

ARTICLE

Homosexuality: An Aggravating Factor

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I. INTRODUCTION

On September 29, 2017, the United Nations Human Rights Council (UNHR) passed a resolution to condemn the criminalization of and use of the death penalty for apostasy, blasphemy, adultery, and consensual same-sex relations.¹ The resolution also called on nations in which the death penalty is legal to ensure that it is not imposed “arbitrarily or discriminatorily.”² The resolution passed by a vote of 27-13, but the United States was among the countries to vote against the resolution.³ The United States was the only western democracy to oppose the resolution.⁴ Some of the countries that joined the United States in the vote against adopting the resolution were Botswana, Burundi, and Egypt.⁵ Of the thirteen countries that voted against the resolution, four still impose the death penalty for individuals that violate their anti-sodomy laws.⁶ A total

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1. Chris D’Angelo, *US Rejects UN Resolution Condemning Death Penalty for LGBTQ People, Other Groups*, HUFFINGTON POST (Oct. 3, 2017), https://www.huffingtonpost.com/entry/united-nations-resolution-death-penalty_us_59d3cc6ae4b0218923e5a4f8.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Max Bearak & Darla Cameron, *Here Are the 10 Countries Where Homosexuality May Be Punished by Death*, WASH. POST (June 16, 2016), <https://www.washingtonpost.com/news/>

of ten countries, worldwide, still have some sort of law that makes it punishable by death to engage in a consensual same-sex relationship.⁷ These countries vary in the amount that they enforce these laws, but each explicitly make it a criminal offense, punishable by death, to engage in a same-sex relationship.

The Trump Administration issued a statement on the day of the vote explaining why it could not vote to pass the UNHR resolution. “As in previous years, we had hoped for a balance and inclusive resolution that would better reflect the position of states that continue to apply the death penalty lawfully The United States is committed to complying with its constitution, laws, and international obligations.”⁸ The United States did not reference or state that it condemns the imposition of the death penalty against those who engage in consensual same-sex relationships. The United States issued another statement on October 3, four days after the vote, after receiving backlash from the public for its original statement. A spokesperson from the White House stated, “The United States unequivocally condemns the application of the death penalty for homosexuality, blasphemy, adultery and apostasy. As in years past, we voted against this resolution because of broader concerns with the resolution’s approach to condemning the death penalty in all circumstances.”⁹ The resolution also called for an end to the discriminatory use of the death penalty “against persons belonging to racial and ethnic minorities and its use against individuals with mental or intellectual disabilities, those under age eighteen, and pregnant women.”¹⁰

The United States already has some precedent from the United States Supreme Court abolishing the death penalty against individuals who fit into those previously stated categories and the use of the death penalty in an arbitrary manner. After the Supreme Court reinstated the death penalty, it held in *Furman v. Georgia* that the death penalty may not be imposed under sentencing procedures that create a substantial risk that it would be inflicted in an arbitrary or capricious manner.¹¹ The Supreme Court held

worldviews/wp/2016/06/13/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death-2/?utm_term=.b2af5d6f9d6e (Iran, Qatar, Saudi Arabia, and United Arab Emirates).

7. *Id.* (Yemen, Iran, Mauritania, Nigeria, Qatar, Saudi Arabia, Afghanistan, Somalia, Sudan, and United Arab Emirates).

8. Jason Mack, *U.S. Explanation of Vote: Resolution on the Question of the Death Penalty*, U.S. MISSION TO INT’L ORGANIZATIONS GENEVA (Sept. 29, 2017), <https://geneva.usmission.gov/2017/10/03/u-s-explanation-of-vote-resolution-on-the-question-of-the-death-penalty/>.

9. D’Angelo, *supra* note 1.

10. *Id.*

11. *Furman v. Georgia*, 408 U.S. 238 (1972).

in *Roper v. Simmons* that the Eighth and Fourteenth Amendments prohibit the execution of offenders under the age of eighteen at the time of the offense.¹² In *Atkins v. Virginia*, the Supreme Court ruled that the death penalty may not be imposed against a mentally retarded person.¹³ Despite the precedent set by the Supreme Court, the United States believed it could not vote in favor of the resolution. But the Supreme Court has not reviewed a case arguing that the death penalty is arbitrarily applied against individuals who engage in same-sex relationships. “There are high barriers against injecting race into a trial, and rape-shield laws that prohibit introducing a victim’s prior sexual history. But no such restrictions exist when it comes to homosexuality.”¹⁴

Which begs the questions this Article seeks to examine: Do those who identify as gay face the risk of having their sexual orientation used as an aggravating factor? Are there sufficient procedural safeguards in place that protect the gay community from having their sexual orientation used against them in a capital murder case?

II. HISTORY OF THE DEATH PENALTY AND HOMOSEXUALS

The United States has a deep history of punishing individuals solely because they engaged in same-sex relationships. The earliest Colonial American law punishing those who engaged in sodomy can be traced back to British Parliament in 1533 during the reign of Henry VIII.¹⁵ The English statute made it a capital felony “for any person to commit the detestable and abominable vice of buggery with mankind or beast.”¹⁶ The first five pre-Revolutionary southern colonies either adopted this statute verbatim or enforced it without incorporating it into their own laws.¹⁷ Plymouth Colony established what is known to be the first American capital code in 1636 that consisted of a list of capital offenses punishable by death: “treason, murder, witchcraft, arson, sodomy, rape, buggery . . . , and adultery.”¹⁸ That same year, the General Court of Massachusetts approached Reverend John Cotton to draft a list of fundamental laws; he

12. *Roper v. Simmons*, 543 U.S. 551 (2005).

13. *Atkins v. Virginia*, 536 U.S. 304 (2002).

14. Richard Goldstein, *Queer on Death Row*, VILLAGE VOICE (Mar. 13, 2001), <https://www.villagevoice.com/2001/03/13/queer-on-death-row/>.

15. Louis Crompton, *Homosexuals and the Death Penalty in Colonial America*, 1 J. HOMOSEXUALITY 277, 277 (1976).

16. *Id.* at 277-78.

17. *Id.* at 278.

18. *Id.*

proposed that lesbianism also be made a capital offense.¹⁹ This was the first time in the history of Colonial America that a proposed law prescribed the same punishment for male homosexuality as for lesbianism.²⁰ At a time when religious sentiment was deeply engrained in colonial society, this equality was surprising because the Bible said that male homosexuality was punishable by death, but it said nothing about lesbianism.²¹

Not long after the establishment of the first colonies, other colonies followed suit and began enacting their own laws, all of which included the criminalization of homosexual acts. The Bay Colony published the “Body of Laws and Liberties” in 1641, which included a list of twelve capital crimes including sodomy.²² The Colony adopted language from Leviticus 20:13, which stated that, “If any man lyeth with mankind as he lyeth with a woman, both of them have committed abhominaton, they both shall surely be put to death.”²³ This language would be used as a basis for many of the new colonies’ anti-sodomy laws. When New Plymouth and Massachusetts Bay combined in 1697, the legislature passed “An Act for the Punishment of Buggery,” which stated that “[e]very man, being duly convicted of lying with mankind, as he lieth with a woman . . . shall suffer the pains of death.”²⁴ The Puritans of Connecticut published “The Code of 1673,” which was one of the first laws we know of that made an exception to the harsh sodomy laws.²⁵ The Code added the words, “except it appear that one of the partiers were forced, or under 15 years of age.”²⁶ New Haven enacted “New Haven’s Settling in New-England and some Lawes of Government” in 1655, which extended the death penalty to cover “lesbianism, heterosexual anal intercourse, and even, in certain circumstances, masturbation.”²⁷ This law was only in place for ten years until New Haven joined Connecticut.²⁸ Even during the early history of our country, we can establish a general societal distaste of homosexual tendencies so strong that we were willing to put those who engaged in these kinds of acts to death. Why? The settlers at the time were gravely

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 279.

23. *Id.*

24. *Id.* at 280.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 281.

concerned that “their new territory would be jeopardized if they provoked divine wrath by allowing sexual abominations to go unpunished.”²⁹ The settlers believed that these acts would defile or compromise the land in the eyes of God.³⁰

During the late 1600s, early America started shifting away from punishing homosexual acts with death. Pennsylvania published the “Great Law” in 1682, which was based on Quaker humanitarian principles and limited the death penalty to only murder.³¹ Pennsylvania reduced the punishment for homosexual acts to imprisonment for a period of six months.³² No lesser penalty for homosexual acts would be adopted by an American state until 1961.³³ The exact language of the law read: “[I]f any person shall be Legally Convicted of the unnatural sin of Sodomy Such persons shall be whipt, and forfeit one third of his or her estate, and work six months in the house of Correction, at hard labour.”³⁴ Pennsylvania’s new law only lasted until 1718 when the British Parliament objected and compelled the colony to align with Britain’s law.³⁵ As a compromise, Pennsylvania passed “An Act Against Incest, Sodomy, and Bestiality.”³⁶ The law stated that

whoever shall be legally convicted of sodomy or bestiality, shall suffer imprisonment during life and be whipped at the discretion of the magistrates, once every three months during the first year after conviction. And if he be a married man, he shall also suffer castration, and the injured wife shall have a divorce if required.³⁷

The Quakers were not pleased, but for the first time in colonial and early American history we see a shift away from punishing homosexual acts with death.

After the American Revolution, States reformed their legal codes and began imposing a lesser punishment for sodomy. New Jersey passed “An Act for the Punishment of Crimes” in 1796 that punished sodomy by “a fine and solitary confinement at hard labor for any term not exceeding twenty-one years.”³⁸ New York enacted “An Act Making Alternations in

29. *Id.* at 279.

30. *Id.* at 279-80.

31. *Id.* at 282.

32. *Id.*

33. *Id.*

34. *Id.* at 282-83.

35. *Id.* at 283.

36. *Id.*

37. *Id.*

38. *Id.* at 287

the Criminal Law” eight days after New Jersey and kept the death penalty only for treason and murder; every other former capital offense was punishable by life imprisonment.³⁹ But not every state was willing to let go of its religious roots. North Carolina enacted the “Revised Code of 1855,” which kept the death penalty for sodomy.⁴⁰ The State did not repeal the law until 1869 when it made the punishment for sodomy and other formerly capital crimes five to sixty years imprisonment.⁴¹ Up to that point, the death penalty for homosexuals was no longer explicitly imposed in the United States. But sodomy and homosexual acts were still criminal offenses and homosexuals would continue to be targeted throughout the 20th century.

III. POST HOMOSEXUAL DEATH PENALTY IN THE UNITED STATES

Although the death penalty for homosexuality was no longer imposed, the gay community was still marginalized by the legal system. Throughout the 20th century, the States and federal government continued to attack individuals based on their sexual orientation. States continued to prohibit same-sex couples from engaging in oral and anal sex. President Truman’s State Department began firing suspected homosexuals in 1947.⁴² In 1953, President Eisenhower issued Executive Order #1045, banning the employment of homosexuals by the federal government.⁴³ By 1955, over 1200 men and women lost their positions with the federal government as a result of “anti-gay witch hunts.”⁴⁴ In 1996, President Clinton signed the Defense of Marriage Act, which denied “federal benefits to same-sex spouses should gay marriage ever become legal.”⁴⁵ The federal government vocally protested its stance against homosexuals throughout the 20th century, while States started making the shift away from discrimination earlier.

Society’s views slowly shifted away from discrimination against homosexuals in the middle of the 20th century. Illinois was the first state to “decriminalize homosexual contact between consenting adults in 1962.”⁴⁶ The American Psychiatric Association officially declared that

39. *Id.*

40. *Id.*

41. *Id.* at 287-88.

42. *A Timeline of Lesbian, Gay, Bisexual, and Transgender History in the United States*, GSAFE (2008), <https://www.gsafewi.org/wp-content/uploads/US-LGBT-Timeline-UPDATED.pdf>.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

homosexuality was not per se a psychiatric order in 1973.⁴⁷ Doctors identified the first case of “Gay-Related Immune Deficiency (GRID)” in 1981, but the name remained unchanged for several years until doctors realized it was not sexual orientation specific and began referring to the disease as Acquired Immune Deficiency Syndrome (AIDS).⁴⁸ The United States Supreme Court overruled *Bowers v. Hardwick* in *Lawrence v. Texas* and declared anti-sodomy laws unconstitutional in 2003.⁴⁹ Massachusetts was the first state to legalize same sex marriage in 2004, and California followed in 2008.⁵⁰

In recent years, the attitude American society seems to be moving towards is a general acceptance of the gay community. The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act were passed in 2009 to combat discrimination against the gay community.⁵¹ The Supreme Court ruled that States cannot ban same-sex marriage in *Obergefell v. Hodges* in 2015.⁵² However, our legal system has been slow to accept this change our society seems to be leaning towards. Through the mid-20th century and even now, we continue to see the attitude against homosexuals in police, lawmakers, and prosecutors. Our political leaders exercise discretion over which laws to enforce, how to enforce them, and which people to target for enforcement. Despite where our society is heading, prosecutors, judges, and legislators continue to believe there is a stigma against homosexuals and use their discretion to target them.

IV. THE CRIMINALIZATION OF HOMOSEXUALS TO ENFORCE SOCIAL IDEALS

The definition of crime is “socially constructed, the result of inherently political processes that reflect consensus only among those who control or wield significant influence . . . It often has more to do with preservation of existing social orders than with the safety of the larger populace.”⁵³ During the mid to late 1900s our society began accepting the gay community, but the government continued to voice its distaste towards homosexuals. Once the United States Supreme Court began declaring

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *LGBT Rights Milestones Fast Facts*, CNN (Mar. 30, 2018), <https://www.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html>.

52. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

53. JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 148 (Michael Bronski ed., 2011).

laws criminalizing gay conduct unconstitutional, political leaders had to find a new way to “protect” their communities from the danger homosexuals posed. Tolerance for homosexuality increased but being gay still meant “living outside the appropriately gendered heterosexual norms.”⁵⁴ Prosecutors use this predetermined storyline to show how a gay defendant’s appearance and behavior was not in compliance with the “accepted” social order. The prosecutor thus shapes how a homosexual defendant’s image will be interpreted to a jury when they are charged with a crime.⁵⁵ Prosecutors begin by creating a narrative that homosexuals are dangerous, violent, sexual predators, and disease ridden so much so that the story the prosecutor portrays can be characterized as an archetype: “recurring, culturally ingrained representations that evoke strong, often subterranean emotional association in response.”⁵⁶ When a known homosexual is convicted of a crime, prosecutors will use these “archetypes” to evoke fear, anger, and anxiety from a jury.⁵⁷

A prosecutor can use these “archetypes” to their advantage when someone who is gay is charged with capital murder and they seek the death penalty. The prosecutor in a death penalty case is given a large amount of discretion in deciding who to put to death. “Anyone who seems outside the bounds of what’s acceptable is more likely to end up being executed.”⁵⁸ The death penalty is not mandatory or automatic, rather, the prosecutor makes the decision as to whom he or she will charge with a capital crime.⁵⁹ When a prosecutor is making this decision, he or she must consider what evidence to show the jury. Because the prosecution must convince a judge or jury to kill a human being, “the prosecutor’s task is . . . greatly enhanced when a defendant belongs to a class stigmatized in society as abnormal, deviant, and pathological.”⁶⁰ Homosexuality, generally, is still deemed outside the sexual norm. A prosecutor could be more likely to seek the death penalty for someone whose image can be molded to a jury as gay, dangerous, and violent. We see this in many of the “God-fearing counties” where capital cases have been tried that involved a known homosexual defendant.⁶¹ The goal of the prosecution is to “demonize, dehumanize and

54. *Id.* at 23.

55. *Id.*

56. *Id.*

57. *Id.*

58. Goldstein, *supra* note 14.

59. Joey L. Mogul, *The Dykier, the Butcher, the Better: The State’s Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. CITY L. REV. 473, 476 (2005).

60. *Id.* at 478.

61. Goldstein, *supra* note 14.

‘other’” the defendant to get the jury to think this person is the worst of the worst.⁶² The prosecution’s use of gay archetypes fits perfectly into a formula to prove whatever aggravating circumstance a State’s death penalty statute requires.

V. CASE EXAMPLES

Bernina Mata, a lesbian, was accused of murdering John Draheim after they met at a bar and went back to Mata’s apartment in 1998.⁶³ Draheim was stabbed multiple times in Mata’s apartment while she and her roommate, Russell Grundmeirer, were present.⁶⁴ In exchange for testifying against Mata, Grundmeirer was granted immunity from prosecution for the murder and sentenced to four years for concealing Draheim’s death.⁶⁵ The State sought the death penalty against Mata under Illinois’ capital punishment statute based on the aggravating circumstance that the murder was “committed in a cold, calculated, premeditated manner, pursuant to a preconceived plan.”⁶⁶ The prosecutor used the archetype of the “homicidal lesbian,” indicating Mata killed Draheim because he made an “unwanted sexual advance at the bar, allegedly touching her shoulder and thigh.” Assistant State’s Attorney Troy Owen stated during the murder trial to the jury:

A normal heterosexual woman would not be so offended by such conduct as to murder We are trying to show that Bernina Mata has a motive to commit this crime in that she is a hard core lesbian, and that is why she reacted to Mr. Draheim’s behavior in this way.

Mata did not conform to “sexist notions society has proscribed for women.”⁶⁷ The prosecutor described Mata as aggressive, unfeminine, and “unladylike.”⁶⁸ The prosecutor made it easy for the jury to see Mata not as a female, but as a masculine “man hater . . . more capable of committing a crime than a heterosexual woman.”⁶⁹

Before the trial began, defense counsel agreed to stipulate that Mata was a lesbian, but the prosecution refused.⁷⁰ Mata’s lesbianism was referred to on seventeen different occasions during every critical stage of

62. MOGUL ET AL., *supra* note 53, at 79.

63. *Id.* at 80.

64. *Id.*

65. *Id.*

66. *Id.*

67. Mogul, *supra* note 59, at 482.

68. *Id.*

69. *Id.* at 483.

70. *Id.* at 485 n.48.

the trial.⁷¹ In the prosecution's case, Mata was a "hard core lesbian" who hated men so much she hatched a plan to kill Draheim after he made an unwanted pass at her.⁷² The prosecution presented ten witnesses who testified Mata was a lesbian and three books with lesbian titles found in her apartment.⁷³ Defense counsel for Mata filed a motion in limine to prevent the books from coming in, but the court admitted them because it was relevant to show the prosecution's theory that "because of her sexual preference [Mata] was offended by the conduct of Draheim and that provoked her motive to kill him."⁷⁴ The prosecutor's portrayal of Mata's plan outweighed the mitigating evidence she presented of the sexual abuse she suffered from her stepfather as a child, her extensive history of mental illness, and the flashbacks of her father she experienced when Draheim made an advance towards her. According to the prosecutor's own language, he likely would not have sought the death penalty against Mata if she was a heterosexual woman. A prosecutor likely would not be confident arguing that a woman's heterosexuality caused her to kill a man who hit on her. After all, according to the prosecutor any normal heterosexual woman would not be so offended by an unwanted gesture from a heterosexual man. Mata's conviction was commuted to life imprisonment in 2003 by then Illinois Governor George Ryan.⁷⁵ But Mata should not have been sentenced to death in the first place.

There are several other incidents where prosecutors have used a woman's sexual orientation against her in a capital punishment case. In Oklahoma City, 1989, Wanda Jean Allen, a black lesbian woman, was convicted and sentenced to death for killing her lover, Gloria Leather.⁷⁶ Instead of the "lesbian man hater" archetype, the prosecution went with the gender defiance story, explaining that Allen wore the "pants in the family" and was the "man [in the] homosexual relationship with the decedent."⁷⁷ Defense counsel objected and the issue was raised on appeal claiming the trial court erred in admitting the evidence of Allen's sexual orientation.⁷⁸ But the Oklahoma court ruled that the probative value of the evidence was not substantially outweighed by its prejudicial effect, stating "the evidence would help the jury understand why each party acted the

71. *Id.* at 485-86.

72. *Id.* at 487.

73. *Id.* at 485.

74. *Id.* at 485 n.51.

75. MOGUL ET AL., *supra* note 53, at 82.

76. Mogul, *supra* note 59, at 489.

77. *Id.* at 490.

78. Allen v. State, 1994 OK CR 13, 871 P.2d 79, 95.

way she did both during events leading up to the shooting and the shooting itself.”⁷⁹ The prosecution argued that this evidence was relevant to show that Allen was the first aggressor the day she killed Leather and throughout the relationship.⁸⁰ Allen claimed the act was in self-defense because Leather approached her with a garden rake before she shot her.⁸¹ In addition, Leather slashed Allen with the same rake earlier that day and Leather previously killed a woman ten years ago.⁸² Unfortunately, the evidence of Allen’s sexual orientation was admitted, and she was executed in Oklahoma in 2001.⁸³ One judge noted in his dissent:

I also take exception to the majority finding the evidence the appellant was the “man” in her lesbian relationship has any probative value at all. Were this a case involving a heterosexual couple, the fact that a male defendant was the “man” in the relationship likewise would tell me nothing. I find no proper purpose for this evidence, and believe its only purpose was to present the defendant as less sympathetic to the jury than the victim.⁸⁴

The prosecutor even went so far as to admit a letter Allen wrote to Leathers showing that she spelled her name “in a masculine way: G-E-N-E.”⁸⁵ The prosecutor did his job and completely defeminized Allen into an aggressive domineering woman who took advantage of Leather; someone who appeared to conform more with societies expectations of what it means to be a woman. After all, Leather was also a lesbian, but at least she conformed to her gender role and remained the “woman” in the relationship.

Even as recently as 2006 in Texas, Lisa Coleman, a black lesbian, was convicted of murdering her partner’s nine-year-old son, Davontae, and sentenced to death.⁸⁶ Paramedics responded to a 9-1-1 call from Davontae’s biological mother, Marcella Williams, and found Davontae dead on the bathroom floor of her apartment.⁸⁷ Davontae was severely underweight, bound repeatedly, and had nearly 250 wounds on his body varying from cigarette burns to broken bones.⁸⁸ A medical examiner

79. *Id.*

80. Mogul, *supra* note 59, at 490.

81. *Id.*

82. *Id.*

83. *Id.* at 491.

84. *Id.*

85. *Id.* at 490.

86. David Carson, *Execution Report: Lisa Coleman*, TEX. EXECUTION INFO. CTR. (Sept. 18, 2014), <http://www.txexecutions.org/reports/517-Lisa-Coleman.htm>.

87. *Id.*

88. *Id.*

determined the cause of death was malnutrition and pneumonia.⁸⁹ There was evidence presented during the trial that both Coleman and Williams abused and bound Davontae.⁹⁰ Coleman's appeals in state and federal court in an attempt to overturn the conviction were denied.⁹¹ John Stickles, one of Coleman's attorneys, had a theory about why Coleman was convicted and sentenced to death. "The state singled Lisa out and figured some way to get her the death penalty because she was black, a lesbian, and an easy target What she's really guilty of is being a black lesbian."⁹² Williams plead guilty and agreed to life imprisonment.⁹³ Coleman was executed on September 17, 2014.⁹⁴ Not only was Coleman black, but a lesbian who failed to take care of a child under her care, another societal expectation of a woman.

Prosecutors are not only using these archetypes against woman, but also men. Calvin Burdine, a gay man, was sentenced to death in 1994 in Texas for the murder of his lover, W.T. Wise.⁹⁵ Burdine met another gay man, Douglas McCreight, and agreed to go to Wise's home and steal money from him.⁹⁶ McCreight threatened Wise with a gun and hunting knife and ordered Wise to the ground.⁹⁷ Before leaving with several of Wise's items, Burdine and McCreight agreed that McCreight would hit Wise in the head with a "lead-filled police sap."⁹⁸ Burdine and McCreight feared that Wise would identify them, so they returned to the scene and McCreight stabbed Wise in the back.⁹⁹ Eventually, both men were caught and tried for murder. Throughout the trial, Burdine endured homophobic conduct from the prosecutor and his own attorney.

The ineffectiveness of Cannon's representation of Burdine and the prosecutor's discriminatory conduct is apparent from the record. During sentencing, the prosecutor stated to the jury: "[S]ending a homosexual to the penitentiary isn't a very bad punishment for a homosexual, and that's

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. MOGUL ET AL., *supra* note 53, at 89.

96. Michael B. Shortnacy, *Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309, 345-46 (2001).

97. *Id.* at 346.

98. *Id.*

99. *Id.*

what he's asking you to do."¹⁰⁰ Burdine's attorney, Joe Cannon, made no objection. Nor did he object to the prosecution's introduction of Burdine's sodomy conviction in 1971.¹⁰¹ The prosecutor argued that this evidence was necessary to show that Burdine "would be a future danger to society."¹⁰² Cannon accepted three jurors who stated during *voir dire* that they had at least some prejudice against homosexuals.¹⁰³ During various court proceedings, Cannon used the words "queer, fairy, and tush hog" when referring to Burdine and homosexuals in general.¹⁰⁴ Cannon also fell asleep during several critical stages of the trial.¹⁰⁵

The prosecution used the archetype "sexually degraded predator" to describe Burdine as a violent homosexual driven by uncontrollable sexual impulses.¹⁰⁶ The only way to stop Burdine and make society safe, in the eyes of the prosecution, was to put him to death. At the time of Burdine's conviction, anti-sodomy laws were still constitutional. But the prosecutor and jury thought those laws were not enough to stop "a gay man driven only by sex."¹⁰⁷ In his post-conviction motion, Burdine raised ten issues, including "whether the prosecutor's homophobic remarks to the jury violated his Eighth and Fourteenth Amendment rights."¹⁰⁸ The court vacated Burdine's conviction, and he is now serving a life sentence.¹⁰⁹ But the judge did not address the homophobic remarks in his decision to vacate the sentence.¹¹⁰

Burdine is not the only man to have his sexual orientation used against him in a capital trial. In a 1995 North Carolina case, the prosecution also used the "sexually degraded predator" archetype in Eddie Hartman's capital trial.¹¹¹ Hartman killed Herman Smith, in his seventies, by shooting him in the back of his head.¹¹² Hartman was convicted of armed robbery and first-degree murder and was sentenced to death.¹¹³ During the penalty phase, Hartman presented mitigating evidence that he

100. *Id.* at 347.

101. *Id.*

102. *Id.* at 348.

103. *Id.*

104. *Id.*

105. *Id.* at 349.

106. MOGUL ET AL., *supra* note 53, at 89.

107. *Id.*

108. Shortnacy, *supra* note 96, at 349.

109. MOGUL ET AL., *supra* note 53, at 89.

110. Shortnacy, *supra* note 96, at 349.

111. *State v. Hartman*, 476 S.E.2d 328, 343 (1996).

112. *Id.* at 330.

113. *Id.*

was sexually abused by several older male relatives during his childhood.¹¹⁴ The prosecutor cross-examined Hartman's mother about the sexual abuse and asked her, "Is your son not a homosexual?"¹¹⁵ In addition, the prosecutor asked other individuals during various stages of the trial whether they knew Hartman was a homosexual.¹¹⁶ Defense counsel objected each time, and the court sustained the objections.¹¹⁷ Defense counsel argued that the prosecutor's theory was that Hartman was "hypersexual," therefore he was not abused but asking for it.¹¹⁸ The prosecutor responded stating that the reason for asking questions about Hartman's sexuality was because shortly after he shot the victim he engaged in "homosexual activity" with one of the State's witnesses.¹¹⁹ The prosecution argued that this evidence was necessary to show evidence of Hartman's lack of remorse.¹²⁰ On appeal, Hartman argued that the prosecution's tactics undercut his mitigating evidence of sexual abuse.¹²¹ The North Carolina Supreme Court ruled there was no error because the prosecutor's "sexual persuasion" questions were not answered.¹²² Hartman was executed in North Carolina in October 2003.¹²³

Another common archetype used against gay men is "the gleeful gay killer."¹²⁴ Jay Wesley Neill, a gay man, killed four people while robbing a bank in Oklahoma in 1984.¹²⁵ Neill and his lover, Robert Johnson, bought weapons before the robbery and spent their earnings while on the run in San Francisco.¹²⁶ Eventually both men were caught and tried in 1992.¹²⁷ At the trial, Neill admitted his guilt but insisted that he acted under extreme emotional distress in fear of losing his lover.¹²⁸ Neill's sexual orientation was referenced several times during trial. The District Attorney of Grady

114. MOGUL ET AL., *supra* note 53, at 90.

115. *Id.*

116. *Hartman*, 476 S.E.2d at 343. Once during jury selection stating, "Whether the sexual persuasion of someone would have any bearing upon their decision in this case." A seconding during cross examination of the Hartman's aunt the prosecutor asked her, "Well, you knew that Hartman is a homosexual. You've heard that."

117. *Id.*

118. MOGUL ET AL., *supra* note 53, at 90.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 86.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

County stated the culprit had to be gay because in “most cases of overkill the perpetrator turns out to be a homosexual.”¹²⁹ Already, we see the prosecution placing in the jury’s head the idea that only a homosexual could commit this violent of a crime. The district attorney went on to tell the jury “there had to be sexual overtones towards the women It had to be someone with an emotional problem toward women and who needed to feel superior to them.”¹³⁰ We can see Neill being portrayed as a gay killer with a hatred towards women trying to fulfill his materialistic needs. The prosecutors introduced several witnesses testifying that he called a fellow female employee at his work a “bitch” and that he was a nonreligious homosexual.¹³¹ During the sentencing phase, the prosecutor sealed his story by saying this to the jury:

I want you to think briefly about the man you’re setting [sic] in judgment I’d like to go through some things that to me depict the true person, what kind of person he is. He is a homosexual. The person you’re sitting in judgment on—disregard Jay Neill. You’re deciding life or death on a person that’s a vowed [sic] homosexual.¹³² I don’t want to import to you that a person’s sexual preference is an aggravating factor. It is not. But these are the areas you consider whenever you determine the type of person you’re setting in judgment on The individual’s homosexual.¹³³

Defense counsel asked to approach the bench and objected to the prosecutor’s statements, but the court overruled.¹³⁴ The prosecutor reminded the jury that Neill was a gay, woman hating, and superficial man who deserved to die. Neill’s sexual orientation made it easier for the prosecutor to argue to impose the death penalty. Neill committed crimes that alone probably would have been enough to convince a jury to kill him. Despite this, the prosecutor knew that inserting Neill’s sexual orientation would guarantee a conviction and sentence of death. Neill challenged the statements made by the prosecutor on appeal to the Tenth Circuit, and the court ruled “there does not appear to be any legitimate justification for these remarks They are improper.”¹³⁵ But the court ruled “not every improper or unfair remark made by a prosecutor will amount to a federal

129. *Id.* at 87.

130. *Id.*

131. *Id.*

132. *Id.* at 88.

133. Neill v. Gibson, 278 F.3d 1044, 1061 (10th Cir. 2001).

134. *Id.*

135. *Id.*

constitutional deprivation” and did not result in a “fundamentally unfair trial.”¹³⁶ However, Circuit Judge Lucero dissented, stating:

Although gays and lesbians face increasing acceptance in our culture in the eyes of many, “gay people remain second-class citizens.” Today, almost half of all Americans continue to think that homosexuality should not be considered an acceptable lifestyle. According to the Federal Bureau of Investigation, there were 1534 reported victims of hate crimes motivated by anti-homosexual bias in 2000. The openly gay defendant thus finds himself at a disadvantage from the outset of his prosecution. When a prosecutor directs the jury to make its guilt-innocence or life-death determination on the basis of anti-homosexual bias, that disadvantage is magnified exponentially and raises constitutional concerns. This is so because prosecutors occupy a position of trust, and their exhortations carry significant weight with juries.¹³⁷

Neill was executed in Oklahoma in December 2002.¹³⁸

VI. PROCEDURAL SAFEGUARDS AGAINST INTRODUCING SEXUAL ORIENTATION

It is apparent from the cases above that homosexuals are at an extreme disadvantage when they are facing the death penalty. These cases seemed to be centered around the late 1990s to early 2000s when the death penalty reached its peak use.¹³⁹ While the acceptance of homosexuality in our society has vastly improved over the past several decades, the United States’ vote not to condemn the imposition of the death penalty against consensual same sex relationships is alarming. Currently, there are very few procedural safeguards regarding the introduction of sexual orientation into a case. As a result, judges and prosecutors still have wide discretion about whether or not to charge a homosexual with a capital crime and then use his or her sexual orientation against them.

The only real procedural safeguard regarding the introduction of a defendant’s sexual orientation is Federal Rule of Evidence 403, which states that otherwise relevant evidence may be excluded, provided “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

136. *Id.*

137. *Id.* at 1066-67 (Lucero, C.J., dissenting) (citations omitted).

138. MOGUL ET AL., *supra* note 53, at 88.

139. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Mar. 28, 2018), <https://deathpenaltyinfo.org/documents/FactSheet.pdf>. From 1996-2003, 572 individuals were executed. In 1999, ninety-eight individuals were executed, the most in a single year since *Furman v. Georgia*.

cumulative evidence.”¹⁴⁰ Each State has an evidentiary rule similar to this. But the cost-benefit analysis under Rule 403 is left to the discretion of a judge. Federal Rule of Evidence 401, defining the test for relevancy, is a relatively low bar, having a materiality and a probative worth prong.¹⁴¹ The only requirements for evidence to be relevant under the Federal Rules of Evidence is that it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹⁴² A judge should only exclude relevant evidence if it is unfairly prejudicial, meaning “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”¹⁴³ Judges are given broad discretion, similar to the discretion of a prosecutor, in applying this cost-benefit analysis and is subject to review on appeal only for abuse of discretion, which is rarely overturned.¹⁴⁴ Thus, much like how the prosecutor decides who to pursue the death penalty against, the judge faces little restriction on whether or not to admit the sexual orientation of a defendant in a capital murder case.

Prosecutors, specifically in capital punishment cases, will use a defendant’s sexual orientation to prove the defendant’s motive, relevant to prove intent or to identify the defendant as the individual who killed the victim(s). Several courts have admitted evidence of a homosexual relationship between the defendant and the victim in an emotionally motivated murder.¹⁴⁵ Other courts have admitted a defendant’s sexual orientation to prove that the defendant killed the victim because they threatened to expose the defendant as a homosexual.¹⁴⁶ Courts have recognized that the prosecutor may use this evidence to “suggest that the defendant is an immoral or bad person and inviting conviction on that basis,” nonetheless the court deems the defendant’s sexual orientation as supporting a possible motive for the crime.¹⁴⁷ Courts seek to avoid the

140. FED. R. EVID. 403.

141. Peter Nicolas, “*They Say He’s Gay*”: *The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793, 797 (2003).

142. FED. R. EVID. 401.

143. Nicolas, *supra* note 141, at 799.

144. *Id.*

145. *See, e.g.*, Smith v. United States, 381 A.2d 258, 259-60 (D.C. 1977); Welborn v. State, 372 S.E.2d 220, 220-21 (Ga. 1988); State v. Schweppe, 237 N.W.2d 609, 615 (Minn. 1975).

146. *See, e.g.*, Guthrie v. State, 637 So. 2d 35, 35-36 (Fla. Dist. Ct. App. 1994); People v. Rozo, 708 N.E.2d 1229, 1232 (Ill. App. Ct. 1999); Chumbler v. Commonwealth, 905 S.W.2d 488, 492-93 (Ky. 1995).

147. Nicolas, *supra* note 141, at 832.

potential prejudice by giving the jury a limiting instruction or presenting the evidence “in a way that is not unduly inflammatory.”¹⁴⁸

These “safeguards” such as a limiting instruction or presenting the defendant’s sexual orientation in a way that is not unduly inflammatory were not present in any of the cases listed above. In Bernina Mata’s case, the prosecutor “offered no scientific evidence or expert testimony to substantiate his theory that lesbians are predisposed to [kill men].”¹⁴⁹ Mata’s lesbianism had no probative value in terms of her intent to kill. Calvin Burdine’s previous sodomy conviction had nothing to do with the murder of his partner. Yet the judges in both cases admitted Mata and Burdine’s sexual orientation on the grounds it showed why Mata killed and why Burdine was a future danger to society. Both Mata and Burdine’s sexual orientation were not intrinsic to the issue at hand: murder.

Some States’ courts have tried to remedy the non-probative, inherently prejudicial use of sexual orientation evidence. The Supreme Court in South Carolina addressed the issue of a defendant’s sexual orientation being admitted in a criminal trial in *State v. Hartfield*:

It is common knowledge that a substantial portion of the populace look with disdain upon homosexuals. When pursued for any other purpose than to prove or disprove some fact in issue, evidence of homosexual relationship tends to become an attack upon the character of the defendant. Upon remand and on a new trial, the judge should be meticulous to see that such evidence and argument, if presented, is kept in bounds and used only for relevant and proper purposes.¹⁵⁰

Other courts have followed suit finding that introducing a defendant’s sexual orientation is highly prejudicial.¹⁵¹ Despite the common law rules, no federal or state procedural rules have been enacted to protect defendants from worrying their sexual orientation could be used against them in a criminal trial. Our legal system leaves this decision to a prosecutor who has wide discretion to determine who he or she will seek the death penalty against. When that prosecutor introduces a defendant’s sexual orientation in a capital punishment case, again, our system leaves the decision to a single judge to determine whether the defendant’s sexual

148. *Id.*

149. Mogul, *supra* note 59, at 488.

150. *State v. Hartfield*, 272 S.C. 407, 411, 252 S.E.2d 139, 141 (1979).

151. *People v. Sales*, 502 N.E.2d 1221, 1225 (Ill. App. Ct. 1986); *Beam v. Paskett*, 3 F.3d 1301, 1310 (9th Cir. 1993); *Guam v. Shymanovitz*, 157 F.3d 1154 (9th Cir. 1998); *Jones v. United States*, 625 A.2d 281, 284 (D.C. App. 1993).

orientation is prejudicial enough that the jury will make its decision based on the defendant's sexual orientation.

VII. CONCLUSION: WE NEED TO ACT

So, is it even relevant to the issue discussed above that our society is moving towards a greater acceptance of homosexuality? Our society still gives a large amount of power to prosecutors and judges to protect us from crime. But what if those prosecutors and judges do not hold the same views as society does? What if prosecutors and judges, specifically in highly conservative/religious states, do not have the same tolerance towards the gay community? In the case of Gregory Scott Dickens, Dickens killed a couple in Arizona while traveling with a sixteen-year-old in 1991.¹⁵² Dicken's attorney wanted to present at trial that it was the teen who fired the gun.¹⁵³ The judge, Tom Cole, intervened and stated that if the defense presented this evidence, the prosecution would be allowed to introduce to the jury that Dickens and the teen were lovers.¹⁵⁴ In addition, the judge hinted that Dicken's prior convictions of fondling minors might also be admissible.¹⁵⁵ At the time of the trial, Judge Cole's own son admitted to being a homosexual.¹⁵⁶ Judge Cole was furious and wrote a letter to his son stating he "hope[d] that his son would die in prison like all the rest of [his] faggot friends."¹⁵⁷

Our legal system leaves it to two individuals, a judge and a prosecutor, to determine whether a defendant's sexual orientation will be used against him or her in a capital murder case. The United States' vote against the UNHR resolution to condemn the use of the death penalty for consensual same-sex relations might mean our system, rather than society, still has a distaste towards the gay community. Vice President Mike Pence and Secretary of State nominee Mike Pompeo have voiced their distaste towards gay marriage and the gay community in general. If our political and legal system continue to be directed by Judge Cole, Pence, and Pompeo, then the need for procedural safeguards is even greater. With high procedural safeguards such as rape shield laws and bars against injecting race at trial, our systems need procedural safeguards against introducing a defendant's sexual orientation at trial, specifically in death

152. Goldstein, *supra* note 14.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

penalty cases. In addition, defense attorneys and prosecutors need to be educated and screened before they take the case of a homosexual defendant. Or we need to do a better job of enforcing ethical violations. Model Rule 8.4 of the Model Rules of Professional Conduct makes it professional misconduct for a lawyer to: “(d) engage in conduct that is prejudicial to the administration of justice; . . . or (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion . . . sexual orientation.” Despite this rule, the judges and lawyers in the cases above acted in a discriminatory manner against homosexuals. If this conduct is going to continue, our system needs increased procedural safeguards for injecting sexual orientation in any criminal case. Our current system is failing the gay community; what we have right now is not good enough.