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Queer* and Unusual:
Capital Punishment, LGBTQ+ Identity, and the
Constitutional Path Forward

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* Throughout this Article, I use the word “queer” synonymously with the acronym “LGBTQ+,” as an umbrella term for non-heterosexual sexual orientations and non-cisgender identities. Given the historical usages of “queer” as a homophobic slur, and the historical specificity of LGBTQ+ identities, fully exploring the implications of this word choice would merit its own dissertation. I intend only to use the term “queer” as a neutral, inclusive shorthand.

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I. INTRODUCTION

When Justice Stewart described the imposition of capital punishment as equivalent to “being struck by lightning,” he sought to highlight the arbitrary way in which death sentences were meted out “among a capriciously selected random handful” of individuals.¹ For Charles Rhines, however, the lightning bolt that resulted in his death sentence verges more on Old Testament divine retribution.

Rhines was convicted of the 1992 murder of a doughnut shop employee in Rapid City, South Dakota, and sentenced to death.² While Rhines’ guilt was largely uncontested at trial,³ his homosexuality featured prominently and explicitly throughout the case. During deliberations, the jury asked the trial court whether sentencing Rhines to life imprisonment would allow him to “mix with the general inmate population,” and whether he would “be allowed to discuss, describe or brag about his crime to other inmates, especially new and or young men jailed for lesser crimes.”⁴ Three jurors interviewed during post-conviction proceedings revealed that there were “‘lots of discussion of homosexuality’ and ‘a lot of disgust’” during deliberations.⁵ On direct appeal of the trial court’s ruling, Rhines argued that the assumptions of predatory behavior underlying those notes constituted “homophobic sentiments that improperly affected jury deliberations.”⁶ Taking the note at face value, the South Dakota Supreme Court affirmed the conviction and death sentence.⁷

1. *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (per curiam).
2. *State v. Rhines*, 548 N.W.2d 415, 424 (S.D. 1996).
3. *Id.* at 425.
4. *Id.* at 441 (discussing juror notes).
5. Petition for Writ of Certiorari at 3, *Rhines v. South Dakota*, 138 S. Ct. 2660 (2018) (mem.) (No. 17-8791).
6. *Rhines*, 548 N.W.2d at 442.
7. *Id.* at 424, 458.

At common law and under the Federal Rules of Evidence, a “no-impeachment rule” prohibits litigants from using such juror testimony about deliberations to challenge a verdict.⁸ However, in *Peña-Rodriguez v. Colorado*, the U.S. Supreme Court upheld a limited exception, under the Sixth Amendment, to the no-impeachment rule when a juror relies on racial stereotypes.⁹

In the wake of that ruling, Rhines sought reconsideration of his sentencing hearing.¹⁰ Arguing that the *Peña-Rodriguez* exception extends to instances of anti-gay animus, Rhines unsuccessfully appealed to the South Dakota Supreme Court.¹¹ In June 2018, the U.S. Supreme Court declined to review that decision; while it is tempting to draw conclusions from the Court’s denial of certiorari, it remains an open question whether, and in what ways, a capital defendant’s sexual orientation may be considered during sentencing.¹² This Article takes up that question and explores two constitutional avenues for arguing that evidence of a defendant’s sexuality cannot be used to justify a death sentence.

At least nine queer individuals have been sentenced to death, and some even executed, through prosecutions that improperly emphasized their sexuality.¹³ This Article begins by rooting those cases in historical context of the general criminalization of queerness. In light of this background, this Article proceeds to analyze the argument Rhines asserted

8. FED. R. EVID. 606(b)(1); see *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017); *Tanner v. United States*, 483 U.S. 107, 119-20 (1987).

9. *Peña-Rodriguez*, 137 S. Ct. at 868-69.

10. *State v. Rhines*, No. 28444 (S.D. Jan. 2, 2018), *cert. denied*, 138 S. Ct. 2660 (2018) (mem.).

11. *Id.* (“It is this Court’s view that neither Appellant’s legal theory (stereotypes or animus relating to sexual orientation) nor Appellant’s threshold factual showing is sufficient to trigger the protections of *Peña-Rodriguez* . . .”).

12. *Rhines v. South Dakota*, 138 S. Ct. 2660 (2018) (mem.). Notably, Rhines had won a previous appeal to the U.S. Supreme Court dealing with a procedural rule for federal habeas litigation. *Rhines v. Weber*, 544 U.S. 269, 278-79 (2005). That decision gives rise to the eponymous *Rhines* stay, wherein a federal district court holds in abeyance a 28 U.S.C. § 2254 petition presenting a mix of ripe and unexhausted claims, in order to allow the petitioner to exhaust lingering claims in state court. *Id.*

13. Much has been written about these cases. See James Hampton, *Homosexuality: An Aggravating Factor*, 28 TUL. J.L. & SEXUALITY 25, 33-40 (2019); Joey L. Mogul, *The Dykier, The Butcher, The Better: The State’s Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y.C. L. REV. 473, 483-91 (2005); Michael B. Shortnacy, *Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309, 332-50 (2001); Richard Goldstein, *Queer on Death Row*, VILL. VOICE (Mar. 13, 2001), <https://www.villagevoice.com/2001/03/13/queer-on-death-row/>.

about *Peña-Rodriguez*'s applicability to anti-queer animus.¹⁴ Though such Sixth Amendment claims are likely limited to instances of racism, this Article explores the Eighth Amendment's prohibition on the criminalization of immutable statuses as a potential source of relief for Rhines and other similarly situated individuals. This Article concludes by considering the feasibility and implications of adopting these arguments within the current queer rights movements.

II. HISTORICAL CONTEXT

In isolation, Rhines' case is a curiosity; however, it loses its idiosyncrasies against the historical backdrop of anti-queer criminal laws. From its earliest days, American criminal law has enforced harsh regulations of sexuality and gender expression.¹⁵ Even before homosexuality was understood as an independent identity category, colonial rules deemed queer conduct a capital offense.¹⁶ Though the severity of the punishments eventually diminished, sodomy statutes and similar prohibitions on non-normative sexualities lingered through the end of the millennium.¹⁷

A. Colonial Roots

Based on Biblical restrictions,¹⁸ same-sex interactions were strictly regulated at common law. King Henry VIII introduced the first known

14. While I take for granted that such an extension of *Peña-Rodriguez* is normatively desirable—and, as I argue in Part III, should be a natural extension of Chief Justice Roberts' decision in *Buck v. Davis*, 137 S. Ct. 759 (2017)—for a compelling account of the reasons why the no-impeachment rule should be extended to instances of queer-phobia, see Chan Tov McNamara, *Sexuality on Trial: Expanding Peña-Rodriguez to Combat Juror Queerphobia*, 17 DUKEMINIER AWARDS J. 393, 426-32 (2018).

15. For the most fervent version of this argument, see DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 27, 41 (2011) and Alok Gupta, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*, HUM. RTS. WATCH (Dec. 17, 2008), <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>. Spade argues that transgender people need to "be cautious not to believe what the law says about itself since time and again the law has changed, been declared newly neutral or fair or protective, and then once more failed to transform the conditions of disparity and violence that people were resisting." SPADE, *supra*, at 27. Additionally, Spade argues that the law inherently imposes a binarized view of gender that instructs trans individuals that they are "impossible people who . . . cannot be seen, cannot be classified, and cannot fit anywhere." *Id.* at 41.

16. Gupta, *supra* note 15.

17. Richard Weinmeyer, *The Decriminalization of Sodomy in the United States*, 16 AM. MED. ASS'N J. ETHICS 916, 917 (2014), <https://journalofethics.ama-assn.org/sites/journalofethics.ama-assn.org/files/2018-05/hlaw1-1411.pdf>.

18. E.g., *Leviticus* 18:22, 20:13 (King James).

sodomy statute in 1533, making “it a capital felony for any person to ‘commit the detestable and abominable vice of buggery with mankind or beast.’”¹⁹ Under British rule, the American colonies either incorporated this prohibition into their burgeoning code books or considered it to be in effect without explicit codification.²⁰ Some jurisdictions repealed these prohibitions in the pre-Revolutionary era,²¹ but sodomy remained a capital crime in most states until the turn of the nineteenth century. For example, Virginia, which carried out one of the two known executions for sodomy, reduced the punishment for homosexual acts to a one-to-ten-year sentence in 1800 (but retained the death penalty for slaves convicted of the crime).²² North and South Carolina retained death-eligibility for sodomy until 1869 and 1873, respectively.²³

B. *Lingering Prohibitions: The Pre-Lawrence Era*

The early sodomy restrictions criminalized specific acts—the so-called “crimes-against-nature statutes”—but not necessarily group identities.²⁴ Indeed, as Michel Foucault has argued, the notion of a gay (or transgender) person as a cognizable category did not arise until the late 1800s.²⁵ Over the course of the early twentieth century, however, queer subcultures became increasingly visible.²⁶ In particular, economic and cultural changes wrought by World War II relaxed the demands on the traditional family unit and allowed young people to live independently,

19. Louis Crompton, *Homosexuals and the Death Penalty in Colonial America*, 1 J. HOMOSEXUALITY 277, 278 (1976); see also *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (“Homosexual sodomy was a capital crime under Roman law.”).

20. Crompton, *supra* note 19, at 278.

21. Even where capital punishment was limited to cases of murder, early penalties were severe; circa 1718, Pennsylvania punished sodomy featuring periodic whippings, mandatory castration, divorce for married sodomites, and even a life sentence for second-time offenders—and often invoked explicitly racist delineations, by still imposing death on any black person convicted of the crime. *Id.* at 282-83.

22. *Id.* at 287.

23. *Id.* at 287-88.

24. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (internal citations omitted).

25. *Id.* (“The modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions.” (quoting JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 121 (2d ed. 1997))); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 43 (Robert Hurley trans., Vintage Books ed. 1990) (1978) (“The sodomite had been a temporary aberration; the homosexual was now a species.”); see also DAVID VALENTINE, *IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY* 29-40, 57-62 (2007) (documenting emergence, adoption, and rejection of “transgender” as an identity category among LGBTQ+ people in New York).

26. See GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE 1890-1940*, at 258, 320 (1994).

outside of the home.²⁷ As a result, gay communities emerged in cities across the country.²⁸

This increasing visibility²⁹ also elicited openly anti-queer discrimination. At the federal level, Senator Joseph McCarthy and his colleagues in the Senate launched an investigation into the prevalence of “sex perverts” working in the national bureaucracy, calling for their removal “in the public interest.”³⁰ Three years later, President Eisenhower issued an executive order calling for a similar investigation of any “sexual perversion” among federal employees.³¹ Locally, vice squads raided and shut down queer establishments.³² In major American cities, hundreds of gay men were arrested each month.³³ Amidst this official oppression, and the social stigmas it exacerbated, queer groups organized formal and unofficial resistance efforts to these prohibitions.³⁴

Against this backdrop, states like Texas passed laws targeting not just sodomy but specifically criminalizing “homosexual conduct.”³⁵ The Texas sodomy law, unlike Revolution-era antecedents, specifically differentiated same-sex intimacy from heterosexual conduct.³⁶ Queer groups organized formal and unofficial resistance to such oppressive measures, but the first

27. John D’Emilio, *Capitalism and Gay Identity*, in *THE LESBIAN AND GAY STUDIES READER* 467, 471-74 (Henry Abelove, Michèle Aina Barale & David M. Halperin eds., 1993).

28. *Id.* at 472.

29. *Id.* at 471. The famous Kinsey Reports, which surveyed thousands of Americans about their sexual practices and revealed a startling prevalence of same-sex behavior, were published in 1948 and 1953. *Dr. Alfred C. Kinsey*, KINSEY INST., <https://kinseyinstitute.org/about/history/alfred-kinsey.php> (last visited Feb. 10, 2020). The books were met with both outrage and intense curiosity, rising to the second spot on *The New York Times* Bestseller’s List. *Id.*

30. Employment of Homosexuals and Other Sex Perverts in Government, Interim Report S. REP. No. 81-241, at 20 (1950).

31. Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 27, 1953).

32. See CHAUNCEY, *supra* note 26, at 347-48; LILLIAN FADERMAN, *THE GAY REVOLUTION: THE STORY OF THE STRUGGLE* 7-8 (2015).

33. John D’Emilio, *The Homosexual Menace: The Politics of Sexuality in Cold War America*, in *PASSION AND POWER: SEXUALITY IN HISTORY* 226, 231 (Kathy Peiss & Christina Simmons eds., 1989) (reporting that in the early 1950s, over 1000 annual arrests were made in D.C. and an average of 100 misdemeanor charges per month were made against queers in Philadelphia).

34. These efforts are most popularly epitomized in the 1969 Stonewall Riots, though a similar, trans-led resistance to police violence occurred several years earlier, at San Francisco’s Compton’s Cafeteria. Nicole Pasulka, *Ladies in the Streets: Before Stonewall, Transgender Uprising Changed Lives*, NPR (May 5, 2015, 4:52 PM), <https://www.npr.org/sections/codeswitch/2015/05/05/404459634/ladies-in-the-streets-before-stonewall-transgender-uprising-changed-lives>.

35. “(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex[;] (b) An offense under this section is a Class C misdemeanor.” TEX. PENAL CODE ANN. § 21.06 (West 1993), *invalidated by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

36. *Id.*

major legal challenge to anti-queer legislation failed before the Supreme Court.³⁷

In *Bowers v. Hardwick*,³⁸ the Justices rejected a substantive due process challenge to Georgia's sodomy statute.³⁹ Emphasizing the “ancient roots” of sodomy restrictions, the *Bowers* majority held that the constitutional right to privacy does not create “a fundamental right to engage in homosexual sodomy.”⁴⁰ In particular, the Justices divided sharply over whether popular belief in the immorality of homosexuality, standing alone, could justify a criminal sanction.⁴¹

The *Bowers* decision engendered harsh critiques in the years that followed, but when an LGBTQ+ rights question returned to the Court a decade later, the result was more sympathetic.⁴² In *Romer v. Evans*, the Court struck down an amendment to the Colorado state constitution that prohibited any legislation protecting homosexuals as a distinct class.⁴³ Because the amendment “impose[d] a special disability” upon queer people that “seems inexplicable by anything but animus toward the class it affects,”⁴⁴ the Court found that it did not pass muster under the Equal Protection Clause.⁴⁵

37. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); see Rebecca J. Rosen, *A Glimpse into 1970s Gay Activism*, ATLANTIC (Feb. 26, 2014), <https://www.theatlantic.com/politics/archive/2014/02/a-glimpse-into-1970s-gay-activism/284077/>.

38. 478 U.S. 186.

39. *Id.* at 194-96. This law, unlike that of Texas, was gender-neutral, prohibiting certain contact regardless of the person's sex. Compare TEX. PENAL CODE ANN. § 21.06(a) (West 1993) (“A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.”), *invalidated by* *Lawrence v. Texas*, 539 U.S. 558, 578-59 (2003), with GA. CODE ANN. § 16-6-2(a) (1984) (“(1) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another; (2) A person commits the offense of aggravated sodomy when he or she commits sodomy with force and against the will of the other person or when he or she commits sodomy with a person who is less than ten years of age . . .”), *invalidated as applied by* *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).

40. *Bowers*, 478 U.S. at 191-92.

41. Specifically, the 5-majority, 4-dissent. *Id.* at 199.

42. Compare *Bowers*, 478 U.S. at 196 (holding that a Georgia sodomy statute was constitutional), with *Romer v. Evans*, 517 U.S. 620, 636 (1996) (holding that an amendment to the Colorado state constitution that prohibited giving protections to homosexuals as a class violated the Equal Protection Clause of the U.S. Constitution). Scholars harshly criticized the *Bowers* decision. E.g., Janet Self, *Bowers v. Hardwick: A Study of Aggression*, 10 HUM. RTS. Q. 395, 395-97, 401 (1988) (arguing that the *Bowers* decision harms LGBTQ+ people in their autonomy—their freedom to sexual intimacy—as well as failing to equally protect LGBTQ+ people).

43. *Romer*, 517 U.S. at 636.

44. *Id.* at 631-32.

45. *Id.* at 635-36.

Building off the momentum from *Romer*, queer rights groups turned their attention toward overturning *Bowers*.⁴⁶ Though sodomy statutes functioned mostly as symbolic prohibitions, the 1998 arrest of Tyron Garner and John Lawrence—an interracial gay couple—for sodomy spurred a new challenge to Texas’ homosexual-specific legislation.⁴⁷ After the men pled no contest to the misdemeanor charges and were fined a total of \$341.25 each,⁴⁸ they revived the Equal Protection and substantive Due Process challenges that the *Bowers* court rejected. Before a newly constituted Supreme Court, they found a receptive audience to the latter claim.⁴⁹ Because the *Bowers* court “fail[ed] to appreciate the extent of the liberty at stake,” including the collateral consequences of the misdemeanor conviction, the *Lawrence* majority determined that “*Bowers* was not correct when it was decided, and it is not correct today,” and thus overruled it.⁵⁰ The decision occasioned a vociferous dissent from Justice Scalia, who argued that “the enforcement of traditional notions of sexual morality” could continue to justify a sodomy prohibition.⁵¹

C. Modern Manifestations

The decision in *Lawrence* represented a resounding and symbolically critical victory for the burgeoning LGBTQ+ rights movement, but it did not root out all manifestations of anti-queer bias in the modern criminal justice system. Indeed, in Louisiana, the legislature has refused to repeal sodomy statutes rendered unconstitutional by *Lawrence*,⁵² perhaps for fear

46. Elizabeth Sheyn, *The Shot Heard Around the LGBT World: Bowers v. Hardwick as a Mobilizing Force for the National Gay and Lesbian Task Force*, 4 J. RACE GENDER & ETHNICITY 2, 12-13, 16-25 (2009); *Getting Rid of Sodomy Laws: History and Strategy That Led to the Lawrence Decision*, ACLU, <https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision> (last visited Feb. 10, 2020).

47. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 126-27, 136 (2012). Based on extensive archival research and interviews with those present at the scene of the arrest, Carpenter presents a compelling case that Garner and Lawrence were not, actually, *in flagrante delicto* when the police arrived, but that the responding officers may have fabricated sodomy charges to justify an otherwise unwarranted intrusion into Lawrence’s home. *Id.* at 67-74.

48. *Lawrence v. Texas*, 539 U.S. 558, 563 (2003).

49. Justice O’Connor, who voted in the *Bowers* majority, would have struck down the Texas law on Equal Protection grounds. *Id.* at 585 (O’Connor, J., concurring). The majority declined to reach that question. *Id.* at 574-75.

50. *Id.* at 567, 578.

51. *Id.* at 601 (Scalia, J., dissenting).

52. House Bill 12, proposed by Rep. Patricia Smith during the 2014 Regular Session, would have removed Louisiana’s ban on some kinds of “crime[s] against nature.” H.B. 12, Reg. Sess. (La. 2014). However, it failed by a considerably wide margin. *Roll Call: LA HB12 | 2014 | Regular Session*, LEGISCAN, <https://www.legiscan.com/LA/rollcall/HB12/id/355874> (last visited Feb. 16, 2020).

of being seen as endorsing homosexuality.⁵³ In courtrooms and in prisons, LGBTQ+ individuals risk humiliation, degradation, and unsafe conditions on the basis of their identities and the “queer criminal archetypes” that follow them.⁵⁴

Unfortunately, anti-queer discrimination in the criminal justice system extends beyond these symbolic measures and pervades substantive law. The AIDS epidemic, for instance, engendered homophobic animus that, in some jurisdictions, manifested in harsh laws criminalizing the transmission of HIV.⁵⁵ In states like Arkansas, knowingly exposing someone to HIV constitutes a Class A felony, warranting lifetime registration as a sex offender, even where the exposure did not cause seroconversion.⁵⁶

Informal surveys demonstrate that LGBTQ+ people are significantly overrepresented in civil commitment facilities.⁵⁷ Empirical studies have shown a willingness to require sex offender registration for queer, rather than heterosexual, juveniles convicted of sex crimes.⁵⁸ Similarly, gay and transgender panic defenses—which seek to exculpate a crime of violence when the victim’s sexuality or gender identity surprises the accused⁵⁹—

53. LA. STAT. ANN. § 14:89 (2018); see Rebekah Allen, *Louisiana Legislature Looks to Clean Up Outdated Laws, but Not Gay Marriage Ban, Anti-Sodomy Law*, ADVOCATE (Mar. 29, 2016, 10:23 AM), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_7e40a010-2302-599d-91f3-6798e125db8e.html. Additionally, in 2018, ten conservative lawmakers voted against a measure that would separate bestiality from sodomy in Louisiana’s “crimes against nature” statute, even where the bill strengthened the penalties for bestiality. Marie Simoneaux, *John Bel Edwards Signs Tougher Bestiality Bill into Law*, NOLA.COM (May 31, 2018, 4:53 PM), https://www.nola.com/crime/2018/05/gov_signs_bestiality_law.html.

54. JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 23-26 (Michael Bronski ed., 2011).

55. Leo Bersani, *Is the Rectum a Grave?*, 43 OCTOBER 197, 199, 201 (1987).

56. ARK. CODE ANN. § 5-14-123 (1989); CTR. FOR HIV L. & POL’Y, HIV CRIMINALIZATION IN THE UNITED STATES: A SOURCEBOOK ON STATE AND FEDERAL HIV CRIMINAL LAW AND PRACTICE 1-2 (3d ed. 2017), <https://www.hivlawandpolicy.org/sites/default/files/HIV%20Criminalization%20in%20the%20U.S.%20A%20Sourcebook%20on%20State%20Fed%20HIV%20Criminal%20Law%20and%20Practice%20062519.pdf>. “Seroconversion” is defined as “[t]he transition from infection with HIV to the detectable presence of HIV antibodies in the blood.” *Seroconversion*, AIDSINFO, <https://aidsinfo.nih.gov/understanding-hiv-aids/glossary/648/seroconversion> (last visited Feb. 10, 2020).

57. Toshio Meronek & Erica Meiners, *The Prison-Like Public Hospital Systems Disproportionately Packed with Gay Men*, ADVOCATE (May 23, 2018, 4:45 AM), <https://www.advocate.com/current-issue/2018/5/23/prison-federal-hospital-system-disproportionately-packed-gay-men>.

58. See Jessica M. Salerno, Mary C. Murphy & Bette L. Bottoms, *Give the Kid a Break—but Only if He’s Straight: Retributive Motives Drive Biases Against Gay Youth in Ambiguous Punishment Contexts*, 20 PSYCHOL. PUB. POL’Y & L. 398, 405-06 (2014).

59. Peter Nicolas, *“They Say He’s Gay”: The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793, 809-14 (2003).

remain on the books in a number of jurisdictions, though legislation to ban these defenses is pending in Congress and at least ten states.⁶⁰

While these restrictions and cases of anti-queer death sentences usually arise in geographically disparate areas,⁶¹ each instance of the legal system's treatment of LGBTQ+ people as deviants, incorrigible and corrupting, conveys messages about social inclusion to members of that community nationwide.⁶² Taken in the aggregate, they sanction discrimination and signal to queers that their social status is questionable.⁶³

III. THE *BUCK* AND *PEÑA-RODRIGUEZ* ARGUMENTS

In response to explicit manifestations of racial bias in the administration of criminal justice, the U.S. Supreme Court issued two landmark decisions in 2017.⁶⁴ In addition to the exception for racial bias that the Court carved out of the no-impeachment rule in *Peña-Rodriguez*, the Court also granted relief to Duane Buck.⁶⁵ At Buck's capital sentencing hearing, his attorney proffered a psychologist who testified that, while Buck himself was not likely to engage in violent conduct, he was "statistically more likely to act violently because he is black" and race was one relevant factor in evaluating a defendant's inclination for violence.⁶⁶ The jury sentenced him to death, spurring decades-long appeals that culminated in the Supreme Court determining that Buck received ineffective assistance of counsel.⁶⁷

60. *LGBTQ+ Panic Defense*, NAT'L LGBT BAR ASS'N, <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/> (last visited Feb. 10, 2020).

61. See MOVEMENT ADVANCEMENT PROJECT, *WHERE WE CALL HOME: LGBTQ PEOPLE IN RURAL AMERICA* 46-49 (2019), <https://www.lgbtmap.org/file/lgbt-rural-report.pdf>; see also Luke A. Boso, *Urban Bias, Rural Sexual Minorities, and Courts' Role in Addressing Discrimination*, 60 UCLA L. REV. 562, 622-24 (2013); Bud W. Jerke, *Queer Ruralism*, 34 HARV. J.L. & GENDER 259, 260 (2011) (describing "queer ruralism" as "structural discrimination stemming from being queer and living in a rural area").

62. Cf. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2067 (2017) (describing how, in the context of policing of black Americans, vicarious community experiences "at both an interactional and structural level . . . can operate to effectively banish whole communities from the body politic").

63. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015) ("Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.").

64. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017); *Buck v. Davis*, 137 S. Ct. 759 (2017).

65. *Buck*, 137 S. Ct. at 780.

66. *Id.* at 767.

67. *Id.* at 767, 780.

While the bulk of the *Buck* decision dealt with procedural matters regarding the Fifth Circuit's standards for granting a certificate of appealability on Buck's Federal Rules of Civil Procedure 60(b) motion, the opinion, like *Peña-Rodriguez*, is notable for its explicit discussion of racial bias.⁶⁸ Writing for the Court, Chief Justice Roberts found it "disturbing" that Buck's death sentence resulted, in part, from his race.⁶⁹ The law, the majority remarked, "punishes people for what they do, not who they are."⁷⁰ That principle is violated when an individual is punished based on "an immutable characteristic."⁷¹ According to the Court, the harm from such racist treatment extends not only to an individual defendant, but to the judicial system and to "the community at large."⁷² The damage such a verdict causes to public confidence therefore overcomes the state's interest in the finality of a judgment and, in Buck's case, provides extraordinary cause for granting a Rule 60(b) motion.⁷³

In the wake of these two decisions, Charles Rhines sought to reopen his case and extend the *Peña-Rodriguez* holding to instances of anti-queer animus.⁷⁴ The South Dakota Supreme Court denied that claim without elaboration, and the Supreme Court declined to review the decision below.⁷⁵ As a result, it is an open question whether the *Buck* and *Peña-Rodriguez* protections against racial discrimination extend to other categories. In fact, both Chief Justice Roberts and Justice Alito asked this very question to Peña-Rodriguez's counsel at oral arguments.⁷⁶

A broad reading of *Buck* may be susceptible to Rhines' argument. The categorical language with which Chief Justice Roberts condemned "punishment on the basis of an immutable characteristic" was not just limited to a defendant's race or ethnicity.⁷⁷ Rather, traits like gender and even sexuality would fall within the ambit of this general prohibition

68. *Id.* at 776, 778.

69. *Id.* at 778.

70. *Id.*

71. *Id.*

72. *Id.* (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)); see Bell, *supra* note 62, at 2140 (court rulings can "send messages to groups about social inclusion, and, indeed, social citizenship").

73. *Buck*, 137 S. Ct. at 778 ("Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015))).

74. *State v. Rhines*, No. 28444 (S.D. Jan. 2, 2018), *cert. denied*, 138 S. Ct. 2660 (2018) (mem.); Petition for Writ of Certiorari, *supra* note 5, at 2-3.

75. *Rhines*, No. 28444.

76. Transcript of Oral Argument at 6-7, 56, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

77. *Buck*, 137 S. Ct. at 778.

against punishing queers for “who they are.”⁷⁸ This rings especially true in a capital case, given that “the penalty of death is qualitatively different” from all other sanctions.⁷⁹ Indeed, the heightened reliability requirements that the Eighth Amendment imposes on capital proceedings bear in favor of a more expansive reading.⁸⁰

Notwithstanding the appeal of Rhines’ argument, the Supreme Court’s subsequent treatment of *Buck* and *Peña-Rodriguez* suggests that the holdings will most likely be limited to the “extraordinary nature of [those] case[s].”⁸¹ Indeed, both opinions were highly fact-specific. The *Buck* decision, for instance, describes in great detail how the prosecution conceded error in five cases similar to *Buck*’s but refused to relent on his claim.⁸²

While the Court has not explicitly held that the cases are limited to their factual circumstances, it has since declined review of at least one case with a similar claim—the racial animus of jury members—to that of *Peña-Rodriguez*.⁸³ The petitioner in that case, Julius Jones, was sentenced to death in 2002 for the murder of a white Oklahoma City resident. Fifteen years later, his counsel learned that a juror referred to Jones, who is black, using a racial epithet and remarked that the proceedings were “a waste of time and ‘they should just take the [n*****] out and shoot him behind the jail.’”⁸⁴ On the basis of this new information, and following the ruling in *Peña-Rodriguez*, Jones timely filed a state post-conviction application.

When the Oklahoma Court of Criminal Appeals denied relief on state-law procedural grounds, Jones sought review before the U.S. high court.⁸⁵ Of course, it is not unusual for the Supreme Court to deny certiorari without comment.⁸⁶ However, where a case, and especially a

78. *Id.*

79. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

80. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (“In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.”).

81. *Buck*, 137 S. Ct. at 778; see *Peña-Rodriguez*, 137 S. Ct. at 869-70.

82. *Buck*, 137 S. Ct. at 778-79 (“The *extraordinary* nature of this case is confirmed by what the State itself did in response to [the expert’s] testimony These were *remarkable* steps.” (emphases added)).

83. *Jones v. State*, No. PCD-2017-1313 (Okla. Crim. App. Sept. 28, 2018), *cert. denied*, 139 S. Ct. 1453 (2019) (mem.); see *Jones v. State*, 128 P.3d 521, 532-33 (Okla. Crim. App. 2006), *reh’g granted*, 132 P.3d 1 (Okla. Crim. App. 2006).

84. Petition for Writ of Certiorari at 5, *Jones v. Oklahoma*, 139 S. Ct. 1453 (2019) (mem.) (No. 18-7658).

85. *Id.* at 1.

86. OFFICE OF THE CLERK, SUPREME COURT OF THE U.S., GUIDE FOR PROSPECTIVE INDIGENT PETITIONERS FOR WRITS OF CERTIORARI 1 (2019), <https://www.supremecourt.gov/casehand/guideforIFPcases2019.pdf>.

capital appeal, raises an incipient constitutional claim based on a recent ruling, the Court will often issue a grant, vacate, and remand (GVR) order, wherein the Court accepts jurisdiction, summarily vacates the opinion below, and remands for furthering proceedings in accordance with the relevant recent decision.⁸⁷ Thus, the Court's unwillingness to issue a GVR order on behalf of Rhines or Jones suggests that *Peña-Rodriguez* was *sui generis*.

To the extent that the Court applies the *Peña-Rodriguez* exception to other cases, the language of the two opinions appears to limit the principle to claims of racial bias; despite the more general rhetoric in *Buck*,⁸⁸ both opinions speak fairly specifically of the harms of racism in the criminal justice system.⁸⁹ This limitation is especially true of *Peña-Rodriguez*, where the Court discussed historical discrimination quite expansively⁹⁰ but singled out racism because of its “*unique* historical, constitutional, and institutional concerns.”⁹¹ The specificity of this language may, on the one hand, reflect a desire to limit the principle to the cause and controversy then before the Court. Indeed, the historical overview offered in Part II demonstrates that the Court could adopt similar arguments about past anti-queer discrimination and its effects on public confidence in the courts or “the community at large.”⁹²

However, the discussion during oral arguments strengthens the interpretation that *Peña-Rodriguez*'s exception applies only to racist

87. See, e.g., *Wright v. Florida*, 138 S. Ct. 360 (2017) (mem.) (grant, vacate, and remand order (GVR) in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017)); *Tatum v. Arizona*, 137 S. Ct. 11 (2016) (mem.) (GVR in light of *Montgomery v. Louisiana*, 136 U.S. 718 (2016)). In January 2018, however, the Court issued a summary GVR ruling on a “remarkable” *Peña-Rodriguez* claim, wherein a juror in the case of black prisoner on Georgia's death row referred to the defendant using slurs and wondered aloud whether “black people even have souls.” *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (per curiam) (internal citation omitted).

88. *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (“Relying on race to impose a criminal sanction ‘poisons public confidence’ in the judicial process.” (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015))).

89. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868-69 (2017); *Buck*, 137 S. Ct. at 778-79.

90. *Peña-Rodriguez*, 137 S. Ct. at 867-69 (documenting history of racial discrimination in the jury system).

91. *Id.* at 868; see also Bell, *supra* note 62, at 2072 (“[P]oor African Americans as a whole tend to have a social experience distinctive from those of other ethnic and class groups in the United States.”).

92. See *Buck*, 137 S. Ct. at 778 (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (discussing “the Nation's experiences with the rights of gays and lesbians” and noting that queers were “targeted by police, and burdened in their rights to associate”).

comments during jury deliberations.⁹³ In response to the Chief Justice's question about a no-impeachment exception for comments about sexuality, counsel for Peña-Rodriguez analogized the inquiry to the *Batson* context and suggested that Equal Protection principles, as well as Sixth Amendment concerns, may apply.⁹⁴ Justices Sotomayor and Kagan suggested a receptiveness to that claim, with the potential to extend the no-impeachment exception to claims around sex discrimination.⁹⁵ Ultimately, though, the Court continued to express skepticism of where the limiting principle could be drawn.⁹⁶ While Peña-Rodriguez's counsel refused to concede that only race-based claims would be viable, suggesting vaguely that "different tools must be available to root out different kinds of discrimination,"⁹⁷ the Court's narrow decision is best read as a limitation of the no-impeachment exception only upon evidence of racism.

IV. STRANGE BEDFELLOWS: *BOWERS* AND THE EIGHTH AMENDMENT

The narrow window opened by *Buck* and *Peña-Rodriguez* may be closed to LGBTQ+ litigants, but there remains another viable constitutional challenge to capital sentencing decisions made on the basis of a defendant's gender or sexuality.⁹⁸ Though *Bowers* was anathema to the LGBTQ+ community, the now-defunct case may offer condemned queers a last hope for relief.⁹⁹ In their opinions, Justice Powell, in his short concurrence, and Justice Blackmun, along with three other Justices in dissent, suggested that the Court's holding in *Robinson v. California*, that the states cannot criminalize the "'status' of . . . addition,"¹⁰⁰ could extend to punishments for same-sex attraction.¹⁰¹ This argument is, in part, a product of contemporary, medicalized understandings of queer

93. Transcript of Oral Argument, *supra* note 76, at 10-12.

94. *Id.* at 6-7, 11-12.

95. *Id.* at 11-13.

96. *Id.* at 56.

97. *Id.* at 12.

98. See *Bowers v. Hardwick*, 478 U.S. 186, 197-98 (1986) (Powell, J., concurring), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

99. See *id.*

100. 370 U.S. 660, 666 (1962).

101. *Bowers*, 478 U.S. at 198 (Powell, J., concurring) (suggesting that sodomy laws imposing prison sentences "would create a serious Eighth Amendment issue"); *id.* at 202 n.2 (Blackmun, J., dissenting).

identities,¹⁰² but this Part assesses its applicability to modern capital sentencing.

A. *The Status Prohibition in Robinson v. California*

Like Lawrence and Garner, Lawrence Robinson was arrested on a misdemeanor charge, namely, being “addicted to the use of narcotics.”¹⁰³ The arresting officers lacked direct proof that Robinson had recently used or possessed any drugs, but a jury based their conviction on the circumstantial evidence that Robinson’s arms were bruised and discolored. Reviewing the statute, the Supreme Court expressed concern that a law criminalizing a “status” would leave an addicted person “continuously guilty” and liable for prosecution “at any time before he reforms.”¹⁰⁴ The Court analogized the California code to theoretical prohibitions on mental illness, leprosy, or contracting a sexually transmitted infection and concluded that criminalization, rather than quarantine, confinement, or compulsory treatment, “would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”¹⁰⁵ The relatively short punishment contemplated by California’s law—imprisonment for at least ninety days—did not diminish the Eighth Amendment claim because “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”¹⁰⁶

The *Robinson* majority prevailed over a 6-2 margin.¹⁰⁷ When a similar challenge, to a Texas law punishing public drunkenness, reached the Court six years later, a newly constituted five-member majority advanced a narrow reading of *Robinson*.¹⁰⁸ Out of concern that a more expansive interpretation would erode the doctrine of mens rea and “common-law concepts of personal accountability,” the Court, in *Powell v. Texas*, held that *Robinson* did not prohibit the states from criminalizing

102. See Andrea Ganna et al., *Large-Scale GWAS Reveals Insights into the Genetic Architecture of Same-Sex Sexual Behavior*, 365 SCI. eaaf7693, eaaf7693 (2019); Pam Belluck, *Many Genes Influence Same-Sex Sexuality, Not a Single ‘Gay Gene,’* N.Y. TIMES (Aug. 29, 2019), <https://nytimes.com/2019/08/29/science/gay-gene-sex.html>.

103. *Robinson*, 370 U.S. at 660 (internal citation omitted).

104. *Id.* at 666.

105. *Id.* (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463-64, 466 (1947)).

106. *Id.* at 667.

107. Justices Douglas and Harlan concurred with the majority opinion while Justices Clark and White dissented. *Id.* at 668 (Douglas, J., concurring), 678 (Harlan, J., concurring), 679 (Clark, J., dissenting), 685 (White, J., dissenting).

108. *Powell v. Texas*, 392 U.S. 514, 536-37 (1968).

any condition that a person is “powerless to change.”¹⁰⁹ Rather, *Robinson* merely held that the Eighth Amendment only prevents laws imposing criminal sanctions against someone who has not committed an *act*.¹¹⁰ Because the petitioner in *Powell* was arrested for specific, public conduct, the *Robinson* Court’s concern that a person suffering from alcoholism would be held “continuously guilty” did not apply.¹¹¹

Notably, Justice White wrote a concurrence suggesting that the appropriate scope of the Eighth Amendment inquiry is not a strict division between “status” and conduct but whether “volitional acts brought about” the sanctioned conduct.¹¹² Thus, while a law punishing “the ‘condition’ of being a chronic alcoholic” may fall within *Robinson*’s ambit, punishing an “isolated instance” of public intoxication resulting from intentional conduct does not implicate the Cruel and Unusual Punishment Clause.¹¹³

B. *Bringing Back Bowers?*

The *Powell* decision decisively clawed back *Robinson*’s holding, and within a few years, the focus of the Court’s Eighth Amendment jurisprudence appeared to shift towards capital punishment.¹¹⁴ However, in *Bowers*, the Justices resurrected *Robinson* to suggest that sodomy laws imposing prison sentences may implicate Eighth Amendment concerns.¹¹⁵ Justice Blackmun’s dissent gave significant treatment to how *Robinson* and *Powell* may apply.¹¹⁶ In particular, the dissent noted the emphasis that Justice White, who authored the *Bowers* majority opinion, placed on “volitional” conduct in his concurrence in *Powell*.¹¹⁷ Citing an amici brief

109. *Id.* at 533, 535 (internal citation omitted).

110. *Id.* at 548 (Black, J., concurring) (“*Robinson v. California* establishes a firm and impenetrable barrier to the punishment of persons who, whatever their bare desires and propensities, have committed no proscribed wrongful act.”).

111. *Id.* at 533-34 (distinguishing the holding in *Robinson* from the case at bar), 550-52 (White, J., concurring); *Robinson*, 370 U.S. at 666.

112. *Powell*, 392 U.S. at 550-51 n.2 (White, J., concurring) (citing *Robinson*, 370 U.S. at 666).

113. *Id.* at 550 n.2.

114. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (reversing the ban on capital punishment imposed by *Furman v. Georgia*); *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam) (striking down capital punishment as cruel and unusual punishment for being disproportionate to the crimes committed by the defendants).

115. The majority does not “suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution.” *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Powell, J., concurring), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

116. *Id.* at 202 n.2 (Blackmun, J., dissenting) (citing *Powell*, 392 U.S. at 550-51 n.2 (White, J., concurring)).

117. *Id.*; *Powell*, 392 U.S. at 550-51 n.2.

from the American Psychological Association (APA) and the American Public Health Association, Blackmun was careful to note that homosexuality, unlike narcotics addiction, is no longer considered a “disease.”¹¹⁸ Nevertheless, same-sex attraction, according to the dissenters, is “obviously” not a “matter of deliberate personal election.”¹¹⁹ Therefore, the Cruel and Unusual Punishment Clause “may pose a constitutional barrier” to imprisoning someone for acting in accordance with that orientation.¹²⁰

Because the argument was unpreserved in *Bowers*, the Eighth Amendment’s relevance to prohibitions on queerness remains unknown, despite the five prospective votes (the four dissents plus Justice Powell concurring) in favor of applying *Robinson*.¹²¹ Aspects of *Lawrence*, however, suggest that the Cruel and Unusual Punishment Clause should apply.¹²² At oral arguments, the Justices raised whether the Court should assess the societal values in determining which fundamental liberty interests are protected by the Due Process Clause.¹²³ Indeed, commentators have suggested that Justice Kennedy’s opinion in *Lawrence* “is better read as an Eighth Amendment case.”¹²⁴ Written around the time of *Atkins v. Virginia*,¹²⁵ *Roper v. Simmons*,¹²⁶ and *Kennedy v. Louisiana*,¹²⁷ Justice Kennedy’s *Lawrence* opinion deploys a similar analysis to those cases; in particular, by citing trends in state legislation and a global consensus against criminalizing sodomy,¹²⁸ the *Lawrence* opinion evokes

118. *Bowers*, 478 U.S. at 202 n.2. The American Psychiatric Association removed homosexuality as a diagnosis in 1973. Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565, 570-71 (2015).

119. *Bowers*, 478 U.S. at 202 n.2 (Blackmun, J., dissenting).

120. *Id.*

121. *Id.* at 197 (Powell, J., concurring); *id.* at 202 (Blackmun, J., dissenting).

122. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

123. Transcript of Oral Argument at 8-9, *Lawrence*, 539 U.S. 558 (No. 02-102). Here, the Court refers to the “evolving standards of decency” discussed in *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

124. Sheldon Bernard Lyke, *Lawrence as an Eighth Amendment Case: Sodomy and the Evolving Standards of Decency*, 15 WM. & MARY J. WOMEN & L. 633, 633 (2009).

125. 536 U.S. 304, 321 (2002) (holding that execution of prisoners with intellectual disabilities constitutes cruel and unusual punishment).

126. 543 U.S. 551, 578-79 (2005) (holding that imposing the death penalty on offenders below the age of majority constitutes cruel and unusual punishment).

127. 554 U.S. 407, 446-47 (2008) (holding that the death penalty is cruel and unusual punishment when the crime does not result in the death of the victim, regardless of the nature of the crime).

128. *Lawrence v. Texas*, 539 U.S. 558, 572-73, 576-77 (2003).

an “evolving standards”¹²⁹ argument without explicitly describing it as such.

C. *From Misdemeanor Prosecutions to Capital Sentencing*

Of course, the leap from misdemeanor prosecutions to the imposition of a death sentence is substantial. Because a penalty phase jury “can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death,”¹³⁰ capital sentencing invokes unique constitutional protections. Under the Eighth Amendment, a capital jury must conduct an individualized assessment of the appropriate sentence.¹³¹ To that end, the factfinder must be able to hear, “as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”¹³² While *Lockett v. Ohio* grants wide latitude to the jury in considering mitigating evidence, that discretion is not absolute; not only must juror discretion be appropriately “channeled” through various procedural safeguards,¹³³ but the Supreme Court has held that heightened evidentiary protections exist in the capital sentencing context.¹³⁴

This recognition that “death is . . . different”¹³⁵ weighs heavily in favor of incorporating the *Bowers* argument—that the Eighth Amendment may offer protection against penalization of a defendant on the basis of

129. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

130. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

131. The Court has stated that individualized sentencing is a “constitutionally indispensable part of the process of inflicting the penalty of death.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

132. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis omitted).

133. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

134. See *Booth v. Maryland*, 482 U.S. 496, 509 (1987) (holding that introducing victim impact evidence requesting certain punishment violated the Eighth Amendment because it contained irrelevant information that distracted the jury from the actual factors it needed to consider and led to the issuance of an arbitrary death sentence), *overruled by* *Payne v. Tennessee*, 501 U.S. 808, 829-30, 830 n.2 (1991) (holding that such victim impact evidence discussed in *Booth v. Maryland* are admissible and not violative of the Eighth Amendment); *Caldwell v. Mississippi*, 472 U.S. 320, 340-41 (1985) (holding that prosecutor’s assurance to jury, that sentencing decision was subject to mandatory appellate review, improperly “minimize[d] the jury’s sense of responsibility” for imposing death and violated “the Eighth Amendment’s heightened ‘need for reliability’” (quoting *Woodson*, 428 U.S. at 305)); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (finding a Due Process violation, despite contradictory state evidence rule, and reversing death sentence, for exclusion of defendant’s proffered hearsay statement at sentencing hearing).

135. *Lockett*, 438 U.S. at 604 (quoting *Woodson*, 428 U.S. at 305).

their sexuality—in the context of capital mitigation.¹³⁶ Central to the *Robinson* Court’s holding was that “[e]ven one day in prison” for a conviction based on an immutable status would violate the Eighth Amendment.¹³⁷ Therefore, that logic must certainly apply where the status-based distinction results in the “ultimate punishment of death.”¹³⁸

While this Eighth Amendment protection would surely warrant relief where the prosecution¹³⁹ or the jury (as in Rhines’ case) espouses homophobic views, it could also theoretically impinge on a defendant’s *Lockett* rights.¹⁴⁰ This concern is somewhat hypothetical, given the national decline in capital prosecutions and the intuitively low likelihood that defendants would introduce potentially prejudicial information against themselves.¹⁴¹ Yet, to the extent that it may arise, courts may need to adopt a *Daubert*-like gatekeeping role for sexual orientation or gender

136. *Bowers v. Hardwick*, 487 U.S. 186, 198 (1986) (Powell, J., concurring), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *id.* at 202 n.2 (Blackmun, J., dissenting).

137. *Robinson v. California*, 370 U.S. 660, 667 (1962).

138. *Woodson*, 428 U.S. at 304.

139. *See* *Neill v. Gibson*, 278 F.3d 1044, 1060, 1062 (10th Cir. 2001) (finding that a prosecutor’s remarks—emphasizing the capital defendant’s homosexuality and calling for sentencing jury to consider “what kind of person he is”—were improper but did not rise to a Due Process violation (internal citation omitted)).

140. *See* Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1922 (2006) (arguing that faithful application of *Lawrence* requires “polic[ing] the use of mitigators, and thereby limit[ing] *Lockett* severely” to exclude prejudicial character judgments). *But see* Kathryn E. Miller, *The Eighth Amendment Power to Discriminate*, 95 WASH. L. REV. (forthcoming 2020) (manuscript at 7-8) (available on SSRN), <https://ssrn.com/abstract=3457293> (urging a reassessment of the individualized sentencing requirement and proposing mandatory mitigation instructions that “inform jurors that certain types of evidence are legally mitigating” and “explain that the law *requires* the jury to consider this evidence as supporting a life sentence”).

141. DEATH PENALTY INFO. CTR., *THE DEATH PENALTY IN 2018: YEAR END REPORT 2* (2018), <https://files.deathpenaltyinfo.org/reports/year-end/Year-End-Report.fl569421674.pdf>. One narrow context in which capital defendants have sought to introduce mitigating evidence relating to the sexuality of the accused is where the defendant is arguing that a same-sex victim sexually abused or molested the defendant, and that the killing resulted, in part, from that abuse. *See* *Williams v. Beard*, 637 F.3d 195, 231 (3d Cir. 2011), *rev’d on other grounds sub nom.* *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1904 (2016) (arguing ineffective assistance of counsel (IAC) for trial counsel’s failure to introduce evidence of the victim and capital defendant’s non-consensual homosexual relationship, where defendant retaliated against the victim after years of serial child molestation); *see also* Hampton, *supra* note 13, at 37-38 (discussing how a prosecutor distorted evidence of a capital defendant’s homosexuality to undercut mitigation evidence about childhood sexual abuse); *Analysis & Vision, SURVIVED & PUNISHED*, <https://survivedandpunished.org/analysis/> (last visited Feb. 16, 2020) (providing more details on instances of sexual violence victims criminalized for their survival).

evidence,¹⁴² in line with existing provisions in the rules of evidence,¹⁴³ professional ethics requirements,¹⁴⁴ and local court rules.¹⁴⁵

V. THE STATUS OF QUEERNESS IN A POST-*OBERGEFELL* AGE

Until this point, this Article has considered the *Robinson* and *Peña-Rodriguez* arguments presumptively applicable to LGBTQ+ people as members of a group defined by an immutable trait. This Article concludes by briefly considering the legal and sociological truth of that proposition in light of recent U.S. Supreme Court decisions, as well as the implications of adopting this rhetoric for larger queer justice movements.

Although same-sex and gender non-conforming conduct have ancient roots, queer *identities* have generally been historically specific.¹⁴⁶ This is especially true in the legal system, where the status of queer people has fluctuated significantly.¹⁴⁷ Most recently, in *Obergefell v. Hodges*, the Supreme Court determined that a combination of Due Process and Equal Protection principles apply to queers, at least with respect to the right to same-sex marriage.¹⁴⁸ However, the Court has yet to decide whether the Equal Protection Clause alone, or federal civil rights laws, protects queers *as a group*.¹⁴⁹ Three cases, already argued before the Court but currently pending final decision, may hold a definitive answer to those questions;¹⁵⁰

142. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

143. *Nicolas*, *supra* note 59, at 809-18 (discussing the relevance of sexuality evidence in homicide cases under the Federal Rules of Evidence 403-405); *see* FED. R. EVID. 403-405.

144. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2018) ("It is professional misconduct for a lawyer to . . . (d) engage in conduct that is prejudicial to the administration of justice; [or] . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . sexual orientation . . . in conduct related to the practice of law.")

145. *E.g.*, DIST. IDAHO LOC. CIV. R. 83.8 ("All pretrial and trial proceedings . . . must be free from prejudice and bias towards another on the basis of . . . sexual orientation.")

146. *See* FOUCAULT, *supra* note 25, at 43.

147. *See* GA. CODE ANN. § 16-6-2(a) (1984), *invalidated as applied by* *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998); TEX. PENAL CODE ANN. § 21.06 (West 1993), *invalidated by* *Lawrence v. Texas*, 539 U.S. 558 (2003); S. REP. NO. 81-241, at 20 (1950); Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 27, 1953).

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

149. In 2016, the Supreme Court granted certiorari to determine whether Title IX extends to anti-transgender discrimination but vacated and remanded the case to the appellate court, without deciding, after the Department of Justice and the Department of Education altered its interpretation of the statute. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017) (mem.).

150. *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018) (per curiam), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.) (granting cert. to resolve whether discrimination is prohibited against transgender people on the basis of their

however, given the current composition of the Court, the outcomes may be inauspicious.¹⁵¹

In pursuit of equality and justice, organized queer communities have adopted different rhetoric in response to changes in the prevailing social and legal conditions; around the time *Bowers* was decided, the medical community had only recently receded from pathologizing homosexuality.¹⁵² Stereotypes of predatory, pedophilic queers circulated in the courts¹⁵³ and in society writ large.¹⁵⁴ During the AIDS crisis in particular, hostility toward queers—who were vilified as dirty or sinful—mounted significantly.¹⁵⁵ To counter those narratives, some activists drew on the legitimating power of biology and asserted that queerness is congenital.¹⁵⁶

Encapsulated in the popular refrain that LGBTQ+ people are “born this way,”¹⁵⁷ the view that queerness is immutable has achieved

status as transgender persons and sex stereotyping under Title VII); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.).

151. Leslie Kendrick & Micah Schwartzman, Comment, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 135 (2018) (“But with Justice Kennedy’s departure from the Court at the end of this past Term, the status of limiting dicta in *Masterpiece* is, at best, deeply uncertain.”); *see, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018); *see* Adam Liptak & Jeremy W. Peters, *Supreme Court Considers Whether Civil Rights Act Protects L.G.B.T. Workers*, N.Y. TIMES (Oct. 8, 2019), <https://www.nytimes.com/2019/10/08/us/politics/supreme-court-gay-transgender.html> (“For the most part, the justices seemed divided along predictable ideological lines” during oral arguments in *Bostock, R.G. & G.R. Harris Funeral Homes, Inc.*, and *Zarda*).

152. *See* Drescher, *supra* note 118, at 570-71. In its latest update to the DSM in 2013 (DSM-5), the APA recharacterized “gender identity disorder” as “gender dysphoria” to reduce the stigma associated with the term “disorder.” AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA 1-2 (2013); *see* Kenneth J. Zucker, *The DSM-5 Diagnostic Criteria for Gender Dysphoria*, in MANAGEMENT OF GENDER DYSPHORIA: A MULTIDISCIPLINARY APPROACH 33, 33-34 (Carlo Trombetta, Giovanni Liguori & Michele Bertolotto eds., 2015).

153. *See Ex parte* Mayhugh, 512 S.W.3d 285, 288, 297 (Tex. Crim. App. 2016); SOUTHWEST OF SALEM: THE STORY OF THE SAN ANTONIO FOUR (Motto Pictures & Naked Edge Films 2016) (describing homophobic prosecution and ensuing wrongful conviction of four Latinx lesbian women).

154. MOGUL, RITCHIE & WHITLOCK, *supra* note 54, at 31-34.

155. *See* Julie Mertus, *The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US*, 29 HUM. RTS. Q. 1036, 1054 (2007).

156. *See* Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCI. 1034, 1034-36 (1991). Notably, neuroscientist Simon LeVay, who is himself gay, has cautioned against extrapolating his findings that far, stating, “I did not prove that homosexuality is genetic, or find a genetic cause for being gay[,] . . . the most common mistake people make in interpreting my work.” David Nimmons, *Sex and the Brain*, DISCOVER (Mar. 1, 1994, 12:00 AM), <http://discovermagazine.com/1994/mar/sexandthebrain346/>.

157. *See* LADY GAGA, BORN THIS WAY (Interscope Records 2011).

widespread acceptance and popular appeal.¹⁵⁸ Nevertheless, queer, and especially transgender, communities have taken issue with this framing, arguing that it assumes a universality of queer identities across time and cultures.¹⁵⁹ In addition, by emphasizing assimilation¹⁶⁰ and sameness, those campaigns exclude marginalized queer people facing intersectional oppression on the basis of their “race, class, nationality [or] ability” status¹⁶¹ and perpetuate systemic inequities.¹⁶² Given that the medical field initially conceived of queerness as a deviant pathology,¹⁶³ transgender activists have cautioned against reliance on medico-legal interventions that continue to impose limiting narratives on queer individuals.¹⁶⁴

For instance, Dean Spade has written extensively about how trans people must acknowledge that they are “trapped in the wrong body,” regardless of whether they feel that way, in order to qualify for gender-affirming surgeries.¹⁶⁵ Thus, by adopting a “born this way”¹⁶⁶ argument, queer movements may undercut more expansive, liberating aims of self-determination and inclusivity.¹⁶⁷

158. See Brief for American Psychological Ass’n et al. as Amici Curiae Supporting Petitioners at 4-5, 8, *Obergefell v. Hodges*, 137 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574); Lynn Neary, *How ‘Born This Way’ Was Born: An LGBT Anthem’s Pedigree*, NPR (Jan. 30, 2019, 11:00 AM), <https://npr.org/2019/01/30/687683804/lady-gaga-born-this-way-lgbt-american-anthem>.

159. See EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 129 (1990); Marie Draz, *Born This Way? Time and the Coloniality of Gender*, 31 J. SPECULATIVE PHIL. 372, 374-76 (2017).

160. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (“[T]he gay context demonstrates in a particularly trenchant manner that assimilation can be an *effect* of discrimination as well as an *evasion* of it.”).

161. Lori A. Saffin, *Identities Under Siege: Violence Against Transpersons of Color*, in *CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX* 141, 141-42 (Eric A. Stanley & Nat Smith, eds., 2d. ed. 2015).

162. See SPADE, *supra* note 15, at 109-10, 123.

163. See Drescher, *supra* note 118, at 569-70.

164. See Draz, *supra* note 159, at 374-76.

165. Dean Spade, *Mutilating Gender*, in *THE TRANSGENDER STUDIES READER* 315, 317, 319-21 (Susan Stryker & Stephen Whittle eds., 2006) (discussing how initial medical conceptions of transsexualism contradict “basic premises” of “sexual and gender self-determination”).

166. See, e.g., GAGA, *supra* note 157.

167. Alla E. Dastagir, *‘Born This Way’? It’s Way More Complicated than That*, USA TODAY (June 15, 2017, 9:04 PM), <https://www.usatoday.com/story/news/2017/06/16/born-way-many-lgbt-community-its-way-more-complex/395035001> (“But many members of the LGBTQ community reject this [“born this way”] narrative, saying it only benefits people who feel their sexuality and gender are fixed rather than fluid, and questioning why the dignity of gay people should rest on the notion that they were gay from their very first breath.”); see Spade, *supra* note 165, at 326 (discussing that for gender-affirming surgeries, “diagnosis and treatment are linked to the performance of normative gender”).

In addition, asserting that someone is “powerless to change”¹⁶⁸ their queer identities may, in fact, further anti-LGBTQ+ stigmas by implying that the only way queerness is acceptable is if it cannot be avoided; it is an otherwise unpleasant fact of life that must be tolerated because it is not purely “volitional.”¹⁶⁹ In fact, Eve Kosofsky Sedgwick, founder of queer studies as an academic discipline,¹⁷⁰ rejected outright the validity of asking whether queerness is inherent.¹⁷¹ Because one never asks why a person ended up cisgender or heterosexual, the question is never neutral, and instead partakes in a “genocidal fantasy” of a world without queers.¹⁷² Ultimately, then, the answer to whether queerness is “immutable,”¹⁷³ “volitional,”¹⁷⁴ or some admixture of both, remains unknown, and perhaps unknowable.

This epistemological debate runs far afield of the limits of current legal doctrine and likely exceeds the judiciary’s philosophical competencies. As a result, litigators must balance asserting queerness as immutable in order to make cognizable a *Peña-Rodriguez* or *Robinson* claim against LGBTQ+ alienation from the legal system¹⁷⁵ and larger movement goals. Though the pending Supreme Court cases¹⁷⁶ may make space for these nuances, or decisively foreclose any LGBTQ+ group-based claims, under the current doctrine, litigants may have to sacrifice theoretical nuance for a chance at relief.

168. *Powell v. Texas*, 392 U.S. 514, 533 (1968) (internal citation omitted).

169. *Id.* at 551 n.2 (White, J., concurring).

170. See William Grimes, *Eve Kosofsky Sedgwick, a Pioneer of Gay Studies and Literary Theorist, Dies at 58*, N.Y. TIMES (Apr. 15, 2009), <https://nytimes.com/2009/04/15/arts/15sedgwick/html>.

171. Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay*, 29 SOC. TEXT 18, 25-26 (1991).

172. SEDGWICK, *supra* note 159, at 129; Sedgwick, *supra* note 171, at 26 (“In this unstable balance of assumptions between nature and culture . . . there is no untethered, unthreatening theoretical home for a concept of gay and lesbian origins.”).

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

174. *Powell*, 392 U.S. at 551 n.2 (White, J., concurring).

175. See *McNamarah*, *supra* note 14, at 429-30; Bell, *supra* note 62, at 2057 (“[L]arge swaths of American society . . . see themselves as anomic, subject only to the brute force of the state while excluded from its protection.”).

176. *Bostock v. Clayton Cty. Bd. of Comm’rs*, 723 F. App’x 964 (11th Cir. 2018) (per curiam), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.) (granting cert. to resolve whether discrimination is prohibited against transgender people on the basis of their status as transgender persons and sex stereotyping under Title VII); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.).

VI. CONCLUSION

From the nation's founding, queers have struggled for fair treatment before the law.¹⁷⁷ When faced with the "ultimate punishment,"¹⁷⁸ LGBTQ+ people have suffered discrimination from prosecutors, juries, and even defense attorneys who assert that their sexuality or gender identity makes them worthy of death.¹⁷⁹ By and large, the courts have sanctioned, or remained silent on, these arguments.¹⁸⁰ Although recent Supreme Court rulings suggest that litigants can explore discrimination in jury deliberations,¹⁸¹ this Article argues that that line of cases likely will not extend to anti-LGBTQ+ animus. However, litigants sentenced to death based on improper consideration of their queer identities may seek protection under the Eighth Amendment's prohibition on punishing immutable statuses.¹⁸² Though the viability of those claims may depend on a trio of cases currently pending before the Supreme Court, and raising them may pose difficult questions for larger queer rights movements, they may present a last reprieve for Charles Rhines and others condemned for their queerness.

177. See Crompton, *supra* note 19, at 278, 287-88 (detailing the criminalization of LGBTQ+ people in Colonial America to the early nineteenth century); Weinmeyer, *supra* note 17, at 916-17 (discussing a timeline of sodomy laws throughout the nineteenth and twentieth centuries in the United States).

178. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

179. See *State v. Rhines*, 548 N.W.2d 415, 436, 442 (S.D. 1996); Hampton, *supra* note 13, at 33-34; Mogul, *supra* note 13, at 489-91.

180. Rhines sought to apply *Peña-Rodriguez* to his case, as homophobic sentiments were expressed during jury deliberations, but the South Dakota Supreme Court declined his motion for relief, and Rhines petitioned the U.S. Supreme Court to grant a writ of certiorari to review the South Dakota Supreme Court's decision. *State v. Rhines*, No. 28444 (S.D. Jan. 2, 2018), *cert denied*, 138 S. Ct. 2660 (2018) (mem.); Petition for Writ of Certiorari, *supra* note 5, at 3. However, the U.S. Supreme Court denied Rhines' petition to review that decision. *Rhines v. South Dakota*, 138 S. Ct. 2660 (2018) (mem.).

181. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017); *Buck v. Davis*, 137 S. Ct. 759, 778 (2017).

182. *Bowers v. Hardwick*, 478 U.S. 186, 198 (1986) (Powell, J., concurring).