Queer in Fear:
The Role of Homophobia and Transphobia in Wrongful Convictions

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This paper will explore how the criminal justice system's ingrained prejudice against LGBTQ2S+ people can lead to wrongful convictions. Primarily, this paper will focus on the negative stereotypes of and myths surrounding queer people, rooted in homophobia and transphobia, that lead to wrongful convictions. Examining the cases of Miguel Castillo, Bernard Baran, The San Antonio Four, and Monica Jones, this paper will prove that these pervasive and dangerous stereotypes impact queer people at every step of the criminal justice system. This paper will conclude by briefly discussing instances of queer wrongful convictions in the Canadian context.

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I Introduction

In most countries, homosexuality and acts associated with homosexuality were at one point criminalized and/or continue to be criminalized to this day.[1] Today, lesbian, gay, bisexual, transgender, queer or questioning, and two-spirit (LGBTQ2S+) people are severely over-

[1] "Fact Sheet: Criminalization" (2014) at 1, online (pdf): *United Nations Free & Equal* <www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf>.

represented in the justice system.[2] This disproportionate representation, often paired with discriminatory treatment based on stereotypes of LGBTQ2S+ people, has led to multiple wrongful convictions within the queer community. This paper will explore how the criminal justice system's ingrained prejudice against LGBTQ2S+ people and the stereotypes of one's sexual orientation or gender identity can lead to wrongful convictions. The case studies in this paper find that wrongful convictions involving individuals from the LGBTQ2S+ community also coincide with other related causes of wrongful convictions, such as forensic science errors, tunnel vision, and professional misconduct from prosecutors and police. Importantly, these cases also often overlap with systemic racism, classism, and sexism.

This paper will start with an overview of the history of criminalization of LGBTQ2S+ people and discuss the general mistreatment of LGBTQ2S+ people in the criminal justice system in North America. Next, this paper will briefly situate homophobia and transphobia within wrongful convictions before analyzing several wrongful conviction cases. First, Miguel Castillo, who was wrongfully convicted because of a fabricated confession by police that was based on a harmful stereotype about gay men. Next Bernard Baran, a gay man, who was wrongfully convicted during the "day-care sex-abuse hysteria" of the 1980s and 1990s. Following that, the San Antonio Four, four Latina lesbian women wrongly convicted of sexual assault, in part due to the idea that lesbian woman are predatory to young girls. Finally, Monica Jones, a transgender woman of colour, who was wrongfully convicted for "manifesting prostitution". Lastly this paper will briefly explore wrongful convictions of LGBTQ2S+ people in the Canadian context and the potential impact of the recent increase in anti-LGBTQ2S+ laws.

A. The Criminalization of LGBTQ2s+ People in the 20th Century

Policing and punishment of "deviant" sexual and gender expression has existed since the beginning of colonization, especially the policing of racialized minorities, immigrants and lower-income people.[3] In Canada and many other countries, criminal law was used to regulate homosexual or queer conduct for decades. Laws against "buggery" (anal intercourse) and "gross indecency" (an intentionally vague term, with no definition, covering a range of "homosexual acts") could be found in s. 159 of the *Criminal Code* until 1969.[4] These laws essentially criminalized homosexuality. The *Criminal Code* was amended in 1969 to decriminalize these offences specifically between married persons of the opposite sex and between consenting adults

[2] Ilan H Meyer et al, "Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011- 2012" (2017) 107:2 America J Public Health 267 at 269; In my paper will be using the acronym LGBTQ2S+ which stands for lesbian, gay, bisexual, transgender, queer & questioning, and two-spirit, with the plus sign representing other sexual identities like pansexual and asexual. I will also use the term 'queer' as an umbrella term to refer to the LGBTQ2S+ community. Although historically used as a derogatory term, LGBTQ2S + communities have reclaimed queer as a term of love, respect, and empowerment.

[3] Joey L Mogul, Andrea J Ritchie & Kay Whitlock, *Queer (In)justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011) at 1.

[4] "Questions and Answers - An Act related to the repeal of section 159 of the Criminal Code" (1 Sep 2021), online: *Department of Justice* <www.justice.gc.ca/eng/csj-sjc/pl/s159/qa_s159-qr_s159.html>.

over 21 years old in private.[5] Therefore, for queer people, even kissing in public was still a crime. Eventually, attitudes began to shift, and in 1987 s.159 of the *Criminal Code* was amended again to remove the offence of gross indecency. Buggery was renamed anal intercourse, but remained banned unless occurring between two people who were married or between two consenting adults over 18 in private.[6] In the 1995 case *R v C.M.*, the Court of Appeal for Ontario found that s.159 was unconstitutional altogether, with two judges deciding it discriminated on the basis of age and Justice Abella deciding it discriminated primarily on the basis of sexual orientation.[7]

Beyond the judicial system, the Canadian government reinforced anti-LGBTQ2S+ rhetoric through a number of measures. Between 1952 and 1977, being gay was a reason prospective immigrants could be denied entry into Canada.[8] The federal government also paid a researcher at Carleton University in the 1960s to find a method to "detect" LGBTQ2S+ people so that they could be fired or identified so as not to be hired in the first place.[9] "The fruit machine" was created out of fear that queer people would be more susceptible to blackmail from Russian spies during the Cold War. The use of this "machine" led to a purge of LGBTQ2S+ people from the federal public service, as well as the Canadian Armed Forces and the RCMP. In 2016, survivors of this purge launched a class action that was settled for $145 million in 2018.[10]

Although the 21st century has seen progress around the perception of LGBTQ2S+ people, this history of criminalization and oppression underlies the relationship that queer people have with the criminal justice system. The laws on buggery and gross indecency created a culture where Canadian police would target LGBTQ2S+ people, often in washrooms, bars, bathhouses and parks.[11] In the 1960s, over 8000 LGBTQ2S+ people were investigated by the RCMP.[12] Although many laws have since been overturned, this history influences the relationship between law enforcement and LGBTQ2S+ people today.

In the United States, where the majority of the wrongful convictions discussed in this paper occurred, sodomy laws were not officially declared unconstitutional by the Supreme Court until 2003 in *Lawrence v Texas*.[13] Dressing in drag was also a crime, and police used "masquerade"

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[5] *Ibid.*

[6] Miriam Smith, "Homophobia and Homonationalism: LGBTQ Law Reform in Canada" (2020) 29:1 Social & Legal Studies 64 at 70.

[7] *R v CM*, [1995] 23 OR (3d) 629, 41 CR (4th) 134.

[8] John Fisher, "Outlaws or In-laws?: Successes and Challenges in the Struggle for LGBT Equality" (2004) 49 McGill LJ 1183 at 1185 (QL).

[9] Peter Knegt, "The Fruit Machine: Why every Canadian should learn about this country's 'gay purge'" *CBC News* (30 May 2018), online: <www.cbc.ca/arts/the-fruit-machine-why-every-canadian-should-learn-about-this-country-s-gay-purge-1.4678718>.

[10] *Todd Edward Ross, Martine Roy, and Alida Satalic v Her Majesty the Queen*, FC File No T-370-17 (Final Settlement Agreement), online (pdf): <lgbtpurgefund.com/wp-content/uploads/2019/08/Final-Settlement-Agreement.pdf>.

[11] Douglas Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005) at 166.

[12] Fisher, *supra* note 8 at 1186.

[13] *Lawrence v Texas*, 123 S Ct 2472 (2003).

laws to arrest people who were gender-nonconforming.[14] In the United States there has been a sharp increase in anti-LGBTQ2S+ laws in recent years. Laws like this have eroded cultural-acceptance of the queer community and increased fear of LGBTQ2S+ people.[15] The backsliding of queer rights and acceptance has the potential to create the types of wrongful convictions that are detailed later in this paper. The criminalization of LGBTQ2S+ people in the 20th century has set the tone for how queer folks are still perceived, associating them with concepts like "danger, degeneracy, disorder, deception, disease, contagion, sexual predation, depravity, subversion, encroachment, treachery and violence."[16] These views lead to what Mogul et al. call "queer criminal archetypes" which make queer people targets for policing and punishment whether or not they actually committed a crime.[17] These stereotypes of LGBTQ2S+ people, along with the criminal law backdrop of the 20th century, demonstrate how the police and the justice system are prejudiced against queer folks, which, as will be shown later in this paper, have led to wrongful convictions.

II The Over-Representation and Mistreatment of LGBTQ2S+ People in the Justice System

As noted, ingrained prejudice against the LGBTQ2S+ community has led to their criminal victimization throughout the past century. In turn, we see a disproportionate representation of the queer community in all parts of the justice system. Researchers have found that, starting from a young age, 20% of youth in the juvenile justice system are LGBTQ2S+, compared to 4-6% of the general population. [18] Of those LGBTQ2S+ youth in the system, 85% identify as people of colour. Further to this, 40% of youth who are assigned female at birth and in the juvenile justice system are gender nonconforming, LGBTQ2S+, or both.

LGBTQ2S+ youth are at increased risk of rejection by their family, forcing them into homelessness or the child welfare system.[19] According to a survey of social service providers who work with LGBTQ2S+ homeless youth, "46% of respondents became homeless because they ran away from home due to family rejection of their sexual orientation and/or gender identity, and 43% were forced out by parents because of their identity."[20] Homelessness is often criminalized

[14] Hugh Ryan, "How Dressing in Drag Was Labeled a Crime in the 20th Century" (last modified 28 Jun 2019), online: *History* <www.history.com/news/stonewall-riots-lgbtq-drag-three-article-rule>.

[15] "LGBTQ+ Americans Under Attack: A Report and Reflection on the 2023 State Legislative Session" (last modified 8 Jun 2023), online (pdf): *Human Rights Campaign* < hrc-prod-requests.s3-us-west-2.amazonaws.com/Anti-LGBTQ-Legislation-Impact-Report.pdf>.

[16] Mogul, Ritchie & Whitlock, *supra* note 3 at 23.

[17] *Ibid.*

[18] Angela Irvine & Aisha Canfield, "The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming and Transgender Youth Within the Child Welfare to Juvenile Justice Crossover Population" (2016) 24:2 J Gender Soc Pol'y & L 243 at 249.

[19] *Ibid* at 249-250.

[20] Jane Hereth, "Overrepresentation of People Who Identify as LGBTQ+ in the Criminal Justice System." (May 2022) online (pdf): *Safety + Justice Challenge* <safetyandjusticechallenge.org/wp-content/uploads/2022/05/LQBTQOverrepresentationReport-1.pdf> at 6.

itself, or can lead to committing crimes to survive, such as theft and sex work. Also, over 50% of youth in Canada's criminal justice system have also been in the child welfare system.[21] The overrepresentation of LGBTQ2S+ youth in the juvenile system translates directly to an overrepresentation in the imprisoned adult population. The 2011-2012 National Inmate Survey found that sexual minorities were disproportionately incarcerated at a rate of over three times more than the non-LGBTQ2S+ population.[22] In one survey of LGBTQ2S+ inmates, one fifth reported homelessness prior to incarceration, 39% said they have traded sex for survival, and half of respondents reported they had sold drugs for money.[23] 58% of these respondents' first arrest occurred when they were under the age of 18 and only 29% had completed high school outside of prison.[24] This demonstrates how impactful the lack of familial support in a child's formative years can be on queer youth.

Although marginalization and the resulting increased poverty levels are an important factor to consider in over-incarceration of queer people, there are also documented examples of how discrimination within the criminal justice system plays a role in the overrepresentation of LGBTQ2S+ people in prisons. Beyond the challenges faced by LGBTQ2S+ adolescents, members of the queer community may face systemic discrimination at each stage of the criminal justice system, which can lead to wrongful convictions. Often, due to the impacts of historical criminalization, queer people are subject to increased police surveillance because of "perceptions of deviance," and police have a history of profiling, entrapping, and harassing queer people.[25] One study found that 67% of queer people have "experienced or perceived the police to be anti-gay; 14% feared abuse from the police and 40% feared public disclosure of their sexual orientation."[26] In Canada, the RCMP had an anti-homosexual hiring policy until 1986, as the force considered being gay a character weakness.[27] The 2SLGBTQ Plus Justice project surveyed 30 participants who had been in the criminal justice system in the Halifax Regional Municipality from 2019 onwards. This study noted that the police demonstrated "blatant disrespect and discrimination" and used "belittling and offensive language" against respondents, which often-included misgendering the individual.[28] In New Zealand in the late 1990s, a series of interviews with police officers demonstrated that many officers still equated homosexuality with deviance, promiscuity

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[21] Jeremy Greenberg, "When One Innocent Suffers: Phillip James Tallio and Wrongful Convictions of Indigenous Youth" (2020) 67:4 Crim LQ 477 at 492.

[22] Meyer et al, *supra* note 2.

[23] Jason Lydon et al, "Coming Out of Concrete Closets: A Report on Black & Pinks National LGBTQ Prisoner Survey" (Oct 2015) online (pdf): *Black & Pink* <www.blackandpink.org/wp-content/uploads/2020/03/Coming-Out-of-Concrete-Closets-incorcporated-Executive-summary102115.pdf> *at 3.*

[24] *Ibid*.

[25] *Supra* note 20 at 5; Christy Mallory, Amira Hasenbush & Brad Sears "Discrimination and Harassment by Law Enforcement Officers in the LGBT Community" (Mar 2015), online: *Williams Institute* < williamsinstitute.law.ucla.edu/publications/lgbt-discrim-law-enforcement/>.

[26] Janoff, *supra* note 11 at 158.

[27] *Ibid* at 158-159.

[28] Feleshia Chandler, "Halifax study highlights experiences of LGBTQ people in criminal justice system" *CBC News* (25 Mar 2021), online: <www.cbc.ca/news/canada/nova-scotia/jail-prison-lgbtq-lgbtquia-criminal-justice-system-1.5964222>.

and pedophilia.[29] As Mogul et. al. noted, "Police and other law enforcement agents do not merely objectively enforce the letter of the law…They are given considerable latitude in deciding which laws to enforce, how to enforce them and which people to target for enforcement."[30] Prejudice and latitude combine to create a culture where stereotypes police officers have of LGBTQ2S+ people contribute to over-incarceration and wrongful convictions, as will be shown in the case studies later in this paper.

Moving further along in the judicial process, in the late 1990s, in Milton, Ontario, potential jurors were asked about their views on homosexuality prior to a trial and approximately 20% stated that they would not be able to view the case fairly.[31] In one study in the United States from 2003 to 2008, 45% of the jurors surveyed viewed homosexuality as an "unacceptable lifestyle."[32] The enduring legacy of laws criminalizing sexual orientation and gender identities continues to inform how queer people are treated in court.[33] When juries are prejudiced it increases risk for wrongful conviction. In a 2014 case, an HIV-positive man living in Toronto was convicted of several sexual assault charges and received a six-year sentence.[34] However, it was discovered that one of the jury members, Derek Welsman, a radio-show performer, had talked about the trial on-air.[35] He had publicly mocked gay men who visit bathhouses and made a variety of homophobic comments, including statements implying that the accused would be eager for prison showers, and that the prison sentence would be "like a cruise" for the appellant.[36] The conviction was then vacated based on a reasonable apprehension of bias.[37] This example shows how homophobia can still be a pervasive influence in courtrooms and on juries. Many people who hold homophobic views, even after swearing to be unbiased, may still end up on a jury which can have profound impacts on sentencing - including wrongful convictions.

After conviction, when a queer person moves to a detention facility, the treatment in jail and prison can also be discriminatory. In one survey of LGBTQ2S+ prisoners, it was reported that members of this community were serving sentences almost 3 times longer than the national average.[38] Prisons often do not provide gender-affirming resources (like clothing), and LGBTQ2S+ people are often targeted for their sexuality, which can be distressing.[39] Respondents to the survey reported they were over 6 times more likely to be sexually assaulted than the general prison population, over a third were physically assaulted by prison staff, and most respondents

[29]Janoff, *supra* note 11 at 163.

[30] Mogul, Ritchie & Whitlock, *supra* note 3 at 48.

[31] Janoff, *supra* note 11 at 163

[32] Christina Swarns, "LGBTQ+ People Are Vulnerable to Wrongful Conviction" Innocence Project (27 Jun 2022), online: <https://innocenceproject.org/news/lgbtq-people-are-vulnerable-to-wrongful-conviction/>.

[33] Mogul, Ritchie & Whitlock, *supra* note 3 at 73.

[34] Jesse McLean & David Bruser, "Shock-jock juror's conduct prompts new trial" *The Toronto Star* (31 Oct 2016), online: <www.thestar.com/news/canada/2016/11/01/shock-jock-jurors-conduct-prompts-new-trial.html>.

[35] *Ibid.*

[36] *R v Dowholis*, 2016 ONCA 801 at para 26.

[37] *Ibid.*

[38] Lydon et al, *supra* note 23 at 4.

[39] Chandler, *supra* note 28.

reported facing discrimination and verbal harassment.[40] This demonstrates how homophobia and transphobia permeate into every aspect of the criminal justice system.

Overall, LGBTQ2S+ people are severely discriminated against in the criminal justice system for their sexual orientation and gender expression. The over-incarceration of LGBTQ2S+ people, as well as systemic discrimination within the justice system and historical criminalization, are all factors that may increase the likelihood of wrongful convictions in the queer community.

III Case Studies

There are many reasons a wrongful conviction may occur. The commonly held causes of wrongful convictions are eyewitness misidentification, false confessions, perjury or false accusations, official misconduct, inadequate legal defence, and unvalidated forensic science.[41] Stereotypes can impact all these canonical causes. The "drive to confirm a preconceived belief in guilt adversely impacts … witness interviews, eyewitness procedures, interrogation of suspects, and the management of informers" and this occurs in almost all known cases of wrongful conviction.[42] Systemic homophobia and transphobia in the justice system can cause errors that lead to wrongful convictions. When police label the LGBTQ2S+ community as perverse and dangerous, they may resort to improper means of gathering evidence in order to convict someone who fits their preconceived notions. Prosecutors perpetuate negative stereotypes and juries often believe these misconceptions.

It is well documented that "when the accused is a marginalized or racialized outsider, the risk for conviction increases."[43] Therefore, the queer community is generally at a higher risk for conviction. Often, the marginalization of accused individuals can lead to improper conduct during cases.[44] "Stereotypes…work to both wrongly exclude and wrongly include suspects in an investigation, not only because the police share the biases of the community but also because they tend to strenuously resist their eradication."[45] Stereotyping and demonization of the queer community increases "public fear and loathing [which] is a necessary element of most cases of wrongful conviction."[46] There is comfort in using stereotypes as it affirms preconceived beliefs and it is difficult to unlearn existing biases and challenge the status quo. The following case studies will explore how stereotypes of the queer community have been a factor in wrongful convictions. These stereotypes help perpetuate systemic homophobia and transphobia in the justice system. The

[40] Lydon et al, *supra* note 23 at 4.

[41] Berube et al, "Identifying Patterns Across the Six Canonical Factors Underlying Wrongful Convictions" (2022) 3:3 Wrongful Convictions L Rev 166 at 167.

[42] Dianne L Martin, "Lessons about Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence" (2002) 70:4 UMKC L Rev 847 at 848.

[43] *Ibid*.

[44] Dianne L Martin, "The Police Role in Wrongful Convictions: An International and Comparative Study" in Saundra D Westervelt & John A Humphrey, *Wrongly Convicted: Perspectives on Failed Justice* (New Brunswick: Rutgers University Press, 2001) 77 at 84.

[45] *Ibid* at 89.

[46] *Ibid* at 85.

case studies also demonstrate how stereotypes of queer people work in conjunction with other systemic and procedural errors that lead to wrongful convictions.

A. Miguel Castillo and the "Queer Killer" Stereotype

The stereotype of LGBTQ2S+ people as violent killers is pervasive and ongoing. Mogul et al. refer to it as the "queer killer" archetype.[47] This archetype can be traced back to Leopold and Loeb, two wealthy students at the University of Chicago who were engaged in a sexual relationship and convicted of the murder of fourteen-year-old Bobby Franks in 1924.[48] Franks' body was found nude with acid marks on his mouth and genitals, and the police believed it was a crime prompted by a perverted homosexual desire.[49] The story was popularized in various of media outlets, including the movie *Rope*, which was based on the murder and perpetuated the stereotype of gay men who can "only feel sexually alive through senseless killing."[50] In Hollywood, queer characters and queer-coded characters in films are often villains and frequently depicted as violent or dangerous. This can be seen in movies such as *Psycho*, *The Silence of the Lambs*, *Cruising*, *Dressed to Kill*, and *Basic Instinct*.[51] These characters are often obsessive, deranged, and murder in a grisly and perverse manner. The "queer killer" archetype suggests that queer people commit murder for no reason other than being queer.[52] This representation of queer people impacts how the public perceives the LGBTQ2S+ community, and the stereotype of the violent "queer killer" has made its way into multiple wrongful conviction cases. As previously noted, the police themselves often perceive queer people to be deviant, and presenting as queer often leads to being perceived as risky or dangerous.[53] The following example shows how this stereotype of the "queer killer" has influenced a wrongful conviction.

In May 1988, Rene Chinea, a 50-year-old gay man and Cuban immigrant, was murdered in Chicago, Illinois. He was found dismembered, with his throat slashed, genitals and hands cut off, and legs partially severed.[54] Upon investigation by the Chicago police, it was determined that Chinea was the victim of a "homosexual murder," meaning that another gay person had committed the crime.[55] The Chicago police made this connection based on the stereotype that "gay men who are lovers or roommates are 'particularly violent' when they fight, often engaging in 'gruesome-type, serious cuttings."[56] In 1989, Miguel Castillo, a thirty-seven-year-old Cuban man, was

[47] Mogul, Ritchie & Whitlock, *supra* note 3 at 27.

[48] *Ibid* at 20.

[49] Mogul, Ritchie & Whitlock, *supra* note 3 at 21

[50] *Ibid* at 22; Wess Haubruch, "'Based Upon A True Story': Leopold & Loeb & Hitchcock's ROPE ('48)" (9 Jul 2017) online: *Medium* <medium.com/the-nu-romantics/based-upon-a-true-story-leopold-loeb-hitchcocks-rope-48-ef689bc1cc6b>.

[51] John Weir, "FILM; Gay-Bashing, Villainy and the Oscars" *The New York Times* (29 Mar 1992), online: <www.nytimes.com/1992/03/29/movies/film-gay-bashing-villainy-and-the-oscars.html>

[52] Mogul, Ritchie & Whitlock, *supra* note 3 at 27.

[53] Rachel Girardi, "'It's easy to mistrust police when they keep on killing us': A queer exploration of police violence and LGBTQ+ Victimization" (2021) 31:7 J Gender Studies 852 at 859.

[54] *Ibid* at 69.

[55] *Ibid.*

[56] *Ibid.*

arrested for the murder. The Chicago police department claimed he had confessed to the murder, but Castillo denied this claim. In court, the officers depicted him as a disturbed queer killer who had bragged about murdering Chinea. Testimony from medical examiners demonstrated that Chinea had been killed between May 7th and 9th, at which time Castillo was in jail.[57] However, the compelling "confession" from Castillo was enough for him to be sentenced to 48 years in prison on October 24th, 1991. In 2000, Castillo's attorneys presented new evidence to prove he was in jail at the time of the murder, leading to his exoneration in 2001.[58]

Castillo's wrongful conviction demonstrates how police can perpetuate negative stereotypes of LGBTQ2S+ people to secure a conviction. From the beginning, the police assumed that the person who killed Chinea was gay due to the gruesome nature of the murder, which maintains the stereotype that gay men are particularly violent. The police attributed the killer's motive primarily to sexual orientation. When the police's tunnel vision closed in on Castillo, it did not matter that Castillo identified as heterosexual and that there was no evidence of his alleged homosexuality or romantic relationship with Chinea. The Chicago police department alleged that in Castillo's confession, he admitted to being Chinea's lover and killing and dismembering him after finding out about an affair with a younger lover.[59] The confession also detailed that cutting off Chinea's hands and penis was symbolic in Cuban culture to indicate he was an unfaithful lover.[60] Further to this, the police testified in court that he was not remorseful, but in fact boastful during his confession. Importantly, Castillo never signed a written statement, the confession was never recorded, and there were no handwritten notes from the interrogation.[61] To this day, Castillo alleges that he was beaten to try to extract a confession and when he failed to give one the police fabricated one for him.[62] All of the attributes of this manufactured confession play into the "queer killer" narrative to show that Castillo was violent and perverse. Additionally, the racist implication that dismembering someone is part of Cuban culture also shows the high degree of prejudice demonstrated by police in this case. Based on limited evidence, the police fabricated a storyline using stereotypes of gay men. They created a confession that confirmed their own narrative to convict Castillo, and it worked despite having a plethora of exculpatory evidence. There was evidence that proved it was almost impossible for Castillo to have been the murderer, including a letter left for Chinea's landlords and a call placed to his employers to explain his absence, two tasks that would have been almost impossible from jail.[63] Also, after Chinea's disappearance, three men were heard playing the stereo and vacuuming in his home. [64] All the evidence, however, was still not enough to counteract the compelling and evocative "confession" built on homophobia.

[57] Rob Warden, "Miguel Castillo" (last updated 21 Oct 2016), online: *The National Registry of Exonerations*: <www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3094>.
[58] *Ibid.*
[59] *Castillo v Zuniga*, [2002] No.01 C 616 (ND Ill) at 3.
[60] Mogul, Ritchie & Whitlock, *supra* note 3 at 70.
[61] *Ibid* at 70-71.
[62] Warden, *supra* note 57.
[63] Mogul, Ritchie & Whitlock, *supra* note 3 at 70.
[64] *Ibid.*

B. Bernard Baran and The San Antonio Four: Satanic Panic and the Predator Stereotype

The myth of LGBTQ2S+ people as predators and child molesters has been an inescapable falsehood since the period of historic criminalization of gay sexual expression. Homosexuality was equated with pedophilia and many media messages during the 1950's and 1960's focused on gay men as predators.[65] "Throughout the twentieth century, the specter of the pathological, predatory, sexually violent deviant played a significant role in shaping discourse about homosexuality." [66] In the 1970's, prominent entertainer Anita Bryant began an anti-gay rights organization called "Save Our Children" which was created in protest of an anti-discrimination law being considered in Dade County, Florida.[67] Save Our Children used a mix of biblical morality arguments and claims that children should be protected from harm. The campaign was built on four arguments, "gay men recruit children because they cannot have children of their own, they want to teach children that homosexuality is acceptable, they cause physical harm to others, and they seduce and molest children."[68] Save Our Children published homophobic newspaper advertisements claiming that passing gay rights laws would give gay men a green light to "recruit and molest their children in schools."[69] Eventually, Save Our Children used this campaign to repeal the anti-discrimination ordinance. At the time, many people did not know much about the queer community, so in the eyes of the public, the homophobic statements made by Save Our Children, veiled by arguments for protecting family and upholding morality, seemed true.[70] The narrative that LGBTQ2S+ people are harmful to children continued to prevail for the rest of the 20th century. Further compounding this fear, a new moral panic erupted in the 1980s. Claims against daycare providers began to surface, asserting that satanic rituals were being performed on the children.[71] This struck fear into the hearts of parents and in turn over one-hundred-day care centers were investigated.[72] Satanic ritual abuse was linked closely to the "sexual deviance" of the LGBTQ2S+ community, especially with conservative and religious media connecting homosexuality and pedophilia.[73] This is the cultural context which led to the wrongful conviction of Bernard Baran and the San Antonio Four.

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[65] Anthony Niedwiecki, "Save Our Children: Overcoming the Narrative That Gays and Lesbians Are Harmful to Children" (2013) 21:125 Duke J Gender L & Pol'y 125 at 143.

[66] Michael A Smith, "Queers and Provocateurs: Hegemony, Ideology, and the 'Homosexual Advance' Defense" (2006) 40:4 Law & Soc'y Rev 903 at 904.

[67] Niedwiecki, *supra* note 65 at 143-144.

[68] *Ibid* at 145.

[69] Niedwiecki, *supra* note 65 at 146.

[70] *Ibid* at 147.

[71] Mary deYoung, "Another look at moral panics: the case of satanic day care centers" (1997) 19:3 Deviant Behaviour 257.

[72] *Ibid* at 258.

[73] Sarah A Hughes, "American Monsters: Tabloid Media and the Satanic Panic 1970-2000" (Doctor of Philosophy, Temple University, 2015) [unpublished] at 73.

i. Bernie Baran: Homophobia Leading to Wrongful Conviction

Bernard Baran was a 19-year-old working as a teacher's assistant at a school day care center, the Early Childhood Development Center (ECDC), in Pittsfield, Massachusetts.[74] In mid-September 1984, the parents of a 3-year-old boy at ECDC filed a complaint about Baran, an openly gay man, being allowed to care for young children. One month later on October 5th, 1984, those same parents filed a report to the police that Baran had touched their child's penis, claiming they found blood in their child's bathwater one evening.[75] They took the child in for a medical examination the next day and a throat culture tested positive for gonorrhea. Another woman who was informed of the allegations, a survivor of sexual abuse herself, questioned her daughter about Baran and contacted the police to inform them her daughter had been molested as well. Following these two reports, Baran was arrested on October 7th for indecent assault and battery.[76] On October 10th Baran was tested for gonorrhea using rectal, throat, and penile samples, all of which all came back negative. However, the news of the arrest spread, and so ECDC performed a puppet show for the children about inappropriate touching. They also sent out letters to the parents informing them of the charges, noting that their own children may have been abused, which resulted in anxiety and more complainants. On November 7th 1984 a Grand Jury, after being shown edited videotapes of the children's interviews, indicted Baran on three counts of rape and five counts of indecent assault and battery. [77] Baran's defense counsel proved to be extremely ineffective, even allowing a sixth allegation to be added on the day of the trial without objection, despite there being no indictment. At trial, the first boy refused to testify. The counts relating to him were dropped, but the jury had already heard opening statements about the boy and the positive test for gonorrhea. Defense counsel did not try to strike this evidence or move for a mistrial and the trial judge simply informed the jury to no longer consider the indictments. Bernie Baran was sentenced to three concurrent life sentences in January of 1985.[78]

In 2004, through the post-conviction discovery process, Baran's new counsel found documents and materials that had not been used at trial, including long unedited versions of the videotapes of the interviews with the children conducted by the district attorney's office. The tapes that Baran's counsel had been searching for were 'discovered' just weeks after a new district attorney had taken over. [79] Baran's counsel also found materials containing information on accusations from two of the children about being molested by their respective mother's boyfriends, which was likely the reason behind the first child having physical evidence of sexual assault. The jury in the original trial had been shown extremely edited versions of the interviews, which omitted portions where the children denied that anything had been done to them, and had even accused other ECDC employees of abuse. The children were also distracted and non-responsive and only accused Baran of molestation after investigators used improper questioning techniques, like

[74] *Commonwealth v Bernard F Baran Jr*, [2009] No 07-P-1096, (MA App Ct) [Baran].

[75] *Ibid.*

[76] Baran, *supra* note 74.

[77] *Ibid.*

[78] *Ibid.*

[79] Daniel Alexander & Tom Opferman, "Freeing Bernie Baran" (11 Sep 2010) online (video): <www.youtube.com/watch?v=msobBlk_ZJ0&ab_channel=Bee%27sVictorySociety>.

leading questions.[80] Techniques such as the misuse of props, like the dolls used by the district attorney's office in this case, have also been proven to lead to false accusations.[81] There were also inconsistencies between the videos and the statements made by the children at trial. One child told their therapist later that year that "mommy told me what to say otherwise we wouldn't get candy and money."[82] Another witness saw the prosecutor saying to one child "when I ask you questions just say yes."[83] One child did not even attend school at the ECDC location Baran worked at, but the files to prove this were allegedly burned in a fire.[84] In 2006, Bernard Baran was freed pending a new trial, after a motion judge ruled that his counsel had been deficient. This judgment was appealed by the district attorney's office. In 2009, the Appeals Court of Massachusetts affirmed the 2006 ruling. Baran received a $400,000 settlement but tragically died in September 2014 at 49 years old.[85]

This wrongful conviction stemmed from the homophobia of two parents. These parents had a history of drug abuse, drug distribution and of cooperating as government informants.[86] In the deposition of Julie Heath, the mother who had made the initial complaint about Baran working at ECDC, she stated that she had a "very bad attitude about the gay community, they shouldn't be with kids, they shouldn't get married, they shouldn't have children, they shouldn't be allowed out in public."[87] Heath eventually admitted that she had lied about blood coming from her son's penis in the original allegation. In the documentary *Freeing Bernie Baran*, Baran states that when the staff found out he was gay they told him to change because they did not believe it was appropriate he worked there. The assumption that gay men are predators was prevalent throughout the trial, with the district attorney even referring to Baran as a "chocoholic in a chocolate factory."[88]

Baran, although testing negative for gonorrhea, was still charged with the first assault. The prosecution stated he could have easily taken penicillin, even though medical records showed that Baran was allergic to penicillin.[89] The shock of a young child with gonorrhea in their throat would have been very persuasive to a jury. The HIV/AIDs crisis was also occurring at the time, and was closely linked with prejudice towards gay men.[90] "The attitudes toward the HIV/AIDS epidemic coalesced around centuries-old beliefs in queer sexuality as deviant and dangerous."[91] The prosecution leveraged the fear created by the HIV/AIDS epidemic and reinforced the stereotype

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[80] Dori Berman et al, "The trials of Bernard Baran" *The Boston Phoenix* (18 Jun 2004) online: <bostonphoenix.com/boston/news_features/top/features/documents/03917095.asp>.

[81] *Ibid.*

[82] Alexander & Opferman, *supra* note 79 at 00h:37m:36s.

[83] *Ibid* at 00h:41m:48s.

[84] *Ibid* at 00h:40m:47s.

[85] Maurice Possley, "Bernard Baran" (last updated 24 Sep 2014), online: *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3011>.

[86] Alexander & Opferman, *supra* note 79 at 00h:13m:29s.

[87] *Ibid* at 00h:06m:38s.

[88] *Ibid* at 00h:42m:55s.

[89] Alexander & Opferman, *supra* note 79 at 00h:26m:43s.

[90] Laura Ramos Grappo, "'Four Lives Lost': Criminalization and innocence in the case of the San Antonio Four" (2020) 18:1 Latino Studies 3 at 9.

[91] *Ibid.*

that gay people carry sexually transmitted infections to implicate Baran. They implied that Baran went to 'underground gay clubs' and was an immoral person as a gay man, therefore would have gonorrhea, despite having physical evidence proving the contrary.[92] The prosecution also used expert evidence stating that gonorrhea is more common among prostitutes and homosexuals, despite having no statistical proof to back this statement.[93] In the end, gonorrhea should not have even been a live issue, as the first child refused to implicate Bernie and the charges were dropped. However, due to incompetent defence counsel, lack of strong jury instruction to disregard the first child's charges, and the stigmatization of gay men during the AIDS crisis, it still impacted the verdict.

Another "victim" from the case, a young girl, claimed that Baran had scooped blood out of her with scissors and then stabbed her in the foot in the bathroom of the daycare, but she never told anyone. This is especially shocking as the bathroom had very little privacy. It had a large window that faced the playground, had no door, was directly attached to a classroom, and there were no witnesses to the incident despite the girl claiming two teachers were in the bathroom with Baran.[94] The only physical evidence of this was three small notches on the child's hymen, which were later proven to be normal and not an indicator of sexual assault.[95] Hearing that a cult of Satanists was on the rise, and that this was allegedly happening in daycares across the country as portrayed by the media (a notion that was later widely debunked), this imagery would have likely struck fear into the jurors hearts. The hysteria surrounding gay people as created by the Save Our Children movement would have also had a strong cultural influence at the time.

Gay and gender-nonconforming people are often denied professional, effective and competent legal service.[96] Counsel for Baran was completely ineffective. Not only did the defence counsel fail to prepare for trial, but he also failed to properly vouch for his client throughout the trial, failed to object to improper evidence and statements from the prosecution, and failed to insist on indictment for the sixth charge added the day of trial. Justice Lenk of the Appeals Court of Massachusetts stated that "defense counsel's apparent failure to engage in any meaningful preparation for what was indisputably a complex, high-stakes trial represented a more or less complete abandonment of his professional obligations to the defendant."[97]

Aside from homophobia and hysteria driving Baran's wrongful conviction, there was also clear prosecutorial misconduct: bad interviewing techniques through the use of anatomically correct dolls and suggestive questioning (and even potentially coercion); junk science surrounding one child's hymen; and the DA's office disregarding two other reports of sexual assaults committed on two children. Bernie, however, cited only two reasons for what happened: that he was gay and that he did not have an education.[98]

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[92] Alexander & Opferman, *supra* note 79 at 00h:31m:22s.

[93] *Ibid* at 00h:31m:49s.

[94] Alexander & Opferman, *supra* note 79 at 00h:34m:40s.

[95] Sabra Thomas, "Addressing Wrongful Convictions: An Examination of Texas's New Junk Science Writ and Other Measures for Protecting the Innocent" (2015) 52:3 Hous L Rev 1038 at 1053.

[96] Mogul, Ritchie & Whitlock, *supra* note 3 at 75.

[97] Baran, *supra* note 74.

[98] Alexander & Opferman, *supra* note 79 at 01h:20m:59s.

ii. The San Antonio Four: Homophobia, Sexism and Racism in Wrongful Convictions

The day care sex abuse hysteria continued well into the 1990s. Elizabeth Ramirez, Anna Vasquez, Kristie Mayhugh, and Cassandra Rivera were four queer, young Latina women from San Antonio, Texas.[99] In 1994, Ramirez's young nieces, aged 7 and 9, stayed with her for a few days in the summer while their mother was in Colorado. All three of the other women had been at Ramirez's apartment frequently throughout the children's stay. [100] After their visit, the girls alleged that they had been sexually assaulted by the four women on multiple occasions, stating that they had been held down, fondled, and that objects had been forced into their vaginas.[101] Throughout the process, the accounts of the sexual assaults were inconsistent, with multiple versions of each event told by both nieces.[102] All four women maintained their innocence. The young girls were brought to a clinic for a sexual-assault exam, and Dr. Kellogg, who was an expert in physical findings for child sex abuse cases, found that the girls' examinations were not normal and one had a scar on the hymen that indicated "painful penetration."[103] Dr. Kellogg linked the signs of physical abuse to lesbianism and satanic rituals.[104] In 1997, Ramirez was sentenced to 37.5 years for sexually aggravated assault and indecency with a child by contact. A year later the other three women were sentenced to 15 years in prison each.[105]

In 2013, a team from the Innocence Project of Texas filed for post-conviction relief based on the fact that one of the victims and Dr. Kellogg recanted their statements. Stephanie, the youngest niece, stated that her father had forced her and her sister to accuse her aunt of sexual assault, and had threated her when she indicated she wanted to tell the truth.[106] Dr. Kellogg also recanted her testimony about the physical evidence of sexual abuse based on more recent scientific studies. She acknowledged that her original testimony was based on scientifically invalid evidence, and recognized that "if the medical science in this area…had been available to her in 1997 or in 1998… she 'would not have testified that the finding was indicative of trauma to the hymen.'"[107] The San Antonio Four brought a new application using the new forensic science statute in Texas that allowed for post-conviction relief on the basis of new science and actual innocence.[108] Anna Vasquez had already made parole at that time but in the summer of 2013 the three other women were released. In 2016 they were exonerated by the Texas Court of Criminal appeals.[109]

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[99] Grappo, *supra* note 90 at 4.

[100] *Kristie Mayhugh et al v. The State of Texas*, [2016] Nos. WR-84, 700-01; WR-84, 700-02 (Tx App Ct), at 6 [Mayhugh].

[101] *Ibid* at 7.

[102] Mayhugh, *supra* note 100 at 9.

[103] *Ibid* at 10.

[104] Grappo, *supra* note 90 at 6.

[105] Mayhugh, *supra* note 100 at 10.

[106] Elvia Mendoza, "State Violence and the Un/making of Queer Subjectivities" (Doctor of Philosophy, The University of Texas at Austin, 2016) [unpublished] at 31; Mayhugh, *supra* note 89 at 31.

[107] Mayhugh, *supra* note 100 at 13.

[108] Innocence Staff, "Justice at Last: San Antonio Four Are Declared Innocent" (30 Nov 2016), online: *Innocence Project* <innocenceproject.org/san-antonio-four-declared-innocent/>.

[109] *Ibid.*

Homophobia was a consistent theme throughout the trial and prosecution of the San Antonio Four. Javier Limon, the father of Elizabeth Ramirez's nieces, had made advances towards Ramirez on numerous occasions.[110] He had sent her unrequited love letters and had offered to marry her, and the four women speculate that he made up the allegations to punish her rejection of his advances.[111] In the documentary *Southwest of Salem,* Ramirez notes that Javier knew that she dated women and "that's one thing he didn't like."[112] The San Antonio Four would have not been convicted were it not for these original false allegations from Javier, based partially in his homophobia towards the group.

During jury selection, Cassandra Rivera stated "the attorneys talked about us being gay as if it were a disease, or something to be frightened of—that we were not human."[113] Throughout the jury selection process, it was difficult to find jurors that were not homophobic, with one prospective juror commenting that the women being lesbians made them "uncomfortable".[114] Another prospective juror for Elizabeth Ramirez's trial stated that "if someone is willing or can justify to themselves the act of homosexuality, that perhaps they can also justify to themselves the act of sexual assault of a child."[115] Importantly, the motion to have this juror excused was denied. Even a reverend, who had told the court he believed homosexuality was wrong because of the Bible, was chosen to be the head juror.[116] It is quite clear that homophobic sentiments were present amongst the jurors. The homophobia the women faced from this Texas-based jury is not surprising considering at the time Texas' anti-sodomy law was still in place. Even today, attempts to remove certain homophobic provisions from the *Penal Code* in Texas have failed. For example, "homosexual conduct," defined as when a person "engages in deviate sexual intercourse with another individual of the same sex", can still be found in the *Penal Code* despite being declared unconstitutional in *Lawrence v. Texas* in 2003 and therefore not enforceable.[117]

The district attorney also leaned into the women's "alternative lifestyle" and lesbian identities. In one line of questioning between the prosecutor and Ramirez he asked about the activities the two young girls had claimed happened in relation to sexual orientation. "When she describes either you or one of the other girls kissing her vagina, that is consistent with a gay lesbian sexual relationship, isn't it?" and "insertion of objects into the vagina is consistent with a gay sexual lesbian relationship – sexual relationship isn't it?"[118] This line of questioning directly associated the alleged acts to the defendant's sexual orientation, implying that the alleged sexual

[110] Grappo, *supra* note 90 at 4.

[111] *Ibid* at 5.

[112] Investigation Discovery, "Southwest of Salem: The Story of the San Antonio Four" (2016) at 00h:16m:52s, online (video):<tubitv.com>.

[113] Mendoza, *supra* note 106 at 70.

[114] *Southwest of Salem*, *supra* note 112 at 00h:18m:05s.

[115] Mendoza, *supra* note 106 at 80.

[116] *Ibid* at 82.

[117] Tom Dart, "Texas clings to unconstitutional, homophobic laws – and it's not alone" *The Guardian* (1 Jun 2019), online:
<www.theguardian.com/world/2019/jun/01/texas-homophobic-laws-lgbt-unconstitutional>.

[118] Mendoza, *supra* note 106 at 74-75.

assault occurred because she is a lesbian. The prosecutor continuously tied the women's sexual orientation into notions of Satanism and pedophilia:

> Records of police and prosecutor questions reveal an intentional confusion over lesbianism itself (wherein the women were continually challenged about their friendships and whether they were in fact all sexually involved with one another) and over the distinction between queer sexuality and pedophilia.[119]

Additionally, Dr. Kellogg's medical reports connecting the (debunked) physical evidence to satanic ritual, which would have been informed by the day-care sex abuse hysteria, were used in the prosecution's arguments.[120] Notably, the prosecution used words to describe what had happened as a "sacrificial offering on the altar of lust."[121] This type of imagery from the prosecution, and the focus on the four as lesbians, falsely equated the women's sexual orientation with sexual deviance and Satanism. "The court's willingness to overlook the peculiarities present in the alleged victims' statements and to accept the dubious testimony surrounding Satanism was clearly tied to the identities of the accused."[122]

Lesbian women often defy the norms of how some believe women 'should' look, dress, and act. This was likely the case for the San Antonio Four, whose gender presentation was unfavourable towards them. During the trial, Anna and Kristie did not conform to heteronormative expectations in the way they presented their gender. Anna sported a mullet, and Kristie had short hair that was buzzed along the side. At trial, they wore clothing that appeared to be oversized men's clothing.[123] This clear defiance of femininity may have worked against them when it came to sentencing:

> Studies show that women who are perceived as gender inappropriate in court receive harsher sentences than women who appear more feminine in court. This could be because prosecutors often emphasize a woman's masculine characteristics, or lesbianism if applicable, to turn jurors against female defendants, instead of relying solely on evidence that the woman committed a crime.[124]

Some legal feminist scholars claim that jurors are more reluctant to convict women than they are for the same crimes committed by men.[125] However, with two of the four women clearly defying gender norms and expectations, visual proof of their "queerness" may have implicated them as more deserving of punishment to the jury.

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[119] Grappo, *supra* note 90 at 4.

[120] Thomas, *supra* note 95 at 1052.

[121] Mendoza, *supra* note 106 at 61.

[122] Grappo, *supra* note 90 at 6.

[123] As observed in the footage of the trial from *Southwest of Salem, supra* note 112.

[124] Andrea L Lewis & Sara L Sommervold, "Death, But Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women" (2015) 78:3 Alb Law Rev 1035 at 1048.

[125] Mendoza, *supra* note 106 at 76.

The women also identify as Latina, which only created additional barriers considering in the United States in the 1990s there was "great national anxiety about Latinx immigration," as well as "overlaps that existed between narratives of the Latino threat and the satanic panic ordeal." [126] The pervasive stereotype of the "hypersexualized" Latina woman may have also impacted the jury's perception of the women as the type of people who would sexually assault a child.[127] The combined effect of identifying as queer Latina women meant that systemic discrimination was working against them on all fronts, and the San Antonio Four paid the price, fighting their wrongful conviction for over 20 years.

C. Monica Jones: Walking While Transgender Leading to Wrongful Conviction

Transgender people face high levels of discrimination in everyday life. Transgender and gender-nonconforming youth often experience discrimination and rejection from their families, leading many to face homelessness. [128] Often due to stigma and lack of other economic opportunities, "many transgender people participate in the sex trade in order to earn income or as an alternative to relying on homeless shelters and food banks."[129] However, as sex workers, transgender people face many issues with policing and violence:

> The criminalizing and stigmatizing of sex work in the United States can worsen the discrimination and marginalization that transgender people already face in society. Trans sex workers experience harassment and violence, often at the hands of police, and these experiences are heightened for transgender people of color, especially women.[130]

Additionally, the impact of masquerade laws and prohibitions on "cross-dressing" have persisted into the 21st Century, impacting how transgender people are policed. *"*Law enforcement officers have fairly consistently and explicitly policed the borders of the gender binary."[131] Police prejudice against transgender people still exists in the forms of arbitrary arrests, arrests for using the incorrect washroom, and routine verbal harassment.[132] A study by the National Center for Transgender Equality and the National Gay and Lesbian Task force found that 1 in 5 trans people who have had police contact reported being harassed by police. For Black transgender people this increased to 38%.[133]

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[126] Grappo, *supra* note 100 at 14.

[127] Maria Jimenez Moya, "Our True Face: Latina women are exoticized and unfairly portrayed in the media" *The Daily Free Press* (9 October 2019), online: <dailyfreepress.com/2019/10/09/our-true-face-latina-women-are-exoticized-and-unfairly-portrayed-in-the-media/>.

[128] Tara Lyons et al, "Negotiating Violence in the Context of Transphobia and Criminalization: The Experiences of Trans Sex Workers in Vancouver, Canada" (2017) 27:2 Qualitative Health Research 182.

[129] Erin Fitzgerald et al, "Meaningful Work: Transgender Experiences in the Sex Trade" (December 2017) at 4, online (pdf): *Trans Equality*
< transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf>.

[130] *Ibid.*

[131] Mogul, Ritchie & Whitlock, *supra* note 3 at 64.

[132] Ibid at 64-67.

[133] *Supra* note 32.

Monica Jones is a Black transgender woman and an advocate for the decriminalization of sex work.[134] In 2013, she was arrested by an undercover police officer in Phoenix, Arizona for manifesting an intent to commit or solicit an act of prostitution, which criminalizes activities such as beckoning or stopping cars, engaging passerby in conversation, and inquiring whether someone is a police officer.[135] Her arrest occurred as a part of Project ROSE, which is a program in Phoenix that targets sex workers on the street and online.[136] Once arrested, she was brought to a church, with no access to a lawyer, and offered a diversion program or otherwise face jail time.[137] In April 2014 she was convicted. Her conviction was later vacated on appeal in 2015.[138]

Transphobia was a theme throughout Jones' case, starting with the law itself, which is a vague and explicitly ambiguous municipal law. The law gives police latitude to decide how to enforce it and which people to target, including targeting people based on how they look. To this effect, Monica Jones, a transgender woman of colour, was profiled for simply walking to the bar that night. Jones was approached by the undercover officer who asked if she needed a ride, and she accepted.[139] Jones states that once she got in the car he harassed her, asking about her prices and services. She denied any intention to prostitute herself and asked to be let out of the car, but was not let out until the police came.[140] The arresting officer testified at trial that the neighbourhood was known for prostitution, and that she had been wearing a "black, tight-fitting dress".[141] The officer also continuously misgendered Jones by referring to her as a man.[142] The blatant transphobia from the officer's statement, exhibited by his refusal to acknowledge her as a woman and the implication that a certain outfit would make her more likely to be a prostitute, is problematic and disrespectful. According to Amnesty International, the profiling of transgender women as sex workers is common amongst police officers, and transgender women often face increased scrutiny from police officers even when engaging in activities such as shopping or walking their dogs.[143] This systemic profiling of transgender women and police misconduct is what led to Monica Jones' wrongful conviction.

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[134] Kavish Harjai, "Monica Jones and the Problem of "Walking While Trans" (30 June 2016), online: *Innocence Project* <innocenceproject.org/monica-jones-walking-while-trans/>

[135] *Ibid*; *Phoenix Municipal Code*, Article 4 sec 23-52(3).

[136] Molly Crabapple, "Project ROSE is Arresting Sex Workers in Arizona to Save Them" *Vice* (26 February 2014), online: <www.vice.com/en/article/av4eyb/in-arizona-project-rose-is-arresting-sex-workers-to-save-them>.

[137] Che Gossett & Eva Hayard, "Monica Jones: An Interview" (2020) 7:4 Transgender Studies Quarterly 611 at 614.

[138] Harjai, *supra* note 134.

[139] *Ibid.*

[140] *Ibid.*

[141] Jamie Ross "'Manifesting' Prostitution Law Challenged" *Courthouse News Services* (6 August 2014), online: <www.courthousenews.com/manifesting-prostitution-law-challenged/>.

[142] *Ibid.*

[143] Amnesty International, "Stonewalled: Police abuse and misconduct against lesbian, gay, bisexual and transgender people in the U.S" (2005) at 21, online (pdf): *Amnesty* <www.amnesty.org/en/wp-content/uploads/2021/08/amr511222005en.pdf>.

Additionally, there is a "criminalizing archetype of transgender and gender non-conforming people as intrinsically dishonest and deceptive."[144]

> The archetypal narrative that casts queers as inherently deceptive undermines LGBT defendants' ability to challenge sex-related charges based on arrests by undercover officers. In such cases, the word of a queer defendant – already marked as dishonest and perverted is pitted against the word of law enforcement officers, whose testimony is generally afforded more credibility than that of civilians.[145]

This archetype was clear at Jones' trial. The prosecutor asked Jones about her previous arrest for sex work, which Jones admitted to, stating "my past is my past."[146] However, in his closing statement, the Judge said that he found her not to be a credible witness as she had a prior conviction for sex work and a motive to avoid a 30-day sentence. Despite a lack of evidence to support the conviction, other than the testimony from a transphobic police officer, the Judge still found her guilty.[147] The stereotype of transgender people as untrustworthy had more weight than the real evidence in this case. Jones was simply "walking while trans" and yet she was still wrongly convicted. Her conviction was eventually overturned on appeal on the grounds that the trial judge had deprived her of a fair trial.[148] However, Jones' case highlights the systemic discrimination transgender people face in the criminal justice system.

IV Wrongful Convictions Today and the Deterioration of Queer Rights

In Canada many queer people were convicted in the 20th century under the homophobic s.159 of the *Criminal Code*.[149] Although there are many definitions of wrongful convictions, most consider either factual or procedural innocence in their definitions.[150] Arguably, however the type of wrongful convictions under s.159 stem from the law itself being morally wrong. In 2018 the government introduced the *Expungement of Historically Unjust Convictions Act*. The purpose of the Act was to recognize that "the criminalization of certain activities constitutes a historical injustice" and would be inconsistent with the *Charter* today.[151] This Act allows people to clear their records of offences involving consensual same-sex activity convictions. However, in the 3 years since its implementation, only 9 expungements have been granted out of over 6000 charges in the RCMP databases.[152] Although there has been 70 applications thus far, 60 were refused as

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[144] Mogul, Ritchie & Whitlock, *supra* note 3 at 66.

[145] *Ibid* at 76.

[146] *The State of Arizona v Monica Renee Jones*, [2015] LC2014-000424-001 DT (AZ Sup Ct) at 2.

[147] Ross, supra note 141.

[148] Harjai, *supra* note 134.

[149] Smith, *supra* note 6.

[150] Kathryn M Campbell, *Miscarriages of Justice in Canada: Causes, Responses, Remedies* (Toronto: University of Toronto Press, 2018).

[151] *Expungement of Historically Unjust Convictions Act*, SC 2018, c 11, preamble.

[152] Patrizia Gentile et al., "Sex Workers Are Left Out by Ottawa's Unjust Conviction Changes" *The Tyee* (19 April 2023), online: <thetyee.ca/Analysis/2023/04/19/Sex-Workers-Left-Out-Ottawa-Unjust-Conviction-Changes/>.

the convictions were not eligible offences for expungement [153] This is likely due to "serious problems that persist in the legislation, including onerous requirements for documentation, an unequal age of consent and an overly restrictive schedule of eligible offences."[154] Queer people who were wrongfully convicted under s.159 deserved a more accessible method to have their records expunged. In doing so, the government would better acknowledge the gravity of queer wrongful convictions.

Unfortunately, anti-LGBTQ2S+ rhetoric has increased over the last few years. Queer rights are being eroded while more homophobic and transphobic bills are signed into law. In June 2023 the Human Rights Campaign, the largest LGBTQ+ organization in the United States, declared a state of emergency for LGBTQ+ people.[155] In the previous year alone over 75 anti LGBTQ2S+ laws were signed into law in the United States, mostly targeting transgender and non-binary individuals.[156] When the law discriminates based on queer identity, more queer people will end up in the criminal justice system. It also further increases the anti-LGBTQ2S+ sentiment that drives the stereotypes that impact wrongful convictions. Recent rhetoric accusing drag queens and other members of the LGBTQ2S+ community of child grooming or harming children is reminiscent of stereotypes seen in the era of Anita Bryant and "Save Our Children". The ongoing rhetoric that queer identities are dangerous will lead to more queer people being prosecuted. The passing of these laws indicate backsliding with respect to queer rights and may result in further wrongful convictions within the community. Understanding the impact that homophobia and transphobia have on wrongful convictions is important, but ensuring the laws themselves are not discriminatory towards the queer community is even more critical.

V Conclusion

LGBTQ2S+ people face systemic discrimination for their sexual orientation and gender identity in the criminal justice system. Through the cases of Miguel Castillo, Bernard Baran, the San Antonio Four, and Monica Jones we can see that this systemic discrimination has also repeatedly led to wrongful convictions. The way forward is to acknowledge and further explore the impact homophobia and transphobia have had, and still have, on the justice system in order to create a better future for all LGBTQ2S+ people.

[153] Steven Maynard, "Pride and prejudice: With only 9 LGBTQ criminal record expungements, what's to celebrate?" *The Conversation* (17 June 2021), online: <theconversation.com/pride-and-prejudice-with-only-9-lgbtq-criminal-record-expungements-whats-to-celebrate-161308>.

[154] *Ibid*

[155] *Supra* note 15.

[156] *Supra* note 15.