

## How Attorneys Can Narrow LGBTQ Gap In The Judiciary

By **Janice Grubin** (June 25, 2021, 4:04 PM EDT)

It is widely acknowledged that a diverse judiciary leads to better decision making and a greater inclusion of the diverse stakeholders in the adjudicative process.

Why is that? The reasons are multifold. Diversity creates a more robust, thoughtful and comprehensive body of juridical work.

A 2006 New York University Law Review article argued: "When the public is divided over questions of public morality, a diverse judiciary is more likely to comprehend and grapple with the full range of potential resolutions," having experienced a wider range of lifestyles and challenges, "and thus arrive at better legal answers about public morality. By making judicial reasoning more open and rigorous, we improve its results." [1]

Judicial diversity also creates public trust and credibility in the decision-making process. U.S. Supreme Court Justice Elena Kagan counsels that "[w]hen people look at an institution and they see people who are like them, who share their experiences, who they imagine share their set of values, and that's a sort of natural thing ... [then] they feel more comfortable if that occurs." [2]

Thus, a diverse judiciary reflects the society over which it presides. In the LGBTQ context, that reflection translates into the proportion of LGBTQ judges being consistent with the proportion of LGBTQ persons in the community in which the judges sit.

### The Reality

LGBTQ-minded New Yorkers can rejoice in the recent confirmation of Anthony Cannataro, an openly gay jurist involved in the LGBTQ community, to their highest court, the New York Court of Appeals. Judge Cannataro fills the seat of the much-beloved, late Judge Paul G. Feinman, who was an active LGBTQ advocate and the first openly gay person to serve on the Court of Appeals.

But for the purposes of this article, let's look at LGBTQ representation on the federal bench.

New York's federal judiciary is composed of almost 5% LGBTQ judges, which approximates the 5.6% LGBTQ identification in the U.S. population — 18.4 million — shown in recent polls. [3] Sadly, New York (and certain other urban enclaves) is an outlier in the federal courts because only 1.4% of active judges



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on the entire federal bench self-identify as LGBTQ.[4]

As of 2019, six of the 13 federal circuit jurisdictions had no circuit or district court judges who self-identified as LGBTQ.[5] Similarly, as of May 7, 2020, only 11 active federal judges out of the 1,387 active and senior status federal judges are openly LGBTQ.[6] Notably, nearly one-third of former President Donald Trump's judicial nominees have anti-LGBTQ records[7] and, to date, President Joe Biden has not nominated a single LGBTQ candidate for the federal bench.

What is the impact of this lack of adequate representation on the bench and, in some cases, antipathy toward LGBTQ litigants and counsel?

In criminal cases, the impact can be devastating.

Since the 1960s and propelled by fear, prejudice, and the obsolete, discredited notion that being LGBTQ is a mental illness, discussions of the LGBTQ "panic" defense[8] have appeared in court opinions in approximately one-half of the states.[9] The LGBTQ panic defense is a legal strategy used to request a jury to make a factual finding that a victim's sexual orientation or gender identity is to blame for a defendant's violent reaction, including murder.[10]

To date, 15 states and the District of Columbia have passed legislation eliminating the use of LGBTQ panic defenses, with 10 states having introduced, but not passed, such legislation.[11] However, the defenses remain available in most states.[12] Statistics collected by the FBI show that the LGBTQ community is disproportionately targeted by perpetrators of hate crimes:

- "In 2019, there were 1,656 recorded hate crimes against people for their sexual orientation and gender identity. These hate crimes made up a combined 18.8 percent of motivation in single-bias hate crime incidents." [13]
- "Research shows that 1 out of 5 lesbian, gay, and bisexual people living in the United States will experience a hate crime in their lifetime, and more than 1 out of 4 transgender people will." [14]
- According to other data collected in 2019, "16.7% of all hate crime victims were targeted because of their sexual orientation and 2.7% were targeted because of their gender identity." [15]

In all cases, the impact can be, at best, degrading and, at worst, perniciously obstructionist and potentially life-threatening.

A 2020 American Bar Association study reported that "47% of attorneys who identify as lesbian, gay, or bisexual had experienced subtle, unintentional biases; 36% of attorneys who identify as transgender or gender-nonconforming said the same." [16]

According to a 2012 study by Lambda Legal, out of the 965 respondents who had been involved in the court system in the previous five years, 19% reported hearing a judge, attorney or other court employee make negative comments about a person's sexual orientation, gender identity or gender expression. [17]

### **How Attorneys Can Narrow the Gap**

Attorneys can be agents of change within their personal and professional spheres and assist in

narrowing the gap between the goal of judicial diversity and the unfortunate, current reality in many different ways:

- Join and become active in judiciary committees of bar and affinity organizations and support initiatives such as Lambda Legal's Fair Courts Project, the New York State Unified Court System's Richard C. Failla LGBTQ Commission and the American Bar Association's Commission on Sexual Orientation and Gender Identity.
- Mentor law students and young attorneys to create a cadre of applicants with the background and expertise to serve in judicial office.
- Establish and participate in outreach programs to reach students in middle and high school.[18]
- Educate peers and loved ones.
- Contact federal and state legislators and governors in states currently trying to ban the LGBTQ panic defense and advocate for the passage of pro-LGBTQ legislation and the defeat of anti-LGBTQ legislation.
- Normalize LGBTQ terms and, ultimately, relationships and social customs by using appropriate pronouns, taking the lead in telling court officials the correct pronouns and honorifics of clients and colleagues, and refusing to tolerate — and calling out — inappropriate and discriminatory conduct.[19]
- Advocate for judicial appointment procedures to conform with the demands of equality and equal opportunity laws.
- Become involved in impactful litigation concerning the LGBTQ community.

In conclusion, our state and federal judiciary must be reflective of our nation's growing diversity, including that of the LGBTQ communities. The U.S. needs and deserves a diverse judiciary because such a judiciary has a greater capacity to be sensitive, accountable and fair to the needs and experiences of the diverse users of the legal system.

We must celebrate the progress that has been made to include more LGBTQ individuals in judicial office, and acknowledge the significant remaining work to be done in that regard.

Happy Pride.

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[1] Joy Milligan, "Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality," *New York University Law Review* 81, no. 3 (2006): 1206, 1210.

[2] Danielle Root, Jake Faleschini, and Grace Oyenubi. "Building a More Inclusive Federal Judiciary," Center for American Progress, October 3, 2019, <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> ("Building a More Inclusive Federal Judiciary").

[3] Jeffrey M. Jones. "LGBT Identification Rises to 5.6% in Latest U.S. Estimate," Gallup, February 24, 2021, <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx>. In contrast, the American Bar Association reported in 2016 that only 1.25 percent of its members self-identified as LGBTQ+.

[4] Danielle Root. "LGBTQ Judges in the Federal Judiciary," Center for American Progress, October 15, 2019, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi8OvgxK7xAhX\\_EFkFHxJ4DfoQFjABegQIAxAD&url=https%3A%2F%2Fcdn.americanprogress.org%2Fcontent%2Fuploads%2F2019%2F10%2F16123654%2FJudicialDiversityFactsheet-LGBTQ-2.pdf&usg=AOvVaw2ATj6HiaTk2yXC6LIEh-JL](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi8OvgxK7xAhX_EFkFHxJ4DfoQFjABegQIAxAD&url=https%3A%2F%2Fcdn.americanprogress.org%2Fcontent%2Fuploads%2F2019%2F10%2F16123654%2FJudicialDiversityFactsheet-LGBTQ-2.pdf&usg=AOvVaw2ATj6HiaTk2yXC6LIEh-JL).

[5] Democracy and Government Reform Team. "Examining the Demographic Compositions of U.S. Circuit and District Courts," Center for American Progress, February 13, 2020, <https://www.americanprogress.org/issues/courts/reports/2020/02/13/480112/examining-demographic-compositions-u-s-circuit-district-courts/>.

[6] "LGBTQ+ Article III Judges." Minority Corporate Counsel Association, last accessed Jun 11, 2021, <https://www.mcca.com/resources/reports/federal-judiciary/lgbt-judges>.

[7] *Id.*

[8] "LGBTQ+ 'Panic' Defense," The National LGBT Bar Association, accessed June 21, 2021, <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/> (the "LGBTQ+ 'Panic' Defense").

[9] Christy Mallory, Brad Sears, Luis A. Vasquez. "Banning the Use of Gay and Trans Panic Defenses," *UCLA School of Law Williams Institute*, (April 2021): 23, accessed June 23, 2021, <https://williamsinstitute.law.ucla.edu/publications/model-leg-gay-trans-panic/> ("Banning the Use of Gay and Trans Panic Defenses").

[10] "The LGBTQ+ 'panic' defense strategy is ... not a free-standing defense to criminal liability, but rather a legal tactic used to bolster other defenses. When a perpetrator uses an LGBTQ+ 'panic' defense, they are claiming that a victim's sexual orientation or gender identity not only explains — but excuses — a loss of self-control and the subsequent assault. By fully or partially acquitting the perpetrators of crimes against LGBTQ+ victims, this defense implies that LGBTQ+ lives are worth less than others." LGBTQ+ "Panic" Defense.

[11] *Id.*

[12] *Id.*

[13] Id.

[14] Id.

[15] Banning the Use of Gay and Trans Panic Defenses.

[16] Emma Cueto. "Many LGBTQ, Disabled Attys Face Unconscious Bias at Work," Law360, July 14, 2020, <https://www.law360.com/articles/1292013/many-lgbtq-disabled-attys-face-unconscious-bias-at-work>.

[17] "Protected and Served?," Lambda Legal, 2015, <https://www.lambdalegal.org/protected-and-served>.

[18] Building a More Inclusive Federal Judiciary.

[19] "Moving Beyond Bias: How to Ensure Access to Justice for LGBT People," Lambda Legal, February 2, 2018, <https://www.lambdalegal.org/publications/moving-beyond-bias>.