

**GUILTY AND GAY, A RECIPE FOR  
EXECUTION IN AMERICAN COURTROOMS:  
SEXUAL ORIENTATION AS A TOOL FOR  
PROSECUTORIAL MISCONDUCT IN DEATH  
PENALTY CASES**

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#### INTRODUCTION

[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds.<sup>1</sup>

Homosexual people<sup>2</sup> in the United States are becoming an increasingly well-organized and visible minority.<sup>3</sup> Although the actual number of homosexual people in the United States is largely

1. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (holding that "the race-based exclusion of potential jurors in a civil case violates the excluded person's equal protection rights").

2. In this Comment, the term "homosexual" includes lesbian, gay, bisexual, transgender, and transsexual people. See, e.g., BYRNE FONE, *HOMOPHOBIA: A HISTORY* 50 (2000) (discussing the origins of the term "homosexual"). Historically, the term "homosexual" has been used to classify diverse groups of people primarily based on their sexual attraction to members of the same gender. See *id.* at 4-5 (tracing the development of the term "homosexual" and its use in everyday parlance). Contrary to this commonly accepted conduct-based classification, the term "homosexual" will be used in this Comment to connote a self-identified or perceived status or lifestyle, irrespective of sexual activity or conduct.

3. The number of nationwide politically activist organizations dedicated to establishing social and legal equality for homosexuals has proliferated over the last thirty years. Examples include: Gays and Lesbians Against Defamation ("GLADD"); National Gay and Lesbian Task Force ("NGLTF"); Lambda Legal Defense & Education Fund; Human Rights Campaign ("HRC"); Servicemembers Legal Education Defense Network ("SLDN"); Gay, Lesbian, Bisexual, Transgendered Veterans of America; and the National Lesbian and Gay Law Association ("NLGLA"). Also telling is the number of homosexual characters regularly appearing on prime time television shows. According to GLADD, there were twenty-seven gay lead, supporting, and recurring characters in prime-time series programming in the 2000-2001 season. See Bonnie J. Dow, *Ellen, Television, and the Politics of Gay and Lesbian Visibility*, 18 *CRITICAL STUD. IN MEDIA COMM.* 2 (2001) (discussing the importance of homosexual characters on television as both a cause of societal acceptance as well as an effect).

unknown,<sup>4</sup> information recently released by the U.S. Census Bureau demonstrates a dramatic increase in the number of same-sex partner households.<sup>5</sup> With an increase in visibility, social acceptance of homosexuals and their lifestyles—as reported in major polling data—also appears to have increased substantially over the last thirty years.<sup>6</sup>

Despite these strides, recent actions by state legislators and voters across the country belie the picture of a more tolerant attitude

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4. See Todd Brower, *Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts*, 38 SAN DIEGO L. REV. 565, 566 (2001) (explaining that many homosexual people who face discrimination, ridicule, loss of contracts, and termination of employment chose to live “in the closet” by concealing or denying their sexual orientation to others).

5. See Karen S. Peterson, *Changes Boost Gay Household Tally*, USA TODAY, July 10, 2001, at A1 (reporting that changes by the U.S. Census Bureau in the compilation of population statistics yielded substantial data on the number of homosexual people). In 1990, the Census Bureau reclassified householders who claimed to have same-sex spouses into different categories. See *id.* (noting that the Census Bureau either changed the sex of one of the same-sex spouses or listed one spouse as either a sibling or roommate). In 2000, the Census Bureau changed its procedure and allowed householders to claim an “unmarried partner” then declare their sex. See *id.* (noting that under the revised procedure, same-sex partnerships could be tallied). As a result of the substantial undercounting by the 1990 census and the subsequent changes to the 2000 census, the reported number of same-sex partner households has increased astronomically in many states: Delaware 781%; Alabama 658%; Vermont 422%; Colorado 385%; Illinois 268%; New York 238%. See *Most U.S. Counties Include Gay Families*, USA TODAY, Aug. 22, 2001, at D6 (revealing that according to census figures “gay and lesbian families” live in 99.3% of all American counties; and that the total number of “gay and lesbian families” counted in the 2000 census was 594,391). But see Genaro C. Armas, *Census’ Same-Sex Data Scrutinized*, AP ONLINE, July 11, 2001, available at 2001 WL 24710679 (describing the position taken by the Census Bureau that “estimates of same-sex unmarried partners are not comparable between the 1990 and 2000 census”); *Technical Note on Same-Sex Unmarried Partner Data From the 1990 and 2000 Censuses*, U.S. Census Bureau, Population Division, Fertility & Family Statistics Branch, at <http://www.census.gov/population/www/cen200/samesex.html> (last modified June 29, 2001).

6. See Alan S. Yang, *The 2000 National Election Survey and Gay and Lesbian Rights: Support for Equality Grows*, at <http://www.nglrf.org/library/index.cfm> (last modified June 29, 2001) (finding that 41.4% of Americans support gay adoption, while 50.5% oppose it; 71.2% support the right of homosexuals to serve in the military, while 22.9% oppose it; and 63.9% support sexual orientation nondiscrimination laws, while 30.9% oppose it); see also SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 168 (1999) (reporting that the percentage of Americans who think homosexual relations between consenting adults should be legal increased from forty-three percent in 1977 to fifty percent in 1999; and college freshmen reporting that homosexual relations should be legally prohibited decreased from forty-seven percent in 1976 to thirty-three percent in 1998); Derek Rose, *Teens Back Marriage By Gays; A Poll Finds*, N.Y. DAILY NEWS, Aug. 28, 2001 (stating that in a national poll of one thousand high school seniors, seventy-nine percent agreed with laws banning job discrimination based on sexual orientation; eighty-eight percent favored laws against hate crimes directed against homosexual people; and sixty-six percent favored legalizing same-sex marriages); Alan S. Yang, *From Wrongs to Rights: Public Opinion on Gay and Lesbian Americans Moves Toward Equality*, Policy Institute of the National Gay and Lesbian Task Force, available at <http://www.nglrf.org/library/index.cfm> (observing trends in national polling data that suggest greater societal acceptance of homosexual people).

toward homosexuals drawn by these polls.<sup>7</sup> In the November 2000 election, voters in several states elected to prohibit same-sex marriages<sup>8</sup> and to repeal existing non-discrimination statutes that included homosexuals.<sup>9</sup> A wave of public opposition to state and local anti-discrimination statutes has also developed in response to the efforts of some municipalities and charitable organizations to use these statutes to prevent the Boy Scouts of America, which exclude homosexual scoutmasters, from using public resources or receiving financial contributions.<sup>10</sup> In January 2001, President George W. Bush also introduced a “Faith Based Initiative”<sup>11</sup> that proposes allowing

7. See *infra* notes 8-9 and accompanying text.

8. See Joyce Howard Price, *Gay-Rights Measures Meet With Defeat in Three States; Maine Ballot Initiative Appears Headed for a Recount*, WASH. TIMES, Nov. 10, 2000, at A10 (observing that seventy percent of voters in Nebraska and Nevada supported ballot initiatives to amend the states’ constitutions to ban same-sex marriages, and further noting that the Nevada amendment will need approval by the voters in that state in another general election before taking effect).

9. See Doug Ireland, *Same-Sexers Under Siege: The Right-Wing Crusade to Roll Back Gay Civil Rights is Gathering Momentum*, NATION, July 2, 2001, available at 2001 WL 2132703 (detailing the states and cities that have removed sexual orientation from their anti-discrimination statutes and the cities where referendums to remove such statutes are likely to be placed on upcoming ballots); see also Press Release, National Gay and Lesbian Task Force, GLBT Communities Expected to Face 12 Hostile Ballot Measures in Next 16 Months (July 25, 2001) (on file with author), available at <http://www.nglftf.org/news/release> (describing the municipalities, counties, and states where measures will be placed on upcoming ballots to repeal existing protections for homosexuals). But see John Flesher, *Five Cities Vote on Gay-Rights Issues*, AP ONLINE, Nov. 7, 2001 available at 2001 WL 29791468 (reporting on how voters in five cities voted on ballot issues pertaining to gay-rights). In Traverse City and Kalamazoo, Michigan, voters rejected amendments that would have prevented the cities from enacting policies to protect homosexuals from discrimination. *Id.* Voters in Miami, Florida, decided that the city should provide employee benefits to domestic partners; and in Huntington Woods, Michigan, voters upheld a municipal ordinance that prohibited discrimination on the basis of sexual orientation. *Id.* Finally, voters in Houston, Texas, disapproved a measure that would require the city to offer health care coverage to domestic partners. *Id.*

10. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that the State of New Jersey’s use of an anti-discrimination statute to force the Boy Scouts to admit a homosexual assistant scoutmaster violated the organization’s First Amendment right to “expressive association”); David France, *Scouts Divided*, NEWSWEEK, Aug. 2001, at 45 (chronicling developments within the Boy Scouts of America as an organization since *Dale*, and reporting that companies such as Fleet Bank, Medtronic, Inc., and Wells Fargo have scaled back their funding to the Boy Scouts, and that companies such as CVS and Levi Strauss have ceased their donations to the Boy Scouts); Harrison Sheppard, *Boy Scouts Ban, Limits Assailed*, L.A. DAILY NEWS, Jan. 28, 2001, available at 2001 WL 6050160 (reporting that the response of many states, counties, municipalities and charitable organizations to limit financial contributions to the Boy Scouts and to limit the Boy Scouts’ access to public facilities, has met great resistance from the public).

11. See Exec. Order No. 13,198, 66 Fed. Reg. 8495 (Jan. 31, 2001) (establishing an Executive Branch agency to “to coordinate department efforts to eliminate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services.”); Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 31, 2001) (creating the “White House Office of Faith-Based and Community Initiatives”).

religious organizations to compete for federal grants without losing their exemption from federal anti-discrimination statutes.<sup>12</sup> Perhaps the most glaring sign of the growing hostility toward homosexuals is the establishment of an inter-faith religious organization that advocates amending the U.S. Constitution to ban same-sex marriages.<sup>13</sup>

In addition to the myriad of hostile laws<sup>14</sup> already in place, and

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12. See Remarks Announcing the Faith-Based Initiative, 37 WEEKLY COMP. PRES. DOC. 231 (Feb. 5, 2001) (stating that “faith-based charities should be able to compete for funding on an equal basis and in a manner that does not cause them to sacrifice their mission.”); President’s Remarks to the Fishing School, 37 WEEKLY COMP. PRES. DOC. 241 (Feb. 5, 2001) (speaking about how faith-based organizations have rallied together towards the implementation of the Faith-Based Initiative); H.R. 7, 107th Cong. (2001) (the “Community Solutions Act of 2001” or the “Faith-Based Initiative” bill that proposed legislatively the incentives for charitable contributions subsequently provided in President Bush’s program). On July 19, 2001, the United States House of Representatives voted 233-198-3 in favor of passing H.R. 7. See CONG. REC. H4281 (daily ed. July 19, 2001). See also Jeanne Cummings & Jim VandeHei, *Faith-Based Initiative Takes Worldly, Rocky Path*, WALL ST. J., Aug. 16, 2001, at A16 (detailing the chronology of events surrounding the faith-based initiative from its introduction to the U.S. House of Representatives, to its “death” in the U.S. Senate; and reporting that the White House conducted private talks with the Salvation Army, which offered support for the legislation in return for White House consideration of new regulations that would shield the Salvation Army from state and local anti-discrimination laws); Bill Myers, *States, Counties, Cities and Towns with Anti-Discrimination Laws Based on Sexual Orientation*, at <http://www.actwin.com/eatonohio/gay/gayri.htm> (last modified Nov. 8, 2001) (charting the states, counties, and municipalities and the areas that their anti-discrimination statutes cover and revealing that 25 states, 53 counties, and 207 municipalities have anti-discrimination laws that include sexual orientation and apply variously to public employment, public accommodations, private employment, education, housing, credit, and union practices).

13. See Carolyn Lochhead, *Religious Leaders Back Anti-Gay Initiative/Constitutional Amendment to Bar Same-sex Marriage*, S.F. CHRON., July 13, 2001, at A6 (describing a proposed amendment to the U.S. Constitution that states: “Marriage in the United States shall consist only of the union of a man and woman. Neither this Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”).

14. The various state sodomy laws that essentially criminalize the non-celibate homosexual lifestyle are just one example of laws that are hostile to homosexual people. Eleven states have sodomy laws that prohibit consensual sex between persons irrespective of gender. Interestingly, many of the statutes label these acts of consensual sex as a “crime against nature,” and in many instances they are the same statutes that prohibit the carnal knowledge of animals. See ALA. CODE §§ 13A-6-60, 65 (2001) (“Deviate sexual intercourse is any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another.”); D.C. CODE ANN. § 22-1112 (2001) (“It is a felony to take the sexual organ of another person into one’s mouth or anus or to place one’s sexual organ in the mouth or anus of another or to have carnal copulation in an opening of the body other than the sexual parts with another person.”); FLA. STAT. ch. 800.02 (2001) (“A person who commits any unnatural and lascivious act with another person commits a misdemeanor of the second degree.”); GA. CODE ANN. § 16-6-2 (2001) (“Sodomy consists of performing or submitting to any sexual act involving the sex organs of one person and the mouth or anus of another.”); IDAHO CODE § 18-6605 (Michie 2001) (“The infamous crime against nature is a felony.”); LA. REV.

STAT. ANN. § 14:89 (West 2001) (“The unnatural carnal copulation by a human being with another of the same or opposite sex is a crime against nature and is a felony.”); MD. CODE ANN. [Crimes and Punishments] § 554 (2001) (“Every person who is convicted of taking into his or her mouth the sexual organ of any other person or animal, or who shall be convicted of placing his or her sexual organ in the mouth of any other person or animal, or who shall be convicted of committing any other unnatural or perverted sexual practice with any other person or animal, shall be fine[d] . . . or be imprisoned in jail . . . .”); MASS. GEN. LAWS ch. 272, § 34 (West 2001) (“Whoever commits the abominable and detestable crime against nature is guilty of a felony.”); MICH. COMP. LAWS § 750.158 (2001) (“It is a felony to commit the abominable and detestable crime against nature.”); MISS. CODE ANN. § 97-29-59 (2001) (“Every person convicted of the detestable and abominable crime against nature is guilty of a felony.”); MONT. CODE ANN. § 45-5-505 (2001) (“Deviate sexual relations between two persons is a felony.”); N.Y. PENAL LAW § 130.00 (2001) (“Deviate sexual intercourse means sexual conduct between persons not married to each other consisting of conduct between the penis and the anus, the mouth and the penis, or the mouth and the vulva.”); N.C. GEN. STAT. § 14-177 (2001) (“It is a felony to commit the crime against nature.”); OKLA. STAT. tit. 21, § 886 (2001) (“Any person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, shall be guilty of a felony . . . .”); 18 PA. CODE STAT. § 2709 (2001) (“An offense relating to deviate sexual intercourse shall constitute a misdemeanor of the first degree”); R.I. GEN. LAWS § 11-10-1 (2001) (“Anyone who commits the abominable and detestable crime against nature with another person commits a felony carrying a seven-year minimum sentence.”); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 2001) (“Buggery is a felony.”); UTAH CODE ANN. § 76-5-403 (2001) (“It is a misdemeanor called sodomy to engage in any sexual act involving the genitals of one person and mouth or anus of another person, regardless of the gender of either participant.”); VA. CODE ANN. § 18.2-361 (Michie 2001) (“It is a felony designated as a crime against nature to carnally know any male or female person by or with the anus or mouth or to submit to such carnal knowledge.”).

Six states have sodomy laws that specifically prohibit consensual sex between people of the same-sex. *See* ARK. CODE ANN. § 5-14-122 (2001) (“Sodomy is any act of sexual gratification involving the penetration, however slight, of the anus or mouth of a male by the penis of another male; or the penetration, however slight of the anus or vagina of a female by any body member of another female.”); KAN. STAT. ANN. § 21-3505 (2001) (“Sodomy between persons of the same sex is a misdemeanor.”); KY. REV. STAT. ANN. § 510.010 (Banks-Baldwin 2001) (“It is a misdemeanor to engage in deviate sexual intercourse with another person of the same sex.”); MO. REV. STAT. § 566.090 (2000) (“A person commits the crime of sexual misconduct in the first degree if he has deviate sexual intercourse with another person of the same sex . . . sexual misconduct in the first degree is a class A misdemeanor.”); TENN. CODE ANN. § 39-13-510 (2001) (“It is a misdemeanor to engage in consensual sexual penetration with a person of the same gender.”); TEX. PENAL. CODE ANN. § 21.06 (Vernon 2001).

The Federal Government and thirty-four states have laws that prohibit the recognition of marriage between persons of the same gender. *See* 1 U.S.C.A. § 7 (West 2000) (codifying the Federal Defense of Marriage Act, and defining marriage as “only a legal union between one man and one woman as husband and wife”); ALA. CODE § 30-1-19 (2001); ALASKA STAT. § 25.05.013 (Michie 2001); ARIZ. REV. STAT. §§ 25-101,112 (West 2001); ARK. CODE ANN. §§ 9-11-107, 190, 208 (Michie 2001); CAL. FAM. CODE § 308.5 (West 2001); COLO. REV. STAT. § 14-2-110 (2001); DEL. CODE ANN. tit 13, §§ 101-104 (2001); FLA. STAT. ch. 741.212 (2001); GA. CODE ANN. § 19-3-3.1; HAW. REV. STAT. § 572-1 (2000); IDAHO CODE §§ 32-202, 209 (Michie 2001); 750 ILL. COMP. STAT. 5/213.1, 216 (2001); IND. CODE ANN. § 31-11-1-1 (Michie 2001); IOWA CODE § 595.2 (2001); KAN. STAT. ANN. § 77-201 (2001); KY. REV. STAT. ANN. §§ 402.020, 402.045 (Banks-Baldwin 2001); LA. CIV. CODE ANN. art. 89 (West 2001); ME. REV. STAT. ANN. tit. 19-A § 701 (West 2001); MICH. COMP. LAWS §§ 551.1, 551.271, 551.272 (2001); MINN. STAT. § 517.03 (2001); MISS. CODE ANN. § 93-1-1 (2001); MO. REV. STAT. § 451.022 (2000); MONT. CODE ANN. § 40-1-401 (2001); NEB. REV. STAT.

pending legislation<sup>15</sup> that threatens to eviscerate the gains toward equal treatment made over the last thirty years, homosexuals face rampant discrimination inside the nation's courtrooms.<sup>16</sup> Despite canons of ethics and local court rules that prohibit prejudicial conduct on the basis of sexual orientation,<sup>17</sup> lawyers, judges, and

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§ 42-117 (2001); N.C. GEN. STAT. § 51-1.2 (2001); OKLA. STAT. tit. 43, § 3.1 (2001); PA. CONS. STAT. ANN. tit. 23, § 1704 (West 2001); S.C. CODE ANN. § 20-1-15 (Law. Co-op. 2001); S.D. CODIFIED LAWS § 25-1-38 (Michie 2001); TENN. CODE ANN. § 36-3-113 (2001); UTAH CODE ANN. §§ 30-1-2, 4 (2001); VA. CODE ANN. § 20-45.2 (Michie 2001); WASH. REV. CODE § 26.04.020 (2001); W. VA. CODE § 48-1-18a (2001). *But see* VT. STAT. ANN. tit. 15, § 23 (2001) (recognizing "civil unions" between persons of the same sex and conferring some civil rights to the members of those "unions"); CAL. FAM. CODE §§ 297-298 (West 2001) (establishing "domestic partnerships" and conferring various civil rights to domestic partners that were traditionally enjoyed by married couples, such as hospital visitation and the administration of estates). *See generally* Frank Murray, *Judge Asked to Skip Trial, License Gay 'Marriages' in Massachusetts*, WASH. TIMES, Aug. 30, 2001, at A4 (reporting that two women sued the Massachusetts Public Health Commissioner in Suffolk Superior Court to gain the state's recognition of their "marriage," and noting that the Massachusetts Attorney General is considering two voter-initiatives submitted for the 2004 ballot seeking to re-write a definition of marriage into the state's Constitution). *But see generally* *Law Allows Gay Unions in Germany; Couples Exchange Vows in Berlin as Same-Sex 'Marriage' Legislation Takes Effect*, AUGUSTA CHRON., Aug. 2, 2001, at A7 (observing that a German law allows gay couples to register their unions at government offices, requiring a court decision for divorce; and that same-sex couples also receive inheritance and health insurance rights); *Gay Couples Marry Under New Dutch Law*, L.A. TIMES, Apr. 1, 2001, at A9 (revealing that a Dutch law not only recognizes marriages between persons of the same gender, but it also "eliminates references to gender in the laws governing matrimony and adoption," and "amend[s] the dictionary to eliminate references to 'man and woman' in the definition of marriage").

15. Five states have pending legislation that would prohibit the state's recognition of same-sex marriages. *See* H.B. 3375, 182d Gen. Court, Reg. Sess. (Mass. 2001) (in Joint Committee on Judiciary June 19, 2001; extension order filed and extended until Dec. 15, 2001); S.B. 57, 224th Ann. Legis. Sess. (N.Y. 2001) (sent to Senate Judiciary Committee on Jan. 11, 2000); S.B. 2195, 224th Ann. Legis. Sess. (N.Y. 2001) (sent to Senate Committee on Judiciary on Feb. 5, 2001); H.B. 234, 124th Gen. Assembly, Reg. Sess (Ohio 2001) (passed by the House of Representatives on Oct. 31, 2001); S.B. 488, 77th Leg. (Tex. 2001) (reported favorably from House Committee on State Affairs on May 17, 2001); H.B. 350, 66th Biennial Sess. (Vt. 2001) (sent to House Committee on Judiciary on February 27, 2001). New York is the only state with pending legislation to allow same-sex marriages. *See* S.B. 1205, 224th Ann. Legis. Sess. (N.Y. 2001) (sent to Senate Committee on Judiciary on Jan. 17, 2001).

16. *See infra* Parts I.A, II.B.

17. The Model Code of Judicial Conduct States that:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, *sexual orientation* or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Model Code of Jud. Conduct Canon 3(B)(5) (1999) (emphasis added). Twenty-eight state court systems have incorporated Canon 3 into their own rules of judicial conduct. *See* Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 450 n.9 (2000) [hereinafter Brown] (collecting the citations of each state's version of Canon (3)(B)(5) of the Model Code of Judicial Conduct). *See generally* William C. Duncan,

court personnel often express homophobic<sup>18</sup> attitudes in open court. Homosexual litigants, jurors, attorneys, and court personnel not only face a system of hostile laws, but also an institution charged with administering those laws that often permits equally homophobic behavior.<sup>19</sup>

Worse still, as this Comment argues, the hostility from within the legal community can often manifest itself in the most egregious form possible: death sentences for criminal defendants.<sup>20</sup> This hostility

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"A Lawyer Class": *Views on Marriage and "Sexual Orientation" in the Legal Profession*, 15 B.Y.U. J. PUB. L. 137 (2001) (discussing the prevalence of state and local legal ethics codes and court rules that includes language prohibiting biased conduct based on sexual orientation); David S. Buckel, *Fighting for Sexual Orientation Fairness in the Courts*, Lambda Legal Defense & Education Fund (1997) (evaluating the role of judicial canons to combat sexual orientation discrimination in the courtroom, and collecting the citations of each state's judicial canons that prohibit bias on the basis of sexual orientation by members of the bar). There are eight federal courts that have rules specifically prohibiting biased conduct based on sexual orientation. *See, e.g.*, D. ARIZ. R. 1.20; BANKR. D. ARIZ. R. 1000-1; D. IDAHO ORDER 112; BANKR. D. IDAHO ORDER 112; D. N.J. APP. R.; W.D. WASH. GEN. R. 9; N.D.W.VA. LOCAL R. GEN. PRAC. 3.02; S.D.W.VA. LOCAL R. GEN. PRAC. 3.02. In addition, ten state court systems have rules or codes of professional conduct that specifically prohibit bias on the basis of sexual orientation. *See, e.g.*, CAL. ST. R. APP. DIV. 1 JUDICIAL ADMIN. § 1; D.C. R.P.C. 9.1; ILL. SUP. CT. R. 63; ILL. R. PROF'L CONDUCT 8.4; MASS. R. 3:07, 3.4; N.J. R. PROF'L CONDUCT 8.4; N.J. R. JUDICIAL EMPLOYEE CONDUCT CANON 1; N.M. R. PROF'L CONDUCT 16-300; N.D. R. PROF'L CONDUCT 8.4; TEX. R. PROF'L CONDUCT 5.08; VT. R. PROF'L CONDUCT 8.4; WASH. ORDER 00-66. Finally, ten county court systems have similar rules. *See, e.g.*, CAL. R. ALAMEDA SUPER. CT. 2.0; CAL. R. CONTRA COSTA PROF'L COURTESY STDS. 3, CAL. CONTRA COSTA ALTERNATIVE DISPUTE RESOLUTION APP. D; CAL. R. SACRAMENTO BAR ASSOC. STDS. PROF'L CONDUCT § 3; CAL. R. SACRAMENTO SUPER. CT. 9.24; CAL. R. SAN DIEGO SUPER. CT. DIV. 1, R. 2.1; CAL. R. S. F. SUPER. CT. 2.7; CAL. R. SANTA BARBARA SUPER. CT. APP. 5; CAL. R. SANTA CRUZ SUPER. CT. EXHIBIT D-1; CAL. R. SANTA CRUZ SUPER. CT. EXHIBIT D-2; CAL. R. SISKIYOU SUPER. CT. APP. 2; CAL. R. SONOMA SUPER. CT. 21.2; WASH. R. ISLAND AND SAN JUAN SUPER. CT. CIV. APP. F.

18. Professor Byrne Fone attempts to define the term "homophobia" in his book bearing the same title. *See FONE, supra* note 2, at 424 n.5 (describing the word's construction as a slang abbreviation for the word "homosexual" joined with "phobia," which is Latin for fear). The term was most likely coined in a 1971 article appearing in *Psychological Reports*. *See id.* at 5 (commenting that the term only recently has been introduced into the American vocabulary). The term "homophobia" itself inadequately conveys the feelings of antipathy and dislike toward homosexual people and homosexuality generally. *See id.* (defining homophobia as "the fear and dislike of homosexuality and of those who practice it"). This Comment will use the term as it is popularly construed.

19. *See infra* Part I (discussing the courtroom as a hostile environment for homosexual people); *see also Report: Findings From the Survey on Barriers and Opportunities Related to Sexual Orientation*, Bar of the City of New York (1995) (providing anecdotal evidence that illustrates the gravity of hostility in the courtroom). "After a hearing, a defense attorney turned to the assistant DA and called him a 'flaming faggot.'" *Id.* at 5. "A gay male attorney was taking a long time to interview a male defendant during arraignments. The judge, ADA [Assistant District Attorney] and court personnel joked that the attorney was probably trying to date the defendant." *Id.* "When I indicated I was familiar with the hotel [involved in a case] the judge said, 'Oh, I didn't know it was a gay hotel!' This was in front of a courtroom full of people." *Id.* at 6.

20. *See infra* note 21 and accompanying text.

culminates in the real possibility that homosexual defendants found guilty of heinous crimes may receive the death penalty, as opposed to life sentences, because of their status as homosexuals.<sup>21</sup> Indeed, in many cases,<sup>22</sup> a defendant's sexual orientation plays a key role in the prosecutor's trial and sentencing strategy.<sup>23</sup> Prosecuting attorneys actually use the defendant's sexual orientation in various prejudicial ways in order to solidify the chances of securing a death sentence from the jury.<sup>24</sup> For example, prosecutors make calculated decisions about when and how to introduce evidence of a criminal defendant's previously undisclosed sexual orientation.<sup>25</sup> Prosecutors also present arguments to the jury that blatantly stereotype and degrade homosexuals.<sup>26</sup> Unfortunately, these are all too common occurrences in death penalty cases in the United States.

Part I of this Comment explores the institutionalization of homophobia in the legal system generally. Part II provides a narrative of four cases that illustrate the homophobic bias in death sentences for criminal defendants whom might otherwise have received life sentences. Part III argues that the current standard of review for prosecutorial misconduct that federal courts employ when

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21. See Richard Goldstein, *Queer on Death Row: In Murder Cases, Being Gay Can Seal a Defendant's Fate*, VILLAGE VOICE, Mar. 20, 2001; Peter Freiberg, *Gays Sentenced to Die: Death Row Cases' Lawyers Charge Homophobia*, WASH. BLADE, Feb. 2, 2001; Memorandum from Eric Ferrero, Public Education Director, American Civil Liberties Union, National Office, Lesbian & Gay Rights and AIDS Projects, America's Unjust Capital Punishment System and LGBT People (July 23, 2001) (on file with author). Part II discusses how prosecutors often use a criminal defendant's sexual orientation to garner support from the jury for a sentence of death as opposed to a sentence of life in prison. See David Rovella, *Criminal Cases; Poll Elicits Fear of Rogue Jury*, NAT'L L.J., Nov. 2, 1998, at A25 (reporting that according to a national survey of potential jurors: (1) seventy-six percent agreed with the statement "[w]hatever the judge says the law is, jurors should do what they believe is the right thing;" and (2) seventeen percent admitted that they could not be fair if a party to a case was homosexual).

22. It is difficult to discern the true extent to which prosecutors either misuse evidence or make improper arguments about a defendant's sexual orientation. Part II of this Comment discusses four cases where the prosecutor's use of the defendant's sexual orientation became an issue on direct appeal and subsequently collateral attack under habeas review in federal court. Discovering these, and similar, cases depends in large part on many variables, including: (1) that the convicted individual and/or their attorney recognizes the prosecutor's inappropriate actions, (2) raise specific objections to these actions and appeal their conviction, (3) that the courts of appeal actually reach the specific issue as it is raised on appeal, and (4) that the appellate court's opinion is published. As Part I of this Comment demonstrates, bias against homosexuals pervades the legal system as a whole. It seems fair to speculate, then, that this type of prosecutorial misconduct is much more pervasive than the four cases addressed in this Comment, on their face, might suggest.

23. See Goldstein, *supra* note 21 and accompanying text.

24. See Goldstein, *supra* note 21 and accompanying text.

25. See Goldstein, *supra* note 21 and accompanying text.

26. See Goldstein, *supra* note 21 and accompanying text.

reviewing state death penalty cases inadequately protects homosexual criminal defendants. Part IV argues that a criminal defendant's sexual orientation should never be a consideration in determining whether to impose the state's ultimate form of punishment—the death penalty.

#### I. THE LEGAL COMMUNITY: A HOSTILE ENVIRONMENT FOR HOMOSEXUALS

Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.<sup>27</sup>

Despite this idealistic description, the courtroom is all too often a forum for biased and discriminatory behavior of judges and attorneys. For example, in a 1991 case involving a plaintiff challenging his dismissal from the U.S. Naval Academy for being gay, U.S. District Court Judge Oliver Gasch repeatedly referred to the plaintiff and gay men in general as “homos.”<sup>28</sup> In a 1997 sentencing, a District Court of Appeals judge in Florida, after learning that the female probationer was living with her lesbian partner, said, “I’ll tell you ma’am. This is a sick situation . . . I’ve seen a lot of sick situations since I’ve been in this court. I’ve been in this profession for 27 years and this ranks at the top.”<sup>29</sup> After announcing the sentence for violating the terms of her probation, the judge observed that “[i]f this is the family of 1997, heaven help us.”<sup>30</sup>

In the 1998 sentencing of a homosexual defendant who had just been convicted of sexually assaulting a thirteen year-old boy that he

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27. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (holding that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race).

28. *See Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991), *rev'd sub nom. Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *rev'd on reh'g en banc, Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (quoting Judge Gasch's response to a discovery request from Steffan's attorney: “The most I would allow is what relates to this plaintiff, not every ‘homo’ that may be walking the face of the earth at this time.”); *see also* Tracy Thompson, *Judge Refuses to Leave Case for Saying ‘Homo,’* WASH. POST, Apr. 13, 1991, at B3 (reporting that based on Judge Gasch's comments, Steffan's attorneys filed a motion to disqualify Judge Gasch, which he denied and stated: “In using the term [“Homo”], the court equated the term with homosexual. No offense was intended.”).

29. *See Rucks v. Florida*, 692 So. 2d 976, 977 (Fla. Dist. Ct. App. 1997) (quoting the trial judge's remarks at the sentencing hearing).

30. *See id.* (granting an informal writ of prohibition “on the assumption that the trial judge will remove himself”). Significantly, in its decision, the District Court of Appeals failed to publicly censure the trial court judge. *See id.*

met on the Internet, a Nebraska District Court judge for Sarpy County read a Bible passage disparaging homosexuality.<sup>31</sup> After reading the Bible passage, the judge stated that he had considered the “nature . . . of the defendant”<sup>32</sup> and found that imprisonment was necessary for the safety of the public.<sup>33</sup> While the Supreme Court of Nebraska vacated the sentence and ordered a new sentencing hearing by a different judge, it neglected to include any public censure or reprimand of the trial judge in its decision.<sup>34</sup>

Unfortunately, these are only a sample of cases where trial courts have allowed a criminal defendant’s status as a homosexual to be used against them in determining a sentence.<sup>35</sup> Indeed, the court

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31. See *State v. Pattno*, 579 N.W.2d 503, 506 (Neb. 1998). The opinion quotes the passage:

For this reason God gave them up to dishonorable passions. Their women exchanged natural relations for unnatural, and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in their own persons the due penalty for their error.

*Id.*

32. See *id.* at 509 (noting that Pattno had no history of prior child molestation or sexual assault and insinuating that the defendant’s sexual orientation was his “nature”).

33. See *id.* at 505 (conceding that the Pre Sentence Investigation (“PSI”) report recommended that if the trial judge selected probation, the defendant should, among other things, continue counseling and complete an offender’s work program). Also note that in Florida the Class IV felony with which the defendant was charged was punishable by a maximum of five years imprisonment, a \$10,000 fine, or both. See *id.* at 509 (reflecting Florida law at the time the defendant was charged). Significantly, there was no minimum sentence of incarceration or fine required. See *id.* (noting that only a maximum sentence was provided for by statute). Pattno was sentenced to not less than twenty months and no more than five years in prison. See *id.* at 506 (noting that the judge made the maximum sentence an available option).

34. See *Pattno*, 579 N.W.2d at 509 (reasoning that the trial judge’s comments during sentencing “could cause a reasonable person to question the impartiality of the judge”). The Nebraska Supreme Court framed its decision in terms of the general “reasonable person” and “impartiality” standards. See *id.* (excluding discussion of the particular type of bias exhibited by the judge).

35. See *People v. Cunningham*, 25 P.3d 519, 573-79 (Cal. 2001) (denying habeas corpus relief to a death penalty defendant where in the penalty phase of the trial the prosecutor presented evidence of an unadjudicated attempted sodomy charge from a prior imprisonment); *Shane v. State*, 716 N.E.2d 391, 399 (Ind. 1999) (ruling that the prosecutor’s introduction of photographs and videotapes of appellant and a male friend, arguably to insinuate that they were homosexual, were properly admitted even though a pre-trial agreement between the parties barred such evidence); *Ex parte Jackson*, 674 So. 2d 1365, 1368 (Ala. 1995) (denying a death penalty defendant’s claim of prosecutorial misconduct where the prosecutor called two homosexual witnesses and introduced forensic evidence that there was semen on defendant’s underwear when he was arrested; and holding that “the court did not err in admitting the evidence suggesting that [defendant] might be homosexual or bisexual and in allowing the jury to draw reasonable inferences therefrom”); *State v. Wilson*, No. 22041-5-II, 1999 WL 1048646, at \*3 (Wash. Ct. App. Nov. 19, 1999) (concluding that the trial court did not err in allowing the prosecution to ask a defense witness if he and the defendant were engaged in a homosexual relationship during cross-examination); *State v. Wells*, No. 94-CA-2255, 1995 WL 502249, at \*5

system itself can be a hostile environment for homosexual criminal defendants.<sup>36</sup> From the limited research that is available, it appears that these occurrences of hostility directed toward homosexual criminal defendants are neither isolated nor infrequent.<sup>37</sup> Unlike race and gender bias, however, prejudice against homosexuals within the legal system receives very little attention from the legal community.<sup>38</sup> In fact, while almost all of the U.S. Circuit Courts of Appeal have established some administrative body to address the occurrence of race and gender bias within their courts,<sup>39</sup> none have

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(Ohio Ct. App. Aug. 23, 1995) (finding that while the prosecutor's cross-examination of appellant regarding homosexual relationships while in prison constituted prejudicial misconduct, it did not rise to the level of plain error); *Noske v. State*, No. CO-91-2486, 1992 WL 365990, at 3 (Minn. Ct. App. Dec. 15, 1992) (holding that while evidence of homosexual activity in a criminal case is considered inherently prejudicial unless it has some particular relevance to an element of a crime, the circumstances of the case did not warrant a new trial). See *infra* Part III (discussing the standard of review for prosecutorial remarks such as these, and arguing that the standard of review leaves homosexual defendants largely unprotected).

36. See *supra* note 19 and accompanying text. See also *infra* Part II (addressing four death penalty cases where the prosecutors used evidence of the criminal defendants' sexual orientation against them in various ways in order to solidify the chances of a death sentence).

37. See *infra* Part I.A & B (discussing two statewide studies that address the prevalence and extent of sexual orientation bias within the legal community).

38. See Report #10A, American Bar Association, Aug. 5, 1996 (on file with author) (providing the 1996 Resolution of the American Bar Association House of Delegates that calls on state, territorial, and local bar associations to "study bias in their community against gays and lesbians within the legal profession and the justice system and make appropriate recommendations to eliminate such bias"). Only fourteen studies have actually been conducted to date. For a discussion of the first eleven sexual orientation bias studies, see Durkin, *infra* note 41 and accompanying text. The remaining three studies were conducted on a statewide basis: Arizona, California, and New Jersey. See *infra* notes 41-42. Significantly, the American Bar Association has not attempted to specifically track and record the state and local bar organizations' compliance with the 1996 resolution. See American Bar Association, Division for Bar Services, 1998 Bar Activities Inventory, Table 5, Question Number 81 (asking each state and local bar, "Does the bar have an organized entity (committee, section, commission) in the following areas: gay/lesbian lawyers?;" and revealing that only one state bar, Arizona, reported an affirmative answer; and that only seven local bar associations: the Bar Association of San Francisco, Los Angeles County Bar Association, Denver Bar Association, Association of the Bar of the City of New York, Philadelphia Bar Association, King County Bar Association, reported an affirmative answer). Similarly, the National Center for State Courts, an information clearinghouse for state court systems, does not compile any data on sexual orientation bias. Telephone interview with Lorrie Montgomery, Communications Manager, National Center for State Courts (Oct. 11, 2001).

39. See Hon. Bruce M. Seyla, *First Circuit: A Study of Gender Bias in and Around the Courts*, 32 U. RICH. L. REV. 647, 647 (1998) (noting that the First Circuit Court of Appeals completed a comprehensive study of gender bias in 1997, after creating two independent task forces to address gender and racial bias in 1993); George Lange, III, *Second Circuit: Study of Gender, Race, and Ethnicity*, 32 U. RICH. L. REV. 703, 703-04 (1998) (observing that in 1993, the Second Circuit created a "Task Force on Gender, Racial, and Ethnic Fairness in the Courts" and completed a comprehensive study on gender bias in 1997); Hon. Dolores K. Sloviter, *Third Circuit: Gender, Race, and Ethnicity—Task Force on Equal Treatment in the Courts*, 32 U. RICH. L. REV. 707, 717

addressed the issue of bias against homosexuals.<sup>40</sup> A handful of state

(1998) (reporting that in 1994, the Third Circuit created the “Task Force on Equal Treatment in the Courts” which presented its findings on gender bias in 1997); Samuel W. Phillips, *Fourth Circuit: The Judicial Council’s Review on the Need for a Gender Bias Study*, 32 U. RICH. L. REV. 721, 722 (1998) (stating that the Fourth Circuit surveyed each of the chief district judges in the circuit, reported its findings to the Judicial Council and opted not to undertake any “duplicative” studies); Gregory A. Nussel, *Fifth Circuit: Study of Gender Bias*, 32 U. RICH. L. REV. 723, 724 (1998) (explaining that the Judicial Council of the Fifth Circuit opted to “build and learn from previous studies rather than conduct an additional costly and lengthy study”); Collins T. Fitzpatrick, *Seventh Circuit: Fairness in the Federal Courts*, 32 U. RICH. L. REV. 725, 726 (1998) (noting that the Seventh Circuit created the “Race and Gender Fairness Committee” in 1993); Hon. Lyle E. Strom, *Eighth Circuit: Gender Fairness Task Force*, 32 U. RICH. L. REV. 731, 731 (1998) (providing that the Eighth Circuit created a task force on gender bias in 1993, and published the findings of its study in 1997); John C. Coughenour, *Ninth Circuit: The Gender Bias Task Force*, 32 U. RICH. L. REV. 735, 735 (1998) (indicating that the Ninth Circuit created the “Gender Bias Task Force” in 1990 and released the findings of its study in 1993); Hon. David M. Ebel, *Tenth Circuit: Gender Bias Study—Continuing Education and Training*, 32 U. RICH. L. REV. 745, 745 (1998) (noting that the Tenth Circuit created the “Gender Bias Task Force” and completed a study of gender bias and sexual harassment); *Eleventh Circuit: “Executive Summary”—Report of the Eleventh Circuit Task Force on Gender Bias*, 32 U. RICH. L. REV. 751, 751 (1998) (noting that the Eleventh Circuit created its “Task Force on Gender Bias” in 1993 and completed a comprehensive study); Hon. John Garrett Penn, *D.C. Circuit: Study of Gender, Race, and Ethnic Bias*, 32 U. RICH. L. REV. 765, 765 (1998) (explaining that the District of Columbia Circuit created the “Task Force on Race and Gender Bias” in 1992 and completed a comprehensive study); see also Hon. Sharon E. Grubin & Hon. John M. Walker, Jr., *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 9, 11 (reporting that the Judicial Council of the Second Circuit created a task force to study and report on the effects of gender, race, and ethnicity on the functions of the court in 1993); *Final Report & Recommendations of the Eighth Circuit Gender Fairness Task Force*, 31 CREIGHTON L. REV. 9, 12 (1997); *Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias*, 84 GEO. L.J. 1657, 1657 (1996) (summarizing the results of the Special Committee); *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745, 745 (1994) (reporting the results of the Task Force). Cf. Jeanette F. Stewart, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN’S STUD. 1, 1 (1996) (analyzing the results of studies conducted by state task forces on gender bias within the courts).

40. See Letter from Gary H. Wentz, Circuit Executive, U.S. Circuit Court of Appeals, First Circuit, to Michael Shortnacy, Staff Member, Am. U. L. Rev. (Sept. 7, 2001) (on file with author) (recognizing that “the First Circuit Task Forces on Gender, Race and Ethnic bias did not undertake to study perceptions or incidences of bias against gays or lesbians in the courts of the First Circuit”); Letter from Toby D. Slawsky, Circuit Executive, U.S. Circuit Court of Appeals, Third Circuit, to Michael Shortnacy, Staff Member, Am. U. L. Rev. (Sept. 7, 2001) (on file with author) (confirming that “the Third Circuit has *not* done a study of bias based on sexual preference”) (emphasis in original); Letter from Samuel W. Phillips, Circuit Executive, U.S. Court of Appeals, Fourth Circuit, to Michael Shortnacy, Staff Member, Am. U. L. Rev. (Sept. 7, 2001) (on file with author) (stating that “The Fourth Circuit has not established a Task Force for undertaking a study of bias against gays and lesbians in the federal court system.”); Letter from Gregory A. Nussel, Circuit Executive, U.S. Court of Appeals, Fifth Circuit, to Michael Shortnacy, Staff Member, Am. U. L. Rev. (Sept. 17, 2001) (on file with author) (pointing out that “the Fifth Circuit has declined to make bias, on any basis, an issue for special study or particularized attention.”); Letter from James A. Higgins, Circuit Executive, U.S. Circuit Court of Appeals, Sixth Circuit, to Michael Shortnacy, Staff Member, Am. U. L. Rev. (Sept. 7, 2001) (on file with author) (acknowledging that the Sixth

judicial councils and local bar associations, however, have undertaken studies about bias against homosexuals within their own court systems.<sup>41</sup> These studies overwhelmingly conclude that homosexuals (whether court employees, attorneys, jurors, court users, or criminal defendants) face widespread and rampant prejudice within the legal system. This Part focuses on two of these studies conducted in the state court systems of both California and Arizona.<sup>42</sup>

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Circuit has not undertaken any studies on bias based on sexual orientation); Telephone Interview with Collins T. Fitzpatrick, Circuit Executive, U.S. Court of Appeals, Seventh Circuit (Aug. 15, 2001) (agreeing that the Seventh Circuit has not undertaken any studies on sexual orientation bias within the courts of that circuit); Letter from Millie B. Adams, Circuit Executive, U.S. Court of Appeals, Eighth Circuit, to Michael Shortnacy, Staff Member, Am. U. L. Rev. (Sept. 21, 2001) (on file with author) (declaring that the Eighth Circuit has not established a formal task force to study the issue of sexual orientation bias); Letter from Robert E. Rucker, Asst. Circuit Executive, U.S. Court of Appeals, Ninth Circuit, to Michael Shortnacy, Staff Member, Am. U. L. Rev. (November 27, 2001) (on file with author) (conceding that "the Ninth Circuit's task forces that have addressed issues of fairness and bias concerning race, ethnicity, religion, and gender did not directly conduct research on the perceptions or incidences of bias against gays or lesbians in the courts of the Ninth Circuit"); Letter from Elisabeth A. Shumaker, Circuit Executive, U.S. Court of Appeals, Tenth Circuit, to Michael Shortnacy, Staff Member, Am. U. L. Rev. (Sept. 26, 2001) (on file with author) (confirming that "this circuit has not undertaken a study of bias involving gays or lesbian in the Tenth Circuit."); Letter from Jill Sayenga, Circuit Executive, U.S. Court of Appeals, District of Columbia Circuit, to Michael Shortnacy, Staff Member, Am. U. L. Rev. (Oct. 11, 2001) (on file with author) (noting that the 1995 report issued by the D.C. Circuit Gender, Race and Ethnic Bias Task Force does not specifically address sexual orientation bias, and that two respondents in that survey reported that they did not file a complaint about sexual orientation that they believed they experienced on the job).

41. See, e.g., Jennifer Durkin, Comment, *Queer Studies I: An Examination of the First Eleven Studies of Sexual Orientation Bias by the Legal Profession*, 8 U.C.L.A. WOMEN'S L. J. 343, 343 (1998) (summarizing the goals, methodology, findings, and recommendations of the first eleven sexual orientation bias studies conducted); Todd Brower, *Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts*, 38 SAN DIEGO L. REV. 565, 565 (2001) (discussing and analyzing the results of the 2001 California Sexual Orientation Bias Study); see also *Sexual Orientation Fairness in the California Courts: Final Report of the Sexual Orientation Fairness Subcommittee of the Access and Fairness Advisory Committee* (Jan. 31, 2001), available at <http://www.courtinfo.ca.gov/programs/access> [hereinafter California Study] (reporting and analyzing the subcommittee's research on the issue); Gay and Lesbian Task Force, *Report to the Board of Governors, State Bar of Arizona* (Apr. 1999) (on file with author), Executive Summary, available at <http://www.azbar.org/sections/GayLesbian/summary.asp> [hereinafter Arizona Study] (summarizing the study's findings, and making recommendations).

42. The California and Arizona studies were chosen for discussion by the author primarily because they were the most recent and comprehensive studies conducted by the date of publishing. Only two other statewide studies (Massachusetts and New Jersey) have been conducted and both reach similar conclusions to those reached in the California and Arizona studies. See Durkin, *supra* note 41, at 353-54 (summarizing "The Prevalence of Sexual Orientation Discrimination in the Legal Profession in Massachusetts" study); see also *New Jersey Supreme Court Task Force on Gay and Lesbian Issues: Final Report*, (Sept. 2001), available at <http://www.judiciary.state.nj.us>, 63 (concluding that sexual orientation bias influences "to some degree" both the judicial process and the judicial workplace).

*A. The California Study*

In January 2001, the Sexual Orientation Fairness Subcommittee of the Access and Fairness Advisory Committee of the Judicial Council of California (the “Fairness Subcommittee”) completed the most comprehensive study (the “California Study”) of sexual orientation bias within a court system ever undertaken.<sup>43</sup> The Fairness Subcommittee elicited feedback from five focus groups consisting of attorneys conducted in San Jose, San Francisco, San Diego, Sacramento, and Los Angeles.<sup>44</sup> It also sent surveys,<sup>45</sup> to two groups of individuals: (1) gay and lesbian court users;<sup>46</sup> and (2) court employees, irrespective of their sexual orientation.<sup>47</sup>

The findings of the Fairness Subcommittee’s study overwhelmingly demonstrate that homosexual court users, employees, and attorneys in the California court system face a great deal of hostility and bias.<sup>48</sup>

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43. The study centered on the State of California’s judicial system, which consists of: the California Supreme Court; six districts of the Court of Appeal; sixty-four trial courts. There are 1,580 judgeships in California’s judicial system and approximately 8.8 million cases were filed in the various courts of California in Fiscal Year 1998-1999. See California Judicial System, *Fact Sheet* (June 2000), available at <http://www.courtinfo.ca.gov/reference/documents/cajudsys.pdf> (describing the California court system). Although the study focused only on analysing the bias exhibited towards gay males and lesbians and failed to address the bias towards individuals who identify as themselves transsexual or transgendered, it was nevertheless the most extensive review of the issue of sexual orientation fairness in any state court system in the country. See California Study, *supra* note 41, at 1.

44. See California Study, *supra* note 41, at 1 (noting that the survey requested that the attorneys identify barriers facing homosexual legal professionals, as well as homosexual clients).

45. See California Study, *supra* note 41, at 12 (noting that fifty-eight percent of the court user group completed the survey, for a total response of 1,225 court users, and that 1,525 out of approximately 5,500 court system employees responded).

46. See California Study, *supra* note 41, at 9 (explaining that the gay and lesbian court user group was ascertained by utilizing the mailing lists of various national and local lesbian and gay advocacy and service organizations and by circulating a flier asking individuals to identify whether they had used the California courts within the past ten years, and if so, whether they were willing to participate in the survey).

47. See California Study, *supra* note 41, at 12 (describing the court employee group as including: court clerks, reporters, administrators, and attorneys). Tellingly, the court employee survey itself generated a significant amount of negative feedback. See California Study, *supra* note 41, at 13. Court employees remarks on the survey included: “I have received your survey on sexual orientation and found it to be degrading and offensive . . . I am sure the Judicial Council could find better use of the talent, time and money that is being wasted on a minority of court personnel.” And, “[s]ome of us have *real* jobs—this is a blatant waste of taxpayer money—who cares about this crap!” Finally, “I can further assure you that, as a court clerk, I have better things to do than keep track of extraneous remarks regarding gays and lesbians.” *Id.* (emphasis in original).

48. See California Study, *supra* note 41, at 30-31 (noting that twenty-two percent of the court user group felt threatened in the courtroom because of their sexual orientation; and reporting responses to the survey which are examples of threats: “I felt intimidated—didn’t want them [two clerks and a police officer observed by respondent while in line] to talk about me the way they were talking about other

For example, fifty-six percent of the responding gay and lesbian court users experienced or observed a “negative comment or action”<sup>49</sup> toward gay men or lesbians.<sup>50</sup> Worse still, “one out of every five court employees heard derogatory terms, ridicule, snickering, or jokes about gay men or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees.”<sup>51</sup>

The California Study also shows that bias against gays and lesbians is deeply ingrained in the courtroom culture, thereby making it difficult to prevent or correct. Many court employees who do witness bias toward gays and lesbians either fail to act altogether, or take action that, unfortunately, does not change the offending behavior.<sup>52</sup> In fact, forty-eight percent of court employees seeing either negative actions or hearing negative comments in open court opted not to respond.<sup>53</sup> Of the court employees who did intervene, only forty percent reported their intervention either stopped or decreased the frequency of the negative comments, and thirty-eight percent reported that their intervention did not effect the negative comments at all.<sup>54</sup>

Alarming, a significant number of gay and lesbian court users feel threatened in the courtroom setting because of their sexual orientation.<sup>55</sup> It also appears that the sexual orientation of gay and lesbian court users is often times revealed either against their will or without their knowledge.<sup>56</sup> Fifty-six percent of the responding court

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gays—kept my mouth shut.”).

49. The study does not define what constitutes a “negative comment or action.” See California Study, *supra* note 41, at 18 (defining other operational terms used within the study).

50. See California Study, *supra* note 41, at 3-4 (explaining that the negative contact most frequently came from a lawyer or court employee, or was an instance in which sexual orientation became an issue).

51. California Study, *supra* note 41, at 4.

52. See California Study, *supra* note 41, at 4 (stating that one explanation for observers of negative actions or comments not responding more was due to a belief that nothing constructive would come from their intervention). Author, Martin Kantor, suggests a response strategy to these comments that is designed to alter the offending behavior. See MARTIN KANTOR, *HOMOPHOBIA: DESCRIPTION, DEVELOPMENT AND DYNAMICS OF GAY BASHING* 200 (1998) (suggesting “passive-aggressive counterstrikes” as the best response homophobic conduct).

53. See California Study, *supra* note 41, at 4.

54. See California Study, *supra* note 41, at 4.

55. See California Study, *supra* note 41, at 4 (observing that thirty-eight percent of respondents reported feeling threatened by the courtroom setting because of their sexual orientation).

56. See California Study, *supra* note 41, at 4. Also, it is important to note that one way in which court users’ sexual orientation may be revealed against their will is by questioning from the judge, prosecutor, or defense attorney in *voir dire*. See Heather C. Brunelli, Note, *The Double Bind: Unequal Treatment For Homosexuals Within the American Legal Framework*, 20 B.C. THIRD WORLD L.J. 201, 228 (2000) (discussing the practicalities of asking jurors in *voir dire* about their sexual orientation versus asking

users reported that during a contact with a court where their sexual orientation became an issue, they had not desired to disclose their sexual orientation.<sup>57</sup> Twenty-nine percent of these respondents believed that someone else disclosed their sexual orientation without their approval.<sup>58</sup>

The California Study demonstrates that the courtroom is often not only a hostile environment for gay and lesbian litigants and jurors, it can also be a hostile work environment<sup>59</sup> for gay and lesbian court employees.<sup>60</sup> Within an environment of hostility, there also appears to be a code of silence among gay and lesbian court employees who refrain from challenging the biased behavior.<sup>61</sup> In fact, forty-two percent of responding court employees who experienced a negative incident at work based on their sexual orientation took no action in response.<sup>62</sup> Of those employees that did take some action, forty-nine

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them about their views on homosexuality in general); Paul R. Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 U.C.L.A. L. REV. 231, 287 (1998) (concluding that constitutional privacy interests provide some protection against compelled disclosure of sexual orientation in *voir dire*). Courts remain divided on whether the exclusion of jurors on the basis of their sexual orientation is constitutionally prohibited. See Laurie L. Levenson, *Jury Selection*, NAT'L L.J., Apr. 3, 2000, at A17 (explaining that while the United States Supreme Court prohibited the racial stereotyping of jurors in *Batson v. Kentucky*, 476 U.S. 79 (1986), and prohibited peremptory challenges based on gender discrimination in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the Court has not decided on whether to extend those protections to homosexual jurors); see also *People v. Garcia*, 92 Cal. Rptr. 2d 339, 347-48 (2000) (holding that sexual orientation should also be a protected class for jury selection purposes); Jennifer Warren, *California and the West: New Law Bars Anti-Gay Bias in Jury Selection*, L.A. TIMES, June 28, 2000, at A3 (reporting that California Governor Gray Davis signed a bill into law barring the exclusion of gays and lesbians from juries solely because of their sexual orientation).

57. See California Study, *supra* note 41, at 4, 29 (noting that the survey found that the court user group felt that their sexual orientation was raised as an issue in a court proceeding when it was not relevant almost as often as when it was relevant; and concluding that "[o]ne might speculate that sometimes sexual orientation is being used as a litigation strategy by lawyers, and that judges should be ready to appropriately address this issue in the courtroom.").

58. See California Study, *supra* note 41, at 4, 28-29 (concluding from this statistic that California courts must be prepared to address sexual orientation issues in a court contact even when it is not pertinent to the proceeding).

59. See California Study, *supra* note 41, at 35. Here, the study is generally referring to a work environment that is hostile toward homosexuals, rather than using the term "hostile work environment" as it applies in the context of Title VII of the Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq. See *Von Gunten v. Maryland*, 243 F.3d 858, 870 (4th Cir. 2001) (listing the elements of a hostile work environment as "evidence of conduct 'severe or pervasive enough' to create 'an environment that a reasonable person would find hostile or abusive;'" (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993))).

60. See *infra* notes 62-66 and accompanying text.

61. See *supra* note 53 and accompanying text (revealing that forty-eight percent of the court employee respondents who witnessed negative actions or comments chose not to take action in response).

62. See California Study, *supra* note 41, at 33 (finding that twenty-five percent of

percent reported that their intervention or action had no effect on the offending behavior.<sup>63</sup> Additionally, one in five lesbian and gay court employees reported experiencing discrimination<sup>64</sup> at work based on their sexual orientation.<sup>65</sup> Sixty-five percent of the court employees who experienced discrimination based on their sexual orientation took some action; however, fifty-six percent reported that nothing resulted from that action.<sup>66</sup> Disturbingly, twenty-nine percent of court employee respondents reported the perception that it is *unsafe* for employees to be open about being a gay or lesbian.<sup>67</sup>

### B. *The Arizona Study*

The State Bar of Arizona Board of Governors (the "Arizona Board") established a Gay and Lesbian Task Force in 1997 to determine whether gays and lesbians interacting with Arizona judicial system faced discrimination.<sup>68</sup> In 1999, the Arizona Board created a standing committee on Sexual Orientation and Gender Identity.<sup>69</sup> The committee prepared a study (the "Arizona Study") that surveyed Arizona judges,<sup>70</sup> attorneys,<sup>71</sup> law students,<sup>72</sup> and members of the gay

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the respondents who experienced a negative incident at work responded by confronting the person responsible for the negative comment; twenty-one percent discussed the incident with a co-worker other than the perpetrator; ten percent talked to someone else).

63. See California Study, *supra* note 41, at 6 (explaining that the acts had no effect on the offensive behavior).

64. The study does not define the term discrimination. See California Study, *supra* note 41, at 6 (noting that the study does differentiate discrimination from negative comments or actions).

65. See California Study, *supra* note 41, at 6 (contrasting the responses of the two percent of heterosexual court employees who reported discrimination based on sexual orientation).

66. See California Study, *supra* note 41, at 6 (noting that of the court employees who reported experiencing discrimination based on their sexual orientation but took no action, forty-six percent refrained from doing so because they thought that nothing constructive would result; twenty-three percent reported taking no action out of fear of negative consequences).

67. See California Study, *supra* note 41, at 7, 37-38 (emphasis added) (failing to explicitly define "unsafe" as it was perceived by the court employee survey respondents).

68. See Sexual Orientation and Gender Identity Committee Statement of Purpose, available at <http://www.azbar.org/Sections/GayLesbian/home.asp> (explaining the mission of the Committee).

69. See *id.* (noting that the creation of the Standing Committee on Sexual Orientation and Gender Identity was requested by the previously created Gay and Lesbian Task Force).

70. See Arizona Study, *supra* note 41, at 8 (explaining that the Task Force mailed questionnaires to each full time state court judge in the State of Arizona; twenty-nine percent of those judges surveyed responded).

71. See Arizona Study, *supra* note 41, at 8 (reporting that the Task Force randomly selected 452 attorneys listed in the State Bar of Arizona's membership database; twenty-nine percent of those attorneys surveyed responded).

72. See Arizona Study, *supra* note 41, at 8-9 (noting that the Task Force

and lesbian community<sup>73</sup> about sexual orientation bias<sup>74</sup> within the court system and the legal profession. Much like the California Study,<sup>75</sup> the results of the Arizona Study indicated that Arizona courtrooms were hostile places for gay and lesbian litigants, court users, attorneys, judges, and employees.<sup>76</sup>

According to the Arizona Study, seventy-seven percent of judges and attorneys reported that they had heard disparaging comments<sup>77</sup> about gays and lesbians.<sup>78</sup> Forty-seven percent of those who reported hearing these remarks heard them in public spaces of the courthouse.<sup>79</sup> Twenty-nine percent of lesbian and gay court employees report that they have heard “negative remarks” about gays and lesbians.<sup>80</sup> Thirteen percent of judges and attorneys have observed negative treatment<sup>81</sup> by judges in open court toward those perceived to be gay or lesbian.<sup>82</sup>

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distributed 465 surveys to the University of Arizona Law School with twenty-two percent of those law students responding; the Task Force also distributed 476 surveys to the Arizona State Law School with twelve percent responding).

73. See Arizona Study, *supra* note 41, at 8-9 (explaining that the Task Force distributed 800 surveys to members of the gay and lesbian community at “gay-friendly” churches, in “gay newspapers,” at “lesbian and gay cultural events,” and to members of the gay and lesbian chambers of commerce; fifty-one percent of those surveyed responded).

74. The Arizona Study does not define “sexual orientation bias.” Using the survey questions themselves as context, it appears that like the California Study, the Arizona Task Force did not include transgendered or transsexual people in its survey. See Arizona Study, *supra* note 41, at apps. IV (providing the actual questionnaires that the Task Force used for each survey group).

75. See discussion *supra* Part I.A.

76. See Arizona Study, *supra* note 41, at 18 (stating that the results provide “evidence that lesbians, gays, and bisexuals are at a substantial disadvantage whether working in the justice system or gaining access to the justice system”).

77. See Arizona Study, *supra* note 41, at app. I (defining disparaging comments as “ridicule, jokes, snickering etc. . .”).

78. See Arizona Study, *supra* note 41, at 18 (suggesting that the findings indicate that negative speech regarding gays and lesbians is the most commonly perceived form of anti-homosexual bias in the courthouse, and that it is pervasive). Significantly, fifteen percent of those judges and attorneys surveyed agreed or strongly agreed with the statement “homosexuality is wrong.” See Arizona Study, *supra* note 41, at 24.

79. See Arizona Study, *supra* note 41, at 18.

80. The Arizona Study does not define the term “negative remarks.” See Arizona Study, *supra* note 41, at app. I (asking “[h]ow often have you heard negative remarks about lesbian or gay people arising out of a particular case?”).

81. The Arizona Study does not define the term “negative treatment.” See Arizona Study, *supra* note 41, at app. II (asking “[h]ow often have you seen or heard negative treatment by judges of those perceived to be lesbian or gay who are before the court?”). See Arizona Study, *supra* note 41, at app. III (asking “[h]ow often have you seen or heard negative treatment by professors, staff, or students of those perceived to be lesbian or gay?”).

82. See Arizona Study, *supra* note 41, at 20 (noting that thirty percent of judges and attorneys agree or very much agree that lesbians and gays are discriminated against within the legal profession).

Perhaps most surprisingly, judges and attorneys reported a lack of knowledge about the statutes,<sup>83</sup> case law,<sup>84</sup> judicial canons,<sup>85</sup> and ethical rules<sup>86</sup> that prohibit discrimination based on sexual orientation.<sup>87</sup> Sixty percent of judges indicated they had little to no knowledge about statutes or case law protecting gay and lesbian people.<sup>88</sup> Sixty-three percent of judges also said that they were not very knowledgeable or not knowledgeable at all about legislation prohibiting employment discrimination on the basis of sexual orientation.<sup>89</sup> Twenty-one percent of judges responded that they were not very knowledgeable or had no knowledge about judicial canons that prohibit discrimination on the basis of sexual orientation.<sup>90</sup>

The attorneys surveyed demonstrated an even greater lack of awareness and information than the surveyed judges about sexual orientation as it relates to Arizona law. Only six percent reported that they were familiar with any case law in Arizona prohibiting discrimination against gays and lesbians.<sup>91</sup> Only thirteen percent

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83. See Arizona Study, *supra* note 41, at 13 (highlighting the presence of PHOENIX CITY CODE, ART. II, § 188-10.01 and PHOENIX ORDINANCE NOS. G-3485, 3558 which prohibit sexual orientation discrimination by Phoenix vendors, suppliers, or contractors employing more than thirty-five people, and TUCSON CITY CODE, CH. 17, ART. II, §§ 17-1-17-16 that prohibits sexual orientation discrimination in public and private employment, in housing, and in places of public accommodation); see also Myers, *supra* note 12 (compiling and categorizing all municipalities with anti-discrimination laws that include sexual orientation).

84. See Arizona Study, *supra* note 41, at 12 (describing the case law that provides “legal prohibitions against discrimination by private lawyers in [Arizona]” including *Romer v. Evans*, 517 U.S. 620, 634 (1996); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-28 (1991); *Blain v. Golden State Container, Inc.*, No. 2 CA-CV 94-1012, slip op. at 3 (Ariz. Ct. App. 1994)).

85. See Brown, *supra* note 17 and accompanying text (pointing out that Arizona has adopted the American Bar Association Model Code of Judicial Conduct Canon 3(B)(5)); see also Arizona Study, *supra* note 41, at 12 (noting that Arizona has also adopted JUDICIAL CONDUCT CANON 3(B)(6) as well as R. PROF’L CONDUCT 8.4, Comment 2 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT).

86. See Brown, *supra* note 17 (observing that the U.S. District Court and the U.S. Bankruptcy Court for the District of Arizona have specific court rules prohibiting prejudicial conduct directed against homosexuals).

87. See Arizona Study, *supra* note 41, at 29, app. I (highlighting the results of the survey questions given to Arizona judges).

88. See Arizona Study, *supra* note 41, at app. I (asking judges, at question 43, to rate their knowledge on a scale of one to five, one being not knowledgeable and five being very knowledgeable, of statutes or case law relating to homosexual people). This statistic is surprising, as presumably there exists a tendency on the part of judges and attorneys to over-report their knowledge of the law in survey responses.

89. See Arizona Study, *supra* note 41, at app. I (asking judges to rate their knowledge of legislation prohibiting employment discrimination on the basis of sexual orientation using a scale of one being not knowledgeable and five being very knowledgeable).

90. See Arizona Study, *supra* note 41, at app. I (discussing the results of the question).

91. See Arizona Study, *supra* note 41, at app. I (asking attorneys if they were aware of any case law in Arizona that prohibits discrimination based on sexual orientation).

reported awareness of any ethical rules prohibiting sexual orientation discrimination.<sup>92</sup> Worse still, sixteen percent of the attorney respondents reported that they were aware of Arizona state statutes that prohibit discrimination based on sexual orientation, even though no such statutes exist.<sup>93</sup>

The Arizona Study also revealed that Arizona law schools were hostile environments for gays and lesbians.<sup>94</sup> There is a dearth of awareness in Arizona law schools regarding gay and lesbian issues.<sup>95</sup> Only seventeen percent of law students surveyed have attended classes specifically designed to address issues involving gays and lesbians.<sup>96</sup> Law students are also misinformed about the laws designed to protect gays and lesbians as illustrated by the finding that seventeen percent of law student respondents mistakenly reported that there were Arizona state statutes that prohibit discrimination based on sexual orientation.<sup>97</sup> Furthermore, only eight percent of law students surveyed reported awareness of case law prohibiting discrimination based on sexual orientation—over half of them admitted that their knowledge was limited.<sup>98</sup> Even more troubling, only one percent of law students reported an awareness of the various judicial and ethical canons prohibiting bias against homosexuals.<sup>99</sup>

### C. Conclusions

The results of these two studies indicate that bias against and ignorance about homosexuals within the court systems of California and Arizona are both rampant and widespread. Both studies strongly recommend education and training for members of the legal community in order to combat sexual orientation bias in the courthouse.<sup>100</sup> They also recommend that the court systems, as

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92. See Arizona Study, *supra* note 41, at 29.

93. See Arizona Study, *supra* note 41, at app. I.

94. See Arizona Study, *supra* note 41, at 21, 30 (finding that thirty-eight percent of law student respondents reported that they had witnessed a negative preference, one quarter of these reports concerned hearing students indicate a preference not to take a class from a lesbian or gay professor, and students not wanting to work with a lesbian or gay peer).

95. See *infra* notes 99-102 and accompanying text.

96. See Arizona Study, *supra* note 41, at app. III (asking law students if they have ever attended a class, seminar, or presentation specifically designed to address gay and/or lesbian issues).

97. See Arizona Study, *supra* note 41, at 3.

98. See Arizona Study, *supra* note 41, at 30.

99. See Arizona Study, *supra* note 41, at 30.

100. See California Study, *supra* note 41, at 39-42 (recommending that the Center for Judicial Education and Research and the Access and Fairness Advisory Committee, along with the Administrative Office of the Courts, develop methods to familiarize judges and non-judicial court personnel with California and federal laws

employers, should establish personnel policies that eliminate sexual orientation discrimination and foster workplace equality.<sup>101</sup> The two studies' most important recommendation, however, is for further research.<sup>102</sup> With only four statewide studies ever conducted on the issue of sexual orientation bias in the courts,<sup>103</sup> the full extent of this kind of discrimination is largely unknown. A philosophical and financial commitment by the legal community as a whole, including court systems,<sup>104</sup> professional organizations,<sup>105</sup> and law schools,<sup>106</sup> is

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relating to sexual orientation fairness and nondiscrimination). The California study also recommends that programs be implemented to develop and provide information, training, and education for all persons concerning sexual orientation. *Id.* Finally, the report recommends that the Judicial Administration Institute of California should incorporate the findings and recommendations of this report into their educational programs for the bench officers and court staff. *Id.*

The Arizona Study recommends that the Arizona Bar sponsor and support Continuing Legal Education ("CLE") seminars specifically targeting gay and lesbian issues, and that the CLE Department include gay/lesbian issues, as appropriate, in every seminar. *See Arizona Study, supra* note 41, at 33-42. The Arizona study also recommends that gay/lesbian issues and discrimination prohibitions should be specifically included in the State Bar Course on Lawyer Professionalism, required of all attorneys; and that judges should have similar training before taking the bench, and periodically thereafter. *Id.* Finally, the Arizona study recommends that the two law schools in Arizona provide an atmosphere of support and growth to gay and lesbian student groups. *Id.*

101. The California study encourages state and local courts to "[endorse] the development and implementation of local court personnel policies and practices to eliminate sexual orientation discrimination and bias in the court as a workplace, including effective intervention in incidents of sexual orientation discrimination or bias and the prevention of retaliation against any individual reporting such incidents. *See California Study, supra* note 41, at 39.

The Arizona study encourages state and local courts to adopt, implement, and publicize a non-discrimination policy that includes sexual orientation and encouraging (1) non-discriminatory recruitment and hiring of qualified employees; (2) the promotion of a workplace climate that ensures equal employment opportunities for gay employees; and (3) providing gay employees and their same-sex domestic partners with employee benefits comparable to those provided to heterosexual employees and their opposite-sex spouses. *Arizona Study, supra* note 41, at 37-39.

102. *See California Study, supra* note 41, at 42 (declaring that the advisory committee will undertake data and information collection to develop baseline data on the current state of the court's ability to respond to sexual orientation, gender identification, and gender expression issues; and that the advisory committee will track the implementation of all recommendations made by this committee); *Arizona Study, supra* note 41, at 36 (affirming the State Bar's commitment in "[supporting] the Task Force in completing surveys of the police and of court personnel and in reporting the findings of those surveys in a supplement to this Report").

103. *See supra* notes 38-41 and accompanying text (discussing the statewide studies and the inattention that sexual orientation bias receives from the American Bar Association, the National Center for State Courts, and federal judiciary).

104. *See supra* note 40 and accompanying text (discussing the federal court system's inattention to the issue of sexual orientation bias).

105. *See supra* note 38 and accompanying text (revealing that neither the American Bar Association or the National Center for State Courts compiles information on sexual orientation bias in the various court systems).

106. *See supra* note 96 and accompanying text (discussing the lack of law school

necessary to ensure that sexual orientation bias no longer results in the unequal application of already hostile laws.<sup>107</sup>

A fuller discussion and a clearer picture of the prevalence and extent of sexual orientation bias in the courtroom, although crucial, are only the first steps in addressing a systemic problem that exacts huge tolls on homosexual criminal defendants. As Part II of this Comment argues, the most egregious impact of sexual orientation bias in the courtroom actually evades statistical quantification. Indeed, sexual orientation bias is often a vehicle by which prosecutors seek to solidify the chance of securing a death sentence from the jury of sexual orientation bias by prosecutors to secure executions.

## II. DEATH PENALTY CASES

Professor Jennifer Gerarda Brown devised a helpful framework for categorizing judicial bias against homosexual criminal defendants within the legal system.<sup>108</sup> Although Professor Brown's framework appears designed to describe the bias exhibited by judges against homosexuals, her framework is also adequate for dealing with bias in the courtroom exhibited by another key player, the prosecuting attorney.<sup>109</sup> Professor Brown establishes three categories of bias: (1) normative bias, (2) positive bias, and (3) disrespectful references.<sup>110</sup> According to Brown, normative bias occurs when feelings about homosexuality cause judicial actors to misinterpret the law—injecting sexual orientation into an issue when it is not relevant.<sup>111</sup> Positive bias occurs when the judicial actor's assumptions about homosexuality leads them to describe a particular gay or

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curricula in Arizona about the legal issues that affect homosexual people). *See generally* Duncan, *supra* note 17, at 163-77 (discussing the state of curricula dealing with sexual orientation in the U.S. News & World Report "top eleven" ranked law schools).

107. *See supra* notes 14-15 and accompanying text (discussing the various state and federal statutes that, *inter alia*, ban same-sex marriages and criminally sanction consensual sex between adults of the same gender, and listing the states that have pending legislation to ban same-sex marriages).

108. *See* Brown, *supra* note 17, at 379 (explaining that the increased use of the state courts by homosexual litigants has resulted in the discovery of anti-gay bias within the court system).

109. *See* Brown, *supra* note 17, at 378 (defining the Brown framework as "identifying judicial behavior troubling enough that it can be said to manifest bias or prejudice").

110. *See* Brown, *supra* note 17, at 379 (asserting that judicial bias against homosexual litigants and defendants is demonstrated through ideas and emotions as well as behavior).

111. *See* Brown, *supra* note 17, at 379 (explaining that normative bias also occurs in cases where the statutes or common law provide judges discretion to consider sexual orientation, and where the judge decides to consider it).

lesbian litigant inaccurately by using stereotypes and popular misconceptions.<sup>112</sup> Finally, disrespectful references toward homosexual litigants occur when the judicial actors broadcast their bias through words and actions, even though the references may not necessarily affect the legal outcome of the case.<sup>113</sup>

Brown's typology is particularly useful in identifying distinct kinds of biased behavior<sup>114</sup> and, more importantly, the ramifications of this behavior in the context of legal outcomes for criminal defendants.<sup>115</sup> This Comment applies Brown's framework to the death penalty cases discussed below,<sup>116</sup> and concludes that prosecutors can shape legal outcomes with their biased behavior.<sup>117</sup> Indeed, as each of the following cases demonstrates, the prosecutor's biased behavior even has the potential to exact the most severe punishment available to the state: execution.<sup>118</sup>

A. *Normative Bias: Prosecutors Importing Sexual Orientation as a Legal Issue When it is Not Relevant.*

1. *The case of Stanley Lingar*<sup>119</sup>

On the evening of January 5, 1985, twenty-two-year-old Stanley Lingar and a friend, eighteen-year-old David Smith, were drinking

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112. See Brown, *supra* note 17, at 379 (noting that positive bias also occurs when judicial actors "rely upon flawed empiricism about homosexuality or allow valid evidence about the gay community as a whole to outweigh evidence regarding the individual litigants before them").

113. See Brown, *supra* note 17, at 379 (stating that disrespectful bias is the most common form of bias).

114. See Brown, *supra* note 17, at 380-436 (identifying disrespectful bias, positive bias, and normative bias). Specifically, Brown explains that bias is an internal or subjective process with external or objective manifestations. See *id.* (noting that bias can be manifested through words (disrespectful bias), perceptions (positive bias), or application of law (normative bias)).

115. See *id.* (discussing how judicial bias results in tainted proceedings). The ramifications of biased judicial behavior are evident in the three forms of bias discussed by Brown. See Brown, *supra* note 17, at 380-436. Brown provides the following examples of each type of bias. Disrespectful bias is the use of negative terms by judges that may reveal the judges' personal bias against homosexuals, as well as influence other judicial decision-makers such as the prosecutor or jury. *Id.* Positive bias can result when the decision-making and fact-finding process of the judge, jury, or prosecutor itself is distorted by their view of sexual orientation. *Id.* Finally, normative bias occurs when the actual application of the law is tainted by the judge's, prosecutor's, jury's sexual orientation bias. *Id.*

116. See discussion *infra* Part II.A-C.

117. See *infra* Part III.

118. See discussion *infra* Part II.A-C.

119. See *State v. Lingar*, 726 S.W.2d 728 (Mo. 1987) (affirming the defendant's convictions and death sentence); *Lingar v. Bowersox*, 176 F.3d 453 (8th Cir. 1999), *cert. denied*, *Lingar v. Luebbers*, 529 U.S. 1039 (2000) (affirming the District Court's denial of Lingar's petition for writ of habeas corpus).

and driving around Doniphan, Missouri.<sup>120</sup> While driving down a rural highway, the two saw a Jeep parked on the side of the road with its hood up.<sup>121</sup> The Jeep's driver, sixteen-year-old Scott Allen, informed them he had run out of gas.<sup>122</sup> Lingar offered to drive Allen to a gas station, and Allen got into the car with the two men.<sup>123</sup>

After driving to several gas stations, all of which were closed, Lingar drove out of town to a nearby lake and instructed Allen to remove his clothing.<sup>124</sup> Once Allen was naked, Lingar ordered him to masturbate.<sup>125</sup> When Allen did not comply,<sup>126</sup> Lingar drove to his parents' house with Smith and Allen where he retrieved a twenty-two-caliber Winchester rifle.<sup>127</sup> Lingar then drove back to the lake and again ordered Allen to masturbate.<sup>128</sup> Allen asked permission to urinate, and as Allen stood urinating, Lingar shot him.<sup>129</sup> Allen fell to his knees and attempted to escape by pulling himself into the car and starting the ignition.<sup>130</sup> Lingar then shot Allen in the head and Allen fell out of the driver's side door.<sup>131</sup> Lingar walked over to Allen and shot him two more times.<sup>132</sup> Seeing that Allen was still alive, Lingar took a tire iron from the trunk and repeatedly hit him.<sup>133</sup> As Allen

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120. *Lingar*, 176 F.3d at 455 (stating that Smith testified that Lingar drank thirty cans of beer, a quart of beer, and a half bottle of wine the day of Allen's murder). It is important to note that the "facts" of the case, as established in Lingar's various appellate court decisions, are simply recitations of David Smith's trial testimony. *See* Appellant's Brief at 4-5, *Lingar v. Bowersox*, 176 F.3d 453 (8th Cir. 1999) (No. 96-3609) [hereinafter *Lingar*, Appellant's Brief] (quoting the trial testimony of David Smith).

121. *See Lingar*, 176 F.3d at 455.

122. *See id.*

123. *See id.*

124. *See id.* (establishing that initially Lingar only told Allen to take off his winter coat, but then continued to instruct Allen to remove additional layers of clothing).

125. *See id.*

126. *See Lingar*, 176 F.3d at 455 (stating that Allen was too frightened to masturbate). When when Allen refused Lingar's request, Lingar threatened to abandon him and not drive him back to his Jeep. *Id.*

127. *See id.* at 456 (stating that a gun expert later testified that the bullets found in Allen could have been fired from Lingar's rifle).

128. *See id.* at 455 (stating that when Lingar returned with the rifle he said to Allen "[n]ow I'll bet you're going to do what I say without arguing.>").

129. *See id.* (explaining that when Allen asked permission to urinate, the three men got out of the Jeep).

130. *See id.*

131. *See Lingar*, 176 F.3d at 456 (stating that a blood expert testified that the blood stains in Lingar's car could have been Allen's blood).

132. *See id.* at 457.

133. *See id.* at 456 (stating that Allen struggled onto his hands and knees after being shot four times and hit with a tire iron). Expert medical testimony, however, contradicts David Smith's version of Scott Allen's death. *See Lingar*, Appellant's Brief, *supra* note 120, at 5 (detailing testimony by the medical examiner who performed the autopsy that contradicted this version of the events on January 5, 1985, specifically, that the cause of death was the first bullet wound to the chest). This alternative theory of death was supported at the sentencing hearing. *See Lingar*,

struggled to his knees, Lingar backed up the automobile and struck Allen with the bumper.<sup>134</sup> Lingar and Smith put Allen's body into the trunk,<sup>135</sup> drove to a nearby river, and threw the body into the water.<sup>136</sup>

Lingar and Smith worked diligently the following day to conceal evidence of the murder.<sup>137</sup> Several days after Allen's death, both men returned to Doniphan at the request of authorities.<sup>138</sup> Lingar and Smith both gave statements to the police who later recovered the car, the gun, and the body.<sup>139</sup> The State of Missouri charged the two men with first-degree murder.<sup>140</sup> In a plea agreement with prosecutors, Smith agreed to testify at Lingar's trial in return for the state dropping the first-degree murder charge against him.<sup>141</sup>

The jury convicted Lingar of first-degree murder.<sup>142</sup> The prosecutor's strategy of using Lingar's homosexuality against him became apparent in the opening argument of the penalty phase of the trial.<sup>143</sup> The prosecutor stated, "The only evidence we'll have to offer you at this stage, we'll recall David Smith, who will basically tell you that . . . from . . . April of 1984 until the time of this homicide[,] there was a homosexual relationship that existed between [him and Lingar]."<sup>144</sup> The defense counsel objected to this statement and

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Appellant's Brief, *supra* note 120, at 5 (stating that the Boone County pathologist, who reviewed the medical examiner's report, testified that it was his medical opinion that Smith's account that Lingar struck Allen repeatedly with the tire iron and with bumper of the car was inconsistent with the medical evidence).

134. *See Lingar*, 176 F.3d at 456. Lingar and Smith then drove to Lingar's brother's house, where his brother advised them to dispose of the body and to cover up the bloody snow. *Id.*

135. *See id.* (explaining that after placing Allen's body into the trunk Lingar and Smith in fact kicked clean snow over the bloody snow).

136. *See id.* (observing that Lingar and Smith threw Allen's body into the river in an attempt to conceal the murder).

137. *See id.* (explaining that Lingar and Smith returned to Lingar's parents' house and cleaned the car; and that they pawned the car to a salvage dealer, and disposed of the rifle on a country road on their way to Bowling Green, Kentucky).

138. *See id.* at 456 (recounting the sequence of events following the murder).

139. *See Lingar*, 176 F.3d at 456 (summarizing the connections between Lingar's rifle and the gun used in the murder).

140. *See id.*

141. *See id.* (noting that Smith pled guilty to second-degree murder, and was sentenced to ten years in prison).

142. *See id.* (indicating the jury deliberated and rendered a guilty verdict); *see also Lingar*, Appellant's Brief, *supra* note 120, at 1 (pointing out that the guilt phase of the trial only lasted two days).

143. *See Lingar*, Appellant's Brief, *supra* note 120, at 6 (explaining that the prosecutor's opening argument in the penalty phase was the first attempt to bring this issue before the jury); *see also Lingar*, 176 F.3d at 458 (rejecting the argument that Lingar argued in his appeal to the U.S. Court of Appeal for the Eighth Circuit: that introducing evidence of his sexual orientation at the penalty phase was uniquely harmful as Lingar was deprived of the ability to "explain or rebut the evidence or to *voir dire* the jury on their attitudes toward homosexuality before trial").

144. *Lingar*, 176 F.3d at 457.

requested a bench conference.<sup>145</sup> The trial judge overruled the objection and Smith was called to testify.<sup>146</sup> When the prosecutor asked Smith about his relationship with Lingar,<sup>147</sup> Smith responded that he had a consensual homosexual relationship with Lingar.<sup>148</sup> Outwardly, the prosecutor justified eliciting Smith's testimony about Lingar's homosexuality to establish that Lingar's motive in killing Allen was to keep his sexual orientation a secret,<sup>149</sup> however, the prosecutor never asked Smith if their relationship was in fact known to others.<sup>150</sup> The jury returned a verdict sentencing Lingar to death based upon two aggravating circumstances: (1) that the murder was outrageously wanton, vile, and horrible; and (2) that the murder happened during a kidnapping.<sup>151</sup>

In his appeal before the Missouri Supreme Court, Lingar raised the issue that the trial judge improperly admitted testimony about his sexual orientation at his sentencing hearing.<sup>152</sup> The Missouri Supreme Court recognized that, in the sentencing phase, trial courts traditionally have discretion to admit any evidence that it deems helpful to the jury in assessing punishment.<sup>153</sup> In finding that the trial

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145. *See id.* (noting that at a bench conference, defense counsel asked the court to prohibit the state from introducing any evidence of a homosexual relationship because the evidence was irrelevant, immaterial, highly prejudicial, and inflammatory). The state responded that the evidence was relevant because it showed one of the circumstances of the crime and it provided an aspect of Lingar's character. *See id.* (noting that the state also argued that keeping his homosexuality secret was a motive in the murder of Allen). The trial judge overruled Lingar's objection.

146. *See id.* (stating that court found that the evidence was relevant given the facts of the crime).

147. *See State v. Lingar*, 726 S.W.2d 728, 739 (Mo. 1987) (revealing that among other things, the prosecutor asked Smith: (1) the type of relationship he had with Lingar; (2) how long it lasted; and (3) whether it continued during the periods they lived together).

148. *See Lingar*, 176 F.3d at 457 (noting that Smith testified that he and Lingar were involved in a sexual relationship from April 1984 until the time of the crime).

149. *See Lingar*, Appellant's Brief, *supra* note 120, at 12 (rejecting the prosecutor's proffered explanation that "[Lingar] realized that to let Scott Allen go would suddenly bring into evidence that he was a homosexual . . ."). Significantly, the prosecutor did not ask Smith if his relationship was a secret or whether others knew that Lingar was a homosexual. *See id.*

150. *See Lingar*, Appellant's Brief, *supra* note 120, at 12-13 (arguing that the prosecutor's justification was a pretext to introduce prejudicial evidence that would "influence a homophobic jury from a rural area" because the prosecutor made no effort to link the homosexual relationship to the crime).

151. *See Lingar*, Appellant's Brief, *supra* note 120, at 7 (indicating that the jury found that "the murder of Thomas Scott Allen involved torture and depravity of mind").

152. *See Lingar*, 726 S.W.2d at 739 (outlining Lingar's argument on direct appeal that admission of evidence pertaining to his sexual conduct was irrelevant and prejudicial, thus requiring a new trial).

153. *See id.* (citing *State v. Malone*, 694 S.W.2d 723, 727 (Mo. 1985), *cert. denied*, 476 U.S. 1165 (1986)) (concluding that whether the trial court abused its discretion

court did not abuse its discretion by allowing the testimony, the Missouri Supreme Court reasoned that Smith's testimony regarding his homosexual relationship with Lingar was relevant to the jury's consideration of both the "character of the defendant"<sup>154</sup> and the circumstances of the crime.<sup>155</sup> According to the court, Lingar's homosexuality tended to "explain [his] desire to force a young man not only to remove his clothing but also to see him masturbate."<sup>156</sup>

Lingar appealed the Missouri Supreme Court's decision to the Eighth Circuit Court of Appeals.<sup>157</sup> The court framed the issue as "whether there is a reasonable probability that the homosexuality evidence might have contributed to Lingar's death sentence."<sup>158</sup> The Eighth Circuit assumed *arguendo* that the evidence of Lingar's homosexuality and his relationship with Smith was not admissible,<sup>159</sup> yet nonetheless concluded that the introduction of this evidence was harmless error.<sup>160</sup> The court reasoned that because Smith's testimony in the sentencing phase was brief and because the prosecutor did not refer to Lingar's homosexuality during the closing argument, it was clear that the admission of the evidence did not contribute to the jury's finding.<sup>161</sup> The court, stressing the appalling facts of the crime and the absence of "compelling" mitigating circumstances, ultimately held that it was clear beyond a reasonable doubt that the admission of evidence of Lingar's homosexuality did not contribute to the jury's

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is the standard of review).

154. See *Lingar*, 726 S.W.2d at 739. The Missouri Supreme Court's reasoning here erroneously imports Lingar's sexual orientation as relevant evidence—purportedly going to the nature of the crime and to the character of the defendant.

155. See *id.* See also *supra* note 149-50 and accompanying text (questioning the prosecutor's motive for introducing the evidence of sexual orientation to prove that Lingar needed to keep his homosexuality secret, even though the prosecutor never asked nor proved that Lingar's sexual orientation was in fact kept a secret).

156. *Lingar*, 726 S.W.2d at 739. The Court's reasoning here is an example of positive bias, where the Court actually ascribes to Lingar the desire to see young boys masturbate because of his homosexuality. See also *infra* Part II.B (illustrating positive bias in the case of Wanda Jean Allen where the prosecutor ascribes to a lesbian criminal defendant the characteristic of the aggressor or "man" in her relationship).

157. See *Lingar v. Bowersox*, 176 F.3d 453 (8th Cir. 1999), *cert. denied*, *Linger v. Luebbers*, 529 U.S. 1039 (2000) (noting that Stanley Lingar appealed the Missouri Supreme Court decision in *State v. Lingar*).

158. See *id.* (citing *Olsen v. Class*, 164 F.3d 1096, 1100 (8th Cir. 1999)).

159. See *id.* at 458 (explaining that even though the Missouri Supreme Court held that the evidence was admissible and never determined whether it was harmful, the reviewing court could make a determination of harmlessness on collateral review).

160. See *id.* (concluding that the jury found that aggravating circumstances existed, and that the admission of evidence about Lingar's sexuality was not a significant factor in the jury's verdict).

161. See *id.* (noting that the court also dismissed Lingar's argument that by introducing evidence about his homosexuality, the prosecutor invited the jury to find the "depravity of mind" aggravating circumstance).

death verdict.<sup>162</sup> On February 7, 2001, at 12:01 a.m., Stanley Lingar, age thirty-seven, was executed by lethal injection at the State of Missouri's Potosi Correctional Center.<sup>163</sup>

2. *The case of Jay Wesley Neill*<sup>164</sup>

During the fall of 1984, Jay Wesley Neill and Robert Grady Johnson were involved in a homosexual relationship.<sup>165</sup> The men began to experience financial difficulties.<sup>166</sup> As their financial troubles grew worse,<sup>167</sup> Neill and Johnson, who shared a checking account, frequently attempted to resolve their money problems at a local bank.<sup>168</sup> Neill commented on several occasions how easy it would be to rob the bank.<sup>169</sup>

In the days and hours that led up to the robbery, Neill and Johnson took steps to prepare for the crime and their escape.<sup>170</sup> Shortly after

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162. See *Lingar*, 176 F.3d at 458 (explaining that even though the jury instructions asked the jurors to determine whether "the murder of . . . Allen involved torture or depravity of mind . . .," the fact that the prosecutor never explicitly referred to depravity of mind meant that the jury found the aggravating circumstance to exist because the nature of the crime was "wantonly vile, horrible or inhuman"). Part III of this Comment critiques the abstract re-weighing of the evidence as determined at trial against the prosecutor's remarks at the sentencing hearing.

163. See *Man Who Killed Teen is Executed; Holdeu, High Court Rejected Appeals*, ST. LOUIS POST-DISPATCH, Feb. 8, 2001, at B3 (explaining that Missouri Governor Bob Holdeu denied clemency to Lingar, and that the denial was the first death penalty decision made by the governor since he took office); *Missouri Gay Killer Executed Despite Protests*, L.A. TIMES, Feb. 8, 2001, at A19 (indicating that forty demonstrators protested outside the prison while Lingar was executed); Gill Donovan, *Death Watch*, NAT'L CATHOLIC REPORTER, Feb. 16, 2001, available at 2001 WL 8697323 (reporting the time and date of Lingar's death); *Missouri Executes Inmate for Murder of a Teenager*, AGENCE FRANCE-PRESSE, Feb. 7, 2001, available at 2001 WL 2337190 (reporting that Lingar was executed by lethal injection).

164. *Neill v. Gibson*, 263 F.3d 1184 (10th Cir. 2001); *Neill v. State*, 896 P.2d 537 (Okla. Crim. App. 1995), cert. denied, *Neill v. Oklahoma*, 516 U.S. 1080 (1996).

165. See *Neill v. State*, 896 P.2d 537, 543 (Okla. Crim. App. 1995) (noting that the two men shared an apartment in Lawton, Oklahoma).

166. See *id.* (explaining that the two men attempted to cut expenses by sharing the apartment with Rhonda Neff and her husband, and that Neff agreed to purchase groceries while Neill and Johnson paid the rent).

167. See *id.* (indicating that Neill eventually fell behind on the rent and utility payments; and observing that the telephone service was discontinued to the apartment, and that Neill purchased a car with a loan, which quickly became delinquent).

168. See *id.* at 543-44 (remarking that Neill sought financial assistance with their debt from their local bank).

169. See *id.* at 544 (revealing that their bank was a small facility that usually had only two tellers and no surveillance cameras or guards).

170. See *Neill*, 896 P.2d at 544 (stating that on December 13, 1984, Neill and Johnson purchased two hunting knives at a local discount store, and talked to a travel agent at the Lawton Municipal Airport about booking a flight to San Francisco, California; and observing that on December 14, 1984, the two men picked up a gun permit, which they had applied for earlier, and purchased a thirty-two-caliber revolver from a pawnshop).

one o'clock in the afternoon on December 14, 1984, Neill went to the bank and encountered three employees.<sup>171</sup> He ordered them into a back room, forced them to lie face down on the floor, and proceeded to stab them to death.<sup>172</sup> A patron entered the bank, found that the teller windows were empty, and looked toward the back room.<sup>173</sup> The customer went outside to tell her husband that she thought the bank was being robbed.<sup>174</sup> She and her husband, who was carrying their fourteen-month-old daughter, went inside the bank to check things out.<sup>175</sup> Another bank customer followed them inside, where Neill greeted them with his gun, herded them into the back room, and forced them to lie down on the floor.<sup>176</sup> At that point, yet another customer entered the bank, and Neill forced her to lie down in the back room as well.<sup>177</sup> Neill shot the four adult customers in the head.<sup>178</sup>

Neill and Johnson escaped and flew to San Francisco<sup>179</sup> where they spent portions of the robbery's proceeds.<sup>180</sup> The Federal Bureau of Investigation arrested Neill and Johnson three days later in San Francisco.<sup>181</sup>

At trial, Neill never contested his guilt.<sup>182</sup> During the sentencing phase, however, he proffered evidence of a mitigating factor, namely, "that he was acting under an extreme emotional disturbance . . . as a

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171. *See id.* at 544 n.2 (revealing that "the evidence as to whether Robert Johnson accompanied [Neill] into the bank is controverted;" and that Neill testified at sentencing that Johnson was at home waiting on him during the robbery).

172. *See id.* at 544.

173. *See id.* (observing that the bank patron, Bellen Robles, looked down the hallway and noticed a man bending over something, then went outside to get her husband).

174. *See id.*

175. *See Neill*, 896 P.2d at 544.

176. *See id.* at 544-45.

177. *See id.* at 545.

178. *See Neill v. Gibson*, 263 F.3d 1184, 1188 (10th Cir. 2001) (noting that one of the bank customers who was lying on the floor, Bellen Robles' husband, had to turn his head during the shooting to keep the blood out of his eyes and, further, that he also saw the gun pointed at his baby daughter and heard a click—the gun was empty).

179. *See Neill*, 896 P.2d at 545 (reporting that Neill and Johnson arrived at the Lawton Airport at approximately 2:30 p.m., and paid \$1,200 in cash for tickets to San Francisco).

180. *See Neill*, 263 F.3d at 1188 (explaining that when the two landed in San Francisco, they spent some of the \$17,000 they stole from the bank on expensive jewelry, clothing, hotels, limousines, and cocaine).

181. *See id.* (commenting that much of the stolen money was marked, which allowed authorities to trace the serial numbers to ascertain their location).

182. *See id.* at 1189 (noting that prior to his second trial, "Neill gave a video taped interview to a religious television program, 'The 700 Club,' and wrote several letters to an author writing a book about the murders. Neill also wrote letters and made telephone calls apologizing to several victims. In these communications, Neill admitted committing the crimes.").

result of his fear of losing his relationship with Johnson.”<sup>183</sup> In the closing arguments of the sentencing phase, the prosecutor imported Neill’s homosexuality as legal issue by explicitly asking the jurors to consider it in their decision making just as they might consider other statutorily prescribed factors.<sup>184</sup> The prosecutor stated the following:

If I could ask each of you to disregard Jay Neill and take him out of the person but consider things in a generic way. I want you to think briefly about the man you’re setting [sic] in judgment on . . . . I’d like to go through some things that to me depict the true person, what kind of person he is. He is a homosexual. The person you’re sitting in judgment on—disregard Jay Neill. You’re deciding life or death on a person that’s a vowed [sic] homosexual . . . . But these are areas you consider whenever you determine the type of person you’re setting [sic] in judgment on . . . . The individual’s homosexual. He’s in love with Robert Grady Johnson.<sup>185</sup>

The jury convicted Neill of four counts of murder in the first degree, three counts of shooting with intent to kill, and one count of attempted shooting with intent to kill.<sup>186</sup> The jury found the existence of three aggravating factors and recommended the death penalty for each count of murder.<sup>187</sup> The trial court, following the jury’s recommendation, sentenced Neill to death.<sup>188</sup>

In direct appeals in Oklahoma state court, Neill never raised the issue of prosecutorial misconduct based on the prosecutor’s

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183. *Id.* at 1197.

184. *See id.* In Oklahoma, jurors are allowed by statute to consider both mitigating and aggravating circumstances in the sentencing phase of capital trials. *See* 21 OKLA. STAT. ANN. § 701.10(c) (2001) (allowing evidence to be presented in the sentencing phase as to any aggravating or mitigating circumstances enumerated in section 701.7); 21 OKLA. STAT. ANN. § 601.11 (2001) (providing that if the verdict is a unanimous recommendation of death, the jury must designate in writing the statutory circumstances it unanimously determined beyond a reasonable doubt); *see generally* 75A AM. JUR. 2D *Trial* § 572 (2001) (remarking that it is appropriate for the prosecutor to refer to the defendant’s remorse, or lack thereof, and to appeal to the jury to assess the deterrent value of the death penalty).

185. *See Neill*, 263 F.3d at 1199 (Lucero, J., dissenting) (quoting the prosecutor’s remarks, and concluding that “[a]ccording to the prosecutor, the ‘true person,’ the ‘kind of person’ Neill is can be summed up in four words: ‘He is a homosexual.’”).

186. *See Neill v. State*, 896 P.2d 537, 543 (Okla. Crim. App. 1995) (summarizing the jury verdict).

187. *See id.* at 557-58 (listing the aggravating factors: (1) Neill had created a great risk of death to more than one person; (2) he had committed the murders to avoid arrest and prosecution; and (3) the murders were especially heinous, atrocious or cruel).

188. *See id.* at 543 n.1 (citing *Neill v. State*, 827 P.2d 884 (Okla. Crim. App. 1992)) (revealing that Neill and Johnson were initially tried together, however, those sentences were vacated on appeal as a result of improper joinder). In a separate retrial, Robert Johnson was sentenced to life imprisonment without the possibility of parole. *See id.*

homophobic statements.<sup>189</sup> After obtaining new legal counsel, he appealed to the Tenth Circuit Court of Appeals,<sup>190</sup> and, among other things, asserted that the prosecutor's comments were inflammatory.<sup>191</sup> With little explanation and without even quoting the prosecutor's statement,<sup>192</sup> two judges of the three-judge panel found that the prosecutor's comments about Neill's homosexuality "were accurate, in light of the evidence, and were relevant to both the State's case and Neill's defense theory."<sup>193</sup>

Neill then successfully petitioned for a rehearing before the Tenth Circuit panel.<sup>194</sup> In reevaluating Neill's claims, the Tenth Circuit focused on the merits of what it referred to as "underlying" claims of prosecutorial misconduct.<sup>195</sup> In reevaluating the prosecutor's statements, the court's standard of review required the remarks to result in a "fundamentally unfair proceeding."<sup>196</sup> After reciting the prosecutor's remarks,<sup>197</sup> the court concluded that while they may have

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189. See *Neill*, 943 P.2d at 147-48 (documenting Neill's argument that he did not waive his claim of prosecutorial misconduct); see also *Neill*, 263 F.3d at 1195 (explaining that "[b]ecause Neill did not assert any prosecutorial misconduct until his state post-conviction application, the Oklahoma appellate court deemed him to have waived these claims. That procedural bar is adequate to preclude federal habeas review.") (citations omitted).

190. Neill's petition for habeas review was first denied by the U.S. District Court for the Western District of Oklahoma. See *Neill v. Gibson*, No. 00-6024, 2001 WL 1584819, at \*1 (stating in the caption that the appeal is from the District Court, D.C. No. Civ-97-1318-C). The District Court decision was not reported and it is never mentioned by the Tenth Circuit Court of Appeals.

191. See *Neill*, 263 F.3d at 1197 (discussing the court's refusal to address the claims of prosecutorial misconduct on the merits because his failure to raise these claims on direct appeal is procedural default barring habeas review). The court, however, did evaluate the statements by the prosecutor concerning Neill's homosexuality in the context of an ineffective assistance of counsel claim. See *id.* (noting that claim was not procedurally barred).

192. See *id.* (stating that the prosecutor's statement merely challenged Neill's proffered mitigating factor: that "[h]e had a gay lover he didn't want to lose;" and observing that the prosecutor then compared Neill's situation to the breakup of a heterosexual relationship). But see *id.* at 1202 (Lucero, J., dissenting) (responding to the logic of the majority and stating, "[t]o my mind, that argument is no different from claiming that a Jewish Defendant opens the door to a prosecutor's anti-Semitic arguments by wearing a yarmulke in the presence of jurors.").

193. *Id.*

194. See *Neill v. Gibson*, No. 00-6024, 2001 WL 1584819, at \*1 (10th Cir. Dec. 7, 2001) (filing the opinion on rehearing with the order granting Neill's petition for rehearing).

195. See *id.* at \*8-9 (noting that because Neill had the same attorney at trial and on direct appeal, his failure to raise claims of ineffective assistance of counsel on direct appeal is not a sufficient procedural bar to federal habeas review); see also *supra* note 191 and accompanying text (discussing same).

196. See *id.* at \*9 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 645 (1974)). Part III of this Comment critiques the use of this *Donnelly* standard for reviewing homosexual criminal defendants' claims of prosecutorial misconduct.

197. See *id.* at \*10-11 (quoting the prosecutor). But see *supra* note 192 (revealing that in its first opinion the Tenth Circuit dismissed the prosecutor's comments

been “improper,”<sup>198</sup> the remarks did not amount to a federal constitutional deprivation.<sup>199</sup> In deciding that the challenged remarks could not “plausibly”<sup>200</sup> have tipped the scales in favor of the prosecution, the court put the comments in “context”<sup>201</sup> and considered the strength of the state’s case against Neill.<sup>202</sup> The court then recited State’s evidence, which was largely uncontested at trial.<sup>203</sup> Ultimately, the court held that “in light of the overwhelming evidence supporting Neill’s guilt and the charged aggravating factors . . . we cannot say that the prosecutor’s improper comments influenced the jury’s verdict or otherwise rendered the capital sentencing proceeding fundamentally unfair.”<sup>204</sup> Jay Wesley Neill awaits his execution on death row in the State of Oklahoma.<sup>205</sup>

*B. Positive Bias: Prosecutors Making Assumptions About Homosexuality that Cause them to Describe Homosexual Criminal Defendants Inaccurately*

*1. The case of Wanda Jean Allen*<sup>206</sup>

Wanda Jean Allen and Gloria Leathers were involved in a

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without quoting them because they were viewed as responsive to Neill’s proffered mitigating circumstance—that he was under emotional duress for fear of losing his lover).

198. *See id.* at \*11 (conceding that “[t]here does not appear to be any legitimate justification for these remarks.”).

199. *See Neill*, 2001 WL 1584819, at \*11 (holding that “not every improper or unfair remark made by a prosecutor will amount to a federal constitutional deprivation.”) (citations omitted).

200. The court actually considered the “*probable* effect the prosecutor’s remarks had on the jury’s ability to judge the evidence fairly.” *See id.* (citing *Rojem v. Gibson*, 245 F.3d 1130, 1143 (10th Cir. 2001)) (emphasis added). Part III of this Comment critiques this “outcome determinative” review of improper prosecutorial remarks.

201. *See id.* at \*12 (stating that “the court considers the prosecutor’s remark ‘in context, considering the strength of the State’s case and determining whether the prosecutor’s challenged remarks plausibly could have tipped the scales in favor of the prosecution.’” (quoting *Rojem*, 245 F.3d at 1142-43 and citing *Donnelly*, 416 U.S. at 643)). Part III of this Comment critiques the casting of isolated prosecutorial remarks that occur in the sentencing phase in the context of the entire trial.

202. *See Neill*, 2001 WL 1584819, at \*11 (reciting the State’s evidence of the crimes committed and the aggravating and mitigating factors presented to the jury).

203. *See supra* note 182 and accompanying text (noting that Neill did not contest evidence of his guilt at his second trial).

204. *See Neill*, 2001 WL 1584819, at \*12 (citing *Rojem*, 245 F.3d at 1142-43). The court then found that Neill’s counsel was not objectively unreasonable for not raising the prosecutorial claim on direct appeal. *See id.* (citing *Smith v. Robbins*, 528 U.S. 259, 285 (2000)).

205. With the exception of Judge Lucero, who dissented in this case, every judge on the Tenth Circuit voted to deny Neill’s petition for a rehearing en banc. *See id.* at \*1 (noting same). Jay Wesley Neill’s fate now lies in the hands of the U.S. Supreme Court.

206. *Allen v. Massie*, No. 98-6340, 2000 WL 16321 (10th Cir.), *cert. denied*, 531 U.S. 1032 (2000); *Allen v. State*, 871 P.2d 79 (Okla. Crim. App.), *cert. denied*, 513 U.S. 952 (1994).

homosexual relationship and had cohabited for approximately two years.<sup>207</sup> Throughout their relationship, the two fought often.<sup>208</sup> On the day of the murder they had been fighting over a welfare check at a local grocery store.<sup>209</sup> The two women returned to their residence and Leathers asked police to be present while Leathers removed some of her personal property.<sup>210</sup> One of the three officers on the scene noticed a small hand rake among the items packed into Leather's car, and placed the rake in a clothesbasket behind the passenger seat for fear it might be used as a weapon.<sup>211</sup> The police officers left the residence after they received a priority call.<sup>212</sup> Eventually, Leathers left the residence with her mother and the two of them went to the police station to file a complaint against Allen.<sup>213</sup> Allen followed them to the police station and pleaded with Leathers to continue the relationship and to return home.<sup>214</sup> During this altercation,<sup>215</sup> Allen shot Leathers and then fled in her car.<sup>216</sup> Leathers later died.

At trial, the jury found Allen guilty of first-degree murder.<sup>217</sup> During the sentencing phase of the trial, the jury found two aggravating circumstances: (1) that Allen had a prior violent felony

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207. See *Allen*, 871 P.2d at 86 (reciting the facts of the case); see also Petition for Writ of Habeas Corpus at 9, *Allen v. Massie*, No. CIV-96-0796-L (W.D. Okla. 1999) [hereinafter *Allen* Petition for Habeas Corpus] (same).

208. See *Allen* Petition for Habeas Corpus, *supra* note 207, at 9 (noting that according to trial testimony, there was evidence that the two women had previously engaged in fist fights during their arguments).

209. See *Allen*, 871 P.2d at 86; see also *Allen* Petition for Habeas Corpus, *supra* note 207, at 9 (citing the trial transcript at 83, 91-92).

210. See *id.* See also *Allen* Petition for Habeas Corpus, *supra* note 207, at 10 (referring to trial transcript at 125-26 and noting that the dispute continued while Leathers removed her property).

211. See *Allen*, 2000 WL 16321, at \*1; see also *Allen* Petition for Habeas Corpus, *supra* note 207, at 10-11 (citing the trial transcript at 131-33, 174-75).

212. See *Allen*, 2000 WL 16321, at \*1 (noting that Allen later told police and testified at trial that after the officers left the scene, Leathers assaulted her with the hand rake); see also *Allen* Petition for Habeas Corpus, *supra* note 207, at 13-14 (discussing that the wounds resulting from the hand rake assault were still visible when police interrogated her days after the shooting and when she was photographed at the Oklahoma County Jail).

213. See *Allen*, 2000 WL 16321, at \*2 (noting that Leathers and her mother filed a complaint against Allen "regarding the disputed property"); see also *Allen* Petition for Habeas Corpus, *supra* note 207, at 11 (citing the trial transcript at 199).

214. See *Allen*, 871 P.2d at 86; see also *Allen* Petition for Habeas Corpus, *supra* note 207, at 11 (citing the trial transcript at 201-02).

215. See *Allen*, 871 P.2d at 86; see also *Allen* Petition for Habeas Corpus, *supra* note 207, at 13 (describing Allen's testimony at trial that during the verbal confrontation at the police station, Leathers approached her with the hand rake as if to hit her again, and only then did she shoot Leathers).

216. See *Allen*, 871 P.2d at 86; see also *Allen* Petition for Habeas Corpus, *supra* note 207, at 11-12 (noting that the police officers witnessed Allen's vehicle speeding away).

217. See *Allen*, 871 P.2d at 86.

conviction; and (2) that she represented a continuing threat to society.<sup>218</sup> The jury recommended that the death penalty be imposed.<sup>219</sup> The trial court followed the recommendation of the jury and sentenced Allen to death.<sup>220</sup>

On a direct appeal to the Court of Criminal Appeals of Oklahoma, Allen raised several propositions of error.<sup>221</sup> One of the alleged errors was that the trial court erred in admitting evidence that Allen was the “man” in the lesbian relationship.<sup>222</sup> This evidence was apparently “used to show that [Allen] was the aggressive person in the relationship, while [Leathers] was more passive.”<sup>223</sup> The appeals court reasoned that the evidence would “help the jury understand why each party acted the way she did both during events leading up to the shooting and the shooting itself.”<sup>224</sup> The court concluded that given the circumstances of the crime, the probative value of the character

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218. See *id.* at 104 (reporting the jury’s finding of both aggravating circumstances).

219. See *id.* at 86.

220. See *Allen*, 871 P.2d at 86.

221. See *id.* at 86-103 (examining Allen’s twenty-five propositions of error).

222. See *id.* at 95 (noting that this evidence was introduced as lay opinion testimony from Leathers’ mother). The prosecuting attorney’s motive to create an image of women charged with capital crimes as “evil” and “unladylike” has received a great deal of attention from legal scholars. See Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WISC. L. REV. 1345, 1347 (1994) (arguing that the law governing the decision to impose the death penalty is a “hidden battleground of gender”); Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 506, 565 (1990) (stating that gender bias “infects” the administration of the death penalty); Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845, 878 (1990) (studying the imposition of the death penalty upon female murderers throughout American history, and indicating that although female offenders have generally benefited from a gender-bias away from imposing the death penalty, most of the female offenders who have been executed have “committed shockingly ‘unladylike’ behavior, allowing the sentencing judges and juries to put aside any image of them as the ‘gentler sex’ and to treat them as ‘crazed monsters’ deserving nothing more than extermination”); Victor L. Streib & Lynn Sametz, *Executing Female Juveniles*, 22 CONN. L. REV. 3, 56-59 (1989) (attributing the extremely low number of female juveniles on death row to the “strong, constitutionally based rejection of the death penalty for juveniles and the even stronger, culturally based rejection of the death penalty for females”); Jenny E. Carroll, Note, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413, 1452 (1997) (concluding that, in part, the decision to impose the death penalty on female offenders depends upon the offenders’ “ability to fall within the designated protective sphere of womanhood”).

223. *Allen*, 871 P.2d at 95. According to Allen’s petition for a writ of habeas corpus, Allen’s trial attorney’s attempts to show the violent nature of Leathers character were rebuffed at the prosecutor’s insistence. See *Allen* Petition for Habeas Corpus, *supra* note 207, at 17, 59 (noting that police reports held by the prosecution reflected that Leathers had been arrested more than a dozen times, including two arrests for assault with a deadly weapon and two arrests for assault and battery).

224. See *Allen*, 871 P.2d at 95 (contemplating the probative value of Leathers’ mother’s testimony).

evidence “was not substantially outweighed by its prejudicial effect.”<sup>225</sup>

Allen also argued that “the prosecutor improperly criticized her during closing argument, making references to her status as the dominant person in the homosexual relationship.”<sup>226</sup> In denying Allen’s claim, the court reasoned the homosexual relationship was “critical to the jury’s understanding of the facts surrounding the shooting, and was a proper factor for the jury to consider.”<sup>227</sup>

Allen then petitioned for habeas corpus relief in the Western District of Oklahoma.<sup>228</sup> Allen’s petition was denied and she subsequently appealed to the Tenth Circuit Court of Appeals.<sup>229</sup> The Tenth Circuit ruled on seven independent instances of prosecutorial misconduct, including instances where the prosecutor engaged in biased behavior.<sup>230</sup> The court reviewed the prosecutor’s comments in context, looking at the strength of the evidence against Allen, and decided whether the prosecutor’s statements “plausibly could have tipped the scales in favor of the prosecution.”<sup>231</sup> Ultimately, the court considered the “probable effect the prosecutor’s [statements] would have on the jury’s ability to judge the evidence fairly” and concluded that the trial was not rendered fundamentally unfair.<sup>232</sup> The court explained that even if the comments were improper, they were not significant enough to influence the jury’s decision.<sup>233</sup> On January 11, 2001, at 9:21 p.m., Wanda Jean Allen, age forty-one, was executed by lethal injection at the Oklahoma State Penitentiary.<sup>234</sup>

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225. *Id.*

226. *Id.* at 97.

227. *Id.* (citing 21 OKLA. STAT. ANN. § 695 (1983)) (allowing the jury to consider the existence of a domestic relationship in determining the grade or punishment of a homicide).

228. *See Allen v. Massie*, No. 98-6340, 2000 WL 16321, at \*1 (10th Cir. Jan. 11, 2000) (reciting the procedural history of Allen’s case).

229. *See id.* at \*12 (affirming the district court’s denial of Allen’s habeas corpus petition).

230. *See id.* at \*5 (listing the alleged instances of prosecutorial misconduct; those relevant to the exhibition of biased conduct were: (2)(a) Ms. Leather’s mother’s testimony in guilt stage opening argument [that Allen was the dominant person in the relationship]; and (7) the prosecution’s improper name calling [that Allen was the “man” in the relationship]).

231. *See id.* \*6 (quoting *Fero v. Kerby*, 39 F.3d 1462, 1474 (10th Cir. 1994)); *see also supra* Parts II.A.2, III & IV.C (discussing and critiquing this “outcome determinative” approach).

232. *See id.* (quoting *Kerby*, 39 F.3d at 1474); *see also supra* Parts II.A.2, III & IV.C (discussing the harm exacted on homosexual defendants by the probabilistic nature of this standard of review).

233. *See Allen v. Massie*, No. 98-6340, 2000 WL 16321, at \*6 (holding that “[i]n light of the evidence of guilt and the weight of the aggravating circumstances, there is not a reasonable probability that the outcomes at either stage would have been different without the alleged misconduct.”) (citing *Hoxsie v. Kerby*, 108 F.3d 1239, 1244-45 (10th Cir. 1997)).

234. *See Nation in Brief*, WASH. POST, Jan. 12, 2001, at A26 (noting that Wanda Jean

*C. Disrespectful References: Prosecutors Broadcasting their Bias Through Words and Actions*

*1. The case of Calvin Jerold Burdine*<sup>235</sup>

Calvin Burdine met W.T. “Dub” Wise in Houston, Texas, in November of 1982.<sup>236</sup> Subsequently, the two men became involved in a homosexual relationship that continued for approximately three and a half months while Burdine lived with Wise.<sup>237</sup> Wise was employed as a night supervisor at a security guard service and obtained a job for Burdine with the same company.<sup>238</sup> Burdine and Wise eventually began to quarrel about the manner in which Wise handled Burdine’s earnings.<sup>239</sup> After Burdine refused to prostitute himself for Wise, Wise asked Burdine to move out.<sup>240</sup> Burdine moved out and approximately two weeks later quit his job at the security company.<sup>241</sup> Then, in an effort to physically harm Burdine, Wise “put a contract out on him.”<sup>242</sup>

Burdine then met a seventeen-year-old gay man named Douglas

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Allen is only the second black woman executed in this country since 1954); *see also* Karen Klinka, *Murder Case Stirs Attention Nationally*, DAILY OKLAHOMAN, Dec. 27, 2000, at Cmty. II, Page 1 (interviewing police officers involved in the case, and noting that the media company HBO plans to create a dramatization of the case).

235. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc) (vacating the panel’s decision and reinstating the writ of habeas corpus). *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000) (reversing the District Court’s grant of writ of habeas corpus). *Burdine v. Johnson*, 66 F. Supp. 2d 854 (S.D. Tex. 1999) (granting Burdine’s petition for writ of habeas corpus). *Burdine v. State*, 719 S.W.2d 309 (Tex. Crim. App. 1986) (en banc) (affirming Burdine’s conviction for capital murder), *cert. denied*, *Burdine v. Texas*, 480 U.S. 940 (1987).

236. *See Burdine*, 719 S.W.2d at 312; *see also* Petitioner’s Petition for Writ of Habeas Corpus at 20, *Burdine v. Johnson*, 66 F. Supp. 2d 854 (S.D. Tex. 1999) (No. H-94-4190) [hereinafter *Burdine Petition for Habeas Corpus*].

237. *See Burdine*, 719 S.W.2d at 312.

238. *See id.* *See also* *Burdine Petition for Habeas Corpus*, *supra* note 236, at 20 (pointing out that because of Burdine’s previous criminal history, Wise devised a plan to conceal Burdine’s real identity by using the pseudonym “Michael Tomlinson” in order to obtain employment at the security guard company).

239. *See Burdine*, 719 S.W.2d at 312; *see also* *Burdine Petition for Habeas Corpus*, *supra* note 236, at 20 (explaining that because Burdine could not cash paychecks issued to his pseudonym “Thomlinson,” Wise picked up Burdine’s paychecks, had Burdine sign them over to him, and deposited them into his own account).

240. *Burdine v. State*, 719 S.W.2d 309, 312 (Tex. Crim. App. 1986) (en banc); *see also* *Burdine Petition for Habeas Corpus*, *supra* note 236, at 21 (charging that Wise had a practice of befriending young male homosexuals and recruiting them to work for him as prostitutes).

241. *See Burdine*, 719 S.W.2d at 312-13; *see also* *Burdine Petition for Habeas Corpus*, *supra* note 236, at 21 (noting that before Burdine moved out, Wise physically assaulted him).

242. *See Burdine*, 719 S.W.2d at 313; *see also* *Burdine Petition for Habeas Corpus*, *supra* note 236, at 21 (maintaining that Burdine was told by a number of Wise’s prostitutes that Wise “put a contract out on him” and that on one occasion four of Wise’s hustlers physically assaulted Burdine, breaking his nose, at Wise’s behest).

McCreight.<sup>243</sup> On April 18, 1983, Burdine and McCreight went to Wise's home to get money from him.<sup>244</sup> After Burdine and McCreight talked with Wise for approximately thirty minutes, McCreight asked to go to the bathroom.<sup>245</sup> When McCreight returned he was wearing a pair of gloves and carrying Wise's gun and a large hunting knife.<sup>246</sup> McCreight ordered Wise to lie on the floor, and he bound his wrists.<sup>247</sup> Burdine retrieved a pair of socks, which McCreight stuffed in Wise's mouth.<sup>248</sup> Burdine and McCreight began stacking items by the front door so that they could take them later.<sup>249</sup> Burdine and McCreight decided that "something had to be done" with Wise because he could identify them.<sup>250</sup> McCreight cut an electrical cord of a clock radio and bound Wise's legs.<sup>251</sup> Both Burdine and McCreight unsuccessfully attempted to smother Wise with a pillow.<sup>252</sup> After further discussion, McCreight hit Wise over the head several times with a lead-filled police sap.<sup>253</sup> Burdine and McCreight left the home, taking the stolen items with them.<sup>254</sup> Concerned that Wise could identify them, they decided to return to the scene.<sup>255</sup> Upon re-entering the home, McCreight made the sign of the cross and stabbed Wise in the back.<sup>256</sup>

Burdine and McCreight fled to Austin, Texas, where Burdine pawned a television set and obtained money from different automatic teller machines with Wise's bankcard.<sup>257</sup> The two men then

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243. See *Burdine*, 719 S.W.2d at 313.

244. See *id.* See also Burdine Petition for Habeas Corpus, *supra* note 236, at 22-23 (noting that Burdine warned McCreight that Wise kept a pistol in his bedroom).

245. See *Burdine*, 719 S.W.2d at 313.

246. See *id.*

247. See *id.*

248. See *id.* See also Burdine Petition for Habeas Corpus, *supra* note 236, at 24 (citing the trial transcript where Burdine testified that he continually asked McCreight to stop attacking Wise).

249. See *Burdine*, 719 S.W.2d at 313; see also Burdine Petition for Habeas Corpus, *supra* note 236, at 24 (quoting the trial transcripts showing that Burdine began taking things from the trailer because he "knew [he] had to leave, and [he] was going to need money").

250. See *Burdine*, 719 S.W.2d at 313.

251. See *id.*

252. See *id.*

253. See *id.*

254. See *id.*

255. See *Burdine*, 719 S.W.2d at 313.

256. See *id.* (according to Burdine's extra-judicial confession he also stabbed Wise once, stating: "[w]hat the hell, hand me the knife."); see also Burdine Petition for Habeas Corpus, *supra* note 236, at 25-26 (noting that the circumstances surrounding Wise's stabbing were never resolved as Texas law allows a capital murder conviction for both principals and accomplices).

257. See *Burdine*, 719 S.W.2d at 313; see also Burdine Petition for Habeas Corpus, *supra* note 236, at 26 (indicating that Burdine used Wise's bank card to withdraw funds from the account which Burdine's own checks were deposited).

proceeded from Austin to Eureka, California, where they pawned Wise's gun for thirty dollars.<sup>258</sup> Burdine and McCreight<sup>259</sup> were arrested at a local gas station. McCreight pleaded guilty to a lesser charge and was paroled after only eight years in prison.<sup>260</sup> Burdine was returned to Houston and indicted for capital murder on June 18, 1983.<sup>261</sup> The trial, lasting twelve hours and fifty-one minutes, resulted in Burdine's conviction for "intentionally and knowingly" causing the death of Wise.<sup>262</sup>

During his trial and subsequent direct appeal,<sup>263</sup> Burdine consistently endured homophobic and biased conduct not only from the prosecuting attorney but also from his *own* court appointed defense counsel.<sup>264</sup> At trial, Burdine's attorney, Joe Cannon,<sup>265</sup> failed to object to several homophobic comments by the prosecuting attorney.<sup>266</sup> The prosecutor made one of his most egregious comments during the punishment phase's closing arguments when he stated, "[s]ending a homosexual to the penitentiary certainly isn't a very bad punishment for a homosexual, and that's what he's asking you to do."<sup>267</sup> Cannon also failed to object to the prosecutor's reliance on Burdine's 1971 consensual sodomy conviction used as

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258. See *Burdine*, 719 S.W.2d at 313.

259. McCreight pleaded guilty to a lesser charge and was paroled after only eight years in prison. See Weinstein, *infra* note 265, at A10 (reporting the sentencing disparity between Burdine and McCreight); *Burdine v. Johnson*, 66 F. Supp. 2d 854, 855 n.1 (S.D. Tex. 1999) (stating same).

260. See *Burdine v. State*, 719 S.W.2d 309, 313 (Tex. Crim. App. 1986) (en banc).

261. See *Burdine* Petition for Habeas Corpus, *supra* note 236, at 27.

262. See *Burdine*, 262 F.3d at 338; *Burdine*, 719 S.W.2d at 312.

263. Burdine's court-appointed attorney, Joe Cannon, served as counsel throughout both his trial and direct appeal. See *Burdine*, 262 F.3d at 339 (stating same).

264. See *Burdine* Petition for Habeas Corpus, *supra* note 236, at 106-12 (recounting numerous instances of Cannon's own homophobia as illustrated by comments made on the record or in affidavits submitted to the court).

265. See Henry Weinstein, *Ruling on Sleeping Lawyer; Court: Texas Man Facing Execution Will Get Another Trial Because His Lawyer Was Unconscious During the First One*, L.A. TIMES, Aug. 14, 2001, at A10 (revealing that during Cannon's career as a defense attorney, ten of his clients were sentenced to death); Paul M. Barrett, *A Mockery of the Process*, WALL ST. J., Sept. 7, 1994, at A1 (noting that "[i]n Texas, which executes more people than any other state, Mr. Cannon's collection of ten death sentences is one of the largest among active lawyers"); see also *Burdine*, 262 F.3d at 339 (agreeing with the district court's conclusion that several members of the jury and the deputy court clerk witnessed Cannon sleeping as many as ten times and for as long as ten minutes); *Ex parte Burdine*, 901 S.W.2d 456, 457 (Tex. Crim. App. 1995) (entering "a finding that defense counsel dozed and actually fell asleep during portions of [Burdine's] trial on the merits, in particular the guilt-innocence phase when the State's solo prosecutor, was questioning witnesses and presenting evidence," yet nevertheless denying habeas relief).

266. See *Burdine* Petition for Habeas Corpus, *supra* note 236, at 115 (arguing Cannon's failure to object amounted to ineffective assistance of counsel).

267. See *id.* at 115-16 (quoting the trial transcript).

evidence to support the claim that Burdine would be a future danger to society.<sup>268</sup> Finally, Cannon accepted three jurors who admitted in *voir dire* that they possessed varying degrees of prejudice against homosexuals.<sup>269</sup>

Cannon himself frequently used derogatory terms to describe homosexuals in various court proceedings, which perhaps explains his failure to object to them during Burdine's trial.<sup>270</sup> During a 1988 evidentiary hearing in state court, Cannon variously referred to homosexuals by using the terms "queer," "fairy," and "tush hog."<sup>271</sup> In an affidavit submitted during the court proceedings, Cannon used the term "queer" to describe gay men.<sup>272</sup> In a 1995 state evidentiary hearing, Cannon stated that he believed that "queer" and "fairy" were merely commonly acceptable forms of "street language" used to describe male homosexuals.<sup>273</sup> When asked whether he had also used the term "faggot" to describe homosexuals, he stated, "I don't recall, I may have."<sup>274</sup> Finally, Cannon revealed that he referred to homosexuals as people who have a medical or mental "problem which they can't help" and which "doctors and psychologists" cannot seem to cure.<sup>275</sup>

After several unsuccessful attempts for habeas relief in the Texas

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268. See *id.* (quoting the trial transcript); see also *Beam v. Paskett*, 3 F.3d 1301, 1309 (9th Cir. 1993) (holding that previous sexually deviant behavior without a showing of violence is not probative of a defendant's future dangerousness).

269. See *Burdine Petition for Habeas Corpus*, *supra* note 236, at 116-17. One juror admitted that he "disagree[d] with the homosexual lifestyle and "[he] can't really say that [his view of homosexuals] would not bias [him] somewhat." *Id.* Another juror stated: ". . . I have always and I will continue to in the future, not have anything socially to do with them [homosexuals]. The few close encounters I had, have been situations of enagement . . . [T]hat's the way I feel." *Id.* A third juror stated: "I think they're [homosexuals] not normal in the sense of the word . . . . To me, they have a problem." *Id.*

270. See *Burdine Petition for Habeas Corpus*, *supra* note 236, at 106-10 (detailing the extent of Cannon's use of homophobic slang terms to describe homosexual people).

271. See *id.* at 106 (providing evidence that Cannon possesses homophobic views which equate to prejudices against homosexuals based on their sexual preferences).

272. See *id.* at 106 (demonstrating that Cannon harbored ill feelings towards homosexuals and had no problem going on the record with those feelings in both written and oral form).

273. See *id.* at 110 (rejecting Cannon's assertion that the terms "queer" and "fairy," which he used to describe homosexuals, are not akin to racial epithets such as "nigger"); see also DAVID A. J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS* 6-13 (1999) (analogizing African Americans' struggle for civil rights to the gay rights movement).

274. See *Burdine Petition for Habeas Corpus*, *supra* note 236, at 110 (stating that Cannon did not find the term offensive and that he was "never too concerned" about using such terms in a variety of settings).

275. See *id.* at 110 (rejecting Cannon's assumption and arguing that it flies in the face of over thirty years of medical thought; the American Psychiatric Association has stated since 1973 that homosexuality is not a medical or psychological pathology).

court system, Burdine appealed to the U.S. District Court in Houston.<sup>276</sup> There, Burdine raised ten issues in his application for writ of habeas corpus, including whether the prosecutor's homophobic remarks to the jury violated his Eighth and Fourteenth Amendment rights.<sup>277</sup> United States District Judge Hittner, however, never addressed this point of error in his decision to grant habeas relief and based his finding on the fact that Burdine's counsel "slep[t] throughout substantial portions of his criminal trial."<sup>278</sup> The State of Texas appealed Hittner's decision to the Fifth Circuit Court of Appeals,<sup>279</sup> which vacated the decision and cleared the way for Burdine's execution.<sup>280</sup> On appeal to the Fifth Circuit *en banc*, the court affirmed the district court's decision and vacated Burdine's conviction,<sup>281</sup> leaving the State of Texas with three options: (1) appeal

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276. See *Burdine v. Johnson*, 66 F. Supp. 2d 854 (S.D. Tex. 1999) (explaining that after denial of habeas corpus relief by the Texas courts in both June of 1994 and April of 1995, Burdine's writ of habeas corpus was granted by the U.S. District Court for the Southern District of Texas in September of 1999).

277. See *id.* at 856. The petition argued that in addition to the homophobic remarks, petitioner should be granted habeas corpus relief because: (1) petitioner's trial counselor's poor performance violated his Sixth and Fourteenth Amendment rights to "effective assistance of counsel;" (2) Texas forfeited its right to execute petitioner under the Eighth and Fourteenth Amendments; (3) petitioner's status as the non-triggerman deserved a "constitutionally adequate vehicle" for jury consideration; (4) equating the term "deliberate" to that of "intentional" violated the petitioner's rights under the Eighth and Fourteenth Amendments; (5) petitioner's Sixth Amendment right of confrontation was violated due to the introduction of allegedly highly incriminating evidence by a non-testifying co-defendant; (6) the jury was not given the "adequate mitigating effect" of childhood sexual abuse and neglect for consideration; (7) the prosecutor's closing arguments violated petitioner's Eighth and Fourteenth Amendment rights; (8) an evidentiary hearing should have been conducted because there was a failure to resolve a factual dispute; and (9) an alleged unconstitutional 1971 sodomy conviction could not be used by the state to prove that the petitioner "posed a future threat to society." *Id.*

278. See *id.* at 866-67 (granting the writ of habeas corpus, vacating Burdine's criminal conviction below, and ordering the state of Texas to either retry or release him within 120 days).

279. See Deborah Tedford, *Death Row Inmate Ordered Released; Prosecutors Missed Deadline to Retry Him*, HOUS. CHRON., Mar. 2, 2000 (reporting that the State of Texas missed the 120 day deadline to retry Burdine and that U.S. District Court Judge Hittner ordered his release within five days; the State of Texas filed an emergency request for a stay from the Fifth Circuit Court of Appeals); Bruce Nichols, *Death Row Inmate to Remain in Prison: Judge Had Ordered Convicted Killer Freed Because State Lawyers Missed Deadline*, DALLAS MORNING NEWS, Mar. 4, 2000, at 31A (reporting that the Fifth Circuit Court of Appeals granted the state's stay and ordered Burdine to be held in custody; quoting the order: "[b]ased upon our review of pertinent portions of the record, including of the trial transcript, we conclude . . . that Burdine should not be released pending appeal.").

280. See *Burdine v. Johnson*, 231 F.3d 950, 951 (5th Cir. 2000) (vacating the decision of the district court because according to the court, the circumstances of the case did not support presuming prejudice).

281. See *Burdine v. Johnson*, 262 F.3d 336, 349-50 (5th Cir. 2001) (*en banc*) (vacating the earlier decision of its own bench based upon a belief that Burdine's counsel sleeping through a critical stage of the trial is equivalent to a denial of

to the U.S. Supreme Court; (2) retry Burdine; or (3) set him free. Calvin Jerold Burdine, age forty-six, awaits the state's decision from death row.

### III. THE STANDARD OF REVIEW FOR PROSECUTORIAL MISCONDUCT INADEQUATELY PROTECTS HOMOSEXUAL CRIMINAL DEFENDANTS

[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.<sup>282</sup>

Contrary to the proclamation above, it appears that in numerous cases,<sup>283</sup> the death penalty, as opposed to a life sentence, is applied to homosexual criminal defendants, at least in part, *because* of their sexual orientation.<sup>284</sup> The sample of cases in Part II demonstrates that prosecuting attorneys, acting as advocates of the state,<sup>285</sup> make calculated decisions about when and how to introduce evidence of the defendant's sexual orientation.<sup>286</sup> Their goal, this Comment asserts, is to appeal to the prejudices of the jury,<sup>287</sup> and ultimately to solidify the chances of securing a death sentence.<sup>288</sup> This Part argues

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counsel, a violation of Burdine's Sixth Amendment right).

282. *Greg v. Georgia*, 428 U.S. 153, 189 (1976) (holding that although the death penalty itself is not unconstitutional, the statutes that regulate its implementation must specify the aggravating factors and mitigating factors that juries may utilize); *see also Jurek v. Texas*, 428 U.S. 262 (1976) (concluding that a jury must have the opportunity to consider not only why a death penalty should be imposed, but also why it should not be imposed."); *Proffitt v. Florida*, 428 U.S. 242 (1976) (holding that sentencing a defendant to life in prison or death depended upon whether "certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist").

283. *See supra* note 22 (speculating that prosecutorial misuse of and improper argument about a criminal defendant's sexual orientation is more widespread than the sample of cases discussed in Part II, standing alone, might suggest).

284. *See* Part II (providing a narrative of four cases where the prosecuting attorneys variously used the defendants' sexual orientation to inflame the prejudices of the jury, presumably to increase the likelihood of a death sentence).

285. *See* Michael T. Fisher, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1303 (1988) (discussing the dual role of the prosecuting attorney).

286. *See supra* Part II (providing a narrative of four cases where the prosecutor prejudicially introduced the defendant's sexual orientation).

287. *See* Rovella, *supra* note 21 and accompanying text (revealing that in a national poll of potential jurors, seventeen percent reported that they could not be fair to a homosexual defendant, and that national opinion polls of the general public reveal that animosity towards homosexuals, though declining, is still prevalent); *see also supra* note 6 and accompanying text (indicating that according to national polling data a significant number of Americans still believe that homosexual relationships between consenting adults should be illegal).

288. *See* Judy Platania & Gary Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials*, 23 LAW & HUM. BEHAV.

that the standards by which the prejudicial comments of the prosecutor are reviewed on appeal<sup>289</sup> leave homosexual criminal defendants particularly unprotected. Under this view, these defendants, then, are potentially being sent to their deaths not only because of the crimes of which they have been convicted, but also because of their status as homosexuals.

The U.S. Supreme Court established the standard of review for prosecutorial misconduct in the form of improper remarks in *Donnelly v. DeChristoforo*.<sup>290</sup> According to *Donnelly*, in order for prejudicial prosecutorial remarks<sup>291</sup> to constitute reversible error, the remarks must be viewed in the “context of the entire trial” and must be “sufficiently prejudicial” so as to deny the defendant the due process of law.<sup>292</sup> The Court revisited the issue of the prosecutor’s

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471, 483 (1999) (revealing that according to the results of a controlled study, “improper statements made by the prosecutor in closing argument influence participant-jurors’ sentencing recommendations;” and that “[p]articipant-jurors who were exposed to improper statements made by the prosecutor were significantly more likely to recommend the death penalty than those jurors not exposed.”).

289. The standard of review that appellate courts actually employ in reviewing these claims can vary widely from case to case depending on a number of factors, including but not limited to: the extent and nature of the misconduct; whether it was contemporaneously objected to; whether the misconduct deprived the defendant of a constitutional right; and whether the judge gave a curative instruction to the jury. See generally BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6 (1997) (providing an overview of the various factors that require different standards of review by appellate courts; and collecting sample cases). The type of the misconduct, whether the trial was in federal or state court, the particular kind of appeal, and the particular kind of relief the petitioner is asking the reviewing court for all affect the standards that reviewing courts apply. See GERSHMAN, § 6-3 to 6-5 (describing plain error review, harmless error review for both constitutional and non-constitutional errors, habeas corpus review, special harmless error rules, and supervisory review; and collecting sample cases); see also Brian C. Duffy, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors’ Use of Religious Arguments in the Sentencing Phase of Capital Cases*, 50 VAND. L. REV. 1335, 1339-49 (1997) (discussing the “current” standards for reviewing prosecutorial misconduct and concluding that results of different standards under direct appeal and habeas review yield similar results); Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 321-24 (2001) (discussing the “usual” standards of review for evaluating charges of prosecutorial misconduct). The standard of review as discussed in this section serves as a general discussion of U.S. Supreme Court precedent that the *Lingar*, *Allen*, and *Neill* courts used in dismissing the respective claims of prosecutorial misconduct. An in-depth analysis of the various standards is beyond the scope of this Part.

290. 416 U.S. 637 (1974) (considering whether remarks made by the prosecutor, although admittedly improper, constituted enough prejudice to deprive the petitioner of a constitutionally guaranteed free trial).

291. See *id.* at 642-43 (distinguishing the prosecutor’s remarks in this case from ones that prejudice a specific right such as the privilege against compulsory self-incrimination or the right to counsel; and noting that under such circumstances, the Court has taken “special care” to insure that prosecutorial misconduct does not infringe upon them).

292. See *id.* at 645 (discussing situations where the improper actions of opposing counsel might deprive defendants of specific benefits provided by the Bill of Rights,

improper comments in criminal trials in *Darden v. Wainwright*.<sup>293</sup> In *Darden*, the Court reaffirmed *Donnelly*, continuing to require the prosecutor's comments to reach the threshold of "so infect[ing] the trial with unfairness as to make the resulting conviction a denial of due process" before rising to the level of reversible error.<sup>294</sup>

This standard of review inadequately protects homosexual criminal defendants because they often endure biased behavior from not only the prosecuting attorney, but also, as the studies discussed in Part I indicate, from the court system itself, as further illustrated in the cases discussed in Part II.<sup>295</sup> The *Donnelly/Darden* standard, operating in an already biased system, requires homosexual criminal defendants to prove the nearly impossible: that their sentencing hearing was rendered "fundamentally unfair" on the basis of an isolated question or comment about their sexual orientation by the prosecuting attorney.<sup>296</sup> Similarly, the *Donnelly/Darden* standard's reliance on the "context of the entire trial" acts to further dilute the potency of isolated homophobic comments such as the ones in

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and concluding that this was not the case in the present action).

293. 477 U.S. 168 (1986) (affirming the rulings of the lower courts that certain opinion comments during closing arguments concerning the strength of the prosecution's case, although improper, did not deprive the petitioner of a fair trial).

294. *See id.* at 181 (finding that in light of the totality of the evidence against the accused, improper comments were not likely prejudicial enough to influence the jury, therefore, regardless of the fact that the trial was "not perfect" it was not "fundamentally unfair"). In reaching this conclusion, the *Darden* Court found the following factors instructive:

(1) whether the weight of evidence going to guilt was heavy, (2) whether the state manipulated or misstated evidence, (3) whether the state's remarks were invited by or responsive to the defense, (4) whether the trial court issued a curative jury instruction, and (5) whether defense counsel was able to cast the state's comments and actions "in a light that was more likely to engender strong disapproval than result in inflamed passions against petitioner."

*See* Neill v. Gibson, No. 00-6024, 2001 WL 1584819, at \*20 (Lucero, J., dissenting) (quoting *Darden v. Wainwright*, 477 U.S. 168, 182-83 (1986)).

295. *See supra* Part I (discussing two state-wide studies on the prevalence of sexual orientation bias in the courts; and revealing that homophobic conduct by judicial actors is endemic). The existence of general societal animosity against homosexuals leads Judge Lucero, dissenting in *Neill*, to conclude that "[t]he openly gay defendant thus finds himself at a disadvantage from the outset of his prosecution." *See* Neill v. Gibson, No. 00-6024, 2001 WL 1584819, at \*18 (citing polling data and literature that suggests despite gains in societal acceptance, animosity against gays and lesbians remains high).

296. *See supra* Part II.A.1 (indicating that in the case of *Lingar*, the prosecutor only asked Smith three questions about the nature of his and *Lingar*'s relationship); *see supra* Part II.A.2 (explaining that the remarks by the prosecutor in *Neill*'s case came only at the closing argument of the sentencing phase of trial); *see supra* Part II.B (revealing that the prosecutor in *Allen*'s case only made two references to her as "the man of the relationship"); *see supra* Part II.C (describing the prosecutor's remarks about sending *Burdine* to prison for life as "hardly a punishment" came only in the closing argument in the sentencing phase of the trial).

*Lingar, Neill, Allen, and Burdine.*<sup>297</sup>

Applying the “contextual” requirement of the *Donnelly/Darden* standard, in cases where the misconduct happens in sentencing hearings, also presents fundamental flaws.<sup>298</sup> As opposed to the guilt/innocence phase, where the jury is charged with determining specific questions of fact, the jury considers a wider array of factors.<sup>299</sup> The “contextual” analysis, then, allows a specific determination of guilt beyond a reasonable doubt at trial to compensate for isolated comments by the prosecutor at sentencing. Courts that review claims of prosecutorial misconduct by applying the *Donnelly/Darden* standard, which weighs evidence of the defendant’s guilt from trial and then evaluates the prosecutor’s isolated comments in the sentencing hearing in the context of the entire trial, inevitably reach the conclusion that the defendant was not denied due process. The *Donnelly/Darden* standard, and the courts that use it, offers little help to homosexual criminal defendants who may have been convicted at trial on overwhelming evidence of guilt.<sup>300</sup>

Furthermore, the *Donnelly/Darden* standard, as applied by the Tenth Circuit, which decided the fate of Jay Wesley Neill and Wanda Jean Allen, conflates what should properly be a question of plausible prejudice with that of probable prejudice.<sup>301</sup> The Tenth Circuit has explained that in viewing the prosecutor’s remarks in context, “we look first at the strength of the evidence against the defendant and decide whether the prosecutor’s statements *plausibly* ‘could have tipped the scales in the favor of the prosecution.’”<sup>302</sup> Ultimately,

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297. See *supra* Part II (providing a narrative of each death penalty case and indicating that the prosecutor’s comments were isolated occurrences in the context of the entire trials).

298. See *Neill v. Gibson*, No. 00-6024, 2001 WL 1584819, at 21 (Lucero, J., dissenting) (finding the majority’s application of *Donnelly/Darden* deficient because “it ignores the qualitative difference between the guilt-innocence and capital-sentencing stages of trial, a distinction acknowledged in *Darden* itself.”).

299. See *Duffy*, *supra* note 289, at 1378 (arguing that the sentencing jury plays a different role than the trial jury, and further arguing that jurors are often confused about the rules of the capital sentencing guidelines and their role in the process).

300. See Jon A. Hlafter, *Prosecutorial Misconduct*, 89 GEO. L.J. 1579, 1579, n.1739 (2001) (listing cases from each of the federal circuit courts that illustrate instances where the prosecutorial comments or arguments were held harmless error where the evidence of the convicted person’s guilt was overwhelming).

301. See *Neill v. Gibson*, No. 00-6024, 2001 WL 1584819, at \*21 (10th Cir. Dec. 7, 2001) (Lucero, J., dissenting) (criticizing the majority’s probabilistic analysis of whether the prosecutor’s comments tipped the scales in favor of the prosecution, and arguing that the correct analysis is whether they plausibly could have).

302. *Fero v. Kerby*, 39 F.3d 1462, 1474 (10th Cir. 1994) (Lucero, J., dissenting) (concluding that the three challenged remarks by the prosecutor, although improper, did not “den[y] *Fero* of a fair trial or infringe his right to due process.” (quoting *Hopkinson v. Shillinger*, 866 F.2d 1185, 1210 (10th Cir. 1989))) (emphasis added).

however, the Tenth Circuit, “consider[s] the probable effect the prosecutor’s [statements] would have on the jury’s ability to judge the evidence fairly.”<sup>303</sup>

The *Donnelly/Darden* standard, as applied by the Tenth Circuit, therefore, establishes an outcome-determinative test that actually evaluates the evidence of the convicted person’s guilt, while determining whether the prosecutor’s comments constitute reversible error.<sup>304</sup> This outcome-determinative approach has substantially “stacked the cards” against homosexual criminal defendants who may indeed be guilty of their crimes, but who have also suffered from prosecutors using the defendant’s sexual orientation in ways that might evoke prejudice from the jury.<sup>305</sup> Arguably, in practice, the Tenth Circuit’s approach means that homosexual defendants who are found guilty beyond a reasonable doubt at trial will not be guaranteed a sentencing proceeding that is free from often blatant prejudice based on their sexual orientation.

#### IV. A CRIMINAL DEFENDANT’S SEXUAL ORIENTATION SHOULD NEVER BE A FACTOR IN DETERMINING WHETHER TO IMPOSE THE DEATH PENALTY

It would seem to be incontestable that the death penalty inflicted on one defendant is “unusual” if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices . . . .<sup>306</sup>

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303. See *Neill v. Gibson*, No. 00-6024, 2001 WL 1584819, at \*19 (10th Cir. Dec. 7, 2001) (quoting *Fero v. Kerby*, 39 F.3d 1462, 1474 (10th Cir. 1994)); see also *supra* notes 232-33 and accompanying text (revealing that the Tenth Circuit used the same analysis to determine that Wanda Jean Allen’s claims of prosecutorial misconduct did not constitute reversible error).

304. See *Fisher*, *supra* note 285, at 1298 (arguing that outcome determinative analysis is inappropriate in determining potential due process violations).

305. See *supra* notes 6, 21 (revealing that a significant number of jurors admit that they could not be fair to homosexual defendants); see also *Platania & Moran*, *supra* note 288 (reporting that according to a recent study of potential jurors, a significant number are more likely to impose a death sentence in trials where there is prosecutorial misconduct present).

306. *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring). Sexual orientation is noticeably absent from this list of classifications deserving protection. Courts have only recently begun to hold that sexual orientation is a classification also worthy of any level of protection. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding the State of Colorado’s Amendment 2 is a violation of the Equal Protection Clause, as “it is a classification of persons undertaken for its own sake”); *Sterling v. Borough of Minersville*, 232 F.3d 190, 197 (3d Cir. 2000) (finding a police officer’s threat to disclose an arrested minor’s homosexuality violated his constitutional right to privacy); *E. High Sch. Prism Club v. Seidel*, 95 F. Supp. 2d 1239, 1251 (D. Utah 2000) (granting the plaintiff school club’s motion for injunctive relief because the student club established a “substantial likelihood that [they would]

Questions about the fairness of the current application of the death penalty<sup>307</sup> have led two justices on the U.S. Supreme Court to

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eventually succeed on the merits” of their First Amendment claim); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170-71 (N.D. Cal. 2000) (finding that harassment due to the victim’s perceived homosexuality can constitute “sexual harassment” within the meaning of Title IX); *E. High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1197-98 (D. Utah 1999) (holding that denying the student club the same opportunities to meet as other non-curricular clubs violated their rights under the Equal Access Act); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1285, 1289-90 (D. Utah 1998) (finding that the school district violated a teacher’s First Amendment and rights under the Equal Protection Clause when they placed restrictions on her right to speak in public about her sexuality).

307. Since 1976, when the U.S. Supreme Court handed down its landmark ruling in *Gregg v. Georgia*, 428 U.S. 153, 186 (1976), that capital punishment is not *per se* unconstitutional, the Court has continuously grappled with various constitutional fairness issues associated with the death penalty. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280 (1976) (finding mandatory death sentences for certain crimes impermissible under the Eighth and Fourteenth Amendments because of their failure to allow for jury discretion or particularized review of the defendant before sentencing him to death); *Coker v. Georgia*, 433 U.S. 584, 592-93 (1977) (declaring the death penalty a disproportionate punishment under the Eighth Amendment for the crime of rape and recognizing the difficulty in supporting a claim that “the death penalty for rape is an indispensable part of the state’s criminal justice system.”); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (prohibiting states from limiting the jury’s ability to consider mitigating factors in death penalty cases); *Enmund v. Florida*, 458 U.S. 782, 797-98 (1982) (ruling that the Eighth Amendment forbids the imposition of the death penalty on those who only aid and abet a felony); *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983) (deciding that federal courts may use special “speeded-up” procedures for handling habeas corpus appeals in death penalty cases); *Ford v. Wainwright*, 477 U.S. 399, 416-18 (1986) (holding that the Eighth Amendment prohibits the execution of those who are, or who have gone, insane while awaiting execution); *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987) (upholding the constitutionality of the death penalty by finding that despite studies that showed that black people who murder white people are generally more likely to receive a death sentence, it in and of itself does not show particular jurors or prosecutors in cases were racially motivated); *Sumner v. Shuman*, 483 U.S. 66, 85 (1987) (striking down a statute that imposed mandatory death sentences on prisoners who were convicted of murder while serving life sentences for failing to adequately consider the significance of individualized sentencing); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (holding that the execution of persons who were fifteen years old or younger at the commission of their crimes is not permissible under the Eighth Amendment because the imposition of the death penalty at such an age fails to contribute to the intended goals of capital punishment); *Penry v. Lynaugh*, 492 U.S. 302, 330-35 (1984) (allowing the imposition of the death penalty for people convicted of murder, even though they are mildly mentally retarded); *Stanford v. Kentucky*, 492 U.S. 361, 369-73 (1989) (discerning that no societal consensus for forbidding the imposition of the death penalty in the case at hand, and, as a result, ruling that the Eighth Amendment allows the imposition of the death penalty on convicted murderers who were sixteen years of age or older at the time they committed their crimes); *Lewis v. Jeffers*, 497 U.S. 764, 780-83 (1990) (allowing federal appellate court to determine “whether any rational trier of fact could have found” the elements of an aggravating circumstance in the consideration of a death penalty case); *Walton v. Arizona*, 497 U.S. 639, 647-49 (1990) (upholding a state law that allowed judges, rather than juries, to decide whether to impose the death penalty on those convicted of first-degree murder). Over this nearly thirty-year period, public support for the death penalty has also substantially declined. *See Brooke A. Masters, Executions Decrease For the 2nd Year; Va., Texas Show Sharp Drops Amid a National Trend*, WASH. POST, Sept. 6, 2001, at A01

comment publicly about their skepticism of the system.<sup>308</sup> Justices Sandra Day O'Connor and Ruth Bader Ginsburg have both publicly stated that they believe the current system should be scrutinized.<sup>309</sup> Although this new discourse on the death penalty is primarily focused on the defendant's representation at trial and the prosecution of potentially innocent people,<sup>310</sup> the discrimination inflicted by prosecutors on homosexual criminal defendants such as Lingar, Neill, Allen, and Burdine should also be included in the discussion.

This Part points out that federal appellate courts have not been receptive to criminal defendants' claims that remarks by the prosecutors about their sexual orientation rendered their sentencing hearings unfair. Indeed, in *Lingar, Neill, Allen, and Burdine*, the United States Courts of Appeals for the Eighth, Tenth, and Fifth Circuits respectively, demonstrated an unwillingness to find homophobic and discriminatory behavior exhibited by the prosecution to constitute reversible error.<sup>311</sup> This Comment argues

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(reporting that the public support for the death penalty, sixty three percent, is at its lowest point in twenty years); Thomas Healy, *Death Penalty Support Drops as Debate Shifts; Foes Turning Focus from Moral Issues to Flaws in the System*, BALT. SUN, July 25, 2001, at 1A (revealing that "two-thirds of Americans support a moratorium on executions until questions about the fairness and integrity of the way the death penalty is administered can be resolved."). This falling public support has not gone unnoticed by elected officials. See Healy, *supra*, at 8A (explaining that Illinois Governor George Ryan's moratorium was motivated in part because thirteen death row inmates have been exonerated since 1977; that a proposed moratorium in Maryland stalled in the senate; that bills to temporarily halt executions in New Hampshire and Nebraska were vetoed by their governors; and pointing out that seventeen states, including Arizona, Connecticut, Florida and Missouri, have banned the execution of mildly retarded people; and that "many" of the thirty-eight states with the death penalty are considering or have approved legislation to afford greater protections for those accused of capital crimes). The U.S. Congress is also taking notice and is considering legislation that would require states to provide qualified and experienced attorneys to all defendants facing the death penalty and that would provide improved access to DNA testing. See Innocence Protection Act, H.R. 912, 107th Cong. (2001); S. 486, 107th Cong. (2001).

308. See Yochi J. Dreazen, *O'Connor's Remarks On Death Penalty Could Bolster Bills*, WALL ST. J., July 5, 2001, at A7 (quoting Justice O'Connor); *Justice Supports Md. Moratorium on Death Penalty*, ARIZ. REPUB., Apr. 10, 2001, at A6 (quoting Justice Ginsburg).

309. See Dreazen, *supra* note 308 (quoting Justice O'Connor who told a group of female lawyers in Minnesota that "the system may well be allowing some innocent defendants to be executed"); see also ARIZ. REPUB., *supra* note 308 (quoting Justice Ginsburg who said, "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial . . . . People who are well represented at trial do not get the death penalty.").

310. See ARIZ. REPUB., *supra* note 308 (indicating that Justices O'Connor and Ginsburg are concerned about innocent individuals being put to death and ineffective assistance of counsel respectively); see also Healy, *supra* note 307.

311. See *Lingar*, 176 F.3d 453, 458 (8th Cir. 1999) (noting that the prosecutor's tactics did not render his trial fundamentally unfair). The Tenth Circuit Court of Appeals similarly dismissed Allen's claim. See *supra* note 233 and accompanying text.

that the sexual orientation of a criminal defendant should never be a factor in the jury's determination in a sentencing hearing of whether to impose the death penalty.<sup>312</sup> It also makes two recommendations: (1) that the prosecutor's introduction of unrelated evidence of a criminal defendant's homosexual status<sup>313</sup> in the sentencing phase of a capital trial should constitute reversible error;<sup>314</sup> and (2) that a prosecutor's prejudicial and inflammatory statements about a criminal defendant's homosexual status in the sentencing phase of a capital trial should constitute reversible error. Part IV concludes with a discussion of Judge Luecero's scathing dissent in *Neill*, which provides hope for similarly situated defendants that federal appellate courts are beginning to recognize this form of prosecutorial misconduct.

*A. The Prosecutor's Introduction of Unrelated Evidence of a Criminal Defendant's Homosexual Status in the Sentencing Phase of a Capital Trial Should Constitute Reversible Error*

The U.S. Supreme Court held in *Dawson v. Delaware*<sup>315</sup> that introduction of evidence of the defendant's membership in the Aryan Brotherhood at sentencing was irrelevant and constitutionally impermissible.<sup>316</sup> This Comment argues that under *Dawson*,

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A two-judge majority of that Circuit followed the same reasoning in *Neill*. See *supra* note 199 and accompanying text. The Fifth Circuit Court of Appeals never addressed the issue of the prosecutor's comments, instead it focused exclusively on the question of whether Burdine was deprived of his right to effective assistance of counsel by the fact that his lawyer slept through portions of his trial. See *supra* note 277 and accompanying text.

312. The term "factor" is used to connote instances of normative bias by the prosecutors, as in the cases of *Lingar* and *Neill*, where the jury is urged to actually consider the sexual orientation of the defendant as it would legitimately consider statutorily prescribed circumstances such as the heinousness of the crime, or that the defendant poses a future threat to society; and instances of positive bias and disrespectful references, as in the cases of *Allen* and *Burdine* (respectively), where the comments and stereotypes proffered by the prosecutor actually urge the jury to base their sentencing decision on prejudice against homosexuals.

313. See *supra* note 2 (distinguishing the term homosexual status from simply homosexual conduct).

314. Reviewing courts, finding the prejudicial introduction of evidence of the defendant's sexual orientation or prejudicial comments about the defendant's sexual orientation, should vacate the death sentence and remand the case for a new sentencing determination.

315. 503 U.S. 159, 167 (1992) (stating "we conclude that Dawson's First Amendment beliefs were violated . . . because the evidence proved nothing more than Dawson's abstract beliefs.").

316. See *Dawson*, 503 U.S. at 160; *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (holding that the "factors that are constitutionally impermissible or totally irrelevant to the sentencing process [include] . . . the race, religion, or political affiliation of the defendant. . ."). But see *O'Neal v. Delo*, 44 F.3d 655, 661 (8th Cir. 1995) (upholding a death sentence where evidence of the defendant's membership in

prejudicial prosecutorial comments about the sexual orientation of defendants are impermissible. Furthermore, this Comment argues that under *Dawson* the introduction of evidence of a defendant's homosexual status by prosecutors exhibiting normative bias (*i.e.*, importing the sexual orientation of the defendant as a legal issue)<sup>317</sup> should constitute reversible error, and warrant a new sentencing proceeding.<sup>318</sup>

In *Dawson*, the defendant, David Dawson, was convicted of first-degree murder, possession of a deadly weapon during the commission of a felony, and various other crimes by a trial court in the State of Delaware.<sup>319</sup> During the sentencing phase of the trial, the prosecution gave notice that it sought to introduce evidence of Dawson's membership in the Aryan Brotherhood, a white supremacy group.<sup>320</sup> Pursuant to a stipulation agreement, Dawson allowed the prosecutor to introduce a statement to the jury describing the Aryan Brotherhood.<sup>321</sup>

Justice Rehnquist, writing for the seven-member majority,<sup>322</sup> concluded that the evidence presented to the jury about Dawson's membership in the Aryan Brotherhood was "totally without relevance to Dawson's sentencing proceeding."<sup>323</sup> Rehnquist reasoned that even if the Delaware group to which Dawson allegedly belonged did espouse racist beliefs, it was not relevant to Dawson's case because elements of racial hatred were not involved in the killing.<sup>324</sup>

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racist prison gang was relevant to show a racial motive for the murder).

317. See *supra* Part II.A.1-2 (discussing normative bias in the cases of *Lingar* and *Neill*).

318. See Duffy, *supra* note 289, at 1382-85 (concluding that vacating the death sentence and remanding for a new sentencing hearing not only negates the impact of improper prosecutorial arguments, but it also ensures adequate deterrence).

319. See *Dawson v. Delaware*, 503 U.S. 159, 161 (1992) (stating the facts of the case).

320. See *id.* The evidence that the prosecution sought to admit as:

- (1) expert testimony regarding the origin and nature of the Aryan Brotherhood, as well as the fact that Dawson had the words 'Aryan Brotherhood' tattooed on the back of his right hand, (2) testimony that Dawson referred to himself as 'Abaddon' and had the name 'Abaddon' tattooed in red letters across his stomach, and (3) photographs of multiple swastika tattoos on Dawson's back and a picture of a swastika he had painted on the wall of his prison cell.

*Id.*

321. See *id.* at 162 (quoting the stipulation agreement: "The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.>").

322. Only Justice Blackmun provided a concurring opinion. See *Dawson*, 503 U.S. at 169 (including only one dissenting opinion, that of Justice Thomas).

323. *Id.* at 165.

324. See *id.* at 166 (noting that the murder victim was white, as is Dawson). Justice Rehnquist also noted that, at best, the evidence of Dawson's gang membership

Rehnquist ultimately concluded that the State of Delaware was prevented “from employing evidence of a defendant’s abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried”—whether a sentence of life imprisonment or a sentence of death should be imposed.<sup>325</sup>

*Dawson* is particularly instructive because like Dawson’s status as a gang member, the homosexual status of the defendants in *Lingar*, *Neill*, *Allen*, and *Burdine*, was neither an element of the crime, nor a motive.<sup>326</sup> In fact, at least one state court has already applied the holding of *Dawson* to exclude evidence of a defendant’s homosexual status.<sup>327</sup> The prosecutor argued that evidence of the defendant’s homosexual relationships while avoiding capture was necessary to help explain how the defendant obtained money to remain at large.<sup>328</sup> Although the court found the latter probative, it cited *Dawson* in refusing to allow evidence of the defendant’s sexual orientation because the evidence might inappropriately prejudice the defendant as the jury may view such conduct as morally reprehensible.<sup>329</sup> Therefore, the Court’s holding in *Dawson*, while not a perfect fit,<sup>330</sup> arguably precludes the state from similarly introducing highly

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“proved nothing more than Dawson’s abstract beliefs,” and therefore violated his First Amendment rights. *See id.* at 167 (quoting *Texas v. Johnson*, 491 U.S. 397 (1989) that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

325. *See Dawson*, 503 U.S. at 168 (noting that the conclusion that the evidence of gang membership was irrelevant and was therefore constitutional error, the Court vacated the death sentence and remanded the case to the Delaware Supreme Court).

326. *But see supra* notes 149-50, 155 and accompanying text (revealing that in *Lingar*, the prosecutor’s outward justification for introducing testimony about Lingar’s sexual orientation was that it showed a motive in the killing of Scott Allen, that Lingar wanted to keep his homosexuality a secret; and concluding that the prosecutor’s reasoning was a pretext for raising prejudicial and inflammatory testimony because the prosecutor never sought to establish that Lingar’s sexual orientation was in fact a secret).

327. *See State v. Cohen*, 634 A.2d 380, 392 (Del. Sup. Ct. 1992) (granting the defendant’s motion to bar evidence of his homosexual encounters in the sentencing hearing of his capital trial because the court found no relevance in such an evidentiary finding).

328. *See id.* at 392.

329. *See id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 203-04 (1976) for the proposition that “[e]ven within the broad range of evidence admissible in a penalty hearing, undue prejudice to the defendant must be avoided”).

330. A person’s sexual orientation is by no means akin to an “abstract belief.” *See* Kurt D. Hermansen, Note, *Analyzing the Military’s Justifications for Its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151, 174 (1992) (describing a person’s sexual orientation as a “central, defining trait of personhood, which one may alter only at the expense of significant damage to one’s identity.”); *see also* Denise Dunnigan, Note, *Constitutional Law: A New Suspect Class: A Final Reprieve for Homosexuals in the Military?*, 42 OKLA. L. REV. 273, 284 (1989) (analogizing sexual orientation to race and national origin, in that sexual orientation plays a key role in a person’s self-perception, group affiliation and identification by others).

prejudicial and irrelevant evidence about a defendant's sexual orientation in the sentencing phase of capital trials.

*B. A Prosecutor's Prejudicial and Inflammatory Statements About a Criminal Defendant's Homosexual Status in the Sentencing Phase of a Capital Trial Should Constitute Reversible Error*

Prosecutorial misconduct in sentencing hearings where prosecutors exhibit positive bias (*i.e.*, the discriminatory mischaracterization and stereotyping of defendants based on their sexual orientation)<sup>331</sup> and in cases where the prosecutors make disrespectful references (*i.e.*, homophobic and inflammatory comments about a defendant's sexual orientation)<sup>332</sup> should constitute reversible error.<sup>333</sup> Various federal circuit courts have held that biased comments, and/or the introduction of previously undisclosed evidence about the defendant's race,<sup>334</sup> ethnicity,<sup>335</sup> religion,<sup>336</sup> and even sexual orientation<sup>337</sup> by the prosecutor constitute

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331. See *supra* Part II.B (discussing the prosecutor's positive bias in the case of *Allen*).

332. See *supra* Part II.C (discussing the prosecutor's use of disrespectful references, including prejudicial and inflammatory statements about the defendant's homosexuality in *Burdine*).

333. See *supra* notes 314, 318 and accompanying text (observing that reversible error found in the sentencing phase ordinarily results in a remand and a new sentencing hearing; and that a new sentencing hearing would be effective in remedying and deterring the prosecutorial misconduct).

334. See *United States v. Doe*, 903 F.2d 16, 27 (D.C. Cir. 1990) (reversing a conviction upon concluding that "the prosecutor's discourse on the activities of Jamaican drug dealers and the accompanying tie-in with appellants were legally improper."); *United States v. McKendrick*, 481 F.2d 152, 156 (2d Cir. 1973) (concluding that a state prosecutor's use of racially prejudicial remarks during closing arguments violated defendant's rights to a fair trial and was therefore impermissible).

335. See *United States v. Vue*, 13 F.3d 1206, 1211-13 (8th Cir. 1994) (concluding that admission of testimony tying members of a particular ethnicity and from a particular geographic region with a specific type of drug trade violated the criminal defendant's constitutional rights).

336. See *Bains v. Cambra*, 204 F.3d 964, 973 (9th Cir. 2000) (finding a prosecutor violated criminal defendant's constitutional rights by appealing to jury to rely on racial, ethnic, and religious stereotypes).

337. See *Beam v. Paskett*, 3 F.3d 1301, 1308-09 (9th Cir. 1993) (holding that "a state may not use the death penalty as a mechanism for enforcing societal norms regarding sexual activity[.]" and that "no additional blame attaches to a capital defendant who has previously been the victim of incest, engaged in homosexuality, or had 'abnormal' relations with women of ages different than himself."); *United States v. Gillespie*, 852 F.2d 475, 478 (9th Cir. 1988) (finding that "it was error to admit evidence from which the jury could infer [that the defendant was involved in] a homosexual relationship."); *Cohn v. Papke*, 655 F.2d 191, 194 (9th Cir. 1981) (concluding that the introduction of evidence of homosexuality creates a "clear potential that the jury may have been unfairly influenced by whatever biases and stereotypes they might hold with regard to homosexuals"); *United States v. Birrell*, 421 F.2d 665, 666 (9th Cir. 1970) (*per curiam*) (reversing a defendant's conviction for theft because the prosecutor's comments "invited conviction irrespective of

reversible error. The federal courts of appeal should uniformly<sup>338</sup> hold that the prosecutor's prejudicial use of evidence about the defendant's homosexual status in the sentencing phase of capital trials constitutes reversible error and, therefore, should grant defendants new sentencing hearings.<sup>339</sup>

The leading case, *Bains v. Cambra*,<sup>340</sup> involving prosecutorial comments about a defendant who was a member of the Sikh religion, is analogous to prosecutorial comments about sexual orientation.<sup>341</sup> Like a defendant's religion, the homosexual status of a defendant may not be readily apparent to others.<sup>342</sup> Indeed, when the defendant's homosexuality was not in evidence at trial, as was the case in *Lingar*, the prosecutor's biased motivations<sup>343</sup> for introducing it in the sentencing phase should be even more apparent to reviewing courts.<sup>344</sup>

The *Bains* court found that the prosecutor's closing arguments highlighted testimony that went "beyond merely providing evidence of motive and intent."<sup>345</sup> In commenting on that evidence, the prosecutor stated, "[i]f you do certain conduct with respect to a Sikh person's female family member, look out. You can expect violence . . . . What you don't understand . . . was the laws in the United States is [sic] not what we're talking about. We're playing this

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innocence of the crime charged, upon the ground that appellant was a homosexual.").

338. See *Neill v. Gibson*, No. 00-6024, 2001 WL 1584819, at \*18 (10th Cir. Dec. 7, 2001) (Lucero, J., dissenting) (citing cases from other circuits where the courts have "overturned convictions when prosecutors have made statements highlighting sexual orientation or race in clear attempts to manipulate the prejudices of the jury" and concluding that "[o]ur decision today thus creates a circuit split.").

339. See *supra* note 333 and accompanying text.

340. 204 F.3d 964.

341. The true analogy to *Bains* is in the court's rejection of the prosecutor's prejudicial remarks about the defendant's religious beliefs in the closing arguments. In *Bains*, however, the defendant's religion and its customs and traditions were very much a part of the trial. See *id.* at 970 (recounting testimony of an officer of the Sutter County Sheriff's Department who was qualified and accepted by the trial court as an expert witness in the Sikh religion).

342. See *Brower*, *supra* note 4 (discussing sexual identity and its disclosure and concealment in the courtroom).

343. See *supra* note 326 and accompanying text (discussing the prosecutor's outward justification for the prejudicial remarks, and concluding that it was pretext); see also Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 140-69 (1999) (reviewing forty-five cases since 1990 where federal courts have reversed convictions on the basis of prosecutorial misconduct, and discussing the role of the prosecutors' intent in influencing the decisions of the reviewing courts).

344. See *id.* at 140-41 (finding in twenty eight of the forty-five reversed cases, the reviewing courts "used language suggesting that the prosecutor made arguments he or she knew or should have known were improper").

345. See *Bains*, 204 F.3d at 974.

game by Sikh rules.”<sup>346</sup> The court held that the prosecutor’s comments invited the jury to “give in to their prejudices and to buy into the various stereotypes that the prosecutor was promoting.”<sup>347</sup>

*Bains* stands strongly for the principle that prosecutors can and often do cross the line between legally appropriate commenting on the evidence,<sup>348</sup> and attempting to exploit the potential prejudices of the jury.<sup>349</sup> Indeed, the reasoning of the *Bains* court emphasizes the point that prosecutors should not be allowed to furtively couch their prejudicial comments in ostensibly legally appropriate arguments.<sup>350</sup>

### C. *A Glimmer of Hope: Judge Carlos Lucero’s dissent in Neill*

Judge Carlos Lucero’s scathing dissents in both of Neill’s hearings before the Tenth Circuit panel provide a glimmer of hope to homosexual people still on death row that their claims of sexual orientation discrimination may no longer fall on deaf ears at the federal appellate court level.<sup>351</sup> In contrast to the majority,<sup>352</sup> which initially dismissed Neill’s claim of prosecutorial misconduct in one short paragraph,<sup>353</sup> Lucero dedicated almost all of his seven-page dissent to the issue of sexual orientation bias.<sup>354</sup>

In his initial dissent, Lucero reasoned that the prosecutor’s comments<sup>355</sup> were “[a]t their core . . . tantamount to urging the jury

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346. *Id.* at 970.

347. *Id.* at 974. *See also* Rovella, *supra* note 21, at A25 (reporting the findings of a national survey of potential jurors which found that seventeen percent of the respondents admitted that they could not be fair to homosexual litigants); Burdine, *Petition for Habeas Corpus supra* note 269 (revealing that several jurors in *Burdine* were empanelled without objection even after they admitted open hostility towards homosexuals in *voir dire*).

348. *See generally* 75A AM. JUR. 2D *Trial* § 572 (1991) (discussing boundaries of appropriate comments by the prosecutor in sentencing phases of capital trials; and collecting cases).

349. *See* Rovella, *supra* note 21, at A25 (polling potential jurors as to their biases).

350. *See supra* Part II (discussing the prosecutor’s biased motives in *Neill*, *Lingar*, and *Allen*; and providing the benign justification that each prosecutor presented to the reviewing court for their biased comments, ranging from providing evidence that goes to the character of the defendant to responding to a mitigating circumstance offered by the defendant).

351. *See Neill*, 263 F.3d at 1199 (Lucero, J., dissenting); *Neill v. Gibson*, No. 00-6024, 2001 WL 1584819, at \*15 (10th Cir. Dec. 7, 2001) (Lucero, J., dissenting).

352. Part II.A.2 of this Comment discusses the majority’s opinions in both hearings at length.

353. *See supra* notes 189-91 and accompanying text (discussing the court’s decision in the first hearing not to evaluate Neill’s claims of prosecutorial misconduct on the merits).

354. *See Neill*, 263 F.3d at 1199-1205 (Lucero, J., dissenting) (focusing his entire analysis on Neill’s claim that his sexual orientation was used against him in the sentencing hearing).

355. *See supra* note 185 and accompanying text (quoting the prosecutor’s comments).

to return the death sentence because a defendant fits within any other group that has been the target of prejudice and discrimination.”<sup>356</sup> Lucero found that the prosecutor’s explicit appeal to the jurors to focus on Neill’s homosexual status when deciding his punishment was an obviously improper appeal to their prejudices.<sup>357</sup> Analogizing the prejudicial impact of homophobic remarks to that of racist ones,<sup>358</sup> Lucero concludes that remarks about sexual orientation in death penalty cases may also require reversal.<sup>359</sup> Ultimately, Lucero stated: “I cannot sanction—because I have no confidence in—a sentencing proceeding tainted by a prosecutor’s request that jurors impose a death sentence based, even in part, on who the defendant is rather than what he has done.”<sup>360</sup>

Upon the rehearing before the panel,<sup>361</sup> Lucero again dissented and again devoted most of his dissent to addressing Neill’s claims of sexual orientation bias.<sup>362</sup> After criticizing the majority for application of the *Donnelly/Darden* standard,<sup>363</sup> Lucero concluded that the court should have granted habeas relief and should have remanded the case for re-sentencing.<sup>364</sup> His powerful conclusion is worthy of restatement:

The message of this case will then be unavoidable. Bottom line: The prosecutor got away with conduct that the majority labels “improper” and that I consider outrageous and overwhelmingly prejudicial. I consider the error before us to be of a magnitude that ‘seriously affect[s] the fairness. Integrity, [and] public reputation of judicial proceedings.’ The precedent for future cases is disturbing.<sup>365</sup>

Unfortunately, Judge Lucero stands alone in the near legion of federal appellate judges who refuse to find that the egregious nature of the prosecutor’s comments regarding homosexual people deprive

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356. *Neill*, 263 F.3d at 1202.

357. *See id.* (regarding prosecutorial appeals to prejudice and citing to American Bar Association Standards for Criminal Justice 3-5.8(c) (3d ed. 1993)).

358. This is an important analogy because unlike the race of the defendant, which is always apparent to jurors, the defendant’s sexual orientation may in fact never have been known—before being surreptitiously introduced by prosecutors.

359. *See Neill*, 263 F.3d at 1203 (citing and quoting *Dawson v. State*, 734 P.2d 221, 223 (1987) that “in a capital sentencing proceeding before a jury, the jury is called upon to make a ‘highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves’.”).

360. *Id.*

361. *Neill v. Gibson*, No. 00-6024, 2001 WL 1584819, at \*13-\*25 (10th Cir. Dec. 7, 2001) (Lucero, J., dissenting).

362. *See id.* at \*13-23 (discussing Neill’s claims of sexual orientation bias).

363. Part III of this Comment discusses the *Donnelly/Darden* standard as it was applied by the Tenth Circuit in *Neill*.

364. *See Neill v. Gibson*, No. 00-6024, 2001 WL 1584819, at \*25 (stating same).

365. *See id.* (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

defendants (such as Lingar, Neill, Allen, and Burdine) of fair sentencing hearings. Lucero's dissent is an important first step in calling the attention of the judiciary and the legal community to this kind of prosecutorial misconduct. Opinions like Lucero's, which are highly critical of the prosecutor's actions and the biased intentions that motivated them, play a critical role in deterring similar conduct by prosecutors in the future.<sup>366</sup> Although reviewing judges should do more in these cases to deter future conduct, including referring the prosecutors for discipline by the bar,<sup>367</sup> Lucero's dissent begins to send the message to prosecutors that this conduct is unacceptable both ethically<sup>368</sup> and professionally.<sup>369</sup>

#### CONCLUSION

It seems that Justice Lewis Powell's concern in his concurring opinion in *Bowers v. Hardwick*,<sup>370</sup> that punishment based on a defendant's homosexual status raises serious Eighth Amendment questions,<sup>371</sup> has come to fruition. With laws prohibiting the marriage of persons of the same gender, and punishing consensual sex between adults of the same gender, and with sexual orientation being stripped from state and local anti-discrimination statutes across the country, our system of laws is increasingly becoming more hostile toward homosexual people. Furthermore, as several studies reveal, the legal community itself, as an institution, as a workplace, and as a training ground for future lawyers, makes the courtroom an incredibly hostile environment for homosexual people. Magnifying this already hostile system of laws, prosecuting attorneys as advocates and agents of the state, are actually administering the law in

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366. See Speigelman, *supra* note 343, at 169 (discussing the role of reviewing courts in deterring future misconduct by prosecutors).

367. See *id.* (arguing that in order to prevent "recidivist" prosecutors from continuing their misconduct, reviewing courts should do more than just censure by reversal, rather they should reprimand them by name in published decisions and refer them to local bars by name).

368. See *supra* note 17 and accompanying text (describing the various federal, state, and local court rules which prohibit biased conduct on the basis of sexual orientation).

369. See American Bar Association Standards for Criminal Justice § 3-5.8(c) & (d) (3d ed. 1993) (providing that "[t]he prosecutor should not make arguments calculated to appeal to the prejudices of the jury"; and that "[t]he prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.").

370. 478 U.S. 186 (1986) (holding that a Georgia anti-sodomy statute did not violate constitutional rights).

371. See *id.* at 197 (Powell, J., concurring) (noting that while there is no substantive due process right to engage in homosexual sodomy, "[t]his is not to suggest, however, that [Bowers] may not be protected by the Eighth Amendment of the Constitution.").

discriminatory ways against homosexual defendants. They are regularly making calculated decisions about when and how to introduce evidence of defendants' sexual orientation in order to appeal to the jury's passions and prejudices. The horrifying result is that the state may be imposing its ultimate form of punishment on homosexual defendants at least in part because of their sexual orientation.

This Comment has argued that these homosexual defendants are also left with no real post-conviction remedies. Because the prejudicial remarks by prosecutors are generally both calculated and isolated, the standard of review, which requires appellate courts to look at the comments in the context of the entire trial, and to evaluate the comments in light of the evidence of guilt, leaves little hope for these homosexual people who are awaiting their executions on death row.

As some Justices on the U.S. Supreme Court, and indeed a majority of the public, seem poised to reconsider the application of the death penalty in America, sexual orientation bias must be included in that debate. In order to correct and to deter the biased behavior of prosecutors, this Comment offers two specific recommendations: (1) that the prosecutor's introduction of unrelated evidence of a criminal defendant's homosexual status in the sentencing phase of a capital trial should constitute reversible error; and (2) that a prosecutor's prejudicial and inflammatory statements about a criminal defendant's homosexual status in the sentencing phase of a capital trial should constitute reversible error. In both situations, reviewing courts should vacate the defendant's death sentence and remand the case for a new sentencing determination.

Furthermore, a systematic study is needed to more fully determine and quantify the extent and prevalence of sexual orientation bias within the entire legal community. Finally, compliance with already existing professional canons prohibiting biased conduct on the basis of sexual orientation must be enforced. Judge Lucero's dissent in *Neill* may well represent a turning point in the federal judiciary in reviewing these claims of biased prosecutorial conduct. Significant steps, however, must still be taken to ensure that the death penalty in America is not imposed on homosexual people even in part *because* of who they are, rather than for what they have done.