

were ‘unanticipated’ at the time of the law’s adoption” (*Bostock*, p 1752).

Dissent

In dissent, Justice Alito (supported by Justice Thomas, and in part by Justice Kavanaugh) stated that Title VII was never meant to include LGBTQ protections because, despite multiple opportunities to do so, Congress has been unwilling or unable to extend the statute to LGBTQ individuals. They argued that the case should have been referred back to Congress for amendment, and that interpretation of a statute should be context- and period-specific, because at the time of the statute’s enactment in 1964, sex would not have included homosexuality and transgender status, an argument undercut by subsequent court filings by gay and transgender individuals soon after the statute’s enactment. They worried that the Court’s decision could impinge on religious convictions and could expand to other workplace topics, including sex-segregated bathrooms, locker rooms, and dress codes.

Discussion

The case of *Bostock* raises many points of discussion and implications for psychiatry, law, and social justice. Although the words of the statute have remained unchanged since its passage, the Court’s recent interpretations to include discrimination on the basis of sex appear to reflect society’s (including psychiatry’s) evolving understanding of sex and gender. In 1964, psychiatrists considered homosexuality a form of mental illness classified over the years as a paraphilia or a disorder of sexual orientation, until 1987 when the disorder was discarded altogether (Drescher J: Out of DSM: depathologizing homosexuality. *Behav Sci (Basel)* 5:570–1, 2015). The inclusion of gender dysphoria diagnosis in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, may leave the unfortunate impression, however, that transgender status is a psychiatric condition. This shows that, although psychiatry has evolved in its understanding of sex and sexuality, there is still room for growth and clarity on these topics.

Elimination of homosexuality from the Diagnostic and Statistical Manual of Mental Disorders does not equate to elimination of stigma against LGBTQ and transgender individuals in the practice of psychiatry, especially on inpatient units. Questions about placement in co-ed, biological-gender, or preferred-gender

units; appropriate bathrooms; and payment for transitional medications and surgeries are a few challenges that transgender patients continue to face and that *Bostock* does not address. Without universal consensus on the treatment of transgender persons in institutions, the risk of ongoing discrimination against these individuals in psychiatric hospitals will remain unacceptably high. *Bostock* reminds psychiatrists that we have an ethics obligation to ensure equal treatment and opportunity for all patients regardless of sex.

Relevance and Reliability in Admitting Forensic Expert Witness Testimony

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Forensic Expert Testimony Must Not Be Excluded On the Basis of the Experts Opinion Alone

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In *U.S. v. Ray*, 956 F.3d 1154 (9th Cir. 2020), the U.S. Court of Appeals for the Ninth Circuit ruled that the U.S. District Court for the Central District of California had abused its discretion in excluding expert testimony offered as part of an insanity defense. The Ninth Circuit found that the district court erred by focusing on the proposed expert’s opinion rather than considering whether the expert’s testimony would have helped the trier of fact make its own decision.

Facts of the Case

In October 2016, Patrick Bacon and Daniel Ray, inmates at the Victorville Federal Prison in California, coordinated an assault of a fellow prison

inmate. Mr. Bacon used a knife concealed within a book provided by Mr. Ray to inflict nonfatal stab wounds to the inmate's chest and head. The assault and its preparation were recorded by prison security cameras. Mr. Bacon and Mr. Ray were charged with assault with a deadly weapon with intent to do bodily harm and assault causing serious bodily injury.

Prior to trial, Mr. Bacon notified the court of his intent to present an insanity defense. In support of the defense, he submitted a report by a forensic psychologist who evaluated Mr. Bacon in December 2017. In his report, the psychologist documented a history of Mr. Bacon's behavioral problems and treatment starting in 2003. He opined that Mr. Bacon experienced "myriad" mental health problems, that at the time of the assault there were "elements of a downward spiral of isolation, depression, paranoia, and anxiety that resulted in a dissociative state" (*Ray*, p 1157), and that, as a result, Mr. Bacon would have had "difficulty understanding the nature and quality of his action at the time of the offense conduct" (*Ray*, p 1157).

The government moved to preclude the psychologist's testimony on the grounds that it was unreliable and irrelevant. They argued that the psychologist did not opine that Mr. Bacon had a specific severe mental disease or defect at the time of the offense and that his opinion about a dissociative state was not supported by medical literature. They also noted that the psychologist did not explain the tests he administered, their results, or their relationship to his conclusions.

The district court granted the motion to preclude the psychologist's testimony, holding that under Fed. R. Evid. 702 (2016), the psychologist's opinion was not relevant. The court found the psychologist's conclusion unhelpful to the trier of fact in facilitating understanding of the evidence or determining the question of sanity because the psychologist did not opine that Mr. Bacon was "unable, as opposed to had difficulty understanding or appreciating the nature and quality" (*Ray*, p 1158) of the assault. Mr. Bacon was unable to present an insanity defense. A jury found Mr. Bacon and Mr. Ray guilty of their charges. Mr. Bacon was sentenced to 10 years in prison and Mr. Ray to eight years and four months. Mr. Bacon appealed.

Ruling and Reasoning

The U.S. Court of Appeals for the Ninth Circuit considered whether the district court had abused its

discretion in precluding the defense's expert testimony and whether the exclusion of the expert's testimony was harmless. The court ruled that the district court had abused its discretion in excluding the expert and that doing so was not harmless. The court vacated Mr. Bacon's conviction and remanded the case to the district court for a new trial.

With respect to the abuse of discretion, the appellate court found that the district court had applied the wrong standard in barring the expert witness testimony. The court wrote that the district court's focus on the relevance of the psychologist's "bottom-line opinions" was erroneous (*Ray*, p 1159). Instead, the district court should have considered the relevance of the psychological evaluation in aiding the trier of fact.

The court ruled the exclusion was not harmless because the expert's testimony might have supported an insanity defense for Mr. Bacon and might have changed his verdict. In addition, the court clarified that the district court did not have to admit the psychologist's testimony in the new trial.

Concurring Opinion

In a concurring opinion, three judges expressed concern about the requirement for a new trial. They stated that if the district court were to find the psychologist's opinion inadmissible again under a different rationale, a jury would hear the same evidence as during the first trial. The second trial would therefore be "wasteful of judicial resources" (*Ray*, p 1161). A potential solution, that the district court first rule on whether the disputed testimony was admissible before requiring a new trial, previously proposed by Judge Nguyen in her dissent in *Estate of Barabin v. AstenJohnson Inc.*, 740 F.3d 457 (9th Cir. 2014), was prohibited on the basis of existing precedent.

Discussion

This case revisits fundamental questions about the admissibility of expert testimony. The federal rules of evidence require that expert testimony be the product of "reliable principles and methods" that are "reliably applied" (Fed. R. Evid. 702 (2016)). The nonexclusive list of criteria for reliability articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) offers some guidance for judges and experts; for example, whether the methodology used to form an opinion is accepted by a professional community. Psychiatric expert opinions, however,

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are not individually testable nor subject to peer review, and no known error rates exist. Reasonable practitioners can and do disagree. There are also no standards controlling how to answer the wide variety of forensic questions that an expert may encounter. Although the American Academy of Psychiatry and the Law publishes practice documents for forensic psychiatric assessments in general and for common consultation questions, these guidelines makes clear that the recommendations “do not set a standard of practice” and highlight the importance of other training, research, and experience (AAPL Practice Guideline for the Forensic Assessment. *J Am Acad Psychiatry Law* 43:S3–53, 2015, p S3). Therefore, courts’ discretion is tempered by the expectation that

“shaky but admissible” evidence be evaluated by the trier of fact with cross-examination and contrary evidence (*Daubert*, p 596).

Some parameters of reliable examination methodology have been articulated in the literature on forensic assessment quality improvement. Accepted metrics for assessment methodology include the use of data sources other than the interview or review of prior medical and psychiatric records. Essential components of written reports are the inclusion of both a clearly stated opinion and explanatory text linking the assessment findings to these conclusions. If some aspects of forensic methodology were codified as indicative of reliable practice, the court may be more easily able to identify helpful testimony.