

The Gay Panic Defense: A Rainbow of Reasons Calling for Abolishment and Protections in Tennessee

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I. INTRODUCTION

In 2015, a thirty-two-year-old man named Daniel Spencer invited his neighbor, sixty-nine-year-old James Miller, over for a night of music and drinking.¹ However, instead of a night of good times and merriment amongst friends, there was only murder and despair that evening.² Daniel Spencer was brutally murdered by James Miller.³ Did this act have any justifiable reason? What could have led to such a tragic event? Miller alleges that the younger, taller Daniel Spencer merely went in for a kiss and became upset when Miller rejected him.⁴ Miller claimed he reacted in self-defense by stabbing Spencer in the back.⁵ There is no one who can corroborate what actually happened that night and no evidence to support the claim of self-defense.⁶ Miller even testified under oath that there was no physical altercation with Spencer before he stabbed Spencer and ended his life.⁷

Instead of spending years behind bars for the brutal murder, Miller received a lesser sentence. Miller was convicted of criminally negligent homicide, rather than first- or second-degree murder or manslaughter.⁸ The jury recommended Miller receive only ten years of probation.⁹ The presiding Texas judge added only an additional six months of jail time, 100 hours of community service, and ordered that Miller pay Spencer's family \$11,000 in restitution.¹⁰ How could such a murderous act escape justice? The answer is the gay panic defense.

The LGBT panic defense, widely known as gay panic defense,¹¹ is a legal defense strategy that legitimizes and excuses violent behavior

1. Curtis M. Wong, *Texas Man Who Killed Neighbor Uses 'Gay Panic' Defense and Avoids Murder Charge*, HUFFPOST (April 27, 2018, 3:30 PM), https://www.huffpost.com/entry/texas-james-miller-gay-panic_n_5ae35296e4b04aa23f22efe8.

2. *Id.*

3. *Id.*

4. *Id.*

5. Chris Harris, *Man Claims He Killed Neighbor in Self-Defense After Victim Tried to Come Onto Him: 'I'm Not Gay'*, PEOPLE (April 30, 2018, 4:14 PM), <https://people.com/crime/texas-man-murders-neighbor-gay-panic/>.

6. *Id.*

7. *Id.* There was no crime committed, and Miller's allegations of Spencer's actions do not amount to anything worthy of warranting death. Spencer did not attempt to harm Miller in anyway. Miller could have left Spencer's residence at any time.

8. Julie Compton, *Alleged 'Gay Panic Defense' in Texas Murder Trial Stuns Advocates*, NBC NEWS (May 2, 2018, 1:12 PM), <https://www.nbcnews.com/feature/nbc-out/alleged-gay-panic-defense-texas-murder-trial-stuns-advocates-n870571>.

9. *Id.*

10. *Id.*

11. This Article will refer to the gay panic defense, homosexual advance defense, LGBTQ+ panic defense, and transgender panic defense as the gay panic defense.

against those in the LGBT¹² community.¹³ The defense asks the jury to find that an individual's sexual orientation or gender identity excuses the defendant's violent behavior.¹⁴ The gay panic defense is not a stand-alone defense strategy, but is used to bolster other defenses, such as insanity, heat of passion, adequate provocation, diminished capacity, and self-defense.¹⁵ The gay panic defense allows evidence to be admitted, that otherwise would not be, simply to prove the victim's sexual orientation or gender identity.¹⁶ Once the victim's sexual orientation or gender identity is established, the defendant claims that the victim's sexual orientation or gender identity triggered them in such a way as to provoke their violence toward the victim.¹⁷ Essentially, the implementation of the gay panic defense puts the victim on trial instead of the defendant because a victim's LGBT status is used against them for discriminatory purposes to justify the defendant's violent act.¹⁸

The gay panic defense is unconstitutional because it violates the Fourteenth Amendment's Equal Protection Clause, and therefore it should be abolished.¹⁹ The continued existence of the gay panic defense is an infraction of Tennessee's own constitution that mirrors the Fourteenth Amendment's Equal Protection Clause.²⁰ Further, the gay

12. "LGBT" is an acronym for Lesbian, Gay, Bisexual, and Transgender. Although "LGBTQ+" is often used to fully recognize the diversity of the LGBT community, this Article utilizes LGBT to comport with the majority of legal cases, articles, and agencies.

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

14. *The LGBTQ+ "Panic" Defense*, THE LGBTQ+ BAR, <https://lgbtqbar.org/programs/advocacy/gay-trans-panic-defense/> (last visited Apr. 1, 2022) [hereinafter *LGBTQ+*].

15. *Id.*; Devan N. Patel, *The Indefensible "Gay Panic Defense,"* 46 J. LEGIS. 114, 119-22 (2019).

16. J. Kelly Strader et al., *Gay Panic, Gay Victims, and the Case for Gay Shield Laws*, 36 CARDOZO L. REV. 1473, 1520-21 (2015).

17. *Id.*

18. *Id.*

19. See U.S. CONST. amend. XIV, § 1. The Equal Protection Clause requires states to exercise equal protection of individuals. The Equal Protection Clause instructs "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* See also *Equal Protection*, CORNELL L. SCH., https://www.law.cornell.edu/wex/equal_protection (last visited Apr. 1, 2022) (stating that the Equal Protection Clause requires states to "govern impartially" and to "treat an individual in the same manner as others in similar conditions and circumstances").

20. See TENN. CONST. art. I, § 8; TENN. CONST. art. XI, § 8; see also *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993) (stating that while TENN. CONST. art. I, § 8 and TENN. CONST. art. XI, § 8 apply under different circumstances they work together to provide equal protections, privileges, and immunities to all people); *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005) ("[T]he state equal protection guarantee is co-extensive with the equal protection guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution."). Therefore, Tennessee's equal protection clause supports, mirrors, and furthers the goals and

panic defense contradicts Tennessee's own hate crime statute, which is designed to enhance a defendant's sentence if the victim was intentionally targeted because of their sexual orientation.²¹ Tennessee's hate crime statute does not include gender identity, but the Tennessee Attorney General issued an advisory opinion that the hate crime statute should cover transgender hate crimes.²² While Tennessee has hate crime protections for LGBT individuals, the allowed use of the gay panic defense in Tennessee's courtrooms negates any progress for equality the Volunteer State has made. Therefore, Tennessee should abolish the gay panic defense through a legislative order. However, abolishment alone is not enough.²³ To further ensure the LGBT community's rights are protected, gay shield laws should be implemented so that LGBT victims are not subject to the gay panic defense in any other forms. Tennessee gay shield laws should resemble existing Tennessee rape shield laws to guarantee bias and prejudice do not undermine the factfinding process.²⁴ These gay shield laws should be implemented because even in the states

objectives of the Fourteenth Amendment's Equal Protection Clause and the Fifth Amendment's Due Process Clause. As a result, Tennessee must provide equal protection to all regardless of race, religion, or sex.

21. TENN. CODE ANN. § 40-35-114 (2021); *Hate Crimes*, LEGAL REFERRAL SERV., <https://chattanooga.alaw.org/pages/info-hate> (last visited Apr. 1, 2022) (“[D]efendants will also receive an enhanced sentence if it can be determined that the victim was intentionally selected due to their race, religion, color, disability, sexual orientation, national origin, ancestry, or gender.”); see also Natalie Allison, *Tennessee Becomes First State in the South with Hate Crime Law Protecting Transgender People*, THE TENNESSEAN (Feb. 14, 2019, 3:30 PM), <https://www.tennessean.com/story/news/politics/2019/02/14/tennessee-transgender-lgbt-hate-crime-protection/2869223002/> (stating that Tennessee's hate crime statute applies to crimes in which the defendant targeted the victim because the victim was targeted due to their sexual orientation. While the Tennessee hate crime statute does not cover gender identity, the General Assembly stated that judges should consider hate crime enhancements if the victim was selected based on their sexual identity). Tennessee's hate crime statute and the actions of the Tennessee General Assembly demonstrate that the state wishes to protect victims of hate crimes and punish those who target individuals due to sexual orientation. The use of the gay panic defense in Tennessee defeats the objectives of the hate crime statute.

22. See Allison, *supra* note 21 (“A defendant who targets a person for a crime because that person is transgender has targeted the person because of his or her gender within the meaning of the current state law that outlines sentence enhancements for hate crimes . . .”).

23. As discussed in Parts II, III, and IV, abolishment alone is not enough. Even if a judge does not permit the use of the gay panic defense, elements of the defense may still be seen and result in a miscarriage of justice. See Strader, *supra* note 16, at 1478.

24. *Rape Shield Laws*, SHIELD LAWS, <https://law.jrank.org/pages/10253/Shield-Laws-Rape-Shield-Laws.html> (last visited Apr. 1, 2022) (explaining how rape shield laws protect victims of criminal sex offenses by not allowing evidence of a rape victim's sexual conduct or reputation except under limited circumstances). As discussed in Part IV, gay shield laws should be created to protect the victim and to aid in diminishing discriminating evidence against the victim.

that have banned the defense, the LGBT community continue to be deprived of their constitutional entitlement to equal protection of the law.²⁵ With the number of hate crimes against members of the LGBT community rising,²⁶ the gay panic defense should be abolished and protections put in place to protect and ensure justice for victims.

Part II of this Article examines the gay panic defense and its scope, provides relevant case law, and explains how the gay panic defense has progressed and been applied. Part III fleshes out why a solution is needed to resolve the issue created by Tennessee's use of the gay panic defense. Part IV calls for Tennessee to abolish the gay panic defense and implement gay shield laws to protect members of the LGBT community. Part V, the Conclusion, offers brief closing remarks. This Article explores the gay panic defense generally as it is used in various jurisdictions but its analysis and solution focus on changing Tennessee law.²⁷ The gay panic defense is a creature of common law and has not been codified in any state statutes, but states that permit its use have allowed the gay panic defense to be utilized under different circumstances.

II. BACKGROUND

A heterosexual defendant can raise the gay panic defense by blaming a victim's sexual orientation or gender identity for the defendant's violent act.²⁸ Case law in which the defense has been used, proves that the gay panic defense can successfully reduce a defendant's sentence, reduce the level on conviction, or even absolve them from liability completely.²⁹ Recent studies have been conducted that prove the effectiveness of the gay panic defense despite positive, modern views regarding homosexuality.³⁰

A. *What is the Gay Panic Defense and When is It Used?*

The gay panic defense is currently only banned in sixteen states plus the District of Columbia,³¹ however, Tennessee is not among those

25. See Part IV.

26. See Part III.B.

27. This Article utilizes persuasive authority from other states and jurisdictions.

28. See Part II.A.

29. See Part II.B.

30. See Part II.C.

31. As of April 27, 2023, only sixteen states have banned the gay panic defense from being used in their criminal courtrooms.

sixteen states.³² The gay panic defense emerges in the judicial setting after a heterosexual individual assaults or murders a member of the LGBT community.³³ When a state court permits the use of the gay panic defense, it allows the defense to blame the victim's sexual orientation or gender identity for the defendant's savage actions.³⁴ Essentially, the gay panic defense alleges that the victim's sexual orientation or gender identity caused the defendant to "panic" and commit a violent attack against the victim.³⁵ The gay panic defense can even be used to show that the victim's sexual orientation or gender identity provoked the attack.³⁶ The defense shifts responsibility for the violent act from the defendant to the victim.³⁷

For example, imagine that a twenty-year-old individual named Colton walks into a bar to have drinks, meet new people, or simply take a break after a long day. After a few drinks, Colton makes friends with two other male individuals that are roughly his age, and the three seemingly share common interests. The other two individuals then invite Colton to have drinks at one of their homes. While Colton thought he was making friends, those friends were targeting Colton due to his homosexuality and their homophobia. Instead of arriving at a new friend's home, Colton is tied to a fence post in the middle of nowhere, beaten to the brink of death, and left to die alone.³⁸ Now imagine that at trial for the murder of Colton,

32. *LGBTQ+*, *supra* note 14. New Hampshire has recently taken legislative action against the defense. New Hampshire's House of Representatives recently passed a bill banning the defense that is currently awaiting New Hampshire senate approval. See Brooke Migdon, *New Hampshire Moves to Outlaw 'Gay Panic' Defense*, THE HILL (Jan. 11, 2022), <https://thehill.com/changing-america/respect/equality/589298-new-hampshire-moves-to-outlaw-gay-panic-defense>.

33. *New York State: Stop Allowing Homophobia and Transphobia to Justify Violence Against LGBTQ People!*, THE CTR.: THE LESBIAN, GAY, BISEXUAL & TRANSGENDER CMTY. CTR., <https://gaycenter.org/demandjustice/> (last visited Apr. 1, 2022) (calling for New York to sign a petition that advocated for the end to the gay panic defense and provided relevant background on the defense).

34. *Id.* ("The gay/trans "panic" defense allows a defendant to claim that finding out a person's actual or assumed sexual orientation or gender identity caused an "extreme emotional disturbance" that led them to violently attack that person.").

35. Jason Delgado, *Democratic lawmakers push to ban 'gay/trans panic defense'*, FLA. POL. (Sept. 29, 2021), <https://floridapolitics.com/archives/461157-democratic-lawmakers-push-to-ban-gay-trans-panic-defense/> (explaining what the gay panic defense is and why Florida should ban the defense). The gay panic defense is being used as an excuse "to defend a hate crime." *Id.* This defense should not even be in existence due to how contrary it is to the Equal Protection Clause. See Part III.A. Instead of a victim getting justice for crimes committed against them, they are being placed on trial simply due to their gender identity or sexual orientation. See. Part II.D.

36. *Id.*

37. *Id.*

38. The facts in this hypothetical are based on the facts surrounding the murder of Matthew Shepard but are slightly altered for use in this hypothetical. *Our Story*, MATTHEW SHEPARD FOUND., <https://www.matthewshepard.org/about-us/our-story/> (last visited Apr. 1,

the defense alleges that Colton's homosexuality caused the defendants to panic, violently attack Colton, and leave him for dead.

Imagine further that the presiding judge allows the defense to enter evidence of Colton's homosexual nature to support the defense's claim. The jury learns that Colton enjoyed wearing dresses on occasions, wore gay pride t-shirts, and attended LGBT parades. The judge and jury then lessen the offense from first degree murder, which carries a maximum penalty of life in prison and ensures what justice is possible to Colton's family, to manslaughter which carries a considerably lower sentence of only three to ten years imprisonment.³⁹ Colton did not try to attack his new friends. Colton did not try to sexually force himself on either of the two individuals. Colton only tried to make new friends at a bar. Colton did nothing wrong and was targeted due to his sexuality.

When the gay panic defense is successful, it can either reduce the defendant's culpability leading to a reduced sentence or completely absolve the person of the horrendous crime committed against a member of the LGBT community by justifying the defendant's actions.⁴⁰ The gay panic defense is not a stand-alone defense, but is commonly used to support an insanity defense, demonstrate provocation, or strengthen a claim of self-defense.⁴¹ The defense must prove that the defendant knew or had reason to know of the victim's sexual orientation or gender identity to invoke the gay panic defense.⁴²

The use of the gay panic defense used to support an insanity defense made its way into the criminal justice system because society once

2021); Jude Sheeran, *Matthew Shepard: The murder that changed America*, BBC NEWS (Oct. 26, 2018), <https://www.bbc.com/news/world-us-canada-45968606>. In the Matthew Shepard murder trial, the presiding judge did not permit the use of gay panic defense. *Id.*

39. The outcome of this hypothetical is based on the murder trial for Lawrence King. See Strader, *supra* note 16, at 1475.

40. *New York State: Stop Allowing Homophobia and Transphobia to Justify Violence Against LGBTQ People!*, THE CTR.: THE LESBIAN, GAY, BISEXUAL & TRANSGENDER CMTY. CTR., <https://gaycenter.org/demandjustice/> (last visited Apr. 1, 2022).

41. AM. BAR ASS'N, REP. NO. 113A (Aug. 12-13, 2018), <https://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>; see *LGBTQ+*, *supra* note 14 (explaining how the gay panic defense is used to bolster insanity, show provocation, and enhance a claim of self-defense); Patel, *supra* note 15, at 119.

42. Michael Dohr, A BILL FOR AN ACT CONCERNING BANNING THE USE OF A PANIC DEFENSE UNLESS A PARTY CAN SHOW ITS RELEVANCE TO THE COURT, H. B. 20-1307, at 1-3 (2020). If the defendant did not know the victim was gay, they could not possibly have committed the violent act because of gay panic.

recognized a gay panic disorder⁴³ as a psychological disorder.⁴⁴ The gay panic defense is often used to support a defense of diminished capacity or insanity. In order to be convicted of a crime, a defendant must possess the required *mens rea*.⁴⁵ When the state filed suit in a criminal matter, the defendant would claim that he or she did not appreciate the criminal or moral wrongness of their violent acts, thereby lacking the required *mens rea* due to their gay panic disorder.⁴⁶ When the gay panic defense is used for the purpose of supporting an insanity defense, the defense theory first suggests that the defendant was faced with a sexual request or gesture by the victim.⁴⁷ As a result, the defendant had a mental break which caused the defendant to suffer a nervous breakdown causing the violent behavior.⁴⁸ Despite the American Psychological Association removing “gay panic disorder” from the *Diagnostic and Statistical Manual of Mental Disorders*⁴⁹ in 1973, it is still frequently used in the courtroom when the defendant is claiming insanity or diminished capacity.⁵⁰ When the gay panic defense is successful at proving the defendant’s diminished

43. Gay panic disorder is also referred to as homosexual panic disorder. Kara S. Suffredini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 BOS. COLL. L. SCH. STUDENT PUBL.’N 279, 288-89 (2001).

44. Strader, *supra* note 16, at 1520-21.

45. Michael A. Foster, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, CONG. RSCH. SERV. (June 30, 2021), <https://crsreports.congress.gov/product/pdf/R/R46836/1> (“[M]ens rea requirements largely fall into loose categories that may include (1) an awareness of, or conscious purpose to bring about conduct, a circumstance, or a result that is a required element of the offense (commonly represented by terms such as ‘intent,’ ‘knowledge,’ or ‘willfulness,’ among others), or (2) an awareness and disregard of substantial risk of harm or failure to perceive a substantial risk of harm when a reasonable person would have perceived it, commonly represented by the terms ‘recklessness’ and ‘negligence,’ respectively.”). *Mens rea* refers to the mental state of the defendant. *Id.*

46. Patel, *supra* note 15, at 121.

47. AM. BAR ASS’N, REP. NO. 113A (Aug. 12-13, 2018), <https://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>.

48. *Id.*

49. The *Diagnostic and Statistical Manual of Mental Disorders*, also known as the DSM, “is the handbook used by health care professionals in the United States . . . as the authoritative guide to diagnosis of mental disorders. DSM contains descriptions, symptoms and other criteria for diagnosing mental disorders.” *DSM – 5: Frequently Asked Questions*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions> (last visited Apr. 1, 2022).

50. Holden, *supra* note 13; Delgado, *supra* note 35; AM. BAR ASS’N, REP. NO. 113A (Aug. 12-13, 2018), <https://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>. While the medical community has discredited gay panic disorder and no longer sees it as a mental disorder, our justice system refuses to acknowledge medical progress and recognition of homophobia as morally unacceptable by allowing such a defense to be used. The use of this defense allows for a severe miscarriage of justice.

capacity, that defendant will receive a lesser offense than the crime charged.⁵¹

The gay panic defense can also be successful to demonstrate the existence of provocation.⁵² In this instance, the defense will likely allege that the victim's sexual, non-violent advance⁵³ on the defendant was sufficient provocation that led to the defendant violently assaulting or killing the victim.⁵⁴ In Tennessee, adequate provocation can lessen a murder charge from first- or second-degree murder to voluntary manslaughter, a Class C felony.⁵⁵ Therefore, despite the fact that the victim did not harm or assault the defendant, the defendant attempts to justify their violent crimes against the victim due to the victim's sexual orientation or gender identity through the gay panic defense.⁵⁶

Finally, defendants use the gay panic defense to strengthen their self-defense claim. Self-defense is defined as "the right to protect [oneself] from harm under certain circumstances even when that conduct would otherwise subject that person to criminal culpability."⁵⁷ Self-defense is a

51. *Diminished Capacity*, LEGAL DICTIONARY, <https://legaldictionary.net/diminished-capacity/> (last visited Apr. 1, 2022).

52. The gay panic defense is ineffective and unjust because the defense shifts responsibility for the violent act from the defendant to the victim.

53. Non-violent advance entails that it is not criminal in nature but is considered provocative when done by a member of the LGBT community. See Scott Dibble et al., *Minnesota Must Ban The 'Gay Panic' Defense*, STARTRIBUNE (Mar. 3, 2021, 5:18 PM), <https://www.startribune.com/minnesota-must-ban-the-gay-panic-defense/600029939/> (explaining how the gay panic defense relates to adequate provocation and the "nonviolent sexual advance" would only be considered "provocative" when relating to an LGBT individual.) In other words, if done by a heterosexual individual to a member of the opposite sex, it would not be considered provocative and would not defend a defendant's violent response.

54. AM. BAR ASS'N, REP. NO. 113A (Aug. 12-13, 2018), <https://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>.

55. TENN. CODE ANN. § 39-13-211 (2021). The Tennessee statute defines voluntary manslaughter as "the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." *Id.* Therefore, if the defendant can prove they acted in a state of passion stemming from reasonable and adequate provocation the defendant could receive a lesser offense. See *infra* Part III (discussing how an assault or murder based on heterosexuality would never be reasonable or adequate provocation).

56. A heterosexual female could not justify killing a male due to a male attempting to kiss her at a bar because it would not rise to the level of reasonable, adequate provocation. However, a heterosexual male could prove reasonable, adequate provocation if a homosexual male attempted to kiss him at a bar due to the gay panic defense. This is undoubtedly a significant violation of the equal protection clause because the gay panic defense singles out only LGBT individuals.

57. *Self Defense Laws*, HQ, <https://www.hg.org/legal-articles/self-defense-laws-40093> (last visited Apr. 1, 2022).

complete defense to criminal liability, resulting in an acquittal.⁵⁸ Under Tennessee law, one may use justifiable force to defend themselves from harm without retreating.⁵⁹ In Tennessee, in order to successfully have a self-defense claim, one must show the existence of the following factors:

- The person has a reasonable belief that there is an imminent danger of death, serious bodily injury, or grave sexual abuse;
- The danger creating the belief of imminent death, serious bodily injury, or grave sexual abuse is real, or honestly believed at the time; and
- The belief of danger is founded upon reasonable grounds.⁶⁰

When a claim of self-defense is coupled with the gay panic defense, the defendant attempts to prove that the victim attempted a sexual advance on the defendant and that use of force was necessary to combat the imminent danger of serious bodily harm that would result from the potential sexual assault.⁶¹ In order to prove the existence of a potential sexual assault, the defendant directs the jury to the victim's sexual orientation or gender identity to prove imminent danger and that the defendant's violent act against the victim was necessary to prevent the act.⁶² Often, self-defense is used to justify the overkill or the use of more force than necessary.⁶³ While the gay panic defense is not always

58. See Beverly Rice, *Criminal Defenses: Excuse and Exculpation Defenses*, LEGAL ZOOM (May. 02, 2022), <https://www.legalzoom.com/articles/criminal-defenses-excuse-and-exculpation-defenses> (defining self-defense and explaining what self-defense can do for a criminal defendant).

59. TENN. CODE ANN. § 39-11-611 (2021); see *Stand Your Ground in Tennessee*, GIFFORDS L. CTR. (Feb. 11, 2021), <https://giffords.org/lawcenter/state-laws/stand-your-ground-in-tennessee/> (explaining the operation of the stand your ground statutes apply in Tennessee).

60. TENN. CODE ANN. § 39-11-611 (2019).

61. *Id.*; AM. BAR ASS'N, REP. NO. 113A (Aug. 12-13, 2018), <https://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>.

62. AM. BAR ASS'N, REP. NO. 113A (Aug. 12-13, 2018), <https://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>.

63. Lucas Grindley, *Why This Texas Man Got Probation for Murdering Gay Neighbor*, ADVOCATE (Apr. 29, 2018, 1:16 PM), <https://www.advocate.com/crime/2018/4/29/why-texas-man-got-probation-murdering-gay-neighbor> (explaining how James Miller used the gay panic defense to strengthen his self-defense claim); see generally Jim Dey, *Jim Dey: 'Gay Panic' Claims Make for Good Headlines, Not Good Law*, NEWS-GAZETTE (June 4, 2017), https://www.news-gazette.com/news/jim-dey-gay-panic-claims-make-for-good-headlines-not-good-law/article_2bd41df9-52e1-56bb-ba2e-56987ffb4679.html (addressing the gay panic defense as it is applied to self-defense and argues that the gay panic defense should no longer be in existence).

successful to acquit a defendant, it has proven effective in reducing defendants' culpabilities for crimes such as assault and homicide.⁶⁴

B. The Gay Panic Defense Exists Today?!

Despite modern protections and views shifting toward understanding and acceptance regarding sexual orientation and gender identity, the gay panic defense continues to be used in the courtroom.⁶⁵ The gay panic defense has effectively resulted in a defendant receiving a lesser conviction or even acquittal despite the defendant's violent acts targeting members of the LGBT community.⁶⁶ Invocation of the gay panic defense does not mean that the presiding judge will allow it or that the jury will always rule in the defendant's favor.⁶⁷ It is difficult to identify case law in which the defendant successfully raised a gay panic defense due to the jury's verdict not resulting in an opinion or appeal and because the gay panic defense is only used as a defense strategy, not a stand-alone legal defense.⁶⁸ These cases are vital to understand how the gay panic defense arises and masquerades itself under the veil of other defenses, as well as the effect the defense has on victims seeking justice. These cases also demonstrate why Tennessee should take action to ban the defense and protect the rights of LGBT individuals. While it is difficult to pinpoint exactly how many times the gay panic has been successfully utilized as a defense strategy, even once is one time too many.⁶⁹

64. Holden, *supra* note 13.

65. See Kenneth Roth, *LGBT: Moving Towards Equality*, HUM. RTS. WATCH (Jan. 23, 2015), <https://www.hrw.org/news/2015/01/23/lgbt-moving-towards-equality#> (explaining how the public perception of homosexuality has shifted more towards acceptance); see *infra* Part III (scrutinizing the use of the gay panic defense).

66. See Jordan Blair Woods et al., *Model Legislation for Eliminating the Gay and Trans Panic Defenses*, THE WILLIAMS INST. (Sept. 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Model-Legisl-Gay-Trans-Panic-Defense-Sep-2016.pdf> (detailing how the gay and trans panic defenses operate, constitutional challenges, and model legislation to abolish the gay and trans panic defenses).

67. *Id.*

68. *Id.* Due to the lack of court opinions, this Article relies on media reports stemming from cases in which the gay panic was used.

69. See *The LGBTQ+ Panic Defense*, WORLD WITHOUT GENOCIDE, <http://worldwithoutgenocide.org/toolkits/transgender-rights/ban-the-lgbtq-panic-defense> (last visited Apr. 1, 2022) (“[T]he LGBTQ+ panic defense gained notoriety [] and popularity. It has been used in hundreds of cases across the country to defend people accused of attacking and even murdering LGBTQ+ people or to reduce the charges against them.”).

1. Lesser Offense and Acquittal for Murder

In August 2013, Islan Nettles was walking with friends in Harlem when James Dixon approached her and began flirting with her.⁷⁰ The two continued to converse until one of James Dixon's friends informed him that Ms. Nettles was a transgender female.⁷¹ Upon this revelation, Dixon was sent into "a blind fury."⁷² Dixon threw Ms. Nettles to the ground and beat her relentlessly.⁷³ Ms. Nettles posed absolutely no physical threat to Dixon.⁷⁴ Even as Ms. Nettles laid helplessly on the sidewalk after the initial blow, Dixon continued the barbaric attack.⁷⁵ Ms. Nettles suffered "a fractured eye, nose, jaw and skull."⁷⁶ By the time Ms. Nettles arrived at the hospital, she was already brain dead.⁷⁷

Dixon readily confessed to the murder, claiming that his pride was at stake and stating, "I just don't want to be fooled."⁷⁸ What is most surprising is that an indictment for first-degree manslaughter and his arrest was not issued for more than a year after the brutal murder.⁷⁹ At first, Dixon pled "not guilty to first- and second-degree manslaughter and

70. Dan Avery, *New York Lawmakers Look to Ban Controversial 'Gay Panic Defense,'* NBC NEWS (Jan. 25, 2019, 10:32 AM), <https://www.nbcnews.com/feature/nbc-out/new-york-lawmakers-look-ban-controversial-gay-panic-defense-n962716>.

71. *Id.*

72. *Id.*; see Shayna Jacobs, *Murder Suspect Said His 'Manhood' was Threatened When He Found Out He Was Hitting on Transgender Woman*, N.Y. DAILY NEWS (Apr. 01, 2016, 10:50 PM), <https://www.nydailynews.com/new-york/nyc-crime/transgender-slay-suspect-manhood-threatened-article-1.2585915> (detailing how Dixon had attempted to sexually entice other transgender females days prior to murdering Islan Nettles and was harassed by his friends as a result).

73. Avery, *supra* note 70.

74. See James C. McKinley Jr., *Man Sentenced to 12 Years in Beating Death of Transgender Woman*, N.Y. TIMES (Apr. 19, 2016), <https://www.nytimes.com/2016/04/20/ny-region/man-sentenced-to-12-years-in-beating-death-of-transgender-woman.html> (providing a detailed account of the brutal murder of Islan Nettles).

75. *Id.*

76. Avery, *supra* note 70.

77. *Id.*

78. *Id.*

79. *Id.*; see Yanan Wang, *The Islan Nettles Killing: What the Trial Means to a Transgender Community Anxious for a Reckoning*, WASH. POST (April 4, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/04/04/the-islan-nettles-killing-what-the-trial-means-to-a-transgender-community-anxious-for-a-reckoning/> ("Nettles's mom, Delores, and trans activists had called on Dixon to be charged with a hate crime to no avail. "Lourdes Hunter, the director of the Trans Women of Color Collective, told the *Post* that the long delay in bringing charges, the fact that [Dixon] was charged with manslaughter as opposed to murder, and the absence of hate crime charges indicated that police consider transgender killings a low priority."). This further stresses the injustices members of the LGBT community receive and why there is a lack of trust in the justice system.

first degree assault.”⁸⁰ However, eventually Dixon pled guilty to first-degree manslaughter.⁸¹ As a result of a plea deal, instead of facing twenty-five years behind bars, Dixon was only sentenced to twelve years as a direct result of the gay panic defense.⁸² Ms. Nettles’ mother, along with activist seeking an end to the gay panic defense, believe that Dixon would have received a much harsher sentence if he had not been permitted to cite “transgender panic” in his confession.⁸³

Similarly, in 1995, an openly gay man, Scott Amedure, appeared on the set for *The Jenny Jones Show*.⁸⁴ In Scott’s segment for the show, he was to announce his same-sex intimate feelings and fantasies for his neighbor, Jonathan Schmitz.⁸⁵ Schmitz, a heterosexual male, alleges that he was only informed by producers that he had a secret admirer and assumed the admirer was female.⁸⁶ When it was revealed to Schmitz that his admirer was Mr. Amedure, he was unpleasantly surprised.⁸⁷ Three days after the episode’s taping, Schmitz received a love note from Mr. Amedure, which triggered his homophobia disorder, went to Mr. Amedure’s home, and shot Mr. Amedure twice in the chest with a shotgun.⁸⁸

After the murder, Schmitz called 911 and confessed to killing Mr. Amedure.⁸⁹ Schmitz alleged that at the time of the murder he was not

80. Avery, *supra* note 70.

81. *Id.*

82. *Id.* Receiving only twelve years for murdering an individual that was doing nothing but carrying about their day could not be a more prime example of the miscarriage of justice members of the LGBT community receive any time a gay panic defense is utilized. *Id.* Islan Nettles did no wrong to receive the fate she was bestowed. Ms. Nettles was merely walking on a public street. The prosecution may have considered that if the case went to trial, Dixon’s defense team would use the gay panic defense to invoke the jury’s homophobic bias. The gay panic defense was likely used as a negotiation tool by the defense to secure a plea deal.

83. Michael Gold, ‘Gay Panic’ Defenses Are Banned in N.Y. Murder Cases, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/nyregion/gay-panic-ny.html>.

84. See Shannon Raphael, *Scott Amedure Was Murdered After He Reveled His Crush on “The Jenny Jones Show,”* DISTRACTIFY (May 12, 2020, 6:07 PM), <https://www.distractify.com/p/scott-amedure-trial-by-media> (detailing Netflix’s *Trial By Media* docuseries episode of the murder of Scott Amedure and the media coverage the case received).

85. *Id.*

86. *Id.* However, it is alleged that Amedure was told by producers the admirer could either be male or female. With this knowledge, he still agreed to be on the show. See Candace Powell, *Inside ‘The Jenny Jones Show’ Murder 25 Years Later*, SHOWBIZ CHEATSHEET (Aug. 16, 2020), <https://www.cheatsheet.com/entertainment/inside-the-jenny-jones-show-murder-25-years-later.html/> (detailing what Amedure was aware of and point out that he purchased a shotgun and ammunition three days before the murder).

87. Raphael, *supra* note 84.

88. *Id.*

89. *Id.*

mentally in the right state of mind and was under the influence of drugs and alcohol.⁹⁰ Schmitz's defense team argued that Schmitz was overwhelmed by the potential negative backlash and embarrassment Schmitz would face once the episode was televised.⁹¹ Instead of receiving punishment to the highest extent of the law, the use of the gay panic defense resulted in Schmitz only being convicted of second degree murder as opposed to first degree, premeditated murder.⁹² Schmitz served only twenty-two years behind bars and received parole in 2017.⁹³ Not only can the gay panic defense be used by the defendant to obtain conviction for a lesser offense, but it can also be used to absolve the defendant of all criminal liability.

In 2017, Joseph Biedermann was acquitted of first degree murder by stabbing his neighbor Terrance Michael Hauser over sixty times.⁹⁴ Hauser invited Biedermann back to his apartment for drinks after Biedermann was refused service at a bar.⁹⁵ Hauser and Biedermann had not previously met but both resided at the same apartment complex.⁹⁶ After discussing various topics, such as sports and pornography, Biedermann fell asleep on Hauser's couch.⁹⁷ At some point, Biedermann claimed he woke up to Hauser holding a sword and threatening to sexually assault him.⁹⁸ Biedermann alleged he took the sword from Hauser and used it to stab him repeatedly.⁹⁹ It was Biedermann's girlfriend, not Biedermann, that

90. Jacob Shelton, *The Bizarre Case of the 'Jenny Jones' Murder*, RANKER (Apr. 05, 2022), <https://www.ranker.com/list/scott-amedure-facts/jacob-shelton>.

91. Raphael, *supra* note 84; Samuel Spencer, 'Trial By Media' on Netflix: Where is Jenny Jones Now and What Has She Said About the Murder of Scott Amedure?, NEWS WEEK (May 13, 2020, 9:46 AM), <https://www.newsweek.com/trial-media-netflix-jenny-jones-now-today-2020-scott-amedure-jonathan-schmitz-1503693> (pointing out that Schmitz did not have to appear on the show, was told that his admirer could either be a man or a woman, suspected that his admirer was Amedure all along, chose to fly back with Amedure, and the two had drinks together after the show had taped). This clarifies that Amedure and Scott were friends and cordial with one another even after the show had aired. *Id.* Schmitz was aware of Amedure's feelings towards him and did not react in a homosexual panic upon the initial discovery of those feelings.

92. Raphael, *supra* note 84.

93. Shelton, *supra* note 90. During these twenty-two years, Amedure's family and friends have grieved the loss of their loved one.

94. Michael Rowe, "Gay Panic Defense" Used to Acquit Illinois Man Who Stabbed Neighbor 61 Times, HUFFPOST (Dec. 6, 2017, 5:12 AM), https://www.huffpost.com/entry/man-acquitted-of-murder-a_b_231748.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*; Eric Zorn, *Murder defendant gambles – and wins*, CHI. TRIB. (July 17, 2009, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-2009-07-17-0907160827-story.html>.

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

placed the 911 call to police.¹⁰⁰ Hauser had a blood alcohol content of 0.277, while Biedermann's was 0.226.¹⁰¹

Rather than stabbing Hauser only enough times to get away and seek safety or assistance, Biedermann kept stabbing and slashing Hauser with the sword, a total of sixty-one times.¹⁰² There were no signs at the scene of the murder that suggested a struggle, Biedermann was physically larger and less intoxicated than Hauser, and sixty-one stab wounds were well beyond the force required to escape.¹⁰³ Biedermann's defense alleged that the overkill, that was clearly driven by anger and hatred, was a result of gay panic and that the homosexual advance was sufficient provocation to justify the act of extreme violence.¹⁰⁴ In this case, gay panic was used to further the defendant's self-defense claim and was successful in obtaining Biedermann's acquittal for the murder of Hauser.¹⁰⁵

2. The Gay Panic Defense in Disguise

The fact that a defense team or judge deny the use of the gay panic defense does not necessarily mean that elements of the defense and LGBT discrimination are not abundantly seen. In 2008, a junior high school student, Lawrence King, was murdered by Brandon McInerney.¹⁰⁶ King was known to enjoy wearing women's clothing and makeup, and school bullies targeted him because of these things.¹⁰⁷ One day, King announced to his classmates that he preferred to go by Leticia.¹⁰⁸ King's mother had been contacted by school officials and asked that she tone down King's

100. Rowe, *supra* note 94.

101. *Id.*

102. *Id.*

103. Zorn, *supra* note 98 ("In the bloody overkill of the stabbing frenzy some see the hallmark of "gay panic" cases—ones in which defendants suggest, sometimes successfully, that homosexual overtures are themselves sufficient provocation for acts of extreme violence."). This Article further implies that Hauser may not have made any attempt on Biedermann. *Id.* This suggests that Biedermann saw the situation as his word against a dead man, that a jury would be homophobic and outraged, and he would be set free. Ultimately, Biedermann received the outcome he envisioned. *Id.*

104. *Id.*

105. *Id.*

106. Strader, *supra* note 16, at 1480; *Brandon David McInerney*, MURDERPEDIA, <https://murderpedia.org/male/M/m/mcinerney-brandon.htm> (last visited Apr. 1, 2022) ("News week described this shooting as "the most prominent gay-bias crime since the 1998 murder of Matthew Shepard," bringing attention to issues of gun violence as well as gender expression and sexual identity of teenagers.").

107. Strader, *supra* note 16, at 1480.

108. *Id.* at 1481.

behavior and clothing style.¹⁰⁹ A few days prior to his murder, King was dared by his fellow classmates to ask McInerney, who was on the basketball court with his friends, to be his valentine.¹¹⁰ The day prior to the murder and after being asked to be King's valentine, a student overheard McInerney say, "I am going to shoot him" referring to King.¹¹¹

The next day, McInerney's father was driving him to school, and when McInerney got to the car he realized he forgot his gun.¹¹² McInerney went back into his house, retrieved the gun, and placed it in his backpack before concealing it in his pants once he arrived at school.¹¹³ McInerney shot King twice in the head during class, once while the teacher was out of the classroom and again after the teacher entered the room and asked McInerney what he was doing.¹¹⁴ King died two days later as a result of his gunshot wounds.¹¹⁵

The defense counsel for McInerney alleges they did not employ the gay panic defense but rather were attempting to prove sexual harassment;¹¹⁶ however, elements of the gay panic defense were clearly apparent. The defense was able to have a forensic psychologist testify that McInerney being asked by King to be King's valentine was the "ultimate

109. Catherine Saillant, *Gay teen's killer takes 21-year deal*, L.A. TIMES (Nov. 22, 2011, 12 AM), <https://www.latimes.com/archives/la-xpm-2011-nov-22-la-me-1122-gay-shooting-20111122-story.html>.

110. Strader, *supra* note 16, at 1482-83.

111. *Id.* at 1484.

112. *Id.*

113. *Id.*

114. *Id.* at 1485.

115. *Id.* In a tragic twist of fate, King was taken off life support on Valentine's Day. Jim Dubreuil & Denise Martinez-Ramundo, *Boy Who Shot Classmate at Age 14 Will be Retried as Adult*, ABC NEWS (Oct. 4, 2011, 3:16 PM), <https://abcnews.go.com/US/eighth-grade-shooting-larry-king-brandon-mcinerney-boys/story?id=14666577>.

116. See David Alan Perkiss, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons Learned From the Lawrence King Case*, 60 UCLA L. REV. 778, 792-93 (2013) (arguing that despite California's Justice for Victims Act juror's biases towards King's sexual orientation directed their decision); see also Strader, *supra* note 16, at 1479 (providing detail of how the attorneys claimed they were not attempting to use the gay panic defense). This case demonstrates that even in state courts that have banned the gay panic defense, elements of the gay panic defense could still present themselves and put the victims at risk of being on trial. *Id.* Thus, gay shield laws mentioned in Part IV should be implemented. As of 2014, California banned the use of the gay panic defense. See Parker Marie Molloy, *California Become First State to Ban Gay, Trans 'Panic' Defenses*, ADVOCATE (Sept. 29, 2014, 4:19 PM), <https://www.advocate.com/crime/2014/09/29/california-becomes-first-state-ban-gay-trans-panic-defenses> (stating that as of 2014, the California Assembly passed a bill abolishing the gay panic defense from being used in the state's criminal courts). Sexual harassment does not justify murder.

humiliation.”¹¹⁷ The psychologist also testified that McInerney believed that he needed to kill King “to get rid of the scourge that had come upon the school.”¹¹⁸ Further, the defense was able to have teachers testify that King was to blame for his own death. One teacher said that King should have kept “his situation” private.¹¹⁹ The same teacher also testified that she informed the principal that “if he didn’t do something the boys in [the] school are going to take [King] behind a shed and beat him to death.”¹²⁰ Shockingly, the defense also was able to display a large photograph of King, smiling and holding a lime-green gown.¹²¹ Essentially, McInerney’s defense team placed a deceased, fifteen-year-old on the stand and adamantly attacked his character.¹²² The family and loved ones who were in pursuit of justice for the brutal murder of their beloved family member had to watch as their son, friend, and classmate was placed on trial by the defense. McInerney accepted a plea deal for “second-degree murder, voluntary manslaughter and use of a firearm.”¹²³ McInerney was subsequently sentenced to twenty-one years.¹²⁴

C. Judicial Discretion, Frequency of Use, and Likelihood of Success

While the gay panic defense has proven effective in getting away with murder and reducing levels of convictions, that is not always the case. In 2010, Vincent McGee murdered Richard Barrett, his employer, by stabbing him repeatedly and setting Barrett’s body on fire.¹²⁵ According to McGee at his arraignment, Barrett dropped his pants and

117. Strader, *supra* note 16, at 1478. The defense ended their argument “by asking jurors to consider the mind-set of a 14-year-old boy and the humiliation that King was inflicting on McInerney with his aggressive flirtations.” *Id.* at 1492.

118. *Id.* at 1483.

119. *Id.* at 1481.

120. *Id.* at 1482.

121. *Id.* at 1518.

122. The fact that Lawrence King wore dresses outside of school or that he was a member of the LGBT community had no relevance in King’s cause of death. Brandon McInerney murdered him, not because King assaulted McInerney but for King merely asking McInerney to be his Valentine. Many courts, including the Tennessee Supreme Court, have held that words alone are never adequate provocation. See *Freddo v. State*, 127 Tenn. 376, 383 (Tenn. 1913).

123. Crimesider Staff, *Calif. Teen Brandon McInerney Sentenced to 21 Years for Point-Blank Murder of Gay Classmate*, CBS NEWS (Dec. 19, 2011, 10:17 PM), <https://www.cbsnews.com/news/calif-teen-brandon-mcinerney-sentenced-to-21-years-for-point-blank-murder-of-gay-classmate/>.

124. *Id.* Despite so many elements of premeditation and planning, McInerney was not convicted of first degree murder.

125. *Investigator: Sexual Advances Led to Barrett’s Death*, WAPT (May 4, 2010, 1:59 AM), <https://www.wapt.com/article/investigator-sexual-advances-led-to-barrett-s-death/2073597>.

told McGee to perform oral sex on him.¹²⁶ McGee then stabbed Barrett sixteen times.¹²⁷ McGee later pled guilty to manslaughter, arson, and burglary after it was apparent his gay panic defense would not be successful due to the overwhelming evidence against him.¹²⁸ These countervailing motives prevented the success of the gay panic defense because it was clear to the district attorney that self-defense of the alleged sexual advances was not likely.¹²⁹ McGee was sentenced to sixty-five years in prison.¹³⁰

Similarly, Aaron McKinney, one of the two individuals that murdered Matthew Shepard, attempted to raise the gay panic defense in his trial.¹³¹ In that case, Matthew Shepard went to a gay bar alone and was approached by Russell Henderson and Aaron McKinney.¹³² Henderson and McKinney pretended to be gay to lure Shepard into their vehicle so the devious pair could rob him.¹³³ Once outside, Henderson and McKinney beat and robbed Shepard, and placed Shepard in their vehicle.¹³⁴ The pair then took Shepard to a remote area, stripped him of his clothes, tied him to a fence, beat Shepard mercilessly, and left him to die alone in the cold.¹³⁵ Henderson accepted a plea deal for a life sentence in order to avoid the death penalty, but McKinney wanted his day in court.¹³⁶ The presiding judge placed a stop to the defense's attempted use of the gay panic defense in which McKinney claimed that Shepard's

126. *Id.*

127. *Ex-con Pleads Guilty to Killing Mississippi White Supremacist*, AL (July 28, 2011, 6:30 PM), https://www.al.com/wire/2011/07/ex-con_pleads_guilty_to_killin.html.

128. *Id.* In this case, there were many countervailing motives that McGee had to kill Richard Barrett that outweighed the effectiveness of his gay panic defense claim such as racial motivations and financial gain. *Id.* The presiding judge likely found McGee was trying to use the homophobia bias of the Mississippi judge and jury to get away with murder, especially since there was no one left alive to dispute McGee's facts.

129. *Id.*

130. *Id.*

131. *Matthew Shepard, Victim of Anti-Gay Hate Crime, Dies*, HISTORY, <https://www.history.com/this-day-in-history/the-victim-of-an-anti-gay-assault-dies> (last visited Apr. 1, 2022) [hereinafter *Matthew Shepard*].

132. *Id.*

133. Robert Zepeda & Emily Shapiro, *Matthew Shepard: The Legacy of a Gay College Student 20 Years After His Brutal Murder*, ABC NEWS (Oct. 26, 2018, 7:21 AM), <https://abcnews.go.com/US/matthew-shepard-legacy-gay-college-student-20-years/story?id=58242426>.

134. *Id.*; Chelsey Parrot-Sheffer, *Matthew Shepard American Murder Victim*, BRITANNICA, <https://www.britannica.com/biography/Matthew-Shepard> (last visited Apr. 1, 2022).

135. Parrot-Sheffer, *supra* note 134.

136. *Matthew Shepard*, *supra* note 131.

advances triggered McKinney's homophobia disorder.¹³⁷ As a result, McKinney also accepted a plea deal for a life sentence.¹³⁸ The only reason the defense was unable to use the gay panic defense was because the presiding judge believed the gay panic defense too closely resembled temporary insanity, a defense that is not recognized in Wyoming.¹³⁹

The gay panic defense has been proven effective in mitigating charges and resulting in acquittal for defendants when judicial discretion permits, but how often is the defense used? This question is extremely difficult to answer because the gay panic defense is not an official defense and its use is not tracked by the courts or government.¹⁴⁰ However, numerous studies have been conducted that provide estimates of the number of times the defense is used and how often it is successful. One researcher, W. Carsten Andresen, has uncovered 104 instances where the gay panic defense has been employed in the courtroom between 1970 and 2020.¹⁴¹ Andresen's analysis has concluded that the gay panic defense is effective in mitigating a defendant's murder charge roughly thirty-two percent of the time.¹⁴²

Another study by James Nichols in 2013 estimated that the gay panic defense has been used forty-five times since 2002.¹⁴³ An additional, complementary study conducted by E. Harrington concluded that the gay panic defense was successful in getting the defendant a reduced sentence in thirteen percent of cases.¹⁴⁴ These studies further stressed that the actual

137. *Id.* Tennessee, however, does allow an insanity defense. TENN. CODE ANN. § 39-11-501 (2021). Therefore, if the murder would have occurred in Tennessee, Aaron McKinney would have likely been able to use the gay panic defense.

138. Douglas O. Linder, *Matthew Shepard Murder: A Chronology*, Famous Trials, <https://famous-trials.com/mattshepard/2496-matthew-shepard-murder-a-chronology> (last visited Apr. 1, 2022).

139. *Matthew Shepard*, *supra* note 131.

140. See 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> (stating that while the FBI does track homicides, the FBI does not collect information about the sexual orientation of the homicide victims); see also Nicholas D. Michalski & Narina Nunez, *When is 'Gay Panic' Accepted? Exploring Juror Characteristics and Case Type as Predictors of a Successful Gay Panic Defense*, 37 J. INTERPERSONAL VIOLENCE 782, 782-803 (2022). Additionally, the victim may have openly identified as a member of the LGBT community. Therefore, even if the FBI did track whether victims in homicide cases were sexually diverse, vital data would still be missing. *Id.*

141. Andresen, *supra* note 140. Andresen estimates there are hundreds more cases that are left to be identified. *Id.*

142. *Id.*

143. Michalski & Nunez, *supra* note 140. This study referenced "189 appellate cases from 1952 to 2005 that mentioned unwanted same-gender advances." *Id.*

144. *Id.*

number of times the defense has been used and its percentage of success could be significantly higher “due to successful attempts not leading to convictions that need to be appealed.”¹⁴⁵ While most defendants that raise the gay panic defense are ultimately convicted of a lesser crime, members of the LGBT community remain vulnerable.¹⁴⁶

When a defendant invokes the gay panic defense, whether or not the defendant actually committed the crime is not in dispute.¹⁴⁷ The mock jurors in these studies were tasked with determining whether the defendant had a reasonable reaction to a stimuli.¹⁴⁸ The gay panic defense is seen most often in cases where the defendant is attempting to demonstrate provocation and bolster a heat of passion defense.¹⁴⁹ In these cases, the defendant will allege that the defendant temporarily lost control of their mind and actions upon discovering the victim was a member of the LGBT community or when that victim made a nonviolent sexual advance on the defendant.¹⁵⁰ Unsurprisingly, the studies concluded that the gay panic defenses was most successful in these instances.¹⁵¹ Moreover, this discriminatory defense tactic is most often employed by heterosexual males.¹⁵² The gay panic defense is most often utilized to reduce a murder charge to manslaughter.¹⁵³

In one study conducted in 2010 outside of the court, researchers concluded that when the gay panic defense is used in court, mock jurors would place blame on the victim if the victim made a sexual advance on the defendant.¹⁵⁴ Two additional studies were conducted which revealed

145. *Id.*

146. ST. EDWARD’S UNIVERSITY, *Researcher analyzes 99 gay/trans panic defense cases*, PHYS ORG (Oct. 5, 2021), <https://phys.org/news/2021-10-gaytrans-panic-defense-cases.html>. This article stressed the importance of how the allowance of this defense tactic makes it more difficult for victims that are LGBT to receive justice. *Id.*

147. Michalski & Nunez, *supra* note 140.

148. *Id.*

149. *Id.* Heat of passion refers to the “mental state provoked by fear, rage anger or terror that, combined with adequate provocation, is a defense to the crimes of first- and second-degree murder.” John F. McGuire, *Can Heat of Passion Be Used as a Defense?*, MCGUIRE L. OFFICES (May 31, 2019), <https://www.mcguirelawoffices.com/can-heat-of-passion-be-used-as-a-defense/>.

150. Michalski & Nunez, *supra* note 140.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* This study was the first substantial study on the gay panic defense as it related to provocation. *Id.* The study was presented to the participants as hate crime assaults that took place either in a bar or gay bar, and the type of provocation varied. *Id.* This study failed to provide a conclusive analysis of the gay panic defense in verdicts, but yielded insight on victim blaming. *Id.* Victim Blaming occurs when one places more blame on the victim than on the defendant. *Id.* This study concluded that when the victim made a sexual advance on the defendant, there was

that participants who were conservative tended to favor a lesser sentence than required for first degree murder when the victim was LGBT.¹⁵⁵ Unsurprisingly, participants who possessed more negative bias toward LGBT individuals were more likely to render a not guilty verdict for the defendant.¹⁵⁶ These participants would place extreme blame on the victim, while placing little responsibility on the defendant for their horrendous, violent acts.¹⁵⁷

A more recent study conducted in 2021 analyzed “the impact of the juror characteristics of homophobia, political orientation, and religious fundamentalism on the success of a gay panic defense compared with a neutral provocation defense.”¹⁵⁸ These three juror characteristics were analyzed in this study because each has a proven impact on a juror’s level of bias toward members of the LGBT community.¹⁵⁹ Out of this study, 73.5 percent of participants chose the lesser offense in both assault and homicide cases.¹⁶⁰ The gay panic defense was proven to be most beneficial to the defendant when the crime charged was assault.¹⁶¹ Further, when jurors are homophobic they are more likely to provide more lenient verdicts.¹⁶²

D. *Tennessee Panic! In the Courtroom*¹⁶³

The gay panic defense has proven to be a successful strategy for defense attorneys, and as previously mentioned, the gay panic defense has

significant evidence of victim blaming as opposed to when the sexual advances were not made. *Id.*

155. *Id.* Salerno and Tomei conducted these studies. *Id.* The Salerno study analyzed homicide cases for which the gay panic defense was utilized and examined the participants’ political preference and moral outrage. *Id.* The Tomei study examined the effect of the gay panic strategy on assault cases. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* In this study, there were 249 participants, each varying in age, gender, and race. *Id.* 213 were heterosexual. *Id.* Nearly all the participants (96%) were jury-eligible in the United States. *Id.*

159. *Id.*

160. *Id.* Instead of a felony offense for an assault, 77.4% of the participant-jurors would choose a misdemeanor verdict. *Id.* Similarly, instead of a murder charge 70.1% of the participant-jurors would opt for a manslaughter verdict. *Id.*

161. *Id.*

162. *Id.*

163. This subheading pays tribute to a band, Panic! At The Disco, due to their history of LGBT advocacy. See HRC Staff, *Panic! At The Disco’s Brendon Urie Joins HRC’s Equality Rocks Campaign*, HUM. RTS. CAMPAIGN (Feb. 25, 2017), <https://www.hrc.org/news/panic-at-the-discos-brendon-urie-has-joined-hrcs-equality-rocks-campaign> (“Urie has been very outspoken about promoting equality in the LGBTQ community, and has also been an advocate for

not yet been banned in Tennessee.¹⁶⁴ This means that Tennesseans who identify as LGBT are left unprotected in the courtroom and face scrutiny for the crimes committed against them in their pursuit of justice simply because of who they love or how they identify. By not prohibiting the defense, the Tennessee justice system leaves a door open for the discriminatory defense to be utilized. For instance, in July 2020, a twenty-one-year veteran of the Memphis Fire Department, Mack Bond (Bond), became the target of a gay hate crime.¹⁶⁵ Mack Bond was off-duty and parked his vehicle next to the car of Carlton Wells (Wells) and his girlfriend, Danielle Mack (Danielle), in Kennedy Park, a location known in Memphis as a “gay cruising area.”¹⁶⁶

In the police affidavit, Wells and Danielle allege that Bond propositioned the couple to have sexual intercourse.¹⁶⁷ As a result, Wells became uncomfortable.¹⁶⁸ However, instead of driving away, calling Memphis police to report the crime of solicitation of prostitution, or even simply laughing the situation off, Wells decided to take “justice” into his own hands. Wells pulled out his loaded gun, pointed it in the direction of Bond, and shot a hero of the Memphis community multiple times.¹⁶⁹ Wells and Danielle left the scene of the crime, took the car they were using to a rental shop, and alleged that there were issues with the transmission

normalizing the idea of sexual fluidity.”); see also Curtis M. Wong, *Panic! At The Disco’s Brendon Urie To Be Honored For LGBTQ Youth Advocacy*, HUFFPOST (Mar. 20, 2019, 6:33 PM), https://www.huffpost.com/entry/panic-at-the-disco-brendon-urie-glsen_n_5c929071e4b0d952b222bab0 (detailing how Urie donated a million dollars to LGBT youth).

164. See *Gay/Trans Panic Defense Bans*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/panic_defense_bans (last visited Apr. 1, 2022) (detailing which states have prohibited the use of the gay panic defense and which have not). 57% of the American LGBT population live in states that do not prohibit the gay panic defense, leaving them vulnerable to the failings of the criminal justice system. *Id.*

165. See Alex Bollinger, *Remorseless Killer Shot a Gay Firefighter Who Flirted with Him Because He Felt ‘Uncomfortable,’* LGBTQ NATION (July 21, 2020), <https://www.lgbtqnation.com/2020/07/remorseless-killer-shot-gay-firefighter-flirted-felt-uncomfortable/> (detailing how essential the defendant is blaming the victim for the defendant’s violent acts).

166. See *Arrests Made in the Shooting Death of a Memphis Firefighter, Police Say*, FOX 13 MEMPHIS (July 18, 2020), https://www.fox13memphis.com/news/arrests-made-in-the-shooting-death-of-a-memphis-firefighter-police-say/article_b0df3f5b-f96d-591d-b797-102e31157b68.html (explaining what events took place on the day Bond was brutally murdered) [hereinafter *Memphis Firefighter*]; see also Donald Padgett, *Gay Firefighter Killed After Flirting With Straight Couple*, OUT (July 22, 2020), <https://www.out.com/crime/2020/7/22/gay-firefighter-killed-after-flirting-straight-couple> (detailing the tragic killing of Bond and how Kennedy Park is known to be a “well-known gay cruising area”).

167. See *Memphis Firefighter*, *supra* note 166 (“According to the affidavit, the victim allegedly asked Wells and Mack to have sex.”).

168. *Id.*

169. *Id.*

in order to receive a different vehicle so that they would not be associated with the crime.¹⁷⁰ While Wells and Danielle were able to leave the crime scene, Bond never got to say goodbye to his friends, family, or the community he served so honorably for over twenty years because he was pronounced dead at the scene from the multiple gunshot wounds he sustained.¹⁷¹ Wells and Danielle were arrested two days after the murder, and in October 2020, a grand jury indicted Wells for second degree murder and possessing a handgun with a felony conviction, and Danielle was indicted for evidence tampering.¹⁷²

This case has not yet gone to trial,¹⁷³ but this case is a prime example of a defendant who is likely to allege gay panic. Presently, there are no existing laws in the state that would forbid Wells from claiming gay panic in his trial. Therefore, the deceased, Bond, a hero in the Memphis community, would subsequently be put on trial. The Tennessee judge and jury would have to take into consideration if Bond's actions, based solely on Wells' allegations, of solicitation warranted death and whether Wells was somehow justified in murdering Bond.

III. ANALYSIS

By allowing the gay panic defense to be used in the courtroom, the Tennessee justice system is demonstrating that homophobia is reasonable by devaluing the lives of LGBT individuals.¹⁷⁴ As a result, the victims of what are clearly hate crimes are placed on trial, like victims of sex crimes before rape shield laws were enacted and employed in Tennessee. Utilizing a gay panic defense in the courtroom implies that an individual's sexual orientation or gender identity excuses the violence committed against them.¹⁷⁵ The United States legal system does not allow panic defenses related to religion, race, or heterosexuality,¹⁷⁶ so how could

170. Bollinger, *supra* note 165.

171. *Id.*

172. Adam M. Rhodes, *Gay and Trans 'Panic' is Still Being Used to Justify Anti-LGBTQ Attacks*, APPEAL (Dec. 21, 2021), <https://theappeal.org/gay-trans-panic-defense/>.

173. At the time of this Article, the defendants have not yet been to trial.

174. Strader, *supra* note 16, at 1501-02. By permitting the use of the gay panic defense, courts are saying that a victim's sexual orientation is to blame for the violent, senseless crimes committed against them. By reducing the defendant's culpability or acquitting the defendant of their wrongdoings, it sends a message that the defendant was justified in their actions. *Id.*

175. *Id.*

176. *Id.*; see "All We Want is Equality": Religious Exceptions and Discrimination Against LGBT People in the United States, HUM. RTS. WATCH (Feb. 19, 2018), <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt->

Tennessee allow such a discriminatory defense? The gay panic defense is clearly discriminatory and the only example of justifying the murder or assault of an American citizen based on an immutable trait or characteristic. Further, admission of a victim's gender identity or sexual orientation has little to no evidentiary value but can be highly prejudicial. Since the gay panic defense is based on an antiquated understanding of LGBT identity, it has no place in Tennessee's modern legal landscape. Therefore, the gay panic defense must be abolished and gay shield laws adopted in the Volunteer State to ensure justice for the LGBT victims and equal protection under the law.

Some individuals may suggest to simply let the gay panic defense fade away and resolve itself since the defense will eventually not be a viable defense tactic due to growing support for LGBT individuals.¹⁷⁷ Some of those same individuals have since changed their outlook on the gay panic defense and now see the negative impact the gay panic defense has on victims.¹⁷⁸ As outlined below, there are several issues surrounding the use of the gay panic defense that support its abolishment and encourage employing additional protections to ensure members of the LGBT community are afforded justice. A defendant is entitled to a defense, but one that is so clearly discriminatory cannot be in play. A lesbian woman would never be able to claim "heterosexual panic" if a man approached her at a bar and asked her to perform a sexual act on him. Instead, the lesbian woman would have to rely only on a self-defense or heat of passion defense. How is it fair that members of the LGBT community are not afforded the same protections under the law? Just as a heterosexual panic defense is not a viable defense strategy, the gay panic defense should also not be possible in our modern legal universe.

Tennessee is nowhere near the leading state in LGBT protections due to the lack of any statewide nondiscriminatory protections.¹⁷⁹

people (explaining how members of the LGBT community seek nondiscrimination protections similar to religious freedom nondiscrimination statutes).

177. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 566 (2008). This article additionally proposed to not ban the gay panic defense because of defendant's First Amendment rights, and the use of the gay panic defense can be valuable in court. *Id.* at 535. See Lee, *infra* note 178.

178. See Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411, 1487-89 (2020) (detailing how Professor Lee now believes that the gay panic defense needs to be abolished).

179. *LGBTQ Non-Discrimination in the States*, FREEDOM FOR ALL AMERICANS (Feb. 15, 2018), <https://freedomforallamericans.org/category/states/tn/>; *Tennessee's Equality Profile*, LGBT MAP, https://www.lgbtm ap.org/equality-maps/profile_state/TN (last visited Apr. 1, 2022); Liam Adams, *Tennessee among states with least support for LGBTQ rights, study finds*,

However, Tennessee's ban of the gay panic defense would be a step in the right direction toward protecting LGBT rights. With hate crimes against LGBT individuals rising, not only in Tennessee but also nationwide, it is likely that the gay panic defense will be utilized more often in Tennessee courtrooms over time. Instead of waiting for the social attitudes of Americans to change, Tennessee must take action to stop the discriminatory effect of the gay panic defense. These actions will ensure that Tennessee's LGBT citizens are protected, that LGBT victims will be more likely to seek justice for crimes committed against them, and that violent acts that targeted LGBT individuals are not left unpunished.

A. *The Defense Clearly Violates the Fourteenth Amendment's Equal Protection Clause*

The Fourteenth Amendment's Equal Protection Clause provides equal protection under the law to all individuals.¹⁸⁰ While this clause was originally created to apply to African Americans, the Supreme Court has expanded its protections to hold all discrimination based on race, religion, and sex unconstitutional.¹⁸¹ Essentially, the Equal Protection Clause directs that all persons similarly situated should be treated equally under the law.¹⁸² The Equal Protection Clause prohibits states from creating and enforcing laws that are discriminatory.¹⁸³ The Equal Protection Clause has historically been expanded to not only protect individuals based on their race and national origin, but also their "gender, immigration status, and wedlock status."¹⁸⁴ For example, in *United States v. Virginia*, the Supreme Court used the Equal Protection Clause to find it unconstitutional for Virginia to deny women admission into a university that it publicly funded.¹⁸⁵ The Court reasoned that discriminating on the basis of sex was unconstitutional because Virginia denied a specific group, women, the

TENNESSEAN (March 18, 2022, 1:15 PM), <https://www.tennessean.com/story/news/religion/2022/03/18/tennessee-among-states-least-support-lgbtq-rights-public-religion-research-institute/7082769001/>.

180. U.S. CONST. amend. XIV § 1.

181. See Brian T. Fitzpatrick & Theodore M. Shaw, *The Equal Protection Clause*, NAT. CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/702> (last visited Apr. 1, 2022).

182. U.S. CONST. amend. XIV § 1; *Due Process Clause, Equal Protection Clause and Disenfranchising Felons*, PBS, <https://www.pbs.org/tpt/constitution-usa-peter-sagal/equality/due-process-equal-protection-and-disenfranchisement/> (last visited Apr. 1, 2022); *E.C. ex rel. Chatman v. Mississippi High Sch. Ass'n*, 868 F. Supp. 2d 563, 568 (S.D. Miss. 2012).

183. U.S. CONST. amend. XIV § 1.

184. Fitzpatrick & Shaw, *supra* note 181.

185. 518 U.S. 515, 534 (1996).

educational opportunity of attending the university and failed to show “exceedingly persuasive justification” for the gender-biased admissions policy.¹⁸⁶ The Supreme Court has even suggested that discrimination based on sexual orientation is a violation of the Equal Protection Clause.¹⁸⁷

While the Supreme Court has not yet applied the Equal Protection Clause to sexual orientation, the gay panic defense is unconstitutional.¹⁸⁸ Similar to *United States v. Virginia*, the gay panic defense singles out a group, LGBT individuals, and clearly discriminates against them. The gay panic defense denies LGBT individuals the opportunity to a fair trial. The gay panic defense can only be applied against homosexual individuals when their aggressor knows of the victim’s sexual orientation or gender identity.¹⁸⁹ By allowing this defense to be utilized in court, LGBT individuals are not afforded the same protections as heterosexuals under the eyes of the law. The gay panic defense targets only LGBT victims, and those victims ultimately pay the price by being adversely impacted in the criminal courtroom. The gay panic defense is undoubtedly unconstitutional due to the defense being a violation of the Fourteenth Amendment’s Equal Protection Clause and should not be an available defense. By allowing the gay panic defense to be used in courtrooms, states like Tennessee are enforcing laws that violate the Constitution.

Tennessee is not only bound to adhere to the Equal Protection Clause of the Fourteenth Amendment, but the state must also follow its own constitutional provisions. Tennessee’s constitution closely corresponds with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.¹⁹⁰ Tennessee’s constitution strives to encompass the mission, goals, and objectives of the Fourteenth Amendment’s Equal Protection Clause.¹⁹¹ However, the Tennessee

186. *Id.* at 534..

187. *Romer v. Evans*, 517 U.S. 620, 635 (1996); see *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

188. See discussion *infra* Part III.B.

189. *Lawmakers Approve Ban on Gay Panic Defense in Virginia*, U.S. NEWS (Feb. 26, 2021, 5:34 PM), <https://www.usnews.com/news/best-states/virginia/articles/2021-02-26/law-makers-approve-ban-on-gay-panic-defense-in-virginia>.

190. TENN. CONST. art. I § 8; TENN. CONST. art. XI § 8; see *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993) (stating that while TENN. CONST. art. I § 8 and TENN. CONST. art. XI § 8 apply under different circumstances they work together to provide equal protections, privileges, and immunities to all people); see also *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005) (“[T]he state equal protection guarantee is co-extensive with the equal protections of the Fifth and Fourteenth Amendments of the U.S. Constitution.”).

191. *Id.*

Supreme Court has stated that the equal protection clause may be adapted by the Court by stating that when interpreting the Tennessee constitution, “the [Tennessee Supreme] Court is always free to expand the minimum level of protection mandated by the federal constitution.”¹⁹² As a result, Tennessee courts are bound to provide equal protection to all of the state’s citizens and may provide an additional level of protections where the Tennessee Supreme Court sees fit. When the gay panic defense is used, LGBT victims do not receive equal protection under Tennessee’s own constitutional provisions. Heterosexual defendants can use evidence of a victim’s sexual orientation or gender identity to excuse their culpability and entice bias in the jury. Conversely, a homosexual defendant would be unable to lessen their sentence by proving that an individual is heterosexual. Heterosexuality evidence does not incite prejudice and bias in the jury like homosexual evidence. LGBT victims are seemingly not entitled to the same level of justice as heterosexual individuals in Tennessee. Since the gay panic defense plainly discriminates only against LGBT members and distinctly places only those individuals at a disadvantage in the justice system, Tennessee needs to ban the defense’s further use in the state.

B. The Gay Panic Defense is Contradictory to Supreme Court Precedent

The Supreme Court has consistently protected the rights of LGBT individuals. In 1958, the Court held that Americans had the right to publish LGBT media, thus upholding LGBT rights relating to freedom of speech.¹⁹³ In 1996, the Supreme Court found a violation of the Equal Protection Clause of the Fourteenth Amendment when Colorado attempted to ban anti-discrimination laws protecting LGBT individuals.¹⁹⁴ The Court reasoned that under the Constitution, the singling out of homosexuals in the Colorado statute deprived them not only of their rights, but also impaired only homosexuals.¹⁹⁵ In 2003, the Court held that sodomy laws were unconstitutional.¹⁹⁶ In *Lawrence v. Texas*, the court reasoned that the Due Process Clause gives consenting

192. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993).

193. Tara Law, 9 *Landmark Supreme Court Cases That Shaped LGBTQ Rights in America*, TIME (Oct. 8, 2019, 6:54 PM), <https://time.com/5694518/lgbtq-supreme-court-cases/>. (explaining the *One, Inc v. Olsen* case in which the Supreme Court determined that media aimed at LGBT individuals is not inherently obscene).

194. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

195. *Id.* at 631.

196. *Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003).

adults the “full right to engage in their conduct without intervention of the government.”¹⁹⁷

A more recent Supreme Court case further demonstrates the Court’s recognition of dignity that must be afforded to the LGBT community and the Court’s protections of LGBT rights. In 2013, the Court in *United States v. Windsor* held Section III of the Defense of Marriage Act (DOMA), which denied federal recognition of same-sex marriages, was a violation of the Due Process Clause of the Fifth Amendment.¹⁹⁸ The Court reasoned that DOMA was unconstitutional because DOMA was only harmful and provided no protections to same-sex couples.¹⁹⁹ In 2015, LGBT individuals were finally given the fundamental right of marriage.²⁰⁰ In *Obergefell v. Hodges*, two Ohio men, Obergefell and Arthur, were legally married in Maryland.²⁰¹ However, upon the death of Arthur, Ohio did not allow Obergefell to be documented on Arthur’s death certificate as his surviving spouse.²⁰² The Court held that there was no “lawful basis” for Ohio, or any other state, to refuse to recognize a marriage performed in another state because of the sexual orientation of the parties.²⁰³ The Court based its decision on the fact that marriage is considered a “fundamental right” under the Constitution and Supreme Court precedent.²⁰⁴ In 2020, the Court held that Title VII of the Civil Rights Act of 1964 was violated when an employer fired an employee based on sexual orientation or gender identity because “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”²⁰⁵ In other words, the Supreme Court held that discrimination based on sex includes sexual orientation and gender identity.²⁰⁶

In the twenty-first century, the Supreme Court has shifted its treatment of LGBT Americans and upheld the rights of LGBT individuals. For example, the Court held that same-sex couples deserve equal dignity and treatment under the law and that employers are prohibited from discrimination at work based on sexual orientation and

197. *Id.* at 578 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”)).

198. 570 U.S. 744, 774–75 (2013).

199. *Id.*

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

201. *Id.* at 658.

202. *Id.*

203. *Id.* at 681.

204. *Id.*

205. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754, 1741 (2020).

206. *Id.* at 1754.

gender identity.²⁰⁷ Thus, Supreme Court precedent demonstrates that even our highest court would likely find the gay panic defense contrary to its current jurisprudence. The gay panic defense devalues the victim, denies the victim or the victim's family of full justice, and places the victim at a disadvantage due to their sexual orientation or gender identity. Not only should the decisions of the Supreme Court influence Tennessee's decision to ban the gay panic defense, but the rising hate crime statistics and presence of LGBT discrimination across the United States should also be influential.

C. *Rising Hate Crimes and Hate Crime Statutes*

While the Supreme Court may have ruled in favor of the LGBT community, LGBT members are still widely discriminated against nationally as well as in Tennessee. In Tennessee, despite state statutes on the books prohibiting hate crimes based on an individual's LGBT status, no discrimination protections are in place at the state level to protect the LGBT community. Although hate crimes based on sexual orientation or gender identity may increase the severity of a defendant's punishment, Tennessee's lack of other protections for LGBT individuals and the continued use of the gay panic defense are directly contradictory.

1. Hate Crimes Against LGBT Individuals Nationally

In 2020, sexual orientation ranked as the second highest motivator for hate crimes in the nation.²⁰⁸ A hate crime is composed of a crime and a bias motivator for committing a crime.²⁰⁹ Race, ethnicity, and ancestry accounted for 61.9% of hate crimes, while sexual orientation made up 20.5% of hate crimes involving victims of single-bias incidents.²¹⁰ An estimated 60% of all LGBT hate crimes targeted homosexual males.²¹¹ Hate crimes involving transgender individuals has increased by nearly

207. See *infra* text accompanying notes 199-205.

208. *FBI Releases 2020 Hate Crime Statistics*, U.S. DEP'T JUST., <https://www.justice.gov/hatecrimes/hate-crime-statistics#piechart-description> (last visited Apr. 1, 2022).

209. *What is a Hate Crime?*, U.S. DEP'T JUST., <https://www.justice.gov/hatecrimes/learn-about-hate-crimes> (last visited Apr. 1, 2022).

210. *Id.*

211. Tim Fitzsimons, *Nearly 1 in 5 Hate Crimes Motivated by Anti-LGBTQ Bias*, *FBI finds*, NBC NEWS (Nov. 12, 2019, 5:36 PM), <https://www.nbcnews.com/feature/nbc-out/nearly-1-5-hate-crimes-motivated-anti-lgbtq-bi-as-fbi-n1080891>.

20% for two consecutive years.²¹² Further, LGBT members are four times as likely as their heterosexual counterparts to be the target of hate crimes.²¹³

While LGBT hate crimes are on the rise, many of the hate crimes remain unreported.²¹⁴ The Hate Crime Statistics Act of 1990 mandates attorneys general to report incidents submitted from state and local law enforcements to the FBI; however, local and state law enforcement agencies are not similarly required to report hate crimes.²¹⁵ Shockingly, only 1,776 of the 15,252 police departments involved in the FBI's crime tracking program reported hate crimes in their jurisdictions.²¹⁶ The actual number of LGBT hate crimes could be even higher since members of the LGBT community retain fears of retaliation, discrimination, harassment, and many other negative consequences that prevent them from reporting

212. Jo Yurcaba, *Anti-gay Hate Crimes Fell Slightly in 2020, While Anti-Trans Crimes Rose, FBI says*, NBC NEWS (Sept. 1, 2021, 3:32 AM), <https://www.nbcnews.com/nbc-out/out-news/anti-gay-hate-crimes-fell-slightly-2020-anti-trans-crimes-rose-fbi-say-rcna1846>.

213. *LGBT People Nearly Four Times More Likely Than Non-LGBT People to be Victims of Violent Crime*, WILLIAMS INST. (Oct. 2, 2020), <https://williamsinstitute.law.ucla.edu/press/ncvs-lgbt-violence-press-release/> ("LGBT people are nearly four times more likely than non-LGBT people to experience violent victimization, including rape, sexual assault, and aggravated or simple assault . . .").

214. Grace Hauck, *Anti-LGBT hate crimes are rising, the FBI says. But it gets worse*, USA TODAY (June 28, 2019, 3:35 PM), <https://www.usatoday.com/story/news/2019/06/28/anti-gay-hate-crimes-rise-fbi-says-and-they-likely-undercount/1582614001/>; *What is a Hate Crime?*, U.S. DEP'T JUST., <https://www.justice.gov/hatecrimes/learn-about-hate-crimes> (last visited Apr. 1, 2022) ("Experts estimate an average of 250,000 hate crimes were committed each year between 2004 and 2015 in the United States. The majority of these were not reported to law enforcement."). This implies that the actual number of hate crimes involving LGBT members is significantly higher than the already troubling number that is being reported.

215. Grace Hauck, *Anti-LGBT Hate Crime Are Rising, the FBI Says. But It Gets Worse*, USA TODAY (July 1, 2019, 7:59 AM), <https://www.usatoday.com/story/news/2019/06/28/anti-gay-hate-crimes-rise-fbi-says-and-they-likely-undercount/1582614001/>.

216. Emma Keith et al., *Lack of Trust in Law Enforcement Hinders Reporting of LGBTQ Crimes*, CTR. PUB. INTEGRITY (Aug. 24, 2018), <https://publicintegrity.org/politics/lack-of-trust-in-law-enforcement-hinders-reporting-of-lgbtq-crimes/>.

these crimes.²¹⁷ Further, many LGBT members refrain from publicly outing their sexual orientation due to negative social consequences.²¹⁸

The increasing statistics for hate crimes committed against LGBT individuals demonstrates that the LGBT community remains widely discriminated against. Studies have concluded that LGBT discrimination continues to adversely impact a gay person's personal life, and professional life, as well as their access to healthcare.²¹⁹ Reportedly, "more than [one] in every [three] LGBTQ Americans faced discrimination of some kind in the past year."²²⁰ Further, transgender individuals face even higher levels of discrimination.²²¹ African American transgender women make up a majority of the transgender victims' statistics.²²² Sixty-seven percent of young, LGBT adults reported they had

217. Holden, *supra* note 13; *LGBT People Nearly Four Times More Likely Than Non-LGBT People to be Victims of Violent Crime*, WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/press/ncvs-lgbt-violence-press-release/> (last visited Apr. 1, 2022); see Keith, *supra* note 215 (stating that the 20% of hate crimes involving sexual orientation and gender bias could be much higher due to LGBT individuals not reporting crimes because of their belief that their reports will not be taken seriously by law enforcement); see also Eli Coston, *Understanding and Handling Hate Crimes Against Gay, Bisexual, and Transgender People*, SCHOLARS STRATEGY NETWORK (Nov. 9, 2018), <https://scholars.org/contribution/understanding-and-handling-hate-crimes-against> (stressing how LGBT individuals are fearful of further victimization by police).

218. See Colin Poitras, *The 'Global Closet' is Huge — Vast Majority of World's Lesbian, Gay, Bisexual Population Hide Orientation*, YSPH Study Finds, YALE SCH. MED. (June 13, 2019), <https://medicine.yale.edu/news-article/the-global-closet-is-hugevast-majority-of-worlds-lesbian-gay-bisexual-population-hide-orientation-ysph-study-finds/> (stating that an estimated 83% of the world's LGBT population remain in the closet); see also Jo Yurcaba, *They lived a 'double life' for decades. Now, these gay elders are telling their stories.*, NBC NEWS (Jan. 24, 2021, 3:30 AM), <https://www.nbcnews.com/feature/nbc-out/they-lived-double-life-decades-now-these-gay-elders-are-n1255358>; see also Mimi Swartz, *Living the Good Lie*, N.Y. TIMES MAG. (June. 16, 2011), <https://www.nytimes.com/2011/06/19/magazine/therapists-who-help-people-stay-in-the-closet.html> (detailing how a therapist's clients did not want to come out as gay because of the potential suffering they may face as a result, especially clients with Christian faith).

219. See Sharita Gruberg et al., *The State of the LBTQ Community in 2020*, CTR. AM. PROGRESS (Oct. 6, 2020), <https://www.americanprogress.org/article/state-lgbtq-community-2020/> (explaining the types of discrimination members of the LGBT community face, as well the psychological and physical impacts of the discrimination).

220. *Id.*

221. *Id.* In America, more than three in five transgender individuals face discrimination. *Id.*

222. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021> (last visited Apr. 1, 2022); see also Annamarie Forestiere, *America's War on Black Trans Women*, HARV. CIV. RTS. — CIV. LIBERTIES L. REV. (Sept. 23, 2020), <https://harvardcrcl.org/americas-war-on-black-trans-women/> ("Black trans women are killed at disproportionate rates because of 'the intersections of racism, Transphobia, Sexism, Biphobia And Homophobia.'"); See Also Dan Avery, *Anti-Transgender Hate Crimes Soared 20 Percent in 2019*, NBC NEWS (Nov. 17, 2020, 3:32 PM), <https://www.nbcnews.com/feature/nbc-out/anti-transgender-hate-crimes-soared-20-percent-2019-n1248011>

faced discrimination due to their sexuality.²²³ Over half of the LGBT people claiming discrimination say that their discrimination occurred while carrying on daily activities such as attempting to use a public restroom, shopping, and using public transportation.²²⁴

Therefore, despite the rulings of the Supreme Court, the presence of hate crime statutes, and federal and state laws aimed at protecting LGBT individuals, gay Americans are still targeted due to their sexual orientation. Thus, the gay panic defense tactic will continue to be a utilized, successful strategy.²²⁵

2. Hate Crimes Against LGBT Individuals in Tennessee

To combat the high hate crime statistics for all demographics, Tennessee law contains a hate crime statute. The existence of the hate crime statute and the Tennessee Attorney General advisory opinion that the law would likely cover transgender hate crimes, contradicts allowing the use of the gay panic defense in Tennessee courts. In Tennessee, the state has the ability to enhance a defendant's penalty if they selected their victim based on many factors including the victim's sexual orientation.²²⁶

(“This year, we saw a tragic new record of fatal violence against transgender and gender-nonconforming people in this country, particularly against Black and Brown transgender women,” HRC President Alphonso David said in a statement.”).

223. Kaye Sosin, *New Research Reveals ‘Shocking’ Rates of Anti-LGBTQ Discrimination*, USA TODAY (Oct. 15, 2020, 7:00 AM), <https://www.usatoday.com/story/news/politics/elections/2020/10/15/lgbtq-discrimination-rise-according-new-research/5952976002/>.

224. *Id.* There is no safe place for members of the LGBT community that is free of discrimination. Nearly everywhere a gay person goes, the discriminatory effect is sure to follow. *Id.*

225. The more discriminatory the potential jury pool may be, the more likely the gay panic defense will be successful.

226. *Understanding Hate Crimes: Definitions*, NASHVILLE.GOV, <https://www.nashville.gov/departments/police/safety-information/safe-place/understanding-hate-crimes#:~:text=A%20hate%20crime%20is%20a%20%E2%80%9Ccriminal%20offense%20against%20a%20person,of%20speech%20and%20other%20civil.> (last visited Apr. 1, 2022); see TENN. CODE ANN. § 40-35-114 (2021) (“[C]ourt[s] shall consider, but is not bound by, the following factors in determining whether to enhance a defendant’s sentence: . . . [if] defendant selected the [victim] . . . , in whole or in part, because of the defendant’s belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry or gender of that [victim] . . .”). Federal hate crime statutes, such as the Matthew Shepard & James Byrd, Jr. Act, permits federal punishment for bias motivated crimes “to include crimes motivated by individual’s actual or perceived gender, sexual orientation, gender identity, or disability.” 18 U.S.C. § 249; see Morgan Gstalter, *Tennessee Becomes First Southern State with Hate Crime Protections for Transgender People*, HILL (Feb. 15, 2019, 11:51 AM), <https://thehill.com/homenews/state-watch/430204-tennessee-becomes-first-southern-state-with-a-hate-crime-law-to-protest>; see Andrew T. Walker, *Tennessee Attorney General Includes “Transgender” in State’s Hate Crime Statutes*, ETHICS & RELIGIOUS LIBERTY COMM’N (Feb. 20, 2019), <https://erlc.com/resource-library/articles/tennessee-attorney-general-includes-transgender-in-states-hate-crime-statutes/>; see also Zach Vance, *Tennessee AG:*

The gay panic defense clearly contradicts the progress Tennessee has made in protecting the rights of LGBT individuals. The defense's entire purpose is to lessen or absolve the defendant of a crime committed against a LGBT victim. In 2020, sexual bias, including sexual orientation and gender identity, accounted for twenty-two percent of the total bias motivation in Tennessee, making it the second highest motivation behind race, ethnicity, and ancestry bias.²²⁷

While Tennessee appears to attempt to be harsh on hate crime targeting to gay victims, the use of the gay panic defense in the state says otherwise. Further, Tennessee has no explicit laws in place aimed at protecting LGBT people from discrimination.²²⁸ As a result, Tennessee must act now to ensure that justice can be received by LGBT victims of violent crime and that their transgressors receive punishment to the full extent of the law. These are the same rights that heterosexual individuals now fully enjoy. Tennessee should send a clear message to all that hate directed toward LGBT community members will not be tolerated by abolishing the defense.

D. *Gay Panic Cases vs. Heterosexual Cases*

Similar to the brutal murder of Ms. Nettles, the only crime Ruth George committed was being at the wrong place at the wrong time.²²⁹ George was walking along the street alone at night and was "catcalled" by a stranger, Donald Thurman, prior to reaching the safety of her vehicle.²³⁰ Thurman became enraged that George had ignored him and continued walking to her car, so Thurman followed her into the parking garage and continued to make comments of a sexual nature directed

Transgender People Covered by Hate Crime Law, JOHNSON CITY PRESS (Feb. 17, 2019), https://www.johnsoncitypress.com/news/tennessee-ag-transgender-people-covered-by-hate-crime-law/article_418d1ce3-58c4-5555-ab68-8154b742657c.html. However, Tennessee's intimidation statute does not protect individuals based on sex. TENN. CODE ANN. § 39-17-309.

227. *TBI Annual Report*, TENN. BUREAU OF INVESTIGATION, <https://www.tn.gov/tbi/divisions/cjis-division/recent-publications.html> (last visited Apr. 1, 2022). This statistic has increased over eight percent since 2019. *Id.*

228. *LGBTQ Americans Aren't Fully Protected from Discrimination in 29 States*, FREEDOM FOR ALL AMERICANS, <https://freedomforallamericans.org/states/> (last visited Apr. 1, 2022). By having no laws to protect LGBT people from discrimination, Tennessee is putting LGBT individuals in jeopardy.

229. See Part II.B.1; see also Alex Horton, *A Woman Ignored a Man's Catcalls – So He Chased Her Down and Killed Her*, *Prosecutors Say*, WASH. POST (Nov. 27, 2019, 3:44 PM), <https://www.washingtonpost.com/crime-law/2019/11/27/woman-ignored-mans-catcalls-so-he-chased-her-down-killed-her-prosecutors-say/> (detailing the tragic events that resulted in the death of Ruth George).

230. Horton, *supra* note 229.

towards George.²³¹ Once George arrived at her vehicle, Thurman “choked her from behind and dragged her into the car, where he sexually assaulted her before fleeing . . . ”²³² Despite George’s family tracking her location and attempting CPR, George was pronounced dead at the scene.²³³ However, instead of a mere twelve year sentence like the one received by Ms. Nettle’s murderer, James Dixon, Thurman, who likewise confessed, has been charged with first degree murder and aggravated sexual assault.²³⁴

Similarly, Mary “Unique” Spears rejected Mark Dorch’s sexual advances.²³⁵ Dorch became angered and repeatedly punched Spears in the face.²³⁶ Spears’s family came to her rescue to get Dorch away from her, but Dorch pulled out a gun and sprayed the family members with bullets.²³⁷ After being shot once, Spears attempted to run away but Dorch shot her two more times in the head.²³⁸ For the murder alone, Dorch was sentenced to thirty to sixty years of imprisonment.²³⁹ The facts of both Spears and George’s cases eerily resemble the facts of Ms. Nettles’ case, but the outcomes could not be more different. A transgender female’s family did not receive the same justice as two heterosexual females’ families. By permitting the use of the gay panic defense, the legal system is sending a message that heterosexual lives matter more than LGBT lives.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*; Faith Karimi, *A Man Strangled a Chicago Student After She Wouldn’t Talk to Him, Prosecutors Say*, CNN (Nov. 27, 2019, 8:48 PM), <https://www.cnn.com/2019/11/27/us/university-of-illinois-chicago-ruth-george/index.html>; see Jessica D’Onofrio, *Chilling Details Reveal UIC Student Ruth George’s Final Moments; Man Charged with Murder, Sex Assault Denied Bail*, ABC 7 EYEWITNESS NEWS (Nov. 26, 2019), <https://abc7chicago.com/uic-ruth-george-student-found-dead-death-chicago/5719715/>; see also Julie Bosman, *A College Student Was Killed by a Man Whose Catcalls She Tried to Ignore, Prosecutors Say*, N.Y. TIMES (Nov. 27, 2019), <https://www.nytimes.com/2019/11/27/us/chicago-college-student-killed-catcall.html>.

Thurman has only been charged with first degree murder, and at the time of this article has not gone to trial and received a conviction.

235. Kate Abbey-Lambertz, *The Man Who Allegedly Killed A Woman After She Rejected Him Has Been Charged With Murder*, HUFFPOST (Nov. 13, 2014, 1:24 PM), https://www.huffpost.com/entry/mary-spears-mark-dorch-detroit_n_6151152.

236. *People v. Dorch*, No. 328119, 2016 Mich. App. LEXIS 2194, at *1 (Mich. Ct. App. 2016).

237. Craig Johnson, *Mary “Unique” Spears: Killed After Rejecting an Admirer*, BLACK GIRL TRAGIC (June 8), <https://www.blackgirltragic.com/home/2016/6/6/mary-unique-spears-killed-after-rejecting-an-admirer..>

238. *Id.*

239. *Dorch*, 2016 Mich. App. LEXIS 2194, at *1.

IV. SOLUTIONS

To protect victims of LGBT violent crime and end the discriminatory effect the gay panic defense creates in the courtroom, the Tennessee legislature must abolish the gay panic defense and prevent its use further by enacting gay shield legislation. In the same way that rape shield victims were once reluctant to bring their rape claims to court, gay hate crime victims are fearful to report crimes committed against them and seek justice in the courtroom.²⁴⁰ Gay shield legislation should prohibit evidence of a LGBT victim's sexual orientation or gender identity from being entered into court unless it is entered by the victim prove the existence of a hate crime to enhance a defendant's sentence, but never to minimize or justify a defendant's acts. By implementing gay shield laws, Tennessee will ensure that victims of LGBT hate crimes feel more confident in the justice system and will seek to prosecute the horrendous, targeted crimes committed against them more frequently.

A. Abolishment of the Defense in Tennessee

The common law use of the gay panic defense needs to be abolished in Tennessee through a new statute. Members of the LGBT community will be further victimized if Tennessee waits for a gay panic defense case to work its way up the court system or ceases to be a viable defense tactic to defense attorneys.²⁴¹ By not acting, LGBT people will continue to suffer, and their aggressors will not be punished adequately in Tennessee.

Tennessee should look to other states that have abolished the defense for guidance in creating its own law to end the gay panic defense. For example, in 2014, California was the first state to ban the use of the gay panic defense.²⁴² The California General Assembly passed the bill banning the use of the gay panic defense in the state's criminal courts.²⁴³ The language of the California bill bans the use the gay panic defense by stating that panic based on sexual orientation or gender identity is not

240. See Part II.E; see also Keith, *supra* note 215 (discussing the lack of trust the LGBT community has in law enforcement).

241. The gay panic defense plays on the jury's homophobia. Riley Grace Roshong, *Opinion: The LGBTQ+ 'Panic' Defense Needs to Go in Md.*, MD. MATTERS (Feb. 9, 2021), <https://www.marylandmatters.org/2021/02/09/opinion-the-lgbtq-panic-defense-needs-to-go-in-md/>. Therefore, the more homophobic presence that exists in the jury, the more likely the defense is to be effective in mitigating offenses or even resulting in acquittal.

242. *LGBTQ+*, *supra* note 14.

243. Niraj Chokshi, *California Could Become the First State to Ban the 'Gay Panic' Defense*, WASH. POST (Sept. 5, 2014, 6:00 AM), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/05/california-could-become-the-first-state-to-ban-the-gay-panic-defense/>.

“objectively reasonable” provocation.²⁴⁴ Soon after the bill was passed, California’s governor signed the bill.²⁴⁵ With the stroke of a pen, California’s governor put an end to a victim’s sexual orientation and gender identity being used against them in criminal court and sent a clear message that discrimination based on those grounds would not be tolerated.²⁴⁶ Since 2014, the gay panic defense has been banned in fifteen other states and legislation is pending in at least seven others.²⁴⁷ Rhode Island passed a similar bill abolishing the gay panic defense in 2018.²⁴⁸ This bill prohibits the gay panic defense from being used to prove provocation, diminished capacity, or self-defense

based solely on the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had romantic or sexual relationship.²⁴⁹

California and Rhode Island have paved the way for other states, like Tennessee, to follow to put an end to the harmful gay panic defense. Like Rhode Island’s gay panic defense ban, Tennessee should also have a statute that states that a victim’s sexual orientation and gender identity cannot be used to blame the victim when the defendant targets a member of the LGBT community to commit violent acts that harm or even kill the victim. The Tennessee statute should prohibit defendants from the ability to use the gay panic defense to further any other defense theory including adequate provocation, heat of passion, insanity, self-defense, and diminished capacity and be codified within the Tennessee Code Annotated. By doing so, Tennessee would be protecting the victim’s right for justice and not placing the victim on trial.

244. Bill No. 2501, LEGIS. COUNS.’S DIGEST, (Ca. 2014), https://leginfo.ca.gov/faces/billNav_Client.xhtml?bill_id=201320140AB2501 (“for purposes of determining sudden quarrel or heat of passion, the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.”).

245. Molloy, *supra* note 116.

246. *Id.*

247. *LGBTQ+*, *supra* note 14.

248. See *Gay/Trans Panic Defense Laws*, LGBT MAP (June 7, 2021), <https://www.lgbtmap.org/img/maps/citations-panic-defense-bans.pdf> (detailing which states have gay and trans panic defense laws and which do not).

249. Act of Jan. 2018, R.I. Gen. Assembly, 2018 – H 7066; <http://webserver.rilin.state.ri.us/BillText18/HouseText18/H7066aa.htm> (last visited Apr. 1, 2022).

B. Rape Shield Laws

The concerns raised by the use of the gay panic defense once plagued rape cases until the introduction of rape shield laws. Rape shield laws are courtroom protections that aim to bar evidence of a rape victim's sexual behavior and character, except in limited circumstances.²⁵⁰ Prior to rape shield laws, a victim's prior sexual history was used by the defendant to impeach the victim, attack the victim's morals, and publicly shame the victim.²⁵¹ Basically, the victim's character was placed metamorphically on trial during the actual trial of defendant, to determine whether the victim was credible and did not consent to the alleged rape.²⁵² Victims of sex crimes "[were] assaulted twice—once by the offender and once by the criminal justice system."²⁵³ An individual's prior sexual history and behavior played a vital role in the jury assessing the credibility of the rape claim.²⁵⁴

The more credibility attributed to the rape victim, the more likely the victim was believed to not have consented to the sexual intercourse in dispute.²⁵⁵ Thus, a virgin was deemed to possess more credibility therefore less likely to have consented to the sex crime.²⁵⁶ An individual with a more experienced sexual history would be deemed less credible and more likely to have consented to the sexual act in question.²⁵⁷ The more consensual the sexual act was or appeared to be, the less likely a rape conviction would be rendered.²⁵⁸ Therefore, the defense would frequently try to paint the rape victim as immoral and impure, thereby making the victim appear untrustworthy and less believable to the jury. In

250. See Rule 412. Sex Offense Cases: The Victim, LEGAL INFO. INST., https://www.law.cornell.edu/rules/fre/rule_412 (last visited Apr. 1, 2022) (providing the federal rape shield statute and comments).

251. *What is the Rape Shield Law?*, MEMPHIS SEX CRIME ATT'Y J. JEFFREY LEE, <https://www.mysexcrimeattorney.com/what-is-the-rape-shield-law/> (last visited Apr. 1, 2022) (explaining what rape shield statutes are and how they operate in Tennessee).

252. *State v. Sheline*, 955 S.W.2d 42, 44 (Tenn. 1997).

253. *Id.*

254. See Kyla Bishop, *A Reflection on the History of Sexual Assault Laws in the United States*, ARK. J. SOC. CHANGE & PUB. SERV. (Apr. 15, 2018), <https://ualr.edu/socialchange/2018/04/15/reflection-history-sexual-assault-laws-united-states/> (explaining how a victim's sexual activity once played a central role is assessing that victim's credibility).

255. Kez Bhola-Dare & Jamie Fletcher, *The Problematic Use of Past Sexual History as Evidence in Rape Trials*, SEXUAL TRAUMA RECOVERY SERV. (Feb. 3, 2020), <https://www.starsdorset.org/blog/the-problematic-use-of-past-sexual-history-as-evidence-in-rape-trials>.

256. *What is the Rape Shield Law?*, JIL FIRM, <https://www.mysexcrimeattorney.com/what-is-the-rape-shield-law/> (last visited Apr. 1, 2022).

257. *Id.*

258. *Sexual Consent*, PLANNED PARENTHOOD FED'N AM., <https://www.plannedparenthood.org/learn/relationships/sexual-consent> (last visited Apr. 1, 2022).

other words, a woman's prior sexual history was considered especially relevant in determining whether the alleged rape was fabricated.²⁵⁹ Ultimately, a woman's prior sexual history was used by the defense to impeach the victim by destroying the victim's credibility.²⁶⁰

Many rape victims felt as though they could not seek justice for the crimes committed against them due to the lack of protection they would receive in the courtroom.²⁶¹ For instance, if a woman alleging rape had many previous sexual partners in her lifetime, she would be reluctant to pursue justice in the courtroom because of the fear that her private, intimate life would become public knowledge, thus subjecting the victim to prejudice, humiliation, and embarrassment. Ultimately, women became less likely to report crimes of a sexual nature due to what victims experienced in the courtroom.²⁶² To combat women refraining from reporting crimes, rape shield laws were enacted.²⁶³ These laws restrict the admission of a victim's prior sexual history in court when the defendant is charged with a sexual offense, increasing the likelihood victims will testify and seek justice against their abusers in the courtroom.²⁶⁴ Lawmakers realized that a victim's "character, morality, and sexual history . . . [were] largely irrelevant to a sex crime trial" because a victim's sexual past had nothing to do with the currently alleged sex crime, and the admission of a victim's sexual history disincentivized individuals from reporting sexual crimes.²⁶⁵

Recognizing that a victim's sexual history was not only prejudicial and a barrier to the victims reporting sex crimes, Tennessee likewise

259. Bhola-Dare & Fletcher, *supra* 254.

260. *Id.*

261. See *A Brief History of the Anti-Rape Movement*, RES. SHARING PROJECT, <https://www.resource-sharingproject.org/brief-history-anti-rape-movement> (last visited Apr. 1, 2022) (discussing how various women's rights movements lead to the formation of rape shield statutes that are gender neutral); see also Brooke Flagler, *A Brief History of Rape Law*, FEMINIST POETRY MOVEMENT (Dec. 13, 2019), <https://sites.williams.edu/engl113-f18/flagler/a-brief-history-of-rape-law/> (explaining how women were basically forced to keep their rapes silent because the justice system would not protect a rape victim).

262. *Rape Shield Laws: Protecting Sex-Crime Victims*, NOLO (Nov. 8, 2013), <https://www.nolo.com/legal-encyclopedia/rape-shield-laws-protecting-sex-crime-victims.html>.

263. Deborah C. England, *In a Rape Case, Can a Defendant Bring Up Their Accuser's Sexual History?*, CRIM. DEF. ATT'Y, <https://www.criminaldefenselawyer.com/resources/in-a-rape-case-can-a-defendant-bring-his-accusers-sex> (last visited Apr. 1, 2022) ("In eras past, criminal defendants charged with rape used to be free to attack the character of their accusers, trying to label them as unchaste and therefore unworthy of trust. But the institution of 'rape shield' laws has effectively stopped this tactic.").

264. *Rape Shield Laws: Protecting Sex-Crime Victims*, *supra* note 261.

265. *Id.*; Ki Akhbari, *Rape Shield Laws*, LEGALMATCH (Mar. 6, 2018), <https://www.legalmatch.com/law-library/article/rape-shield-laws.html>.

adopted a rape shield rule in the Tennessee Rules of Evidence 412.²⁶⁶ The comments to Tennessee's rape shield law state that justice is "frustrated" when sexual assault victims fail to report sex crimes due to "the possible admission of [the victim's] sexual history" and if evidence of an alleged victim's sexual history were admitted, "[it] may cause the jury to be unfairly prejudiced against the victim."²⁶⁷ In Tennessee, evidence of a victim's sexual history or reputation is only available in court under a few, well delineated exceptions.²⁶⁸ To determine whether evidence is admissible under Rule 412, Tennessee courts must conduct a hearing in chambers and outside the presence of the public and jury.²⁶⁹ If the judge, in his or her discretion, determines that "the probative value of the evidence outweighs its unfair prejudice to the victim, the evidence shall be admissible."²⁷⁰

Assume an individual, Stormy, was a victim of sexual assault in Tennessee. Suppose that Stormy is known in her community to be sexually promiscuous. Due to Tennessee courts protecting Stormy's prior sexual history and her reputation in the community from a potential jury, she feels like her assault claim will be taken seriously. As a result, Stormy

266. See *State v. Sheline*, 955 S.W.2d 42, 45 (Tenn. 1997); Tenn. R. Evid. 412; see also *Tennessee Rape Shield Law*, LAWPIPE, https://www.lawpipe.com/Tennessee/Tennessee_Rape_Shield_Law.html (last visited Apr. 1, 2022). The Tennessee rape shield statute protects a victim of an alleged rape in court proceedings in which a person is accused aggravated rape, rape, aggravated sexual battery, sexual battery, statutory rape, spousal sexual offenses, rape of a child, sexual battery by an authority figure, solicitation of minors for sexual acts, incest, or the attempt to commit any such offense. *Rule 412: Sex Offense Cases; Relevance of Victim's Sexual Behavior*, TENN. CTS. SYS., <https://www.tncourts.gov/rules/rules-evidence/412> (last visited Apr. 1, 2022); see J. Jeffery Lee, *How Does the Rape Shield Law Work in TN Criminal Cases?*, YOUTUBE (Jan. 18, 2016) <https://www.youtube.com/watch?v=ORjTR4tDPWc>.

267. *Sheline*, 955 S.W.2d at 45.

268. *Rule 412: Sex Offense Cases; Relevance of Victim's Sexual Behavior*, TENN. CTS. SYS., <https://www.tncourts.gov/rules/rules-evidence/412> (last visited Apr. 1, 2022). There are very limited circumstances in which evidence of an individual's specific instances of conduct to the victim, reputation of the victim, or one's opinion on the victim can be offered. *Id.* To introduce this evidence, the opposing party must file a motion to the court and provide notice to the other party ten days prior to trial beginning or during trial if the court deems necessary, the motion must describe what the party intends to introduce and why, and a hearing will be held to determine if the probative value of the evidence outweighs its unfair prejudicial effect to the victim. *Id.* There are four instances in which prior, specific instances of sexual conduct may be permitted: (1) when required by the Constitutions of Tennessee or United States, (2) if the proposed evidence is introduced to show the credibility of the alleged victim and the prosecutor or victim has presented evidence of the victim's sexual behavior, (3) if the sexual behavior was with the defendant, (4) if the sexual behavior was with persons other than the defendant. *Id.* By limiting the evidence of a victim's sexual history, the court is ensuring that victim is not also prosecuted for crimes committed against them. Thus, ensuring the victim's rights.

269. Tenn. R. Evid. 412(d).

270. Tenn. R. Evid. 412(d)(4).

is more likely to seek justice in the court rather than taking action into her own hands or doing nothing about the crimes committed against her, ultimately leaving more individuals at risk of victimization from Stormy's abuser. In this instance and many others, the Tennessee rape shield statute is effective in encouraging victims of sex crimes to seek judicial action. Tennessee's rape shield statute makes victims of sexual crimes feel as though they have a path to justice, despite their character or reputation, because they know their past acts and the opinions of others can only be admitted in limited circumstances. Due to rape shield law, victims of sex crimes are protected in courtrooms in the state of Tennessee. Similar to how a rape victim's promiscuity was once perceived as a negative trait in courtrooms, the gay panic defense asserts that a LGBT victim deserved the hate crime committed against them by justifying those horrendous acts.

C. Implementation of Gay Shield Laws in Tennessee

As evidenced by the Lawrence King case, abolishment of the gay panic defense is not enough. Even if an attorney does not characterize its defense as one that involves gay panic, they could still be utilizing gay panic defense in disguise.²⁷¹ Therefore, additional protections for victims of LGBT hate crimes are needed in Tennessee. Those additional protections should take the form of gay shield laws and be codified in the Tennessee Rules of Evidence after being passed by Tennessee legislature.

Gay shield laws can be modeled after rape shield laws. Rape shield laws exist to bar the admission of a rape victim's sexual history except under limited circumstances.²⁷² Similarly, gay shield laws would exclude evidence that could provoke homophobic and transphobic responses among the jurors. Gay shield laws would serve to prevent the jury from potentially becoming prejudiced and shifting blame to the victim. Tennessee gay shield laws would completely bar any evidence of a victim's sexual orientation or gender identity from coming into the court because of its low relevance and highly prejudicial nature, unless the victim or state introduces evidence of their sexual orientation or gender identity for purposes of proving the existence of a hate crime. A judge should then issue a jury instruction that an individual's sexual orientation or gender identity should only be considered for purposes of proving the

271. See Part II.B.4.

272. *Rape Shield Laws, Shield Laws*, <https://law.jrank.org/pages/10253/Shield-Laws-Rape-Shield-Laws.html> (last visited Apr. 1, 2022).

existence of a hate crime, not to diminish the culpability of a defendant. A defendant should be prohibited from introducing evidence of the victim's sexual orientation or gender identity for any purpose. Tennessee's new evidentiary rule should state that "[u]nder no circumstances, unless admitted by the victim to prove their sexual orientation or gender identity for purposes of proving a hate crime has been committed, should evidence of a victim's sexual orientation, gender identity, or sexual expression be admissible in court."

This law would make it clear that LGBT discrimination and victim blaming is not permitted in Tennessee. For example, say Bryer invited Jonathan over for an evening at his home. Once there, Bryer requests Jonathon join Bryer in his bedroom to cuddle with him in his rainbow blanket. As a result, Jonathan loses control, grabs a gun, shoots, and kills Bryer. At the murder trial, if the defense attempts to introduce evidence of Bryer's rainbow blanket and that Bryer owned rainbow wine glasses that were present on the table at the scene of the crime and are indicative of homosexual males, that evidence would not be admissible. The only relevant purpose the wine glasses or blanket serve in court is to prove that the Bryer was gay and to inflame the jury.²⁷³ This new rule provides Tennessee judges with a clear, bright line rule to follow when deciding whether to admit evidence in criminal cases. If an attorney attempts to introduce evidence of a victim's sexual orientation or gender identity during trial, that evidence must be stricken from the record. If the state introduced evidence of Bryer's sexuality to prove the existence of a hate crime to enhance Jonathan's sentence, the judge must give jury instructions to exclude all evidence relating to Bryer's sexual orientation or gender identity except for proving a hate crime was committed.

Without gay shield laws, an LGBT victim's sexual orientation or gender identity could still be admissible in court, and jurors' internalized homophobia could result in the defendant getting away with assault or even murder. Fifty-three percent of Tennessee adults, the potential jury pool that an LGBT victim could have to decide the fate of their aggressors, believe that homosexuality should be discouraged.²⁷⁴ Therefore, if an LGBT individual's sexual orientation or gender identity is disclosed, it is likely that a Tennessee jury would discriminate against the victim and find the defendant either not guilty or mitigate the defendant's offense. Gay

273. The only purpose of this evidence is to show that the victim, Bryer, was LGBT.

274. *Views About Homosexuality Among Adults in Tennessee*, PEW RSCH. CTR., <https://www.pewforum.org/religious-landscape-study/state/tennessee/views-about-homosexuality/> (last visited Apr. 1, 2022).

shield laws should be put into place to ensure that LGBT victims receive a fair day in court and are not further victimized while attempting to seek justice.

V. CONCLUSION

Tennessee should ban the use of the gay panic defense and provide gay shield laws to protect the estimated 223,000 Tennesseans that are members of the LGBT community.²⁷⁵ Despite a shift in nationwide LGBT acceptance, hate crimes involving bias toward sexual orientation and gender identity are on the rise, and the LGBT community remains widely discriminated against. Thus, it is likely that the gay panic defense will be utilized by defense attorneys to nullify some or all of the defendant's violent acts. By banning the defense, Tennessee would be ensuring that LGBT individuals receive the protections of the Fourteenth Amendment's Equal Protection Clause and that LGBT hate crimes are adequately punished. However, banning the defense alone would not be sufficient because elements of the defense could still be raised by a defendant in the courtroom. By implementing gay shield laws, Tennessee would alleviate some of the barriers facing LGBT victims. Therefore, Tennessee should ban the gay panic defense and establish gay shield laws.

275. *Tennessee's Equality Profile*, LGBT MAP, https://www.lgbtmap.org/equality-maps/profile_state/TN (last visited Apr. 1, 2022).