

**PANIC! AT THE COURTHOUSE: A NEW PROPOSAL  
FOR AMENDING ENACTED LEGISLATION BANNING THE  
LGBTQ+ PANIC DEFENSE**

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INTRODUCTION

The LGBTQ+ “panic” defense allows “a jury to find that a victim’s sexual orientation or gender identity/expression is to blame for a defendant’s violent reaction, including murder.”<sup>1</sup> Seventeen states have banned the use of the LGBTQ+ panic defense; twelve more have proposed legislation doing the same.<sup>2</sup> However, not all states that have enacted this legislation have placed outright bans on the defense entirely. Rhode Island, Maine, and Connecticut have legislation that includes language specifying the defense may be barred only if it is based *solely* on the discovery of a victim’s actual or perceived sex or

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<sup>1</sup> *LGBTQ+ “Panic” Defense*, THE LGBTQ+ BAR, 2 <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/> (last visited May 22, 2022).

<sup>2</sup> *Id.* The state of this legislation is constantly evolving. These numbers will likely become inaccurate, as more states are adopting the legislation.

sexual orientation.<sup>3</sup> In effect, inclusion of the word “solely” has created a loophole and left a way for defendants to still claim the defense.

This Note will discuss closing the gap on the panic defense.<sup>4</sup> Part I will walk through the contemporary use of the LGBTQ+ panic defense generally. The defense’s history is limited because there is no official law sanctioning its use; instead, courts allow these arguments without consequence. This defense is rarely used on its own; instead, there are three main ways the defense is brought up in court: (1) provocation; (2) diminished capacity; and (3) self-defense. States are slowly beginning to outlaw the defense through legislation; however, some states leave a loophole in the statutes by only barring the defense if it is the only justification. Part II will discuss the implications of allowing this gap to still exist. Part II will compare state legislation of Rhode Island, Maine, and Connecticut. Part II will also give examples of how, through statutory interpretation, there is a gap in legislation which effectively negates the purpose. Finally, Part III will discuss arguments for leaving the gap open, then suggest compromises or solutions to balance protection in each state’s legislation. Nevada’s legislation<sup>5</sup> will act as the model of a state that categorically bans all use of the defense.

## I. BACKGROUND

### *A. Use: LGBTQ+ Panic*

The “gay panic” or “trans panic” defense is not officially recognized for use by any legislature, other than through legislation that bans it.<sup>6</sup> This defense is most frequently used, according to the LGBTQ+ Bar, as a “legal tactic used to bolster other defenses.”<sup>7</sup> The history of its use has changed over time. Originally used as the stand-alone “gay panic” defense, there is a new incarnation: “trans panic.”

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<sup>3</sup> ME. STAT. tit. 17-A, § 108(3) (2021); 12 R.I. GEN. LAWS ANN.

§§ 12-17-17–12-17-19 (West 2018); CONN. GEN. STAT. § 53a-13 (2020).

<sup>4</sup> Discussions of the panic defense include mild descriptions of the murders and violence committed against members of the LGBTQ+ community.

<sup>5</sup> NEV. REV. STAT. ANN. § 193.225 (West 2019).

<sup>6</sup> Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 475 (2008).

<sup>7</sup> THE LGBTQ+ BAR, *supra* note 1.

This alternative language is most frequently used when a person transitioning from male to female is assaulted or murdered.<sup>8</sup>

The panic defense is invoked in three main defense strategies: (1) provocation; (2) self-defense; and (3) diminished capacity.<sup>9</sup> When a defendant uses one of these defenses, the panic defense may bolster any original claim.<sup>10</sup> The panic defense would not totally acquit someone of murder or assault, but would instead create a justification pandering to a sympathetic jury. Generally, a provocation defense is a defense to murder or manslaughter.<sup>11</sup> When this defense is successfully invoked, an original charge may decrease in severity (e.g., murder may drop to manslaughter).<sup>12</sup>

Provocation or “heat-of-passion” defense requires four elements be met: “(1) reasonable and adequate provocation; (2) no cooling-off time in the period between the provocation and the slaying; (3) a defendant who actually was impassioned by the provocation; and (4) a defendant who did not cool off before the slaying.”<sup>13</sup> The panic defense acts as the catalyst, triggering the provocation element.<sup>14</sup> Here, a non-violent sexual advance is only provocative enough to justify murder when the advance is by an LGBTQ+ individual.<sup>15</sup>

The provocation and panic defenses are commonly linked. Because of homophobia and perpetuated stereotypes of gay men, straight men are considered more justified in their violence when there

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<sup>8</sup> *Id.* The LGBTQ+ Bar now uses the term “LGBTQ+ panic” rather than “gay panic” or “trans panic” so as to encompass the spectrum of panic defenses.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> David A. Perkiss, Comment, *A New Strategy of Neutralizing the Gay Panic Defense at Trial: Lessons from the Lawrence King Case*, 60 UCLA L. REV. 788, 797 (2013).

<sup>13</sup> *State v. Josephs*, 803 A.2d 1074, 1109 (N.J. 2002) (citing *State v. Mauricio*, 568 A.2d 879 (N.J. 1990)).

<sup>14</sup> See Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflection on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 731 (1995) (“[A] homosexual advance is considered an affront to prevailing heterocentrist/heterosexist/homophobic norms, and thus may cause passion in the Reasonable Man (*i.e.*, a reasonable heterosexual homophobic man).”).

<sup>15</sup> THE LGBTQ+ BAR, *supra* note 1.

is a non-violent homosexual advance because of the general affront to their masculinity that such an advance conveys.<sup>16</sup> Some individuals—or even collective juries—may see violence towards gay men by straight men as more acceptable. When these biases slip in, individuals or juries will be more likely to sympathize with an assailant and accept a panic defense.<sup>17</sup> Here, the court would not be justifying the attack in accepting the defense; but rather, the court would be excusing the act and thus reducing the charge from murder to manslaughter.<sup>18</sup>

The panic defense may also bolster a claim of self-defense. Self-defense requires a party show they believed the victim was about to cause them serious bodily harm.<sup>19</sup> Part of a panic defense would apply here if the alleged victim were about to cause the defendant serious harm *because* of their sexual orientation or gender identity.<sup>20</sup> This version of the panic defense was used as recently as 2016<sup>21</sup>

Sixty-nine year-old James Miller from Texas received ten years probation after killing his 32 year-old neighbor, David Spencer.<sup>22</sup> A jury found Miller guilty of criminally negligent homicide.<sup>23</sup> Applying the panic defense, the court downgraded the defendant's murder charge.<sup>24</sup> Miller was at Spencer's home, where

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<sup>16</sup> See generally Dressler, *supra* note 14, at 736 (arguing men and women respond differently “to affronts . . . men are more likely to characterize themselves as victims of injustice, or to think that their self-worth has been attacked, and to act offensively as a result.”).

<sup>17</sup> *Id.* at 731, 750 (discussing the direct relationship between the provocation defense and murders of homosexual men); see discussion *infra* Part III.A.

<sup>18</sup> Dressler, *supra* note 14, at 737.

<sup>19</sup> See MODEL PENAL CODE § 3.04(1) (AM. L. INST. 2020) (“[T]he use of force . . . is justifiable when the actor believes that such force is immediately necessary . . . [to] protect[] [them]self against the use of unlawful force by such other person.”).

<sup>20</sup> THE LGBTQ+ BAR, *supra* note 1.

<sup>21</sup> Juliette Maigné, *Trans Woman’s Killer Used the “Gay Panic Defense.” It’s Still Legal in 42 States*, VICE NEWS (July 21, 2019), <https://www.vice.com/en/article/a3xby5/trans-womans-killer-used-the-gay-panic-defense-its-still-legal-in-42-states>.

<sup>22</sup> Cleve R. Wootson, Jr., *A Former Police Employee Said He Killed a Man in ‘a Gay Panic’ – an Actual Legal Defense that Worked*, WASH. POST (Apr. 27, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/04/27/a-former-cop-said-he-killed-a-man-in-a-gay-panic-an-actual-legal-defense-that-worked/>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

they were spending the evening together.<sup>25</sup> Miller alleged he felt Spencer was going to hurt him and stabbed him twice, killing Spencer.<sup>26</sup> Miller turned himself in and later claimed self-defense while “in a ‘gay panic’ after being hit on by [Spencer].”<sup>27</sup>

Diminished capacity is a defense frequently used in popular culture. The defense attacks the intent element of a crime. The Model Penal Code § 4.01(1), Mental Disease or Defect Excluding Responsibility, states, “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental . . . defect [they] lack[] substantial capacity . . . to appreciate the criminality . . . of [their] conduct or to conform [their] conduct to the requirements of law.”<sup>28</sup> A defendant’s invoking of the panic defense pleads their mental capacity was diminished; thus, they were not responsible for their actions.<sup>29</sup> Here, a defendant would claim temporary diminished capacity—or panic—because of an interaction with an LGBTQ+ individual.<sup>30</sup>

Seventeen year-old Gwen (Lida) Araujo was transgender. She was brutally murdered by Jose Merel and Michael Magidson<sup>31</sup> (both 25 years old) and buried in a shallow grave in El Dorado County, California.<sup>32</sup> Merel and Magidson were originally charged with first-degree murder but ultimately found guilty of second-degree murder and not guilty of a hate crime.<sup>33</sup> During their trial, the defense and testimony focused heavily on Gwen’s actions prior to her murder.<sup>34</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> MODEL PENAL CODE § 4.01(1) (AM. L. INST. 2020).

<sup>29</sup> *Id.*

<sup>30</sup> See THE LGBTQ+ BAR, *supra* note 1 (highlighting that sexual advances are considered “interactions”).

<sup>31</sup> Jason Cazaraes (25 years old) was also implicated in the murder of Gwen, but during his trials the jury was deadlocked both times. Carolyn Marshall, *Two Guilty of Murder in Death of a Transgender Teenager*, N.Y. TIMES (Sept. 13, 2005), <https://www.nytimes.com/2005/09/13/us/two-guilty-of-murder-in-death-of-a-transgender-teenager.html>.

<sup>32</sup> *People v. Merel*, No. A113056, 2009 WL 1314822, at \*6–8 (Cal. Ct. App. May 12, 2009); Marshall, *supra* note 31.

<sup>33</sup> *Merel*, 2009 WL 1314822, at \*9.

<sup>34</sup> *Id.* at \*1–5.

She had previous sexual encounters with Merel and Magidson; this was considered the catalyst to her murder.<sup>35</sup>

The night she was killed, Gwen did not have sexual encounters with Merel or Magidson. The two men attacked her because of rumors circulating in their friend group “that Lida might be a man.”<sup>36</sup> Gwen was confronted at Merel’s home after a night of drinking where, during a game of dominos, Merel “stood up and put his fingers across her throat.”<sup>37</sup> While this was happening, the group yelled for her to say “if she was a woman or a man.”<sup>38</sup> What followed was Gwen’s brutal murder; an autopsy revealed the ultimate cause of death could have been “blunt trauma to the head” or strangulation.<sup>39</sup>

The California Appellate Court’s opinion in *People v. Merel* discussed at length the heat-of-passion defense.<sup>40</sup> The court reasoned Gwen being transgender was an adequate provocation; therefore, the lower court had correctly applied the heat-of-passion defense. Gwen, as a transgender woman, was a sufficient provocation to cause “an ordinary person of average disposition to act rashly or without due deliberation and reflection.”<sup>41</sup> The Defense based their argument off of this principle: Merel did not “have the requisite mental state of aider and abettor” when he assisted in the attack of Gwen Araujo.<sup>42</sup> The panic defense—in all of its incarnations—perpetuates violence against LGBTQ+ community members by labeling their mere existence as a threat or danger to society unworthy of protections under the law.<sup>43</sup>

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

<sup>36</sup> *Id.* at \*1.

<sup>37</sup> *Id.* at \*2.

<sup>38</sup> *Id.*

<sup>39</sup> *See id.* at \*1–5 (describing in detail how Gwen was murdered, including details from her autopsy report).

<sup>40</sup> *See generally id.* at \*9–13.

<sup>41</sup> *Id.* at \*11 (quoting *People v. Lee*, 20 Cal.4th 47, 59 (Cal. 1999)).

<sup>42</sup> *Merel*, 2009 WL 1314822 at \*15; *see generally* Malaika Fraley, *Gwen Araujo Murder 14 Years Later: Transgender Teen’s Killers Face Parole*, E. BAY TIMES (Oct. 15, 2016), <https://www.eastbaytimes.com/2016/10/14/the-murder-of-gwen-araujo/> (explaining that after 14 years Merel was granted parole while Magidson was not).

<sup>43</sup> *See* Omar T. Russo, *How to Get Away with Murder: The “Gay Panic” Defense*, 35 *TOURO L. REV.* 811, 827 (2019).

Banning the use of the panic defense becomes more important every year. FBI Hate Crime statistics show an average increase of roughly 100 victims of hate crimes per year from 2016–2018.<sup>44</sup> Additionally, 2021 was the deadliest year on record<sup>45</sup> in the United States for transgender people—53 transgender people were killed in targeted violence.<sup>46</sup> This rise is up from 2019, where a total of 26 transgender people were murdered—23 of them transgender women.<sup>47</sup> Since 2013, 77% of victims of fatal violence have been transgender women of color.<sup>48</sup> A 2015 survey by the National Center for Transgender Equality reported 47% of the individuals who took the survey “have been sexually assaulted at some point in their lifetime” and 10% “were sexually assaulted in the past year.”<sup>49</sup> Additionally, 9%

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<sup>44</sup> FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., HATE CRIME STATISTICS, 2016 4 (2017), (showing total victims of hate crimes based on sexual orientation were 1,218 in 2016); FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., HATE CRIME STATISTICS, 2017 4 (2018) (showing total victims of hate crimes based on sexual orientation were 1,303 in 2017); BIAS MOTIVATION, FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, *Incidents, Offenses, Victims, and Known Offenders* (2018) (showing total victims of hate crimes based on sexual orientation were 1,445 in 2018).

<sup>45</sup> This statistic was last updated January 2022. If trends continue, 2022 likely will rank higher. See generally Nico Lang, *2021 Was the Deadliest Year on Record for Anti-Trans Murders*, XTRA MAG. (Jan. 4, 2022), <https://xtramagazine.com/power/deadliest-year-anti-trans-murders-215625>.

<sup>46</sup> *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, HUM. RTS. CAMPAIGN FOUND., <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021> (last visited May 22, 2022).

<sup>47</sup> Serena Sonoma, *44 Trans People Killed in 2020, Marking Worst Year on Record for Transphobic Violence*, THEM (Jan. 7, 2021), <https://www.them.us/story/44-trans-people-killed-2020-worst-year-for-transphobic-violence>; *Murders of Transgender People in 2020 Surpasses Total for Last Year in Just Seven Months*, NAT’L CTR. FOR TRANSGENDER EQUAL.: BLOG (Aug. 7, 2020), <https://transequality.org/blog/murders-of-transgender-people-in-2020-surpasses-total-for-last-year-in-just-seven-months>.

<sup>48</sup> *An Epidemic of Violence 2021*, HUM. RTS. CAMPAIGN FOUND., <https://reports.hrc.org/an-epidemic-of-violence-fatal-violence-against-transgender-and-gender-non-confirming-people-in-the-united-states-in-2021#epidemic-numbers> (last visited May 22, 2022).

<sup>49</sup> SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* 198 (2016).

of the respondents also reported being physically attacked in the past year because of their gender identity.<sup>50</sup> Of the 9%, a disproportionate number were Black, Indigenous, or People of Color (BIPOC).<sup>51</sup>

In 2006, as a direct response to violence against transgender women, California Governor Arnold Schwarzenegger signed the Gwen Araujo Justice for Victims Act into law.<sup>52</sup> The law was the first in the country to address gay and trans panic defenses. The changes to the law included allowing a party to request additional jury instructions which would define bias in any criminal trial<sup>53</sup> and banning the “use of panic strategies based upon discovery or knowledge of an actual or perceived characteristic of their victim.”<sup>54</sup> Additional modifications were made in 2014 when California added similar protections to the heat-of-passion defense.<sup>55</sup> The modifications barred the use of the defense if any provocation “resulted from the discovery of . . . the victim’s actual or perceived gender.”<sup>56</sup> This Bill and subsequent modifications were the first of their kind to start action for change necessary to protect LGBTQ+ people.

After the Gwen Araujo Justice for Victims Act was signed into law, in 2013 the American Bar Association (ABA) issued a resolution calling for “legislative action to curtail the availability and effectiveness of the [panic] defenses.”<sup>57</sup> Citing many of the reasons

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<sup>50</sup> *Id.* at 202–03 (defining a physical attack as “grabbing them, throwing something at them, punching them, or using a weapon against them for any reason”).

<sup>51</sup> *Id.* at 203 (finding that of the 9%, 19% were American Indian; 11% were Asian; 9% were Black; 9% were Latinx; 14% were Middle Eastern; 12% were Multiracial; and 8% were White).

<sup>52</sup> A.B. 1160, 2005 Gen. Assemb., Reg. Sess. (Cal. 2006).

<sup>53</sup> *Id.* (“[A] party may request that the jury receive an instruction that defines bias as inclusive of bias against the victim or victims based upon disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation, in any criminal trial.”).

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

<sup>55</sup> A.B. 2501, 2013 Gen. Assemb., Reg. Sess. (Cal. 2014); THE LGBTQ+ BAR, *supra* note 1.

<sup>56</sup> See Cal. A.B. 2501 (“[T]he 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.”).

<sup>57</sup> ABA H.D., Resolution 113A, 1 (2013).

previously discussed, the ABA addressed the purpose and implications of panic defenses generally, while also asserting that a panic defense “suggests that violence against LGBT individuals is excusable.”<sup>58</sup> Having an organization like the ABA condemn use of the panic defense may bolster any argument calling for legislation to ban the defense because of the knowledge and understanding of the legal system within the organization.

After California passed its bill and the ABA issued its resolution, other states slowly began banning or limiting the panic defense. Including California, 17 states have banned or limited the use of gay or trans panic defenses.<sup>59</sup> Each state has adopted unique language, but the purpose remains the same: LGBTQ+ individuals are especially vulnerable and susceptible to violence and should be protected. More states must ban the defense completely—ending the use of this defense will ensure justice for victims.<sup>60</sup>

Legislators have introduced bills at the federal level without success,<sup>61</sup> while 12 other states have introduced legislation banning the defense, which have also been unsuccessful.<sup>62</sup> In Washington D.C., bills failed in both 2017 and 2019.<sup>63</sup> During public hearings on the 2019 bill, support appeared to be overwhelmingly positive from community members, but there was pushback from some organizations like the District of Columbia Association of Criminal Defense Lawyers (DCACDL).<sup>64</sup> The most direct argument the DCACDL made against the panic defense bill was arguing the heat-of-passion defense is a legitimate defense for a heterosexual male if

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<sup>58</sup> *Id.* at 20.

<sup>59</sup> THE LGBTQ+ BAR, *supra* note 1.

<sup>60</sup> *See id.* (“[L]ocal governments need to educate courts, prosecutors, defense counsel, and the public about the devastating individual and legal consequences of the LGBTQ+ ‘panic’ defense.”).

<sup>61</sup> *See, e.g.*, Gay and Trans Panic Defense Prohibition Act of 2018, H.R. 6358, 115th Cong. (2018).

<sup>62</sup> THE LGBTQ+ BAR, *supra* note 1.

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

<sup>64</sup> *See generally* Public Hearing on Hate Crimes in the District of Columbia and the Failure to Prosecute by the Office of the United States Attorney, B23-0409, and B23-0435 Before the Council of the D.C. Comm. on the Judiciary & Pub. Safety, 23–32 (D.C. 2019) (written statement of Richard Gilbert, Chair, Legis. Comm., D.C. Ass’n of Crim. Def. Laws.).

exposed to a person they believed to be *biologically female* because of “human psychology.”<sup>65</sup> This argument will be discussed later; however, it is important now to understand the type of barriers are facing legislation banning the panic defense.

## II. STATUTORY INTERPRETATION

### *A. Foundation of Legislation in Rhode Island, Maine, and Connecticut*

Rhode Island, Maine, and Connecticut each take a similar approach in drafting legislation banning the panic defense. Independently, each state gives the illusion of addressing the three ways the defense is used by enacting legislation that does not actually ban the panic defense at all.<sup>66</sup> Each state maintains the defense is barred *only* when it is the sole defense being claimed.<sup>67</sup> The state statutes offer no guidance on how “solely” is defined, nor do they elaborate or place limits on how a panic defense may be used when it is claimed alongside another defense. Without a definition or guidance, “solely” in state statutes effectively negates the entire piece of legislation as a whole.

Rhode Island places limits on the panic defense by specifically targeting its use in all three main categories of the defense: provocation,<sup>68</sup> diminished capacity,<sup>69</sup> and self-defense.<sup>70</sup> However, the defense is only blocked in these three instances when the discovery of the victim’s gender or sexual orientation was the *sole* reason for the attack.<sup>71</sup> Further, the legislature in Rhode Island explains “[t]his act would *restrict* the use of a victim’s gender or sexual orientation as a

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<sup>65</sup> *Id.* at 26 (“We think, however, the Council ignores basic human psychology when it ignores the role that sexual interactions can play in human emotions.”).

<sup>66</sup> THE LGBTQ+ BAR, *supra* note 1 (discussing the three main uses of the panic defenses); ME. STAT. tit. 17-A, § 108(3) (2021); 12 R.I. GEN. LAWS ANN. §§ 12-17-17–12-17-19 (West 2018); CONN. GEN. STAT. § 53a-13 (2020).

<sup>67</sup> ME. STAT. tit. 17-A, § 108(3) (2021); 12 R.I. GEN. LAWS ANN. §§ 12-17-17–12-17-19 (West 2018); CONN. GEN. STAT. § 53a-13 (2020).

<sup>68</sup> 12 R.I. GEN. LAWS ANN. § 12-17-17 (West 2018).

<sup>69</sup> *Id.* § 12-17-18.

<sup>70</sup> *Id.* § 12-17-19.

<sup>71</sup> *Id.* §§ 12-17-17–12-17-19.

defense.”<sup>72</sup> The Rhode Island Legislature here categorically affirms that the defense is not altogether banned.

The legislature in Maine takes a similar approach to Rhode Island and limits the panic defense in the three previously mentioned incarnations where they are used “based *solely* on the discovery of . . . the victim’s actual or perceived gender.”<sup>73</sup> The statute additionally limits the use of the panic defense “including . . . [if] the victim made an unwanted nonforcible romantic or sexual advance toward the person or in which the person and victim dated or had a romantic or sexual relationship.”<sup>74</sup>

Connecticut added limits in its penal code on using the panic defense. The defense is limited in Connecticut to when the defendant claims lack of capacity due to mental disease or defect as an affirmative defense.<sup>75</sup> Like in Rhode Island and Maine, the defense is only barred in Connecticut when it is used “based *solely* on the discovery of . . . the victim’s actual or perceived sex [or] sexual orientation.”<sup>76</sup> During the state’s hearings on the Act, legislators generally expressed apprehension at even needing to bother with creating legislation to ban the panic defense.<sup>77</sup>

Each state had limited pushback during the enactment period of the new laws. In Maine, one commenter discussed how unnecessary the new law would be because the state courts have already refused to allow the defense.<sup>78</sup> The stakeholder referenced a 2004 case, *State v.*

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<sup>72</sup> H. 7066, 2018 Gen. Assemb., at 3 (R.I. 2018) (emphasis added). The legislative history for the bill shows zero nay votes and twenty-one absent; additionally, no public comments were submitted. *Rhode Island House Bill 7066 (Prior Session Legislation)*, LEGISCAN, <https://legiscan.com/RI/rollcall/H7066/id/767569> (last visited May 22, 2022).

<sup>73</sup> ME. STAT. tit. 17-A, § 108(3) (2021) (emphasis added).

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

<sup>75</sup> CONN. GEN. STAT. § 53a-13 (2020).

<sup>76</sup> *Id.* (emphasis added).

<sup>77</sup> See generally *An Act Concerning Gay and Transgender Panic Defense: Hearing on P.A. 19-27 Before the Conn. Gen. Assemb.*, 2019 Gen. Assemb. (Conn. 2019), reprinted in CT. STATE LIBR., LEGISLATIVE HISTORY FOR CONNECTICUT ACT P.A. 19-27 (2019). The legislature shows misguided apprehension at enacting the law because the committee had heard of very few instances of the defense being successfully used; this is incorrect as discussed above. *Id.* at 7905.

<sup>78</sup> See Memorandum from the Crim. L. Advisory Comm’n to the Comm. on Crim.

*Graham*.<sup>79</sup> The case was an appeal from the trial court where a jury found Edwin Graham guilty of manslaughter for killing Zachary Savoy in December 2001.<sup>80</sup> Both parties were intoxicated, and at one point Savoy put his hand on Graham's shoulder and moved closer to him. Graham interpreted this action as a "pass" and in reaction "took Savoy's arm and gently placed him back into his seat. . . . [then] told Savoy to respect his space."<sup>81</sup> Later on, Savoy brought out marijuana and Graham asked him to put it away. When Savoy refused, Graham took the marijuana and threw it away.<sup>82</sup> This act escalated into a fistfight, with Graham then hitting Savoy with a baseball bat until it broke and stabbing him five times.<sup>83</sup>

At the trial, Graham attempted to use a panic defense by claiming "sexual self-defense;"<sup>84</sup> however, the court rejected this as an allowable jury instruction and only allowed for a "traditional self-defense" jury instruction.<sup>85</sup> The jury found Graham guilty of manslaughter, and Graham appealed.<sup>86</sup> On appeal, Graham argued he should have been entitled to the sexual self-defense jury instruction.<sup>87</sup> The Maine Supreme Court disagreed, holding that without an objectively reasonable situation, if "Savoy made *any* attempt to forcefully sexually assault Graham," he would not be entitled to the sexual self-defense jury instruction.<sup>88</sup>

In *Graham* the court did not place any type of restriction on using the panic defense. The court determined for Graham's situation

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Just. & Pub. Safety 1 (May 12, 2019) (on file with author) (opposing the limits to the panic defense because criminal codes must be written in ways to address a "myriad [of] specific situations that might arise").

<sup>79</sup> *Id.*

<sup>80</sup> *State v. Graham*, 845 A.2d 558, 560–61 (Me. 2004).

<sup>81</sup> *Id.* at 560.

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

<sup>83</sup> *Id.* at 560–61.

<sup>84</sup> "Sexual self-defense" would be justifying the use of deadly force because of Savoy's advance on Graham. *See* THE LGBTQ+ BAR *supra* note 1 (describing the self-defense incarnation of the panic defense).

<sup>85</sup> *See Graham*, 845 A.2d at 561.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 563.

he was only entitled to a *regular* self-defense instruction.<sup>89</sup> Because of the facts of this case, citing it as an instance where the court categorically rejected the defense was incorrect. Instead, this case was an example where Maine courts determined they would not allow the defense to be used where facts were insufficient to support the claim.<sup>90</sup>

Requiring adequate support for a claim or defense is the judicial standard all courts maintain.<sup>91</sup> A person may not make unfounded claims or add questionable favorable facts to make something allowable. The court in *Graham* was not interpreting law to add protection to LGBTQ+ individuals. This interpretation does not contribute to how states will apply or use the legislation banning the panic defense.

### B. “Solely” and the Issue with Consistent Application

The laws from each state do in fact actively attempt to curb the ability to use panic defenses. Where they are ineffective is in the uninterpreted gap of the word *solely*. Each state uses foundationally the same language but differs slightly in legislative history and summary guidance. Rhode Island, Maine, and Connecticut offer little guidance on how to apply the law. A court’s ability to remain impartial is intrinsic to the justice system; however, where interpretation of the law is required, even Supreme Court Justices have conservative or liberal leanings that may dictate which way they could rule.<sup>92</sup> Conservative leanings of a judge could factor into interpreting panic

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<sup>89</sup> *See id.* (“Even when viewed in the light most favorable to Graham, the evidence is not sufficient to generate a jury instruction on sexual self-defense. The court properly declined to so instruct the jury.”).

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

<sup>91</sup> One example of this principle is the Rule 56 Motion for Summary Judgment. According to this rule, if a party does not present “substantive evidentiary” proof where a reasonable jury could rule in their favor, the case will be dismissed. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986).

<sup>92</sup> *See generally* Mona Chalabi, *Here’s How Conservative the Supreme Court Could Tip with Amy Coney Barret*, GUARDIAN (Oct. 26, 2020), <https://www.theguardian.com/news/datablog/2020/oct/26/us-supreme-court-amy-coney-barrett-conservative-majority> (outlining the leanings of the U.S. Supreme Court bench prior to Justice Ruth Bader Ginsberg’s death and the confirmation of Justice Ketanji Brown Jackson).

defense statutes because of the different interpretation techniques they might apply.<sup>93</sup> Having a word like *solely* in the statutes permits varying interpretations and inconsistent application, allowing for the panic defense to make its way back into the courtroom. Currently, conservatism is on the rise; the Overton Window is shifting to the right, leading to more conservative leanings in all three branches of government.<sup>94</sup>

The Overton Window is a concept that condenses public policy and societal norms into a single idea to illustrate what is considered “widely accepted . . . as legitimate policy options.”<sup>95</sup> Some scholars suggest the Overton Window is moving more to the right.<sup>96</sup> The Trump Administration, conservative policy implementation, and a conservative U.S. Supreme Court have arguably influenced the right-shift in the window.<sup>97</sup> If this is the case, laws and judicial interpretation going forward are likely to move away from protecting marginalized groups, because enacted policy and fringe ideologies are tugging at the Window.<sup>98</sup>

Without defining the word *solely*, courts will be open to interpret and apply the language as they see fit. The U.S. Supreme Court will act as the benchmark for statutory interpretation. If presented with an ambiguity in legislation, the Court would likely

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<sup>93</sup> See, e.g., VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 13–15 (2018) (explaining the steps a textualist would take in interpreting a statute).

<sup>94</sup> See Sarah Manivas, *How the Alt-Right Shifted the Overton Window*, NEW STATESMAN (Sept. 21, 2021), <https://www.newstatesman.com/culture/books/2020/06/alt-right-politics-2016-andrew-marantz-antisocial-review> (noting that “alt-right figures were able to shift the Overton window quickly in their favour,” as reflected by the effects of figures like Steve Bannon working in the Executive branch, Marjorie Taylor Green working in the legislature, and the repercussions of their views on judicial appointments).

<sup>95</sup> *A Brief Explanation of the Overton Window*, MACKINAC CTR. FOR PUB. POL’Y, <https://www.mackinac.org/OvertonWindow> (last visited May 22, 2022).

<sup>96</sup> Manivas, *supra* note 94.

<sup>97</sup> See Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 28, 2020) (outlining the new executive order to “combat *offensive* and anti-American race and sex stereotyping and scapegoating” (emphasis added)); Chalabi, *supra* note 92 (explaining the Martin-Quinn Ideology Scale, which shows a significant shift when Amy Coney Barret is confirmed to the Supreme Court).

<sup>98</sup> Manivas, *supra* note 94.

interpret *solely* using a textualist approach, while state courts could vary in their approach.<sup>99</sup> For present purposes, this analysis will use a textualist approach.

*Solely* in the context of each law is ambiguous. The word is ambiguous because, depending on how it is brought up, the defense could seek different interpretations of the law.<sup>100</sup> In one instance, they could argue *solely* means the panic defense may only be claimed once and must be paired with a defense outside the three main panic claims. In another instance, a defendant could argue that the panic defense may be claimed under multiple defenses. If a party argues, for example, diminished capacity paired with panic and self-defense paired with panic, the question becomes: is this technically outside the parameters of a sole claim of the panic defense?

In *People v. Soto*, Juaquin Garcia Soto claimed self-defense and intoxication (diminished capacity) after he stabbed and killed Israel Ramirez.<sup>101</sup> The issue before the court was whether voluntary intoxication is admissible to prove self-defense.<sup>102</sup> In this case, Soto claimed a methamphetamine-induced psychosis negated the malice element of a murder charge.<sup>103</sup> He also claimed he acted in self-defense.<sup>104</sup> The court held voluntary intoxication was “irrelevant to pro[ve] certain mental states” and the evidence disproved his self-defense claim.<sup>105</sup>

Here, *Soto* analogizes to an application of the panic defense. A party could use a defense strategy similar to *Soto* and claim panic instead of voluntary intoxication. A panic/diminished capacity defense is defense one, while the self-defense claim is defense two. *Solely* can be read as allowing the panic defense as long as a second defense is claimed. In Rhode Island, Maine, or Connecticut, this defense approach would open the courts to hearing a panic claim any time two

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<sup>99</sup> See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting) (“The Court’s opinion is like a pirate ship. It sails under a textualist flag . . .”).

<sup>100</sup> See *Ambiguity*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining an *ambiguity* as when “the same word is capable of meaning two different things.”).

<sup>101</sup> *People v. Soto*, 415 P.3d 789, 791 (Cal. 2018).

<sup>102</sup> *Id.* at 790.

<sup>103</sup> *Id.* at 792.

<sup>104</sup> *Id.* at 793.

<sup>105</sup> *Id.* at 798.

or more defenses are claimed. The legislation does narrow the claim of the defense as requiring the panic claim to be directly connected to the force used, diminished capacity, or provocation.<sup>106</sup> In Maine, for example, “a person is not justified in using force against another based solely on the discovery of . . . the victim’s actual or perceived gender, gender identity, gender expression or sexual orientation.”<sup>107</sup> The language here of “not justified . . . based solely on” implies that to claim the force was justified, defendants must link the force to something else beyond only the panic defense. Each section of the Maine act regarding the panic defense begins with similar language, thus extending the same limitations to all three sections.<sup>108</sup> While the act itself provides context to slightly narrow interpretations of *solely*, an ambiguity remains. This ambiguity contributes to defeating any underlying purpose of a law designed to extend justice to a vulnerable population.

*Commonwealth of Pennsylvania v. Sheppard* is another illustrative case for a discussion on the ambiguity of *solely*.<sup>109</sup> Sheppard was convicted of first-degree murder after he attacked and killed Karl Kerr with an axe.<sup>110</sup> He appealed the decision claiming ineffective counsel because his counsel failed to bring up psychiatric testimony that may have supported a heat-of-passion, diminished capacity, or imperfect self-defense.<sup>111</sup> The Pennsylvania Court held there was no error; the psychiatric testimony also would not support either defense anyway.<sup>112</sup> The court affirmed the conviction of first-degree murder.<sup>113</sup>

*Sheppard* presents an example where a party may attempt to claim all three panic defenses.<sup>114</sup> Here, the defendant may interpret

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<sup>106</sup> See *supra* text accompanying notes 8–18.

<sup>107</sup> ME. STAT. tit. 17-A, § 108(3) (2021).

<sup>108</sup> See *id.* § 201(4) (“[P]rovocation was not adequate if it resulted solely from the discovery of, knowledge about or potential disclosure of the victim’s actual or perceived gender . . .”).

<sup>109</sup> See *generally* *Commonwealth v. Sheppard*, 648 A.2d 563 (Pa. Super. Ct. 1994).

<sup>110</sup> *Id.* at 564–65.

<sup>111</sup> *Id.* at 565–66.

<sup>112</sup> *Id.* at 568, 570.

<sup>113</sup> *Id.* at 571.

<sup>114</sup> See *supra* text accompanying notes 8–29.

*solely* to mean only one kind of panic defense. The language of the statutes would now read as: the panic defense will be banned if only one defense is being claimed. This method could allow a party to claim self-defense through a non-violent sexual advance coupled with diminished capacity and justification (heat-of-passion).

### C. A Textual Interpretation of the Panic Defense

Courts are required to find a balance between interpretation and maintaining the integrity and purpose of the law. A textualist will attempt to read the law staying firmly within the confines of the statute's language at almost all costs.<sup>115</sup> In a case that wrestles with the application of Rhode Island, Maine, or Connecticut's statutes, a party could argue ambiguity. The statute is ambiguous if there are two or more reasonable interpretations of the law.<sup>116</sup> A judge could reasonably interpret *solely* as ambiguous not necessarily because of the definition of the word itself, but rather because of the ways the statute could be applied with the word included, as seen above. For a textualist, the first point of interpretation would be the statute's language.<sup>117</sup> The statutes, however, offer no real clarification in the form of definitions or guidance on how they should be applied. Additionally, the legislation in Rhode Island, Maine, and Connecticut is so new that there is no interpretation or judicial precedent to rely on.

If a textualist has exhausted the intrinsic options for interpretation, the next step may be seeking out a dictionary definition to find the ordinary meaning of the ambiguous language.<sup>118</sup> Merriam-Webster defines *solely* as either "to the exclusion of all else" or "without another: singly."<sup>119</sup> These definitions present few options for a textualist. Here, statutes would have to be interpreted as allowing for the panic defense provided it is claimed along with another defense or

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<sup>115</sup> See BRANNON, *supra* note 93 at 13.

<sup>116</sup> BLACK'S LAW DICTIONARY, *Ambiguity*, *supra* note 100.

<sup>117</sup> BRANNON, *supra* note 93, at 13.

<sup>118</sup> See generally Phillip A. Rubin, *War of the Words: How Courts Can Use Dictionaries Consistent with Textualist Principles*, 60 DUKE L.J. 167, 184–98 (2010) (describing ways dictionaries are used in textualist analysis).

<sup>119</sup> *Solely*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2014).

supported by a second claim.<sup>120</sup> A textualist would likely interpret this statute as effectively not banning the panic defense.

Another form of statutory interpretation is purposivism. The purposivist grounds their analysis in following the purpose of the legislation.<sup>121</sup> This is most effective when judges “pay[] attention to the legislative process.”<sup>122</sup> If a judge were to review a state’s legislative history to interpret the statute, they would see overwhelming support from committees pushing for protection of LGBTQ+ individuals and for banning the defense. For example, in Connecticut, there were members of both the House and Senate expressing overwhelming support for the law.<sup>123</sup> During the Senate hearing, Senator Martin Looney addressed the state’s tough stance on hate crimes; he evaluated this new law with the other hate crime statutes: “[i]t is a hate crime. And if we don’t recognize or limit or debar the use of this defense, we are in effect eviscerating our own hate crime statutes . . . .”<sup>124</sup> The law passed this same session.<sup>125</sup>

A purposivist would interpret the Connecticut legislative history as openly supporting a ban on the panic defense. While the legislative history does not show pushback on how the defense is banned, it also does not show any back-and-forth about the language at all.<sup>126</sup> The transcripts of both the General Assemblies show *solely* is

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<sup>120</sup> *Supra* text accompanying notes 91–94, 99–105.

<sup>121</sup> BRANNON, *supra* note 93, at 11.

<sup>122</sup> *Id.* at 12.

<sup>123</sup> See *An Act Concerning Gay and Transgender Panic Defense Hearing on PA 19-27 Before the Conn. Gen. Assembly H.*, 2019 Leg. (Conn. 2019) (statement of Rep. Craig C. Fishbein) (“I am in support of nobody being able to use gender against someone else no matter what it is as defense for violence.”), reprinted in CT. STATE LIBR., LEGISLATIVE HISTORY FOR CONNECTICUT ACT P.A. 19-27, at 7907 (2019); *An Act Concerning Gay and Transgender Panic Defense Hearing on S-719 Before the Conn. Gen. Assembly S.*, 2019 Leg. (Conn. 2019) (statement of Senator Martin M. Looney) (addressing that the panic defense is rarely used on its own), reprinted in CT. STATE LIBR., LEGISLATIVE HISTORY FOR CONNECTICUT ACT P.A. 19-27, at 1108 [hereinafter Statement of Senator Martin M. Looney, LEGISLATIVE HISTORY FOR CONNECTICUT ACT P.A. 19-27].

<sup>124</sup> Statement of Senator Martin M. Looney, LEGISLATIVE HISTORY FOR CONNECTICUT ACT P.A. 19-27, *supra* note 123, at 1109.

<sup>125</sup> *Id.* at 1143.

<sup>126</sup> *Id.*

not brought into the discussion at all.<sup>127</sup> This lack of discussion may show indifference or oversight, but the statements by senators in support of a ban would support a purposivist's desire to ban the panic defense.

The courts have a duty to merely interpret the law.<sup>128</sup> If a textualist could find continued ambiguity and a purposivist could find a law at odds with the ultimate purpose, neither has the ability to remedy the discrepancy. The only way for Rhode Island, Maine, and Connecticut to close the gap and absolutely ban the panic defense is to amend their respective laws. This decision may not be left for interpretation by the courts.

### III. POLICY, PUSHBACK, AND FEASIBILITY

#### *A. Juries and Implicit Bias*

The violence against transgender people has been deemed an “epidemic” by the Human Rights Campaign (HRC).<sup>129</sup> Fifty-five transgender and gender non-conforming people were killed in 2021 alone.<sup>130</sup> HRC attributes the increase in violence to the anti-transgender stigma that permeates into the public sector and leads to decreased access to resources like housing.<sup>131</sup> The panic defense is

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<sup>127</sup> See generally *An Act Concerning Gay and Transgender Panic Defense Hearing on PA 19-27 Before the Conn. Gen. Assembly H.*, 2019 Leg. (Conn. 2019), reprinted in CT. STATE LIBR., LEGISLATIVE HISTORY FOR CONNECTICUT ACT P.A. 19-27 (2019); *An Act Concerning Gay and Transgender Panic Defense Hearing on S-719 Before the Conn. Gen. Assembly Senate*, 2019 Leg. (Conn. 2019).

<sup>128</sup> *The Judicial Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/> (last visited May 22, 2022).

<sup>129</sup> *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 May 22, 2022).

<sup>130</sup> *Id.*

<sup>131</sup> Madeleine Roberts, *Marking the Deadliest Year on Record, HRC Releases Report on Violence Against Transgender and Gender Non-Conforming People*, HUM. RTS. CAMPAIGN (Nov. 19, 2020), <https://www.hrc.org/press-releases/marking-the-deadliest-year-on-record-hrc-releases-report-on-violence-against-transgender-and-gender-non-conforming-people>; see IT'S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW

relevant here because if bias and discrimination are able to permeate into other protected public spheres, it is likely this same bias is present in the courts despite any previous efforts to curb it.

One very important and nearly uncontrollable factor is juries. If a person is on trial for murder, the trial will take place in front of a jury unless they waive a jury trial.<sup>132</sup> These juries are subject to *voir dire*, but during *voir dire* both the prosecution and defense are working to have a jury that works in their favor.<sup>133</sup> Emerging studies look into implicit bias with juries and the LGBTQ+ community.<sup>134</sup> A conservative jury may be swayed by negative stereotypes of LGBTQ+ individuals. Use of the panic defense acts as an overt technique to let juries lean into their own implicit biases. If the panic defense is banned outright, defense attorneys would lose this tactic for lessening their clients' convictions.

In a 2020 psychological study done at the University of Wyoming, Dr. Narina Nuez explored the idea of implicit bias and the panic defense.<sup>135</sup> This study tested to see if the personal characteristics of jurors presented with the panic defense in a trial involving violent crime would influence the success of the defense.<sup>136</sup> This study

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YORK STATE MEN'S PRISONS, SYLVIA RIVERA L. PROJ. 13 (2007), <https://srp.org/files/warinhere.pdf> ("Needs assessment surveys of the transgender communities in San Francisco and Washington D.C. illustrate the ubiquitous discrimination and bias that many transgender and gender non-conforming people encounter when trying to access basic healthcare, employment, and housing.").

<sup>132</sup> U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

<sup>133</sup> See *Voir Dire*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1 . . . Loosely, the term refers to the jury-selection phase of a trial. 2. A preliminary examination to test the competence of a witness."); *11 Must-Dos from a Voir Dire Master*, AM. BAR ASS'N (Mar. 2019), <https://www.americanbar.org/news/abanews/publications/youraba/2019/march-2019/11-tips-for-effectively-conducting-voir-dire/> (describing the art of *voir dire* with 11 "tips").

<sup>134</sup> See generally 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 (2022) (discussing the implications of anti-LGBTQ+ rhetoric in the courtroom and how it can lead to sympathy from conservative jurors).

<sup>135</sup> *Id.* at 786–87.

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

initially surveyed participants using different survey scales and testing levels of homophobia, religious fundamentalism, and political orientation.<sup>137</sup> Afterwards, participants were presented with different variations of a similar hypothetical.<sup>138</sup> The hypothetical involved an argument and a “physical altercation between two men.”<sup>139</sup> Each version was manipulated to change either party’s sexual orientation, type of crime, and “provocation type.”<sup>140</sup> Depending on the combination of various traits and if the outcome of the hypothetical was homicide or assault, it was likely that an affirmative claim of a panic defense would lead the juror to choose the more lenient conviction (e.g, manslaughter instead of murder).<sup>141</sup>

The study had many findings; one finding stood out as distinguishing belief systems as a driving force behind some of the verdicts:

This research suggests that homophobia is the driving force behind perceptions of the case as a hate crime, negative perceptions of the victim, and ultimately verdict decisions compared with other juror characteristics. When the gay panic defense is presented, more homophobic jurors provide more lenient verdicts for the defendant.<sup>142</sup>

This study was essentially conducted in a vacuum, because all the participants were not actual jury members and instead were volunteers;<sup>143</sup> however, it does provide an insight into the untested thoughts of the public and their own implicit biases. Translating this to everyday courts, because of the implicit bias of individuals on juries, this study illustrates ways a defense may not actually speak to the guilt of the person and instead only the sympathy of a juror. It follows that

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<sup>137</sup> *Id.* at 787.

<sup>138</sup> *Id.* at 791.

<sup>139</sup> *Id.* at 789.

<sup>140</sup> *See id.* (describing *provocation type* to mean gay panic or neutral defense).

<sup>141</sup> *See id.* at 792 (“In the homicide case, 70.1% of participants chose the more lenient manslaughter verdict.”).

<sup>142</sup> *Id.* at 800.

<sup>143</sup> *Id.* at 791.

even an unsuccessful claim of the panic defense may find a way to create a sympathetic jury and thus still end up with the ultimate result of a drop in conviction from murder to manslaughter.

Cynthia Lee makes the argument in *The Gay Panic Defense* that if this type of defense is categorically banned, defense attorneys “will find more subtle ways to get the same idea across to the jury.”<sup>144</sup>—meaning, more elaboration on and reinforcement of negative stereotypes of LGBTQ+ individuals. This would make prejudices harder for the jury to refute since they speak deeply to implicit bias.<sup>145</sup> Lee addresses this argument again in *The Trans Panic Defense Revisited*:

Even in a jurisdiction where the trans panic defense strategy has been legislatively banned, a defendant claiming trans panic can take the stand and tell the jury that he was so upset when he found out that the victim was a transgender individual that he lost his self-control.<sup>146</sup>

Lee’s point reinforces the idea that even discussions of an unsuccessful claim of a panic defense may still bolster the defendant’s claim.

While the defendant’s claims may be met by a sympathetic jury, making assertions relating to the victim’s sexual orientation or gender expression can only lead to abstract sympathy.<sup>147</sup> A jury must return a verdict on the law presented to them by the judge.<sup>148</sup> If a jury is sitting in on a trial for first-degree murder and they are told facts that may make them sympathetic, they cannot unilaterally decide to convict on voluntary manslaughter. “The only way a jury could return a

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<sup>144</sup> Lee, *The Gay Panic Defense*, *supra* note 6, at 522.

<sup>145</sup> *Id.*

<sup>146</sup> Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411, 1456 (2020).

<sup>147</sup> *See id.* at 1456–57 (“If a legislative ban were in place stating that an alleged provocation is not reasonable if it resulted from the discovery of the victim’s gender identity, the jury would not be able to lawfully return a voluntary manslaughter verdict.”).

<sup>148</sup> ADMIN. OFF. OF THE U.S. CTS., HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 1 (Aug. 2012) [hereinafter HANDBOOK].

voluntary manslaughter verdict for a defendant in such a jurisdiction would be by engaging in jury nullification.”<sup>149</sup> Nullification is not a reliable strategy for defendants for two reasons. First, jury nullification is highly disfavored by the courts and thus is unlikely to be allowed for discussion in open court.<sup>150</sup> Second, according to Lee, juries are more likely to follow the law and not simply nullify.<sup>151</sup> Because of this, inflammatory statements about the victim’s sexual orientation or gender identity are unlikely to aid in a defense.

*B. The New Proposal for Rhode Island, Maine, and Connecticut*

Maine, Rhode Island, and Connecticut need to close the gaps in their legislation. Nevada is an example of a state that categorically bans all use of the defense by simply stating “[a] person is not justified in using force against another person based on the discovery of . . . perceived sexual orientation or gender identity.”<sup>152</sup> Nevada’s statutory language ensures that a victim may not be blamed for their own death based on their sexual orientation or gender identity. Legislation like this ensures fair and equal punishment for a crime and that a person may not be given lighter punishment because they were “justified” in the murder.<sup>153</sup>

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<sup>149</sup> Lee, *The Trans Panic Defense Revisited*, *supra* note 146, at 1457; *cf.* HANDBOOK, *supra* note 148 (providing that jurors are required to follow the instructions of the law as provided to them by the judge in their individual case, which makes nullification—though technically still an option, as Lee notes—not entirely in line with jury standards).

<sup>150</sup> See Naomi Gilens, *It’s Perfectly Constitutional To Talk About Jury Nullification*, ACLU (Jan. 22, 2020), <https://www.aclu.org/blog/free-speech/its-perfectly-constitutional-talk-about-jury-nullification> (describing an instance where two activists were arrested and each charged with seven counts of criminal jury tampering after distributing pamphlets with information about jury nullification outside of a Colorado courthouse).

<sup>151</sup> Lee, *The Trans Panic Defense Revisited*, *supra* note 146, at 1457.

<sup>152</sup> NEV. REV. STAT. ANN. § 193.225 (LexisNexis 2019).

<sup>153</sup> See Julie Compton, *Alleged ‘Gay Panic Defense’ in Texas Murder Trial Stuns Advocates*, NBC NEWS (May 2, 2018), <https://www.nbcnews.com/feature/nbc-out/alleged-gay-panic-defense-texas-murder-trial-stuns-advocates-n870571>

(convicting Miller of criminally negligent homicide rather than murder or manslaughter because the court accepted his use of the panic defense to justify his self-defense and disproportionate use of force).

During the enactment process, Nevada's Clark County Public Defender's Office proposed an amendment to the pending legislation.<sup>154</sup> This amendment would have mirrored Rhode Island's legislation by including *solely* in the body of the text regarding the "heat-of-passion."<sup>155</sup> The proposed amendment would have also totally removed banning the defense under diminished capacity and self-defense.<sup>156</sup> Lastly, the office also submitted Lee's 2008 article *The Gay Panic Defense* to the legislature.<sup>157</sup> The Assembly Committee meeting shows a discussion about the proposed amendment in which multiple members of the committee expressed general assent with the proposed amendment. Other members discussed flaws in the language *solely*.<sup>158</sup> Because the proposed amendment changes are not in the final law, it can be reasonably assumed that the majority of the Committee disagreed with including *solely*. Here, the Committee sought to right a very specific wrong and was successful in its modifications to the law.

The Nevada legislation also provides insight into the reasoning for enactment of the law and does not muddle words in furtherance of the purpose of the act:

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<sup>154</sup> S.B. 97, 2019 Leg., 80th Sess. 1 (Nev. 2019) (JOHN J. PIRO, Proposed Amendment 2019).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 2.

<sup>157</sup> Exhibits for SB97, Nev. Legislature (Apr. 26, 2022), <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6080/Exhibits> (detailing the exhibits submitted to the Nevada legislature during the comment period, including Lee's article, submitted by John J. Piro alongside his proposed amendment on behalf of the Clark County Public Defender's Office). This is relevant because in 2019, Lee's 2008 article was very outdated. About one year after this hearing, Lee published *The Trans Panic Defense Revisited*. The article essentially walked back much of her original analysis against outright bans on the panic defense, while also reintegrating many of the original points that were once used to support a ban. See Lee, *The Trans Panic Defense Revisited*, *supra* note 146, at 1412.

<sup>158</sup> *An Act Relating to Crimes; Prohibiting the Use in a Criminal Case of Certain Defenses Based on the Sexual Orientation or Gender Identity or Expression of the Victim: Meeting on S.B. 97 Before the Judiciary Assemb.*, 2019 Leg., 80th Sess. 21 (Nev. 2019) (statement by Assemb. Jill Tolles) ("[Y]ou add the word 'solely' . . . My concern would be that all somebody would have to do is add something else. . . . [T]hat would not solve the problem we are trying to solve with this legislation.").

WHEREAS, Continued use of these anachronistic defenses reinforces and institutionalizes prejudice at the expense of norms of self-control, tolerance and compassion, which the law should encourage, and marks an egregious lapse in the march toward a more just criminal justice system; and WHEREAS, To end the antiquated notion that the lives of lesbian, gay, bisexual and transgender persons are worth less than the lives of other persons and to reflect a modern understanding of lesbian, gay, bisexual and transgender persons as equal to other persons under the law, the use of “gay panic” and “trans panic” defenses must end.<sup>159</sup>

The purpose of the act was clear: LGBTQ+ people matter in the eyes of the law—hate and discrimination may not justify their killing.

If Maine, Rhode Island, and Connecticut were to amend their statutes to more closely match the legislation in a state like Nevada, there may be a way to still protect against some of the issues Lee discusses. According to the LGBTQ+ Bar, part of the solution to an absolute end to the panic defense includes educating courts, prosecutors, defense counsel, and the public about the consequences of this legal defense.<sup>160</sup> However, with the Overton Window shifting more and more to the right,<sup>161</sup> it is now more important than ever to close gaps that allow for bias to permeate the judicial system. In her article, Lee says that “[w]hen a message that relies on negative stereotypes is conveyed covertly, it will often have a more powerful impact than if the message had been aired overtly.”<sup>162</sup> Lee also frankly explains that “education is necessary but not sufficient to change attitudes and behavior.”<sup>163</sup> It would be optimistic to claim just because the law says you may not argue using bias, those arguments would stop.

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<sup>159</sup> S.B. 97, 2019 Leg., 80th Sess. 2 (Nev. 2019).

<sup>160</sup> THE LGBTQ+ BAR, *supra* note 1.

<sup>161</sup> Manivas, *supra* note 94.

<sup>162</sup> Lee, *The Gay Panic Defense*, *supra* note 6, at 522.

<sup>163</sup> Lee, *The Trans Panic Defense Revisited*, *supra* note 146, at 1446.

Without statutory modification, education may be a long-term superficial catharsis to the system and provide a sliver of protection to LGBTQ+ people. Further, even without modification a purposivist judge may still consider legislative history, which could keep the panic defense barred from the court.<sup>164</sup> However, for more fundamental and effective changes, Maine, Rhode Island, and Connecticut need to modify their statutes. A shift to the Nevada statutory model would remove the ambiguous language that requires judicial interpretation. A textualist (and likely more conservative) judge would no longer have the ability to read the statute as a partial ban<sup>165</sup> and would thus be blocked from admitting the panic defense back into the courtroom. Instead, if the new language mirrors the Nevada statute, a judge should read the language as an unequivocal ban on the defense.

If the ambiguous word *solely* is eliminated, the statute becomes clearer and now matches the legislative intent. If more direction is given in legislation and if protections of LGBTQ+ individuals are made clearer, defense attorneys may be held accountable if they make biased arguments in open court.

#### CONCLUSION

States across the country have enacted or are in the process of enacting legislation to ban the panic defense.<sup>166</sup> Policy reasons for banning the defense range, but the heart of the argument is to move beyond biases once allowable by law. States that keep the language *solely* in their legislation banning the panic defense make an illusory promise to the public that protection is the purpose of the bill; however, the argument is short-lived when challenged by a defendant claiming two defenses. *Solely* creates a gap that effectively does not ban the panic defense at all.

In the midst of a conservative shift in the judiciary and executive branches, public policy is likely to reflect that shift. At the same time, violence against LGBTQ+ people is reaching an all-time

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<sup>164</sup> See *supra* Part II.C (describing a purposivist's interpretation of an ambiguous statute).

<sup>165</sup> See *id.* (describing a textualist's interpretation of an ambiguous statute).

<sup>166</sup> THE LGBTQ+ BAR, *supra* note 1.

high. Finding ways to reconcile differences means working together. The legislature creates the laws and must ensure clear language with a clear purpose to guide judges in their interpretations. Additionally, with a judicial system that wants to interpret statutes using a textualist approach, state legislatures need to keep clear and concise language in the text of their bills because if challenged, legislative history will not be considered.

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During the publication process for this article, even more trans women were murdered. In Vermont, Fern Feather—a trans woman—was murdered. Her killer, Zane Davison, alleges that Feather “made a sexual advance and attacked him.”<sup>167</sup> Vermont recently banned the Panic Defense and Davison will be likely barred from asserting it or any similar defense.

The work banning the use of the panic defense is not over. The work to make LGBTQ+ people feel safe and protected in the United States is not over. LGBTQ+ people deserve more than the ability to just exist. They should have the freedom to thrive and the legislation to be protected.

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<sup>167</sup> Peter D’Auria, *Killing of Transgender Woman in Vermont Draws Condemnation, Grief*, VT DIGGER (Apr. 13, 2022), <https://vtdigger.org/2022/04/13/killing-of-transgender-woman-in-vermont-draws-condemnation-grief/>.