Notes

NOT UP FOR DELIBERATION: EXPANDING THE *PEÑA-RODRIGUEZ* PROTECTION TO COVER JURY BIAS AGAINST LGBTQ+ INDIVIDUALS

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ABSTRACT

Discrimination against LGBTQ+ individuals persists within the United States criminal justice system, which is no surprise given the history of LGBTQ+ discrimination in the United States. Evidence of jurors convicting LGBTQ+ defendants—or, in some extreme cases, sentencing them to death—because of the defendant's queer identity is especially concerning.

Standing in the way of protecting LGBTQ+ defendants from LGBTQ+ bias in jury deliberations is Federal Rule of Evidence 606(b), which prohibits defendants from using juror testimony regarding jury deliberations to impeach the jury's verdict. However, in 2017, the Supreme Court in Peña-Rodriguez v. Colorado *provided an exception to this "no-impeachment rule" for clear statements of racial bias that significantly motivated the juror's decision. The Supreme Court has a history of extending protections against racial discrimination in the jury context to sex discrimination, and, in 2020, the Supreme Court ruled in* Bostock v. Clayton County *that the prohibition against sex discrimination in employment under Title VII of the Civil Rights Act prohibits discrimination based on sexual orientation and gender identity. Thus, there may be multiple*

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constitutional avenues to expanding the protection granted in Peña-Rodriguez *to LGBTQ+ bias in jury deliberations.*

This Note argues that such an expansion can soundly be constitutionally granted, particularly when analyzed from an intersectional perspective. Only then can the criminal justice system ensure that LGBTQ+ defendants are punished for what they do, not who they are or who they love.

INTRODUCTION

"One juror made a comment that if he's gay, we'd be sending him where he wants to go if we voted for [life without parole]."[1]

"We . . . knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison."[2]

"There was a lot of disgust. This is a farming community . . . . There were lots of folks who were like 'Ew, I can't believe that.'"[3]

"Rhines had a fair and compassionate jury—very fair."[4]

Juries are supposed to punish people "for what they do, not who they are."[5] Yet, these juror statements from Charles Rhines's criminal trial highlight that who Charles Rhines was—a gay man—may have mattered in deciding whether he deserved to live.[6] Despite juror testimony that LGBTQ+ bias may have influenced the jury's sentencing deliberations, the Supreme Court denied Rhines's petition.[7] On November 4, 2019, the jury's sentence became final and fatal when the State of South Dakota executed Charles Rhines.[8] In 2019, a citizen of the United States was possibly executed simply for being gay.

1. Petition for Writ of Certiorari app. at 97, Rhines v. South Dakota, 138 S. Ct. 2660 (2018) (No. 17-8791) (declaration of Frances Cerosimo).

2. *Id.* at 96 (declaration of Harry Keeney).

3. *Id.* at 98 (declaration of Katherine Ensler).

4. *Id.* at 97 (declaration of Frances Cerosimo).

5. Buck v. Davis, 137 S. Ct. 759, 778 (2017).

6. *See supra* notes 1–4 and accompanying text (detailing the jurors' homophobic comments).

7. Rhines v. Young, 140 S. Ct. 8, 8 (2019) (No. 19-6477) (cert. denied).

8. *Charles Rhines Executed by South Dakota Despite Evidence of Jurors' Anti-Gay Bias*, AM. BAR ASS'N (Dec. 1, 2019), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2019/year-end-2019/charles-rhines-executed-by-south-dakota-despite-evidence-of-juro [https://perma.cc/4QQW-C2PW].

Charles Rhines deserved to be punished for his crime, not his sexuality.[9]

The LGBTQ+ rights movement has been largely successful in securing equal rights and protections for the LGBTQ+ community. Within the past two decades, the Supreme Court has declared certain sodomy laws unconstitutional,[10] protected the LGBTQ+ community's right to marry,[11] and ruled that employment discrimination based on sexual orientation and gender identity violates the Civil Rights Act of 1964.[12] LGBTQ+ individuals are being elected to public office in record numbers,[13] and states are taking action against LGBTQ+ discrimination.[14] However, this progress does not rectify the long history of discrimination that the LGBTQ+ community has faced and the discrimination that the community continues to face.[15] Full equality has not yet been achieved, especially if the government can still execute someone despite evidence of jury bias against the defendant's sexuality.[16] The government's ability to take away LGBTQ+ individuals' life and liberty through criminal convictions because of their LGBTQ+ identity is an alarming gap in constitutional protections for LGBTQ+ individuals.

This kind of discrimination persists, in part, because of Federal Rule of Evidence 606(b) and state equivalents of the rule.[17] The rule, commonly known as the "no-impeachment rule," prohibits a juror from "testify[ing] about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the

9. I have intentionally left out details about the crime Charles Rhines committed because—regardless of the type of crime—Charles Rhines did not deserve the death penalty because of his sexuality.

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

11. Obergefell v. Hodges, 576 U.S. 644, 644 (2015).

12. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1734 (2020).

13. Shane Goldmacher, *L.G.B.T.Q. Elected Officials in U.S. Number Nearly 1,000, Rising Fast*, N.Y. TIMES (July 28, 2021), https://www.nytimes.com/2021/07/28/us/politics/gay-lesbian-elected-officials.html [https://perma.cc/D3CW-HY4F].

14. Julie Moreau, *Pro-LGBTQ Laws Outpaced Anti-LGBTQ Laws in 2018, Report Finds*, NBC NEWS (Feb. 10, 2019, 11:32 AM), https://www.nbcnews.com/feature/nbc-out/pro-lgbtq-laws-outpaced-anti-lgbtq-laws-2018-report-finds-n969826 [https://perma.cc/5WPS-NRAW].

15. *Infra* Part I.

16. *See supra* notes 1–8 and accompanying text (describing the trial of Charles Rhines).

17. *See* FED. R. EVID. 606(b) (significantly limiting what a juror can testify about regarding jury deliberations); *see, e.g.*, COLO. R. EVID. 606(b) (same).

verdict" when a court is inquiring into the validity of a verdict.[18] The no-impeachment rule is a policy choice, though, not a constitutional mandate.[19] The courtroom is where the government exercises some of its most powerful authority, and the government should not be able to take away a defendant's liberty because of their LGBTQ+ identity.[20] Jurors are "officers of the court,"[21] and, by protecting jurors who use LGBTQ+ bias to convict or sentence a defendant, the government violates the Constitution[22] and turns the jury into a tool of oppression.[23]

Thankfully, there appear to be several possible pathways to declaring this form of oppression unconstitutional. In *Peña-Rodriguez v. Colorado*,[24] the Supreme Court declared an exception to the no-impeachment rule for evidence of juror statements of racial bias during deliberations that indicate the bias was a "significant motivating factor" in the juror's vote to convict.[25] The Court's reason for the exception was the "unique historical, constitutional, and institutional concerns" with racial bias in the criminal justice system,[26] but its opinion also left room open for other exceptions.[27] In fact, constitutional protection against sex discrimination has followed protection against racial bias in another jury trial process: jury selection.[28]

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18. *Id.*

19. Daniel S. Harawa, *Sacrificing Secrecy*, 55 GA. L. REV. 593, 598 (2021).

20. *See* Michael B. Shortnacy, Comment, *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, 310 (2001) ("Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds." (citation omitted)).

21. McDonald v. Pless, 238 U.S. 264, 266 (1915).

22. *Infra* Part IV.

23. Chan Tov McNamarah, Note, *Sexuality on Trial: Expanding* Pena-Rodriguez *To Combat Juror Queerphobia*, 17 DUKEMINIER AWARDS J. 393, 430 (2018).

24. Peña-Rodriguez v. Colorado, 580 U.S. 206 (2017).

25. *Id.* at 225.

26. *Id.* at 224.

27. *See id.* at 236 (Alito, J., dissenting) ("[I]t is doubtful that there are principled grounds for preventing the expansion of today's holding.").

28. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145–46 (1994) (recognizing that protecting against gender discrimination is critical to protecting against racial discrimination); *see* Robert I. Correales, *Is* Pena-Rodriguez v. Colorado *Just a Drop in the Bucket or a Catalyst for Improving a Jury System Still Plagued by Racial Bias, and Still Badly in Need of Repairs*, 21 HARV. LATINX L. REV. 1, 10 (2018) ("[H]istory shows that concern over other forms of bias such as gender, sexual orientation, and disability usually follow the progress made in the area of race . . . .").

The unique history of discrimination against LGBTQ+ individuals inside and outside the courtroom should be enough for an exception to the no-impeachment rule, but that is not the only option. Because protections against sex discrimination have followed protections against racial discrimination in a jury trial process before, the Supreme Court's recent ruling in *Bostock v. Clayton County*[29] may provide another path. The Court ruled that employment discrimination based on sexual orientation and gender identity is sex discrimination under the Civil Rights Act of 1964 and therefore unlawful.[30] Thus, if history repeats itself and sex discrimination also becomes an exception to the no-impeachment rule, it logically follows that discrimination in jury deliberations based on sexual orientation and gender identity is unconstitutional as well. Additionally, in *Buck v. Davis*,[31] the Court declared, "Our law punishes people for what they do, not who they are."[32] Punishing LGBTQ+ individuals for their sexual orientation or gender identity is inconsistent with this principle and could possibly be the basis for an Eighth Amendment claim.[33] More broadly, research on intersectionality also supports a rule treating racial, gender, and LGBTQ+ bias equally in jury deliberations because permitting one or more of these biases in jury deliberations could provide a cover for prohibited biases.[34] The constitutional ends of the Sixth, Eighth, and Fourteenth Amendments—that a defendant receive a fair trial, a fair punishment, and fair treatment by the government—are all jeopardized by LGBTQ+ discrimination in jury deliberations.[35]

This Note argues that the exception to the jury no-impeachment rule established in *Peña-Rodriguez* should be extended to LGBTQ+ discrimination in jury deliberations and proceeds in four parts. Part I details the history of discrimination against the LGBTQ+ community and how it has spread to jury deliberations. Part II describes Federal

29. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

30. *Id.* at 1734.

31. Buck v. Davis, 137 S. Ct. 759 (2017).

32. *Id.* at 778.

33. Matt Kellner, Note, *Queer and Unusual: Capital Punishment, LGBTQ+ Identity, and the Constitutional Path Forward*, 29 TUL. J.L. & SEXUALITY 1, 14 (2020).

34. *See* Jazmine Adams, Note, *The Intersectionality of Juries, Race, and Gender: Extending the* Peña-Rodriguez v. Colorado *Decision To Protect Against Gender Discrimination in Jury Deliberations*, 10 ALA. C.R. & C.L.L. REV. 95, 110 (2019) ("[I]f gender is not afforded the same protections as race in the jury context, gender could then be used as a way to circumvent the racial discrimination prohibition.").

35. *Infra* Part IV.

Rule of Evidence 606(b), which harbors the jury no-impeachment rule, and the Supreme Court's decision in *Peña-Rodriguez v. Colorado* establishing an exception to the rule. Part III discusses the Supreme Court's recent ruling in *Bostock v. Clayton County* and its implications for how the Supreme Court should address discrimination, particularly from an intersectional perspective. Finally, Part IV details the constitutional arguments supporting an exception to the jury no-impeachment rule for jury bias against LGBTQ+ individuals and addresses concerns about creating such an exception. This Note is not the first to discuss this issue and its impact on the LGBTQ+ community, but it makes two important contributions: first, it applies the *Bostock* ruling to this specific area of law[36]; second, it more thoroughly discusses and emphasizes an intersectional approach to this area of constitutional jurisprudence.[37]

It is especially important to have this conversation in a post-*Dobbs*[38] world, where criminalization of particular conduct, including abortion and, potentially, private, consensual homosexual sexual activity, could increase the number of LGBTQ+ criminal defendants.[39]

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36. All of the previous scholarship that directly discusses this issue predates the Court's ruling in *Bostock v. Clayton County* in 2020. *See, e.g.*, Kellner, *supra* note 33, at 24 (noting that the viability of arguments for protections against anti-LGBTQ+ animus in jury deliberations may depend on the then-pending *Bostock* decision); Taariq Lewis, Note, Peña-Rodriguez v. Colorado *and the Racial Animus Exception to the No-Impeachment Rule: Extending an Exception to Suspect Classes that Experience Pervasive Bias in the Jury System*, 72 FLA. L. REV. 1353, 1353 (2020) (predating the *Bostock* decision); Tressa Bussio, Note, *Blatantly Biased: Expanding* Peña-Rodriguez *to Cases of Bias Against Sexual Orientation, Religion, and Sex*, 26 WM. & MARY J. WOMEN & L. 167, 181 (2019) (same); McNamarah, *supra* note 23, at 393 (same). *Bostock* was a monumental case for LGBTQ+ rights at the Supreme Court level. Thus, any prior work that does not include *Bostock* has an unfilled gap, a gap Parts III and IV of this Note will fill.

37. *See, e.g.*, McNamarah, *supra* note 23, at 413–14 (discussing intersectionality briefly in one paragraph). This gap also needs to be filled because failure to address intersectionality leaves out a strong legal argument (explained in Parts III and IV) and precludes *fully* representing the forms of discrimination that LGBTQ+ individuals face.

38. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overturning the constitutional right to an abortion).

39. It is possible that criminalizing private, consensual homosexual sexual activity could become constitutionally permissible again. *See id.* at 2301 (Thomas, J., concurring) (calling for the Court to reconsider substantive due process protections for "private, consensual sexual acts"). If these types of laws were constitutionally permitted again, it would exacerbate this issue in two ways: first, it would put more LGBTQ+ individuals in the courtroom; second, their sexuality would become the *subject* of the prosecution, further inviting prejudice against LGBTQ+ individuals. But even if the Supreme Court does not overturn other substantive due process rights, *Dobbs* alone may exacerbate the issue. "[S]exual minority women are more likely than other women to have experienced unwanted pregnancy through sexual violence." Chris Johnson, *Here's*

Stories such as Charles Rhines's must continue to be shared. No more LGBTQ+ individuals should lose their liberty—or their lives—because of who they are or who they love.

I. A HIDDEN HISTORY: LGBTQ+ DISCRIMINATION INSIDE AND OUTSIDE THE COURTROOM

It is critical to understand the history of LGBTQ+ bias in the United States in order to understand the need for protection against LGBTQ+ bias in jury trials.[40] Thus, Section A discusses the history of LGBTQ+ discrimination "on the books," including anti-LGBTQ+ laws, policies, and Supreme Court decisions. Then, Section B details how LGBTQ+ bias has permeated into jury trials. This Part will not be able to cover the *full* history of LGBTQ+ discrimination in the United States; instead, it will focus on federal and state policies, Supreme Court decisions, and other cultural influences that significantly "othered" LGBTQ+ individuals.[41] History and current shortcomings indicate clearly that LGBTQ+ bias is still a permissible prejudice.

A. Discrimination "on the Books"

Anti-LGBTQ+ laws have existed for centuries, but they became especially prevalent in the mid-twentieth century. LGBTQ+ discrimination goes as far back as 1533 with common law antisodomy laws.[42] American colonies incorporated these laws, and at least two states kept capital punishment eligibility for sodomy throughout much of the nineteenth century.[43] Gay and lesbian life was transformed in the 1940s, though, by sex-segregated environments caused by World War II.[44] With members of the same sex being placed in the same

Why Abortion Is an LGBTQ Rights Issue, WASH. BLADE (May 11, 2022), https://www.washingtonblade.com/2022/05/11/heres-why-abortion-is-an-lgbtq-rights-issue [https://perma.cc/7575-TXFP]. So, in the states where abortion is now illegal, there may be an uptick in LGBTQ+ criminal defendants—and it would be in trials concerning an already inflamed issue.

40. It is also relevant because proof of a history of discrimination is a key consideration for several constitutional analyses. *Infra* Part IV.

41. For a more detailed history of LGBTQ+ discrimination in the United States, see Brett V. Ries, The Relationship Between LGBTQ+ Representation on the Theatrical and Political Stages (May 2020) (B.A. thesis, University of South Dakota), https://red.library.usd.edu/cgi/viewcontent.cgi?article=1074&context=honors-thesis [https://perma.cc/258U-US4M].

42. Kellner, *supra* note 33, at 4–5.

43. *Id.* at 5.

44. ST. JAMES PRESS GAY & LESBIAN ALMANAC 1 (Neil Schlager ed., 1998) ("By uprooting millions of young women and men and often placing them in nonfamilial, sex-segregated

environment for an extended period of time, queer identity began to form,[45] which may have provoked several subsequent responses. The federal government denied homosexuals who served in WWII certain rights that were normally given to ex-service personnel.[46] In 1952, the American Psychiatric Association listed homosexuality as a "sociopathic personality disturbance."[47] A year later, President Dwight D. Eisenhower issued an executive order that banned homosexuals from working for the federal government,[48] a policy that the U.S. Civil Service Commission did not reverse until 1975.[49]

Although momentum was building for the LGBTQ+ civil rights movement in the 1960s, several events from the 1960s to 1980s dealt serious blows to the movement.[50] In 1967, the Supreme Court held in *Boutilier v. Immigration and Naturalization Service*[51] that "'psychopathic personality' . . . was a term of art intended to exclude homosexuals from entry into the United States" and, thus, homosexuality could be a ground for exclusion of homosexuals at the border.[52] The AIDS crisis in the 1980s reopened the debate about the legitimacy and morality of homosexuality,[53] and the media described AIDS as a "gay plague."[54] It is no surprise, then, that Chief Justice Warren E. Burger stated in 1986 in *Bowers v. Hardwick*[55] that "there is no such thing as a fundamental right to commit homosexual sodomy."[56]

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environments, World War II fostered the process of lesbigay identity formation and the development of lesbigay communities.").

45. *Id.*

46. Ries, *supra* note 41.

47. *Milestones in the American Gay Rights Movement*, PBS, https://www.pbs.org/wgbh/americanexperience/features/stonewall-milestones-american-gay-rights-movement [https://perma.cc/NF2N-RR3D].

48. *Id.*

49. *A Timeline of Lesbian, Gay, Bisexual, and Transgender History in the United States*, GSAFE, https://www.gsafewi.org/wp-content/uploads/US-LGBT-Timeline-UPDATED.pdf [https://perma.cc/K2YG-XTAM].

50. Ries, *supra* note 41 (describing in detail both positive and negative political events regarding LGBTQ+ rights from 1960 through the 1980s).

51. Boutilier v. Immigr. & Naturalization Serv., 387 U.S. 118 (1967).

52. *Id.* at 118–19.

53. Ries, *supra* note 41.

54. *Id.*; ST. JAMES PRESS GAY & LESBIAN ALMANAC, *supra* note 44, at 17.

55. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

56. *See id.* at 196 (Burger, C.J., concurring) ("[I]n constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.").

The 1990s also reflected a culture of hostility toward LGBTQ+ individuals. During this decade, President Bill Clinton allowed the "Don't Ask, Don't Tell" policy to take effect, which prohibited LGBTQ+ individuals from being "out" in the military.[57] President Clinton also signed the Defense of Marriage Act, which prohibited federal legal recognition of nonheterosexual marriages.[58] Thus, LGBTQ+ individuals were still being treated as second-class citizens.

Momentum finally seemed to rebuild for LGBTQ+ individuals in the 2000s. In 2003, the Supreme Court overruled *Bowers* in *Lawrence v. Texas*[59] when it held that the government "cannot demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime" and expanded the right to privacy under the Fourteenth Amendment to include private, consensual homosexual sex.[60] In 2015, the Court gave LGBTQ+ individuals "equal dignity in the eyes of the law" when it granted full marriage equality in *Obergefell v. Hodges*.[61] In 2020, the Supreme Court ruled in *Bostock* that Title VII prohibits employers from discriminating against LGBTQ+ individuals because of their sexual orientation or gender identity.[62]

That is not to say that there has not been pushback against the LGBTQ+ community or that the LGBTQ+ community has achieved anything near full equality. In 2016, a large mass shooting occurred at the Orlando Pulse LGBTQ+ nightclub in Florida.[63] In 2018, the Trump administration banned transgender individuals from serving in the military.[64] Additionally, transgender women of color are murdered at an alarming rate, and a wave of antitransgender legislation has been sweeping across state legislatures.[65] In Florida, public school teachers

57. *LGBTQ Rights Milestones Fast Facts*, CNN, https://www.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html [https://perma.cc/392T-ASH3], (last updated Oct. 23, 2022, 11:02 AM).

58. *Id.*

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

60. *Id.* at 578.

61. Obergefell v. Hodges, 576 U.S. 644, 644, 681 (2015).

62. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1734 (2020).

63. Ralph Ellis, Ashley Fantz, Faith Karimi & Eliott C. McLaughlin, *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN, https://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/index.html [https://perma.cc/SHR8-VBJK], (last updated June 13, 2016, 11:05 AM).

64. *LGBTQ Rights Milestones Fast Facts*, *supra* note 57.

65. *See* Lauren Holter, *The Murder Rate of Transgender Women in the U.S. Isn't Declining*, REFINERY29 (Apr. 24, 2017, 5:30 PM), https://www.refinery29.com/en-us/2017/04/151401/trans

are not even allowed to discuss sexual orientation or gender identity.[66] And the constitutional rights of LGBTQ+ individuals are now under attack by at least one member of the Supreme Court.[67] Bias toward LGBTQ+ individuals remains prevalent.

Discriminatory laws and Supreme Court rulings have had many impacts on the LGBTQ+ community. Until the mid-1970s, LGBTQ+ individuals were mostly viewed as deviant sexual offenders in the criminal justice system.[68] The criminalization of queerness and the societal stigma attached to it also impacted LGBTQ+ individuals' ability to organize.[69] This stigma does not easily go away, particularly when some parts of the United States population still believe queerness is immoral.[70] Further, the Supreme Court has avoided ruling that it is unconstitutional to refuse services to LGBTQ+ individuals in public accommodations or to prevent LGBTQ+ individuals from adopting children,[71] demonstrating that LGBTQ+ discrimination is still

gender-women-murder-rate-us-2017 [https://perma.cc/48SZ-HX6H] (noting that trans women are 4.3 times more likely to be murdered compared to cis women in the United States); Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN, https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html [https://perma.cc/6YHH-7P9J], (last updated Apr. 15, 2021, 9:46 AM) (noting that more than one hundred antitransgender bills have been introduced).

66. Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay*,' NPR, https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis [https://perma.cc/5UR3-TDY5], (last updated Mar. 28, 2022, 2:33 PM).

67. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (calling for the Court to reconsider *Lawrence* and *Obergefell*).

68. Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, 667 (2017).

69. Fear of incarceration, the possibility of losing one's job, and societal and familial rejection for being LGBTQ+ affected mobilization. *See* Ries, *supra* note 41 (detailing laws and policies that criminalized LGBTQ+ behavior and made queerness grounds for firing).

70. *See LGBT Rights*, GALLUP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx [https://perma.cc/25V2-EVHZ] (noting that 25 percent of respondents to a 2022 survey believed gay and lesbian relations are morally wrong).

71. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1720 (2018) (holding that the commission's actions in the case violated the Free Exercise Clause instead of ruling on the underlying discrimination claim); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (holding that the City of Philadelphia violated the Free Exercise Clause instead of ruling on the underlying discrimination claim).

considered to be a permissible prejudice.[72] This prejudice has seeped into the courtroom.[73]

B. Discrimination "in Practice"

The full extent of LGBTQ+ bias in the criminal justice system is hard to know because there is little data about LGBTQ+ people who enter the system as offenders or victims.[74] However, from the evidence available, it is clear that homosexuality and heterosexuality are not treated equally in the courtroom.[75] LGBTQ+ individuals have been discriminated against in virtually every role in the courtroom, including as defendants, victims, third parties, and litigants.[76] The Supreme Court has warned that "[s]ome toxins can be deadly,"[77] and, as Charles Rhines's case illustrates, the toxin of LGBTQ+ bias has been deadly in the courtroom.[78] As recently as 2018, a juror stated: "[I]f I felt the person was a homosexual, I personally believe that person is morally depraved enough that he might lie, might steal, might kill."[79]

LGBTQ+ bias has permeated many of the jury system's processes. In voir dire, which entails questioning potential jurors about possible biases,[80] courts have not been consistent on whether defendant's counsel can ask questions regarding LGBTQ+ bias.[81] In some cases, the judge did not permit counsel to ask jurors about their bias toward

72. *See* McNamarah, *supra* note 23, at 429 ("Indeed, in United States society, anti-queer bias remains the 'last socially acceptable prejudice.'" (quoting Krystal E. Noga-Styron, Charles E. Reasons & Derrick Peacock, *The Last Acceptable Prejudice: An Overview of LGBT Social and Criminal Injustice Within the USA*, 15 CONTEMP. CRIM. JUST. REV. 369, 369 (2012))).

73. *Infra* Part I.B.

74. Woods, *supra* note 68, at 670. For these reasons, it is hard to know how many situations like Charles Rhines's have occurred, because of both this lack of data and the jury secrecy issue discussed in this Note.

75. Warren Moïse, *Homosexuality in the Courtroom*, S.C. LAW., Nov. 2010, at 11, 13.

76. *See* McNamarah, *supra* note 23, at 402–16 (explaining examples of anti-LGBTQ+ discrimination in the courtroom).

77. Buck v. Davis, 137 S. Ct. 759, 777 (2017).

78. *See supra* notes 3–8 and accompanying text (describing the trial of Charles Rhines).

79. Patrick v. State, 246 So. 3d 253, 263 (Fla. 2018).

80. Bussio, *supra* note 36.

81. *Compare* United States v. Bates, 590 F. App'x 882, 887 (11th Cir. 2014) (ruling that the district court abused its discretion when it failed to inquire about LGBTQ+ bias during voir dire), *with* United States v. Click, 807 F.2d 847, 850 (9th Cir. 1987) (finding no abuse of discretion when the district court judge refused to allow defendant's attorney to ask jurors questions about LGBTQ+ bias during voir dire).

LGBTQ+ individuals.[82] Further, attorneys have used their peremptory strikes against LGBTQ+ jurors, prompting some courts to step in and prohibit this type of discrimination.[83]

LGBTQ+ individuals also face discrimination from prosecutors who introduce the defendant's sexuality and make inflammatory remarks. In *Neill v. Gibson*,[84] the prosecutor told the jury: "I'd like to go through some things that to me depict . . . what kind of person [the defendant] is. He is a homosexual. . . . You're deciding life or death on a person that's a vowed [sic] homosexual."[85] This type of prosecutorial conduct is not uncommon.[86] An LGBTQ+ defendant is not even safe from their own attorney's prejudice. In *Fisher v. Gibson*,[87] a defense attorney did not give effective assistance to his client because he thought "homosexuals were among the worst people in the world."[88]

Jury deliberations are not immune from LGBTQ+ bias either. In *Commonwealth v. Delp*,[89] a juror admitted that he found the defendant guilty of the rape of a child "solely on [the defendant's] apparent homosexuality" of the rape of a child.[90] Research has shown that juries are more likely to convict gay defendants than heterosexual defendants in some types of cases.[91] Society's prejudice toward LGBTQ+

82. *See, e.g.*, State v. Lovely, 451 A.2d 900, 901 (Me. 1982) (stating that the lower court judge refused defense counsel's request to ask jurors about LGBTQ+ bias).

83. *See* SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471, 474 (9th Cir. 2014) (holding that equal protection prohibits peremptory strikes based on sexual orientation); Commonwealth v. Carter, 172 N.E.3d 367, 372 (Mass. 2021) (ruling that sexual orientation is a protected characteristic for the purpose of *Batson* challenges).

84. Neill v. Gibson, 278 F.3d 1044 (10th Cir. 2001).

85. *Id.* at 1060. Neill's trial attorney unsuccessfully challenged the remarks, and, while the Tenth Circuit found the prosecutor's remarks improper, it did not find that they amounted to a federal constitutional deprivation. *Id.* at 1060–61.

86. *See* McNamarah, *supra* note 23, at 402–05 (describing different cases when prosecutors have misused a defendant's sexuality in the courtroom).

87. Fisher v. Gibson, 282 F.3d 1283 (10th Cir. 2002).

88. *Id.* at 1298. The Tenth Circuit ruled that Fisher's attorney provided ineffective assistance of counsel partially because of this sentiment toward Fisher. *Id.* at 1303–05.

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

90. *Id.* at 115.

91. *See* Tisha R.A. Wiley & Bette L. Bottoms, *Effects of Defendant Sexual Orientation on Jurors' Perceptions of Child Sexual Assault*, 33 LAW & HUM. BEHAV. 46, 46, 54 (2009) (finding that jurors are more likely to convict a gay defendant (58 percent) versus a straight defendant (39 percent) in boy-victim cases). Another study found that individuals were significantly more supportive of sex offender registration for gay juveniles compared to straight juveniles. Sarah E. Malik & Jessica Salerno, *Moral Outrage Drives Biases Against Gay and Lesbian Individuals in Legal Judgments*, 26 JURY EXPERT 14, 15 (2014).

individuals may also cause jurors to use a defendant's LGBTQ+ identity as character evidence against them.[92] This could, in part, explain why LGBTQ+ individuals are disproportionately incarcerated.[93] Even LGBTQ+ youth suffer disproportionate criminal justice punishments despite no greater engagement in illegal or transgressive behaviors.[94] Greater protection is needed.

II. FEDERAL RULE OF EVIDENCE 606(B) AND THE *PEÑA-RODRIGUEZ* RULING

Although jury deliberation secrecy has been around for centuries,[95] the Supreme Court did not thoroughly address the issue until the twentieth century.[96] Section A lays out Federal Rule of Evidence 606(b), which contains the no-impeachment rule, and the history of how the Supreme Court has interpreted the no-impeachment rule. Section B discusses the Supreme Court's ruling in *Peña-Rodriguez v. Colorado*, which provides an exception to the no-impeachment rule.

A. Federal Rule of Evidence 606(b) and Previous Precedent

The no-impeachment rule declares that a losing party cannot use juror testimony to impeach a jury's verdict unless it falls into one of three listed exceptions.[97] Congress adopted the rule in Federal Rule of

92. *See* Moïse, *supra* note 75, at 11 ("[The *Diddlemeyer* court noted] that society's disdain for such [homosexual] conduct causes a jury to use it as character evidence.").

93. *See* Ilan H. Meyer, Andrew R. Flores, Lara Stemple, Adam P. Romero, Bianca D.M. Wilson & Jody L. Herman, *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012*, 107 AJPH 267, 267 (2017) (finding that LGBTQ+ individuals are disproportionately incarcerated compared to heterosexual individuals).

94. Kathryn E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49, 49 (2010).

95. For a more detailed history of the rule, see Lewis, *supra* note 36, at 1357–61.

96. *See* McDonald v. Pless, 238 U.S. 264, 268–69 (1915) (explaining that prior to the Court's decision in *McDonald*, there were "only three instances in which the subject [of jury impeachment] ha[d] been before this court").

97. FED. R. EVID. 606(b).

Evidence 606(b).[98] Most states have modeled their own rules of evidence on Federal Rule of Evidence 606(b).[99]

Although Rule 606(b) did not yet exist, the Supreme Court first thoroughly addressed the no-impeachment rule in *McDonald v. Pless*.[100] In *McDonald*, the defendant challenged a quotient verdict delivered by the jury.[101] In support of his challenge, the defendant wanted to have jurors testify in front of the judge about the deliberations.[102] The lower court did not allow a juror to testify to impeach his own verdict.[103] The Supreme Court affirmed the decision using the no-impeachment rule: "[T]he losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict."[104] Importantly, however, the Court did not say jury testimony about deliberations could *never* be used.[105] That testimony could be used "in the gravest and most important cases"[106] or when excluding the testimony would "violat[e] the plainest principles of justice."[107]

The Court in *McDonald* did not further expand on exceptions to the rule, but Rule 606(b) itself provides exceptions: extraneous

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98. *Id.* Rule 606(b) reads:

> (b) During an Inquiry into the Validity of a Verdict or Indictment.
>
> (1) *Prohibited Testimony or Other Evidence*. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) *Exceptions*. A juror may testify about whether:
>
> (A) extraneous prejudicial information was improperly brought to the jury's attention;
>
> (B) an outside influence was improperly brought to bear on any juror; or
>
> (C) a mistake was made in entering the verdict on the verdict form.

Id.

99. *See* Peña-Rodriguez v. Colorado, 580 U.S. 206, 218 (2017) ("Some version of the no-impeachment rule is followed in every State and the District of Columbia, most of which follow the Federal Rule.").

100. McDonald v. Pless, 238 U.S. 264 (1915).

101. *Id.* at 265. A quotient verdict is a verdict in which each juror writes down an amount they think a party is entitled to recover; the amounts are added and divided by twelve; and the quotient becomes the verdict. *Id.*

102. *Id.* at 266.

103. *Id.*

104. *Id.* at 269.

105. *Id.* at 268–69.

106. *Id.* at 269.

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

prejudicial information, outside influence, and mistakes in entering the verdict form.[108] Two Supreme Court decisions are relevant to the Court's interpretations of Rule 606(b)'s exceptions: *Tanner v. United States*[109] and *Warger v. Shauers*.[110]

In *Tanner*, the Court ruled that drug and alcohol consumption by the jury during trial was not an outside influence under Rule 606(b) but rather involved juror mental competence, which usually had been described as an "internal" matter.[111] The Court thus refused to permit jurors to testify about such conduct to impeach their verdict.[112] The majority opinion expressed concern about destroying the jury system by permitting postverdict investigation into improper jury behavior, stating, "It is not at all clear . . . that the jury system could survive such efforts to perfect it."[113] In response, the dissent warned that "[i]f we deny them this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless."[114] This exchange highlights the tension that Rule 606(b) creates: weighing the interest of preserving the integrity of the jury system against an individual's interest in receiving an impartial jury and fair trial.

The Court was not as divided in *Warger v. Shauers*.[115] In *Warger*, the Court had to determine "whether Rule 606(b) precludes a party seeking a new trial from using one juror's affidavit of what another juror said in deliberations to demonstrate the other juror's dishonesty during *voir dire*."[116] The Court unanimously ruled that the affidavit was not admissible under Rule 606(b).[117] Although Warger argued that the jury foreperson's statements were extraneous prejudicial information admissible under Rule 606(b)(2)(A), the Court explained that information is generally "extraneous" if the *source* is external to the

108. FED. R. EVID. 606(b).

109. Tanner v. United States, 483 U.S. 107 (1987).

110. Warger v. Shauers, 574 U.S. 40 (2014).

111. *Tanner*, 483 U.S. at 118–19, 122.

112. *Id.* at 127.

113. *Id.* at 120.

114. *Id.* at 142 (Marshall, J., dissenting).

115. *Warger*, 574 U.S. at 41.

116. *Id.* at 42. The jury foreperson, who had answered in voir dire that she could be fair and impartial during a motorcycle accident lawsuit, allegedly mentioned during deliberations that her daughter had caused a motor vehicle accident and that "if her daughter had been sued, it would have ruined her life." *Id.* at 42–43.

117. *Id.* at 44.

jury.[118] Thus, the affidavit provided testimony on internal matters, which is generally not admissible under Rule 606(b).[119] It seemed, then, that the Court was willing to be quite protective of deliberations, but *Peña-Rodriguez* changed this pattern.

B. Peña-Rodriguez v. Colorado

In 2017, the Supreme Court declared a racial bias exception to the no-impeachment rule in response to evidence that racial bias influenced the jury's conviction of Miguel Angel Peña-Rodriguez.[120] After the jury convicted Peña-Rodriguez, two jurors came forward alleging that anti-Hispanic comments had been made during deliberations.[121] Specifically, the jurors stated that another juror ("H.C.") had said 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."[122] The trial court, however, denied Peña-Rodriguez's request for a new trial because Colorado Rule of Evidence 606(b)—similar to Federal Rule of Evidence 606(b)—prohibited inquiry into jury deliberations.[123] The Colorado Court of Appeals and the Colorado Supreme Court affirmed the conviction.[124]

The Supreme Court reversed the decision, holding that permitting the racial bias in Peña-Rodriguez's case would violate his Sixth Amendment right to a fair and impartial jury.[125] Justice Anthony Kennedy, writing for the majority, began by emphasizing that "[t]he jury is a central foundation of our justice system and our democracy" and "a fundamental safeguard of individual liberty."[126] Justice Kennedy also used the Court's language in *McDonald*—that an exception to the no-impeachment rule may arise "in the gravest and most important cases"—as justification for declaring a racial bias exception.[127] To Justice Kennedy and the majority, permitting racial

118. *Id.* at 51.
119. *Id.* at 51–52.
120. Peña-Rodriguez v. Colorado, 580 U.S. 206, 212–14, 225 (2017).
121. *Id.* at 212–13.
122. *Id.* at 212.
123. *Id.* at 213.
124. *Id.* at 214.
125. *Id.* at 225.
126. *Id.* at 210.
127. *Id.* at 216.

bias in jury deliberations would damage "'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'"[128] Even though the Court did not explicitly state that permitting racial bias in jury deliberations violates the Equal Protection Clause of the Fourteenth Amendment—instead rooting its decision in the Sixth Amendment—it did invoke Fourteenth Amendment equality language.[129]

Importantly, Justice Kennedy distinguished the decision from *Tanner* and *Warger*.[130] He stated that the influence of racial bias was different from the influence of alcohol and drugs in *Tanner* and the personal history bias in *Warger* because "neither history nor common experience show that the jury system is rife" with the biases in those cases, unlike the history of recurring racial bias in the jury system.[131] In other words, Justice Kennedy believed there were "unique historical, constitutional, and institutional concerns" with racial bias and leaving them unaddressed would "risk systemic injury to the administration of justice."[132]

Thus, the Court declared that the Sixth Amendment requires that Federal Rule of Evidence 606(b) give way to evidence "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant."[133] For the statement to qualify, it "must tend to show that racial animus was a significant motivating factor in the juror's vote to convict."[134] So, not every racially charged statement will rise to the level of a constitutional violation, but the exception will still help guarantee protection in the "gravest and most important cases."[135]

Justice Samuel Alito dissented, stressing the long history of the no-impeachment rule, which he considered to be a product of

128. *Id.* at 223 (quoting Powers v. Ohio, 499 U.S. 400, 411 (1991)).

129. *See id.* at 224 (noting that eliminating racial bias from the jury system is an effort 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").

130. *Id.* at 223–24.

131. *Id.* at 224.

132. *Id.*

133. *Id.* at 225.

134. *Id.* at 225–26.

135. *See id.* at 216 ("[T]he no-impeachment rule might recognize exceptions 'in the gravest and most important cases' . . . ." (citation omitted)).

"reasoned democratic rulemaking."[136] Essentially, Justice Alito disagreed with the majority's conclusion that existing safeguards, such as voir dire, would not be enough to protect against racial bias in the jury system, although he failed to account for the safeguards' failure to protect Peña-Rodriguez.[137] Justice Alito also strongly disagreed with the Court's invocation of equal protection and opposed the idea that the extent of the Sixth Amendment's protections depends on the type of bias.[138]

Equally concerning to Justice Alito was how the Court's decision would open the floodgates for other exceptions and the difficulty the Court would have in determining which types of bias demand exceptions.[139] Justice Alito warned that recasting the decision as an equal protection case would not help distinguish which types of bias demand an exception, as doing so would require including any suspect classification protected under the Equal Protection Clause.[140] Justice Alito's conclusion that the ruling would have to be extended to other types of bias is exactly right; Supreme Court precedent commands extension to some other forms of bias in jury deliberations, including LGBTQ+ bias.

III. THE *BOSTOCK* RULING AND IMPLICATIONS FOR INTERSECTIONALITY

A recent Supreme Court case could play a major role in securing an exception to the no-impeachment rule for LGBTQ+ individuals. This Part discusses the Court's recent decision in *Bostock v. Clayton County* and its implications for using intersectionality to justify granting equal protection against racial, gender, and LGBTQ+ discrimination in the justice system.

136. *Id.* at 241 (Alito, J., dissenting).

137. *See id.* (stating that there are adequate safeguards).

138. *See id.* at 882 (arguing that the Sixth Amendment does not protect against certain biases more than others).

139. *Id.* at 236 ("[A]lthough 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.").

140. *See id.* at 252 ("Recasting this as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias. At a minimum, cases involving bias based on any suspect classification . . . would merit equal treatment.").

A. Bostock v. Clayton County

In 2020, the Supreme Court ruled in *Bostock v. Clayton County* that firing an individual for being gay or transgender violates Title VII of the Civil Rights Act of 1964 because it is employment discrimination on the basis of sex.[141] In each of the three consolidated cases an individual was fired for being gay or transgender, but the courts of appeals were divided over whether discrimination based on sexual orientation or gender identity qualified as "sex discrimination" under Title VII.[142] The Supreme Court said the answer is clear: it does.[143]

Importantly, the Court noted that although sexual orientation, gender identity, and sex may be distinct concepts, discrimination based on homosexuality or transgender status cannot happen without first discriminating based on sex.[144] Because homosexuality and transgender status are "inextricably bound up with sex," an employer who intentionally treats employees differently because they are gay or transgender treats them differently because of their sex.[145] For example, an employer who fires a male employee for being gay is punishing the employee based on sex: the employee is fired for being a man attracted to other men, whereas a woman who was only attracted to men would not be punished. "[I]t's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it"; what matters is that the employer is discriminating because of one's sex.[146]

Seemingly opposed to an intersectional approach to the definition of "sex discrimination," Justice Alito wrote another passionate dissenting opinion criticizing the majority's analysis.[147] He disagreed with treating discrimination based on the sex of an individual's partner as analogous to discrimination based on the partner's race.[148] He noted that "[a] prohibition on 'race-mixing' was . . . grounded in bigotry against a particular race and was an integral part of preserving the rigid

141. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1734 (2020).

142. *Id.* at 1737–38.

143. *Id.* at 1737.

144. *Id.* at 1741.

145. *Id.* at 1742.

146. *Id.* at 1744.

147. *See id.* at 1778–83 (Alito, J., dissenting) (explaining how the Court's decision could impact several areas of law).

148. *Id.* at 1764–65.

hierarchical distinction that denominated members of the black race as inferior to whites."[149] However, prohibitions on same-sex marriage were also grounded in bigotry, and prohibiting same-sex marriage was an important part of a system that treated LGBTQ+ individuals as inferior to their heterosexual counterparts.[150] Justice Alito did not address this similarity, even though he laid out decades of LGBTQ+ discrimination later in the opinion.[151]

Pushing against an intersectional approach even further, he argued, "[Discrimination because of sexual orientation] cannot be regarded as a form of sex discrimination on the ground that applies in race cases since discrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or women."[152] By doing so, Justice Alito completely misrepresented the analogy. Discriminating against an employee because they are married to someone of another race violates Title VII because it is racial discrimination.[153] It does not matter if the policy treats *all* races the same; what matters is that the discrimination is a "core form of race discrimination" that intends to treat Black individuals as inferior to white individuals.[154] Similarly, discriminating against employees who have a same-sex partner violates Title VII because it is sex discrimination.[155] It does not matter if the policy treats *all* sexes the same; what matters is that the discrimination necessarily includes sex and intends to treat LGBTQ+ individuals as inferior to heterosexual individuals.[156]

Recognizing the intersectional implications of the Court's decision, Justice Alito also warned that equating sexual orientation and gender identity discrimination to sex discrimination would have several consequences for federal law and constitutional interpretation.[157] For

149. *Id.* at 1765 (quoting Zadra v. Altitude Express, Inc., 883 F.3d 100, 137 (2d Cir. 2018) (Lynch, J., dissenting)).

150. *See supra* Part I.A (noting how LGBTQ+ individuals were treated as second-class citizens).

151. *Bostock*, 140 S. Ct. at 1765, 1769–71 (Alito, J., dissenting).

152. *Id.* at 1765.

153. *Id.* at 1764–65.

154. *Id.* at 1765.

155. *Id.* at 1741–42 (majority opinion).

156. *Id.* at 1748–49.

157. *Id.* at 1778–83 (Alito, J., dissenting) (explaining how the Court's decision could impact several areas of law).

one, he reasoned that it would impact a number of policy areas covered by federal law, including housing, healthcare, and sports regulation.[158] Most importantly, Justice Alito warned that advocates would use the Court's decision to subject sexual orientation, gender identity, and sex discrimination to the same standard of review under the Equal Protection Clause of the Fourteenth Amendment.[159] By equating LGBTQ+ discrimination to sex discrimination, the Supreme Court indeed may have opened the door to granting LGBTQ+ individuals greater protection under the Equal Protection Clause of the Fourteenth Amendment.

B. The Argument for Intersectionality

Although Justice Alito views with caution the possibility of treating race, sex, sexual orientation, and gender identity discrimination equally, doing so may better align with the lived experiences of LGBTQ+ individuals of different races and genders. To be clear, each identity comes with different experiences, but these identities often interact in ways that exacerbate discrimination. For example, a cisgender white gay man certainly does not experience the same prejudice as a transgender Black lesbian woman. But that does not mean the law should not protect a transgender Black lesbian woman from discrimination against each of her identities that subject her to unfair prejudice.[160] It is possible to recognize the unique experiences of particular identities while also advocating for better protections for all of them.[161] In fact, protections against gender and LGBTQ+ discrimination have historically followed protections against racial discrimination.[162] Thus, now may be the time to advocate for an intersectional approach to protecting against bias in the criminal justice

158. *Id.* (listing areas of federal law such as housing, healthcare, and sports regulation).

159. *Id.* at 1783.

160. *See* Harmann Singh, Comment, *Bias in the Jury Room: Where To Draw the Line*, HARV. C.R.-C.L.L. REV.: AMICUS BLOG (Apr. 9, 2017), https://harvardcrcl.org/bias-in-the-jury-room-where-to-draw-the-line [https://perma.cc/E8JC-YNPY] ("While race may be the most odious form of discrimination, and while the justice system may need to be particularly aware of racial bias, these arguments do not provide any basis for *not* extending the exception beyond racial bias.").

161. *See* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 633–34 (1997) ("[M]ultidimensionality examines the interactions of [race and sexuality] to highlight the diverse harms gays and lesbians face. Multidimensionality portrays these harms without diminishing . . . the importance of race and other sources of empowerment and disempowerment.").

162. Correales, *supra* note 28, at 10.

system, an approach that would call for equal protection against each bias using the same constitutional standard.[163]

1. *Race and Gender*. The Supreme Court has already recognized that gender and race are "overlapping categories," including in the context of jury discrimination.[164] The Court has warned that if gender discrimination is not treated the same as racial discrimination, then gender discrimination could be used as a way to circumvent racial discrimination.[165] For example, if a prosecutor is allowed to strike jurors because of gender but not race, a prosecutor could strike all Black female jurors because of their race but claim it was because of their gender. Additionally, women are treated differently in the criminal justice system, particularly when they are perceived to be "unladylike," and women of color are often falsely perceived as "more aggressive, more violent[,] and less apt or able to take care of their children than white women" and treated differently as a result.[166] Treating racial and gender prejudice differently not only devalues both experiences, but it is also difficult to implement, which is why the Court permitted *Batson*[167] challenges for both racial and gender discrimination.[168]

2. *Race and LGBTQ+ Identity*. Racial and LGBTQ+ identities can and do interact with each other.[169] For example, studies have shown that white transgender individuals have different experiences with the

163. *Supra* Part III.A.

164. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145 (1994) (reasoning that racial and gender discrimination in the jury selection process should receive the same treatment because race and gender are overlapping categories).

165. *Id.*

166. 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, 482 (2005).

167. Batson v. Kentucky, 476 U.S. 79 (1986).

168. *See J.E.B.*, 511 U.S. at 146 (ruling that both gender and racial discrimination are unconstitutional in the juror striking context). A *Batson* challenge refers to a party's objection to an opposing party's juror strikes on the basis that the challenged party is discriminating based on race and/or gender in striking jurors. *See* Matt Haven, *Reaching* Batson*'s Challenge Twenty-Five Years Later: Eliminating the Peremptory Challenge and Loosening the Challenge for Cause Standard*, 11 U. MD. L.J. RACE RELIGION GENDER & CLASS 97, 106–08 (2011) (discussing the three-step process for a *Batson* challenge).

169. Hutchinson, *supra* note 161, at 609 ("[R]acial and class hierarchies create numerous stereotypes that impact gays and lesbians of color and that inform heterosexual—and gay—society's perception of them.").

police than other races.[170] Further, racial stereotypes often exacerbate LGBTQ+ stereotypes and vice versa: Black individuals are perceived to be more sexually deviant than whites, and LGBTQ+ individuals are perceived to be more sexually deviant than heterosexual individuals.[171] Thus, a gay Black man may be perceived by a jury as more sexually deviant than a gay white man, who may be perceived as more sexually deviant than his white heterosexual male counterpart. Instead of treating racial discrimination as separate and distinct from LGBTQ+ discrimination in the criminal justice context, courts should treat them equally to best protect against both biases.

3. *Gender and LGBTQ+ Identity*. Gender stereotypes also interact with LGBTQ+ stereotypes. An alarming number of women on death row in the past have had sexuality used against them in court.[172] This may be because labeling a woman as a lesbian often invokes the stereotypes of lesbians being "man hater[s], aggressive, and deviant," which makes it easier for a prosecutor to get a jury to convict.[173] Take, for example, the case of Bernina Mata, where the prosecutor stated, "We are trying to show that [Bernina Mata] has a motive to commit this crime in that she is a hard core lesbian . . . . A normal heterosexual woman would not be so offended by [a man's] conduct as to murder."[174] And, as pointed out in *Bostock*, discrimination based on sexual orientation or gender identity inherently involves gender discrimination.[175] So, whether sex, sexual orientation, and gender identity discrimination are conceptualized as the same or distinct, each form of discrimination should be protected equally to fully address each bias.

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170. Woods, *supra* note 68, at 720.

171. *See* Hutchinson, *supra* note 161, at 609 ("[U]nder racial hierarchy, blacks are considered sexually deviant—promiscuous and predatory. This racial stereotype may interact with and reinforce notions of gay promiscuity.").

172. *See* Mogul, *supra* note 166, at 483 ("Forty percent of the women on death row have had some implication of lesbianism used against them at trial regardless of whether it was true or not.").

173. *See id.* ("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." (footnote omitted)).

174. *Id.* at 473 (quoting Transcript of Record at 2133, 2135, People v. Mata, No. 98-CF-110 (Cir. Ct. Boone Cnty., Ill. Oct. 7, 1999) (unpublished transcript) (on file with author) (emphasis omitted) (first alternation in original)).

175. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741–42 (2020).

4. *Race, Gender, and LGBTQ+ Identity*. After examining how these identities interact with one another in pairs, it is not difficult to imagine how they all interact together. A Black transgender lesbian, who could be perceived as more aggressive and sexually deviant and thus more likely to be guilty,[176] is not fully protected unless each of her identities that subject her to prejudice is protected. Expanding Federal Rule of Evidence 606(b) exceptions beyond race to include other identities would make it unnecessary to draw difficult distinctions as to what level of protection to use when multiple biases may be at play, and it would put the exception on a more principled ground.[177]

Courts have already used intersectionality or promoted it in the context of *Batson* challenges, which address discrimination in juror strikes.[178] When the Supreme Court extended *Batson* protections against racial bias to gender bias in *J.E.B. v. Alabama ex rel. T.B.*,[179] it did not require identical experiences between the two identities.[180] Instead, the Court looked at the real experiences of the groups and determined those experiences demanded protection.[181] The Ninth Circuit invoked similar principles when it further extended *Batson* protections to sexual orientation bias.[182] While the Ninth Circuit treated each identity as unique, its decision still promotes intersectionality by granting protection for each of the identities discussed.[183] Granting equal protection for each identity best protects

176. *See* Hutchinson, *supra* note 161, at 609 (explaining that Black and gay identities are seen as more sexually promiscuous); Mogul, *supra* note 166, at 482–83 (arguing that Black lesbians and Black women who are perceived as lesbians are easier to convict because of lesbian stereotypes and because Black women are seen as more violent than white women).

177. *See* Jason Koffler, Note, *Laboratories of Equal Justice: What State Experience Portends for Expansion of the* Peña-Rodriguez *Exception Beyond Race*, 118 COLUM. L. REV. 1801, 1846 (2018) ("Pragmatically, expansion beyond race would avoid a number of muddled distinctions and place the exception on firmer doctrinal ground.").

178. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145 (1994) (recognizing that protecting against gender bias is critical to protecting against racial bias).

179. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

180. SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471, 484 (9th Cir. 2014) (citing *J.E.B.*, 511 U.S. at 135–36).

181. *Id.*

182. *See id.* at 485 ("Gays and lesbians may not have been excluded from juries in the same open manner as women and African Americans, but . . . the principles that lie behind *Batson* and *J.E.B.* require[] that we apply the same principles to the unique experiences of gays and lesbians.").

183. *See id.* (stating that the experiences of LGBTQ+ individuals with the jury system are different from those of women and Black individuals).

all of the individual's protected identities and thus promotes the intersectional goal of recognizing and addressing each of those identities. Because courts have already acknowledged the impact of intersectional identities in the context of juror selection, it is not a far cry to extend similar protections to the context of jury deliberations.

IV. EXPANDING *PEÑA-RODRIGUEZ* TO COVER JURY BIAS AGAINST LGBTQ+ INDIVIDUALS

Sometimes laws that once seemed necessary and proper are later revealed to be oppressive, and, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[184] This Part will argue that the Sixth, Eighth, and Fourteenth Amendments could each provide a basis for expanding the protection granted in *Peña-Rodriguez* to cover LGBTQ+ bias in jury deliberations. The last Section of this Part will address the concerns with expanding the exception from *Peña-Rodriguez* beyond race. The constitutional ends of the Sixth, Eighth, and Fourteenth Amendments—that a defendant receive a fair trial, a fair punishment, and fair treatment by the government—are all jeopardized by LGBTQ+ discrimination in jury deliberations, and remedying this jeopardy can fairly be prioritized over any policy concerns.

A. Sixth Amendment

The Sixth Amendment provides the strongest constitutional basis to expand the exception to the no-impeachment rule to LGBTQ+ bias in jury deliberations, as most states that have expanded the exception have used the Sixth Amendment to do so.[185] LGBTQ+ bias in the criminal justice system is pervasive enough to likely qualify under *Peña-Rodriguez*'s criterion,[186] and unaddressed LGBTQ+ bias in the courtroom both threatens the promise of an impartial jury and undermines confidence in the jury system.[187]

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184. Lawrence v. Texas, 539 U.S. 558, 579 (2003).

185. *See* Koffler, *supra* note 177, at 1829 ("[T]he vast majority of states that have recognized bias exceptions to the no-impeachment bar have done so . . . under the Sixth Amendment, or similar state constitutional protections, and the principles of due process and equal protection."). For specific examples, see *id.* at 1829 n.151.

186. McNamarah, *supra* note 23, at 429, 431.

187. *Cf.* Peña-Rodriguez v. Colorado, 580 U.S. 206, 223 (2017) ("Permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'" (quoting Powers v. Ohio, 499 U.S. 400, 411

LGBTQ+ bias in the criminal justice system meets the criterion used by the majority in *Peña-Rodriguez*: a recurring history of discrimination in the criminal justice system that implicates "unique historical, constitutional, and institutional concerns."[188] Unlike alcohol usage or prejudice against football teams, LGBTQ+ bias in jury deliberations is a recurring, pervasive issue in the criminal justice system, including in jury trials.[189] Further, from an intersectional perspective, if racial bias in jury deliberations demands protection under the Sixth Amendment, extending such protections to sex, sexual orientation, and gender identity is critical to protecting individuals against racial discrimination.[190]

If the government continues to permit juries to use LGBTQ+ bias in deliberations, the jury system will continue to be an instrument of oppression,[191] and the government's interest in promoting jury secrecy should not outweigh that oppression.[192] The Constitution does not require secret deliberations; secret jury deliberation is a policy choice.[193] What the Constitution *does* require, however, is that juries deliver fair and impartial verdicts.[194] Therefore, jury privacy is not the constitutional end itself.[195] Instead, it is "a means of ensuring the integrity of the jury trial."[196] By prioritizing jury secrecy over evidence of clear prejudice, courts undermine the actual guarantee of the Sixth Amendment: an impartial jury.[197] Having an impartial jury has long

(1991))); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994) (stating that excluding people from jury selection solely because of their race or gender jeopardizes "the integrity of our judicial system").

188. *See Peña-Rodriguez*, 580 U.S. at 223 (noting that racial bias in the jury system has been recurring and thus a historical concern of the Court).

189. *Supra* Part I.B.

190. *See Peña-Rodriguez*, 580 U.S. at 225 (holding that the Sixth Amendment prohibits some instances of racial bias in jury deliberations); *J.E.B.*, 511 U.S. at 145 (stating that protecting against gender discrimination is critical to protecting against racial discrimination in jury selection).

191. *See* McNamarah, *supra* note 23 (arguing that permitting jurors to use anti-LGBTQ+ bias in deliberations "converts the jury itself into an instrument of oppression").

192. *See Peña-Rodriguez*, 580 U.S. at 225 (holding that the secrecy of jury deliberations must give way to the Sixth Amendment in some cases).

193. *See* Harawa, *supra* note 19 (stating that jury deliberations are secret by choice because the U.S. Constitution does not compel secret deliberations).

194. *See* U.S. CONST. amend. VI (declaring a right to an "impartial jury").

195. Harawa, *supra* note 19, at 626 (quoting Johnson v. Duckworth, 650 F.2d 122, 124 (7th Cir. 1981)).

196. *Id.*

197. *See* U.S. CONST. amend. VI (declaring a right to an "impartial jury").

been seen as a "necessary component of a fair and functioning justice system."[198] Without it, one cannot say that a jury is a "fundamental safeguard of individual liberty."[199]

Permitting LGBTQ+ bias in jury deliberations would also undermine confidence in the jury system and its perceived legitimacy.[200] The Court emphasized in *Peña-Rodriguez* that a racial bias exception was "necessary to prevent a systemic loss of confidence in jury verdicts"[201] and that permitting racial bias would damage the perception of the jury as a "vital check against the wrongful exercise of power by the State."[202] In *J.E.B.*, the Court stated that state-sanctioned discrimination in the courtroom inevitably results in a loss of confidence in the judicial system.[203] Permitting LGBTQ+ bias in jury deliberations would also lead to a loss of confidence in the jury system.[204] Even if courts do not want to grant LGBTQ+ individuals protections against LGBTQ+ bias on its own merits, intersectionality demands that these protections be granted in order to preserve protections against racial and gender discrimination.[205]

B. Eighth Amendment

Courts generally do not employ the Eighth Amendment when recognizing exceptions to the no-impeachment rule,[206] but recent

198. Koffler, *supra* note 177, at 1802.

199. *See* Peña-Rodriguez v. Colorado, 580 U.S. 206, 210 (2017) ("The jury [is] considered a fundamental safeguard of individual liberty.").

200. *Cf. id.* at 225 ("A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994) (stating that excluding people from jury selection solely because of their race or gender jeopardizes "the integrity of our judicial system").

201. *Peña-Rodriguez*, 580 U.S. at 225.

202. *Id.* at 223 (quoting Powers v. Ohio, 499 U.S. 400, 411 (1991)).

203. *J.E.B.*, 511 U.S. at 140 ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.").

204. *See* SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471, 488 (9th Cir. 2014) (noting that permitting LGBTQ+ discrimination in peremptory strikes would "cast[] doubt on the integrity of the judicial process" (quoting Powers v. Ohio, 499 U.S. 400, 412 (1991))).

205. *See J.E.B.*, 511 U.S. at 145 (stating that protecting against gender discrimination is critical to protect against racial discrimination in jury selection).

206. *See* Koffler, *supra* note 177, at 1829 ("[T]he vast majority of states that have recognized bias exceptions to the no-impeachment bar have done so . . . under the Sixth Amendment, or similar state constitutional protections, and the principles of due process and equal protection.").

precedent suggests this route may be available. In *Buck v. Davis*, Buck's attorney called a psychologist to the stand during the sentencing phase to testify to whether Buck was likely to commit acts of violence in the future.[207] If Buck were likely to commit future violent acts, the Texas jury could impose the death penalty for Buck's capital murder conviction.[208] The psychologist testified that "Buck was statistically more likely to act violently because he is black," and the jury imposed a death sentence.[209] Upon review, the Supreme Court emphatically stated that "a basic premise of our criminal justice system [is that o]ur law punishes people for what they do, not who they are" and said the punishment "flatly contravene[d] this guiding principle."[210] Although *Buck v. Davis* was not a direct Eighth Amendment case, that does not mean the principle is unimportant in an Eighth Amendment context, where punishing the status of an individual may create constitutional issues.

The Court's decisions in *Robinson v. California*[211] and *Powell v. Texas*,[212] which *were* Eighth Amendment cases, indicate that punishing an individual merely for being LGBTQ+ could violate the Eighth Amendment because it would punish status, not conduct.[213] Additionally, Justice Kennedy's opinion in *Lawrence*, which invoked an "evolving standards" argument traditionally used in Eighth Amendment analysis to prohibit LGBTQ+ discrimination, has been described as an Eighth Amendment case by commentators.[214] Punishing LGBTQ+ individuals for their identity may have been acceptable decades ago, but the majority of our society has "evolved" since then.[215]

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207. Buck v. Davis, 137 S. Ct. 759, 767 (2017).

208. *Id.*

209. *Id.*

210. *Id.* at 778.

211. Robinson v. California, 370 U.S. 660 (1962).

212. Powell v. Texas, 392 U.S. 514 (1968).

213. *See* Kellner, *supra* note 33, at 15–16 (noting that the two cases stand for the proposition that "the Eighth Amendment only prevents laws imposing criminal sanctions against someone who has not committed an *act*"); *Robinson*, 370 U.S. at 666 (ruling that criminalizing the "status" of being addicted to drugs violates the Eighth Amendment); *see also Powell*, 392 U.S. at 532 (acknowledging that punishing "mere status," such as being a chronic alcoholic, may violate the Eighth Amendment).

214. *Id.* at 17–18.

215. *See LGBT Rights*, *supra* note 70 (noting that 71 percent of respondents to a 2022 survey believed gay and lesbian relations are not morally wrong).

The Eighth Amendment claim becomes even more profound and important in capital punishment cases because "death is . . . different."[216] In *Zant v. Stephens*,[217] the Court stated that a decision on whether to take a human life should be based on "reason rather than caprice or emotion."[218] If the jury sentenced Charles Rhines to death because it thought he would enjoy prison too much as a gay man, its decision was based on emotion, prejudice, and the defendant's status, not his actions, which seems to violate the Eighth Amendment.[219] Although "[e]ven one day in prison" would be a cruel and unusual punishment for simply being queer, the discrimination is especially heinous in the capital punishment context, where life is at stake.[220]

C. Fourteenth Amendment

Jury discrimination certainly implicates the Fourteenth Amendment. Several federal courts have cited *Peña-Rodriguez* for Fourteenth Amendment propositions,[221] and many states have expanded the exception in *Peña-Rodriguez* beyond race using equal protection and due process analyses.[222] Jurors have historically been seen as "officers of the court"[223] and, therefore, are government actors restrained by the Fourteenth Amendment.[224] Discrimination in jury

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216. *See* Kellner, *supra* note 33, at 18–19 ("This recognition that 'death is . . . different' weighs heavily in favor . . . [of the argument] that the Eighth Amendment may offer protection against penalization of a defendant on the basis of their sexuality . . . ." (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978))).

217. Zant v. Stephens, 462 U.S. 862 (1983).

218. *See id.* at 885 ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (quoting Gardner v. Florida, 430 U.S. at 358 (1977))).

219. *Id.*

220. *See* Kellner, *supra* note 33, at 19 ("Central to the *Robinson* Court's holding was that '[e]ven one day in prison' for a conviction based on an immutable status would violate the Eighth Amendment.").

221. *See, e.g.*, Young v. Davis, 860 F.3d 318, 333–34 (5th Cir. 2017) (using *Peña-Rodriguez* to support the assertion that eradicating discrimination is the "core" of the Fourteenth Amendment); Stout v. Jefferson Cnty. Bd. of Educ., 250 F. Supp. 3d 1092, 1179 (N.D. Ala. 2017) (quoting *Peña-Rodriguez* to support the argument that racial discrimination is intolerable under the Fourteenth Amendment).

222. Correales, *supra* note 28, at 17.

223. McDonald v. Pless, 238 U.S. 264, 266 (1915).

224. *See* Aaron M. Clemens, *Executing Homosexuality: Removing Anti-Gay Bias from Capital Trials*, 6 GEO. J. GENDER & L. 71, 73–74 (2005) ("A venire member, when administered an oath,

deliberations is thus subject to Fourteenth Amendment analysis.[225] To receive a test higher than rational basis under the Fourteenth Amendment, however, LGBTQ+ individuals would have to either be deemed a suspect class for purposes of the Equal Protection Clause or pursue a substantive due process claim.

1. *Equal Protection: Suspect Classification*. Sexual orientation and gender identity should be considered separate suspect classifications. The LGBTQ+ community satisfies the "discrete and insular minorit[y]" criteria that the Court has used to identify suspect classifications.[226] First, sexual orientation and gender identity are immutable traits.[227] Second, the LGBTQ+ community has historically faced discrimination.[228] Third, the LGBTQ+ community has lacked effective representation in the political process and still lacks effective representation.[229] The Equal Protection Clause is supposed to protect minorities from discriminatory treatment by the majority, but if the government permits juries to criminalize LGBTQ+ identity by using LGBTQ+ bias to convict and sentence an individual, that permission is

becomes 'an officer of the court, and must submit to like restraints.'" (quoting Clark v. United States, 289 U.S. 1, 12 (1933))).

225. *See McDonald*, 238 U.S. at 266 (stating that jurors are "officers of the court"); Clemens, *supra* note 224 (arguing that jury members must be subject to the same restraints as the government).

226. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating that "prejudice against discrete and insular minorities may be a special condition" that requires greater judicial inquiry).

227. Immutability does not require that members of the class "be physically unable to change or mask the trait defining their class." Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring). Rather, traits can be considered "immutable" if changing those traits would be greatly difficult or if those traits are "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically." *Id.*

228. *Supra* Part I.

229. *See* Rowland v. Mad River Loc. Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) ("Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena."); *Watkins*, 875 F.2d at 727 (Norris, J., concurring) ("The very fact that homosexuals have historically been underrepresented in and victimized by political bodies is itself strong evidence that they lack the political power necessary to ensure fair treatment at the hands of government."); Scottie Andrew, *Nearly 1,000 US Elected Officials Identify as LGBTQ, But Equitable Representation Is Still a Ways Off, Report Finds*, CNN (July 30, 2021, 11:21 AM), https://www.cnn.com/2021/07/30/us/lgbtq-elected-officials-2021-trnd/index.html [https://perma.cc/HLE7-8WG2] (noting that over twenty-eight thousand more LGBTQ+ people must still be elected to reach equitable representation).

"an invitation" to subject LGBTQ+ individuals "to discrimination both in the public and in the private spheres."[230]

Some Justices and courts have advocated treating sexual orientation as a suspect class or already have classified sexual orientation as a suspect class.[231] Justices on the Supreme Court have suggested that sexual orientation be considered a suspect classification since as early as 1985.[232] More recently, in 2014, the Ninth Circuit went so far as to say that there is "no . . . question that gays and lesbians are no longer a 'group or class of individuals normally subject to "rational basis" review'" and applied heightened scrutiny to an equal protection claim involving sexual orientation.[233]

Even if courts do not want to recognize sexual orientation and gender identity as separate suspect classifications, *Bostock* may require courts to treat discrimination based on these identities as sex discrimination, which already receives heightened scrutiny under the Equal Protection Clause.[234] Because a person's sexual orientation and gender identity are "inextricably bound up with sex," it would be difficult for the Court to justify treating LGBTQ+ bias as sex discrimination in an employment context but not in other forms of governmental discrimination.[235] Since the Court's ruling in *Bostock*, federal courts have already begun to treat transgender discrimination as sex discrimination and subject to heightened scrutiny.[236] Thus, if

230. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

231. *See Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting) (stating that homosexuality should be a suspect class); SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471, 489 (9th Cir. 2014) (holding that heightened scrutiny applies to classifications based on sexual orientation).

232. *See Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting) ("[H]omosexuals constitute a significant and insular minority of this country's population. . . . State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny . . . .").

233. *SmithKline*, 740 F.3d at 484 (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143 (1994)).

234. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting).

235. *See id.* at 1742 (majority opinion) ("[H]omosexuality and transgender status are inextricably bound up with sex.").

236. *See* Corbitt v. Taylor, 513 F. Supp. 3d 1309, 1314–15 (M.D. Ala. 2021) (ruling that a law that treated people differently based on the nature of their genitalia was a classification based on sex and subject to intermediate scrutiny); Morris v. Pompeo, No. 219-cv-00569, 2020 WL 6875208, at *7–8 (D. Nev. Nov. 23, 2020) (holding that discrimination based on transgender status is discrimination based on sex and subject to heightened scrutiny), *appeal dismissed*, No. 21-15302, 2021 WL 2026257 (9th Cir. Mar. 23, 2021).

sexual orientation and gender identity discrimination inherently involve discrimination based on sex, then sexual orientation and gender identity discrimination must be subjected to at least heightened scrutiny.[237]

This logic is helpful in the context of protecting against discrimination in jury deliberations. First, the Supreme Court has already ruled that sex discrimination in some jury system processes violates the Constitution.[238] While the Supreme Court has not yet expanded the exception in *Peña-Rodriguez* to gender bias, the Court likely will do so given its rationale in *Peña-Rodriguez* and its history of extending protections originally only granted against racial bias to instances of gender bias.[239] Second, while *Bostock* does not explicitly address intersectionality, it does somewhat promote it by recognizing that sexual orientation, gender identity, and sex are inextricably bound up with one another.[240] So, since the Court has already stated that protections against sex discrimination are necessary to protect against racial discrimination in the jury system,[241] it would not be a far leap for the Court to envelop sexual orientation and gender identity in the equation.[242] In this manner, *Bostock* can be used to secure protections against LGBTQ+ bias in jury deliberations.

2. *Due Process: Dignity*. The Due Process Clause may provide another route. Justice Kennedy used a "dignity" rationale to declare anti-LGBTQ+ laws unconstitutional under the Fourteenth Amendment's Due Process Clause.[243] Dignity concerns the status of a person within a community and how a government should treat its citizens,[244] and Justice Kennedy and other members of the Court have

237. *See Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting).

238. *See J.E.B.*, 511 U.S. at 146 (O'Connor, J., concurring) (ruling that the Equal Protection Clause prohibits gender discrimination in jury selection).

239. *See* Peña-Rodriguez v. Colorado, 580 U.S. 206, 223–25 (2017) (stating that the historical and recurring nature of racial bias in the criminal justice system justified a racial bias exception to the no-impeachment rule); Correales, *supra* note 28.

240. *See Bostock*, 140 S. Ct. at 1742 ("[H]omosexuality and transgender status are inextricably bound up with sex.").

241. *J.E.B.*, 511 U.S. at 145.

242. *See Bostock*, 140 S. Ct. at 1742 ("[H]omosexuality and transgender status are inextricably bound up with sex.").

243. Steve Sanders, *Dignity and Social Meaning:* Obergefell*,* Windsor*, and* Lawrence *as Constitutional Dialogue*, 87 FORDHAM L. REV. 2069, 2070 (2019).

244. *Id.* at 2104.

used the concept of dignity to explain how laws that demean or inflict stigma—that is, degrade an individual or class's dignity—without a legitimate public purpose are repugnant to the Fourteenth Amendment.[245]

This concept of dignity can and has been applied in the criminal justice context.[246] It has been used in Eighth Amendment analysis to determine whether punishments are cruel and unusual,[247] and Justice Kennedy used it in *Peña-Rodriguez*.[248] If racial bias in jury deliberations violates a person's right to equal dignity, it is hard to imagine why LGBTQ+ bias would not have the same effect. It is even harder to imagine when intersectionality is considered. Permitting a jury to discriminate against a gay Black man when it uses homophobic remarks that could also be influenced by race and gender bias seems to undermine the dignity of not only LGBTQ+ individuals but also individuals of different races and genders.

D. Addressing Concerns

Arguments against expanding the exception granted in *Peña-Rodriguez* fall into three general categories: jury-process concerns, adequacy of other safeguards within the trial system, and line-drawing concerns. None of these arguments outweigh the interests associated with preserving an individual's constitutional right to a fair and impartial jury.

1. *Jury-Process Concerns*. Opponents of exceptions to the no-impeachment rule typically have three concerns regarding the jury process: inhibiting juror conversations, promoting juror harassment, and undermining the finality of verdicts.[249]

245. *Id.* at 2073.

246. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003) (explaining that the antisodomy law affected "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," which "are central to the liberty protected by the Fourteenth Amendment"); Peña-Rodriguez v. Colorado, 580 U.S. 206, 221 (2017) ("It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons.").

247. Sanders, *supra* note 243, at 2078.

248. *Peña-Rodriguez*, 580 U.S. at 221.

249. *See id.* at 219–21 (addressing these concerns).

First, there is little to no evidence that exceptions to the no-impeachment rule have unduly inhibited deliberations.[250] Even if they have, the interest in promoting open discussions in jury deliberations has already been watered down by two policies: a juror can come to the judge about any concerns before the verdict, and a juror can speak to the public and media about deliberations after the verdict.[251] Therefore, there are theoretically *three* separate threats to open and honest discussion in jury deliberations, yet there is no substantial evidence of a chilling effect.[252] There *is* evidence of LGBTQ+ bias in jury deliberations, though,[253] so a defendant's constitutional rights should be prioritized over theoretical concerns.

Second, in the jurisdictions where exceptions to the no-impeachment rule were granted before *Peña-Rodriguez*, there was no evidence of increased juror harassment.[254] And even if exceptions to the rule do increase juror harassment, there are still many ways to prevent juror harassment. Rules of professional ethics and local court rules can regulate posttrial contact with jurors.[255] Additionally, courts could require that jurors come forward of their own volition like the jurors did in *Peña-Rodriguez*.[256] Although this may not be optimal given the burden it would place on jurors, it nonetheless could provide a safeguard. Courts could also implement time restrictions or require good-cause showings.[257]

Third, the interest in "finality" in verdicts should yield to the constitutional demands of protecting against LGBTQ+ bias in jury deliberations. Allowing the interest in finality to outweigh constitutional violations within jury deliberations would contradict Supreme Court precedent and Rule 606(b) itself.[258] If finality were the

250. *See id.* at 227 ("[T]he Court relies on the experiences of the 17 jurisdictions that have recognized a racial-bias exception to the no-impeachment rule—some for over half a century—with no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations.").

251. Singh, *supra* note 160.

252. *See Peña-Rodriguez*, 580 U.S. at 227 (noting that there have been "no signs of . . . a loss of juror willingness to engage in searching and candid deliberations").

253. *Supra* Part I.B.

254. *Peña-Rodriguez*, 580 U.S. at 227.

255. *Id.* at 226.

256. *Id.* at 226–27.

257. Singh, *supra* note 160.

258. *See* Buck v. Davis, 137 S. Ct. 759, 779 (2017) (stating that the interest in finality for a verdict based on racial bias "deserves little weight"); *Peña-Rodriguez*, 580 U.S. at 225 (stating

paramount goal, Rule 606(b) likely would not permit any exceptions. Instead, the rule recognizes that some violations of a defendant's constitutional right to a fair and impartial jury outweigh the finality interest.[259] Jury bias against a historically marginalized class should certainly qualify as one of those exceptions.

Finally, the *Peña-Rodriguez* Court also put a significant limitation on itself. The exception only applies when a juror makes a *clear* statement of racial bias, and the statement must show that racial animus was a *significant motivating factor* in the juror's vote to convict.[260] Lower courts have made the "clear statement" requirement a high bar.[261] This rule helps ensure that ambiguous statements will not derail the finality of a verdict, and it can guide jurors as to what kinds of statements to report.

2. *Other Safeguards Against Juror Bias*. Opponents also point to other safeguards within the trial system: voir dire, trial observations of misconduct, pre-verdict reporting, and using nonjuror evidence to impeach after the verdict.[262] As *Peña-Rodriguez* exemplifies, these safeguards are sometimes not enough to provide the protections they claim to provide.[263]

Voir dire is a particularly insufficient safeguard against LGBTQ+ bias in the jury system.[264] First, voir dire on jurors' biases is not always constitutionally mandated,[265] and some courts have not allowed questions regarding LGBTQ+ bias.[266] Second, voir dire also relies on jurors knowing the defendant is LGBTQ+ when the jury selection process happens, which is not always going to be the case, especially if

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that the policy interests of the no-impeachment rule do not outweigh Sixth Amendment concerns because "there is a sound basis to treat racial bias with added precaution"); FED. R. EVID. 606(b) (permitting exceptions to the no-impeachment rule).

259. *See* FED. R. EVID. 606(b) (permitting exceptions to the no-impeachment rule).

260. *Peña-Rodriguez*, 580 U.S. at 225–26.

261. Bussio, *supra* note 36, at 188.

262. *See, e.g.*, *Peña-Rodriguez*, 580 U.S. at 243 (Alito, J., dissenting).

263. *See id.* at 211–12 (majority opinion) (describing how racial bias was not uncovered until two jurors came forward after deliberations).

264. *See* McNamarah, *supra* note 23, at 422 ("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.").

265. *Id.* at 421.

266. *See supra* Part I.B.

the judge thinks it is irrelevant to the case.[267] Third, jurors probably are not likely to openly share their bias toward LGBTQ+ individuals.[268] Fourth, research has shown that juror rehabilitation—a process in which the court asks prospective jurors if they can set aside their biases (if done before jury selection is finished) or instructs sitting jurors to set aside their biases (if done post-jury selection)—does not decrease bias but rather only causes jurors to be less sure of themselves.[269] In all these ways, voir dire fails as a sufficient safeguard, as exemplified in *Peña-Rodriguez* and *Warger*.

Other safeguards are also ineffective. Jurors likely are not going to be outwardly queerphobic in a way observable by counsel or the judge.[270] Jurors can report misconduct before the verdict is delivered, but, again, the burden associated with calling out another juror's prejudice during deliberations can be overwhelming.[271] Permitting jurors to come forward after deliberations helps minimize this burden. Finally, defendants can use nonjuror evidence to impeach the verdict after it has been delivered,[272] but the best evidence of bias influencing jury deliberations may come from the jurors who participated in those deliberations. Without permitting testimony from those inside the deliberation room, juror bias could possibly go undiscovered or be discovered too late.[273]

3. *Line-Drawing Issue*. Opponents have also expressed concern about how the Court will determine which biases demand exceptions to the no-impeachment rule.[274] However, the Court has participated in such line drawing before with other jury processes, like jury

267. *See* McNamarah, *supra* note 23, at 418, 421–22 (noting that judges retain the discretion to disallow voir dire into LGBTQ+ bias).

268. *See id.* at 422 (identifying various obstacles to detecting jurors' LGBTQ+ biases).

269. Bussio, *supra* note 36, at 183–84; McNamarah, *supra* note 23, at 423–24.

270. *See* McNamarah, *supra* note 23, at 422 ("Jurors have no incentive to admit their prejudices against queer persons in open court. They may alternatively be unaware of their implicit anti-queer biases or lie about their attitudes towards LGBTQ+ persons." (footnotes omitted)).

271. *See id.* at 430 ("[F]ellow 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.").

272. Peña-Rodriguez v. Colorado, 580 U.S. 206, 243 (2017) (Alito, J., dissenting).

273. Harawa, *supra* note 19, at 627.

274. *Peña-Rodriguez*, 580 U.S. at 236 (Alito, J., dissenting) ("[I]t is doubtful that there are principled grounds for preventing the expansion of today's holding.").

selection.[275] *Peña-Rodriguez* limits itself to the "gravest and most important cases" and to forms of discrimination that have historically recurred in the jury system.[276] Although neither the *Peña-Rodriguez* ruling nor the Court's Sixth Amendment jurisprudence demands it, the Court could also limit the exception to suspect classes.[277] Either one of these limitations would properly restrain the exceptions to the no-impeachment rule. To argue, as Justice Alito did,[278] that it is unfair to treat racial bias differently than bias toward football teams ignores that the suspect classification doctrine itself proves that the Court has long treated certain forms of discrimination as more severe and constitutionally impermissible than others.[279] Therefore, the issue is not whether the Court can draw a line but rather what line the Court draws.

CONCLUSION

Granting protection against LGBTQ+ bias in jury deliberations is crucial to advancing LGBTQ+ equality inside and outside the courtroom. Research has shown that advancement of legal protections for LGBTQ+ individuals can affect social norms and could lead to more positive public attitudes toward LGBTQ+ individuals.[280] If we do not take further steps to eliminate LGBTQ+ bias—and the other types of bias that accompany it—from the criminal justice system, LGBTQ+ individuals will continue to be perceived as second-class citizens and be stripped of their dignity. This is not a minor issue: it can be a matter of life or death for some LGBTQ+ individuals. And as long as jurors can still use LGBTQ+ bias to make their decisions and can hide that bias within the "black box," we cannot claim that the jury system is fully "a fundamental safeguard of individual liberty."[281]

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275. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 144–45 (1994) (stating that both gender and racial bias in jury selection are impermissible).

276. *See Peña-Rodriguez*, 580 U.S. at 219, 224 (distinguishing "anomalous behavior from a single jury" from bias that is "a familiar and recurring evil").

277. Bussio, *supra* note 36, at 186.

278. *Peña-Rodriguez*, 580 U.S. at 251 (Alito, J., dissenting).

279. *See id.* at 224 (majority opinion) ("This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns."); *J.E.B.*, 511 U.S. at 144–45 (stating that both gender and racial bias in jury selection are constitutionally impermissible).

280. Sanders, *supra* note 243, at 2118.

281. *See Peña-Rodriguez*, 580 U.S. at 210 ("The jury [is] considered a fundamental safeguard of individual liberty.").