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Opening Remarks

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OPENING REMARKS:

SYMPOSIUM

HOMOPHOBIA IN THE HALLS OF
JUSTICE: SEXUAL ORIENTATION BIAS
AND ITS IMPLICATIONS WITHIN THE
LEGAL SYSTEM

MICHAEL B. SHORTNACY*

I am honored to introduce this symposium, which focuses on the issue of sexual orientation bias within the legal system. One need only glance at recent headlines to see that the issue of gay bias within the legal system is a problem of great concern—and one that does not simply exist within the vacuum of academic discussion.

On March 12, 2002, a three judge panel of the Tenth Circuit Court of Appeals granted a new trial to James T. Fisher, a gay capital murder defendant, whose own defense attorney sabotaged his client's defense because of an anti-gay bias.¹ In concluding that the attorney's performance fell below "objectively reasonable standards of professional attorney conduct,"² the appellate court referenced

* Note & Comment Editor, *American University Law Review*, J.D. Candidate, 2003, *American University, Washington College of Law*, B.A., 1996, *University of Southern California*. This symposium is dedicated to the members of the lesbian, gay, bisexual and transgendered community who face discrimination in courthouses every day across the nation. I would like to thank Professor Angela J. Davis, without whose commitment and guidance this symposium would not have been possible. Finally, I am forever grateful for the unconditional encouragement and support of my mother, Anita T. Fowler.

1. See *generally* Fisher v. Gibson, 282 F.3d 1283, 1298-1311 (10th Cir. 2002) (holding that defense counsel's performance failed, for numerous reasons, to support defendant's case or to "advance any defense theory" and that Fisher was prejudiced by counsel's inadequate performance).

2. See *id.* at 1307 (finding that defense counsel's representation was inadequate due to his failure to adequately investigate, his failure to diligently advocate for his client, his hostility to his client's interests, his failure to advance a defense theory,

the defense attorney's own explanation that, "My personal feelings towards Mr. Fisher and his case are the only reason I can think of to explain why I waived those closing arguments."³ While the Tenth Circuit did not reach the issue of the defense counsel's inadequate performance in the sentencing stage of the trial,⁴ it is nevertheless significant to note that the defense attorney uttered only nine words in the stage where his client was sentenced to death. One of those words was "waive," as the defense attorney waived his closing argument—the last chance to plead for his client's life.⁵ The defense attorney later explained his inaction in an affidavit: "[A]t that time I thought homosexuals were among the worst people in the world, and I did not like that aspect of this case. I believe my personal feelings towards James Fisher affected my representation of him."⁶

On March 21, 2002, a Los Angeles jury returned a guilty verdict against Marjorie Knoller and Robert Noel, the owners of two dogs that attacked and mauled Diane Whipple, a well-respected and openly lesbian lacrosse coach.⁷ The jurors reached this conclusion despite the defense attorney imploring them not to buy into the prosecution's attempt to "curry favor" with the gay community.⁸ Thankfully, as Dianne Whipple's surviving partner pointed out, the jury saw through that smoke screen and convicted the two dog owners.⁹

and his failure to make a closing argument).

3. *Id.* at 1305.

4. *Id.* at 1311 n.16 (noting that because the court concluded that Mr. Fisher was denied effective assistance of counsel in the guilt phase of the trial, the court need not reach the issue of defense counsel's ineffective assistance in the sentencing phase).

5. See Robert E. Boczkiewicz & Diana Baldwin, 'Inept' Lawyer Blamed for Reversal: Appeals Court Says Attorney 'Sabotaged' Client's Defense, DAILY OKLAHOMAN (Oklahoma City), Mar. 13, 2002, at 9A (noting that the defense counsel's nine words included: "waive" as he was recognized by the judge to present an opening statement; "rest" as he was recognized to present mitigating evidence; "Judge, I object to that" as an overruled objection during the prosecutor's closing argument; and "We waive" as the defense counsel was recognized to present his closing arguments).

6. *Fisher*, 282 F.3d at 1298.

7. See *California Couple Guilty in Dog Mauling Case*, CNN (Mar. 26, 2002) (indicating that the defendants were found guilty of all the charges against them), available at <http://www.cnn.com/2002/law/03/21/dog.mauling.trial/>.

8. See Jaxon Van Derbeken, *All Stops Pulled Out in Mauling Trial; Knoller-Noel Case Should Go to Jury Today*, S.F. CHRON., Mar. 19, 2002, at A1.

9. See *Dogs Kill but Owners Pay*, HERALD (Rock Hill, S.C.), Mar. 25, 2002 (page numbers unavailable) (reporting the conviction of Marjorie Knoller for second-degree murder and of Knoller and Robert Noel for involuntary manslaughter, while warning that owners should be responsible for their pets). *But see* Herbert A. Sample, *Dog Maul Murder Conviction Overturned*, SCRIPPS HOWARD NEWS SERVICE, June 17, 2002 (discussing the shocking overturning of Knoller's second-degree murder conviction because Superior Court Judge Warren concluded that the evidence did not show the

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On March 22, 2002, the Judicial Inquiry Commission in the State of Alabama found “no reasonable basis” to charge the Chief Justice of the Alabama Supreme Court with a violation of the Alabama Canons of Judicial Ethics.¹⁰ This result occurred, despite the fact that Chief Justice Moore, in declaring a lesbian mother an unfit parent by virtue of her sexual orientation, extensively relied on the Bible to find that homosexuality is an “inherent evil” and is “abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature.”¹¹

Unfortunately, these are just the stories that make it into the headlines and onto the general public’s radar screen. Meanwhile every day, in courthouses across the nation, gay litigants, lawyers, judges and jurors face openly biased behavior.¹² Discussions like the ones that follow these remarks, which raise awareness of the existence and extent of anti-gay bias in the halls of justice, play an absolutely vital role in the struggle to secure equal rights for gays and lesbians.

Indeed, the struggle for equal rights for gay people will not be complete unless and until anti-gay bias in the courtroom is eliminated. While many gay civil rights organizations, such as Lambda Legal Defense and Education Fund, National Gay and Lesbian Task Force, and the Human Rights Campaign devote a substantial of their resources to fighting for the right to adopt, for civil unions, for employment non-discrimination and domestic partner benefits (all extremely important civil rights), we must not forget that it is in the courthouse itself where the mettle of these laws will truly be tested.

Even holding onto hope of favorable Supreme Court jurisprudence, somewhere on the horizon, we must not forget the lessons of *Brown v. Board of Education of Topeka, Kansas*¹³ (*Brown II*) and its progeny—where desegregation “with all deliberate speed”¹⁴ was thwarted by racist judges at every turn. We must recognize that lawyers and judges are the ones who actually apply the law to facts.

defendant knew that the dogs would kill a human).

10. See *Alabama Chief Justice Cleared of Bias Against Gays*, L.A. TIMES, Mar. 22, 2002, at A12.

11. *Ex Parte H.H.*, 2002 WL 227956, at *5 (Ala. Feb. 15, 2002).

12. See Michael 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, 318-31 (2001).

13. 349 U.S. 294 (1955).

14. *Id.* at 301 (ordering the District Court to “take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools *with all deliberate speed* the parties to these cases.”) (emphasis added).

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Further, we must recognize that the struggle for equal rights for gay people cannot take place exclusively in the halls of Congress, state legislatures, and in the form of pleadings in specific court actions. We must see the whole picture.

Finally, to provide additional gravity to an already serious discussion, we should take a moment to remember the people who have paid the ultimate price for this anti-gay bias as it is manifested in criminal trials. These individuals, while found guilty of the terrible crimes of which they were accused, were sentenced to die in some measure *because* of their sexual orientation.¹⁵ Wanda Jean Allen, age forty-one, was executed by the State of Oklahoma on January 11, 2001, at 9:21 p.m.¹⁶ Stanley Dewaine Lingar, age thirty-seven, was executed by the State of Missouri on February 7, 2001, at 12:01 a.m.¹⁷

I would like to close with a quote from Justice Kennedy of the United States Supreme Court that beautifully explains the unique harm exacted by discrimination in the courtroom:

The injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds.¹⁸

15. See generally Shortnacy, *supra* note 12, at 332-37, 341-44 (discussing the cases of Stanley Lingar and Wanda Jean Allen).

16. See *Oklahoma Executes Woman Who Killed Friend and Lover*, WASH. POST, Jan. 12, 2001, at A26.

17. See *Missouri Gay Killer Executed Despite Protests*, L.A. TIMES, Feb. 8, 2001, at A19.

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