounding these figures is often limited to rumors, such as those surrounding bachelor President James Buchanan’s sexuality.<sup>15</sup>

Culturally, similar restrictions have limited expressions of sexuality beyond cisgender and heterosexual expressions. Although some strides were made in the early days of cinema, regulation surrounding indecency in movies set back efforts to show queer stories, stifling them for much of the twentieth century.<sup>16</sup> Despite media regulations and codified laws, public recognition of homosexuality continued to

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13. See Dana Liebelson, *Why Do So Many States Still Have Anti-Sodomy Laws?*, WK. (Apr. 8, 2013), <https://theweek.com/articles/465821/why-many-states-still-have-antisodomy-laws>.

14. See Gillian Brockell, *A Gay First Lady? Yes, We’ve Already Had One, and Here Are Her Love Letters.*, WASH. POST (June 20, 2019), <https://www.washingtonpost.com/history/2019/06/20/she-was-once-first-lady-she-is-buried-next-her-long-time-female-partner/> (Brockell describes the nearly thirty-year relationship between Evangeline Simpson Whipple and Rose Cleveland including love letters, romantic nicknames, their immigration to Tuscany, and their neighboring burial plots. Although lesbian was only a word used in reference to Sappho’s poetry, the romantic friendship was “undoubtedly sexual, in addition to loving and intimate . . . . One letter describes ‘long rapturous embraces’ that ‘carry us both in one to the summit of joy, the end of search, the goal of love!’”).

15. See Thomas Balcerski, *The 175-Year History of Speculating About President James Buchanan’s Bachelorhood*, SMITHSONIAN MAG. (Aug. 27, 2019), <https://www.smithsonianmag.com/history/175-year-history-examining-bachelor-president-james-buchanans-close-friendship-william-rufus-king-180972992/>.

16. See Sophie Cleghorn, *Film: The Hollywood Production Code of 1930 and LGBT Characters*, MEDIUM (Nov. 6, 2017), <https://medium.com/@sophieclegh/how-did-the-hollywood-production-code-of-1930-shape-the-representation-of-lgbt-characters-in-film-93e92a4fec62> (“This set the stage for *Wings* which was directed by William A. Wellman in 1927 and featured what is considered the first gay kiss in an American film. *Wings* follows two Air Force pilots in World War I, Jack and Dave, who compete for the affections of a beautiful girl before discovering the true love they feel for each other.”).

increase. With more visibility came more attempts to study and analyze homosexuality, particularly in the rapidly expanding fields of psychology and psychiatry.

To standardize the field of psychiatry, the American Psychiatry Association published the “Diagnostic and Statistical Manual of Mental Disorders,” known as the DSM-I, in 1952. This manual listed all recognized mental disorders to assist psychiatrists in classifications and diagnoses.<sup>17</sup> One such mental disorder found in the DSM-I was “homosexuality” as a “sociopathic personality disturbance.”<sup>18</sup> Despite research on homosexuality from various psychologists showing the normality of homosexuality, the DSM-I’s classification showed the prevailing attitude of the psychiatric community: it was a mental disorder for deviants on the level of pedophilia and sadism.<sup>19</sup> Not long after the DSM-I was released, with its inclusion of the psychological term of “panic, acute homosexual,”<sup>20</sup> came the first iteration of “gay panic,” or LGBTQ+ panic, as a legal defense strategy. As a strategy, the term took on a new life, and was manipulated into its more widely known definition, meaning the reactionary use of violence, separating and broadening its previous psychiatric definition.

Homosexuality as a mental disorder would remain in the official DSM until 1973, even after the DSM was revised into the DSM-II.<sup>21</sup> Throughout the 1960s, gay activists worked in and around the American Psychology Association to

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17. See AM. PSYCHIATRIC ASS’N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1st ed. 1952).

18. *Id.* at 38–39.

19. *Id.* at 39.

20. *Id.* at 121.

21. See *The A.P.A. Ruling on Homosexuality: The Issue Is Subtle, The Debate Still On*, N.Y. TIMES (Dec. 23, 1973), <https://www.nytimes.com/1973/12/23/archives/the-issue-is-subtle-the-debate-still-on-the-apa-ruling-on.html>.

declassify homosexuality as a disorder.<sup>22</sup> In one of the more memorable actions, a gay psychiatrist, Dr. John Fryer, spoke in disguise as Dr. H. Anonymous (due to the risk of openly identifying as gay) to testify on behalf of the declassification committee at a conference in 1972.<sup>23</sup> In addition to Dr. Fryer’s appearance on panels, gay activists also disrupted panels and gave speeches to make a clear statement to the psychological community: “Stop it, you’re making me sick.”<sup>24</sup> Facing pressure from gay rights activists following successful movements such as the Stonewall Riots, the term was eventually removed in 1973.<sup>25</sup> Despite some initial dissent in the psychology and psychiatry communities, the decision to remove homosexuality as a mental disorder was supported by scientific research from psychologists on human sexuality.<sup>26</sup> The classification of homosexuality as a psychiatric disorder was removed in the sixth reprinting of the DSM-II in 1973.<sup>27</sup>

#### B. *The Early Uses of LGBTQ+ Panic as a Legal Defense*

The DSM-I’s initial definition of “gay panic” was a reactionary use of violence. This definition was utilized soon after the DSM-I’s publication. One of the earliest documented uses of LGBTQ+ panic as a mitigating factor occurred during the trial for the murder of William T. Simpson, in which the defendants claimed Simpson’s homosexuality was a mitigating factor for their crime.<sup>28</sup> On

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22. See Ray Levy Uyeda, *How LGBTQ+ Activists Got “Homosexuality” Out of the DSM*, JSTOR DAILY (May 26, 2021), <https://daily.jstor.org/how-lgbtq-activists-got-homosexuality-out-of-the-dsm/>.

23. *Id.*

24. *Id.*

25. See *The A.P.A. Ruling on Homosexuality*, *supra* note 20.

26. See *id.*

27. *Id.*

28. See Graham Brunk, *1954 Miami Murder Leads to ‘Homosexual Panic,’* ERIE GAY NEWS, <https://www.eriegaynews.com/news/article.php?recordid=201711williamtsimpson> (last visited Apr. 27, 2022).



August 2, 1954, Simpson, a 27-year-old flight attendant, arrived from Detroit in his home city of Miami. He had told a co-worker about a scheduled date he had that evening.<sup>29</sup> On the way to his date, Simpson stopped at a bar, where he was propositioned by Charles Lawrence.<sup>30</sup> Unbeknownst to Simpson, Lawrence was notorious in Miami for scamming gay men by propositioning and then robbing them.<sup>31</sup> Lawrence would lure gay men into a secluded area under a bridge with the promise of relations, and then his accomplice, Lewis Killen, would rob the victim.<sup>32</sup> While the two were known for this modus operandi, called “rolling” gay men, they had previously limited their crimes to theft until August 2, when they escalated to lethal violence for unknown reasons.<sup>33</sup> Lawrence shot Simpson, and the two left him face-down in gravel, taking off with the twenty-five dollars Simpson had on him at the time.<sup>34</sup> Two Miami residents found Simpson’s body, where it had been left in a roadway in a pool of blood.<sup>35</sup>

The very next day, the *Miami Daily News* reported the murder, indicating its location as a “Lovers Lane” based on its alleged popularity in the gay community for its seclusion. Even in Miami, known for its popular and vibrant underground gay club scene, 1950s Florida was not a hospitable place for same-sex relations.<sup>36</sup> *Miami Daily News* referenced Simpson’s suspected sexuality, leading the story

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29. Graham Brunk, *How the Murder of a Flight Attendant in Miami Led to a ‘Homosexual Panic’ in 1954*, LGBTQ NATION (Oct. 23, 2017), <https://www.lgbtqnation.com/2017/10/murder-flight-attendant-miami-led-homosexual-panic-1954/>.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Death in Miami*, DAILY MIRROR (Nov. 20, 2010), <https://ladailymirror.com/2010/11/20/death-in-miami/>.

36. *See* Brunk, *supra* note 28.

to gain traction in the local media circuit.<sup>37</sup> The purported scandal of homosexuality, even suspected homosexuality, in mainstream media eclipsed all other details, stealing focus from the horror of the crime itself.<sup>38</sup> Capitalizing on the community’s interest in and outrage by Simpson’s sexuality, the newspaper published a follow-up story only a week after Simpson’s murder, titled “Pervert Colony Uncovered in Simpson Slaying Probe,” about a nearby area that was home to about 500 gay men.<sup>39</sup> Even with a full confession from both killers—Lawrence and Killen both admitted to the murder—the media at the time focused instead on Simpson’s own “culpability.”<sup>40</sup> One newspaper even claimed that Simpson had been looking to become “queen” of the colony, despite Simpson’s own modest lifestyle and inactivity in Miami’s gay scene.<sup>41</sup> Lawrence and Killen argued at their joint trial that although they had made a habit of robbing gay men in this manner, with Simpson they felt unsafe.<sup>42</sup> They argued Simpson made unwanted sexual advances towards Lawrence as well.<sup>43</sup> Negative public attitudes about gay people, as well as the media coverage surrounding Simpson’s death, inevitably influenced the trial and its outcome.<sup>44</sup> Even with their admissions, both Lawrence and Killen were convicted of manslaughter—a lesser charge than murder—for their roles in the death of Simpson.<sup>45</sup> Killen would later appeal this conviction arguing that the jury had been improperly instructed on the manslaughter charge, but the judge upheld the previous decision and Killen would go on to serve 20

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Brunk, *supra* note 27.

43. *Id.*

44. *See id.*

45. *Id.*

years in prison.<sup>46</sup>

Following its use in the trials of Lawrence and Killen for the murder of Simpson, the LGBTQ+ panic defense strategy's use continued. One event that brought attention to the defense was in the trial for the murder of Scott Amedure.<sup>47</sup> In 1995, a local talk show, hosted by Jenny Jones, discussed the topic of secret admirers.<sup>48</sup> Amedure's friend Jonathan Schmitz was a guest on that show, and Jones invited Amedure on to confess his crush on Schmitz.<sup>49</sup> Schmitz appeared on stage and greeted a female friend, thinking she was the secret admirer, but was soon shocked to see Amedure walk out and to hear him introduced as the real secret admirer.<sup>50</sup> Three days later, Schmitz drove to Amedure's house and shot him twice.<sup>51</sup> Schmitz left the scene and called 911 to confess to the shooting.<sup>52</sup> He attributed the reveal on Jenny Jones's show as the initial inciting incident, but the final provocation came when he received an unsigned suggestive note at his home, presumably written and delivered by Amedure.<sup>53</sup> Schmitz, although he had previously admitted to the killing, pled not guilty at his arraignment. At trial, Schmitz claimed that he suffered from diminished capacity due to the "ambush" by Jenny Jones and the "betray[al]" of Amedure's confession.<sup>54</sup> He stated that his psyche was so damaged that he could not form general or

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46. *Id.*; Killen v. State, 92 So. 2d 825, 826 (Fla. 1957).

47. LGBTQ+ "Panic" Defense, *supra* note 8.

48. *Id.*

49. *Id.*

50. See Associated Press, *Fatal Shooting Follows Surprise on TV Talk Show*, N.Y. TIMES (Mar. 12, 1995), <https://timesmachine.nytimes.com/timesmachine/1995/03/12/406595.html>.

51. See *id.*

52. See *id.*; People v. Schmitz, 586 N.W.2d 766, 768 (Mich. Ct. App. 1998).

53. See *Fatal Shooting Follows Surprise on TV Talk Show*, *supra* note 49.

54. Schmitz, 586 N.W.2d at 768.

specific intent.<sup>55</sup> Schmitz was charged with first-degree murder and using a firearm in a felony.<sup>56</sup> Although Schmitz personally called the police after committing the crime, the jury seemed to be convinced by the argument made by the defense at trial and returned a guilty verdict of the lesser offense of second-degree murder.<sup>57</sup> While over forty years had passed since Simpson’s 1954 murder, the jury was still persuaded that a crime motivated by homophobia deserved a lesser sentence.

In 1998, one of the most widely known anti-gay hate crimes was committed: the murder of Matthew Shepard.<sup>58</sup> Shepard was an openly gay college student studying in Wyoming when one evening he went to a bar and met Aaron McKinney and Russell Henderson.<sup>59</sup> Similar to Simpson’s attackers’ motive, McKinney and Henderson told police they planned to lure Shepard into McKinney’s truck to rob him.<sup>60</sup> McKinney and Henderson kidnapped, robbed, and pistol-whipped Shepard.<sup>61</sup> They tied him to a fence, beat him, and left him for dead in the freezing cold for eighteen hours until he was found.<sup>62</sup> Shepard died five days later from his injuries.<sup>63</sup> McKinney and Henderson were charged with attempted murder and their girlfriends, Chasity V. Pasley and Kristen L. Price, were charged as accessories.<sup>64</sup>

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55. *Id.*

56. *See Fatal Shooting Follows Surprise on TV Talk Show, supra* note 49.

57. *See id.*

58. Jude Sheerin, *Matthew Shepard: The Murder That Changed America*, BBC NEWS (Oct. 26, 2018), <https://www.bbc.com/news/world-us-canada-45968606>.

59. *See id.*

60. *Id.*

61. James Brooke, *Gay Man Dies From Attack, Fanning Outrage and Debate*, N.Y. TIMES (Oct. 13, 1998), <https://www.nytimes.com/1998/10/13/us/gay-man-dies-from-attack-fanning-outrage-and-debate.html>.

62. Sheerin, *supra* note 57.

63. *Id.*

64. Brooke, *supra* note 60.

Investigators at the time said that although robbery was the motivating force, the violence escalated when, as one of the women claimed, Shepard had embarrassed the men by making a pass at McKinney.<sup>65</sup> At trial, McKinney's lawyers tried to argue that McKinney's actions were the result of Shepard touching him, causing McKinney to fly into a violent rage.<sup>66</sup> This argument was dismissed by the judge.<sup>67</sup> Both McKinney and Henderson received two life sentences, but they evaded death penalty sentences.<sup>68</sup>

Although in the trial for the murder of Matthew Shepard the judge explicitly dismissed this rationalization of McKinney's and Henderson's violent rage resulting from Shepard's purported actions, other judges have taken different approaches that show implicit and sometimes explicit biases. Some judges have even spoken publicly about how their biases pertaining to homophobically motivated violence affected their decisions. In 1988, Judge Jack Hampton of Dallas drew criticism after easing the sentence of an eighteen-year-old murderer, Richard Lee Bednarski, when Hampton learned the victims were gay.<sup>69</sup> Hampton claimed that the victims would not have been murdered "if they hadn't been cruising the streets picking up teen-age boys."<sup>70</sup> Hampton went on to describe his opinions behind his sentencing decision by saying, "I put prostitutes and gays at about the same level, . . . and I'd be hard put to give somebody life for killing a prostitute."<sup>71</sup> In addition, Hampton attempted to justify his reasoning by assuming the

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65. *Id.*

66. Sheerin, *supra* note 57.

67. *Id.*

68. *Id.*

69. Lisa Belkin, *Texas Judge Eases Sentence for Killer of 2 Homosexuals*, N.Y. TIMES (Dec. 17, 1988), <https://www.nytimes.com/1988/12/17/us/texas-judge-eases-sentence-for-killer-of-2-homosexuals.html>.

70. *Id.*

71. *Id.*

victims were “cruising,” stating, “I don’t care much for queers cruising the streets. I’ve got a teen-age boy”—even though no conclusive evidence was presented at trial that the victims had solicited sexual relations.<sup>72</sup> Evidence was presented through witness testimony that the defendant, with a group of high school friends, had set out to harass gay men and had entered the victims’ car with the intention of violently assaulting them.<sup>73</sup> Despite this evidence, Hampton chose to disregard the prosecution’s desired sentence of life imprisonment and chose to sentence the defendant to thirty years.<sup>74</sup> When asked about his decision, Hampton stated, “I did what I thought was right.”<sup>75</sup> Hampton was censured by a judicial panel in 1989 for his comments following this sentence.<sup>76</sup> In 1993, he also narrowly lost a race for a position on the Texas Court of Appeals, possibly due to his rationale for leniency in the sentencing, as Democrats stated that about one-fifth of Hampton’s opponent’s fundraising had come from gay supporters and LGBTQ+ organizations.<sup>77</sup>

Although politically defeated, Hampton’s sentiments and thus lenient sentencing regarding crimes of this nature were certainly not unique to him. In 1994, Judge David Young of Utah drew similar criticism for reducing the sentence of David Nelson Thacker after his killing of Douglas Koehler, which was motivated by Koehler’s sexual orientation.<sup>78</sup> Thacker had met Koehler at a bar, and they went back together to Thacker’s bedroom, where they used

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. Associated Press, *Judge Draws Protests After Cutting Sentence of Gay Man’s Killer*, N.Y. TIMES (Aug. 17, 1994), <https://www.nytimes.com/1994/08/17/us/judge-draws-protests-after-cutting-sentence-of-gay-man-s-killer.html>.

77. *Id.*

78. *Id.*

cocaine and alcohol.<sup>79</sup> Thacker stated he later awoke to find Koehler fondling him and threw Koehler out of his home.<sup>80</sup> He later sought Koehler out, enraged, and within an hour of the inciting incident, Thacker shot Koehler in a parking lot with a pistol.<sup>81</sup> In contrast to Thacker's claim, the prosecutor stated he believed that consensual sex may have occurred between the two men.<sup>82</sup> Despite Thacker pleading guilty to the manslaughter charge, carrying a possible sentence of up to fifteen years in prison, Judge Young sentenced Thacker to a maximum of six years in prison.<sup>83</sup> Even before the lenient sentencing, the prosecution's decision to allow Thacker to plead guilty to the lesser charge of manslaughter, instead of murder, drew criticism from LGBTQ+ activists.<sup>84</sup> The prevalence of the legal justification, not only as a defense strategy from defendants but also as a mitigating sentencing factor, is undeniable.

Although the American Bar Association (ABA) does not recognize LGBTQ+ panic as a legal defense,<sup>85</sup> it is still in use—as recently as 2015.<sup>86</sup> The ABA classifies it as a tactic to strengthen the defense by playing on prejudice.<sup>87</sup> It has, however, been used to not only explain a defendant's actions, but to excuse them as well. The LGBT Bar states that it is a “legal strategy that asks a jury to find that a victim's sexual orientation or gender identity/expression is to blame for a

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79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. See Alexandra Holden, *The Gay/Trans Panic Defense: What It is, and How to End It*, AM. BAR ASS'N: C.R. & SOC. JUST. (Mar. 31, 2020), <https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense>.

86. LGBTQ+ “Panic” Defense, *supra* note 8.

87. Holden, *supra* note 84.

defendant’s violent reaction, including murder.”<sup>88</sup>

While many of the foregoing examples cite to cases from decades ago, this legal strategy is still invoked. In 2015, the same year in which the right to same-sex marriage was guaranteed to Americans, Daniel Spencer was murdered by his neighbor Robert Miller.<sup>89</sup> Miller stated that after rejecting Spencer’s sexual advance, he needed to act in self-defense, despite no evidence of physical danger.<sup>90</sup> Miller’s murder charge was mitigated to criminally negligent homicide.<sup>91</sup> Although the defense has never been terribly popular,<sup>92</sup> it is still used and can still be successful. But there are signs that it is on its way out.

## II. CURRENT CLIMATE OF LGBTQ+ TOLERANCE AND THE STATUS OF LGBTQ+ PANIC DEFENSE

In this Part, I will look at how attitudes over the last half century have evolved towards tolerance.<sup>93</sup> I will next look at landmark Supreme Court cases that have guaranteed certain civil rights for LGBTQ+ people. Then, I will look at legislation that has been passed codifying these cultural and

88. *LGBTQ+ “Panic” Defense*, *supra* note 8.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.* (“Juries have acquitted dozens of murderers of their crimes through a defense team’s use of an LGBTQ+ ‘panic’ defense strategy.”).

93. Although I note and celebrate the changing cultural attitudes here, I do not want to give the impression that this is a “mission accomplished” moment. It should not go unacknowledged that every millimeter that the needle has moved toward acceptance was fought (and continues to be fought) for tooth and nail by the gay rights movement. While not the focus of this Comment, I also do not want to leave unacknowledged the prejudice, discrimination, harassment, and even violence that many members of the LGBTQ+ community have faced and continue to face, to say nothing of the willful ignorance the American government perpetuated in the face of the literal plague of the AIDS epidemic in the 1980s and 1990s. Although that is not the purpose of this specific argument, my argument would be deficient to the point of ignorance without acknowledging the history and reason for such cultural attitude changes.



judicial victories. Finally, I will analyze legal scholarship specifically on the LGBTQ+ panic defense and potential recommendations pertaining to the defense's future.

A. *Changes in Cultural Attitudes Show Increased Acceptance of LGBTQ+ People*

One of the most promising advancements toward the elimination of the LGBTQ+ panic defense is the cultural shift and growing acceptance of same-sex relationships. The ability of a defendant to use an LGBTQ+ panic defense strategy relies on a jury believing that panic is a reasonable reaction—or at least not unthinkable reaction—to a same-sex romantic advance. A jury must think that a violent reaction could be a rational one. That is a harder argument to make when LGBTQ+ people are more visible in today's society than in that of previous generations. It becomes much harder to argue that LGBTQ+ people are a potential threat when they are parents, siblings, daughters, sons, classmates, coworkers and neighbors to the defendants, attorneys, judges, and jurors, as well as those same defendants, attorneys, judges, and jurors themselves. A recent study found that one in six people of Generation Z (those born 1997–2002) identified as LGBTQ+.<sup>94</sup> While that is not representative of all generations, (only two percent of baby boomers identified as such),<sup>95</sup> it is still likely that a courtroom, made up of many actors, would contain at least some members of the LGBTQ+ community. For the judiciary, the judge's chambers would similarly likely contain someone closely affiliated with a member of the LGBTQ+ community, if not a member themselves. Judges, clerks, prosecutors, advocates, and other attorneys as well as jurors are significantly less likely to think violence is a logical reaction

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94. Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx>.

95. *Id.*

if they are gay themselves, lived with a gay person, or sat through an entire trial with a gay person without succumbing to violent impulses.

In addition, heterosexual Americans today are significantly more comfortable around gay people. Most Americans today report that a coworker, friend, or relative has personally told them that they are gay or lesbian,<sup>96</sup> making it harder for many to believe that a murderous rage is a reasonable reaction. In 2003, following *Lawrence v. Texas*, laws prohibiting private homosexual activity were ruled unconstitutional.<sup>97</sup> In 2015, following *Hodges v. Obergefell*, gay marriage became legal.<sup>98</sup> In 2020, following *Bostock v. Clayton County*, discrimination against employees because of their sexual orientation (as well as their gender identity) became illegal.<sup>99</sup> These legal changes reflect changes in attitudes. In a Gallup poll from 2020, seventy-two percent of Americans polled stated they felt that relationships between two same-sex consenting adults should be legal, which was an increase of forty percentage points from only thirty-two percent in 1986.<sup>100</sup> While approval had steadily been on the rise, it still only was at forty-nine percent in 2005.<sup>101</sup> Possibly more telling in regards to potential jurors’ declining acceptance of the LGBTQ+ panic defense, a 2009 Gallup poll stated seventy-eight percent of Americans polled said they felt personally comfortable when around someone they know is gay or lesbian.<sup>102</sup> This may be because so many more people know

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96. See *id.*; *LGBT Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Apr. 27, 2022).

97. See *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

98. See *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

99. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

100. See *LGBT Rights*, *supra* note 95.

101. *Id.*

102. *Id.*

gay or lesbian people than previous generations had.<sup>103</sup> A 1985 Los Angeles Times poll stated that only twenty-four percent answered that they had a friend, relative, or coworker tell them personally that they are gay or lesbian.<sup>104</sup> By 2013, a Gallup poll states that number was seventy-five percent.<sup>105</sup> Therefore, it is much more difficult for a jury to take the stance that being told someone is gay would cause someone to fly into a murderous rage when seventy-five percent of Americans and potential jurors had personally already been told that.<sup>106</sup>

### B. *Judicial Victories Move the Needle*

In addition, as previously alluded to, three landmark Supreme Court cases have allowed some of the cultural shifts to become law. These changes show how in addition to society pressuring law to reflect its values, the reverse is often true. While not eliminating the homophobia that many gay people face, the judicial victories have secured the protection of certain civil rights in the LGBTQ+ community. In 2003, the Court ruled in *Lawrence v. Texas* that U.S. laws prohibiting private homosexual activity, sodomy, and oral sex between consenting adults were unconstitutional.<sup>107</sup> That same year, only forty-eight percent of Americans felt that gay and lesbian relations between consenting adults should be legal.<sup>108</sup> In 2020, that number would be seventy-two percent.<sup>109</sup> In 2015, the Court ruled in *Obergefell v. Hodges* that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

108. *See LGBT Rights*, *supra* note 95.

109. *Id.*

Protection Clause of the Fourteenth Amendment.<sup>110</sup> This federal ruling followed many states passing their own laws granting the right to same-sex marriage in that state.<sup>111</sup> That same year, fifty-eight percent of Americans believed marriage between same-sex couples should be recognized as valid, with the same rights as traditional marriages.<sup>112</sup> In 2020, that number would be sixty-seven percent. In 2020, the Court ruled in *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964 protects employees against discrimination because of their sexual orientation or gender identity.<sup>113</sup> A 2019 poll showed that over eighty percent of Americans believed a qualified gay person should be hired for the armed forces, as an elementary school teacher, high school teacher, or member of the president’s cabinet.<sup>114</sup> Over ninety percent of people believed a qualified gay person should be hired as salesperson or doctor.<sup>115</sup> By contrast, in 1977, only twenty-seven percent of Americans believed a gay person should be hired as an elementary school teacher and only forty-four percent believed a gay person should be hired as a doctor—especially notable as grade school teachers and doctors consistently rank in the most trusted professions and are entrusted with two particularly vulnerable populations.<sup>116</sup> Although these cases do not specifically pertain to the LGBTQ+ panic defense or the hate crimes that lead to the defense’s use, Supreme Court decisions guaranteeing civil rights for the LGBTQ+ community show the changing legal environment in which gay rights issues will be decided.

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110. *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

111. *Id.* at 680.

112. *LGBT Rights*, *supra* note 95.

113. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

114. *LGBT Rights*, *supra* note 95.

115. *Id.*

116. *Id.*; see also Lydia Saad, *U.S. Ethics Ratings Rise for Medical Workers and Teachers*, GALLUP (Dec. 22, 2020), <https://news.gallup.com/poll/328136/ethics-ratings-rise-medical-workers-teachers.aspx>.

C. *Legislative Action Commemorates the Lives of Those Slain*

While some of the greatest strides in fighting homophobia have come in landmark Supreme Court cases, there have also been strides in legislative action. In 2007, a bill extending the definition of hate crimes to include violence against people motivated by sexual orientation, as well as removing a previous prerequisite that the victim be engaged in a federally protected activity when the hate crime was committed, was introduced in the Senate.<sup>117</sup> In 2009, President Barack Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.<sup>118</sup> The law states:

Congress makes the following findings: (1) The incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem. (2) Such violence disrupts the tranquility and safety of communities and is deeply divisive. (3) State and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes in the United States, including violent crimes motivated by bias. These authorities can carry out their responsibilities more effectively with greater Federal assistance. (4) Existing Federal law is inadequate to address this problem. (5) A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.<sup>119</sup>

Expanding the hate crime definition to include prejudicially motivated acts of violence as a harsher category

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117. See Editorial, *Caving in on Hate Crimes*, N.Y. TIMES (Dec. 10, 2007), <https://www.nytimes.com/2007/12/10/opinion/10mon3.html>.

118. James Byrd was an African-American man dragged to death by white supremacists in 1998, the same year Matthew Shepard was killed. See *Obama Signs Hate Crimes Bill into Law*, CNN (Oct. 28, 2009, 7:39 PM), <https://www.cnn.com/2009/POLITICS/10/28/hate.crimes/>.

119. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. 111-84, div. E, §§ 4702, 123 Stat. 2190, 2835 (2009) (codified as amended at 34 U.S.C. § 30501, among other scattered sections of 18, 28, 34, and 42 U.S.C.).

makes a strong statement. If a person is targeted for violence because of his, her, or their inclusion in a protected class, it follows that that person should receive greater protection from crimes stemming from that inclusion. Committing a hate crime should exacerbate a defendant’s punishment, not excuse it as the LGBTQ+ panic defense strategy argues.

Stemming from this, in the last seven years, several states have also enacted specific bans on the LGBTQ+ panic defense. Beginning in 2014, California banned the defense, and several other states followed suit.<sup>120</sup> Illinois and Rhode Island banned the defense in 2017 and 2018, respectively.<sup>121</sup> In 2019, Connecticut, Hawaii, Maine, Nevada, and New York also banned the defense.<sup>122</sup> In 2020, Colorado, New Jersey, Washington, and Washington, D.C., also banned the defense.<sup>123</sup> In 2021, Virginia became the first southern state to ban the defense, as well as Maryland, Oregon, and Vermont.<sup>124</sup> In addition to the state legislation enacted, Massachusetts Senator Edward Markey and Representative Joseph Kennedy introduced a federal ban on the LGBTQ+ panic defense in 2018.<sup>125</sup> After it did not pass, the bill was reintroduced in 2019.<sup>126</sup> In 2020, Democrats gained control

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120. See *Gay/Trans Panic Defense Laws*, MOVEMENT ADVANCEMENT PROJECT (June 7, 2021), <https://www.lgbtmap.org/img/maps/citations-panic-defense-bans.pdf>.

121. *Id.*

122. *Id.* The New York ban led to the *New York Times* article that inspired this Comment. See Gold, *supra* note 2.

123. *Gay/Trans Panic Defense Laws*, *supra* note 119.

124. Scottie Andrew, *Virginia Becomes the First State in the South to Ban Gay and Trans Panic as a Defense*, CNN (Apr. 5, 2021, 2:07 PM), <https://www.cnn.com/2021/04/05/us/virginia-bans-gay-trans-panic-defense-trnd/index.html>. This legislation was coincidentally announced only days before this Comment was originally submitted for publication.

125. Jeannie Suk Gersen, *The End of the Gay-Panic Legal Defense*, NEW YORKER (July 8, 2019), <https://www.newyorker.com/news/our-columnists/the-end-of-the-gay-panic-legal-defense>.

126. Trudy Ring, *Bill in Congress Would Ban Gay, Trans ‘Panic’ Defenses*, ADVOC. (June 5, 2019, 6:20 PM), <https://www.advocate.com/politics/2019/6/05/bill-congress-would-ban-gay-trans-panic-defenses>.

of the White House through the election of President Joseph R. Biden, in addition to maintaining control of the House of Representatives.<sup>127</sup> In 2021, Democrats also gained control of the Senate, with fifty senators and Vice President Kamala Harris serving as president of the Senate and tie-breaking vote.<sup>128</sup> While the Democrats control the House of Representatives, the Senate, and the White House, Congress should certainly pass this Democrat-introduced bill. In addition, the legal community should act independently to take its own stance in fighting homophobia, specifically as a legal defense theory.

*D. Legal Scholarship Differs on LGBTQ+ Panic*

One article that discusses the future of the LGBTQ+ panic defense is 2008's "The Gay Panic Defense" by George Washington University Law School Professor Cynthia Lee.<sup>129</sup> In her article, Professor Lee argues the defense should not be eliminated, and in fact must be permitted because the best way to dismantle the underlying prejudice of the LGBTQ+ panic defense is to allow for a debate over its merits.<sup>130</sup> Professor Lee writes that to stop the debate would stop people from realizing the idiocy of it, and therefore empower further homophobia.<sup>131</sup> Professor Lee likens the discussion around sexual orientation bias to race bias or gender bias.<sup>132</sup> She also suggests some ways that prosecutors can combat this bias by suggesting the jury pretend the races

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127. Bhaskar Sunkara, *Democrats Are Poised to Control the US Senate. They Have No Excuses Any More*, GUARDIAN (Jan. 11, 2021, 6:18 PM), <https://www.theguardian.com/commentisfree/2021/jan/11/democrats-us-senate-control-georgia-no-excuses>.

128. *See id.*

129. *See* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008).

130. *See id.* at 532.

131. *See id.* at 532–33.

132. *See id.* at 545–50.

or genders of the victims were different.<sup>133</sup> Professor Lee states, “Suppression of gay panic claims, like suppression of bad speech, will not eliminate the underlying stereotypes and assumptions that make such claims persuasive.”<sup>134</sup> While there is certainly validity to the notion of using debate to allow for a meritocracy of ideas, here it is not present. A meritocracy of ideas requires different ideas to be presented and debated reasonably. Hatred and prejudice cannot be debated reasonably as they do not come from a place of reason. They come from a place of fear.

The reality of the fear and hatred surrounding these crimes is shown in the statistics Professor Lee cites. Although the article was written a mere thirteen years ago, it reflects a very different time period. The attitudes surrounding same-sex relationships have radically shifted. When Professor Lee wrote this article, Don’t Ask, Don’t Tell was still military policy.<sup>135</sup> The Defense of Marriage Act—defining marriage as legally between a man and a woman—was still law.<sup>136</sup> Only three states legally allowed gay marriage and one of those states, California, would overturn that decision in November 2008.<sup>137</sup> Landmark decisions

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133. *See id.* at 482, 564.

134. *Id.* at 565.

135. *See* Ali Rogin, *How Don’t Ask, Don’t Tell Has Affected LGBTQ Service Members, 10 Years After Repeal*, PBS (Dec. 22, 2020, 8:08 PM), <https://www.pbs.org/newshour/nation/how-dont-ask-dont-tell-has-affected-lgbtq-service-members-10-years-after-repeal> (detailing the effects of the compromises found in President Bill Clinton’s 1993 bill, “which said gay service members were not required to disclose their sexual orientation, but could still be discharged if they were discovered to be gay”). Don’t Ask, Don’t Tell (DADT) remained in place until December 22, 2010, when President Barack Obama signed the repeal of DADT into law. *Id.*

136. Defense of Marriage Act, 1 U.S.C. § 7, *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

137. *See* Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003); Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008); *In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008); *see also* Chris Cillizza & Sean Sullivan, *How Proposition 8 Passed in California—And Why It Wouldn’t Today*, WASH. POST (Mar. 26, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/03/26/how-proposition-8-passed-in-california-and-why-it-wouldnt-today/>.



pertaining to gay rights like *Obergefell v. Hodges* and *Bostock v. Clayton City* were still seven years and twelve years, respectively, from being decided. Moreover, Professor Lee quotes statistics from even earlier, including a 1995 survey of noncriminal young adults in the San Francisco Bay area.<sup>138</sup> In this survey, almost one in five men admitted to physically assaulting or threatening people whom they believed were homosexual.<sup>139</sup> While hate crimes against LGBTQ+ people have not disappeared by any means in the time since the survey cited or even since Professor Lee's article,<sup>140</sup> the expectation that homophobic violence cannot be reduced and homophobic views cannot be changed does not align with polls showing national attitudes towards LGBTQ+ individuals.<sup>141</sup> Professor Lee writes that the need for free speech in the courtroom is necessary for the prosecution and jury to discover underlying homophobic biases that could influence decisions.<sup>142</sup> Her conclusion is that bias is better visible than invisible.<sup>143</sup> However, utilizing her previous strategy of substituting race or gender for sexual orientation, her argument becomes less clear. It is unlikely that one would argue that allowing racist or sexist rhetoric in a courtroom is helpful, let alone necessary, to fight the underlying prejudice on those biases.

Another more recent example of legal scholarship surrounding the LGBTQ+ panic defense strategy is a 2019

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138. See Lee, *supra* note 128, at 475.

139. *Id.* at 475–80.

140. See Ariel Zambelich & Alyson Hurt, *3 Hours in Orlando: Piecing Together an Attack and Its Aftermath*, NPR (Jun. 26, 2016, 5:09 PM), <https://www.npr.org/2016/06/16/482322488/orlando-shooting-what-happened-update> (describing the incident in 2016 in which a gunman killed forty-nine people and wounded fifty-three others at a gay nightclub in Orlando, the deadliest mass shooting by a single gunman in U.S. history at the time).

141. See generally *LGBT Rights*, *supra* note 95.

142. See Lee, *supra* note 128, at 482.

143. See *id.* at 566 (“Making sexual orientation salient through role-reversal exercises can help jurors consciously mediate and control what would otherwise be automatic stereotype-congruent responses.”).

note, “The Indefensible ‘Gay Panic Defense’” by Devan N. Patel, mentioned earlier in this Comment.<sup>144</sup> In the note, Patel similarly disagrees with the conclusions of Professor Lee’s article. Patel writes that the purpose of banning the defense to “[send] a message that such clear homophobic attitudes will not be tolerated by our justice system is a powerful and worthwhile endeavor to lend security and dignity to the homosexual community in this nation” outweighs any issues Professor Lee finds with it.<sup>145</sup> Patel posits that there are three variations to this defense: insanity or diminished capacity, self-defense, and provocation.<sup>146</sup> Patel also argues that indeed the defense should be totally eliminated, but puts the onus on the legislators to ban this defense.<sup>147</sup> Patel argues that, in addition to passing the federal legislation already proposed, “[t]hree distinct provisions should be added to the federal bill: providing for bans on gay panic defenses when used in (1) insanity and diminished capacity claims, (2) provocation claims, and (3) self-defense claims.”<sup>148</sup> Patel also advocates for an exception to be made for judges to include evidence surrounding relevant prior trauma.<sup>149</sup> The suggestions advocated by Patel could be instrumental to fighting biases in the courtroom, but that is not all that could be done to further move the needle toward justice.

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144. See Patel, *supra* note 4.

145. *Id.* at 113.

146. *Id.* at 102.

147. *Id.* at 116.

148. *Id.* at 132; see also W. Carsten Andresen, *I Track Murder Cases that Use the ‘Gay Panic Defense,’ a Controversial Practice Banned in 9 States*, CONVERSATION (Jan. 29, 2020, 8:21 AM), <https://theconversation.com/i-track-murder-cases-that-use-the-gay-panic-defense-a-controversial-practice-banned-in-9-states-129973> (noting that legislation enacted and proposed that bans the gay panic legal defense strategy does not ban defendants from making the argument that they were motivated by self-defense in response to an attempted sexual assault by their victims).

149. Patel, *supra* note 4, at 116.

## III. WHERE THE LEGAL COMMUNITY NEEDS TO GO

State legislatures should pass bans on the LGBTQ+ panic defense. If a person is targeted for violence because of his, her, or their inclusion in a protected class, that person should receive greater protection from crimes stemming from that inclusion, not less. It is contrary to reason that a victim's inclusion in a protected class could be a mitigating factor to a defendant's crime rather than an aggravating one. It is imperative that state legislatures pass these bans, particularly where bills have already been introduced, such as in Wisconsin (2019), Texas (2020), Iowa (2021), Nebraska (2021), Florida (2021), New Hampshire (2021), Minnesota (2021), Massachusetts (2021), Pennsylvania (2021), Michigan (2021), and North Carolina (2021).<sup>150</sup> In addition, the federal bills banning the defense, S.1721 and H.R.3133, have still not been passed. They should be expanded per Patel's suggestions and signed into law immediately as a first step. In the states, the passing of such bills would serve as a concrete human rights victory, as most murder and homicide cases are tried under state law. For federal law, it would show a solidified commitment to protecting the lives of LGBTQ+ people. While the previous administration's commitment to LGBTQ+ issues was questionable, there is increased optimism surrounding the Biden Administration and Democrat-controlled Congress that these bills will pass and be signed into law. In addition to this step, while the legislators have a responsibility to the millions of LGBTQ+ Americans represented by the Congress, the legal community also has a responsibility to act morally and definitively for civil rights. The legal community has the ability to act without the impediment of statewide reelection campaigns in making these demonstrative actions. Many of the greatest accomplishments in equality were made through judicial action, and likewise an obligation to act exists here regarding the LGBTQ+ panic defense.

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150. LGBTQ+ "Panic" Defense, *supra* note 8.

This Comment suggests an update to the Federal Rules of Evidence to make it impossible for an attorney to use homophobia as a legal defense for violence. One way to accomplish this objective is by adding a new rule to the Federal Rules of Evidence. A new rule could prohibit the admission of evidence of a victim’s homosexuality when it is used as a legal defense to homicide or as a mitigating factor in a defendant’s homicide charge. This would follow the precedent of Federal Rule of Evidence 412 regarding Sex-Offense Cases. Federal Rule of Evidence 412 states, “The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim’s sexual predisposition.”<sup>151</sup> This rule forbids evidence offered to prove that a victim engaged in other sexual behavior or a victim’s sexual predisposition in a civil or criminal proceeding involving alleged sexual misconduct.<sup>152</sup> Sexism exists in the justice system. Irrelevant information pertaining to the supposed promiscuity of a victim has little, if any, bearing on the guilt of a defendant—but it could potentially prejudice a jury, and it is therefore prohibited from admission for fear of unfair prejudice. This type of propensity evidence can distort fact-finding by allowing ugly biases to creep into the courtroom. Federal Rule of Evidence 412 acts as a barrier to evidence that could prejudice a jury.

The rule this Comment proposes would read:

(a) Prohibited Uses. The following evidence is not admissible as a mitigating factor in a civil or criminal proceeding involving homicide, manslaughter, or murder:

(1) evidence offered to prove that a victim engaged in homosexual activities; or

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151. FED. R. EVID. 412.

152. *Id.*

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) Criminal Cases. The court may admit the following evidence in a criminal case: (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered to prove consent by defendant or sexual assault by the victim; and (C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.<sup>153</sup>

This rule would perform a similar function to Rule 412, by preventing potentially biasing information from reaching jurors' ears when it has minimal bearing on the likelihood of a defendant's guilt. The impact of a rule that makes an anti-homophobic statement, such as this proposed rule, in the Federal Rules of Evidence would be impactful in every courtroom. This change would be a far-reaching statement from the legal community that exploiting jurors' potential homophobia will not be tolerated as a substitute for sound legal argument.<sup>154</sup>

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153. *See id.* (on which this proposed rule was modeled).

154. In addition, the next generation of law students should be taught in Evidence classrooms and tested on the Bar Exam that homophobia is not an acceptable argument in a courtroom.

## CONCLUSION

While trends show that LGBTQ+ acceptance is increasing, the legal community has a responsibility to make a proactive statement that homophobia is not an acceptable legal defense strategy in 2022. The continued use of the LGBTQ+ panic defense shows that although strides have been made toward acceptance, including decriminalizing same-sex relationships, legalizing same-sex marriage, and banning discrimination of LGBTQ+ people in the workplace, there is still work to be done. In addition to enacting the bans suggested in the federal legislature and in individual state legislatures, introducing a new rule into the Federal Rules of Evidence to ban evidence of homosexuality as a mitigating factor allows those strides toward progress to be achieved.