

NOTE

QUEER EYES DON'T SYMPATHIZE: AN EMPIRICAL INVESTIGATION OF LGB IDENTITY AND JUDICIAL DECISION MAKING

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Do lesbian, gay, and bisexual judicial decision makers differ from their heterosexual counterparts? Over the past decade much has been said about queer judges, with many suggesting that they cannot be impartial in cases involving LGBTQ+ parties or religious interests. To investigate these questions, this Note presents the findings of the first empirical analysis of the decision making of lesbian, gay, and bisexual judges in the United States.

Examining employment-discrimination litigation, this Note finds no evidence that a judge's sexual orientation affects the outcome of the cases they decide on the merits. Specifically, looking to one year of data from federal district courts, this Note's results demonstrate that any divergence between the decisions of LGB judges and their heterosexual colleagues is not statistically significant.

Stepping back from the question of whether LGB judges are different from heterosexual ones, the latter part of this Note considers whether they should be. Against the backdrop of the Trump Administration's appointment of explicitly anti-queer federal judges—including some who vehemently oppose equality for sexual minorities—this Note suggests that in the immediate future queer judges may play a central role in the continued fight for equal rights for LGBTQ+ Americans.

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Two weeks ago at an event hosted by the Stonewall Bar Association, I came out publicly for the first time. I am bisexual. . . . *Of course, my identity has no effect on my work as a judge.* It is my solemn and absolute duty to deliver fair and impartial justice for every citizen. However, this decision to come out does help show the broader community the diversity of our bench.¹

—Judge Michael “Mike” Jacobs, DeKalb County, Georgia
First Openly Bisexual Judge in the United States

INTRODUCTION

In 2016, the American public collectively recoiled when then-presidential nominee Donald Trump suggested that a federal judge was biased because he was a racial minority.² Many commentators noted such an accusation is antithetic to many core principles of American jurisprudence—particularly the tenet that one’s racial or ethnic background does not determine one’s occupational aptitude or ability to faithfully discharge one’s duties.³ Indeed, the accusation runs afoul of the larger

¹ Patrick Saunders, *DeKalb State Court Judge Mike Jacobs Comes out as LGBT*, PROJECT Q ATLANTA (May 1, 2018, 3:16 PM) (emphasis added), http://www.projectq.us/atlanta/dekalb_state_court_judge_mike_jacobs_comes_out_as_lgbt?gid=18937 [<http://perma.cc/DK97-FK6R>]. Judge Mike Jacobs is a former Georgia state representative and now serves as a judge on the DeKalb County (Georgia) State Court.

² In an interview with CNN host Jake Tapper, the following exchange occurred:

Jake Tapper: [I]f you’re saying he can’t do his job because of his race, is that not the definition of racism?

Donald Trump: No. I don’t think so at all.

. . . .

Donald Trump: This judge is giving us unfair rulings. Now, I say why? Well, I’m building a wall, OK? And it’s a wall between Mexico. Not another country.

Jake Tapper: But he’s not from Mexico. He’s from Indiana.

Donald Trump: He’s of Mexican heritage and he’s very proud of it.

See Z. Byron Wolf, *Trump’s Attacks on Judge Curiel are Still Jarring to Read*, CNN (Feb. 27, 2018), <https://www.cnn.com/2018/02/27/politics/judge-curiel-trump-border-wall/index.html> [<https://perma.cc/WT86-UC5K>]. Even many Republicans swiftly criticized or disagreed with Donald Trump’s statements. See, e.g., Bridget Bowman, *GOP Senators Criticize Trump’s Comments on Judge*, ROLL CALL (June 6, 2016), <http://www.rollcall.com/news/politics/gop-senators-trumps-judge-comments-unacceptable> [<https://perma.cc/RZ8E-2UUG>] (collecting statements of Senators Collins, Rubio, Cruz, Ayotte, Sasse, McConnell).

³ See, e.g., *Macdraw, Inc. v. CIT Grp. Equip. Fin.*, 994 F. Supp. 447, 447–48 (S.D.N.Y. 1997), *aff’d*, 138 F.3d 33 (2d Cir. 1998) (sanctioning defense attorneys for implying that Asian American District Court Judge Denny Chin was biased in favor of Asian American plaintiffs); *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4–5 (S.D.N.Y. 1975) (rejecting the defendant’s motion that a judge’s sex and race rendered her partial in a sex discrimination case, stating: “if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on

American value that one's race does not predetermine one's thoughts, behaviors, or actions.⁴

The thrust of Donald Trump's comments echoed those of one of his federal district court nominees, Howard Nielson, Jr., who was confirmed by the Senate in May 2019. In 2010, Nielson filed a motion to overturn Judge Vaughn Walker's trial court decision in support of marriage equality.⁵ In his motion to overturn Walker's decision, Nielson argued Walker "had a duty to disclose not only the facts concerning his relationship, but also his marriage intentions."⁶ Only if Walker had "un- equivocally disavowed any interest in marrying his partner could the parties and the public be confident that he did not have a direct personal interest in the outcome."⁷ While the motion was denied,⁸ other conservatives made similar claims about Judge Walker.⁹

this court could hear this case or many others . . ."); *Pennsylvania v. Local Union 542*, 388 F. Supp. 155, 158, 177 (E.D. Pa. 1974) (detailing a motion to recuse African American judge, Leon Higginbotham because he was partial to the "causes of blacks, including the cause of correction of social injustices . . ."). Denying the motion, Judge Higginbotham noted "[A]mong some whites, there is an inherent disquietude when they see that occasionally blacks are adjudicating matters pertaining to race relations . . ."); see also Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 327 (2002) (dismissing the notion that all black judges think alike).

⁴ See, e.g., *Holder v. Hall*, 512 U.S. 874, 905–06 (1994) (Thomas, J., concurring) (finding the premise that "members of [a] racial group must think alike" as "repugnant to any nation that strives for the ideal of a color-blind Constitution"); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (declaring the notion that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike," an "impermissible racial stereotype [I]"); cf. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (holding that the "Equal Protection Clause . . . forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black").

⁵ Trudy Ring, *Trump Judicial Nom Doesn't Think Gay Judges Should Hear LGBT Cases*, ADVOCATE (Jan. 3, 2018), <https://www.advocate.com/politics/2018/1/03/trump-judicial-nom-doesnt-think-gay-judges-should-hear-lgbt-cases> [<https://perma.cc/F2DC-E3BV>].

⁶ *Id.*

⁷ *Id.* This motion was opposed by a motion from then-California Attorney General Kamala Harris, who noted, "Just as every single one of the attempts to disqualify judges on the basis of their race, gender, or religious affiliation has been rejected by other courts, this Court should similarly reject Defendant-Intervenors' effort to disqualify Judge Walker based on his sexual orientation." Brief for State Defendants in Opposition to Motion to Vacate Judgment at 2, *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119 (N.D. Cal. 2011) (No. C 09-02292 JW), 2011 U.S. Dist. Ct. Motions LEXIS 4140, at *3.

⁸ See *Perry*, 790 F. Supp. 2d at 1133.

⁹ See, e.g., Dahlia Lithwick, *Too Gay to Judge?*, SLATE (June 13, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/too_gay_to_judge.html [<https://perma.cc/N794-PYMK>] (referencing additional articles that questioned Judge Walker's impartiality).

In the shadow of marriage equality,¹⁰ conservatives have gone even further, suggesting that lesbian and gay judges must recuse themselves from religious freedom cases because their sexual orientation inevitably renders them partial.¹¹ Some have gone as far as to say gay judges are incapable of giving Christians a “fair shake” at trial.¹² The irony of such views is amplified by ubiquitous findings of pervasive queerphobia in the courtroom,¹³ and by the fact that vehemently anti-queer judges rarely recuse themselves from cases that affect the lives of the LGBTQ+ community.¹⁴ In other words, many conserva-

¹⁰ See generally *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (holding that same-sex couples have a fundamental right to marry, and invalidating state laws discriminating against same-sex marriages); *United States v. Windsor*, 570 U.S. 744, 775 (2013) (holding that the federal law discriminating against same-sex marriages is unconstitutional).

¹¹ See Nick Duffy, *Gay Judges Should Be Banned From Hearing Cases About Christians, Says Evangelical Leader*, PINK NEWS (Jan. 15, 2018), <https://www.pinknews.co.uk/2018/01/15/gay-judges-should-be-banned-from-hearing-cases-about-christians-says-evangelical-leader/> [<https://perma.cc/PG2V-UCYQ>].

¹² See Kyle Mantyla, *Mat Staver: Gay Judges Are Incapable of Giving Christians ‘a Fair Shake’ in Court*, RIGHT WING WATCH (Jan. 12, 2018), <http://www.rightwingwatch.org/post/mat-staver-gay-judges-are-incapable-of-giving-christians-a-fair-shake-in-court/> [<https://perma.cc/5AG9-43W4>].

¹³ See Chan Tov McNamarah, Note, *Sexuality on Trial: Expanding Pena-Rodriguez to Combat Juror Queerphobia*, 17 *DUKEMINIER AWARDS J.* 393, 396–416 (2018) (demonstrating the myriad ways in which queerphobia affects trials involving parties who are queer); Todd Brower, *Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in the California Courts*, 11 *AM. U. J. GENDER SOC. POL'Y & L.* 39, 46 (2003).

¹⁴ See, e.g., *In re Day*, 413 P.3d 907, 922 (Or. 2018) (“[Per Judge Vance Day’s instructions,] [i]f the [judicial assistant] or clerk determined that the couple was a same-sex couple, then they should call the couple back and say that [Judge Vance Day] was not available or they should otherwise provide that information to [Judge Vance Day], so that he could decide how to proceed. If the couple was an opposite-sex couple, however, then the wedding date should be put on respondent’s schedule.”); *State v. Pattno*, 579 N.W.2d 503, 505 (Neb. 1998) (describing a case in which a judge read a Bible verse before sentencing a defendant who was gay); Brett Kelman, *In Secret Recording, Judge Says Licked Envelope from HIV-Positive Murder Suspect is ‘Gross,’* DESERT SUN (Apr. 11, 2018), https://www.desertsun.com/story/news/crime_courts/2018/04/11/secret-recording-judge-bias/494440002/ [<https://perma.cc/E58Q-MB3L>] (“[Riverside County, California Superior Court Judge David B. Downing] was also caught saying that it was ‘gross’ that a gay, HIV-positive suspect had filed court motions in envelopes that were licked closed.”); Antonia Molloy, *Arkansas Judge Apologizes for ‘Racist, Sexist and Homophobic’ Online Comments*, INDEPENDENT (Mar. 8, 2014), <https://www.independent.co.uk/news/world/americas/arkansas-judge-apologises-for-racist-sexist-and-homophobic-online-comments-9178815.html> [<https://perma.cc/C7KS-VMR5>] (“And in another post, [Arkansas Circuit Judge Mike Maggio] said that gay sex is just a ‘small step’ away from sex with a dog and that people should avoid ‘gay/lesbian week’ at Disney World in Florida.”).

As further illustration of what occurs when homophobic judges refuse to recuse themselves from cases involving sexual minorities, consider this 1987

tives effectively demand that allegedly anti-Christian, gay judges recuse themselves in religious freedom cases, while simultaneously finding no problem with Christian judges failing to recuse themselves in LGBTQ+-related cases. This is the proverbial wanting to have one's cake and eat it too.¹⁵

The principles underpinning Donald Trump's 2016 comments and conservative criticism of LGB¹⁶ judges are the by-product of larger, deep-rooted conversations that question the tenets of objectivity and neutrality in law and judicial decision making. For instance, in the 1930s, Justice Oliver Wendell

exchange between a judge and prosecuting attorney at the trial for the beating of a gay man, Daniel Wan:

In 1987, Daniel Wan was beaten outside a gay bar According to testimony, the assailants called Mr. Wan and his friends "faggot," kicked him repeatedly and threw him against a moving vehicle. Two days later, Mr. Wan died from his injuries. At a pre-trial hearing where the anti-gay nature of the crime was discussed, Broward Circuit Judge Daniel Futch jokingly asked the prosecuting attorney, "That's a crime now, to beat up a homosexual?" The prosecutor replied, "Yes, sir. And it's a crime to kill them." To that, the judge quipped, "Times really have changed."

Robert B. Mison, Note, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133, 163 (1992) (emphasis added) (quoting Suzanne Bryant, Nat'l Lesbian & Gay Law Ass'n, Remarks Before the A.B.A. Judicial Conduct Subcommittee 4 (Sept. 22, 1989)).

¹⁵ Unfortunately, access to cake in the marketplace may now depend on sexual orientation. The Supreme Court recently reversed the Colorado Court of Appeals' decision to sanction a Christian baker who refused to bake a wedding cake for a same-sex couple's wedding celebration. See *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1732 (2018). In dissent, Justice Ginsburg noted, "[S]ensible application of CADA [[Colorado Anti-Discrimination Act]] to a refusal to sell any wedding cake to a gay couple should occasion affirmation of the Colorado Court of Appeals' judgment." *Id.* at 1752 (Ginsburg, J., dissenting).

¹⁶ At present, there are no openly transgender federal judges. See *LGBT Article III Judges*, MINORITY CORP. COUNSEL ASS'N (July 31, 2017), <https://www.mcca.com/resources/reports/federal-judiciary/lgbt-judges/> [<https://perma.cc/AW5K-HU89>] (collecting a list of LGBT judges, none of whom are transgender). There are, however, transgender judges serving on state and local courts. See, e.g., Katie Campbell, *Transgender Judge Takes Bench as Gender Issues Heat Up*, ARIZ. CAPITOL TIMES (Oct. 26, 2018), <https://azcapitoltimes.com/news/2018/10/26/arizona-tracey-nadzieja-transgender-judge-takes-bench-as-gender-issues-heat-up/> [<https://perma.cc/W5S3-3W3Q>] (discussing Tracey Nadzieja, who became a judge on the Maricopa County Superior Court in October 2018); Malaika Fraley, *Meet Judge Victoria Kolakowski, Nation's First Transgender Judge*, EAST BAY TIMES (Mar. 14, 2017), <https://www.eastbaytimes.com/2017/03/14/meet-judge-victoria-kolakowski-nations-first-transgender-judge/> [<https://perma.cc/YX2A-JWHZ>] (discussing Victoria Kolakowski, who was elected to the Alameda County Superior Court in 2010); Deborah Sontag, *Once a Pariah, Now a Judge: The Early Transgender Journey of Phyllis Frye*, N.Y. TIMES (Aug. 29, 2015), <https://www.nytimes.com/2015/08/30/us/transgender-judge-phyllis-frye-early-transformative-journey.html> [<https://perma.cc/ARL4-FDE8>] (discussing Phyllis Frye, who Houston Mayor Annise Parker appointed to the City of Houston Municipal Courts in 2010).

Holmes' opus, *The Common Law*, raised these questions with the oft-repeated statement: "The life of the law has not been logic: it has been experience."¹⁷ In doing so, Holmes challenged the previously uncontested notion that judges made decisions based on freestanding logic, rather than personal experience and biases.¹⁸

Later, in the 1970s and 1980s, the Critical Legal Studies movement interrogated what the movement dubbed, the "myth of legality"—the belief that legal decisions are made based upon autonomous, neutral, and objective applications of legal rules¹⁹—arguing instead that judicial decisions were based on maintaining the hegemonic status quo.²⁰ From this ideological ground, in the 1990s twin movements, the Feminist Legal Theory and Critical Race Theory, produced pathbreaking scholarship contending that legal "neutrality" is often a pseudonym for white²¹ and male perspectives,²² and advocated the existence

¹⁷ OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (M. Howe ed., 1963). He continued, "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." *Id.*

¹⁸ See Saul Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory*, 10 HOFSTRA L. REV. 673, 690–91 (1982) (summarizing the views and assumptions that Holmes' work challenged).

¹⁹ *Critical Legal Theory*, CORNELL LAW LIB., https://www.law.cornell.edu/wex/critical_legal_theory [<https://perma.cc/DL48-XJJV>].

²⁰ *Id.*

²¹ As one antagonistic commentator summarized: "Critical race theorists attack the very foundations of the liberal legal order, including equality theory, legal reasoning, Enlightenment rationalism and neutral principles of constitutional law . . . [alleging they] are mere social constructs calculated to legitimate white supremacy." Jeffrey J. Pyle, Note, *Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 788 (1999); see also MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 6 (1993) ("Critical race theory expresses skepticism toward dominant legal claims of neutrality . . ."); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 323 (1987) (stating that black people are more likely to believe that any "claim to neutral application of legal principles is false").

²² See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1206 (1989) (arguing that "[i]f judges continue to strive for the ostensibly objective perspective in assessing sexual harassment claims, then they will succeed primarily in entrenching the male-centered views of harassment that prevail in many workplaces"); Martha Minow, *The Supreme Court 1986 Term: Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 32 (1987) (explaining that women tend to be judged "in relation to the unstated male norm"); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3–4 (1988) (arguing that human beings are constructed as masculine in jurisprudence); Bonnie B. Westman, Note, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WILLIAM MITCHELL L. REV. 795, 797 (1992) (arguing that "adopting [a] reasonable woman standard will reduce sexual harassment and create greater equality in the workplace."); Note, *Sexual Harassment*

of distinct women's voices²³ and voices of color.²⁴

The most recent iteration of this conversation has been the rise of scholarship on judicial diversity and the impact diversity has on judicial decision making.²⁵ In the past decade, much has been written about whether judges make decisions differently based on their racial backgrounds,²⁶ gender,²⁷ age,²⁸

Claims of Abusive Work Environment Under Title VII, 97 HARV. L. REV. 1449, 1459 (1984) (demonstrating the failures of the "reasonable man" standard and advocating instead for a reasonable woman standard in sexual harassment claims).

²³ See, e.g., Sue Davis, *Do Women Judges Speak 'In a Different Voice?': Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit*, 8 WIS. WOMEN'S L.J. 143 (1992) (evaluating the contention that female judges "speak in a different voice" than their male colleagues).

²⁴ See, e.g., Matsuda, *Looking to the Bottom*, *supra* note 21, at 324 ("[T]hose who have experienced discrimination speak with a *special voice* to which we should listen." (emphasis added)).

²⁵ See, e.g., Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 10 ASIAN AM. L.J. 127, 134–35 (2003) ("The case for diversity is especially compelling for the judiciary. It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. . . . A diverse judiciary signals the public acknowledgement of historically excluded communities and sends an invaluable message of inclusion. . . . Of course, as with any other institution, diversity also enhances the quality of judicial decision making."); Joy Milligan, Note, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206, 1206 (2006) ("Racial and ethnic diversity is likely to improve the judiciary's institutional capacity for openness to alternative views . . ."). This is true not only in the United States, but also in other countries. See, e.g., Rosemary Hunter, *More Than Just a Different Face? Judicial Diversity and Decision-Making*, 68 CURRENT LEGAL PROBS. 119, 119 (2015) ("There has been significant attention paid in England and Wales in recent years to the need for greater judicial diversity; in particular, the need to appoint more women judges.").

²⁶ See, e.g., Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. RACIAL & ETHNIC JUST. 91, 91 (2012) (finding judges were more likely to hold for plaintiffs in racial harassment cases where the judge and plaintiff were of the same race); Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749, 749 (2001) (finding that black judges were more likely to sentence both black and white offenders to prison).

²⁷ See, e.g., Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1776 (2005) (finding that a judge's gender impacted the outcome of Title VII cases).

²⁸ See, e.g., Carol T. Kulik et al., *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 L. & HUM. BEHAV. 69, 69 (2003) (finding that younger judges were more likely to find for plaintiffs in sexual harassment claims); Kenneth L. Manning et al., *Does Age Matter? Judicial Decision Making in Age Discrimination Cases*, 85 SOC. SCI. Q. 1, 1 (2004) (finding that younger judges were less sympathetic to age discrimination claims, whilst older judges were more sympathetic).

class,²⁹ lived experience,³⁰ and most recently, partisan affiliation.³¹ Equally present in the conversation are inquiries as to whether a judge's diverse background or lived experience *should* affect their decision making, or whether judges are charged with remaining impartial.³² Amidst these conversa-

²⁹ See, e.g., BRENDEN HIGASHI, CLASS AND COURTS: AN ANALYSIS OF CLASS ATTRIBUTES AND JUDICIAL DECISION MAKING (2015), <https://wpsa.research.pdx.edu/papers/docs/Higashi%20Class%20and%20Courts.pdf> [<https://perma.cc/2MCP-AVKR>] (finding no effects of judge class on voting behavior, and a strong relationship between the party of the appointing president and voting style).

³⁰ See, e.g., Angela Nicole Johnson, *Intersectionality, Life Experience & Judicial Decision Making: A New View of Gender at the Supreme Court*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 353, 353–54 (2014) (arguing that life experience, rather than gender per se, is the determining factor as to how female judges make decisions).

³¹ See, e.g., Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions* 19 (Nat'l Bureau of Econ. Research, Working Paper 24615, 2018), <https://www.nber.org/papers/w24615.pdf> [<https://perma.cc/87RZ-TF9N>] (finding that Republican-appointed judges sentenced black defendants to longer prison terms, and women to shorter terms than their Democratic-appointed counterparts); Adam Liptak, *Black Defendants Get Longer Sentences From Republican-Appointed Judges, Study Finds*, N.Y. TIMES (May 28, 2018), <https://www.nytimes.com/2018/05/28/us/politics/black-defendants-women-prison-terms-study.html> [<https://perma.cc/6J5A-W7GC>] ("Judges appointed by Republican presidents gave longer sentences to black defendants and shorter ones to women than judges appointed by Democrats, according to a new study that analyzed data on more than half a million defendants."); see also *infra* note 32 and accompanying text (juxtaposing Justice Sotomayor's "wise Latina" comments and Justice Gorsuch's comments dismissing the Republican judge and Democratic judge labels).

³² Consider, for instance, differences in approaches between Supreme Court Justices Sonia Sotomayor and Neil Gorsuch. Compare Dana Bash & Emily Sherman, *Sotomayor's 'Wise Latina' Comment a Staple of Her Speeches*, CNN (June 8, 2009), <http://www.cnn.com/2009/POLITICS/06/05/sotomayor.speeches/index.html> [<https://perma.cc/Z9ZN-9V3Z>] ("Sotomayor's point [expressed in her 'wise Latina' remarks]—that a person's experiences influence how he or she sees the world—doesn't sit well with some Republicans, who believe that viewpoint means the law takes a back seat to a more nuanced judgment."), with Sean Sullivan, *Gorsuch: 'No Such Thing' as Dem or GOP Judges*, WASH. POST (Mar. 21, 2017), https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/gorsuch-no-such-thing-as-dem-or-gop-judges/?utm_term=.7b8f4053a87e [<https://perma.cc/XF5V-ZLKK>] ("There is no such thing as a Republican judge or Democratic judge. We just have judges,' Gorsuch said [at his Senate Judiciary Committee confirmation hearing].").

Additionally, Chief Justice John Roberts rebuked Donald Trump for distinguishing between "Trump judges" and "Obama judges." Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, ASSOCIATED PRESS (Nov. 21, 2018), <https://www.apnews.com/c4b34f9639e141069c08cf1e3deb6b84> [<https://perma.cc/4DW6-VV5W>] ("We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them,' [Justice John] Roberts said."). Trump quickly took to Twitter to fire back at Roberts, declaring, "Sorry Chief Justice John Roberts, but you do indeed have 'Obama judges,' and they have a much different point of view than the people who

tions, however, less scholarship has been devoted to LGB decision makers, and if and how LGB identity may affect judicial decision making.³³ These considerations are the focus of this Note.

This Note's objectives are twofold. First, this Note presents the findings of the first ever empirical analysis of the voting patterns of LGB judges,³⁴ as compared to heterosexual judges

are charged with the safety of our country." Katie Reilly, *President Trump Escalates Attacks on 'Obama Judges' After Rare Rebuke from Chief Justice*, TIME (Nov. 21, 2018), <http://time.com/5461827/donald-trump-judiciary-chief-justice-john-roberts/> [https://perma.cc/JV3F-4NK2]; see also Mark A. Thiessen, *Chief Justice Roberts is Wrong. We do Have Obama Judges and Trump Judges*, WASH. POST (Nov. 23, 2018), https://www.washingtonpost.com/opinions/chief-justice-roberts-is-wrong-we-do-have-obama-judges-and-trump-judges/2018/11/23/ee8de9a2-ef2c-11e8-8679-934a2b33be52_story.html?utm_term=.dc47c30db72a [https://perma.cc/6S2W-HXTP] ("Roberts was not only wrong to speak out, but also his claim that there are no Obama judges or Trump judges was wrong.").

³³ Given the number of LGBTQ+ federal judges appointed by President Barack Obama during his presidency, these considerations are particularly timely. Cf. Jennifer Bendery, *How Barack Obama Transformed the Nation's Courts*, HUFFINGTON POST (Jan. 12, 2017), https://www.huffingtonpost.com/entry/barack-obama-judicial-legacy_us_586c1944e4b0de3a08f9eb1f [https://perma.cc/XSN7-3YPT] ("Obama put more Latino, Asian-American and LGBT judges on federal courts than any previous president. . . . He . . . appointed . . . 10 times as many LGBT judges as any other president.").

³⁴ At the time of this Note's completion, there were twelve active, retired, or senior status openly LGB federal judges: Todd M. Hughes (active, Court of Appeals for the Federal Circuit), Michael W. Fitzgerald (active, Central District of California), Vaughn R. Walker (retired, Northern District of California), Darrin P. Gayles (active, Southern District of Florida), Staci M. Yandle (active, Southern District of Illinois), Judith E. Levy (active, Eastern District of Michigan), Pamela K. Chen (active, Eastern District of New York), Alison J. Nathan (active, Southern District of New York), Deborah Batts (senior status, Southern District of New York), James P. Oetken (active, Southern District of New York), Michael J. McShane (active, District of Oregon), Nitza I. Alejandro (active, Eastern District of Pennsylvania). See *LGBT Article III Judges*, *supra* note 16. Since this Note's completion, Judge Deborah Batts tragically passed away.

Thus far President Donald Trump has nominated two openly LGB judges: Judge Mary Rowland to the Northern District of Illinois and Patrick Butatay to the Ninth Circuit Court of Appeals. Brooke Sopelsa, *Trump Nominates Openly Gay Conservative to Federal Appeals Court*, NBC NEWS (Oct. 16, 2018), <https://www.nbcnews.com/feature/nbc-out/trump-nominates-openly-gay-conservative-federal-appeals-court-n920831> [https://perma.cc/M4UB-K6NM]. On October 11, 2018, the Senate Judiciary voted 16 to 5 in favor of advancing Mary Rowland's nomination to the full U.S. Senate. See *Results of Executive Business Meeting*, SENATE JUDICIARY COMMITTEE (Oct. 11, 2018), <https://www.judiciary.senate.gov/imo/media/doc/10-11-18%20Results%20of%20Executive%20Business%20Meeting1.pdf> [https://perma.cc/SJ7N-HSHW]. But when her nomination lapsed under Senate rules at the beginning of 2019, President Trump did not renominate her. Ellis Kim, *Who Didn't Make Trump's Renominations & Why Democrats Are Miffed*, LAW.COM (Jan. 25, 2019), <https://www.law.com/nationalallwjournal/2019/01/25/who-didnt-make-trumps-renominations-why-democrats-are-miffed/> [https://perma.cc/F3YT-GW5A]. On December 10, 2019, the Senate confirmed Butatay's nomina-

in the United States.³⁵ Second, this Note considers what role a judge's LGB identity may play in his or her decision making. Using social science research curated in the context of race and gender, this Note summarizes previous debates concerning other minority statuses and introduces them to the environment of sexual orientation. Informed by prior scholarship on race and gender in judicial decision making, this Note extends the conclusions and principles to consider whether LGB identity *should* affect decision making and *how* it may do so.

The Note unfolds in six parts. In Part I, this Note presents a comprehensive literature review of previous empirical work investigating the impact of judge race, gender, religion, and partisan affiliation on decision making. Parts II and III present this Note's research hypothesis and methodology, respectively. Part IV contains the results and discussion of this Note's examination into the role of sexual orientation in employment-discrimination cases. And finally, Part V considers the normative inquiry of whether sexual orientation should play a role in decision making, and if so, in what way.

I

LITERATURE REVIEW

The effect of judicial characteristics on judicial decision making has attracted much attention. This Part seeks to highlight significant findings, through a review of previous empirical studies on the effects of various demographic characteristics on decision making. As it documents, far from being innocuous, various characteristics affect how judges make decisions, and the outcomes of cases. Pivoting toward the question of sexual orientation and decision making, the latter section of this Part then analyzes the ways in which LGB judges make decisions. Though no studies have methodologically explored the decision making of sexual minorities, much anecdotal evidence exists. A review of such sources will lay the groundwork for the next Part's empirical analysis.

tion by a 53-40 vote. Kristina Davis, *San Diego Federal Prosecutor Confirmed as 9th Circuit Judge*, SAN DIEGO UNION TRIBUNE (Dec. 10, 2019, 11:58 AM), <https://www.sandiegouniontribune.com/news/courts/story/2019-12-10/san-diego-federal-prosecutor-confirmed-as-9th-circuit-judge> [https://perma.cc/YJC8-SGWD]. Since this Note's completion, Patrick Bumatay has received his judicial commission, taken the bench, and began issuing decisions.

³⁵ See Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 253 (2019) ("[A]s of our writing, no research has examined the voting of LGBT judges, despite the importance of LGBT rights-related litigation.").

A. Race & Judicial Decision Making

Race and ethnic identities are perhaps the most studied judicial characteristic, with several studies findings that a judge's race is most potent when the case centers around issues of race.³⁶ Of note, Pat Chew and Robert Kelley have found that a judge's race is a significant predictor of success in racial harassment cases, with plaintiffs faring better before African American³⁷ judges in general and before judges of their own race in particular.³⁸ Moreover, they have found that in racial discrimination cases, blacks are more than twice as likely to lose than their white counterparts where the judge is white.³⁹ African American judges were also more likely to react to harassment regardless of the source, whether it be coworkers or supervisors, whilst white judges reacted more strongly to claims of discrimination from supervisors.⁴⁰ These findings have been further supported by the work of Christina Boyd, who found that black judges rule in favor of plaintiffs at statistically higher rates than white judges in both race and sex discrimination cases.⁴¹

Outside of racial discrimination, studies have found that race plays an important role in defendant sentencing and Voting Rights Act cases.⁴² And with respect to affirmative action, studies find that black judges support such programs at higher rates, and the presence of even a single black judge on an appellate panel increases the probability that a nonblack judge will vote in favor of the program by over 25%.⁴³

An interesting offshoot of work investigating the impact of judge race on appellate panels is the findings of one study that

³⁶ See Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANNU. REV. L. SOC. SCI. 203, 207 (2017) (summarizing sources).

³⁷ Throughout this Note, we use the terms "African American" and "black" interchangeably to collectively refer to persons of African descent.

³⁸ Chew & Kelley, *supra* note 26, at 110 ("White judges are less likely to hold for African American plaintiffs than White plaintiffs; African American judges are less likely to hold for White plaintiffs than African American plaintiffs; and Hispanic judges treat both Whites and African Americans less favorably than Hispanics.").

³⁹ Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1117 (2009).

⁴⁰ *Id.* at 1160.

⁴¹ Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges' Sex and Race*, 69 POL. RES. Q. 788, 793-94 (2016) (suggesting that black judges are more sensitive to others facing discrimination).

⁴² See Rachlinski & Wistrich, *supra* note 36, at 207-08 (collecting studies).

⁴³ Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 178-79 (2013).

demonstrated that randomly assigning an African American judge to a death penalty panel increases the probability that the petitioner will be granted relief by almost 25%.⁴⁴ This only happens, however, when the petitioner is black.⁴⁵

B. Gender & Judicial Decision Making

Before the Carter Administration, fewer than ten female judges sat on the federal bench.⁴⁶ By the time he left office in 1981, President Carter appointed forty women to the federal bench.⁴⁷ Soon thereafter, legal scholars began asking whether gender impacted judicial decision making. Early studies suggested that gender had no significant impact on judicial voting behavior, at least in the sentencing context.⁴⁸ Later studies reached a similar conclusion in other contexts.⁴⁹ Relatedly, studies have found that female judges on various courts exhibit no difference in judicial voting behavior than their male colleagues—including on state supreme courts,⁵⁰ federal courts of appeals,⁵¹ and the United States Supreme Court.⁵²

⁴⁴ See Jonathan P. Kstellec, Race, Context, and Judging on the Court of Appeals: Race-Based Panel Effects in Death Penalty Cases 23 (July 26, 2016), http://www.princeton.edu/~jkastell/Death_Penalty_Race/kastellec_race_DP_paper.pdf [<https://perma.cc/S283-6UU4>].

⁴⁵ *Id.*

⁴⁶ Mary L. Clark, *One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 492–93 (2004).

⁴⁷ Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record*, 11 J. GENDER, SOC. POL'Y & L. 1131, 1133 (2011).

⁴⁸ See John Gruhl et al., *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 308 (1981); Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition*, 14 Soc. Sci. J. 77, 86 (1977).

⁴⁹ See, e.g., Darrell Steffensmeier & Chris Hebert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?*, 77 Soc. Forces 1163, 1163 (1999) (finding only slight differences between male and female judicial voting behavior in the sentencing context); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 607 (1985) (finding no relationship between gender and judicial voting behavior in the criminal and women's rights contexts).

⁵⁰ See Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 Soc. Sci. Q. 750, 750 (2000). *But see* David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?*, 12 JUST. SYS. J. 232, 232 (1987) (finding that some female state supreme court judges exhibit more liberal judicial voting behavior than their male counterparts) [hereinafter *Token or Outsiders?*].

⁵¹ See Davis, *supra* note 23, at 171 (finding no meaningful support for the claim that female judges on the Ninth Circuit decide Equal Protection claims differently than their male counterparts).

⁵² See Jilda Aliotta, *Justice O'Connor and the Equal Protection Clause: A Feminine Voice?*, 78 JUDICATURE 232, 232 (1995) (presenting an empirical analysis of

Still, the legal scholarship suggests that gender does impact judicial decision making when the legal issue involves gender itself. Several studies demonstrate that female judges will exhibit judicial voting behavior different than that of their male counterparts in employment discrimination cases.⁵³ This is true even when the same female and male judges show no difference in judicial voting behavior in other contexts.⁵⁴ Studies have consistently found a relationship between gender and judicial voting behavior in cases involving workplace sex discrimination or sexual harassment.⁵⁵ A 2015 study not only confirms that the relationship still exists, but also shows that female judges on federal courts of appeals panels influence their male colleagues to exhibit more liberal judicial voting behavior in Title VII cases.⁵⁶

C. Religion & Judicial Decision Making

Empirical investigations examining religious backgrounds have ubiquitously concluded that a judge's religious affiliation influence their decision making.⁵⁷ One early examination of the role of a judge's religious background found that an appel-

Justice O'Connor's judicial voting record and concluding that her voting behavior was explained better by her partisan affiliation than her gender); Susan W. Johnson & Donald R. Songer, *Judge Gender and the Voting Behavior of Justices on Two North American Supreme Courts*, 30 JUST. SYS. J. 265, 265 (2009) (finding that, unlike in Canada, gender does not significantly impact judicial voting behavior when the analysis controls for partisan affiliation). *But see* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 543 (1986) (contending that Justice O'Connor's judicial voting behavior was a product of her "feminine voice" and perspective).

⁵³ See David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156, 159–65 (1993) [hereinafter *Role Orientations*]; Gerard Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 146–53 (1986).

⁵⁴ Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 425 (1994) (finding no relationship between gender and judicial voting record in cases concerning obscenity or search and seizure violations, but finding a relationship between gender and judicial voting record in cases concerning employment discrimination).

⁵⁵ See Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 389 (2010); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 299 (2004); *Role Orientations*, *supra* note 53, at 159–65. *But see* Jennifer Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 144 (2000) (finding that male judges appointed by President Clinton were more likely than female judges appointed by President Clinton to be supportive of claims involving women's issues).

⁵⁶ Peresie, *supra* note 27, at 1778–79.

⁵⁷ See Rachlinski & Wistrich, *supra* note 36, at 206–07 (collecting studies).

late judge's religious affiliation factored significantly in their decisions involving injured parties, labor disputes, and economic liberalism, and further that Catholic judges were more liberal than their Protestant counterparts.⁵⁸ Unsurprisingly as well, Catholic judges have been found more likely to side against LGBTQ+ rights,⁵⁹ as well as harsher on obscenity defendants.⁶⁰ In contrast, Jewish judges are the most likely to uphold gay rights.⁶¹ At the Supreme Court level, a study of the religious backgrounds and voting patterns of Supreme Court Justices found that those who were Catholic voted more conservatively in abortion and Establishment Clause cases, but more liberally in civil and criminal rights cases.⁶²

Finally, in a comprehensive study of religious freedom cases, Gregory Sisk, Michael Heise, and Andrew Morris noted "religious affiliation variables—both those of judges and of claimants—were the most consistently significant influences on judicial votes in the religious freedom cases"⁶³ Specifically, the researchers found that judges who were Jewish were significantly more likely to approve of judicially ordered accommodations in Free Exercise cases, and more likely to find government interaction infringed the Establishment Clause.⁶⁴ Similarly, judges from nonmainstream Christian backgrounds were more likely to intervene where the government "either refused to accommodate religious dissenters or provided an official imprimatur upon a religious practice or symbol"⁶⁵ In contrast, Catholic judges were more likely to rule in favor of religious exemption claims.⁶⁶

In short, then, like a judge's race and gender, a judge's religious background has a significant impact in a judge's decisions across a wide swath of issues.

⁵⁸ See Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 505 (1975).

⁵⁹ DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* 88 (2003).

⁶⁰ Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507, 521(1999).

⁶¹ PINELLO, *supra* note 59, at 87.

⁶² William Blake, *God Save This Honorable Court: Religion as a Source of Judicial Policy Preferences*, 65 POL. RES. Q. 814, 820–23 (2012).

⁶³ Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 501 (2004).

⁶⁴ *Id.* at 502.

⁶⁵ *Id.*

⁶⁶ *Id.*

D. Partisan Affiliation, Political Ideology, & Judicial Decision Making

Partisan affiliation⁶⁷ is perhaps the most extensively discussed characteristic that affects judicial decision making. A breadth of legal scholarship supports the notion that partisan affiliation plays a significant role in the judicial decision-making process.⁶⁸ As early as 1948, legal scholars and political scientists have found a relationship between a Supreme Court Justice's partisan affiliation and judicial voting behavior.⁶⁹ Countless studies have found that Supreme Court Justices exhibit judicial voting behavior that aligns with their partisan affiliation.⁷⁰ Furthermore, Jeffrey Segal and Harold Spaeth's Attitudinal Model suggests that the Supreme Court "decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices."⁷¹ Other scholarship has found similar results among judges on the lower federal courts.⁷² Furthermore, the scholarship suggests that Republican-appointed and Democratic-appointed judges exhibit starkly different voting behavior on a wide array of issues.⁷³

⁶⁷ The Note intends the term "partisan affiliation" to serve as a proxy for political ideology, which in turn affects decision making. Although this Note recognizes that the two are not synonymous, it will use the two interchangeably. Cf. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999) ("Cumulating and synthesizing empirical findings on the link between judges' political[-]party affiliation and their performance on the bench confirm conventional wisdom that party is a dependable measure of ideology in modern American courts. Democratic judges indeed are more liberal on the bench than Republican counterparts.").

⁶⁸ LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 2-4*, 66-70 (2013) (reviewing the legal scholarship); see also *supra* note 31 and accompanying text (reviewing some of the legal scholarship concerning the relationship between partisan affiliation and judicial decision making).

⁶⁹ C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947*, at 33-45 (1948) (finding a positive correlation between the political party of the president which appointed a Supreme Court Justice and the voting record on cases during the New Deal Era).

⁷⁰ See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 33-36 (1998) (discussing Herman Pritchett's finding that some justices always tend to vote along party lines).

⁷¹ JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002). Again, this Note reiterates its recognition of the distinction between partisan affiliation and ideology. See *supra* note 67.

⁷² See CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 147-48 (2006).

⁷³ See, e.g., Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 813 (2008) ("When agency decisions are liberal, Democratic appointees are significantly more likely to vote to uphold them than when they are conservative. By contrast, Republican appointees are significantly more likely to uphold conservative agency decisions than liberal agency

E. Sexual Orientation & Judicial Decision Making

How might a judge's sexual orientation influence their approach to decision making generally and in individual cases? Historically, the minute number of openly LGB judges has stymied empirical investigation of the relationship between sexual orientation and judicial voting behavior, and little qualitative evidence exists. Still, the available anecdotal evidence and case law paint a rich picture of how sexual orientation may manifest in judges' decision making. This section surveys both.

1. *A Review of Anecdotal & Testimonial Evidence*

Within the community of LGB judges, there is a primary division between those who actively and openly acknowledge their sexual orientation and those who refuse to acknowledge their sexual orientation, instead treating it as peripheral to their role as a judicial decision maker. This is, perhaps, a facet of a larger conversation within the queer community on whether LGBTQ+ persons should present their sexual-minority status openly or choose to "cover" it.⁷⁴ In light of the historical removal of jurists who were open about their sexual orientation⁷⁵ and continuing societal prejudice against sexual minori-

decisions."); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 526 (2011) ("Judges nominated by Republicans appear more concerned with keeping foreign plaintiffs from forum shopping into the U.S. federal courts than those nominated by Democrats; and in terms of territorial factors, Republican nominees appear more concerned with the place of conduct, and Democratic nominees appear more concerned with the place of injury."); Peresie, *supra* note 27, at 1769 ("[J]udges appointed by Democratic presidents found for [Title VII] plaintiffs more often than did Republican appointees.").

⁷⁴ See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 842-48 (2002) (detailing the ways in which gay men may cover their sexual orientation); see also Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES (Jan. 15, 2006), <https://www.nytimes.com/2006/01/15/magazine/the-pressure-to-cover.html> [<https://perma.cc/9HF7-JSHY>] (detailing the following conversation with a colleague when he began his career as a law professor: "'You'll have a better chance at tenure,' he said, 'if you're a homosexual professional than if you're a professional homosexual.' Out of the closet for six years at the time, I knew what he meant. To be a 'homosexual professional' was to be a professor of constitutional law who 'happened' to be gay. To be a 'professional homosexual' was to be a gay professor who made gay rights his work."). Consider also the following statement made to Dermot Meagher, the first openly gay judge in Massachusetts, prior to his election to the judiciary: "I don't want you to be presented as the gay candidate. You should be viewed as a highly qualified candidate who *happens to be gay*." Joyce Kauffman & John Ward, *The Experience of LGBT Lawyers*, in REFLECTIONS ON DIVERSITY IN THE MASSACHUSETTS LEGAL PROFESSION: PAST AND PRESENT (Rudolph Kass ed., 2014).

⁷⁵ See Aimée D. Dayhoff, *Sodomy Laws: The Government's Vehicle to Impose the Majority's Social Values*, 27 WM. MITCHELL L. REV. 1863, 1891 (2001) ("In

ties,⁷⁶ reservation about sharing details about their personal life and relationships is unsurprising.

Another division amongst the community of LGB judges is the amount of LGBTQ+-advocacy they engage in. There are some who have taken positions—both inside and outside the courtroom—that are explicitly pro-LGBTQ+ equality. Openly lesbian judge Tonya Clark was chastised when she publicly took the stance of refusing to oversee any heterosexual marriages in order to publicly bring attention to marriage inequality prior to the *Obergefell*⁷⁷ decision and the fact that she herself could not marry her partner.⁷⁸

In a similar vein, other judges are known for having done significant advocacy work on behalf of the LGBTQ+ community prior to being elected to the judiciary.⁷⁹ Patricia M. Logue, a judge on the Cook County Circuit Court, spent over a decade working at Lambda Legal fighting for the full recognition of LGBTQ+ rights.⁸⁰ This included serving as lead attorney in *Lawrence*⁸¹—the Supreme Court case rendering sodomy laws

Minnesota, an openly gay judge was removed from the bench because he ‘may’ be violating Minnesota’s sodomy law. In North Carolina, an openly gay judge was accused of creating a conflict between being one who upholds the laws of the state, and one who openly breaks the state sodomy laws.”).

⁷⁶ See, e.g., Haeyoun Park & Iaryna Mykhyalyshyn, *L.G.B.T. People Are More Likely to Be the Targets of Hate Crimes Than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html> [<https://perma.cc/WA5H-HH33>] (“[LGBT people are] the most likely targets of hate crimes in America . . .”).

⁷⁷ See generally *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (holding that same-sex couples have a fundamental right to marry, and invalidating state laws discriminating against same-sex marriages).

⁷⁸ See Leon Watson, *Openly Gay Judge Refuses to Marry Straight Couples Until Same Sex Couples get Same Rights*, DAILY MAIL (Feb. 24, 2012), <https://www.dailymail.co.uk/news/article-2105958/Openly-gay-Judge-refuses-marry-straight-couples-sex-couples-rights.html> [<https://perma.cc/N6EW-EED4>]; SOGI Commissioner, *Q & A with Hon. Tonya Parker*, AM. BAR ASSOC. (Nov. 1, 2017), https://www.americanbar.org/groups/diversity/sexual_orientation/publications/equalizer/2017-winter/hon-tonya-parker/ [<https://perma.cc/YN5C-93LA>].

⁷⁹ Judge Paul G. Feinman of the New York Court of Appeals, for instance, not only founded the Gay Student’s Association at the University of Minnesota Law School, but also became the president of the LGBT Bar Association of Greater New York upon graduation. See *Meet Judge Feinman—New York’s First Openly Gay Judge on Its Highest Court*, NAT’L LGBT BAR ASSOC. (Nov. 8, 2017), <https://lgbtbar.org/bar-news/meet-judge-feinman-new-yorks-first-openly-gay-judge-highest-court/> [<https://perma.cc/QAV6-FWGV>].

⁸⁰ *Lambda Legal Honors Judge Patricia Logue*, WINDY CITY TIMES (Mar. 3, 2018), <http://www.windycitymediagroup.com/lgbt/Lambda-Legal-honors-judge-Patricia-Logue/62099.html> [<https://perma.cc/QCM8-QRZN>].

⁸¹ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas’s law criminalizing sodomy and overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

unconstitutional.⁸² Judge Mike Jacobs, quoted in this Note's epigraph, was also known for supporting and implementing pro-LGBTQ+ initiatives prior to both his coming out and his elevation to the judiciary.⁸³

On the contrary, however, there are also LGB decision makers who have been considered antigay prior to their election to the bench. Judge Vaughn Walker, for example, represented the U.S. Olympic Committee in an action against a gay group, attempting to label itself the "Gay Olympics."⁸⁴ Obviously then, the evidence is split.

Collectively, LGB judges have largely been reticent in response to direct questions of if and how their sexual orientation influences their approach to decision making. When asked, the majority of answers have ranged from avowed impartiality⁸⁵ to coy dismissal.⁸⁶ Indeed, while a few judges have acknowledged possible influence,⁸⁷ the overwhelming majority of LGB judges maintain that their sexual orientation has little, if any, influence in their approach to deciding cases.

⁸² *Lambda Legal Honors Judge Patricia Logue*, *supra* note 80.

⁸³ See Greg Bluestein, *DeKalb Judge at Center of 2015 'Religious Liberty' Fight Comes Out as Bisexual*, ATLANTA J.-CONSTITUTION (May 1, 2018), <https://politics.myajc.com/blog/politics/dekalb-judge-center-2015-religious-liberty-fight-comes-out-bisexual/nX7mokpOjNimtD2R6cUPoN/> [<https://perma.cc/F5G4-FSTE>].

⁸⁴ See Philip Shenon, *Battle Looming Over a Nominee for U.S. Court*, N.Y. TIMES (Jan. 14, 1988), <https://www.nytimes.com/1988/01/14/us/battle-looming-over-a-nominee-for-us-court.html> [<https://perma.cc/5N3H-KQMA>].

⁸⁵ Deborah Batts, the first openly LGB federal judge, once stated in an interview with the New York Law Journal that she "did not want to be known as the gay judge." Henry J. Reske, *Appointment Breaks Barrier: First Openly Gay Federal Judge Assumes Duties*, A.B.A. J. 29, 29 (1994) ("I'm a mother . . . I'm an African American. I'm a lesbian. I'm a former professor. If people assume any one of these aspects is going to predominate, it would create a problem." (internal quotation marks omitted)). Likewise, Judge Michael R. Sonberg of the New York County Supreme Court has attested: "That someone is L/G/B/T really does not have an impact on how I deal with the case . . ." Symposium, *Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual, and Transgendered [sic] Law*, 27 FORDHAM URB. L.J. 279, 323 (1999).

⁸⁶ For instance, when Judge John Paul Barnich was asked whether, as a gay judge, he would be different than a heterosexual judge, he responded that he "would upgrade the courtroom's sound system in order to play show tunes." *John Paul Barnich, First Openly Gay City Judge, Dies at 63*, WALTRIP HIGH SCHOOL CLASS OF 1973 (Feb. 3, 2009), http://www.waltripclassof73.com/class_profile.cfm?member_id=6011663 [<https://perma.cc/9SLQ-5GC8>].

⁸⁷ See, e.g., Jerome Stuart Nichols, *Kuhnke Could Be First Lesbian Judge Elected in Michigan*, PRIDE SOURCE (Oct. 11, 2012), <https://pridesource.com/article/56142-2/> [<https://perma.cc/CGZ5-BHKN>] ("So, where we have laws that are not friendly to the LGBT community, an LGBT judge advocating for change and explaining why change is needed is, I think, tremendously helpful.").

The judges' reluctance to acknowledge their sexual orientation is somewhat understandable given the once widely held negative stereotypes about queerfolk collectively,⁸⁸ the fact that a judge's sexual orientation was once considered a viable reason to oppose a judicial nominee's candidacy,⁸⁹ and because the ability to remain impartial to one's own personal characteristics has always been a thorn in the continuous debate in the

⁸⁸ Steve Schmadeke, *Gay, Lesbian Judges Note the Progress in Cook*, CHI. TRIBUNE (Dec. 6, 2009), <http://www.chicagotribune.com/news/ct-xpm-2009-12-06-0912050274-story.html> [<https://perma.cc/9NCW-DSDV>] (noting a "cutting joke" about an openly gay judge, Thomas Chiola, spread through Cook County invoking the historical stereotype linking homosexuality and pedophilia); see also Jennifer Bendery, *Obama Picks Staci Michelle Yandle, Black Lesbian Judge, for Federal Judgeship*, HUFFINGTON POST (Feb. 15, 2016), https://www.huffingtonpost.com/2014/01/16/obama-black-lesbian-judicial-nominee_n_4612412.html [<https://perma.cc/K2CS-CDXD>] (quoting Yandle as saying: "When I first started practicing, for a while I did not feel comfortable acknowledging my sexual orientation because I didn't want it to cost me my job Many members of the LGBT community still have that fear." (internal quotation marks omitted)).

⁸⁹ For example, in 2012, openly gay prosecutor Tracy Thorne-Begland's judicial appointment was strongly opposed and eventually blocked by the Virginia GOP for being a homosexual activist and apparently exhibiting "a pattern of behavior that is just notorious for homosexual advocacy." Sabrina Tavernise, *Gay Prosecutor is Denied Virginia Judgeship Despite Bipartisan Support*, N.Y. TIMES (May 15, 2012) (internal quotation marks omitted), <https://www.nytimes.com/2012/05/16/us/politics/gay-prosecutor-is-denied-judgeship-in-virginia.html> [<https://perma.cc/H9S2-LTNA>]. In an interview, Republican Delegate Bob Marshall made clear that his opposition to Thorne-Begland was solely on the basis of his sexual orientation, stating: "We have a constitution which says marriage is between one man and one woman [H]is lifestyle is exactly contrary to that." Alix Bryan & Lorenzo Hall, *State Lawmaker Challenges Gay Judge Nominee*, WTVR (May 14, 2012, 08:58 PM) (internal quotation marks omitted), <https://wtvr.com/2012/05/13/marshall-challenges-gay-judge-nominee-tracy-thorne-begland/> [<https://perma.cc/SQN2-SRA3>]; see also Ken Dixon, *Republicans Reject McDonald for Supreme Court Chief*, CT POST (Mar. 27, 2018, 6:34 PM), <https://www.ctpost.com/local/article/Republicans-ready-to-sink-McDonald-for-Supreme-12784561.php> [<https://perma.cc/L4D2-GGCD>] (relating how the Connecticut legislature rejected an openly gay judge's nomination); Aimee Green, *Judge Vance Day Should be Ousted from Job, in Part for Refusing to Marry Gays*, COMMISSION SAYS, OREGONIAN (Jan. 25, 2016), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/judge_vance_day_should_be_oust.html [<https://perma.cc/2JQT-LN5Q>] (noting that Judge Vance Day opposed the appointment of Marion County Circuit Judge Cheryl A. Pellegrini "because of her sexual orientation as a lesbian"); Carrie Maxwell, *Lesbian Judge Andrea Schleifer on Bias, Cases, Elections*, WINDY CITY TIMES (Mar. 14, 2012), <http://www.windycitymediagroup.com/lgbt/Lesbian-judge-Andrea-Schleifer-on-bias-cases/36661.html> [<https://perma.cc/4KF8-U7XG>] (relating that homophobic discrimination prevented her from becoming a judge in the 1980s and '90s); Amanda Terkel, *Traditional Values Coalition Tells Senators to Block Judicial Nominee Because She's a 'Radical Lesbian'*, THINK PROGRESS (Apr. 20, 2010, 3:12 PM), <https://thinkprogress.org/traditional-values-coalition-tells-senators-to-block-judicial-nominee-because-shes-a-radical-lesbian-1868290652e4/> [<https://perma.cc/64NJ-X2AJ>] (describing how certain Republicans attempted to block an Obama nominee).

movement for judicial diversity.⁹⁰ The question of impartiality has formed a dark cloud over LGB judges in particular, with many openly suggesting that LGB judges are inherently biased against religious plaintiffs⁹¹ and favor the queer community.⁹² Relatedly, some have gone as far to suggest that LGBT legal victories signed by a gay judge would not hold as much weight as those signed by a judge who was “conservative [and] straight.”⁹³

⁹⁰ *E.g.*, Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C.L. REV. 95, 97 (1997) (arguing that “[t]he importance of detachment, disinterest and impartiality to good judging is so imbedded in our legal mythology that acknowledging judges as representatives can be perceived as a threat to the judicial function” (footnote omitted)).

⁹¹ *See* Duffy, *supra* note 11 (collecting sources); *see also* Drake v. Walker, 529 S.W.3d 516, 518 n.1 (Tex. App. 2017) (rejecting an appellant’s argument that as “a Christian [he] has a right to object to a ‘gay’ or ‘lesbian’ judge”).

⁹² *See, e.g.*, Frederick C. Hertz, *When Legal Protections Are Few . . . Breaking Up Is Hard to Do*, 20 FAM. ADVOC. 12, 18 (1997) (suggesting that lesbian or gay judges would have to recuse themselves from overseeing LGB divorces, “because of the likely potential for a conflict due to overlapping social and professional circles”); Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 466–67 (2014) (detailing debates on whether Judge Sophia Hall, a lesbian, should recuse herself from hearing twin lawsuits challenging the Illinois law prohibiting same-sex marriage); Siobhan Morrissey, *Overlooked No Longer: A New ABA Commission Will Address Sexual Orientation and Gender Identity Issues in the Legal Profession*, 93 A.B.A. J. 62, 62–63 (2007) (relating an anecdote where a public defender requested a gay judge recuse himself from a case including a gay victim); Eva S. Nilsen, *The Criminal Defense Lawyer’s Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 33 (1994) (recalling that as a member of a legal team for a defendant accused of a homophobic hate crime, she “feared that [gay] judges would be especially sensitive to issues of gay bashing and might therefore be less receptive to our client’s claim of innocence”); Carmen, *Anti-Gay Community Very Worried About Lesbian Judge’s Opinion on Gay People*, AUTOSTRADDE (July 26, 2012, 2:35 PM), <https://www.autostraddle.com/anti-gay-community-very-worried-about-lesbian-judges-opinion-on-gay-people-142259/> [<https://perma.cc/T2MY-A6LD>] (noting that “[a]nti-gay activists” have called it a “conflict of interest” for an openly gay judge to preside over a case involving marriage equality); Eric Resnick, *The L Word Enters Wisemans Judicial Race*, GAY PEOPLE’S CHRON. (Jan. 25, 2008), <http://www.gaypeopleschronicle.com/stories08/january/0125081.htm> [<https://perma.cc/W9QQ-9DHU>] (noting an opponent in a 2008 Montgomery Pleas Court suggested a candidate “should not hear cases involving Ohio’s same-sex marriage ban amendment or Dayton’s new human rights ordinance, because she is lesbian”).

Accusation of pro-LGBT bias was also recently lobbed at President Trump’s first LGBT judicial nominee, Judge Mary Rowland. *See* Calvin Freiburger, *Trump Nominates Lesbian Judge Tied to LGBT Groups for Federal Bench*, LIFESITE (Aug. 24, 2018), <https://www.lifesitenews.com/news/trump-nominates-lesbian-judge-tied-to-lgbt-groups-for-federal-bench> [<https://perma.cc/V6LE-4PXL>] (stating Rowland’s “professional associations raise doubts as to whether [she] would separate her homosexuality from her jurisprudence . . .”).

⁹³ *See* Sharon E. Debbage Alexander, Romer v. Evans and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America, 6 TEX. F. ON C.L. & C.R. 261, 284 n.93 (2002) (describing the predica-

2. *A Review of Case Law Involving LGB Judges*

When considering how a judge's personal characteristics might affect decision making, the conventional wisdom is that a judge will be less likely to vote against their own interests. Thus, "[a] black or gay judge," it is thought, "would not have handed down *Plessy v. Ferguson* or *Bowers v. Hardwick*."⁹⁴ Within the case law, a cursory look does suggest that LGB judges are overrepresented in pro-LGBTQ+ cases. Consider that two of the twelve cases legalizing same-sex marriage at the state level were overseen by openly gay judges. The first, in California, was issued by Judge Vaughn Walker, who did not come out until after the ruling.⁹⁵ The second, in Oregon, written by District Judge Michael J. McShane who took a notably personal tone and "recalled the indecencies, big and small, of the homophobia and hate he experienced both as a young man and as an adult."⁹⁶ Judge McShane is also the author of what is considered one of the most progressive and far-reaching opinions on the health care of transgender inmates.⁹⁷

A more comprehensive consideration, however, shows that by no means do these anecdotes prove that LGB judges are partial towards litigants who themselves are LGBTQ+. To the contrary, LGB judges have authored opinions that cut against equality for sexual minorities. In 1979, for example, the first openly gay judge in the United States, Stephen Lachs,⁹⁸ took a less-than-pro-gay stance when he conceded that societal prejudice against lesbians and gays might justify denying the

ment the legal team in *Romer v. Evans* faced when choosing a judge to hear their district court case: "There was some concern that they would draw a gay judge, and the general consensus . . . was that this would not be the most desirable situation for the plaintiffs. A favorable verdict from a gay jurist might not have provided as strong a case going into the inevitable appeal as one from a moderate to conservative straight judge. Further, an unfavorable decision from a gay judge could be lethal to the case." (citations omitted).

⁹⁴ Richard Delgado, *Rodrigo's Committee Assignment: A Skeptical Look at Judicial Independence*, 72 S. CAL. L. REV. 425, 444 (1999) (footnotes omitted).

⁹⁵ See Bob Egelko, *Judge Vaughn Walker Tells His Side of Prop. 8 Trial*, S.F. GATE (Apr. 20, 2014, 11:09 PM), <https://www.sfgate.com/lgbt/article/Judge-Vaughn-Walker-tells-his-side-of-Prop-8-5416851.php> [<https://perma.cc/HT3B-HTM6>].

⁹⁶ Ari Ezra Waldman, *The Freedom to Marry: Politics and Law in 2014 and Beyond*, 40 HUM. RTS. 19, 22 (2014).

⁹⁷ See William J. Rold, *Prisoner Litigation Notes*, 2018 LGBT L. NOTES 91, 94 (Feb. 2018) (describing the case, *Wright v. Peters*, 16-cv-01998 (D. Ore., filed October 17, 2016), as "the most far reaching" settlement addressing the needs of transgender inmates).

⁹⁸ See generally CHUCK MCFADDEN, *TRAILBLAZER: A BIOGRAPHY OF JERRY BROWN* 91 (2013) (discussing how "[Governor Jerry Brown] continued to be a trailblazer in appointments" by appointing LGBTQ+ judges).

right to adopt to queer persons.⁹⁹ Additionally, openly gay Oregon Supreme Court justice, Rives Kistler, voted with a unanimous court upholding Oregon's ban on same-sex marriage.¹⁰⁰ Despite this, his ability to remain impartial on the topic of gay rights was openly questioned,¹⁰¹ and he consulted a judicial ethics panel prior to hearing the case.¹⁰² Thus, despite conservatives' conjectures, it is clear that LGB decision makers do not unvaryingly support queer parties before the court.

Still, interestingly, in the cases where LGB judges have ruled against queer plaintiffs, they have displayed a depth of understanding of LGBTQ+ issues that is often beyond that of their heterosexual counterparts. In *Doe v. Fedcap Rehabilitation Services, Inc.*, United States District Judge J. Paul Oetken, an openly gay federal judge, dismissed a genderqueer trans masculine plaintiff's request to remain anonymous.¹⁰³ Throughout the order, Judge Oetken is particularly careful to acknowledge the weight of publicly acknowledging one's sexual minority status entails.¹⁰⁴ Indeed, beyond emphasizing the plaintiff's difficulty in coming out,¹⁰⁵ Judge Oetken also granted the plaintiff a fourteen-day time period in which to decide whether they wanted to proceed using their real name.¹⁰⁶

This understanding, and perhaps empathy, has been consistently recorded with respect to LGBTQ+ and adjacent issues in the courtroom. It was LGBTQ+ decision makers who pioneered asking prospective jurors whether they had a domestic partner as opposed to being married—heightening the visibility

⁹⁹ See Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 877 n.157 (1985) (characterizing such arguments as "a truly rational concern, considering the intensity of our society's prejudice and the cruelty which children can exhibit toward one another" (internal quotation marks omitted)).

¹⁰⁰ *Li v. State*, 110 P.3d 91, 102 (Or. 2005) (en banc); MICHAEL KLARMAN, FROM THE CLOSET TO THE ALTER: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 214 (2014).

¹⁰¹ KLARMAN, *supra* note 100, at 214.

¹⁰² Joan Biskupic, *Amid Debate Over Rights, Number of Gay Judges Rising; Most Report Sexual Identity Not an Issue, but Conservative Groups Wary*, USA TODAY, Oct. 17, 2006, at 5A, https://usatoday30.usatoday.com/news/washington/2006-10-17-gay-judges_x.htm [<https://perma.cc/ZN2Q-568L>].

¹⁰³ *Doe v. Fedcap Rehabilitation Services, Inc.*, No. 17-CV-8220 (JPO), 2018 U.S. Dist. LEXIS 71174, at *9 (S.D.N.Y. Apr. 27, 2018).

¹⁰⁴ See *id.* at *7 ("The Court is mindful that coming out is a delicate process, and that LGBTQ individuals may feel comfortable disclosing one aspect of their identity but uncomfortable disclosing another.")

¹⁰⁵ *Id.* at *9. ("In sum, the Court certainly believes Plaintiff that public disclosure of their trans-masculinity would be difficult and uncomfortable.")

¹⁰⁶ *Id.*

and inclusion of LGBTQ+ venire members.¹⁰⁷ In other instances, LGB judges were known for the empathy and respect they showed to persons living with HIV and AIDS, especially at a time when such respect was scarce, given the many harmful misconceptions of persons living with the illness.¹⁰⁸ Judge Robert J. Sandoval, the first openly gay judge elected in California, reprimanded court staff who would wear plastic gloves when interacting with plaintiffs who were living with HIV.¹⁰⁹ Further, Judge Sandoval also ended the practice of publicly announcing the AIDS testing results required for those charged with prostitution. Instead, he began informing such persons privately in his chambers with a grief counselor present for support.¹¹⁰

Outside of the realm of LGBTQ+ issues, it is more unclear if sexual orientation impacts the decision makers' empathy towards other subordinated groups. To illustrate, though Judge Pamela Chen, an open lesbian, is noted for her decision to impose punitive damages in a case involving police brutality against an African American man—a rarity¹¹¹—Judge Vaughn Walker is equally renowned for his membership in a private club that refused membership to women and minorities.¹¹²

On balance, then, the anecdotal and testimonial evidence is sparse, and equally important, the outcomes are mixed. To combat this, the following Parts present the first empirical examination of the role of sexual orientation in decision making.

II

RESEARCH METHODOLOGY

A. Observational Study Design

To explore the theory that LGB identity influences judicial decision making, this Note adopts a methodology similar to that used by Adam Glynn and Maya Sen in *Identifying Judicial*

¹⁰⁷ Elaine Woo, *Robert J. Sandoval, 56: Openly Gay Judge, Ex-City Prosecutor*, L.A. TIMES (Mar. 6, 2006, 12:00 AM), <http://articles.latimes.com/2006/mar/06/local/me-sandoval6> [https://perma.cc/ND67-GSEE].

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Rebecca Rosenberg & Ruth Brown, *NYPD Cop Beaten by Other Officers Could Still Get \$5.4M*, N.Y. POST (Aug. 28, 2018, 4:59 PM), <https://nypost.com/2018/08/28/nypd-cop-beaten-by-other-officers-could-still-get-5-4m/> [https://perma.cc/5LNV-LFUF].

¹¹² Shenon, *supra* note 84.

Empathy.¹¹³ Instead of using data from the United States Courts of Appeals, however, this Note uses data from the United States district courts. This Note restricts its data set to include only federal district court judges and cases because eleven of the twelve active, senior, or retired LGB federal judges are on the district court level. Restricting the data set to exclusively district court cases also eliminates the influence of any confounding variables arising from the different decision-making contexts associated with federal district courts and federal appellate courts.¹¹⁴

Additionally, this Note limits its geographic scope to the two federal judicial districts that encompass New York City—that is, the federal district courts for the Eastern District of New York (EDNY) and Southern District of New York (SDNY)—to limit the data challenges and increase the power of the observations described later in the Note. Therefore, the LGB observational group will consist of four judges: Pamela K. Chen (active, EDNY), Alison J. Nathan (active, SDNY), Deborah Batts (senior status, SDNY), and James P. Oetken (active, SDNY). The control group will include other federal judges from EDNY and SDNY.¹¹⁵

Glynn and Sen aptly noted that “gathering personal information on federal judges is a difficult enterprise. . . .”¹¹⁶ Glynn and Sen explained that they focused on federal appellate court cases—at least in part—because of the relative ease in collecting data for appellate court judges, as opposed to district court judges.¹¹⁷ Although collecting data for the federal district court judges was challenging, this Note was able to collect almost all of the information it sought.¹¹⁸

Glynn and Sen also noted that the federal appellate courts were appealing because of their “long-standing practice of not

¹¹³ See Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 42–45 (2015).

¹¹⁴ Moreover, Judge Todd M. Hughes serves on the Court of Appeals for the Federal Circuit, which deals mainly with patent and related cases. Therefore, it is unlikely that Judge Hughes will have decided many—if any—cases that are relevant for this Note's empirical analysis.

¹¹⁵ As shown below, this Note's data set of cases features decisions by fifty-six judges from EDNY and SDNY in addition to the four LGB judges. As mentioned above, see *supra* note 34, at the time of this note's completion and during the 2018 observational period, Judge Deborah Batts was still serving as a senior judge on the Southern District of New York, see *infra* note 139 and accompanying text.

¹¹⁶ Glynn & Sen, *supra* note 113, at 42.

¹¹⁷ *Id.*

¹¹⁸ See *infra* subpart III.B for a more robust explanation and discussion.

allowing justices to request cases.”¹¹⁹ More specifically, justices with daughters could not request gender-related cases, which might have confounded their data. It appears, however, that most federal district courts also adhere to random-assignment rules that would prevent a federal district court judge from requesting particular cases.¹²⁰ This includes both the Southern and Eastern Districts of New York.¹²¹ The random assignment of cases in the two federal judicial districts this Note examines will reduce any confounding variables related to judges selecting their own cases.

Further, this Note recognizes that there may be some non-random assignment or selection of cases.¹²² Still, this Note considers all employment discrimination cases regardless of the basis for the discrimination claim. The cases included in the data pool include cases involving plaintiffs alleging discrimination on the basis of race, color, sex, gender, age, disability, religion, sexual orientation, and several other bases. Moreover, the plaintiffs bring discrimination claims under a myriad of statutes—including but not limited to Title VII,¹²³ the Americans with Disabilities Act,¹²⁴ the Age Discrimination in Employment Act,¹²⁵ the Family and Medical Leave Act,¹²⁶ the New York State Human Rights Law,¹²⁷ the New York City Human

¹¹⁹ Glynn & Sen, *supra* note 113, at 42.

¹²⁰ See, e.g., C.D. CAL. GEN. ORDER NO. 08-05 § 1.2 (2008) (“The assignment of civil cases shall be completely at random through the Automated Case Assignment System (ACAS).”); D. OR. R. 16-1(a) (“The case will be randomly assigned to a judge in accordance with the Court’s Case Management case number.”); N.D. ILL. R. 40.1(a) (“[T]he assignment of cases shall be by lot.”); D.N.M. CIV. R. 73.1(a), (c) (ordering random assignment of cases to Magistrate Judges); E.D. PA. CIV. R. 40.1(b) (outlining a random assignment process).

¹²¹ See *Rules for the Division of Business Among District Judges*, S.D.N.Y. R. 1, E.D.N.Y. R. 50.2, <http://www.nysd.uscourts.gov/rules/rules-2018-10-29.pdf> [<https://perma.cc/X2LL-UTPX>]. But see Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York’s “Related Cases” Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 210 (2014) (“Yet a close examination of the Southern District of New York’s rules reveals that random assignment, though presumed to be the status quo, is often the exception rather than the rule.”).

¹²² See Macfarlane, *supra* note 121, at 210–14 (discussing how the case assignment and selection process in SDNY is not entirely random).

¹²³ Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. §§ 2000e to –17 (2012).

¹²⁴ The Americans with Disabilities Act of 1990 is codified at 42 U.S.C. §§ 12101–12213 (2012).

¹²⁵ The Age Discrimination in Employment Act of 1967 is codified at 29 U.S.C. §§ 621–34 (2012).

¹²⁶ The Family and Medical Leave Act of 1993 is codified at 29 U.S.C. §§ 2611–19 (2012).

¹²⁷ The New York State Human Rights Law is codified at N.Y. EXEC. LAW §§ 290–301 (McKinney 2019).

Rights Law,¹²⁸ among others. Thus, while it is possible that LGB judges could nonrandomly select LGBTQ+-related discrimination cases or discrimination cases based on another characteristic, it is equally possible that heterosexual judges could nonrandomly select discrimination cases based on a particular demographic characteristic. Presumably, then, the effect, if any, of case requesting will equally affect both the observational group and the control group.

B. Variables and Observational Groups

In conducting an empirical analysis of the voting patterns of LGB judges as compared to heterosexual judges, this Note uses sexual orientation and LGB identity as the independent variable of interest and a judge's case judgments as the dependent variable. The dependent variable will be coded (1) if the judge's decision in an employment discrimination case favors—either completely or partially—the claimant/plaintiff and will be coded (0) otherwise.

But first this Note must address the issue of properly identifying a judge's sexual orientation.¹²⁹ Recognizing that resolving this issue inevitably will entail a degree of imprecision, this Note will use opposite-sex marriage as a proxy for heterosexuality. Therefore, a judge who is married to a member of the opposite sex will be designated as heterosexual for the purposes of the empirical analysis. On the other hand, this Note will not use same-sex marriage or any other proxy for LGB identity.¹³⁰ Instead, this Note will include federal judges who

¹²⁸ The New York City Human Rights Law is codified at N.Y. ADMIN. CODE §§ 8-101 to 133 (2019).

¹²⁹ This Note is not the first to encounter this issue. Amongst scholars who study sexual minorities, there is general consensus on the difficulty of capturing adequate samples. See Michael E. Martell, *Differences Do Not Matter: Exploring the Wage Gap for Same-Sex Behaving Men*, 39 E. ECON. J. 45, 50 (2013) (documenting the misclassification that occurs when male sexual history is used as a proxy for homosexuality); Michael E. Martell & Mary Eschelbach Hansen, *Sexual Identity and the Lesbian Earnings Differential in the U.S.*, 75 REV. SOC. ECON. 159, 160 (2017) (demonstrating that studies using sexual history and cohabitation status as proxies for lesbianism misclassify women who identify as lesbians); Nattavudh Powdthavee & Mark Wooden, *Life Satisfaction and Sexual Minorities: Evidence from Australia and the United Kingdom*, 116 J. ECON BEHAV. & ORG. 107, 112 (2015) (detailing the shortcomings of every form of measuring sexual orientation in social science); FEDERAL INTERAGENCY WORKING, GROUP CURRENT MEASURES OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS 19–20 (Aug. 2016), https://nces.ed.gov/FCSM/pdf/current_measures_20160812.pdf [<https://perma.cc/997R-427E>].

¹³⁰ If this Note were to use opposite-sex and same-sex marriages as proxies to designate the two observational groups, there would be few judges to populate the

openly identify as LGB in the LGB designation.¹³¹ Furthermore, because this Note uses opposite-sex marriage merely as a proxy for heterosexuality, any openly LGB judges who are married to a member of the opposite sex will still be included in the LGB observational group.¹³²

This Note acknowledges that in using both cohabitation and self-identification as indications of sexual orientation, it may incorrectly include bisexual judges who do not openly identify as bisexual in the heterosexual observational group.¹³³ Capturing bisexual individuals with precision remains a central problem in research on sexual orientation.¹³⁴ Theoretically, however, this also could apply to a lesbian or gay judge who nonetheless is married to a member of the opposite sex.

C. Cases Considered

To test the relationship between a judge's sexual orientation and their voting pattern in employment discrimination cases, this Note will consider cases involving claimants alleging discrimination in the employment context.¹³⁵ Other scholarship has also focused on the relationship between a judge's

LGB judge group. This is because most openly LGB federal judges are not married.

¹³¹ See *supra* note 34.

¹³² It should be noted that none of the openly LGB judges in this Note's data pool is married to a member of the opposite sex. This Note deems it important to stipulate this methodological detail, however, for future research and for consistency purposes.

¹³³ The pool of judges included in this Note's observational study consists of sixty-two judges. Of the sixty-two judges, four judges openly identify as LGB and fifty-four judges are married to an individual of the opposite sex. Furthermore, eight of the judges neither openly identify as LGB or are married to an individual of the opposite sex. Part IV of this Note presents statistics from analyses both including and excluding the eight judges.

¹³⁴ See Greta R. Bauer & David J. Brennan, *The Problem with 'Behavioral Bisexuality': Assessing Sexual Orientation in Survey Research*, 13 J. BISEXUALITY 148, 150–51 (2013) (presenting a meta-analysis concluding there is no problem-free survey method to capture bisexual populations); cf. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 364 (arguing that bisexual invisibility stems from erasure).

¹³⁵ See *supra* notes 123–128 (listing the statutes under which the claimants bring the employment discrimination claims); see generally Jared Ham, Note, *Wrongful Termi(gay)tion: A Comparative Analysis of Employment Non-Discrimination Laws and LGBTQ+ Workplace Protections in South Africa and the United States*, 104 CORNELL L. REV. 233, 284 (2018) ("The United States still lacks comprehensive federal employment non-discrimination laws or workplace protections for LGBTQ+ individuals. Extending Title VII—either via court decision or by passing the Equality Act—will provide robust workplace protections on the basis of sexual orientation and gender identity.").

identity and their voting pattern in discrimination cases.¹³⁶ This Note aims to follow a method similar to that employed by past scholarship to assess this relationship.¹³⁷

Following the model of past scholarship, this Note will use relevant published and unpublished cases from EDNY and SDNY. To collect the relevant cases, this Note will include cases from WestLaw and LexisNexis that include the variants of the terms: “discrimination” and “employment.”¹³⁸ Additionally, this Note will consider case data in the year of 2018—that is, all employment discrimination cases in EDNY and SDNY between the dates of January 1, 2018 and December 31, 2018.¹³⁹ This follows the methodology and temporal scope of other empirical analyses of judicial decision making.

The original search returned about 900 cases. But of the 900 cases, about 500 cases either did not involve employment discrimination or the presiding judge was a magistrate judge. Thus, this Note was left with 401 cases involving employment discrimination. This Note proceeded to code the directionality of the judges’ decisions in those cases as being either (0) anti-employment discrimination plaintiff or (1) partially or entirely pro-employment discrimination plaintiff. This strategy adheres to the methodology that Glynn and Sen used in *Identifying Judicial Empathy*.¹⁴⁰ This Note, however, went one step further and considered only cases that were decided on the merits or involved dispositive motions.¹⁴¹ In other words, this Note re-

¹³⁶ See, e.g., Jon Gottschall, *Carter’s Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 171–72 (1983) (finding that female judges favored claimants in race and sex discrimination cases more than their male colleagues); Nancy E. Crowe, *The Effects of Judges’ Sex and Race on Judicial Decision Making on the U.S. Court of Appeals, 1981–1996*, at 1–2 (June 1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with UMI, A Bell & Howell Information Company) (finding that judges’ gender, race, and political affiliation impacted their likelihood of voting in favor of a sex discrimination plaintiff and race discrimination claimants).

¹³⁷ See *supra* subpart II.A.

¹³⁸ The exact search will be: discriminat! AND employ!.

¹³⁹ As explained in the following paragraph, the search for cases involving variants of “discrimination” and “employment” returned about 900 cases. This Note then had to eliminate cases that did not meet the requirements set forth in the methodology. Given that this Note restricted its data set to cases involving employment discrimination and cases decided by federal district court judges, countless cases had to be removed from the pool of cases that ultimately would be coded.

¹⁴⁰ Cf. Glynn & Sen, *supra* note 113, at 43 (coding judges’ votes as being either “(1) antifeminist or (2) partially or entirely feminist”).

¹⁴¹ Examples of dispositive motions in this Note’s data set include: motions to dismiss, motions for judgment on the pleadings, motions for a judgment as a matter of law, motions for summary judgment, motions for preliminary injunc-

moved any case from the pool of 401 that involved a nondispositive motion.¹⁴² This left 358 cases remaining in the data pool.

D. Characteristics of the Judge Pool

The pool of judges used in this Note's data set consists of sixty-two judges. Four of the judges identify as openly lesbian, gay, or bisexual. As previously explained, this Note did not assume that the remaining judges were heterosexual; this Note only included the judges who are married to members of the opposite sex as heterosexual. Eight judges were removed from the pool of judges because no marriage information could be gathered. This also resulted in the exclusion of thirty-four cases from the data set.¹⁴³

The pool of judges shows an approximately 55% to 45% gender divide with male judges outnumbering female judges. White judges make up approximately 71% of the pool of judges. Finally, approximately two-thirds of the judges were appointed by Democratic presidents and approximately three-fifths of the pool of judges reside in SDNY rather than EDNY. A summary of the judge pool demographics and the number of cases that each demographic group accounts for is included in Table 1.

tion, and motions to reconsider. *See generally* FED. R. CIV. P. 12(b) (motions to dismiss); FED. R. CIV. P. 12(c) (motions for judgment on the pleadings); FED. R. CIV. P. 50 (motions for judgment as a matter of law); FED. R. CIV. P. 56 (motions for summary judgment); FED. R. CIV. P. 65 (motions for preliminary injunctions).

¹⁴² Examples of nondispositive motions in this Note's data set include: motions to compel arbitration, motions to proceed *in forma pauperis*, motions to strike, motions to amend, motions to compel discovery, and motions in limine. *See generally* 9 U.S.C. § 4 (motions to compel arbitration); FED. R. APP. P. 24 (motions to proceed *in forma pauperis*); FED. R. CIV. P. 12(f) (motions to strike); FED. R. CIV. P. 15 (motions to amend); FED. R. CIV. P. 37 (motions to compel discovery).

¹⁴³ As explained below, this Note ultimately analyzes the data with the thirty-four cases included in the data pool. The results including the thirty-four cases is virtually identical to the results omitting the thirty-four cases. *See infra* subpart III.A.

TABLE 1: TABLE DISPLAYING THE DEMOGRAPHIC CLASSIFICATIONS OF JUDGE POOL

	Number of Judges	Percentage of Pool	Number of Cases	Percentage of Cases
1. Sexual Orientation				
LGB	4	6.45%	36	10.06%
Heterosexual	58	93.55%	322	89.94%
2. Gender				
Female	28	45.16%	155	43.30%
Male	34	54.84%	203	56.70%
3. Appointing Party				
Democratic	40	64.52%	250	69.83%
Republican	22	35.48%	108	30.17%
4. Race				
White	44	70.97%	228	63.69%
Black	9	14.52%	44	12.29%
Latinx	4	6.45%	37	10.33%
Other	5	8.06%	49	13.69%
3. Court				
SDNY	38	61.29%	245	68.44%
EDNY	24	38.71%	113	31.56%
Total	62		338	

E. Research Hypothesis

Building on previous research, the current study’s objective is to examine the role of sexual orientation in judicial decision making. Ideally, this Note’s study would explore the results of cases related to LGBTQ+ issues, differentiating between whether a judge was heterosexual or lesbian, gay, or bisexual (LGB). Unfortunately, the lack of such cases renders such an investigation impossible.¹⁴⁴ Consequently, this Note’s major hypothesis, derived from the literature, is as follows:

Prior field research generally suggests that minority judges are more favorable towards plaintiffs in employment discrimina-

¹⁴⁴ Only about two percent of the employment discrimination cases in the entirety of cases returned in the year-long search described in subpart II.A involved LGBTQ+ plaintiffs. This small number of cases involving LGBTQ+ plaintiffs is inadequate to empirically scrutinize. Therefore, this Note proceeded to consider all employment discrimination cases returned in the year-long search described in subpart II.A, regardless of the demographics of the plaintiff.

tion cases. Therefore, this Note might predict that LGB judges will be more pro-plaintiff than their heterosexual counterparts.

The research concerning LGBTQ+ judges and LGBTQ+ judicial decision making, however, is virtually nonexistent. And in keeping with the standard social science approach, the null hypothesis for this Note's observational study will be that there is no difference in the rates of pro-plaintiff outcomes between LGB and heterosexual/opposite-sex married judges.¹⁴⁵ Therefore, unless this Note finds a statistically significant difference in the voting patterns and judicial decision making of LGB and heterosexual/opposite-sex married judges, this Note will not reject the null hypothesis. In other words, the alternative hypothesis—that is, that LGB judges exhibit greater pro-plaintiff judicial voting behavior—will only be accepted if the data reveal a statistically significant difference between LGB judges and heterosexual/opposite-sex married judges.

III

RESULTS & DISCUSSION

A. Results

TABLE 2A: TABLE SHOWING THE BREAKDOWN OF PRO-PLAINTIFF OUTCOMES IN LGB AND NON-LGB JUDGES (INCLUDING ONLY MARRIED NON-LGB JUDGES)

Judges		Number of Judges' Decisions	Number of Pro-Plaintiff Decisions	Percentage Pro-Plaintiff Decisions
Republican Appointees	LGB	N/A	N/A	N/A
	Heterosexual	96	28	29.17%
	Total	96	28	29.17%
Democratic Appointees	LGB	36	16	44.44%
	Heterosexual	192	66	34.38%
	Total	228	82	35.98%
All Judges	LGB	36	16	44.44%
	Heterosexual	288	94	32.64%
	Total	324	110	33.95%
		*Here 34 decisions (from 8 judges) were excluded from the data pool because the judge was neither married nor openly LGB, or we were unable to locate publicly available marital information		

¹⁴⁵ Recall that this Note uses marriage to a member of the opposite sex as a proxy for heterosexuality. See *supra* subpart II.B.

TABLE 2B: TABLE SHOWING THE BREAKDOWN OF PRO-PLAINTIFF OUTCOMES IN LGB AND NON-LGB JUDGES (INCLUDING BOTH MARRIED AND NON-MARRIED NON-LGB JUDGES)

Judges		Number of Judges' Decisions	Number of Pro-Plaintiff Decisions	Percentage Pro-Plaintiff Decisions
Republican Appointees	LGB	N/A	N/A	N/A
	Heterosexual	108	33	30.56%
	Total	108	33	30.56%
Democratic Appointees	LGB	36	16	44.44%
	Heterosexual	214	75	35.05%
	Total	250	91	36.40%
All Judges	LGB	36	16	44.44%
	Heterosexual	322	107	33.23%
	Total	358	123	34.36%
		*Here we assume anyone who is not LGB is heterosexual		

Table 2A and Table 2B present the frequencies and corresponding proportions of pro-plaintiff decisions. The Tables further delineate by both sexual orientation and the partisan affiliation of the judge's appointing president. Table 2A presents the frequencies and corresponding proportions, but excludes decisions from the data pool where the judge was neither married nor openly LGB, or this Note was unable to locate publicly available marital information for the judge. In total, this Note determined that eight judges from the observational group were either unmarried or publicly available marital information for the judge could not be found. This reduced the total number of cases from 358 to 324. Table 2B presents the frequencies and corresponding proportions while including all judges in the observational group. In other words, this Note assumed that any judge who is not openly LGB is heterosexual. The difference in results between the two tables is negligible. Given the negligible difference in results, this Note will proceed and conduct statistical analyses using the entire pool of 358 cases.

The Tables suggest that there is a difference between the judicial voting behavior of LGB and non-LGB judges. Whereas non-LGB judges favored employment discrimination in 33% of cases, LGB judges favored employment discrimination cases in 44% of cases. Although the data suggest that LGB judges are

more likely to exhibit pro-plaintiff judicial voting behavior, subsequent statistical analyses find that the data does not suggest that the difference between LGB judges and their heterosexual counterparts is statistically significant.¹⁴⁶

This Note also sought to compare the judicial voting behavior of LGB judges appointed by Democratic presidents and Republican presidents. As of December 2018, however, there are no LGB judges on the federal bench that have been appointed by a Republican president. But a comparison of all Democratic-appointed judges and Republican-appointed judges renders a divergence similar to that demonstrated by LGB and non-LGB judges.

These results, while suggestive, should be treated with caution. Given the comparatively small number of both LGB decisions (thirty-six overall) and LGB pro-plaintiff decisions (sixteen of thirty-six, or approximately 44%), when comparing LGB decision making in this context to non-LGB decision making, this Note's models have insufficient LGB observations to allow for a differentiation from the null. In other words, while this Note's models do not show a statistically significant difference between LGB and non-LGB judges, this may simply be a function of "Type II Error" in which the model shows no difference, but one does, in fact, exist.

Given this Note's existing number of observations, to find an effect would require LGB pro-plaintiff decisions to occur at a proportion significantly larger than that of non-LGB judges. This Note can nonetheless posit that if there is a disparity between LGB and non-LGB judges, then that difference is not sufficiently stark to rise to significance in this Note's sample.

¹⁴⁶ As explained in subpart II.C, this Note only considered cases that were decided on the merits or involved dispositive motions and removed cases that were not on the merits or involved nondispositive motions from the data pool. The statistical analyses of only the cases involving dispositive motions found that the data does not suggest that the difference between LGB judges and their heterosexual counterparts is statistically significant. However, the statistical analyses of cases involving either dispositive or nondispositive motions found that the data suggest that the difference between LGB judges and their heterosexual counterparts is statistically significant. This Note discusses why this difference may exist in subpart III.B and explains why this difference necessitates further research in subpart III.C.

TABLE 3: CHI SQUARE COMPARING PRO-PLAINTIFF OUTCOMES IN LGB AND NON-LGB JUDGES

	Anti-Plaintiff	Pro-Plaintiff	Total
LGB Judge	20 (56%)	16 (44%)	36
Non-LGB Judge	215 (67%)	107 (33%)	322
N	235 (67%)	123 (34%)	358
Pearson $\chi^2(1) = 1.81$, Pr = 0.179			

Table 3 presents the frequencies and corresponding proportions of pro-plaintiff and anti-plaintiff decisions by both the LGB and non-LGB judges. Based on the frequencies and corresponding proportions, this Note calculated the Pearson Chi-Squared value to be 1.81. This value was calculated using the degrees of freedom equaling one. The Pearson Chi-Squared test analyzes whether the observed frequencies differ significantly from the expected frequencies. In this Note's model, it is expected that the proportion of pro- and anti-plaintiff decision will not differ between LGB and non-LGB judges (i.e., this Note's null hypothesis).¹⁴⁷ In other words, the Pearson Chi-Squared value, as applied to our observational study, assesses whether the difference in pro-plaintiff voting behavior between LGB and heterosexual judges can be attributed to their sexual orientation.

To reject the null hypothesis at the usual significance level of the p-value equaling 0.05, the data would need to produce a Pearson Chi-Squared value of 3.84. The data here produced a Pearson Chi-Squared value of only 1.81. Furthermore, the data produced a p-value of 0.179, which is well above the generally accepted 0.05 level. Therefore, this Note cannot conclude that the difference between the judicial voting behavior of LGB judges and their heterosexual colleagues in employment discrimination cases is statistically significant.

¹⁴⁷ See *supra* note 145 and accompanying text.

TABLE 4: LOGISTIC REGRESSION PRO-PLAINTIFF OUTCOMES IN EMPLOYMENT DISCRIMINATION CASES, EASTERN AND SOUTHERN FEDERAL DISTRICT COURTS OF NEW YORK, JANUARY TO DECEMBER 2018

	Coefficient	P-value
LGB Judge	2.04 (0.82)	0.073
Democrat Appointee	1.58 (0.54)	0.184
Female	0.46 (0.13)	0.008
White	0.77 (0.25)	0.416
Time on Bench (Months)	1.00 (0.001)	0.070
Constant	0.38 (0.19)	0.055
N	358	
Wald Chi 2	12.80	0.025

Notes: Standard errors in parenthesis, clustered on judge. Coefficients reported in odds-ratios.

Finally, Table 4 presents the logistic regression values for several independent variables, including: sexual orientation, partisan affiliation of appointing president, gender, race, and time on the bench. As with the Pearson Chi-Squared value, a p-value equal or less than 0.05 suggests that a variable produces a difference in outcome at a statistically significant level. The values in Table 4 suggest that there is not a statistically significant relationship between sexual orientation and pro-plaintiff judicial voting behavior. In other words, LGB judges do not exhibit pro-plaintiff judicial voting behavior at a rate statistically higher than their non-LGB counterparts.

The probability of obtaining the Wald Chi-Squared value for our model is 0.025, which means that we can reject the null hypothesis that taken together the independent variables have no effect on the dependent variable. The “LGB Judge” variable does not rise to significance, although we note that the p-value of 0.073 is just outside the standard 0.05 significance level. Given the results in our full sample—which include dispositive motions and nondispositive motions decisions alike—more

data may change this outcome.¹⁴⁸ Accordingly, these results should be treated with some caution.

In our sample, the odds of a female judge finding for the plaintiff are 54% less than that of a male judge (statistically significant at the 0.008 level). This result runs counter to other studies on women judges in the employment discrimination and sexual harassment context. From the data we collected, it is unclear whether other unobserved variables drive this result, and this is an area worthy of further study.

Overall, the data produced from cases spanning January 2018 to December 2018 do not allow this Note to conclude that LGB judges are statistically more likely to side with employment discrimination plaintiffs than their heterosexual counterparts. This Note again cautions excessive extrapolation from this data and recognizes the limited sample sizes corresponding to certain observational groups—especially the LGB judge group.

B. Discussion

One possible explanation for the results is that LGB judges are particularly adept at System II decision making.¹⁴⁹ That is, LGB judges are cognizant of and skilled at suppressing their intuitions—sympathizing and empathizing with plaintiffs alleging discrimination based on membership of a protected class.¹⁵⁰ Although research and legal scholarship suggest that judges generally are more hostile and less sympathetic to em-

¹⁴⁸ See *supra* note 146 for a more robust discussion about the difference between the dispositive motions sample and the full sample, which includes both dispositive and nondispositive motions.

¹⁴⁹ See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 20–30 (2011) (describing System I and System II decision making). System I decision making is fast, instinctive, and emotional, while System II decision making is slower, deliberative, and calculating. See *id.*

¹⁵⁰ Cf. Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities*, 85 CORNELL L. REV. 313, 329–30 (2000) (“Paying greater attention to generalized discrimination would not only affect the outcome of particular disputes, but also alter societal consideration of ‘analogies’ between ‘different’ kinds of discrimination and ‘coalitions’ between ‘different minorities. . . . The experience [of seeing how other minorities suffer from exactly the same source of inequality] may encourage these ‘different’ minorities to treat each other more decently. Recognizing generalized discrimination in some instances may therefore promote future equality, the prime purpose of antidiscrimination law.”). Judicial sympathy and empathy are not only relevant when a judge decides a case on the merits, but also at every phase of the trial—including when defining the scope of protected classes. Cf. Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 182 (2017) (decrying the “protected class gatekeeping” phenomenon and addressing the scope of the “problem”).

ployment discrimination claims than other claims,¹⁵¹ conventional wisdom might expect LGB judges to be more sympathetic and empathetic than their heterosexual counterparts.¹⁵² To be sure, as the members of a group that has been marginalized and discriminated against,¹⁵³ LGB judges are in a unique posi-

¹⁵¹ See, e.g., Donna M. Gitter, *French Criminalization of Racial Employment Discrimination Compared to the Imposition of Civil Penalties in the United States*, 15 COMP. LAB. L.J. 488, 521 (1994) (“[J]udges in the United States are perceived as less likely than a lay jury to be sympathetic to and deliver a verdict in favor of [an employment discrimination] plaintiff.”); Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304, 312 (1992) (“The availability of trial by jury [as opposed to the prospect of a bench trial,] is a significant victory for [employment discrimination plaintiffs].”); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 841–42 (1994) (“[T]he Court’s most recent decision interpreting Title VII again demonstrates persistent hostility toward civil rights plaintiffs.”); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 168 (2011) (“[There is] a larger movement of the judiciary toward foreclosing employment discrimination plaintiffs’ cases without the necessary analysis.”).

¹⁵² Cf. Beth Barrett, *Defining Queer: Lesbian and Gay Visibility in the Courtroom*, 12 YALE J.L. & FEMINISM 143, 160 (2000) (“[E]ducating juries and judges will play a critical role in the success of gay rights litigation. Rather than concede [LGBTQ+] invisibility, litigators must embrace an advocacy style that counteracts prejudice through self-definition and appeals to empathy. This approach focuses on making visible the real lives and experiences of lesbians and gay men living in a homophobic society.”). Additionally, the conclusions of studies conducted in other contexts can be extrapolated to the courtroom and the judicial decision-making context. For example, one study demonstrated that lesbian and gay parents, by virtue of their sexual orientation, are “apt to be more sensitive to issues surrounding their children’s sexual development and to injuries that children with nonconforming desires may experience, more open to discussing sexuality with their children, and more affirming of their questions about sexuality.” Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 178 (2001) (citations omitted). Presumably, if queer parents—because of their sexual orientation—are more sensitive to certain aspects of their children’s lives, queer judges—because of their sexual orientation—can be more sensitive to the plight of employment discrimination claimants.

¹⁵³ See *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1750 (2018) (Ginsburg, J., dissenting) (“[The Colorado baker] would *not* sell to [the same-sex couple], for no reason other than their sexual orientation, a cake of the kind he regularly sold to others.” (emphasis in original)); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601–02 (2015) (“As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”); *United States v. Windsor*, 570 U.S. 744, 770 (2013) (“The avowed purpose and practical effect of the [DOMA is] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”); *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (“Proposition 8, in the [Ninth Circuit]’s view, violated the Equal Protection Clause because it served no purpose but to impose on gays and lesbians, through the public law, a majority’s private disapproval of them and their relationships.” (internal quotation marks and citations omitted)); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring) (“Texas’

tion to sympathize and empathize with plaintiffs who have faced discrimination.¹⁵⁴ And unlike many—and perhaps most—heterosexual judges, LGB judges operate under a microscope.¹⁵⁵ Their decisions are heavily scrutinized and conservatives are quick to object to any instance of perceived bias.¹⁵⁶ As a result, LGB judges must be hypercognizant and hypersensitive to every word they use and every decision they make.¹⁵⁷

sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.” (internal quotation marks and citations omitted); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (“[The discriminatory Colorado constitutional amendment,] in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts upon them immediate, continuing, and real injuries”); see also Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 50 HASTINGS L.J. 1015, 1167 (1999) (“[A] thorough reading of the Article does reveal systematic and pervasive discrimination against homosexual individuals in our courts and dispels the popular idea that, because homosexual individuals occupy every walk of life, there is no real discrimination against them. On the contrary, homosexual individuals are penalized in all aspects of their lives because of their sexual preference.” (citations omitted)).

¹⁵⁴ Cf. Johnson, *supra* note 30, at 381 (“[W]hen deciding a case that involves a form of discrimination that only a certain class of discriminatees can experience, those life experiences will impact judicial decision[-]making. The premise is *not* that women or minorities have a different ‘voice’ on the court. Rather, there is a natural tendency to relate to individualized experiences.” (emphasis in original)); Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW. ENG. L. REV. 1173, 1207 (1992) (“The appointment of . . . gay judges will increase the likelihood that a different perspective will be brought into and to bear upon the adjudicative process.”). For a more robust discussion of judicial empathy, see generally Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012) (defending the use of empathy in judging); Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decision-making*, 85 S. CAL. L. REV. 313, 324–27 (2012) (discussing the “empathetic perspective” of judicial decision making); Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 911 (2015) (suggesting that judges cannot put their empathy aside).

¹⁵⁵ Cf. Alicia C. Shepard, *Judge Walker Is Gay. Are You Sure? Does It Matter?*, NPR (Aug. 17, 2010, 1:40 PM), <https://www.npr.org/sections/ombudsman/2010/08/09/129092082/is-it-relevant-that-the-judge-is-gay> [<https://perma.cc/8PV7-VSBL>] (“The ‘buzz’ about [Judge] Walker’s sexuality did become relevant after Prop 8 supporters lost and then said they didn’t get a fair shot because the judge is ‘openly gay.’ Even so, Walker’s sexual orientation is a side issue.”).

¹⁵⁶ See *supra* notes 11–15 and accompanying text.

¹⁵⁷ Cf. David Morgan, *Same-Sex Marriage Decision: “Far From Over”*, CBS NEWS (Aug. 8, 2010, 12:38 PM), <https://www.cbsnews.com/news/same-sex-marriage-decision-far-from-over/> [<https://perma.cc/U5AS-2LHK>] (“Tony Perkins, president of Family Research Council and a supporter of the ban on same-sex marriage, called the decision an example of judicial activism ‘I think what you have is one judge who thinks he knows—and a district level judge and an openly-homosexual judge at that—who says he knows better than not only 7 million voters in the state of California, but voters in 30 states across the nation’”).

Although the public expects all judges to impartially apply legal principles,¹⁵⁸ the margin for error is smaller for LGB judges.

The results this Note finds and discusses above can be reconciled with this conclusion. While at first glance the heightened System II decision making seems inconsistent with the disparity in statistical significance between the dispositive-motion sample and the full sample that also includes nondispositive motions, it is not. This Note proposes that it makes sense that sympathy and empathy for plaintiffs alleging discrimination are less pronounced when the LGB judges must rule on the merits or decide a dispositive motion. When the stakes are higher, the LGB judges will be more cognizant and sensitive to their decision making. That is, the LGB judges' System II decision making is stricter when they must decide motions that will dispose of the case one way or the other. In contrast, when the stakes are lower, the LGB judges' System II decision making is more relaxed and their intuitive decision making is stronger. Thus, the LGB judges' System II decision making operates on a spectrum—as the stakes increase or decrease, so too does the level of System II decision making.

C. Future Research

This Note recognizes its limitations. The population of LGB judges and the corresponding number of cases in this Note's data set are relatively small. Although the proportion of judges in this Note's data set who are LGB mirrored (or exceeded) the proportion of LGB individuals in the general population, future research could include even more LGB judges. For example, future research could conduct a similar observational study with every LGB federal district court judge in the country. Or future research could consider cases involving discrimination beyond just employment discrimination—for example, housing discrimination, adoption discrimination, marriage discrimination, immigration discrimination, or public accommodation discrimination.

The difference in statistical significance between the principal on-the-merits/dispositive-motion sample that this Note uses for its results and the full sample also suggests the need for future research. Additional research could further explore the difference between judicial decision making by LGB judges involving dispositive motions only and both dispositive and

¹⁵⁸ See ROBERT KEETON, *KEETON ON JUDGING IN THE AMERICAN LEGAL SYSTEM* 1.3.1 (1999).

nondispositive motions. Because the LGB Judge variable's *p*-value of this Note's logistic regression results is just outside the standard 0.05 significance level, further research could also apply this Note's methodology but to a data sample from a longer temporal period or different judicial districts to determine if the disparity in statistical significance between the two samples persists.

Furthermore, this Note originally sought to examine whether LGB judges exhibit greater pro-plaintiff judicial voting behavior in discrimination cases when the plaintiff is an LGBTQ+ individual. Unfortunately, the pool of relevant cases is currently prohibitively small.¹⁵⁹ As a result of the small pool of relevant cases, this Note had to broaden its sample to include all employment discrimination claims within EDNY and SDNY in 2018. When the number of discrimination cases featuring LGB judges and LGBTQ+ plaintiffs increase substantially, future research could—and should—consider this Note's original question as well. That, in this Note's view, is amongst the most important questions concerning LGBTQ+ judicial decision making and LGBTQ+ judges that legal researchers and political scientists can answer.

One of the largest barriers—if not *the* largest barrier—to researching LGBTQ+ judicial decision making is the jarring lack of LGBTQ+ judges. This is especially true on the federal bench. Currently, fewer than twenty LGB judges sit on the federal bench. And it is not likely that the number will dramatically increase in the next couple years. Even worse, there is not a single transgender or gender nonconforming judge on the federal bench. Beyond depriving legal researchers and political scientists of the necessary data to make conclusions about the judicial decision-making tendencies of LGBTQ+ judges, the lack of LGBTQ+ judges deprives the federal bench of diversity of identity and diversity of perspective. That is perhaps the most shameful implication. Thus, beyond calling for more research on LGBTQ+ judicial decision making and LGBTQ+ judges, this Note also calls for the nomination and confirmation of greater numbers of LGBTQ+ judges across the country and in districts outside New York City.

¹⁵⁹ See *supra* note 144 and accompanying text.

IV

SHOULD LGBTQ+ IDENTITY AFFECT DECISION MAKING?

In this Part, this Note steps back from the question of whether sexual orientation *actually does* have an effect on judicial decision making, and instead considers whether and how it *should* have an effect.¹⁶⁰ To do this, this Note summarizes the arguments made in the context of women and racial minority judges and exports them to location sexual minority status.

A. Previous Literature on Minority & Female Judges

Judicial diversity has three central benefits: (1) representation and role model value—that is, diverse judges serve as exemplars to their respective communities; (2) increased public confidence in the judiciary; and (3) the inclusion of unique perspective and additional level of understanding.¹⁶¹ The latter benefit is most germane for the purposes of this Note.

Previous scholarship has documented the important and distinct perspectives that minority and female judges bring to the bench. Illustratively, in her 1992 tribute to Justice Thurgood Marshall, Justice Sandra Day O'Connor demonstrated the educational benefits associated with this “special perspective.”¹⁶² There, she noted that prior to hearing Marshall—then a lawyer for the National Association for the Advancement of Colored People—arguing in *Brown v. Board*,¹⁶³ she had limited understanding of the experience of “being a minority in a society that cared primarily for the majority.”¹⁶⁴ In listening to Marshall, however, her “awareness of race-based disparities deepened.”¹⁶⁵ In doing so then, and as he would do many other times during his tenure on the Supreme Court, Marshall was bringing his perspective as an African American, intimate with the painful indignities of racism, to court. In a similar vein, female judges do the same. For example, during her confirmation, Justice Ginsburg responded that the woman would make the male Justices “look at life differently” when

¹⁶⁰ Justice Kagan recently emphasized that “with great power there must also come—great responsibility.” *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2415 (2015) (quoting S. Lee and S. Ditko, *Amazing Fantasy No. 15: “Spider-Man,”* p. 13 (1962)).

¹⁶¹ See Milligan, *supra* note 25, at 1240–46.

¹⁶² Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 *STAN. L. REV.* 1217, 1217 (1992).

¹⁶³ 347 U.S. 483 (1954) (striking down the segregation of black and white students in public schools).

¹⁶⁴ O'Connor, *supra* note 162, at 1217.

¹⁶⁵ *Id.*

asked about how women Justices would change the Supreme Court.¹⁶⁶ And in 2009, as Justice Sonia Sotomayor's "wise Latina" remarks drew furor, Ginsburg would revisit her remarks, saying: "[W]omen bring a different life experience to the table. . . . That I'm a woman, that's part of it, that I'm Jewish, that's part of it, that I grew up in Brooklyn, N.Y., and I went to summer camp in the Adirondacks, all these things are part of me."¹⁶⁷

These unique perspectives can have very real differences in judicial decision making, particularly in the deliberative appellate process.¹⁶⁸ Indeed, the inclusion of women and minorities on panels can greatly alter the outcomes of the case.¹⁶⁹

B. The LGBTQ+ Judge Context

Like their racial minority and female counterparts, LGBTQ+ judicial decision makers play an integral role in introducing previously excluded perspectives into the judiciary. As the anecdotal accounts demonstrate, LGBTQ+ judges can and have brought a wealth of personal experience that adds a special depth to their decision making, particularly about issues that concern the queer community.¹⁷⁰

Because queerfolk have been traditionally excluded from the judiciary—and society at large—there is even more need for LGBTQ+ judges to use their special perspective to educate other members of the bench and the wider society. Realistically, many cisgender and heterosexual people have limited interaction with and understanding of LGBTQ+ issues—decreasing their empathy in this regard. This is amplified by the particularly skewed demographics of the judiciary—as most are white, male, and heterosexual. By way of example, as Sylvia R. Lazos Vargas has previously demonstrated, the Supreme Court's opinion in *Bowers*¹⁷¹ ignored the perspectives of gays and lesbians, ultimately overlooking the detriments associated

¹⁶⁶ *People: The Finer Points of Andean Diplomacy*, INDEPENDENT (Aug. 10, 1993, 12:02 AM), <https://www.independent.co.uk/news/world/people-the-finer-points-of-andean-diplomacy-1460230.html> [<https://perma.cc/SS6H-4HVB>].

¹⁶⁷ Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES (July 7, 2009), <https://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html> [<https://perma.cc/JT58-KT9L>].

¹⁶⁸ See, e.g., *Token or Outsiders?*, *supra* note 50; Sherry, *supra* note 52.

¹⁶⁹ See subparts I.A–I.B.

¹⁷⁰ See subsection I.E.1.

¹⁷¹ *Bowers v. Hardwick*, 478 U.S. 186, 196 (upholding the constitutionality of Georgia's law criminalizing sodomy and other sexual acts between consenting adults).

with sodomy laws.¹⁷² Indeed, underlying the Court's justification for not striking down the sodomy law was the reasoning that its jurisprudence on family, procreation, or privacy was inapplicable to the case because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."¹⁷³

Arguably, the Court's reasoning that same-sex intimacy was completely separate from family and privacy interests could have been combatted by the perspective that an openly LGBTQ+ judge might have brought to the conference. For instance, a queer judge could have highlighted that Michael Hardwick, the defendant in the eponymous case, was arrested for acts with "his long-term lover in the privacy of his own home."¹⁷⁴ That the defendant had a longstanding intimate relationship cuts against the inference that there is no connection between family and homosexual activity. Indeed, as Lazos Vargas points out "[t]here can only be no connection between homosexual 'activity' and family if one concludes that the spiritual love and intimacy experienced in same-sex relationships is unlike the spiritual love and intimacy experienced by opposite sex couples."¹⁷⁵ A queer judge might have been able to explain that LGBTQ+ relationships are equally worthy of respect and value as their heterosexual counterparts.¹⁷⁶

More indirectly as well, as many cases involving lesbian and gay parents would later demonstrate, a parent's homosexual intimacy is squarely related to family. In the aftermath of

¹⁷² See Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 177-84 (1999)

¹⁷³ *Bowers*, 478 U.S. at 191.

¹⁷⁴ Lazos Vargas, *supra* note 172, at 178.

¹⁷⁵ *Id.* at 180.

¹⁷⁶ This is not to say that only queer judges could make this point. Cf. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) ("It would misunderstand [the gay and lesbian plaintiffs] to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."). This Note simply contends that the likelihood of an adequate explanation being offered in judicial deliberations significantly increases when a LGBTQ+ judge is present. After all, if you're not at the table, you're on the menu. See Samantha Allen, *Christine Hallquist, Gina Ortiz Jones, and the Other LGBT Candidates to Watch Out for in the Midterm Elections*, DAILY BEAST (Nov. 5, 2018, 6:01 PM), <https://www.thedailybeast.com/christine-hallquist-gina-ortiz-jones-and-the-other-lgbt-candidates-to-watch-out-for-in-the-midterm-elections> [<https://perma.cc/KET4-THR6>] ("LGBT advocates like to quote a common saying: 'If you're not at the table, you're on the menu.' In this context, that means that if LGBT people aren't holding elected office, their rights are more endangered.").

the *Bowers* decision, sodomy statutes were routinely used to remove children from the custody of lesbian and gay parents.¹⁷⁷ Again, this is a connection that an LGBTQ+ judicial decision maker is more likely to have been aware of.

Queer judges' unique perspectives may likewise be helpful in cases involving antiqueer discrimination. As Sherrilyn Ifill has noted in the case of judges of color: "Nowhere is the role of judges in bringing racial perspective and values into judicial decision[]making more relevant than in discrimination cases."¹⁷⁸ These findings are also relevant for discrimination against the LGBTQ+ community. Case law is replete with examples of judges failing to fully comprehend the indignities that state-supported second-class citizenship and homophobic discrimination impose on LGBTQ+ citizens.¹⁷⁹ It is not far-fetched to conclude then, that a queer judge might bring a perspective different to their consideration of cases involving employment discrimination,¹⁸⁰ LGBTQ+ youth bullying and other forms of anti-LGBTQ+ student discrimination,¹⁸¹ and transgender rights.¹⁸²

A companion question is whether LGB judges should express empathy towards LGBTQ+ plaintiffs and issues, or should remain devoutly impartial. This Note joins Thomas Colby in his conclusion that:

¹⁷⁷ See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by 'Un-enforced' Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 147–53 (2000).

¹⁷⁸ Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 449 (2000).

¹⁷⁹ See, e.g., *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1732 (2018) (upholding a baker's right to refuse service to a same-sex couple); *Adar v. Smith*, 639 F. 3d 146, 162 (5th Cir. 2011) (upholding the constitutionality of Louisiana registrar's refusal to add gay parent's names to the birth certificate of their adopted son).

¹⁸⁰ See *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1258 (11th Cir. 2017) (dismissing an employment discrimination claim by a lesbian plaintiff on the basis that Title VII does not cover sexual orientation).

¹⁸¹ See, e.g., Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool to Stop Bullying of LGBT Students*, 125 YALE L.J. 2006, 2010 (2016) (reporting LGBT students "are twice as likely as non-LGBT students to be verbally harassed or physically assaulted at school"); Ari Ezra Waldman, *Are Anti-Bullying Laws Effective?*, 103 CORNELL L. REV. ONLINE 86, 88 (2018) (finding LGBTQ teenagers are "nearly three times more likely than heterosexual teens to be harassed online, and twice as likely to receive threatening or harassing text messages"); Chan Tov McNamarah, Note, *On the Basis of Sex(ual Orientation or Gender Identity): Bringing Queer Equity to School with Title IX*, 104 CORNELL L. REV. 745, 779–89 (2019) (demonstrating the various types of discrimination queer youth face at school on a daily basis).

¹⁸² *Doe v. Shanahan*, No. 18-5257, 2019 U.S. App. LEXIS 307, at **18 (D.C. Cir. Jan. 4, 2019) (striking down a preliminary injunction against President Trump's transgender military ban).

Empathetic judges do not exceed their role as part of the judicial branch, and they do not improperly take nonlegal factors into consideration. They simply use empathy to ascertain and make sense of the relevant facts and to apply the relevant legal factors—thus fulfilling, rather than abdicating, their role within the judicial branch.¹⁸³

Empathy is particularly necessary since queer persons remain one of the most vulnerable minorities in this country. They are largely unprotected from the discriminatory whims of both private and governmental actors. They face discrimination in the housing and employment contexts, as well as high levels of queerphobic violence.¹⁸⁴ And the urgency of having LGBTQ+ judges who are willing to acknowledge their sexuality and fight on the community's behalf is amplified by President Trump's stacking the court with conservative judges who have no problem using their position to attack the queer community.¹⁸⁵

Against the backdrop of the Trump Administration's nomination of several openly anti-LGBTQ+ judicial nominees, queer judges can play a crucial role in disrupting narratives about the LGBTQ+ community by speaking on its behalf. A recent report from Lambda Legal notes that almost one-third of the judges nominated by President Trump have "anti-LGBTQ+

¹⁸³ Colby, *supra* note 154, at 2013–14.

¹⁸⁴ See, e.g., J. Shahar Dillbary & Griffin Edwards, *An Empirical Analysis of Sexual Orientation Discrimination*, 86 U. CHI. L. REV. 1, 1 (2019) (empirically finding that same-sex couples face pervasive discrimination in mortgage applications); Jordan Dashow, *New FBI Data Shows Increased Reported Incidents of Anti-LGBTQ Hate Crimes in 2016*, HUM. RTS. CAMPAIGN (Nov. 13, 2017), <https://www.hrc.org/blog/new-fbi-data-shows-increased-reported-incidents-of-anti-lgbtq-hate-crimes-i> [<https://perma.cc/YT3D-R4TN>] (reporting a five percent increase in queerphobic hate crimes).

¹⁸⁵ See ALL. FOR JUST., TRUMP'S JUDICIAL NOMINEES: THREATS TO LGBTQ RIGHTS (2018), <https://afj.org/wp-content/uploads/2018/02/Trump-Nominees-LGBT.pdf> [<https://perma.cc/D6GQ-6VHY>]; Jennifer Bendery, *Don't Forget About Trump's Judicial Nominees. Another 44 Just Moved Forward.*, HUFFINGTON POST (Feb. 7, 2019, 8:14 PM), https://www.huffingtonpost.com/entry/trump-judicial-nominees-lgbtq-abortion-voting-rights_us_5c5c97d6e4b0e01e32aa8edf [<https://perma.cc/5VUG-9Q25>] (“[Trump’s] picks for lifetime federal court seats have records of attacking LGBTQ rights . . .”). It should also be noted that many of Trump’s judicial nominations have declined the opportunity to reaffirm the holding in *Brown v. Board of Education*. See Stephanie Mencimer, *Trump Judicial Nominees Are Refusing to Endorse Brown v. Board of Education*, MOTHER JONES (Feb. 14, 2019), <https://www.motherjones.com/politics/2019/02/trump-judicial-nominees-are-refusing-to-endorse-brown-v-board-of-education/> [<https://perma.cc/T7C7-Q62W>] (“In normal times, the moment [in which one of Trump’s judicial nominees refused to endorse *Brown v. Board of Education*] might have been extraordinary. During the Trump administration, it’s par for the course. [The nominee] is one of at least 10 Trump nominees to the federal courts in the past year who have refused to offer an opinion on *Brown*.”).

records.”¹⁸⁶ For example, prior to being confirmed to the Fifth Circuit Court of Appeals in May 2018, Kyle Duncan worked tirelessly to undermine the wellbeing of LGBTQ+ persons, filing an amicus brief urging the Court to uphold Louisiana’s same-sex marriage ban, and later filing a brief in opposition to marriage equality in *Obergefell*.¹⁸⁷ Thereafter, Duncan served as lead counsel for schools against the recognition of the rights of transgender students.¹⁸⁸ Another nominee, Damien Schiff, has opined in opposition of efforts against LGBTQ+ bullying in schools, railing against what he described as an effort to teach “that the homosexual lifestyle is a good [sic], and that homosexual families are the moral equivalent of traditional heterosexual families.”¹⁸⁹ Gregory G. Katsas, before being confirmed to the D.C. Circuit Court of Appeals, defended the Defense Against Marriage Act (DOMA).¹⁹⁰ John K. Bush, who was recently confirmed to the Sixth Circuit Court of Appeals, has previously openly used derogatory slurs for gay men.¹⁹¹ In a similar vein, before his nomination was pulled, Jeff Mateer referred to transgender children as apart of “Satan’s plan.”¹⁹² In each of these examples, an LGBTQ+ decision maker could, and this Note believes should, intervene to edify and interrupt such unsupported, and frankly, homophobic perspectives.

¹⁸⁶ *Trump’s Judicial Assault on LGBT Rights*, LAMBDA LEGAL (Dec. 20, 2017), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/final-trumps-judicial-assault-on-lgbt-rights_28129.pdf [<https://perma.cc/4AF4-ELFJ>].

¹⁸⁷ ALL. FOR JUST., STUART KYLE DUNCAN: UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 5 (2018), <https://afj.org/our-work/nominees/stuart-kyle-duncan> [<https://perma.cc/DC8B-EBVS>]; see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (holding that same-sex couples have a fundamental right to marry, and invalidating state laws discriminating against same-sex marriages).

¹⁸⁸ ALL. FOR JUST., *supra* note 187.

¹⁸⁹ *President Trump’s New Nominee Called Justice Kennedy a ‘Judicial Prostitute’*, ALL. FOR JUST. (May 26, 2017), <https://www.afj.org/blog/president-trumps-new-nominee-called-justice-kennedy-a-judicial-prostitute> [<https://perma.cc/87Y7-XGLZ>].

¹⁹⁰ See ALL. FOR JUST., AFJ NOMINEE REPORT: GREGORY KATSAS 10–11 (2017), <https://www.afj.org/wp-content/uploads/2017/10/AFJ-Katsas-Report.pdf> [<https://perma.cc/KF6A-XM7P>].

¹⁹¹ See John K. Bush, *A Certain Starting Place*, ALL. FOR JUST. (2017), <https://www.afj.org/wp-content/uploads/2017/06/A-Certain-Starting-Place.pdf> [<https://perma.cc/YJB7-6R2K>].

¹⁹² Nicole Cobler & Todd J. Gillman, *No Judgeship for ‘Satan’s Plan’ Texan, as White House Drops Jeff Mateer Nomination*, DALLAS MORNING NEWS (Dec. 13, 2017, 5:00 PM), <https://www.dallasnews.com/news/politics/2017/12/12/grassley-urges-trump-drop-mateer-judicial-pick-spoke-satans-plan-transgender-kids> [<https://perma.cc/FQ3V-Z23Q>].

C. A Final Contemplation on the Queer Perspective & Essentialism

This Note closes with a parsimonious clarification. This Note's assertion that LGBTQ+ decision makers bring a unique perspective to the bench should not be interpreted to mean that there is a single, definable, "queer point of view." Rather, LGBTQ+ persons bring a swath of experiences, values, and political viewpoints. To be certain, queerfolk may fall at the intersection of numerous marginalized or underrepresented statuses, including various genders and gender identities, racial and ethnic backgrounds, religious backgrounds, and geographic upbringings. Consequently, a monolithic queer perspective is an impossibility. It is possible, and indeed likely, that the life experiences of a LGBTQ+ decision maker who is black, female, and a lesbian from the South will imbue her with a different viewpoint and bring a different perspective from one who is white, male, and raised in the Midwest.

This Note's use of the term "unique perspective" should instead be interpreted to mean the range of experiences that queerfolk have *because* of their identity as sexual minorities. While some of these are common—consider for instance Judge Oetken's description of the difficulties that LGBTQ+ persons face coming out publicly, or Judge McShanes' recollection of the homophobic indignities he experiences—many are not.¹⁹³ This Note's call that judges bring their unique perspectives to their evaluation is then, a charge that LGB decision makers bring their full selves to their role, rather than deliberately seek to diminish or downplay the experiences they have had as queer Americans.

CONCLUSION

Though questions involving the impartiality of queer judges have been repeatedly posed over the past decade, until this Note's analysis, no statistically supported answers existed. To fill the void, this Note undertook an empirical analysis evaluating the judicial voting behavior of LGB judges. While this Note initially sought to examine whether sexual minority judges demonstrate greater pro-plaintiff judicial voting behavior in cases involving LGBTQ+ plaintiffs, the dearth of LGB judges hearing cases involving LGB plaintiffs made such an evaluation impractical.

¹⁹³ See *supra* notes 96, 103–106 and accompanying text.

Instead, after surveying one year of data encompassing employment discrimination cases in two federal district courts, the analysis of this Note has found no evidence that the difference in pro-plaintiff voting behavior among LGB and heterosexual judges is statistically significant. One possible explanation for this result is that LGB judges are particularly adept at overriding their instinct to sympathize and empathize with plaintiffs alleging discrimination. While novel, this Note's findings are only a first step. Given this Note's limitations, it is imperative that future legal scholarship continue to analyze the relationship between LGBTQ+ identity and judicial decision making.

In considering findings in the contexts of race and gender, the Note then documented how minority and women judges serve to increase representation and public faith in the judiciary. Most importantly, diverse backgrounds bring previously excluded perspectives into the judiciary and into the decision-making process. In particular, LGB judges have a wealth of experiences that this Note believes can positively enhance the judicial function.

This conclusion is especially true given the rapidly increasing catalogue of judicial appointments of persons who are unabashedly against the social and political equality of LGBTQ+ Americans. This cannot be allowed to continue unaddressed. This Note asserts that LGB decision makers can and *should* intervene to edify and interrupt unsupported, and frankly, homophobic perspectives of their colleagues. At a time when the queer community's stalwart Supreme Court supporter has retired,¹⁹⁴ with an administration that has ubiquitously rolled back protections for sexual minorities, and in a social climate where prejudice against LGBTQ+ persons is rapidly resurging, the importance of the role that LGB decision makers can play

¹⁹⁴ See Lawrence C. Levine, *Justice Kennedy's "Gay Agenda": Romer, Lawrence, and the Struggle for Marriage Equality*, 44 MCGEORGE L. REV. 1, 2 (2013) ("In this Article, I praise Justice Kennedy's sensitivity and vision when it comes to gay and lesbian rights as no Supreme Court Justice has done more to provide constitutional protection to this community."); *but see* Tobin Sparling, *A Path Unfollowed: The Disregard of Dignity Precedent in Justice Kennedy's Gay Rights Decisions*, 26 TUL. J.L. & SEXUALITY 53, 55 (2017) ("In the chain of gay rights opinions written by Justice Kennedy, each case relies to a remarkable degree on the dignity precepts he announced in the chain's prior opinions. This has exposed these decisions to the charge that their legal standing is suspect. The gay rights decisions, however, did not have to suffer from this deficiency. . . . Justice Kennedy could have mined [the Court's dignity jurisprudence] to enrich his [cited] dignity jurisprudence, defend it from critics, and place the gay rights decisions on a firmer legal foundation.").

cannot be emphasized enough. American society is experiencing a watershed moment in which further progress toward LGBTQ+ equality maybe blocked, and previous progress may be severely undercut.¹⁹⁵ Viewed thus, queer judges have an integral role to play. Put simply, they must desert the practice of overriding their instinct to empathize with queer interests. In sum: while queer eyes don't sympathize, *they should*.

¹⁹⁵ Cf. Jared Ham, Note, *Getting Away with Marginalization: Rejecting a Formalistic Standing Analysis and Remediating LGBTQ+ Discrimination Through Congressional Legislation*, 28 CORNELL J. L. & PUB. POL'Y 569, 595–96 (2019) (“The Fifth Circuit erroneously found that LGBTQ+ plaintiffs did not have standing to challenge HB 1523. And the Supreme Court failed to correct the mistake. . . . If, as Justice Kennedy referenced, LGBTQ+ individuals are entitled to equal dignity, equal rights, and equal protection under the law, then laws such as HB 1523 cannot stand. If the courts continue to shirk their responsibility of protecting fundamental rights and continue to greenlight discrimination . . . Congress must intervene.” (footnotes omitted)).