

Sexuality On Trial: Expanding *Pena-Rodriguez* To Combat Juror Queerphobia

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“There will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a homosexual or bisexual person offensive . . . [O]ur criminal justice system must take the necessary precautions to assure that people are convicted based on evidence of guilt, and not on the basis of some inflammatory personal trait.”¹

“I was taken aback by Christian’s dialect. That when I heard it, I considered Christian a Homosexual. And from that point, accepted Commonwealth’s testimony as Gospel, while on the other hand, found defense testimony, no matter how helpful to Christian’s case, unsubstantial. And that my verdict was based on Christian’s Homosexuality.”²

INTRODUCTION

On March 6, 2017, in *Pena-Rodriguez v. Colorado*, the U.S. Supreme Court recognized a constitutional exception to Federal Rule of Evidence 606(b), holding that a juror’s comments made during deliberation may be used to set aside a verdict if they suggest reliance “on racial stereotypes or animus.”³ Rule 606(b) serves as a “no impeachment rule”—generally preventing jurors from testifying about statements made during deliberations after a verdict has been rendered.⁴ In *Pena-Rodriguez*, the Supreme Court considered whether Rule 606(b) preempted juror testimony and impeachment of the verdict, where a juror made statements evoking disparaging stereotypes about “Mexican[s] and Mexican men” during deliberations.⁵ The five to three decision ultimately carved out a limited exception, covering only cases in which “one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict.”⁶ Writing for the majority, Justice Anthony M. Kennedy reasoned that such an exception was necessary “to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.”⁷

The *Pena-Rodriguez* holding adds fuel to a larger discussion on the issue of juror bias. In recent years, a growing body of scholarship has focused on jurors’ implicit biases,⁸ most prominently White jurors’

1. *State v. Ford*, 926 P.2d 245, 250 (Mont. 1996).

2. *Commonwealth v. Delp*, 672 N.E.2d 114, 115 (Mass. App. Ct. 1996).

3. 137 S. Ct. 855, 869 (2017).

4. FED. R. EVID. 606(b)(1) (“During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement or incident that occurred during the jury’s deliberations.”).

5. *Pena-Rodriguez*, 137 S. Ct. at 862.

6. *Id.* at 869.

7. *Id.* at 868.

8. *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (discussing the existence of implicit biases in civil and criminal trials and

biases towards Black defendants,⁹ and male jurors' biases against women.¹⁰ Fewer articles have comprehensively considered juror biases against queer parties¹¹ or solutions to prevent queerphobia from improperly influencing outcomes in criminal proceedings.¹² This Note seeks to fill that dearth by conducting a thorough consideration of queerphobia at trial. The Note is both descriptive and prescriptive. It argues that the effects of juror queerphobia are not uniform but dynamic, manifesting in a myriad of ways depending upon the type of trial and the queer party's role therein. To combat this queerphobia, the Note then proposes an extension of *Pena-Rodriguez* to cases of blatant anti-queer bias. In so doing, the Note constitutes the first published call for an extension of the *Pena-Rodriguez* to queerfolk.¹³

The Note proceeds in three parts. Part I uses social science research on societal queerphobia to document the pervasiveness and consequences of anti-queer bias. Existing scholarship overwhelmingly focuses on the effects of queerphobia in criminal, not civil, trials. Part I also builds

strategies for combatting them); Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U.L. REV. 513 (2014) (examining the effects of implicit bias in death penalty cases); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012) (proposing the use of the Implicit Association Test (IAT) to improve jury service).

9. See, e.g., Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017 (2011) (finding that all-White jury pools convicted Black defendants 16 percentage points more than White defendants); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001) (finding that white jurors were likely to demonstrate racial prejudice in cases without salient racial issues).

10. See e.g., Connie Lee, *Gender Bias in the Courtroom: Combating Implicit Bias Against Women Trial Attorneys and Litigators*, 22 CARDOZO J.L. & GENDER 229 (2016) (documenting biases against female attorneys).

11. In this paper, the term *queer* is used interchangeably to refer to gender and sexual minorities including those mentioned under the acronym "LGBTQ+" (Lesbian, Gay, Bisexual, Transgender, Queer, and Others). The term has been reclaimed by LGBTQ+ communities and is not intended as derogatory. This usage is consistent with recent scholarship on LGBTQ+ issues. See, e.g., Diane L. Zosky & Robert Alberts, *What's in a Name? Exploring Use of the Word Queer as a Term of Identification Within the College-aged LGBT Community*, 26 J. HUM. BEHAV. SOC. ENV'T 597 (2016) (providing evidence that LGBTQ+ persons have reclaimed the term "queer").

12. Others have peripherally noted juror queerphobia within larger studies of queerphobia in the judicial system. The majority of these studies have been limited to biases against Lesbian and Gay individuals. See, e.g., Todd Brower, *Twelve Angry—and Sometimes Alienated—Men: The Experiences and Treatment of Lesbian and Gay Men During Jury Service*, 59 DRAKE L. REV. 669, 672–95 (2011) (examining the experience of gay men and lesbians during jury service).

13. Per preemption check (4/22/18).

upon such work by considering how juror queerphobic bias may affect the outcomes of civil trials.¹⁴

Part II proposes expanding *Pena-Rodriguez* to combat blatant juror queerphobia at jury trials. Because *voir dire* has not facilitated the removal of jurors with queerphobic biases, the issue requires a more specific and intentional response, which an expansion of *Pena-Rodriguez* could bring.

Finally, Part III recounts the contours of the *Pena-Rodriguez* case and argues that because of the pervasive and invidious nature of queerphobic sentiment, the same *Pena-Rodriguez* rationale applies. Both the similarities between racial and queerphobic prejudices and the ineffectiveness of procedural tools designed to remove and reduce jury biases amplify the need for the *Pena-Rodriguez*'s safety net to be extended to queerphobic bias.

I. JUROR QUEERPHOBIA AND THE CONSEQUENCES FOR QUEER JUSTICE

A. *The Existence & Prevalence of Anti-Queer Bias*

Over the past decade polls have conveyed a narrative of rapidly decreasing bias against queer persons, and have touted gathering public support for queer persons and relationships. One public opinion poll on the morality of homosexual relations documented a twenty-three (23) percent increase in “moral acceptance” between 2014 and 2017.¹⁵ Other meta-reviews of public opinion polls indicate that support for lesbians and gays has doubled over the past thirty years,¹⁶ the belief that homosexuality is wrong has decreased dramatically over the past forty years,¹⁷ and between 2005 and 2011 support for transgender persons has increased by forty percent.¹⁸ In terms of support for same-sex marriage, one pre-*Obergefell* meta-review found that support for marriage equality increased nationwide by an average of 2.6 percent per year between 2004 and 2012 and by 6.2 percent per year between 2012 and 2015.¹⁹

14. Few others have briefly considered the role of sexual orientation discrimination in civil jury deliberations. See Peter Nicolas, “*They Say He’s Gay*”: *The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793, 835–842 (2003) (discussing case examples of civil trials where evidence of a litigant’s sexual orientation was raised). However, this Note is the first to comprehensively consider the effects jurors’ attitudes towards queerfolk in the calculation of economic and noneconomic damage awards.

15. *Gay and Lesbian Rights*, GALLUP NEWS (2015), <http://news.gallup.com/poll/1651/gay-lesbian-rights.aspx>.

16. ANDREW R. FLORES, WILLIAMS INST., NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES (2014) (analyzing the results of over 325 national surveys on LGBT rights).

17. *Id.* at 15.

18. *Id.*

19. ANDREW R. FLORES & SCOTT BARCLAY, WILLIAMS INST., TRENDS IN PUBLIC

In addition, Americans' support for same-sex marriage increased seven percentage points between 2015 and 2017 (the years immediately following *Obergefell v. Hodges*)²⁰ so that by the close of 2017 sixty-two percent of Americans favored allowing gays and lesbians to marry.²¹ With respect to transgender individuals, polls suggest that a large majority of "Americans agree that transgender people deserve the same rights and protections as other Americans."²² Moreover, three-quarters of Americans support hate crime legislation and employment nondiscrimination laws to protect transgender people.²³

However, these national trends fail to show the full picture. Support for queer persons is not uniform nationally, instead queerfolk face a range of social realities depending on where they live. A 2014 Williams Institute Report documented extensive regional variances in LGBT acceptance and rights protections across the United States.²⁴ The report noted an association between legal protection and social acceptance,²⁵ meaning that queerfolk who live in legally unsupportive states are more likely to also experience a lack of social support and vice versa.²⁶ This association suggests that jurors in less legally supportive states may be less accepting of queer litigants and likewise harbor higher levels of queerphobic sentiment.

Popular studies that indicate increasing acceptance of queerfolk are also inaccurate measurements of societal queerphobia. The findings are largely drawn from data gathered by way of opinion polls or surveys—types of self-reporting mechanisms.²⁷ Such mechanisms fail to capture implicit biases,²⁸ and are also subject to reporting and social-desirability biases.²⁹ As a result, these statistics may not accurately represent societal

SUPPORT FOR MARRIAGE FOR SAME-SEX COUPLES BY STATE (2015) (analyzing the results of national surveys on same-sex marriage).

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

21. See GALLUP NEWS, *supra* note 16.

22. Daniel Cox & Robert P. Jones, *Most Americans Favor Rights and Legal Protections for Transgender People*, PUB. RELIGION RESEARCH INST. (Nov. 3, 2011), <http://www.prii.org/research/american-attitudes-towards-transgender-people>.

23. *Id.*

24. AMIRA HASENBUSH ET AL., WILLIAMS INST., *THE LGBT DIVIDE: A DATA PORTRAIT OF LGBT PEOPLE IN THE MIDWESTERN, MOUNTAIN & SOUTHERN STATES* (2014).

25. *Id.* at 6. The report measured legal support as the existence of laws protecting against anti-LGBT discrimination. *Id.* at 4.

26. *Id.* at 7. ("This is likely because LGB/T supportive laws are less likely to pass in areas where LGB/T social acceptance is lower and the lack of LGB/T supportive legal protections can contribute to less LGB/T supportive social climates.")

27. See *supra* text accompanying notes 22–27.

28. See Roberts, *supra* note 9, at 834 ("Levels of implicit bias frequently conflict with self-reported attitudes, usually because explicit measures show no bias, while implicit measures show bias.")

29. See Robert J. Fisher & James E. Katz, *Social-Desirability Bias and the Validity of Self-Reported Values*, 17 PSYCHOL. & MARKETING 105, 106 (2000) (reporting that self-interest may cause participants to give self-reported answers they believe are

sentiment, but may instead reflect an increasing reluctance to admit bias against queerfolk.

Indeed, notwithstanding polls suggesting societal queerphobia is on the decline, studies eliminating social desirability bias³⁰ and those examining implicit attitudes, report continuing bias against queerfolk.³¹ One study comparing participants' self-reported and implicit bias using the Implicit Association Test (IAT) found that participants faked positive explicit attitudes towards homosexuals.³² Another study found that explicit preferences for straight persons over gay persons declined approximately twice the amount as implicit preferences did during the investigated period—suggesting that self-reported attitudes were probably not the result of changing negative attitudes, but more likely because

socially desirable).

30. For example, a 2016 study found that when respondents were assured that their answers were anonymous and untraceable—thereby reducing or eliminating social desirability bias—self-reports of anti-gay sentiment increased substantially. See Katherine B. Coffman et al., *The Size of the LGBT Population and the Magnitude of Antigay Sentiment Are Substantially Underestimated*, 63 MGMT. SCI. 3168, 3169–3170 (2017), [HTTPS://DASH.HARVARD.EDU/HANDLE/1/34403526](https://dash.harvard.edu/handle/1/34403526) (finding “[r]espondents were 67% more likely to express discomfort with an openly gay manager at work 71% more likely to say it should be legal to discriminate in hiring on the basis of sexual orientation . . . 22% less likely to support the legality of same-sex marriage, 46% less likely to support adoption by same-sex couples . . . and 32% less likely to state they believe homosexuality is a choice” under anonymous conditions.).

31. See, e.g., Melanie C. Steffens, *Implicit and Explicit Attitudes Towards Lesbians and Gay Men*, 49 J. HOMOSEXUALITY 39, 39 (2005) (“Explicit attitudes [towards Lesbians and Gays] were very positive. However, implicit attitudes were relatively negative instead, except for female participants’ implicit attitudes towards lesbians which were repeatedly as positive as were their attitudes towards heterosexuals.”); Shankar Vendantam, *See No Bias*, WASH. POST MAG., Jan. 23, 2005, at W12 (“[N]early 83 percent of heterosexuals showed implicit biases for straight people over gays and lesbians.”); See also Pasquale Anselmi et al., *Implicit Sexual Attitude of Heterosexual, Gay and Bisexual Individuals: Disentangling the Contribution of Specific Associations to the Overall Measure*, 8 PLOS ONE, Nov. 2013, at 1, 1, <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0078990>. (“A preference for heterosexuals relative to homosexuals is observed in heterosexual respondents, driven most by associating positive attributes with heterosexuals rather than negative attributes with homosexuals.”); Gregory M. Herek, *Heterosexuals’ Attitudes Toward Lesbians and Gay Men: Correlates and Gender Differences*, 25 J. SEX RES. 451, 451 (1988) (finding “a consistent tendency for heterosexual males to express more hostile attitudes than heterosexual females, especially toward gay men”); Melanie C. Steffens & Axel Buchner, *Implicit Association Test: Separating Transsituationally Stable and Variable Components of Attitudes Toward Gay Men*, 50 EXPERIMENTAL PSYCHOL. 33, 33 (2003) (“Explicit attitudes towards gay men as assessed by way of questionnaire were positive and stable across situations. Implicit attitudes were relatively negative instead.”).

32. See Rainer Banse et al., *Implicit Attitudes Towards Homosexuality: Reliability, Validity, and Controllability of the IAT*, 48 ZEITSCHRIFT FÜR EXPERIMENTELLE PSYCHOLOGIE 145 (2001) (describing IAT for anti-gay bias demonstrating, “participants were able to fake positive explicit but not implicit attitudes” toward homosexuals).

people have “become more reluctant to admit bias.”³³ Both studies suggest that trends in self-reported attitudes are attributed to a growing reluctance to admit anti-queer sentiment due to apprehension of societal consequences, rather than due to true attitude shifts.

Federal Bureau of Investigation hate crime statistics may also cut against the narrative of declining queerphobia. For example, 2014 statistics indicate that lesbian, gay, bisexual and transgender people are “the most likely targets of hate crimes in America.”³⁴ But whether these statistics truly indicate growing queerphobia is unclear. Mark Potok of the Southern Poverty Law Center suggests that hate crimes may have risen because “[a]s the majority of society becomes more tolerant of L.G.B.T. people, some of those who are opposed to them become more radical.”³⁵

Also contradicting the polls suggesting increasing public support for queerfolk, are studies documenting discrimination against transgender persons. In the first large-scale survey of transgender and gender nonconforming persons in the United States, the National Center for Transgender Equality documented alarming rates of discrimination.³⁶ Specifically, thirteen percent of transgender and ten percent of gender nonconforming respondents reported being “denied equal treatment” or “harassed and disrespected” while interacting with “judges, courts and legal services clinics.”³⁷

A look to anti-queer legislation further refutes positive public opinion trends. More than 129 anti-queer bills were introduced across 30 states in 2017.³⁸ This number included ten states that attempted to pass legislation banning transgender people from accessing the appropriate public facilities.³⁹ Further, on February 25, 2018, the Georgia Senate passed legislation allowing adoption and foster care agencies to refuse placing children with same-sex couples based on religious convictions.⁴⁰

33. Erin C. Westgate et al., *Implicit Preferences for Straight People Over Lesbian Women and Gay Men Weakened From 2006 to 2013*, 1 COLLABRA 1, 1 (2015), <https://www.collabra.org/articles/10.1525/collabra.18>.

34. Haeyoun Park & Iaryna Mykhalysyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html>.

35. *Id.*

36. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011).

37. *Id.* at 133.

38. HUMAN RIGHTS CAMPAIGN & EQUAL. FED'N INST., STATE EQUALITY INDEX: A REVIEW OF STATE LEGISLATION AFFECTING THE LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER COMMUNITY AND A LOOK AHEAD IN 2018, at 2 (2017).

39. *Id.*

40. See Brandon Voss, *Georgia State Senate Passes Anti-LGBT Adoption Bill*, NEWNOWNEXT, Feb. 25, 2018, <http://www.newnownext.com/georgia-senate-passes-anti-lgbt-adoption-bill-sb375/02/2018>.

Within the legal community, both courts and attorneys have recognized the continued presence of anti-queer bias amongst jurors and within the judicial system for years.⁴¹ In addition, studies examining queerphobia in the jury box consistently documented such biases. In one national study for instance, “seventeen percent of jurors surveyed admitted that they could not be fair if a party to a case was homosexual,” and “[t]hree-and-a-half times more people said that they could not be fair and impartial if a party to a case was gay than said that they could not be fair if a party was female, black, or Latino.”⁴² In another survey by the National Law Journal, twelve percent of jurors surveyed admitted that they could “not be fair to a gay defendant.”⁴³ Surveys by state judicial commissions on LGBT equality have similarly confirmed queerphobia amongst jurors.⁴⁴

41. See, e.g., Michael B. Shortnacy, *Guilty and Gay, a Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U.L. REV. 309, 321–22 (2001) (“A handful of state judicial councils and local bar associations, however, have undertaken studies about bias against homosexuals within their own court systems. These studies overwhelmingly conclude that homosexuals (whether court employees, attorneys, jurors, court users, or criminal defendants) face widespread and rampant prejudice within the legal system.”). See *State v. Lovely*, 451 A.2d 900, 902 (Me. 1982) (recognizing, “[t]he stigmatization of homosexuals in our society and the possibility of anti-homosexual bias arising from the pervasive belief that homosexuals are deviants cannot be gainsaid.”); Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 490 (2000) (describing an attorney’s concern over potential juror queerphobic bias in a murder trial:

He worried that jurors might be more hostile to Kelly if they knew she was a lesbian. Instead, he advised Kelly to avoid any mention of her lesbianism, present herself as heterosexual, and agree that she had “dated” Billy Ronald [the alleged murderer]—but assert that it had not been a serious involvement.). In a more recent example of queerphobia within the judiciary, a murder conviction had to be reconsidered when Riverside County Superior Court Judge David B. Downing was caught on tape saying he did not read a defendant’s motions because the envelopes had been sealed by a gay defendant who was HIV positive. The judge was recorded saying, “[J]ord knows where his tongue has been.” Brett Kelman, *Judge’s Secretly Recorded HIV Insult Could Undo Palm Springs Killers’ Convictions*, DESERT SUN, Nov. 1, 2017, https://www.desertsun.com/story/news/crime_courts/2017/11/01/judges-secretly-recorded-hiv-insult-could-undo-palm-springs-killers-convictions/797205001. See also *People v. Garcia*, No. E057519, 2016 Cal. App. Unpub. LEXIS 5726 (Cal. Ct. App. Aug. 3, 2016).

42. See Aaron M. Clemens, *Executing Homosexuality: Removing Anti-Gay Bias From Capital Trials*, 6 GEO. J. GENDER & L. 71, 83 (2005) (citing Shortnacy, *supra* note 42, at 317).

43. Sally Kohn, *Greasing the Wheel: How the Criminal Justice System Hurts Gay, Lesbian, Bisexual and Transgendered People and Why Hate Crime Laws Won’t Save Them*, 27 N.Y.U. REV. L. & SOC. CHANGE 257, 266 (2001).

44. See generally Pamela D. Bridgewater & Brenda V. Smith, *Homophobia in the Halls of Justice: Sexual Orientation Bias and its Implications Within the Legal System Obstacle Courts—Results of Two Studies on Sexual Orientation Fairness in the California Courts*, 11 AM. U.J. GENDER SOC. POL’Y & L. 39 (2003) (discussing the findings of Dominic J. Brewer & Maryann Jacobi Gray, Survey Data, Preliminary Report Draft 3/31/99, reported in 4/9/99 materials of the Subcommittee on Sexual Orientation

Therefore, though the results of self-reporting mechanisms indicate increasing support for, and acceptance of queerfolk, queerphobia still widely exists. Reports of discrimination against queerfolk, as well as hate crime statistics cut against narratives of increasing tolerance and decreasing queerphobia. Research on implicit biases against queer persons similarly suggests that public opinion trends are the result of a reluctance to admit queerphobic bias, rather than true attitude shifts. As a result, it is likely that a significant minority of potential jurors express queerphobic bias, and even more hold implicit biases against queer persons. The following Part will examine the consequences that occur when these biases enter the jury deliberation process.

B. *The Consequences of Juror Queerphobia*

During deliberation, jurors are as subject as anyone else to their human experiences, prejudices, and opinions.⁴⁵ If jurors are queerphobic, their biases may ultimately impinge on a queer litigant's right to be tried by an impartial jury.⁴⁶ Jurors have admitted that queerphobic bias directly influenced their verdict decisions,⁴⁷ some jurors have refused to convict defendants for anti-queer hate crimes due to their own biases against the victim,⁴⁸ and in other cases prosecutors have used jurors anti-queer sentiment to force harsher sentences for queer defendants.⁴⁹ This Part will explore examples of queerphobic biases and resulting injustice at trial.

Fairness 8 (1999)). At the time of this writing no similar studies have been published on discrimination against transgender persons amongst jurors; however, studies examining the wider judicial system provide anecdotal evidence of transphobia amongst judges and court staff. *See, e.g., Protected and Served?*, LAMBDA LEGAL (2014), <https://www.lambdalegal.org/protected-and-served/courts> (discussing the findings of a 2012 national Lambda Legal survey as demonstrating wide-spread discrimination including misgendering and misnaming of transpersons).

45. *See* Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 186 (2011) ("In formulating and completing these stories, jurors rely significantly upon their implicit assumptions and expectations. Not surprisingly, implicit biases alter the stories that jurors construct and individuals tend to rely on their biases when confronting situations of divergent facts."); FED. CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 1.11 (COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 2017)http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf ("You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life."). *See also* NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 65–66 (2007) (documenting instances of jurors drawing on life experiences to interpret the evidence presented at trial). Indeed, jurors are often instructed and praised for using their personal experience to interpret the evidence.

46. *See, e.g., Chumbler v. Commonwealth*, 905 S.W.2d 488, 494 (Ky. 1995) (reasoning the introduction of a defendant's homosexual relationships and sexual habits, "had the effect of poisoning the atmosphere of the trial, rendering it impossible for the defendants to have had a fair trial").

47. *See infra* notes 55–58 and accompanying text.

48. *See infra* notes 84–110 and accompanying text.

49. *See infra* notes 59–78 and accompanying text.

1. *Queerfolk as Defendants in Criminal Trials*

Courts have recognized that introducing evidence of a defendant's sexual orientation can improperly influence the jury to convict defendants due to queerphobic animus rather than on the basis of trial evidence.⁵⁰ In *State v. Lovely*, a Maine appellate court refused to affirm the arson conviction of a homosexual in a case where the trial judge refused to question the jury on queerphobic bias.⁵¹ Specifically, the court emphasized "the essential unfairness of allowing a homosexual or one who might well be perceived by the jury as homosexual to be tried by a jury whose prejudices concerning homosexuals have not been examined."⁵² Because of this unfairness, the court vacated the trial court's holding.⁵³ The court's decision suggests a concern that anti-queer bias may impair a jury's ability to remain fair and impartial.⁵⁴

The *Lovely* court's concerns have been realized in cases where queerphobia has played a role in a juror's verdict. In *Commonwealth v. Delp* for instance, after a jury convicted a defendant of rape of a child and contributing to the delinquency of a minor, a juror admitted that his verdict was "based on" the defendant's homosexuality.⁵⁵ The juror disclosed that prior to realizing the defendant's sexual orientation he believed the defendant was innocent, and the juror disclosed that he found the defendant "guilty solely on his apparent homosexuality."⁵⁶ Despite the juror's own admission of partiality, the court held that the "personal consciousness of one juror" should not be allowed to disturb the "expressed conclusion of twelve," and denied the defendant's motion for a new trial.⁵⁷

Prosecutors have long been aware of the power of jury queerphobia,⁵⁸ and in many cases have consciously highlighted a queer defendant's

50. See, e.g., *United States v. Bates*, 590 F. App'x 882, 886 (11th Cir. 2014) (collecting case opinions emphasizing the prejudicial impact of evidence of homosexuality on juries); *Cohn v. Papke*, 655 F.2d 191, 194 (9th Cir. 1981) (finding evidence of homosexuality creates "clear potential that the jury may have been unfairly influenced by whatever biases and stereotypes they might hold with regard to homosexuals or bisexuals"); *United States v. McDowell*, 30 M.J. 796, 799 (A.C.M.R. 1990) (finding a prosecution's introducing evidence of the defendant's homosexuality "carried a clear and powerful potential for abuse through whatever biases and stereotypes exist in regard to homosexuality"). Cf. *United States v. Provoo*, 215 F.2d 531, 537 (2d Cir. 1954) (finding introduction of evidence of the defendant's homosexuality was inadmissible because "[t]he sole purpose and effect of this examination was to humiliate and degrade the defendant, and increase the probability that he would be convicted, not for the crime charged, but for his general unsavory character").

51. See *State v. Lovely*, 451 A.2d 900, 902 (Me. 1982).

52. *Id.*

53. *Id.*

54. *Id.* at 901.

55. *Commonwealth v. Delp*, 672 N.E.2d 114, 115 (Mass. App. Ct. 1996).

56. *Id.*

57. *Id.* at 117 (quoting *Mattox v. United States*, 146 U.S. 140, 148 (1892)).

58. Studies have confirmed the power of queerphobia in raising feelings of

sexuality to “play off implicit or explicit juror prejudice.”⁵⁹ As Sally Kohn has noted, “prosecutors often portray gay male capital defendants as predators—regardless of the facts of the alleged crime—in order to exploit the fears of heterosexual male jurors and the fallacious association of gay men with child molesters.”⁶⁰ Further, other commentators have observed that prosecutors use juror queerphobia to sentence defendants to death rather than life in prison.⁶¹ In *Burdine v. Johnson*, the prosecutor explicitly urged the jury to sentence Calvin Burdine, convicted of capital murder, to death rather than to life imprisonment because he was a homosexual.⁶² The prosecutor reasoned that because Burdine was a homosexual, he “would enjoy a sentence of life in prison and therefore it would not be punishment.”⁶³

Similarly, in *Neill v. Gibson*,⁶⁴ a prosecutor asked the jury to consider the defendant’s homosexuality as evidence of an undesirable character in deciding to sentence him to death:

I want you to think briefly about the man you’re setting [sic] in judgment on and determining what the appropriate punishment should be. . . . I’d like to go through some things that to me depict the true person, what kind of person he is. He is a homosexual. . . . You’re deciding life or death on a person that’s a vowed [sic] homosexual.⁶⁵

The jury recommended the death penalty, and Neill was sentenced to four death sentences and twenty years imprisonment.⁶⁶ On appeal from the denial of habeas relief, the Tenth Circuit Court of Appeals concluded that the prosecutorial remarks were “improper” but reasoned that “not

moral outrage. See, e.g., T.R. Wiley & B.L. Bottoms, *The Effects of Defendant Sexual Orientation on Jurors’ Perceptions of Child Sexual Assault*, 33 LAW HUM. BEHAV. 46 (2008) (finding when a defendant was portrayed as gay, jurors made more pro-prosecution decisions in an examination of mock jurors’ reactions to a sexual abuse case between a male teacher and a ten-year-old child).

59. Kohn, *supra* note 44, at 266. See also *United States v. Birrell*, 421 F.2d 665, 666 n.2 (9th Cir. 1970) (describing the prosecution’s frequent references to a defendant’s homosexuality and “urg[ing] the jury, because of these facts, not to ‘turn him loose on society,’” thereafter the appellate court found that the prosecutor’s comments “invited conviction irrespective of innocence of the crime charged, upon the ground that appellant was a homosexual.”).

60. Kohn, *supra* note 44, at 265.

61. See Clemens, *supra* note 43, at 83 (“Jurors’ anti-gay bias is problematic because ‘prosecutors often use a criminal defendant’s sexual orientation to garner support from the jury for a sentence of death as opposed to a sentence of life in prison.’”); Shortnacy, *supra* note 42, at 316–17 (“[Queerphobic] hostility culminates in the real possibility that homosexual defendants found guilty of heinous crimes may receive the death penalty, as opposed to life sentences, because of their status as homosexuals.”).

62. 262 F.3d 336 (5th Cir. 2001).

63. Kohn, *supra* note 44, at 265.

64. 278 F.3d 1044 (10th Cir. 2001).

65. *Id.* at 1065 (Lucero, J., dissenting).

66. *Id.* at 1050.

every improper or unfair remark made by a prosecutor will amount to a federal constitutional deprivation.”⁶⁷ Instead, the court held that the prosecutor’s remarks did not render the trial fundamentally unfair and affirmed the denial of habeas relief.⁶⁸

Similar homophobic stereotypes have been used to sentence lesbians to death.⁶⁹ In such cases, prosecutors use stereotypes about lesbians to de-feminize defendants, thereby stripping them of the protectionist notions accompanying femininity.⁷⁰ Indeed, a common prosecutorial strategy is to imply that lesbian defendants are masculine.⁷¹ By invoking such stereotypes, “the labeling of a woman as a lesbian often falsely brands her as a man hater, aggressive, and deviant, and thus more capable of committing a crime than a heterosexual woman.”⁷² In *People v. Mata*, for example, a jury examined the case of Bernina Mata, accused of stabbing John Draheim to death the night the two met at a bar.⁷³ In this case, the State consistently raised Mata’s sexual orientation, arguing that it provided motive to kill Draheim.⁷⁴ It is clear that appealing to jurors’ queerphobic bias formed a key prosecutorial strategy: before

67. *Id.* at 1061 (citing *Tillman v. Cook*, 215 F.3d 1116, 1129 (10th Cir. 2000)).

68. *Id.* at 1061.

69. See generally Joey L. Mogul, *The Dykier, The Butcher, The Better: The State’s Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. CITY L. REV. 473 (2005) (providing evidence that prosecutors capitalize on jurors’ homophobic biases in the capital trials of lesbians).

70. *Id.* at 482. See Joan W. Howarth, *Executing White Masculinities: Learning From Karla Faye Tucker*, 81 OR. L. REV. 183, 211 (2002) (“Most of the women charged with capital murder are not sufficiently feminine—because of poverty, mental illness, race, or the violent agency of the crime of which they are accused, to earn the full protection of womanhood through informal immunity from being charged as capital defendants.”). See also Jenny E. Carroll, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413, 1436 (1997) (“[C]ourts consider[] . . . women’s ability to conform to gender expectations in either initially sentencing them or making decisions to commute or reverse their sentences. . . . [W]omen suffer or benefit from their ability to conform to anticipated gender roles.”). Cf. Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64 (2012) (providing empirical evidence of chivalric norms in jury decisions to impose the death penalty against female defendants).

71. See, e.g., *Wiley v. State*, 427 So. 2d 283, 285 (Fla. Dist. Ct. App. 1983) (“[T]he State elicited the fact that she was a “bull dagger”—a lesbian that assumes the male role during intercourse.”); Adam Buckley Cohen, *Who Was Wanda Jean?*, ADVOCATE, Mar. 13, 2001 (describing the prosecution of Wanda Jean Allen, the first Black woman executed in the United States since 1954. At trial, prosecutors emphasized that Allen went by the masculine nick-name “Gene,” and was the “man” in her relationship); David Kirby, *Was Justice Served?*, ADVOCATE, Feb. 27, 2001 (describing the prosecution’s anti-gay rhetoric at Allen’s trial, including the statement that Allen “wore the pants” in the relationship).

72. Mogul, *supra* note 70, at 483.

73. *Id.* at 473.

74. *Id.* at 474.

the trial, the state rejected the defense's offer to stipulate Mata was a lesbian, instead bombarding the jury with highly prejudicial evidence of her sexual orientation.⁷⁵ In addition, at trial the prosecutor, Assistant State's Attorney Troy C. Owen, explicitly stated: "[w]e are trying to show that [Bernina Mata] has a motive to commit this crime in that she is a hard core lesbian, and that is why she reacted to Mr. Draheim's behavior in this way. A normal heterosexual woman would not be so offended by such conduct."⁷⁶ Mata was subsequently convicted of murder, and a jury sentenced her to death.⁷⁷

2. *Queerfolk as Victims in Criminal Trials*

Jurors' queerphobic attitudes may also arise when the defendant is not queer but the victim is, a scenario often arising in the context of hate crimes. A common defense strategy in such cases involves using evidence of the victim's sexual orientation or gender identity to elicit animus toward the victim and manufacture sympathy for the defendant.⁷⁸

In *Brocksmith v. U.S.*, a jury sentenced defendant Russell Brocksmith to 15 years imprisonment for the assault and attempted robbery of Valerie Villalta, a transgender woman.⁷⁹ At trial, Villalta's transgender status became a central part of Brocksmith's defense when he claimed that Villalta had falsely accused him of robbery to "get even" for his insults on her gender identity.⁸⁰ During opening statements Broderick's defense attorney claimed that "Ms. Villalta fabricated the assault after [Broderick] rebuffed her unwanted sexual overtures and insulted her as he walked past her on the street."⁸¹ While the tactic of raising Ms. Villalta's transgender status ultimately failed in *Broderick*, other cases suggest that defendants believe introducing a victim's gender identity is a potentially viable legal strategy.⁸²

75. At trial, the State offered ten witnesses to testify Mata was a lesbian. *Id.* at 485.

76. *Id.* at 473 (quoting unpublished Transcript of Record at 2133, 2135, *People v. Mata* (Cir. Ct. Boone County, Ill. Oct. 7, 1999) (No. 98-CF-110)).

77. *Id.* at 474.

78. See *infra* notes 94–97 and accompanying text.

79. 99 A.3d 690 (D.C. Cir. 2014).

80. *Id.* at 693.

81. *Id.* at 694. Specifically, the defense alleged that Ms. Villalta sought to get back at Broderick, because his transphobic comments "cut deep . . . to the core of who she was." *Id.* at 693 n.4.

82. See e.g. *Jordan v. State*, NO. 01-14-00721-CR, 2015 Tex. App. LEXIS 11491 (Nov. 5, 2015), where a defendant suggested that introducing a victim's transgender status would have made his conviction less likely. There, a jury sentenced defendant James Jordan to 30 years confinement after he forced entry into the home of Lupe Valdez, begun removing her clothes, and threatened sexual violence against her. On appeal, Jordan argued that the State's failure to reveal that Valdez was transgender "denied him a fair trial," *Id.* at 12. According to Jordan, "Valdez's transgender status would have made a difference in his trial," because "the prosecution's painting of the

“Panic defenses”⁸³ are also another avenue through which jurors’ queerphobic biases affect trials. The quintessential “gay panic” case is one wherein a heterosexual man is charged with murdering a gay man, and the “trans panic” defense is the analog in for murders of transwomen.⁸⁴ In either case, the defendant (likely to be heterosexual and male) claims provocation—that he killed the gay man or transwoman as the result of an unwanted sexual advance.⁸⁵ Underlying these defenses is the societal belief that a defendant can be partially excused if a different but still reasonable person would have become similarly inflamed by similar events.⁸⁶ To prevail on such a defense the defendant must convince a jury that it is reasonable for a heterosexual man enact violence upon someone exhibiting unreturned sexual desire for the heterosexual.⁸⁷ Such a belief is necessarily rooted in queerphobic bias.⁸⁸ Estimates suggest such panic defenses have been used in around forty-five cases,⁸⁹ but this figure may not account for cases where the defense is raised implicitly.⁹⁰ Some

complainant as a ‘damsel in distress’ may have been rebutted with testimony, medical records and cross-examination as well as other inquiry into the motives and mens rea of Appellant vis-à-vis the complainant . . . ” *Id.* at 15–17. Further, Jordan contended that he would have introduced Valdez’ transgender status, and would have argued “impossibility, mistake, or heat of passion.” *Id.* at 13.

83. See generally Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 475 (2008) (documenting the use of gay panic defenses—the excuse that the victim’s unwanted homosexual advance constituted provocation which sent the defendant into a violent emotional state or “heat of passion,” thereby mitigating a murder charge to the lesser offense of manslaughter.)

84. See generally Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77 (2014) (documenting the use of “trans panic” defenses—the excuse that the revelation that the victim was transgender constituted provocation and sent the defendant into a violent emotional state).

85. Lee, *supra* note 84.

86. See Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 754–55 (1995) (discussing the theoretic underpinnings of panic defenses).

87. See J. Kelley Strader et al., *Gay Panic, Gay Victims, and the Case for Gay Shield Laws*, 36 CARDOZO L. REV. 1473, 1501 (2015) [hereinafter *Gay Shield Laws*].

88. For example, Cynthia Lee argues gay panic defenses “seek to capitalize on unconscious bias in favor of heterosexuality that is prevalent in today’s heterocentric society.” Lee, *supra* note 84, at 476. Lee also makes the point, “[a] man who responds to a (homo)sexual advance with deadly violence claims he acted as the average heterosexual man would have acted. A woman who tries to make a similar claim would find it extremely difficult to succeed.” *Id.* at 510. Similarly, Kara Suffredini argues: “our legal system does not accept ‘race panic,’ ‘gender panic,’ or ‘heterosexual panic’ as culpability-reducing defenses to violence against people of color, women, and heterosexuals.” Kara S. Suffredini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 310 (2001).

89. See David Alan Perkiss, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons From the Lawrence King Case*, 60 UCLA L. REV. 778, 780 (2013).

90. For instance, J. Kelly Strader et al., point out that introducing inflammatory

scholars have called panic defenses a “judicial institutionalization of homophobia”⁹¹ and believe that they resonate with juries because of the prevalence of negative stereotypes about queer persons as sexual predators.⁹² A recent study examining the gay panic defense further supports the belief that the success of these defenses are fueled in part by juror’s queerphobic biases.⁹³

Beyond relying on negative stereotypes that infuse the trial with queerphobic bias, queer panic defenses often lead to the admission of prejudicial and inflammatory evidence that courts allow as proof of the victim’s sexual orientation.⁹⁴ Such evidence may distract the jury from its task of objectively evaluating the evidence, and,⁹⁵ in some cases, the admission of such evidence has led to reduced sentences and acquittals of defendants who have committed crimes against queer victims.⁹⁶

The trial of fourteen-year-old Brandon McInerney for the murder of fellow E.O. Green Middle School student Lawrence “Larry” King is one such case. Larry King was a queer teenager, self-identified as gay.⁹⁷ King reportedly dressed and behaved in a gender-nonconforming manner.⁹⁸ After King and McInerney engaged in a verbal altercation, McInerney brought a hand gun to school,⁹⁹ shot King twice in the back

evidence of a victim’s sexual orientation or using dog-whistle rhetoric may have the same effect of eliciting juror animus towards the queer victim, though the panic defense is not explicitly raised. *See Gay Shield Laws*, *supra* note 88 at 1477–78.

91. Robert B. Mison, Note, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 136 (1992).

92. Lee, *supra* note 84, at 512–13.

93. The researchers asked participants to read vignettes depicting control and gay panic conditions. Participants were then asked to provide verdicts, and ratings of victim blame and responsibility. The research also measured participants’ levels of homonegativity and political orientation. *See Jenna Tomei et al., The Gay Panic Defense: Legal Defense Strategy or Reinforcement of Homophobia in Court?*, J. INTERPERSONAL VIOLENCE 1, 17 (2017), <http://journals.sagepub.com/doi/pdf/10.1177/0886260517713713> (finding that participants who registered higher degrees of homonegativity were more likely to assigned higher levels of victim blame, lower defendant responsibility, and assigned more lenient verdicts).

94. *See, e.g., Russell v. State*, 522 So. 2d 969 (Fla. Dist. Ct. App. 1988) (discussing the trial court’s decision to allow evidence that the murder victim had AIDs in order to corroborate his identity as a gay man, and support the defense’s gay panic defense). *See generally* SEXUAL ORIENTATION AND THE LAW 36–38 (Harvard Law Review Ass’n eds., 1990) (collecting examples of courts allowing evidence of a victim’s sexuality in gay panic defense cases).

95. Mison, *supra* note 92, at 169 (“The introduction of highly prejudicial and often irrelevant evidence in homosexual-advance cases also diverts the fact finders’ attention.”).

96. SEXUAL ORIENTATION AND THE LAW, *supra* note 95, at 36 (collecting cases).

97. *See Gay Shield Laws*, *supra* note 88, at 1475 n.7.

98. *See id.* at 1473 (reporting that King had feminine mannerisms and sometimes wore jewelry, makeup, and women’s clothes).

99. *Id.* at 1484.

of the head, put the gun down and ran out of the classroom.¹⁰⁰ King died two days later.¹⁰¹

At trial, the defense focused on King's identity and behavior as a queer person.¹⁰² The defense argued that that King had sexually harassed McInerney, publicly humiliated him, and pushed him to his "emotional breaking point."¹⁰³ In rebuttal, prosecutor Maeve Fox asked the jury to set aside any queerphobic biases they may have.¹⁰⁴ Ultimately, after seventeen hours of deliberations, the jury of three men and nine women could not come to a consensus on whether McInerney should be convicted of voluntary manslaughter or murder, and the judge declared a mistrial.¹⁰⁵

The jurors' actions after the trial support the conclusion that the verdict was based, at least in part, upon queerphobic sentiments. In a post-trial interview, one juror appeared to admit that she was unable to set aside her biases during deliberations.¹⁰⁶ Subsequently, another juror characterized the victim as a "deviant" in a letter to the district attorney.¹⁰⁷ Finally, in a documentary about the trial, one female juror suggested that if Larry had suppressed his gender non-conforming behavior, he would not have been killed.¹⁰⁸ Instead of being sympathetic to Larry, she asked, "where are the civil rights of the one who is being taunted by a person who is cross-dressing?"¹⁰⁹

3. *Queerfolk as Third-Parties in Criminal Trials*

Juror queerphobia also affects queer witnesses, lawyers and jurors at trial in addition to queer defendants and victims. In some cases attorneys have used a witness' queer identity as means of disputing their credibility. For example, in *United States v. Santos* a defendant offered evidence of a witness's lesbianism in order to impute bias, thereby discrediting her

100. *Id.* at 1485.

101. *Id.*

102. *Id.* at 1488.

103. *Id.* at 1488–1490. This argument evoked the previously discussed stereotypes of queerfolk as sexually aggressive. See text accompanying *supra* note 93.

104. *Gay Shield Laws*, *supra* note 88, at 1492.

105. *Id.* at 1493.

106. See AmericanNetworkNews, *Hung Jury in Murder Trial of Brandon McInerney Who Shot Gay Classmate Larry King in California*, YouTube at 2:13 (Sept. 15, 2011), <https://www.youtube.com/watch?v=9ucOuwe8sY> (Interviewer: "We are supposed to leave all our personal stuff outside that courtroom." Juror: "It's impossible—I mean for the most part we are supposed to decide based on the evidence provided you know as they instructed us but you can't help but to notice this kid." The jurors went on to call McInerney's retrial a "tragedy.") (last visited Nov. 1, 2017).

107. *Gay Shield Laws*, *supra* note 88, at 1477 (quoting Letter from Lisa S., Juror No. 11, to Gregory D. Totten, Dist. Attorney, Ventura Cty. (Sept. 28, 2011)).

108. See VALENTINE ROAD at 1:12:45 (Bunim-Murray Prod.'s & Eddie Schmidt Prod.'s 2013).

109. *Id.*

testimony.¹¹⁰ The fact that juror queerphobia may discredit witnesses is also supported in a study of homophobia in the California Court system, which found anecdotal evidence of jurors using witnesses perceived queerness as grounds for discounting them.¹¹¹

In other cases queerphobia has been used to discredit attorneys. For instance, in 2001 Marjorie Knoller was infamously tried for the death of Dianne Whipple, a lesbian, who was killed after being attacked by Knoller's dogs.¹¹² At trial the defense sought to undermine the prosecutor by insinuating that he was improperly interested in the case because he was gay.¹¹³ Knoller was ultimately convicted of second-degree murder.¹¹⁴

Imputations of queer identity can even be used to discredit other jurors. Consider the case of *Wing Shung Lam v. Chung-Ko Cheng*.¹¹⁵ There, the First Department of the Supreme Court of New York set aside a jury verdict, in part, because of jury queerphobia.¹¹⁶ During tumultuous deliberations, several jurors falsely accused the jury foreman of "having engaged in a 'homosexual encounter' with plaintiff's counsel in a courthouse bathroom."¹¹⁷

110. See *United States v. Santos*, 201 F.3d 953, 964 (7th Cir. 2000) (where the defendant was a supporter of a major anti-queer political candidate, and introduced the witness' lesbianism to imply her testimony was not impartial).

111. Survey responses noted a "jury member suggested that witness was gay and therefore his testimony could not be trusted," and another stated "I was discredited as a witness because they said I was probably 'out at a club or something' before I witnessed the accident." See Todd Brower, *Homophobia in the Halls of Justice: Sexual Orientation Bias and its Implications Within the Legal System Obstacle Courts—Results of Two Studies on Sexual Orientation Fairness in the California Courts*, 11 AM. U. J. GENDER SOC. POL'Y & L. 39, 46 (2003) (quoting Dominic J. Brewer & Maryann Jacob Gray, Survey Data, Preliminary Report Draft 3/31/99, reported in 4/9/99 materials of the Subcommittee on Sexual Orientation Fairness 8 (1999)). *But see* Lisa Olson, *Assessing Sexual Orientation Bias in Witness Credibility Evaluations in a Sample of Student Mock Jurors*, 14 JUST. POL'Y J. 1, 17–20 (2017), http://www.cjck.org/uploads/cjck/documents/assessing_sexual_orientation_bias.pdf (finding no significant effect of witness sexual orientation on mock jurors' assigned credibility, but finding that Lesbian witnesses were viewed as the least credible).

112. See *People v. Knoller*, 158 P.3d 731 (Cal. 2007) (discussing underlying trial in *People v. Knoller*, No. 18181301, Super. Ct. S.F. Cty.).

113. John Gallagher, *Homophobia for the Defense*, ADVOCATE, May 14, 2002, at 34, 34 (quoting defense attorney Nedra Ruiz: "What is the prosecution's excuse for keeping this evidence from you? . . . Maybe he wants to curry favor with the homosexual and gay folks who were picketing 2398 Pacific [the apartment building in which Whipple lived with her partner, Sharon Smith] and demanding justice for Diane Whipple. Maybe that's his motivation for hiding this from you."). *Id.* at 36.

114. See Barbara Kate Repa, *Dog Mauling Conviction Affirmed Again*, NEW FILLMORE (Feb 6, 2016) <http://newfillmore.com/2016/02/06/dog-mauling-conviction-again-affirmed>.

115. *Wing Shung Lam v. Chung-Ko Cheng*, 762 N.Y.S.2d 759 (N.Y. App. Term 2003), *rev'd*, 773 N.Y.S.2d 303 (N.Y. App. Div. 2004).

116. *Id.* at 549.

117. *Id.* at 539.

4. *Queerfolk as Litigants in Civil Trials*

This Part considers the effects of juror queerphobia in civil trials, by focusing on damage awards in cases in which the litigant is queer. The reasons for focusing on damage awards are threefold. First, monetary awards provide an objective measure that is easily comparable across queer and non-queer cases. Second, the lack of detailed jury instructions for calculating noneconomic damages makes them ideal for measuring the existence and effects of juror queerphobia. Conditions of uncertainty and discretion facilitate discrimination, and therefore we can expect disparities in noneconomic damage awards to display any queerphobic biases jurors have. And, finally, by focusing on jury damage awards, this Part adds to the body of scholarship documenting disparities in damage awards to women and people of color.

At the time of this writing, no studies have examined the effects of queerphobic bias on civil trial damages awards, and little anecdotal evidence exists.¹¹⁸ Nonetheless, studies conducted on the effects of racial and gender biases in civil trials suggest that queerphobic bias may affect civil juries in addition to criminal ones. This Part will therefore begin by examining studies on racial and gender bias in civil trials to establish a baseline understanding of how biases affect civil trial juries generally. This Part then proceeds by extending the conclusions and principles, where appropriate, to the queer context in order to try and explain how anti-queer bias may affect civil trials.

While juries in civil trials serve many functions, undoubtedly one of the most common is the calculation of relief awards. Jurors in civil cases may award three kinds of relief: economic damages, noneconomic damages, and punitive damages.¹¹⁹ Economic damages compensate plaintiffs for harms that are effable in monetary terms, including the loss of past or future income, the incurrence of medical bills, and property loss.¹²⁰ Non-economic damage awards compensate plaintiffs for injuries inexpressible in economic terms, including, but not limited to, pain and suffering, emotional distress, loss of consortium, loss of parental guidance, loss of society, disfigurement, and loss of enjoyment of life.¹²¹ Finally,

118. See, e.g., *Carrington v. Depaoli*, NO. COA11-1566, 2012 N.C. App. LEXIS 1107, at *12 (N.C. Ct. App. 2012) (noting a gay appellant's contention that "Defendants' counsel improperly told the jury in closing argument that it could consider [his] 'alternative lifestyle,' which [he] contends meant his homosexual lifestyle, in their deliberations."); Nicolas, *supra* note 15, at 835-842 (2003) (discussing case examples of civil trials where evidence of a litigant's sexual orientation was raised).

119. See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 519 (10th ed. 2000) [hereinafter PROSSER, WADE AND SCHWARTZ'S TORTS].

120. *Id.* at 530. See also Herbert M. Kritzer et al., *An Exploration of "Noneconomic" Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 974 (2014).

121. Kritzer et al., *supra* note 121, at 974.

punitive damage awards seek to punish a defendant for her conduct and deter others from engaging in similar conduct.¹²²

a. *Economic Damages and Queerphobia*

Juror bias can affect the amount of damages awarded for a number of reasons.¹²³ For example, jury bias against racial and ethnic minorities, as well as to women results in lower jury damage awards.¹²⁴ Some commentators have suggested that these disparities are attributable to the use of objective future expectancy data in the calculation of economic damages—that is the disparities in economic damage awards are the result of real-life gender and racial gaps in earnings.¹²⁵ The theory is that because of the gender wage gap, and racial income inequality, any future income estimates calculated based on the average earnings of members of these groups replicates existing disparities.

Examining jury calculations of loss of future income, Professors Martha Chamallas and Jennifer Wiggins have documented that gender and race-based data tables are used to determine an individual's work life expectancy and estimated yearly income.¹²⁶ By using these generalized gender and race-based tables in the calculating loss of future earning capacity, they find that juries replicate “historical patterns of wage discrimination in the labor market.”¹²⁷ The Professors give several illustrations of how the use of race and gender-based economic data results in significantly lower awards for minority and female plaintiffs, ultimately undervaluing injuries that primarily affect minority communities.¹²⁸

122. PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 120, at 519.

123. *See, e.g.*, Robert K. Bothwell et al., *Racial Bias in Juridic Judgment at Private and Public Levels*, 36 J. APPLIED SOC. PSYCHOL. 2134, 2144 (2006) (finding White mock jurors placed more blame, and gave lower damages amounts to Black plaintiffs than White ones); Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445 (1999) (finding mock jurors awarded geographically remote plaintiffs less than local plaintiffs).

124. *See generally* Loren D. Goodman, Note, *For What It's Worth: The Role of Race- and Gender-Based Data in Civil Damages Awards*, 70 VAND. L. REV. 1353 (2017) (collecting cases and literature on the disparities caused by using race and gender objective data).

125. *See, e.g., id.*; Nicolas, *supra* note 14, at 839 (highlighting the routine use of race and gender based statistical tables, and discussing life expectancy tables displaying lower life expectancy for African Americans, and wage earning tables showing lower earnings for women).

126. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 159 (2010).

127. Chamallas & Wiggins give the following example: historically, women have traditionally left the labor force to raise children. *Id.* Using gender-based work life tables would continue to assume that women work fewer years than men. *Id.*

128. *Id.* at 159–60 (discussing the use race-based economic data in calculating damages in lead paint litigation). *See also* Goodman, *supra* note 125, at 1354 (illustrating racial and gendered award disparities in lead paint poisoning trials).

Based upon these findings, there are many ways in which queer identity could result in similar discrepancies in jury economic damages awards. Recent studies have found that gay men and lesbians generally have higher incomes than their heterosexual counterparts.¹²⁹ Nonetheless, any wage advantages that gays and lesbians experience will likely be lost in the use of objective future expectancy data. When a jury calculates economic damages for queer parties, the objective data tables selected will probably classify the litigants based on their racial or ethnic groups, and gender.¹³⁰ The use of racial and gendered generalized statistics, rather than a queer litigant's individualized circumstances could harm gay and lesbian litigants, since comparing a lesbian plaintiff to her generalized racial and gender cohorts would likely result in under-calculated damage awards. In contrast, using statistics based on generalized cohorts for cases involving transgender plaintiffs may lead to over-calculated damage awards, since studies suggest transpersons experience wage penalties when compared to their non-transgender counterparts.¹³¹

129. See Christopher S. Carpenter & Samuel T. Eppink, *Does It Get Better? Recent Estimates of Sexual Orientation and Earnings in the United States*, 84 S. ECON. J. 426 (2017) (finding that self-identified lesbians earned significantly more, and gay men earned ten percent more than their heterosexual counterparts); Robin Fisher, Geof Gee & Adam Looney, *Joint Filing by Same-Sex Couples After Windsor: Characteristics of Married Tax Filers in 2013 and 2014*, at 11 (Office of Tax Analysis, Working Paper No. 108, 2016) (examining joint tax returns of LGB couples and finding that gay couples had an average adjusted gross income of \$176,000, compared to lesbian couple's average of \$124,000, and heterosexual couple's \$113,000). See also Heather Antecol et al., *The Sexual Orientation Wage Gap: The Role of Occupational Sorting and Human Capital*, 61 INDUS. & LAB. REL. REV. 518 (2008) (finding lesbians earn more than their heterosexual counterparts regardless of marital status, whereas homosexual men earned less than comparable married heterosexual men, but more than cohabiting heterosexual men); Mareika Klawitter, *Meta-Analysis of the Effects of Sexual Orientation on Earnings*, 54 INDUS. REL. 4, 13 (2015) (conducting a meta-analysis on homosexual wage differential studies and finding, "studies found, on average, that gay men earned 11 percent less than did heterosexual men although the estimates ranged from 30 percent less to no difference. Studies, on average, found that lesbians earned 9 percent more than heterosexual women and the range . . . from 25 percent to 43 percent more"). But see Sylvia A. Allegretto & Michelle M. Arthur, *An Empirical Analysis of Homosexual/Heterosexual Male Earnings Differential: Unmarried and Unequal?*, 54 INDUS. & LAB. REL. REV. 631 (2001) (finding wage differentials for unmarried partnered homosexual men of 15.6 percent less than similar married heterosexual men, and 2.4 percent less than similar unmarried partnered heterosexual men); M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726 (1995) (finding that behaviorally gay and bisexual men earned 11 to 27 percent less than their heterosexual counterparts, controlled for experience, marital status, geographical residence and education).

130. See Goodman, *supra* note 125, at 1361 ("[M]any commonly used life tables present [] data according to race, gender, and combinations of race and gender."). Indeed life tables that are queer specific do not exist at this time.

131. STEPHEN D. SUGARMAN, *Tort Damages for Non-economic Losses (in Cases of Physical Injury to the Person)*, in *COMPARATIVE TORT LAW: GLOBAL PERSPECTIVES* 202 (M. Bussani & A. Sebok eds., 2014). See Lydia Geijtenbeek & Erik Plug, *Is There*

In some economic damage calculations the jury may consider the plaintiff's specific background—including individualized prior injuries and specific health defects—in addition to generalized statistics about identity groups to which the plaintiff belongs. But even if the court decides to incorporate plaintiff-specific information, this could also serve to decrease the queer litigant's damage awards. Professor Peter Nicolas has made the point that statistics suggest a shorter life expectancies, lower employment participation, and less employment retention for queer persons, all of which could factor in the calculation and reduction of economic damages.¹³²

Another complication involves intersectional and multidimensional identities.¹³³ Queer persons may fall at the intersections of multiple minority statuses—including different racial and ethnic groups. Consequently, the identities considered in the calculation of economic damages may either harm or help the queer litigant.¹³⁴ To illustrate, in calculating economic damages for a Black-gay litigant the jury could arguably compare him to similarly situated men, Black persons (both genders),

a Penalty for Registered Women? Is There a Premium for Registered Men? Evidence From a Sample of Transsexual Workers, EUR. ECON. REV. (forthcoming 2018) (finding evidence of a 'transition' wage penalty for male to female transsexual workers); Kristen Schilt & Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, 8 B.E. J. ECON. ANALYSIS & POL'Y (2008) (finding that Male to Female (MTF) transgender worker's average earnings fall by nearly 1/3 following their gender transitions).

132. See Nicolas *supra* note 15, at 837 (making the argument that "a defendant might point to statistics that state that gay men are more likely than straight men to contract HIV, or that gay people are more likely to have drinking problems, smoke, or use illicit drugs, all of which would affect life expectancy and employment participation and retention").

133. For a detailed explanation of intersectionality, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). In the years following Crenshaw's seminal article, scholars have applied the concept to the interaction of heterosexism, poverty, and racial subordination to originate the "multidimensionality" paradigm. See Darren Lenard Hutchinson, "Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358 (1999).

134. See Jamie H. Douglas & Michael D. Steinberger, *The Sexual Orientation Wage Gap for Racial Minorities*, 54 INDUS. REL. 59, 68 (2015) (finding white and Asian same-sex male couples earn less than married men of the same race yet more than cohabiting men, gay black and Hispanic men make more than both their married and cohabiting counterparts, and regardless of race, lesbian women earn more than heterosexual women). *But see* Lisa Saunders, Lee Badgett & Gary Gates, *Double Disadvantage? African American Same-Sex Couples: Evidence from Census 2000*, (Williams Inst., Working Paper, 2006) (finding that black-gay male couples earn 10–16 percent less than their white-gay counterparts, and 5 percent less than their black-heterosexual male counterparts. Amongst lesbians, black-lesbian couples earned 9–10 percent less than their white-lesbian counterparts, and 5 percent less than their black-heterosexual counterparts).

Black men, gay persons, or Black-gay men, producing a range of possible outcomes.¹³⁵

b. *Noneconomic Damages and Queerphobia*

Noneconomic damages are calculated according to subjective assessments of non-pecuniary harms, such as pain and suffering.¹³⁶ These damages may be at higher risk for having their determination or valuation influenced by jurors' queerphobia. In determining the value of a victim's pain and suffering, jurors are afforded great discretion, which is often accompanied by a certain degree of uncertainty.¹³⁷ Social psychology research suggests that such uncertainty and discretion facilitate discrimination.¹³⁸ The uncertainty, discretion, and the lack of detailed instructions, open the jury room to extraneous biases.¹³⁹

Discrepancies in the amounts awarded for pain and suffering between plaintiffs of different races and genders support the conclusion that extrajudicial juror biases affect noneconomic damage awards. For instance, bias against racial and ethnic minorities has been shown to impact noneconomic injury awards. In the first large-scale study analyzing the outcomes of more than 9,000 civil jury trials in Cook County, Illinois, researchers found that a litigants' race had a "pervasive influence on the outcomes of civil jury trials."¹⁴⁰ The study found that Black plaintiffs won less often than White plaintiffs, and, when they did win, Black plaintiffs on average received seventy-four percent of the amount civil juries awarded White plaintiffs.¹⁴¹ In another study, researchers identified

135. See sources cited, *supra* note 135. The outcomes are further complicated by studies suggesting that black-gay men face less discrimination than their individual black and gay counterparts—suggesting the effect of intersectionality. This would potentially lower the effect of systematic discrimination in comparison to their heterosexual counterparts. See David S. Pedulla, *The Positive Consequences of Negative Stereotypes: Race, Sexual Orientation, and the Job Application Process*, 77 Soc. PSYCHOL. Q. 75, 89 (2014) (finding that stereotypes about gay men interacted with stereotypes about black men to produce positive results for black-gay men, in a study manipulating the race and sexual orientation of fictitious applicants).

136. SUGARMAN, *supra* note 132.

137. See Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 PSYCHOL. PUB. POL'Y & L. 743, 747 (2000) (concluding that instructions for damage calculations are "notoriously vague").

138. See Erik Girvan & Heather J. Marek, *Psychological and Structural Bias in Civil Jury Awards*, 8 J. AGGRESSION, CONFLICT & PEACE RESOL. 247 (2016) (summarizing social psychological findings indicating that psychological biases operate under ambiguity).

139. See Joseph H. King Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 176 (2004) (describing pain and suffering awards as "subject to the influence of extrajudicial factors, such as race, gender, and social and physical attractiveness").

140. Audrey Chin & Mark A. Peterson, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* viii (1985).

141. *Id.*

plaintiff race by relying on probability estimates based on census data¹⁴² and examined the awards in 1,133 civil cases that included awards for pain and suffering. The authors found that jurors “tend to award black plaintiffs approximately 41 percent of the amount of pain and suffering damages as white plaintiffs” even when controlling for total economic damages.¹⁴³ Both studies support the conclusion that jurors’ biases result in lower noneconomic damage awards in civil trials.

Damage awards may also be depressed because of the close relationship between economic and noneconomic damage calculations. Economic damages serve as a significant predictor of noneconomic damages.¹⁴⁴ Therefore any bias that infects the calculation of economic damage awards will be replicated in the calculation of noneconomic damage awards. If queerphobic biases lower economic damages awards as previously discussed,¹⁴⁵ then we can expect noneconomic damage awards for queerfolk to also be lower.

Queerphobic prejudice correlates with higher levels of victim-blame, which may bias jurors’ subjective decisions relating to non-economic damages. Previous studies of civil trials have found a general anti-plaintiff bias amongst jurors,¹⁴⁶ and have found that jurors are often skeptical of civil plaintiffs’ motives.¹⁴⁷ When jurors begin to blame plaintiffs, the amount of damages eventually awarded decreases.¹⁴⁸ This may be particularly troubling in the case of queer litigants since studies examining queerphobia and victim-blame have consistently found that prejudice against queerfolk correlates with higher levels of blame attribution to queer victims.¹⁴⁹ This suggests that jurors with queerphobic biases may

142. See Girvan & Marek, *supra* note 139, at 251. The research used U.S. Census Bureau Genealogy Project data that “includes each surname shared by at least 100 individuals, and the proportion of respondents with that surname who identified as a member of each of the racial categories. For example, 96.03 percent of individuals with the name Olson identified as White.” *Id.*

143. *Id.*, at 251–53.

144. Valerie P. Hans & Valerie F. Reyna, *To Dollars From Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. 120, 141–42 (2011) (“In both judge and jury trials, the economic damage award reached by the decision-maker is a significant predictor of the noneconomic damages,” but is “a slightly stronger determinant of the noneconomic damage award for juries as compared to judges”).

145. See *supra* text accompanying notes 131–136.

146. See, e.g., Valerie P. Hans & William S. Lofquist, *Jurors’ Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion*, 26 LAW & SOC’Y REV. 85, 93 (1992) (finding jurors skeptical of the motivations and actions of plaintiffs).

147. Bothwell, *supra* note 124, at 2135.

148. VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 39 (2000).

149. See, e.g., Christopher J. Lyons, *Stigma or Sympathy? Attribution of Fault to Hate Crime Victims and Offenders*, 69 SOC. PSYCHOL. Q. 39, 50 (2006) (presenting the findings from a vignette study indicating that more negative attitudes towards lesbians and gays were associated with increased victim blame attribution); Dexter M. Thomas

attribute more blame to queer litigants, thereby increasing their skepticism and in-turn lowering damage awards.

5. *The Pervasive Effects of Queerphobia at Trial*

The minority of potential jurors likely to express queerphobic biases is significant enough to warrant concern; and the number of individuals subject to implicit biases against queerfolk is infinitely greater. These biases operate dynamically; distorting justice in different ways depending on the queer party's role in a variety of cases. These include criminal cases where the accused's or victim's sexual orientation or gender identity may become known to the jury, civil cases where the plaintiff's queer identity may be discovered, and cases that involve queer witnesses or attorneys. It is therefore important to recognize, acknowledge, and actively combat juror queerphobia in a wide swath of cases. The following Part considers why the trial procedures expected to safeguard against juror biases may fail to inoculate against the queerphobic biases described.

II. *VOIR DIRE'S FAILURE TO DETECT & REMOVE QUEERPHOBIC JURORS*

Having discussed the existence and effects of juror queerphobia, this Part now begins to chart the Note's sole prescriptive claim that the *Pena-Rodriguez* exception should extend to cases of blatant juror queerphobia.

The holding in *Pena-Rodriguez* was based, in part, upon the failure of key procedural safeguards to detect and remove a juror's racial biases.¹⁵⁰ There, the majority noted that defendants have several defenses against juror bias, including: "*Voir dire* at the outset of trial, observation of juror demeanor and conduct during the trial, juror reports before the verdict, and nonjuror evidence after trial."¹⁵¹ The court also suggested that jury instructions might also serve to remind jurors of their duty to remain impartial and to reduce the potential for juror biases to affect deliberations.¹⁵² However, the court acknowledged that safeguarding mechanisms could be compromised or insufficient.¹⁵³ For instance, generalized questions during *voir dire* may fail to expose "specific attitudes or

et al., *Anti-transgender Prejudice Mediates the Association of Just World Beliefs and Victim Blame Attribution*, 17 INT'L J. TRANSGENDERISM 176, 180–81 (2016) (finding higher levels of genderism (the belief in two genders) and transphobia were associated with higher levels of transgender victim blaming). See also Karyn M. Plumm et al., *Victim Blame in a Hate Crime Motivated by Sexual Orientation*, 57 J. HOMOSEXUALITY 267, 276 (2010) (finding evidence that mock jurors with higher support for gay community members were less likely to blame LGB victims).

150. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868–69 (2017).

151. *Id.* at 868.

152. *Id.* at 871.

153. *Id.* at 868.

biases that can poison jury deliberations,”¹⁵⁴ but overly specific questions might “exacerbate whatever prejudice might exist without substantially aiding in exposing it.”¹⁵⁵ Similarly, expecting a juror to report another’s bias before the verdict was unlikely to work.¹⁵⁶

This Part will focus specifically on one safeguard—*voir dire*—because of its central role in uncovering juror bias, and because of the other procedural safeguards’ failure to detect and remove socially-unacceptable biases such as those against racial and sexual minorities.¹⁵⁷ As other scholars have noted, “[i]t is often said that a trial is won or lost at the jury selection stage.”¹⁵⁸ Indeed as the Court referenced in *Pena-Rodriguez*, *voir dire* is the earliest safeguard against juror bias, and serves the most prominent gate-keeping function to remove bias at the outset of trial.¹⁵⁹ The capability of *voir dire* to remove juror bias is further evinced by Supreme Court precedent requiring “that defendants be permitted to ask questions about racial bias during *voir dire*.”¹⁶⁰ In addition, other tools that may reduce juror bias at trial, including diverse juries¹⁶¹ or salience¹⁶² are outside the

154. *Id.* at 869.

155. *Id.* at 869 (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 195 (Rehnquist, J., concurring)).

156. *Id.* at 869. (“The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case. . . . It is quite another to call her a bigot.”).

157. *See id.* at 869 (reasoning that the stigma associated with racial bias renders safeguards like juror reports prior to the verdict “compromised . . . or insufficient.”). Indeed, as Justice Kennedy noted, reporting a fellow juror’s racist statements may be viewed as “call[ing] her a bigot.” *Id.*

158. *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C.L. REV. 1555, 1590 (2013); *Id.* at 1590 n.223 (quoting Herald Price Fahringer, “*Mirror, Mirror on the Wall . . .*”: *Body Language, Intuition, and the Art of Jury Selection*, 17 AM. J. TRIAL. ADVOC. 197, 197 (1993) as “noting that ‘[a]cknowledged experts in the field believe that eighty-five percent of the cases litigated are won or lost when the jury is selected.’”); Herald Price Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, 43 LAW & CONTEMP. PROBLEMS 116, 116 (1980) (“Jury selection is the most important part of any criminal trial. If a lawyer has a difficult case, but succeeds in obtaining a jury sympathetic with his client’s cause, the chances of winning improve substantially.”); Cathy E. Bennett et al., *How to Conduct a Meaningful & Effective Voir Dire in Criminal Cases*, 46 SMU L. REV. 659, 659 (1993) (“Effective and skillfully conducted *voir dire* is the most important ingredient in willing a trial”).

159. *Pena-Rodriguez*, 137 S. Ct. at 866.

160. *Id.* at 868.

161. *See, e.g.*, Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERS. & SOC. PSYCHOL. 592 (2006) (suggesting that racially diverse juries reduces juror bias).

162. *See, e.g.*, Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 861 (2015) (suggesting that “making salient the potential racism of juror’s attitudes[,]” can lessen jurors racial biases); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 480 (2008) (extending research on salience and racial bias to the context of sexual orientation bias).

scope of this Note.¹⁶³ A discussion of whether *voir dire*, as it is currently used, is a sufficient safeguard against juror queerphobia follows.

A. *When is Inquiry Into Jurors' Attitudes Towards LGBTQ+ Issues Necessary?*

As demonstrated, even when a case does not directly involve queer issues, queerphobic bias may infect jury deliberations and verdicts.¹⁶⁴ Inquiry into jurors' attitudes towards queer persons is therefore appropriate in a variety of cases, many of which will involve legal issues entirely unrelated to identity politics and queerness.¹⁶⁵ These include civil and criminal disputes, whether litigated, unresolved, or resolved by alternative means of resolution.¹⁶⁶

Whether there is a risk of queerphobic juror bias infecting jury deliberations and therefore a heightened need for an inquiry into queerphobic bias, will depend upon whether the jury becomes aware that or believes that a party is queer. Presumably, if throughout the case a juror cannot tell or does not believe that any party is queer, queerphobia will not affect the outcome. Ultimately such an awareness will depend on whether the party's sexual orientation or gender identity is "outed" during trial—which is always a possibility, or if the party does not "pass" as straight.¹⁶⁷ Others have suggested that there is little risk of a queer defendant's sexual orientation or gender identity being discovered at trial, arguing that while gender and racial identity are associated

163. Arguably, diverse jury selection will be less feasible since preemptive strikes against LGBTQ+ venire members have not been held unconstitutional. For a detailed discussion, see Kathryn Ann Barry, *Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation*, 16 BERKELEY WOMEN'S L.J. 157 (2001) (arguing for legislative protection against homophobic peremptory strikes); Julia C. Maddera, Note, *Batson in Transition: Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression*, 116 COLUM. L. REV. 195 (2016).

164. See discussion *supra* Part I(B)(1)–(5).

165. See *supra* Part I(B) discussing the wide-ranging consequences of juror anti-gay bias. Professor Giovanna Shay illustrates the range of contexts where *voir dire* on attitudes towards sexual orientation and gender identity could be useful. See Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407, 413–14 (2014); Abbe Smith, *The Complex Uses of Sexual Orientation in Criminal Court*, 11 AM. U.J. GENDER SOC. POL'Y & L. 101 (2002) (exploring ways evidence of party homosexuality may bias juries).

166. See *State v. Edwards*, 219 S.E.2d 249 (N.C. Ct. App. 1975) (upholding trial court inquiry into prospective jurors' prejudices against homosexuality when the state's witnesses were homosexuals or transvestites, to determine if they could impartially consider witness testimony).

167. The term "passing" is used to describe the "social process whereby the [queer individual] presents himself or herself to the world as heterosexual." Raymond M. Berger, *Passing: Impact on the Quality of Same-Sex Couple Relationships*, 35 Soc. WORK 328, 328 (1990).

with visible physical traits and generally easily discernable,¹⁶⁸ queer identity is not.¹⁶⁹

Many disagree with the argument that there is little risk of a juror recognizing a party is queer. Whether jurors will be able to readily determine if a party is queer remains an open question. Scholarship on whether persons can easily visually distinguish between gay and straight persons have come to mixed conclusions.¹⁷⁰ However, recent studies have uniformly found that persons can accurately perceive sexual orientation from observing as little as one second video clips,¹⁷¹ listening to voices,¹⁷² viewing full body photographs,¹⁷³ viewing facial photographs,¹⁷⁴ and even viewing isolated facial traits such as the eyes.¹⁷⁵ Related scholarship examining transpersons' ability to "pass" has also found reported widespread difficulties in transpersons passing in their new gender.¹⁷⁶ These studies suggest that it is very likely that trial juries may become aware of a party's queer identity during trial, bolstering the need for *voir dire* on attitudes towards LGBTQ+ issues, wherever a party identifies as queer.¹⁷⁷

168. See generally LINDA MARTÍN ALCOFF, *VISIBLE IDENTITIES: RACE, GENDER, AND THE SELF* (2006).

169. See Brower, *supra* note 13, at 680 (arguing "most sexual minorities are not identifiable visually, by accent, or surname").

170. Compare Gregory Berger et al., *Detection of Sexual Orientation by Heterosexuals and Homosexuals*, 13 J. HOMOSEXUALITY 83 (1987) (finding little evidence to support accurate detection of sexuality based on observing short videotaped interviews), and Brower, *supra* note 13 at 680 n.60 (stating "contrary to many people's beliefs, heterosexuals often cannot identify lesbians or gay men who do not disclose their sexual orientation"), with *infra* notes 172–177.

171. See Nalina Ambady et al., *Accuracy of Judgments of Sexual Orientation From Thin Slices of Behavior*, 77 J. PERSONALITY & SOC. PSYCHOL. 538, 545 (1999).

172. See, e.g., Rudolf P. Gaudio, *Sounding Gay: Pitch Properties in the Speech of Gay and Straight Men*, 69 AM. SPEECH 30 (1994); J.B. Pierrehumbert et al., *The Influence of Sexual Orientation on Vowel Production*, 116 J. ACOUSTICAL SOC'Y AM. 1905 (2004) (confirming differences in the acoustic characteristics of gay, lesbian, bisexual (GLB) and heterosexual speakers); Gerulf Rieger et al., *Dissecting "Gaydar": Accuracy and the Role of Masculinity-Femininity*, 39 ARCHIVES SEXUAL BEHAV. 124 (2010) (finding accurate perception of sexual orientation from sound recordings, as well as picture and short videos).

173. Rieger et al., *supra* note 173.

174. See Nicholas O. Rule & Nalini Ambady, *Brief Exposures: Male Sexual Orientation Is Accurately Perceived at 50ms*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1100 (2008) (finding sexual orientation correctly characterized at above-chance levels when participants were shown faces for durations between 50ms and 10,000ms).

175. See Nicholas O. Rule et al., *Accuracy and Awareness in the Perception and Categorization of Male Sexual Orientation*, 95 J. PERSONALITY & SOC. PSYCHOL. 1019 (2008) (finding accurate judgements of sexual orientation based on photographs of hair, eyes, and mouth areas).

176. See Schilt & Wiswall, *supra* note 132, at 18 ("56 percent of FTM [female-to-male] respondents describe themselves as 'always' passing as men. In contrast, 17 percent of MTFs [male-to-female] describe themselves as 'always' passing as women.").

177. While beyond the scope of this Note, whether jurors know for certain that a litigant is queer does not necessarily insulate deliberations from queerphobic bias.

B. *The Modern Framework for Voir Dire on Juror Bias*

When deciding whether to conduct *voir dire* on specific biases, a court must first determine whether “juror prejudices are reasonably suspected.”¹⁷⁸ That is, whether there is “a constitutionally significant likelihood that, absent questioning about [the potential] prejudice, the jurors would not be indifferent” to the potentially biasing trait.¹⁷⁹ In addition, courts have recognized a “heightened need” for *voir dire* questioning where “either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact.”¹⁸⁰

Under this framework LGBTQ+ status meets all the threshold requirements for a “heightened need” for *voir dire* questioning. As discussed in Part I, anti-queer biases remain rife in American society, and, therefore, it is improbable that jurors will be “indifferent” toward queer identity.¹⁸¹ Rather, it is more likely that “[t]here will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a . . . [queer] person offensive.”¹⁸² As numerous other courts have reasoned, queerphobia is so pervasive that it should be the rare case with a queer party where a court should not consider conducting *voir dire* questioning on jury attitudes towards LGBTQ+ issues.¹⁸³ Despite this, it is still the infrequent case in which *voir dire* on queerphobic attitudes is conducted. Moreover, when it has been allowed, *voir dire* may still be unsuccessful at removing jurors with anti-queer biases.

If jurors perceive litigants to be queer—whether or not they are—queerphobic bias may still infect jury deliberations and therefore affect the trial’s outcome. *See, e.g., State v. Lovely*, 451 A.2d 900, 902 (Me. 1982) (“[W]e vacate the conviction because of the essential unfairness of allowing a homosexual or one who may be *perceived* to be a homosexual to be tried by a jury whose prejudices concerning homosexuals have not yet been examined.”) (emphasis added); Matt Hamilton, *L.A. Sanitation Worker Taunted Over Perceived Homosexuality Wins \$174-Million Verdict*, L.A. TIMES (June 15, 2017, 9:30 PM), <http://www.latimes.com/local/lanow/la-me-ln-city-discrimination-verdict-20170615-story.html> (detailing a case where a plaintiff was found to have been mistreated, and discriminated against for perceived homosexuality, despite being heterosexual).

178. *See United States v. Bates*, 590 F. App’x 882, 886 (11th Cir. 2014) (quoting *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1037 (11th Cir. 2005)).

179. *See Bates*, 590 F. App’x at 886 (citing *Ristaino v. Ross*, 424 U.S. 589, 596 (1976)).

180. *Bates*, 590 F. App’x at 886.

181. *See supra* notes 31–34.

182. *State v. Ford*, P.2d 245, 250 (Mont. 1996).

183. *See, e.g., United States v. Delgado-Marrero*, 744 F.3d 167, 205 (1st Cir. 2014) (“As evinced in part by the government’s persistence in hammering the largely irrelevant point of Delgado’s same-sex relationship, evidence of homosexuality has the potential to unfairly prejudice a defendant.”); *Tanner v. Oregon Health Sci.’s Univ.*, 971 P.2d 435, 447 (Or. Ct. App. 1998) (“[C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.”).

C. *Why Voir Dire Fails to Detect & Remove Queerphobia*

Voir dire on juror's biases is not constitutionally mandated, despite the theoretical risk that denying inquiry may implicate constitutional Sixth Amendment and due process rights. Instead, inquiry into jurors' prejudices and the scope of such an inquiry remains decisively within the discretion of the trial court.¹⁸⁴ Consequently, seldom have appeals courts reversed decisions based upon the failure to conduct *voir dire* on jurors' biases against queer persons.¹⁸⁵ Undisputed trial court discretion, in tandem with appellate reluctance to reverse, creates an environment in which jurors with anti-queer biases remain largely unquestioned within the justice system.¹⁸⁶

For instance, in *Toney v. Zarynoff's Inc.*¹⁸⁷ a Massachusetts Appellate court affirmed the trial judge's refusal to conduct *voir dire* on possible bias against homosexuality where the plaintiffs, a homosexual couple, argued that the jury would realize the two were homosexuals.¹⁸⁸ The trial judge denied the request, finding that the plaintiff's sexuality was a "totally extraneous issue" which he would "hate to inject" into the case.¹⁸⁹ On appeal, the court admitted that "[t]here is no question that some people do harbor prejudice against homosexuals," and advised lower courts to generously allow *voir dire* into homophobic bias when one of the parties is a homosexual.¹⁹⁰ Despite this advice, the appellate court concluded that "the ultimate decision as to whether the question

184. Shay, *supra* note 166, at 415.

185. *Id.* at 415 n.47 (collecting cases).

186. *Id.* As an additional illustration, consider the following exchange between a prospective juror and defense counsel, in a case where homosexuality might become an issue:

Prospective Juror S: I feel that the homosexual lifestyle is *disgusting*, but I don't think I have any difficulty being objective hearing the evidence.

Defense Counsel: If you hear information about promiscuity, escort services, transgender individuals, are you going to have difficulty separating your feelings, your personal feelings about how that lifestyle is, from your ability to judge the evidence.

Prospective Juror S: No. I don't think so.

Defense Counsel: Could you serve?

Prospective Juror S: Yes.

Defendant challenged prospective Juror S for cause. The trial court denied the challenge, stating, "He did say he could be fair. So based on his representations about his own abilities. I can't excuse him for cause. And perhaps he might be someone you might consider on a peremptory."

People v. McAfee, No. 06CA0987, 2008 Colo. App. LEXIS 2355, at *14 (Colo. App. Aug. 14, 2008). The appellate court ultimately held that the court "did not abuse its discretion in denying the challenge for cause." *Id.*

187. 755 N.E.2d 301 (Mass. App. Ct. 2001).

188. *Id.* at 556.

189. *Id.*

190. *Id.* at 560.

should be asked lies within the judge's sound discretion."¹⁹¹ The plaintiff's motion for a new trial was denied.¹⁹² Likewise, in *United States v. Click*, the Ninth Circuit Court of Appeals upheld a trial court judge's decision to refuse *voir dire* on homosexuality because "it would unnecessarily call attention to Click's effeminate mannerisms."¹⁹³

In the instances where *voir dire* on attitudes towards LGBTQ+ issues is conducted, it is ineffective at detecting and removing jurors with implicit anti-queer biases.¹⁹⁴ Jurors have no incentive to admit their prejudices against queer persons in open court.¹⁹⁵ They may alternatively be unaware of their implicit anti-queer biases¹⁹⁶ or lie about their attitudes towards LGBTQ+ persons.¹⁹⁷ For example, briefly return to the Lawrence King case discussed in Part I.¹⁹⁸ In jury selection, prospective jurors were questioned on their attitudes towards LGBT persons on two separate occasions—once in a juror questionnaire and again in *voir dire* conducted in groups of twelve.¹⁹⁹ The former included the question: "Do you have strong feelings or opinions about homosexuality or gender identity issues that would impact your ability to be a fair or impartial juror in a case involving these issues?"²⁰⁰ Clearly, the post-trial comments indicate that *voir dire* was unsuccessful.²⁰¹ Additionally, consider *People v. Avila*, a case alleging child molestation by a gay defendant.²⁰² During *voir dire*, four jurors brought religious texts with them. Two brought bibles, one brought a Christian devotional, and another brought a Buddhism devotional.²⁰³ In *voir dire*, each juror was asked whether there was anything about their "religious beliefs that would make it difficult or impossible to serve as a juror."²⁰⁴ Each answered "No."²⁰⁵ Nevertheless, post-ver-

191. *Id.* at 561.

192. *Id.* at 565.

193. *United States v. Click*, 807 F.2d 847, 850 (9th Cir. 1987).

194. *Cf.* Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People With Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179 (2003) (explaining why the voir dire process is ineffective at removing biased jurors).

195. *See* Clemens, *supra* note 43, at 97 ("Potential jurors may not be entirely forthcoming about their anti-gay bias, particularly when questioned about anti-gay bias in front of other jurors.").

196. *See* Shay, *supra* note 166, at 434 (suggesting that venire persons may be unaware of, and thus not admit to harboring anti-queer biases).

197. *Cf.* *supra* notes 31–34 and accompanying text.

198. *See supra* Part I(B)(2).

199. Shay, *supra* note 166, at 418 (citing a Telephone Interview with Maeve Fox, Senior Deputy District Attorney, Ventura County District Attorney's Office (June 11, 2013)).

200. Shay, *supra* note 166, at 418.

201. *See supra* notes 107–110 and accompanying text.

202. *People v. Avila*, B229013, 2012 Cal. App. Unpub. LEXIS 2061 (Mar. 19, 2012).

203. *Id.* at *13.

204. *Id.*

205. *Id.*

dict testimony revealed that *voir dire* was insufficient to eliminate juror queerphobia. During jury deliberation, an older male juror made “statements to the effect that Avila [, the defendant,] was a homosexual, that homosexuality was a sin, and that homosexuals had to repent for their sin or else they would go to hell.”²⁰⁶ The juror then opened and pointed to the bible. An elderly female juror then stated that she shared a similar view to the elder juror’s, based on her reading of the bible.²⁰⁷ Clearly, the jurors’ claims of impartiality during *voir dire* were false.

Professor Giovanna Shay has documented that even when *voir dire* identifies venire persons with queerphobic biases, they may not be removed from jury service.²⁰⁸ Instead they are likely rehabilitated. During the rehabilitation process, the court instructs biased venire persons on their duty to remain fair and impartial.²⁰⁹ The venire persons are then repeatedly asked if they can “set aside” their biases.²¹⁰ If they answer affirmatively, the court considers the venire members “rehabilitated” and allows them to serve on the jury.²¹¹

The rehabilitation process is both counterintuitive and ineffective. It is unlikely that jurors who have expressed strong anti-queer beliefs will be able to remain fair and impartial when evaluating the case, despite acquiescing to the judge’s questions.²¹² As the Court recognized in *Irvin v. Dowd*, “[w]here so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.”²¹³ Rehabilitation’s effectiveness is also particularly dubious considering social science findings based upon self-reporting that jurors are not able to set aside

206. *Id.* at *25.

207. *Id.* at *19.

208. *See, e.g., Owens v. Hanks*, No. 96-1124, 1996 U.S. App. LEXIS 15465, at *5 (7th Cir. Jun. 25, 1996) (finding jurors who expressed biases set them aside and rendered a fair verdict, where two jurors admitted “they would be less likely to believe a homosexual.”); Shay, *supra* note 166, at 428–434 (discussing the common practice of rehabilitating jurors who have expressed queerphobic bias).

209. *See Amanda R. Wolin*, Note, *What Happens in the Jury Room Stays in the Jury Room . . . but Should It? A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 287 (2012) (discussing the rehabilitation process).

210. *See Christopher A. Coper*, Note, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1474–75 (2003) (describing the rehabilitation process).

211. *Id. See, e.g., Sechrest v. Baker*, 816 F. Supp. 2d 1017 (D. Nev. 2011) (discussing the rehabilitation of a juror who admitted that she would have a problem with the issue of homosexuality because of her Christian beliefs).

212. *See Wolin, supra* note 210, at 288 (“[N]o amount of rehabilitation would make a person who candidly admits his bias impartial.”).

213. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). As early as 1807 the Supreme Court has expressed skepticism towards rehabilitation’s effectiveness. *See United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692g) (“He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him.”).

personal feelings and biases during the trial.²¹⁴ Indeed as Professors Neil Vidmar and Valerie Hans have argued, “[h]uman psychology is such that people cannot avoid their biases simply by vowing that they won’t be affected by them.”²¹⁵

Overall, it is clear that the *voir dire* process is inadequate to prevent anti-queer bias from entering the jury room. Allowing inquiry into juror’s biases against queerfolk is discretionary, and appellate courts rarely overturn verdicts because of a denial of *voir dire*. Moreover, where *voir dire* on the issue is conducted, jurors may either be unaware of, or easily able to conceal their queerphobic biases. In the instances in which venire members admit to having prejudices against queer persons, judges are apt to rehabilitate them, ultimately failing to immunize against jurors’ queerphobic biases.

III. EXPANDING *PENA-RODRIGUEZ*’S CONSTITUTIONAL EXCEPTION

A. *Pena-Rodriguez’s Exception to Federal Rule of Evidence (FRE) 606(b)*

In *Pena-Rodriguez v. Colorado*, following the conviction of Miguel Angel Pena-Rodriguez for harassment and unlawful sexual conduct, two jurors approached the defense counsel and stated that that juror “H.C.” had expressed “anti-Hispanic” sentiment towards the defendant and the defendant’s alibi witness.²¹⁶ According to the jurors, during jury deliberations H.C. told the others that, he “believed the defendant was guilty because, in [H.C.’s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.”²¹⁷ He also opined that Mexican men were controlling of women, saying “I think he did it because he’s Mexican and Mexican men take whatever they want.”²¹⁸ H.C. went on to explain that in his experience, “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.”²¹⁹ Finally, the affidavits noted that H.C. also expressed bias against the defendant’s alibi witness by suggesting that the witness was not credible because he was “an illegal.”²²⁰

Based on the juror’s statements the trial court acknowledged H. C.’s bias, but it denied Pena-Rodriguez’s motion for a new trial because “[t]he actual deliberations that occur among the jurors are protected

214. See Cathy Johnson & Craig Haney, *Felony Voir Dire: An Exploratory Study of Its Content and Effect*, 18 LAW & HUM. BEHAV. 487, 499 (1994) (finding that fifty percent of jurors interviewed admitted to having not being able to “set aside their personal beliefs, feelings, and life experiences for the duration of the trial”).

215. VIDMAR & HANS, *supra* note 46, at 101.

216. 137 S. Ct. 855 (2017).

217. *Id.* at 862.

218. *Id.*

219. *Id.*

220. *Id.*

from inquiry under [Colorado Rule of Evidence] 606(b).”²²¹ A divided appellate court affirmed Pena-Rodriguez’ conviction, and the Colorado Supreme Court affirmed by a four to three vote.²²² Thereafter, the Supreme Court granted certiorari to determine “whether there is a constitutional exception to the no-impeachment rule for instances of racial bias.”²²³

Writing for the majority, Justice Kennedy began by reaffirming the importance of the jury to the justice system and wider democracy.²²⁴ Kennedy then recounted the development of the common law rule against juror verdict impeachment.²²⁵ That rule, later deemed the Mansfield rule, prevented jurors from testifying about their subjective thoughts or objective events that arose during jury deliberations after the verdict was entered.²²⁶

The Mansfield rule, the majority acknowledged, served to give verdicts stability and prevent post-trial juror harassment.²²⁷ For these reasons, the Court had previously refused to overturn jury verdicts based on post-trial testimony on two occasions: First, in *Warger v. Shauers*, where the Court had considered whether a juror’s lying about pro-defendant bias could support a motion for a new trial;²²⁸ and next in *Tanner v. United States*, where the Court considered whether evidence that jurors were intoxicated during deliberations could support a motion for a new trial.²²⁹ Notwithstanding these verdicts, the Court had previously signaled possible exceptions to the no-impeachment rule by the time that *Pena-Rodriguez* was decided, particularly in the “gravest and most important cases.”²³⁰

Returning to the present case, Justice Kennedy explained why the facts supported a constitutional exception to Federal Rule of Evidence 606 (b). He emphasized the importance of “ris[ing] above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons.”²³¹ Kennedy then distinguished the juror’s racial bias in *Pena-Rodriguez* from the juror misconduct in *Tanner* and *Warger*.²³² Racial bias “if left unaddressed, would risk *systemic injury* to the

221. *Id.*

222. *Pena-Rodriguez*, 137 S. Ct. at 862.

223. *Id.*

224. *Id.* at 860.

225. *Id.* at 863.

226. *See id.*

227. *Id.* at 866.

228. 135 S. Ct. 521 (2014).

229. 483 U.S. 107 (1987).

230. *McDonald v. Pless*, 238 U.S. 264, 269 (1915) (noting instances where excluding juror testimony would “violat[e] the plainest principles of justice.” (quoting *United States v. Reid*, 53 U.S. 361, 366 (1852))).

231. *Pena-Rodriguez*, 137 S. Ct. at 867.

232. *Id.* at 868.

administration of justice.”²³³ Therefore, allowing an exception to the no-impeachment rule was not an effort to perfect the jury, but one “to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.”²³⁴

Considering the insufficiency of judicial safeguards, and the potentially detrimental effects of racial biases at trial Justice Kennedy declared:

“[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”²³⁵

Finally, the Court finished by considering the practical application of the constitutional exception. Kennedy endorsed the lower courts’ authority, noting that determinations of what constituted a “clear statement” of bias or animus would be left to the individual courts.²³⁶ Finding that “blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases,” the Court held that blatant racist comments constituted a constitutional exception to Federal Rule of Evidence 606(b)’s no-impeachment rule.²³⁷

B. *An Argument for Expanding the Exception*

Conceptually, the reasoning underlying the holding in *Pena-Rodriguez* could permit its applicability to other juror biases—a point Justice Alito adamantly pressed in his dissent.²³⁸ The majority’s bases for why racial bias justifies an exception to the no-impeachment rule are two-fold. First, racial bias “implicates unique historical, constitutional, and institutional concerns,”²³⁹ so leaving the “familiar and recurring evil” that is racial bias unaddressed “would risk *systematic injury* to the administration of justice.”²⁴⁰ Second, judicial safeguards are substantially less successful at protecting against racial bias.²⁴¹ Both arguments are equally applicable to queerphobic biases.

233. *Id.* at 867 (emphasis added).

234. *Id.* at 868.

235. *Id.* at 869.

236. *Pena-Rodriguez*, 137 S. Ct. at 871.

237. *Id.*

238. *Id.* at 875 (Alito, J., dissenting) (“This is a startling development, and although the Court tries to limit the degree of intrusion, it is doubtful that there are principled grounds for preventing the expansion of today’s holding.”).

239. *Id.* at 868.

240. *Id.* (emphasis added).

241. *Id.*

Given the appalling history of state-sponsored discrimination against LGBTQ+ persons, a failure to confront blatant queerphobia within the jury room will undermine the queer community's faith in the justice system, ultimately resulting in systematic injury to the administration of justice. Just as history of prejudice and animus against racial minorities affords "a sound basis to treat racial bias with added precaution,"²⁴² so too does the historical marginalization of queerfolk.²⁴³

For much of American history, queer persons have been considered pathological. They have faced cruel conversion therapies, criminalization, imprisonment, and societal exclusion.²⁴⁴ The Supreme Court's consistent emphasis of the widespread discrimination against queerfolk is a testament to its familiarity and recurrence; indeed, over the past half-century seldom has the Court failed to mention the state-sanctioned and societal prejudice against queerfolk in any case it has resolved related to LGBTQ+ issues.²⁴⁵

242. *Id.* at 869.

243. In no way should this be interpreted as a direct comparison between racial subordination and queerphobia. Instead, my argument is that the two factors considered in *Pena-Rodriguez*, (risk of systemic injury, and the failure of judicial safeguards) are applicable in the context of juror queerphobia. For detailed discussions of the problems arising from comparisons of race and queer subordination, see Darren Leonard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997); Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1017 (2014) ("Arguments about what blacks and gays can and cannot do tend to overlook people who are black and gay.") (emphasis in original).

244. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 794–804 (2002) (detailing the development of homosexual conversion therapy); Jordan Blair Woods, *LGBT Identity and Crime*, 105 CAL. L. REV. 667, 674 (2017) ("[U]ntil the mid-1970s—before which almost every U.S. state criminalized same-sex sodomy—there was little space to view LGBT people in the criminal justice system other than as deviant sexual offenders.").

245. In the Court's first consideration of prejudice against the LGBT community *Rowland v. Mad River Local School District*, Justice William Brennan noted that gay persons "are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuality is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'" 470 U.S. 1009, 1014 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). On the next occasion, it recognized that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization." *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, J., concurring).

Later, when the Court explicitly overruled *Bowers* in *Lawrence v. Texas*, Justice Kennedy stated "it must be acknowledged, of course that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." 539 U.S. 558, 571 (2003). In his dissent, Justice Scalia, joined by Justice Clarence Thomas, similarly highlighted the unassailable conclusion that homosexuality was widely historically condemned, writing "[t]here are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state

In *Obergefell v. Hodges*, Justice Kennedy again took care to acknowledge historical discrimination against queer persons.²⁴⁶ He wrote, “until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity.”²⁴⁷ Echoing the Supreme Court, countless lower courts have also acknowledged the history of state-sanctioned, and societal queerphobia.²⁴⁸

Dissenting in *Pena-Rodriguez*, Justice Alito illustrated the constitutional dilemmas at play with an anecdote of two cellmates convicted for homicides.²⁴⁹ At one prisoner’s trial, during deliberations, a juror expresses bias against the defendant because of his race; at the other, a juror expresses animosity towards the defendant because the defendant was “wearing the jersey of a hated football team.”²⁵⁰ Alito ended the illustration by problematizing any distinction between the two hypothetical prisoners: if the Court has entitled the first prisoner to a no-impeachment rule exception, the other must receive one as well.²⁵¹

Justice Alito’s vignette fundamentally mischaracterizes the majority’s reasoning. Central to the majority’s focus is the danger of “systemic injury to the administration of justice.”²⁵² This understanding is reflective of the historical and current extent of bias against specific communities in the United States. Presumably, even the most deep-seated of sport rivalries could not result in a community-wide loss of faith in the

reporters from the years 1880-1995. . . . There are also records of 20 sodomy prosecutions and 4 executions during the colonial period.” *Id.* at 597 (Scalia, J., dissenting).

246. 135 S. Ct. 2584 (2015).

247. *Id.* at 2596.

248. *See, e.g., Watkins v. United States Army*, 875 F.2d 699, 724 (9th Cir. 1989) (“Discrimination against homosexuals has been pervasive in both the public and private sectors. Legislative bodies have excluded homosexuals from certain jobs and schools, and have prevented homosexuals marriage. In the private sphere, homosexuals continue to face discrimination in jobs, housing and churches.”) (citation omitted) (en banc) (Norris, J. concurring); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 427 (M.D. Pa. 2014) (“Within our lifetime, gay people have been the targets of pervasive police harassment, including raids on bars, clubs, and private home; portrayed by the press as perverts and child molesters; and victimized in horrific hate crimes.”); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) (“Outside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility . . . and such immediate and severe opprobrium as homosexuals.”) (citation omitted).

249. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 883 (2017) (Alito, J., dissenting).

250. *Id.*

251. *Id.*

252. *Id.* at 868.

administration of justice, and in respect for the rule of law.²⁵³ To the contrary, queerphobic bias can.²⁵⁴

Collectively, queer individuals remain one of the most vulnerable minorities in this country. They are largely unprotected from the discriminatory whims of both private and governmental actors.²⁵⁵ Indeed, in United States society, anti-queer bias remains the “last socially acceptable prejudice.”²⁵⁶ Thus, allowing discrimination to enter the legal system gives queerphobic prejudices the added color of the law, amplifying the subjugation of queer individuals.²⁵⁷

253. Assuming, that the sports-team animus will not be detected by the *Tanner* procedural safeguards the reluctance related to reporting a fellow juror’s racial or queerphobic bias would likely not apply.

254. See *Miller-El v. Dretke*, 545 U.S. 231, 237 (2005) (“It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.”). To illustrate the full extent and significance of queerphobic bias, see Lee, *supra* note 84 at 539 (“Eighty-eight percent of Whites who have taken the IAT have manifested implicit bias in favor of Whites and against Blacks. Nearly 83% of heterosexuals have manifested implicit bias in favor of straight people over gays and lesbians.”). Compare Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, (Nat’l Bureau of Econ. Res., Working Paper No. 9873, 2003), <http://www.nber.org/papers/w9873.pdf> (finding resumes with White sounding names received 50 percent more callbacks than those with Black sounding ones), with András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 592 (2011), <http://www-2.rotman.utoronto.ca/facbios/file/tilcsikajs.pdf> (finding that resumes without words signifying LGBT identity received 40 percent more callbacks than those that did), and Westgate et al., *supra* note 34 (documenting implicit bias against gays and lesbians.).

255. See, e.g., Park & Mykhyalyhyn, *supra* note 41; HUMAN RIGHTS CAMPAIGN FOUND., VIOLENCE AGAINST THE TRANSGENDER COMMUNITY IN 2017 (2017), [HTTPS://WWW.HRC.ORG/RESOURCES/VIOLENCE-AGAINST-THE-TRANSGENDER-COMMUNITY-IN-2017](https://www.hrc.org/resources/violence-against-the-transgender-community-in-2017). More recently, public debates have centered around controlling transpersons right to use the bathroom of their gender identity, and whether businesses may discriminate against gay people exercising their constitutional right to marry. See generally Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL’Y 1 (2016) (summarizing debates over transgender bathroom and locker room rights); Terri R. Day & Danielle Weatherby, *Contemplating Masterpiece Cakeshop*, 74 WASH. & LEE L. REV. ONLINE 86 (2017) (summarizing the debates surrounding Masterpiece Cakeshop v. Colorado Civil Rights Commission, No. 16–111, 2017 WL 2722428 (June 26, 2017) (granting certiorari)).

256. See Krystal E. Noga-Styron et al., *The Last Acceptable Prejudice: An Overview of LGBT Social and Criminal Injustice Within the USA*, 15 CONTEMP. CRIM. JUST. REV. 369 (2012).

257. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (“[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds.”).

When a court ignores blatant anti-queer bias “within jury deliberations, [it] is tantamount to state-sponsored” queerphobia.²⁵⁸ Given the jury’s place as an “instrument of the court system,”²⁵⁹ allowing a conviction to stand despite its basis in anti-queer bias “undermines the jury’s ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression.”²⁶⁰ To echo the petitioner’s brief in *Pena-Rodriguez*, “[t]his cannot be right.”²⁶¹

Based on the results of studies examining implicit biases against queerfolk, it is clear that like the racial animus discussed in *Pena-Rodriguez*, queerphobic biases are concealable and insidious, making the judicial safeguards discussed in *Tanner* ineffective at detecting or rendering them innocuous at trial.²⁶² As we have seen, *voir dire* is overwhelmingly unsuccessful at removing queerphobic bias. This is because defense attorneys may be reluctant to raise the issue of sexual orientation, trial courts may, in their discretion, refuse to inquire about attitudes towards LGBTQ+ issues,²⁶³ and where *voir dire* is allowed to investigate queerphobia, few jurors will openly admit having such prejudices.²⁶⁴ Moreover, venire members who actually admit to having prejudices against queer persons are routinely sent into jury duty after being “rehabilitated,” though the effectiveness of this process remains dubious.²⁶⁵

Free from the inherent pressure of the venire process and scrutiny from fellow venire members and the judge, during deliberations jurors feel less urgency to give socially desirable responses.²⁶⁶ It is then that jurors’ biases will be revealed.²⁶⁷ However, fellow jurors are unlikely to immediately report queerphobic statements made during the course of deliberations, whether out of fear of confronting other jurors, because they are unaware they can make such reports, or for a separate reason.²⁶⁸

258. Kevin Zhao, Note, *The Choice Between Right and Easy: Pena-Rodriguez v. Colorado and the Necessity of a Racial Bias Exception to Rule 606(B)*, 12 DUKE J. CONST. L. & PUB. POL’Y 33, 42 (2016) (making the same argument in cases of racial bias).

259. *Id.* (citing *Sinclair v. United States*, 279 U.S. 749, 765 (1929)).

260. Zhao, *supra* note 259, at 42 (citing 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6074, at 513 (2d ed. 2007)).

261. Brief for Petitioner at 46, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) No. 15–606.

262. *See supra* Part.1(A).

263. *See supra* notes 185–194 and accompanying text.

264. *See supra* notes 196–208 and accompanying text.

265. *See supra* notes 209–216 and accompanying text.

266. *See Wolin, supra* note 210, at 287–88.

267. *Id.* at 288.

268. *Id.* at 282 (“Unless instructed, jurors may not know that they have a duty—or even the ability—to report another juror’s bias or prejudice. Furthermore, even those who know that they have this ability may not know that it is no longer available once they render the verdict.”).

Consequently, post-verdict evidence of bias may be the only means by which to prove juror misconduct.²⁶⁹

To avoid manifest injustice against queer defendants, it is therefore necessary to allow an extension of the *Pena-Rodriguez* holding to blatant statements of queerphobic bias. Where judicial safeguards fail to prevent bias from entering deliberations, a defendant's Sixth Amendment rights must supersede Rule 606(b).²⁷⁰

In addition, the Rule 606(b) exception must ultimately be expanded, not only to apply to defendants who are queer, but also to a wider array of cases than was present in *Pena-Rodriguez*. Jurors' biases are not restricted to defendants.²⁷¹ Instead, as shown, juror's biases disrupt justice in innumerable ways. In the case of queerphobic sentiment, these biases may infringe on a defendant's right to a fair and impartial trial even where the defendant herself is not queer.²⁷² Limiting the exception to only statements made against queer defendants would be to willfully ignore the many ways that anti-queer bias threatens a defendant's Sixth Amendment rights. Juror's blatantly anti-queer statements are arguably no less detrimental when made against a queer victim, witness, or attorney, than when made against a defendant.

In his *Pena-Rodriguez* dissent, Justice Alito invoked the Court's earlier concerns in *Tanner* and *Wagner* that such an exception would impair "full and frank discussion,"²⁷³ promote an increase in juror harassment, and "undermine the finality of verdicts."²⁷⁴ Evidence from states that have implemented such exceptions renders these concerns moot.²⁷⁵ Any further apprehensions related to a "barrage of post-verdict scrutiny"²⁷⁶ are particularly inapplicable in expanding *Pena-Rodriguez* to post-trial evidence of queerphobic bias, given the small population of Americans who identify as queer.²⁷⁷

269. *Id.* at 283.

270. *Tanner v. United States*, 483 U.S. 107, 137 (1987) ("If [Rule 606(b)] policy considerations seriously threaten the constitutional right to trial by a fair and impartial jury, they must give way.") (Marshall, J., dissenting).

271. In fact, recall that in *Pena-Rodriguez* the juror expressed bias against *both* the defendant and the witness. Specifically, he discounted the witness an "illegal," indicating that his biases affected not only his evaluation of the defendant but his overall interpretation of the evidence proffered at trial. *See also* Part I(B)(2)–(4).

272. For example, if a juror makes a statement indicating that he has disregarded the testimony of one of the defendant's witnesses *because* they are queer, the defendant's right to an impartial jury has been infringed upon, despite the defendant herself not being queer. *See supra* Part I(B)(2)–(4).

273. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 884 (2017).

274. *Id.* at 885.

275. *Id.* at 870.

276. *Tanner*, 483 U.S. at 121.

277. *See, e.g.*, Gary J. Gates, *In U.S., More Adults Identifying as LGBT*, GALLUP NEWS (Jan. 11, 2017), <http://news.gallup.com/poll/201731/lgbt-identification-rises.aspx> (finding 4.1 percent of Americans identified as LGBT); Gary J. Gates, WILLIAMS INST.,

Admittedly, the Supreme Court's history of confronting anti-queer discrimination in the justice system pales in comparison to its history of addressing racial animus. However, limiting *Pena-Rodríguez's* Rule 606(b) exception to instances where the Court has historically made efforts to eliminate bias in the justice system is akin to asking the Court to stand still; the Court has not yet confronted queerphobic prejudice within the judicial system, so it must not do so now. To the contrary, as the Court noted in *Obergefell*, "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."²⁷⁸ The rampant queerphobia in the justice system is one such inequality.

The Court's decision in *Pena-Rodríguez* symbolizes only a portion of a journey, a step toward the "promise for equal treatment under the law."²⁷⁹ In his dissent in *Tanner*, Justice Thurgood Marshall forecasted that if "policy considerations [underlying Rule 606(b)] seriously threaten the constitutional right to trial by a fair and impartial jury, they must give way."²⁸⁰ Thirty years later, in *Pena-Rodríguez*, the Court heeded Justice Marshall's teaching. It is time the journey toward equal treatment under the law continues. Queerfolk deserve to share in the impartiality of the justice system and the equal administration of justice.

The majority in *Pena-Rodríguez* noted in closing, "it is the mark of a maturing legal system that it seeks to *understand* and to *implement* the lessons of history."²⁸¹ With respect to juror queerphobic bias, undeniably, the lessons learned from combating juror racial bias are relevant. *Pena-Rodríguez's* progression to queerphobic bias would not be novel, and, considering the continued vulnerability of the queer community, a failure to do so would be both arbitrary and unjust.²⁸² When faced with the question of whether to extend *Pena-Rodríguez* to protect the Sixth Amendment rights of queerfolk,²⁸³ Justice Marshall's closing words in *Tanner* are apt: "If we deny them this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless."²⁸⁴

HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1 (2011) (finding 3.5 percent of American adults identified as LGBT).

278. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

279. *Pena-Rodríguez*, 137 S. Ct. at 868. See also Harmann Singh, Recent Development, *Bias in The Jury Room: Where to Draw the Line*, HARV. CIV. RTS.-CIV. LIBERTIES L. REV. (Apr. 9, 2017), [HTTP://HARVARDCRCL.ORG/BIAS-IN-THE-JURY-ROOM-WHERE-TO-DRAW-THE-LINE](http://harvardcrcl.org/bias-in-the-jury-room-where-to-draw-the-line) (making the same point).

280. *Tanner*, 483 U.S. at 137 (Marshall, J. dissenting).

281. *Pena-Rodríguez*, 137 S. Ct. at 871 (emphasis added).

282. See Jessica L. West, *supra* note 46, at 185 (remarking on the arbitrariness of limiting a post-verdict evidence exception to evidence of racial bias in a pre-*Pena-Rodríguez* argument for a Rule 606(b) exception).

283. Singh, *supra* note 280.

284. *Tanner*, 483 U.S. at 142 (Marshall, J. dissenting).

CONCLUSION

In providing a detailed account of the ways juror queerphobia can manifest at trial, this Note has shown that jurors' anti-queer biases infringe upon queerfolk's Sixth Amendment rights and threaten the impartiality of the judicial system. Procedural safeguards such as *voir dire*, used to eliminate impartial jurors, have proven ineffective at detecting, removing, or rendering queerphobic biases innocuous.

In response, this Note examined one possible solution—expanding the *Pena-Rodriguez* exception. As this Note argues, in order to avoid a systemic injury and giving anti-queer prejudices the color of the law, the Court must confront juror biases when they are made apparent. Thus, the Supreme Court's holding in *Pena-Rodriguez* must be extended to the context of blatant juror queerphobic bias.