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Cover Page Footnote

This Article is a modified version of a panel introduction at the National Lesbian Gay Law Association and the National Lesbian and Gay Law Foundation's 2003 Lavender Law Conference at Fordham University School of Law (Oct. 17-19, 2003). ** Litigation associate, Loeb & Loeb LLP, New York, NY; J.D., American University Washington College of Law, 2003; B.A., University of Southern California, 1996.

SEXUAL MINORITIES, CRIMINAL JUSTICE, AND THE DEATH PENALTY*

*Michael B. Shortnacy***

Of the myriad issues explored in panels and discussions over the past few days of this conference—from same-sex marriage to immigration and asylum—this particular panel explores a topic that should be of central importance to the lesbian, gay, bisexual, and transgender (“LGBT”) community: the systemic bias against and hostility towards sexual minorities within the legal system. This bias, exhibited by key players in the legal system such as attorneys, judges, court personnel, and jurors, not only makes the courthouse a hostile environment for sexual minorities but it also undercuts major legal victories, such as *Lawrence v. Texas*,¹ which are only as powerful as the attorneys, judges, and jurors who actually apply law to fact. Moreover, the bias towards sexual minorities within the legal system, in its most serious form, can ultimately affect the outcome of criminal prosecutions and may even encourage the imposition of death sentences for sexual minorities found guilty of capital crimes.

I will begin my remarks today with a quote from Justice Anthony Kennedy, who I think beautifully illustrates the gravity and seriousness of discrimination occurring within the courthouse itself. He writes, “The 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.”² Of course, Justice Kennedy was referring to racial discrimination in selecting juries for civil trials, but his words are no less powerful and no less applicable to the bias confronting sexual minorities in the legal system.

The existence and effect of racial and sex bias in our legal institutions

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1. *Lawrence v. Texas*, 539 U.S. 558 (2003).

2. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991).

has been the subject of extensive study and debate over the years. Bias against sexual minorities, however, has gone almost completely unstudied and rarely discussed. The limited research that has been conducted on this form of bias, however, has yielded some startling findings. There have been at least two comprehensive state-wide studies conducted on the issue of bias against sexual minorities within the legal system, which are worthy of consideration. One study conducted by the Judicial Council of California³ found that thirty-eight percent of gay and lesbian respondents reported feeling threatened by the courtroom setting because of their sexual orientation.⁴ The California study also found that one out of five court employees heard derogatory terms, ridicule, snickering, or jokes about gays or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees.⁵ A second state-wide study, conducted by the State Bar of Arizona,⁶ found that seventy-seven percent of judges and attorneys reported that they heard disparaging comments about gays and lesbians.⁷ Forty-seven percent of those reporting hearing these disparaging comments also reported hearing them in open spaces of the courthouse.⁸

While this research is admittedly limited in comparison to the volumes of studies and commentary over the years on other forms of bias in the legal system, it nevertheless paints a grim picture of the level of hostility toward sexual minorities in the legal system. I believe that the results of these two studies are the only tip of the iceberg and that further study will only support these already upsetting findings. Indeed, the legal community, including bar associations, judicial councils and conferences, and perhaps most importantly law schools, should begin to recognize that bias against sexual minorities exists and they should devote sufficient resources to allow for comprehensive study of this problem and for the education of the bar and the public.

One effect of critical importance to the LGBT community of the bias

3. *Judicial Council of Cal., Sexual Orientation Fairness In the California Courts: Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee* (2001), available at <http://www.courtinfo.ca.gov/programs/access/documents/report.pdf>. The California study is of significant value because of the sheer magnitude of that state's court system, which saw 8.8 million cases filed in 1998-1999.

4. *Id.* at 4.

5. *Id.*

6. *State Bar of Ariz., Gay and Lesbian Task Force, Report to the Board of Governors* (Apr. 1999).

7. *See id.* at app. I.

8. *See id.* at 18.

against sexual minorities exhibited by key players in the legal system who apply the law to the particular facts of particular cases—attorneys, judges, and jurors—is that it actually undermines the hard-fought legal victories gained in recent landmark legal rulings, such as *Lawrence*. Of course these decisions directly affect only the parties to the suits before those courts. It is how these cases are interpreted and applied to other cases—by way of, among other things, attorneys who apply the cases in their legal briefs and judges who apply the cases in their decisions—that ultimately determine the cases’ practical impact and effect on the broader LGBT community. The limited research we have suggests that bias against sexual minorities is prevalent among key players in the legal system. This bias can negatively affect the reach and scope of landmark decisions, just as *Brown v. Board’s*⁹ proclamation of “all deliberate speed” was stymied by biased southern judges. In sum, the LGBT and legal communities should realize that legal victories on the macro level risk being severely undermined by bias against sexual minorities on the micro level—the battlefield needs to be redefined to include the environment within the courthouse and the behavior of judges, lawyers, and jurors. We would be remiss if we do not acknowledge this bias and incorporate it with our broader strategies for impact litigation and legislative reform, which are only as affective as those charged with implementing and applying the end result on a daily basis.

In its most egregious form this bias against sexual minorities among key players in the legal system may actually be a factor in the imposition of the death penalty. In several cases, the prosecutors have exhibited bias directly and played on the biases of jurors by using the defendant’s sexual orientation as another reason to condemn the convicted criminals to death. In the case of Jay Wesley Neill, the prosecutor blatantly appealed to the jurors’ biases when he stated: “I want you to think briefly about the man you are setting [sic] in judgment on . . . I’d like to go through some things that to me depict the true person you’re sitting in judgment on—disregard Jay Neill. You’re deciding life or death of a person that’s a vowed [sic] homosexual.”¹⁰ I posit that the prosecutor’s remarks clearly indicate that Jay Wesley Neill was sentenced to death at least in part because of his status as a homosexual man.

The prosecutor in Calvin Burdine’s murder trial went a step further and actually explicitly used Burdine’s sexual orientation as a reason not to send him to prison for life, but rather sentence him to death. In his closing statement during the sentencing phase of Burdine’s trial, the prosecutor

9. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1954).

10. *Neill v. Gibson*, 263 F.3d 1184, 1199 (10th Cir. 2001) (Lucero, J., dissenting).

argued that “sentencing a homosexual to the penitentiary certainly isn’t a very bad punishment for a homosexual, and that’s what he’s asking you to do.”¹¹ Again, I posit that Burdine’s status as a homosexual was a factor—and I would argue a large factor—in the jury’s decision to sentence Burdine to death.

In the case of Gregory Scott Dickens, it was the judge who made the ultimate decision to condemn Dickens to death.¹² Even though Dickens was acquitted of premeditated murder at trial, Judge Cole found other aggravating factors to justify the imposition of a death sentence.¹³ In his appeal of Judge Cole’s sentence, Dickens claims that during his trial Judge Cole’s own son had come out of the closet, to which Judge Cole reacted with rage.¹⁴ Judge Cole allegedly wrote a letter to his son expressing his hope that his son would “die in prison like all the rest of [his] faggot friends.”¹⁵

I would like to close with a final observation about the relative inattention this bias against LGBT capital murder defendants receives from the LGBT community. Perhaps not unsurprisingly, these sexual minority capital defendants hardly make good poster children for LGBT equality. Unlike Matthew Sheppard and James Bird, these defendants are not innocent victims who were singled out at random and attacked based on their sexual orientation. Rather, they are capital defendants, each accused and convicted of heinous and gruesome murders. Depending on one’s belief about the legality of the death penalty in general, these capital defendants may have deserved to receive a death sentence on that basis. I believe, however, that the LGBT community should be outraged when these capital defendants are sentenced to death in part because of their status as sexual minorities. In the fight for full equality for all its members the LGBT community should truly advocate for equality for all its members, including the community’s most reviled—capital defendants.

11. See Petitioner’s Petition for Writ of Habeas Corpus at 115-16, *Burdine v. Johnson*, 66 F. Supp. 2d 854 (S.D. Tex. 1999).

12. See Richard Goldstein, *Queer on Death Row*, VILLAGE VOICE, Mar. 20, 2001, at 38.

13. *Id.*

14. *Id.*

15. *Id.*