

# THE POLITICS OF ERADICATION AND THE FUTURE OF LGBT RIGHTS

NANCY J. KNAUER\*

## ABSTRACT

*The debate over LGBT rights has always been a debate over the right of LGBT people to exist. This Article explores the politics of eradication and the institutional forces that are brought to bear on LGBT claims for visibility, recognition, and dignity. In its most basic form, the desire to eradicate LGBT identities finds expression in efforts to “cure” or “convert” LGBT people, especially LGBT youth. It is also reflected in present-day policy initiatives, such as the recent wave of anti-LGBT legislation that has been introduced in states across the country. The politics of eradication has prompted the Trump administration to reverse many Obama-era initiatives that recognized and protected LGBT people. It is also at the heart of a proposal to promulgate a federal definition of gender that could remove any acknowledgment of transgender people from federal programs and civil rights protections.*

*This Article is divided into three sections—each uses a distinct institutional lens: science, law, and religion. The first section engages the field of science, which helped produce the initial iterations of LGBT identity. It charts the evolution of scientific theories regarding LGBT people and places a special emphasis on how these theories were used to further both LGBT subordination and liberation. The second section shifts the focus to the legal battles over LGBT rights that began in the 1990s at approximately the same time the scientific community started its exploration of the biological underpinnings of LGBT identities. It reviews the legal advancements that were facilitated, at least in part, by the emerging scientific theories of LGBT immutability and a growing public commitment to the inherent dignity of LGBT people. The third and final section focuses on religion and morality. Today, the same types of claims that once justified anti-LGBT laws are being used to advocate for religious and moral exemptions from laws designed to protect the dignity of LGBT people. With this turn back to religion, the cycle of subordination has come full circle. Although the means have changed, the goal to eradicate LGBT identities—whether from public life or more targeted venues—remains the same. A brief conclusion discusses the future of LGBT rights and why it is imperative to counter the politics of eradication by continuing to assert the intrinsic morality of LGBT identities and humanity of LGBT people.*

---

\* Sheller Professor of Public Interest Law and Director of the Law & Public Policy Program, Temple University, Beasley School of Law. Special thanks to Sarah Connor for her excellent research assistance. © 2020, Nancy J. Knauer.

I.	INTRODUCTION . . . . .	616
II.	SCIENCE . . . . .	624
	A. INVERSION AND THE SEXOLOGISTS . . . . .	626
	B. THE SEXUAL PSYCHOPATH AND THE AMERICAN FREUDIANS . . . . .	627
	C. GAY LIBERATION MOVEMENT AND THE END OF DIAGNOSIS . . . . .	630
	D. “BORN THIS WAY” AND BIO-SCIENCE . . . . .	634
III.	LAW . . . . .	637
	A. DON’T ASK, DON’T TELL AND <i>BAEHR V. LEWIN</i> . . . . .	639
	B. THE DEFENSE OF MARRIAGE ACT AND <i>ROMER V. EVANS</i> . . . . .	642
	C. MARRIAGE AND <i>LAWRENCE V. TEXAS</i> . . . . .	646
	D. MARRIAGE EQUALITY—U.S. V. <i>WINDSOR</i> AND <i>OBERGEFELL V. HODGES</i> . . . . .	648
IV.	RELIGION AND MORALITY . . . . .	650
	A. IDEOLOGICAL POLARIZATION . . . . .	652
	B. ANTI-LGBT LAWS AND POLICIES . . . . .	654
	C. RELIGIOUS EXEMPTIONS . . . . .	658
	1. Religious Freedom Reformation Acts . . . . .	660
	2. First Amendment Defense Acts . . . . .	662
	3. Targeted Religious Exemptions . . . . .	665
V.	CONCLUSION . . . . .	668

## I. INTRODUCTION

The history of the LGBT rights movement in the United States has been a struggle for visibility, recognition, and the type of dignity that comes from being able to live an authentic life. Over the last fifty years, LGBT activists and advocates have engaged science, the law, religion, the media, and public opinion to make the case that LGBT people are a legitimate and deserving minority.<sup>1</sup> At times, they have embraced the prevailing scientific understandings of LGBT identity; at other points, they have fought to change them.<sup>2</sup> They have argued for enhanced legal protections as members of a “politically unpopular group”<sup>3</sup> or a suspect category,<sup>4</sup> and they have grappled with the distinction between status and

1. The 1969 Stonewall Riots in New York City are generally considered to mark the beginning of the contemporary LGBT rights movement. *See generally* MARC STEIN, *THE STONEWALL RIOTS: A DOCUMENTARY HISTORY* (2019).

2. *See* RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 9 (1987).

3. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”).

4. *See generally* *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (applying intermediate scrutiny under the factors enumerated in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)).

conduct.<sup>5</sup> Their opponents, on the other hand, have rejected the legitimacy of LGBT identities and have defended “conversion” therapy. Anti-LGBT advocates have argued in favor of what they characterize as traditional morality<sup>6</sup> and have branded LGBT legal protections as “special rights.”<sup>7</sup> Their practices and beliefs produce a politics of eradication which contests the very existence of LGBT identity through a process of conversion, containment, and redefinition.

Although the LGBT rights movement is often considered synonymous with legal challenges, it is important to remember that the law is only one of the multiple and interlocking institutional forces which have historically regulated and subordinated LGBT people.<sup>8</sup> In the early days of the gay liberation movement, activists targeted psychiatry as the primary source of subordination, but the eventual declassification of homosexuality as a mental illness did not immediately translate to equality and acceptance.<sup>9</sup> The same can be said for *Lawrence v. Texas* and the demise of criminal sodomy laws.<sup>10</sup> Despite the importance of that U.S. Supreme Court decision, the end to criminalization did not cause other legal disabilities to melt away.<sup>11</sup> Even the Holy Grail of marriage equality has proven to be only a partial victory, as it has underscored the persistent inequalities and disparities experienced by LGBT individuals<sup>12</sup> and has prompted calls for broader

5. Justice Sandra Day O’Connor in *Lawrence* opined that the Court could strike down the Texas homosexual sodomy law on Equal Protection grounds without overruling *Bowers v. Hardwick*. *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring); see generally JANET E. HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY (1991).

6. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2614 (2015) (Roberts, J., dissenting) (“There is no dispute that every State at the founding . . . defined marriage in the traditional, biologically rooted way.”).

7. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

8. Focusing on several high-profile court cases, some commentators have already declared victory in the struggle for LGBT rights. See, e.g., LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION (2013).

9. BAYER, *supra* note 2, at 12 (describing push to declassify homosexuality as a mental illness).

10. *Lawrence*, 539 U.S. at 578–79 (invalidating Texas homosexual criminal sodomy law).

11. For seventeen years after *Lawrence*, there were no anti-discrimination protections at the federal level until *Bostock v. Clayton County*. 590 U.S. \_\_\_\_ (2020) (holding discrimination because of sex for purposes of Title VII includes sexual orientation and gender identity). There are still no protections in the majority of states. See Susan Miller, ‘Shocking’ Numbers: Half of LGBTQ Adults Live in States Where No Laws Ban Job Discrimination, USA TODAY (Oct. 8, 2019), <https://www.usatoday.com/story/news/nation/2019/10/08/lgbt-employment-discrimination-half-of-states-offer-no-protections/3837244002/>.

12. Until *Bostock*, same-sex couples who exercised their constitutional right to marry could be fired the next day due to their sexual orientation in a majority of states. See Gene Robinson, *State of LGBT Rights: Married on Sunday, but Fired on Monday*, DAILY BEAST (Dec. 14, 2014), <https://www.thedailybeast.com/state-of-lgbt-rights-married-on-sunday-but-fired-on-monday>. Only twenty-one states and the District of Columbia provide employment protections on the basis of sexual orientation and gender identity. *State Maps of Laws & Policy—Employment*, HUM. RTS. CAMPAIGN (Jan. 28, 2019), <https://www.hrc.org/state-maps/employment> [hereinafter *Employment Map*]. One additional state extends protection based on sexual orientation alone. *Id.* There are no general LGBT anti-discrimination protections at the federal level. See Katy Steinmetz, *Why Federal Laws Don’t Explicitly Ban Discrimination Against LGBT Americans*, TIME (Mar. 21, 2019), <https://time.com/5554531/equality-act-lgbt-rights-trump/>. There is an increased consensus among the courts that discrimination based on gender identity constitutes sex discrimination within the meaning of Title VII and Title IX. Harry

and more comprehensive religious exemptions.<sup>13</sup>

Each of these milestones—declassification, decriminalization, marriage—may have been a necessary step in the trajectory of LGBT liberation, but none was sufficient to secure liberation, due to the complex and overlapping nature of LGBT subordination. Multiple institutional forces—including law, science, religion, and morality—have regulated LGBT identities, so the removal of one disabling institutional force would not automatically displace the rest. Mental illness was backstopped by criminal prohibitions, which yielded to traditional morality, which then became the template for broad religious exemptions.<sup>14</sup> Moreover, the fundamental premise of LGBT subordination in the U.S. has been that LGBT identities are illegitimate. Large segments of society still believe that LGBT identity is a choice<sup>15</sup> that is false,<sup>16</sup> ungodly,<sup>17</sup> delusional,<sup>18</sup> immoral,<sup>19</sup> a sign of mental illness,<sup>20</sup> or an expression of depravity.<sup>21</sup> In this way, the debate over LGBT

Litman, *The Trump Administration Jumps into a High-Stakes Court Case in Support of Intolerance*, WASH. POST (Aug. 27, 2019), <https://www.washingtonpost.com/opinions/2019/08/27/trump-administration-says-lgbtq-workers-arent-protected-by-civil-rights-law-supreme-court-will-decide-just-time-election/>. Although the U.S. Equal Employment Opportunity Commission agrees, the U.S. Department of Justice under the Trump administration has officially disagreed with this interpretation of sex. *Id.*

13. See, e.g., The First Amendment Defense Act, H.R. 2802, S. 1598, 114th Cong. § 3(a) (2015).

14. Professor Reva Siegel has identified a process of “preservation through transformation,” whereby opponents to proposed reforms modernize their rhetoric after a civil rights victory in order to maintain unequal status regimes. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996). The dynamic with respect to the politics of eradication is slightly different, because the ultimate goal is not maintaining hierarchy but, rather, the eradication of LGBT individuals entirely.

15. Nik Gass, *Ben Carson Says Being Gay is a Choice, Citing Prison Example*, POLITICO (Mar. 4, 2015), <https://www.politico.com/story/2015/03/ben-carson-gay-choice-prison-115744>.

16. *Transgender Woman Sues NYPD Officers Over ‘False Personation’ Arrest*, NBC NEWS (Jan. 24, 2019), <https://www.nbcnews.com/feature/nbc-out/transgender-woman-sues-nypd-officers-over-false-personation-arrest-n962236>.

17. Ric Fritz, *The LGBTQ Movement and Christianity, Part 3: The Enemy’s Game Plan*, CHRISTIAN HEADLINES (July 11, 2018), <https://www.christianheadlines.com/columnists/guest-commentary/the-lgbtq-movement-and-christianity-part-3-the-enemy-s-game-plan.html> (“The Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) movement represents a clear and present danger to the culture, to the Church, and to eternal salvation of millions because of its active rebellion against God’s design of gender, marriage, family, and purpose of sexual relations.”).

18. John Patrick McCormick, *US Radio Host: Gay People are Living a ‘Sad Delusion’ and Need to ‘Embrace Reality’*, PINK NEWS (Mar. 25, 2013), <https://www.pinknews.co.uk/2013/03/25/us-radio-host-gay-people-are-living-a-sad-delusion-and-need-to-embrace-reality/>.

19. As of 2019, nearly one-in-four Americans believed that homosexuality should be illegal, and close to one-in-three believed that same-sex relationships were immoral. *In Depth Topics A to Z: Gay and Lesbian Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Mar. 27, 2020).

20. Roy Richard Grinker, *Being Trans Is Not a Mental Disorder: When Will the American Psychiatric Association Finally Stop Treating It Like It Is?*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/opinion/trans-gender-dysphoria-mental-disorder.html>.

21. Brian Roewe, *Bishop Morlino, Others Charge ‘Homosexual Subculture’ for Clergy Abuse Crisis*, NAT’L CATH. REP. (Aug. 21, 2018), <https://www.ncronline.org/news/accountability/bishop-morlino-others-charge-homosexual-subculture-clergy-abuse-crisis> (blaming the clergy sex abuse scandal on rampant homosexuality within the clergy as “the sins of sexual depravity committed by members of the clergy and episcopacy”).

rights has ultimately been a debate over LGBT people and their right to exist.<sup>22</sup> It is not simply a question of which rights to extend to LGBT people, and on what terms, but rather whether LGBT people should exist in the first place.<sup>23</sup> Even today, for many people, including prominent decision makers and religious leaders, the answer to that question is “no.”<sup>24</sup>

This core rejection of the inherent humanity of LGBT people and their right to self-determination has produced a pernicious politics of eradication that transcends our understanding of subordination.<sup>25</sup> Rather than simply contain and silence LGBT identities within an existing hierarchy, its goal is to abolish LGBT identities completely.<sup>26</sup> This goal has defined much of the opposition to LGBT rights and has been expressed at different times through different institutional forces—illness, criminality, immorality, and sin. At its most basic, the fundamental belief that LGBT identities are illegitimate has fueled the barbaric efforts to

22. This statement is not meant to imply that the United States debate advocates killing LGBT people, as can be the case in some countries. See, e.g., Julia Hollingsworth et al., ‘*Barbaric to the Core*’: Brunei Brings in Gay Sex Stoning Law, CNN (Apr. 3, 2019), <https://www.cnn.com/2019/04/03/asia/brunei-stoning-law-intl/index.html>; Adam Taylor, *Ramzan Kadyrov Says There are No Gay Men in Chechnya—and If There Are Any, They Should Move to Canada*, WASH. POST (July 15, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/07/15/ramzan-kadyrov-says-there-are-no-gay-men-in-chechnya-and-if-there-are-any-they-should-move-to-canada/>; Brian Whitaker, *No Homosexuality Here*, THE GUARDIAN (Sep. 25, 2007), <https://www.theguardian.com/commentisfree/2007/sep/25/nohomosexualityhere> (discussing Iranian President Ahmadinejad’s remark: “In Iran, we don’t have homosexuals.”).

23. Michael Warner explains, “there have always been moral prescriptions about how to be a woman or a worker or an Anglo-Saxon; but not whether to be one.” Michael Warner, *Introduction*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY*, xviii (Michael Warner ed., 1993).

24. For example, Vice President Mike Pence has a history of anti-LGBT policies and is no stranger to the politics of eradication. When he was first running for Congress in 2000, he opposed funding the Ryan White CARE Act, which injected crucial federal funding into the fight against HIV/AIDS, unless an audit was conducted to ensure that funds were not going “to organizations that celebrate and encourage the types of behaviors that facilitate the spreading of the HIV virus.” Liam Stack, *Mike Pence and ‘Conversion Therapy’: A History*, N.Y. TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/30/us/politics/mike-pence-and-conversion-therapy-a-history.html>. In lieu of funding such organizations, then-candidate Pence proposed redirecting resources to “institutions which provide assistance to those seeking to change their sexual behavior.” *Id.*

25. Martha Nussbaum has described a politics of disgust that denies the humanity of LGBT people. See generally MARTHA NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (2010). However, I argue in this Article that the emotion of disgust is a symptom of the larger goal of eradication. It is true that opponents to LGBT rights often express disgust, but disgust is not an end or a goal. It is a reaction, but not necessarily an organizing feature. It is the desire to cure, contain, and redefine LGBT identities out of existence that unites contemporary anti-LGBT efforts.

26. Again, it is important to make the distinction between abolishing identities and abolishing the people who hold those identities. See, e.g., Hollingsworth et al., *supra* note 22 (describing countries that impose the death penalty and sponsor anti-gay pogroms). Even with that caveat, the denial of LGBT identities can inflict grave harm on LGBT people. This is especially true for young LGBT people, who are more than three times as likely to attempt suicide as their non-LGBT peers. Linda Carroll, *LGBT Youth at Higher Risk for Suicide Attempts*, REUTERS (Oct. 8, 2018), <https://www.reuters.com/article/us-health-lgbt-teen-suicide/lgbt-youth-at-higher-risk-for-suicide-attempts-idUSKCN1MI1SL>. Transgender young people are almost six times more likely to attempt suicide. *Id.*



“cure” or “convert” LGBT people, especially LGBT youth.<sup>27</sup> Once a prescribed therapeutic intervention for homosexuality,<sup>28</sup> conversion therapy continues to be practiced by some therapists and in some religious settings.<sup>29</sup> In the face of universal condemnation by the scientific and medical communities,<sup>30</sup> the 2016 GOP Platform specifically mentioned the need to protect parental rights to subject children to controversial therapies.<sup>31</sup>

The politics of eradication continues to inform present-day policy initiatives on both the state and federal levels, despite tremendous gains in terms of legal recognition, political empowerment, and social acceptance for LGBT people. It has driven a spate of anti-trans legislation on the state level that defines gender as the sex assigned at birth.<sup>32</sup> These bills touch on all aspects of the lives of transgender people, especially transgender children. They limit access to gender-confirming medical care,<sup>33</sup> prohibit transgender students from participating in sports,<sup>34</sup> and require transgender people to use the bathroom of the sex they were assigned at

27. See generally Arcangelo Cella, *A Voice in the Room: The Function of State Legislative Bans on Sexual Orientation Change Efforts for Minors*, 40 AM. J.L. & MED. 113 (2014).

28. J. Seth Anderson, *Why We Still Haven't Banished Conversion Therapy in 2018*, WASH. POST (Aug. 5, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/08/05/why-we-still-havent-banished-conversion-therapy-in-2018/>.

29. Jean Marbella, *Federal Lawsuit Seeks to Overturn Maryland's Ban on Conversion Therapy*, BALT. SUN (Jan. 18, 2019), <https://www.baltimoresun.com/politics/bs-md-conversion-therapy-lawsuit-20190118-story.html>.

30. See American Academy of Pediatrics, *Homosexuality and Adolescence*, 92 PEDIATRICS 631, 633 (1993), <http://pediatrics.aappublications.org/content/92/4/631.full.pdf>; *Policy Statement on Conversion Therapy*, AM. ACAD. OF CHILD & ADOLESCENT PSYCH. (Feb. 2018), [https://www.aacap.org/AACAP/Policy\\_Statements/2018/Conversion\\_Therapy.aspx](https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx); *H-160.991 Health Care Needs of the Homosexual Population*, AM. MED. ASS'N (2018), <https://policysearch.ama-assn.org/policyfinder/detail/gender%20identity?uri=%2FAMADoc%2FHOD.xml-0-805.xml> (last visited Mar. 20, 2020); *Position Statement on Conversion Therapy and LGBTQ Patients*, AM. PSYCH. ASS'N (Dec. 2018), <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Position-Conversion-Therapy.pdf>; *Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression*, AM. PSYCH. ASS'N (Jun. 2012), <http://www.apsa.org/content/2012-position-statement-attempts-change-sexual-orientation-gender-identity-or-gender> (last visited Mar. 20, 2020); *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, AM. PSYCH. ASS'N (Aug. 5, 2009), <http://www.apa.org/about/policy/sexual-orientation.pdf>; Hilary Daniel & Renee Butkus, *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper From the American College of Physicians*, ANNALS OF INTERNAL MED. (July 21, 2015), <http://annals.org/article.aspx?articleid=2292051>.

31. See Garrard Conley, *GOP's Support of Conversion Therapy is a 'Death Sentence'*, TIME MAG. (July 16, 2016), <http://time.com/4410894/rnc-conversion-therapy/>.

32. See Tim Fitzsimons, *'Slate of Hate': Advocates Decry 'Anti-LGBTQ' Bills Introduced in Tennessee*, NBC NEWS (Mar. 4, 2019), <https://www.nbcnews.com/feature/nbc-out/slate-hate-advocates-decry-anti-lgbtq-bills-introduced-tennessee-n979116>.

33. See, e.g., H.B. 5, 31st Leg. Sess., 1st Sess. (Alaska 2019), [http://www.akleg.gov/basis/Bill/Detail/31?Root=HB%20%20%205#tab1\\_4](http://www.akleg.gov/basis/Bill/Detail/31?Root=HB%20%20%205#tab1_4) (prohibiting the expenditure of state money on gender reassignment medical procedures).

34. See, e.g., H.B. 1225, 92d Leg. Sess. (S.D. 2019), [https://sdlegislature.gov/Legislative\\_Session/Bills/Bill.aspx?Bill=1225&Session=2019](https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=1225&Session=2019). (providing that “the sole determinant of a student’s sexual identity is the sexual identity noted on the student’s certificate of birth” for purposes of determining participation in sports).

birth.<sup>35</sup> For example, a bill in South Dakota attempted to silence positive portrayals of transgender identities in schools.<sup>36</sup> Based on the fear that LGBT identities spread like a contagion, the bill was similar to the “no promo homo” laws which were enacted in states during the Culture Wars of the 1990s and which remain in place in a number of states.<sup>37</sup> The desire to silence LGBT identities was also reflected in the early use of obscenity laws to stop the spread of homosexuality.<sup>38</sup>

At the federal level, the Trump administration has reversed many Obama-era initiatives that recognized and protected LGBT identities,<sup>39</sup> such as the transgender military ban.<sup>40</sup> Moreover, it has embarked on an aggressive campaign to remove any acknowledgment of transgender people or identities from federal programs and civil rights protections.<sup>41</sup> A new proposed federal definition would

35. For example, Massachusetts Bill H.B. 1427 applies to all sex-segregated facilities and accommodations. It states: “Access to lawfully sex-segregated facilities, accommodations, resorts, and amusements, as well as educational, athletic, and therapeutic activities and programs, shall be controlled by an individual’s anatomical sex of male or female, regardless of that individual’s gender identity.” H.B. 1427, 191st Gen. Assemb., Reg. Sess. (Mass. 2019), <https://malegislature.gov/Bills/191/H1427>.

36. “No instruction in gender identity or gender expression may be provided to any student in kindergarten through grade seven in any public school in the state.” H.B. 1108, 92d Leg. Sess. (S.D. 2019), [https://sdlegislature.gov/Legislative\\_Session/Bills/Bill.aspx?File=HB1108P.htm&Session=2019&Version=Printed&Bill=1108](https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?File=HB1108P.htm&Session=2019&Version=Printed&Bill=1108).

37. John Paul Brammer, ‘No Promo Homo’ Laws Affect Millions of Students Across U.S., NBC NEWS (Feb. 9, 2018), <https://www.nbcnews.com/feature/nbc-out/no-promo-homo-laws-affect-millions-students-across-u-s-n845136>.

38. *See, e.g., One, Inc. v. Olesen*, 355 U.S. 371 (1958) (landmark case addressing free speech rights in the context of homosexuality).

39. The vigor with which the Trump administration has pursued these changes, and the prevalence of anti-LGBT legislation in so-called “Red States,” should not be surprising given public opinion polls. *See* Anna Brown, *Republicans, Democrats Have Starkly Different Views on Transgender Issues*, PEW RES. CTR. (Nov. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/11/08/transgender-issues-divide-republicans-and-democrats>; *In Depth Topics A to Z: Gay and Lesbian Rights*, *supra* note 19; *Homosexuality, Gender and Religion*, PEW RES. CTR. (Oct. 5, 2017), <https://www.people-press.org/2017/10/05/5-homosexuality-gender-and-religion>. As of 2018, three-out-of-four Americans believed that homosexuality should be legal, and two-out-of-three Americans believed that same-sex relationships were not immoral. *Gay and Lesbian Rights*, *supra* note 19. With respect to transgender identities, slightly over one-in-two Americans believed that gender was determined by sex assigned at birth. *See* Brown, *supra*. But when party affiliation was controlled for, those numbers changed dramatically. *Id.* Among Republicans or Republican-leaning individuals, only a bare majority say that homosexuality should be accepted by society. *Homosexuality, Gender and Religion*, *supra*. A striking eight-out-of-ten Republicans say that gender is determined by the sex assigned at birth. *Id.* Accordingly, it is to be expected that during periods of Republican control, policies shift against LGBT rights and identities.

40. *See* Rebecca Kheel, *Pentagon Signs Directive to Implement Transgender Military Ban*, THE HILL (Mar. 12, 2019), <https://thehill.com/policy/defense/433788-pentagon-signs-directive-to-implement-transgender-military-ban>. Transgender servicemembers had been serving openly since 2016. President Trump unexpectedly tweeted a policy change in 2017. *Id.* After April 12, 2019, people diagnosed with gender dysphoria will not be able to serve in the military unless a doctor certifies they have been stable in their biological sex for thirty-six months, have not transitioned to the gender with which they identify, and are willing to serve in their biological sex. *Id.*

41. *See* Erica L. Green et al., ‘Transgender’ Could Be Defined Out of Existence Under Trump Administration, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

establish gender as a biological and immutable fact determined at birth.<sup>42</sup> If adopted, the new definition of gender would end federal recognition of the approximately 1.4 million Americans who do not identify with the sex they were assigned at birth.<sup>43</sup> Numerous agencies have already rescinded Obama-era protections for transgender people in a variety of spaces, including in prisons, homeless shelters, and schools.<sup>44</sup>

It is important to neither overstate nor understate the impact of the politics of eradication on LGBT people and their families. First and foremost, LGBT people are resilient. The politics of eradication is, at best, a politics of denial. The practices of conversion, containment, and redefinition are not sufficient to stop individuals from identifying as LGBT. Conversion therapy is not only immoral, it does not work. After decades of scientific inquiry, it is clear that LGBT people cannot “change”—nor should they be forced to try.<sup>45</sup> The containment and silencing of LGBT identities to stop contagion did not work in the 1950s when obscenity laws were used to stop the distribution of homophile newsletters,<sup>46</sup> and it will definitely not work in the age of online communities and interconnectedness.<sup>47</sup> An official act of redefinition cannot erase the lived experience of LGBT people or their dignity.<sup>48</sup> The Defense of Marriage Act that defined marriage at the federal level<sup>49</sup> did not stop couples from getting married, nor did it threaten to banish them, as the Commonwealth of Virginia did to Mr. and Mrs. Loving in the 1960s.<sup>50</sup> Likewise, President Trump’s proposed transgender policy will not outlaw transgender Americans.

That said, these policies and practices cause real and lasting harm when they deny the basic humanity of LGBT people. They deny tangible benefits, exacerbate existing disparities, and signal official disapproval that can encourage more restrictive state laws, as well as bullying and violence.<sup>51</sup> Countless individual

---

42. *Id.*

43. *Id.*

44. See generally Robin Knauer Maril, *Trump’s Administrative Abuse and the LGBTQ Community*, HUM. RTS. CAMPAIGN FOUND. (Sept. 2017), <https://www.hrc.org/resources/trumps-administrative-abuse-and-the-lgbtq-community>.

45. See Julie Compton, *Once-Prominent ‘Conversion Therapist’ Will Now ‘Pursue Life as a Gay Man’*, NBC NEWS (Jan 23, 2019), <https://www.nbcnews.com/feature/nbc-out/once-prominent-conversion-therapist-will-now-pursue-life-gay-man-n961766>.

46. See *One, Inc. v. Olesen*, 241 F.2d 772, 774–75 (9th Cir. 1957).

47. See Alexandra Samuel, *The LGBT Community to Take Pride Online*, JSTOR DAILY (June 13, 2017), <https://daily.jstor.org/9-reasons-for-the-lgbtq-community-to-take-pride-online/> (“Today, that teen doesn’t have to feel so alone—at least in theory—because the internet makes it possible to connect with other LGBTQ people all over the world.”).

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

49. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (1997)), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

50. In *Loving v. Virginia*, the trial judge imposed a one-year jail sentence but suspended it for twenty-five years provided the Lovings left Virginia and did not return. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

51. For example, Dhruv Khullar, M.D. explains that disparities experienced by LGBT often “stem from an explicit denial of rights: same-sex marriage bans, employment discrimination, denial of federal



testimonies speak to the tremendous pain and devastation caused by conversion therapy.<sup>52</sup> Forbidding schools from talking about transgender identity further isolates and marginalizes transgender youth.<sup>53</sup> The extraordinarily high suicide rate and incidence of homelessness among LGBT youth should be sufficient to show the impact of continued attacks on the legitimacy of LGBT identities and the humanity of LGBT people.<sup>54</sup> The proposed federal redefinition of gender will have a sweeping impact on transgender Americans by denying them access to health care and protection under the federal civil rights laws, including Title IX, which applies to schools.<sup>55</sup>

At the most fundamental level, the debate over LGBT rights has always been a debate over the right of LGBT people to exist. This Article explores the politics of eradication and the institutional forces that are brought to bear on LGBT claims for visibility, recognition, and dignity. It is divided into three sections, each of which uses a distinct institutional lens—science, law, and religion. The first section engages the fields of science and medicine, which helped produce the initial iterations of LGBT identity. It charts the evolution of scientific theories regarding LGBT people beginning in the nineteenth century, and it places a special emphasis on how these theories were used to justify both LGBT subordination and liberation. The second section shifts the focus to the legal battles over LGBT rights in the 1990s, which began at approximately the same time the scientific community began to examine the biological underpinnings of LGBT identities. It reviews the legal and political advancements that were facilitated, at least in part, by the emerging scientific theories of LGBT immutability and by a growing public commitment to the inherent dignity of LGBT people. It concludes with the marriage equality cases. The third, and final, section focuses on religion and morality. Opponents to LGBT rights once based their objections on religion and “traditional morality,” but the Supreme Court rejected those “profound and deep

---

benefits. Discrimination in any form can have serious health consequences: Sexual minorities living in communities with high levels of prejudice die more than a decade earlier than those in less prejudiced communities.” Dhruv Khullar, *Stigma Against Gay People Can Be Deadly*, N.Y. TIMES (Oct. 9, 2018), <https://www.nytimes.com/2018/10/09/well/live/gay-lesbian-lgbt-health-stigma-laws.html>. Khullar outlines some of these disparities as follows:

For decades, we’ve known that lesbian, gay, bisexual and transgender individuals experience a range of social, economic and health disparities—often the result of a culture and of laws and policies that treat them as lesser human beings. They’re more likely to struggle with poverty and social isolation. They have a higher risk of mental health problems, substance use and smoking. Sexual minorities live, on average, shorter lives than heterosexuals, and L.G.B.T. youth are three times as likely to contemplate suicide, and nearly five times as likely to attempt suicide.

*Id.*

52. See generally MARTIN DUBERMAN, CURES: A GAY MAN’S ODYSSEY (1991).

53. See generally Nick Morrow, *South Dakota House of Representatives Passes Discriminatory Anti-Transgender Bill*, HUM. RTS. CAMPAIGN (Feb. 12, 2019), <https://www.hrc.org/blog/south-dakota-house-passes-discriminatory-anti-transgender-bill>.

54. See Carroll, *supra* note 26 (discussing high suicide rate).

55. Green et al., *supra* note 41.

convictions” in *Lawrence*.<sup>56</sup> Today, the same sort of claims based on religion and morality are being used to advocate for expansive religious and moral exemptions from laws designed to protect the dignity of LGBT people.<sup>57</sup> With the present turn back to religion and morality, the cycle of subordination has come full circle. Although the means have changed, the goal to eradicate LGBT identities—whether from public life or more targeted venues—remains the same. A brief conclusion discusses the future of LGBT rights and why it is imperative to counter the politics of eradication by continuing to assert the intrinsic morality of LGBT identities and humanity of LGBT people.

## II. SCIENCE

It is fitting to begin with a discussion of the role of science and medicine in the struggle for LGBT rights, because, in many ways, these fields articulated the first LGBT identities. In the latter part of the nineteenth century, Victorian sexologists identified, named, and studied a distinct type of individual who experienced “contrary sexual feeling,” whom they called an invert.<sup>58</sup> At the time, both religion and law imposed harsh proscriptions on sodomy and other expressions of same-sex sexuality and transgender identity.<sup>59</sup> The theory of inversion, however, shifted the focus from particular sex acts and behavior to a specific kind of individual.<sup>60</sup>

---

56. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (invalidating Texas homosexual criminal sodomy law).

57. For example, in *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, a baker argued that providing a cake for a same-sex wedding, as required by the Colorado public accommodation laws, violated his sincerely held religious belief that marriage was only between a man and a woman. *See* 138 S. Ct. 1719 (2018). The Court did not reach the question of whether the Colorado public accommodation law impermissibly infringed on the baker’s free exercise rights guaranteed under the First Amendment. *Id.* at 1721 (finding that the Commission was hostile towards the baker’s religious beliefs).

58. Commentators generally identify Karl Westphal, a German physician, as the author of the first published medical article on homosexuality. *See, e.g.*, JENNIFER TERRY, AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY 36, 45 (1999). Michel Foucault used the date of Westphal’s article to establish the creation of the modern homosexual, but was one year off. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 43 (1978); JAMES D. STEAKLEY, THE HOMOSEXUAL EMANCIPATION MOVEMENT IN GERMANY 9 (1993) (establishing date as 1869, not 1870).

59. In England, sodomy was first criminalized during the reign of Henry VIII. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 157 (1999). The penalty for “the detestable and abominable vice of buggery committed with mankind or beast” was death. *Id.* Eskridge reports that “the English crime of buggery was generally applicable in the American colonies, either as a matter of common law or statutory decree.” *Id.* Under English law, the death penalty for sodomy was not removed until the Offences Against the Person Act of 1861. *The Offences Against the Person Act of 1861*, in NINETEENTH-CENTURY WRITINGS ON HOMOSEXUALITY: A SOURCEBOOK 44 (1999). Both Edward Coke and William Blackstone believed that the very nature of the act was unmentionable and described sodomy as “the infamous crime against nature.” ESKRIDGE, *supra*, at 158. The Labouchere Amendment to the Criminal Law Amendments Act of 1885 criminalized oral sex between men with the creation of a separate criminal offense of “gross indecency with another male person.” *Id.* (quoting Amendment). Eskridge reports that in the United States, a number of states later amended their sodomy laws to include oral sex. *Id.*

60. *See generally* FOUCAULT, *supra* note 58. Foucault explained the progression in the following passage:

It also asserted, for the first time, the medical profession's jurisdiction over the lives and identities of LGBT people.

Over the next century, scientists and medical professionals classified and reclassified individuals experiencing same-sex attraction or gender variance as invert, homosexuals, transsexuals, and, finally, as gay and transgender.<sup>61</sup> The theories of the sexologists were eventually replaced by a Freudian psychoanalytic model, which then gave way to a genetic or biological framework. Each new theory and classification presented a different view of causation, the efficacy of therapeutic intervention, and the prospect or desirability of a cure.<sup>62</sup> Each new theory also invited or informed different legal responses.<sup>63</sup> For example, the naturalness of congenital inversion suggested that sodomy should be decriminalized, but the acquired nature of homosexuality under the psychoanalytic model led to harsh punishments and ruthless attempts to effect a cure.<sup>64</sup>

The explanatory power of the various theories often found a receptive audience among LGBT people, who, unsurprisingly, turned to the best scientific minds of their time to explain their profound feelings of difference. Generations of people who were labeled as invert, homosexuals, transsexuals, gay and lesbian, and LGBT have embraced these theories, at least to some extent,<sup>65</sup> and have willingly participated in medical studies.<sup>66</sup> With each new explanation and theory, LGBT people have attempted to harness their liberating potential—whether to find a

---

This new persecution of the peripheral sexualities entailed an incorporation of perversions and a new specification of individuals. As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and because it was a secret that always gave itself away. It was consubstantial with him, less as a habitual sin than as a singular nature.

*Id.* at 42–43.

61. TERRY, *supra* note 58, at 1 (discussing the “causes and consequences of scientific and medical inquiries into homosexuality”).

62. *See generally* DUBERMAN, *supra* note 52.

63. *See infra* text accompanying notes 75–79 and 98–102 (describing different views of legal sanction).

64. *Id.*

65. Growing anecdotal evidence exists, in the form of memoirs and letters, that individuals with contrary sexual feelings were often relieved and grateful to discover the “true” nature of their identity; Krafft-Ebing received thankful letters from his readers. HENRY L. MINTON, *DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA* 16 (2001). In the words of one of Krafft-Ebing's readers, the appellation of invert gave many “the comfort of belonging together and not being alone anymore.” *Id.*

66. Perhaps surprisingly, the small homophile movement that formed during the 1950s endorsed medical and psychiatric research into not only the cause, but also the cure, of homosexuality. *See* BAYER, *supra* note 2, at 70–88 (describing early homophile movement); *see also* MINTON, *supra* note 65, at 238.

“cure” for their perceived affliction or to argue for progressive legal and social reforms.<sup>67</sup>

#### A. INVERSION AND THE SEXOLOGISTS

Working in the latter part of the nineteenth century, the sexologists, most notably Richard Krafft-Ebing and Havelock Ellis, considered individuals who experienced same-sex attraction and perceived gender variance to be distinct, with a set of clearly defined characteristics, traits, and failings.<sup>68</sup> As Foucault famously observed in his *History of Sexuality*, “[t]he sodomite had been a temporary aberration; the homosexual was now a species.”<sup>69</sup> Inversion was characterized by varying degrees of cross-gender identification; Krafft-Ebing once described female inversion as “the masculine soul, heaving in the female bosom.”<sup>70</sup> Working from rigid gender roles and a strict presumption of heterosexuality, the sexologists reasoned that a woman who desired a woman was acting like a man; she was experiencing contrary sexual feelings.<sup>71</sup> Beyond simple same-sex desire, Krafft-Ebing theorized inversion as existing along a continuum of varying stages of severity ending with complete androgyny for men or gynandry for women, where the invert experienced signs of physical inversion that we would now refer to as intersex conditions.<sup>72</sup>

The sexologists believed that inversion was a naturally occurring biological variation or congenital predisposition.<sup>73</sup> The naturalness of inversion generally argued against any therapeutic intervention or attempts at a “cure.”<sup>74</sup> Both Krafft-Ebing and Ellis claimed that scientific advances in the study of human sexuality should direct legal reform with regard to the regulation of sexuality.<sup>75</sup> In the case

67. See, e.g., *infra* text accompanying notes 77–79 (discussing how inverts were empowered to argue for the repeal of sodomy laws).

68. See generally FOUCAULT, *supra* note 58 (describing the “naming” of the homosexual).

69. *Id.* at 43. Foucault asserted that under the sexologists’ theories the newly minted homosexual “was characterized . . . less by a type of sexual relations than by a certain way of inverting the masculine and the feminine in oneself.” *Id.*; see also EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 44–47 (1990) (discussing Foucault’s critique of inversion).

70. Melanie Taylor, ‘The Masculine Soul Heaving in the Female Bosom’: Theories of Inversion and The Well of Loneliness, 7 J. GENDER STU. 287, 287–96 (1998).

71. *Id.* at 288.

72. *Id.* at 288–90.

73. For example, Ellis defined inversion “as largely a congenital phenomenon, or . . . as a phenomenon which is based on congenital conditions.” Havelock Ellis & John Addington Symonds, *Sexual Inversion* (1897), in NINETEENTH-CENTURY WRITINGS ON HOMOSEXUALITY: A SOURCEBOOK 99 (Chris White ed., 1999).

74. Ellis concluded that “if we can enable an invert to be healthy, self-restrained, and self-respecting, we have often done better than to convert him into the mere feeble simulacrum of a normal man.” Ellis & Symonds, *supra* note 73, at 104. With respect to acquired inversion, Krafft-Ebing considered it treatable, and Ellis thought that it could be prevented through sound social hygiene. *Id.* at 103.

75. R. VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS: A MEDICO-LEGAL STUDY* 410 (Charles Gilbert Chaddock trans., F.A. Davis Co. 7th ed. 1920). Ellis voiced a similar concern regarding the effect of social stigma on the invert, when he wrote that “the invert is not only the victim of his own abnormal obsession; he is the victim of social hostility.” Ellis & Symonds, *supra* note 73, at 104.

of inverts, Krafft-Ebing argued that the law should “cease to punish them” and that society should not stigmatize them because of the terrible toll it takes on the invert, resulting in “mental despair . . . even insanity and suicide . . . at the very least, nervous disease[.]”<sup>76</sup> In addition to the sexologists, homosexual emancipation organizations, such as the German Scientific-Humanitarian Committee<sup>77</sup> and individual social activists, including Edward Carpenter,<sup>78</sup> used the scientific insights of the sexologists to argue for legal and social reform. For example, the Scientific-Humanitarian Committee lobbied vigorously for the repeal of paragraph 175 of the German Imperial Penal Code that criminalized sodomy.<sup>79</sup>

#### B. THE SEXUAL PSYCHOPATH AND THE AMERICAN FREUDIANS

In the early part of the twentieth century, the views of the sexologists were gradually displaced by Freudian theory that focused on interior selves and the unconscious.<sup>80</sup> Psychoanalytic theory advanced a new understanding of same-sex attraction and rejected the sexologists’ belief that homosexuals were simply born that way—a naturally occurring variant.<sup>81</sup> Unlike early sexologists who conflated same-sex attraction with transgender behavior,<sup>82</sup> Freudians developed a separate theory of gender identity based largely on nurture rather than nature.<sup>83</sup> Freudian

76. *Id.*

77. The Scientific-Humanitarian Committee was the first of several politically active homosexual organizations established in Germany beginning in the late nineteenth century. See STEAKLEY, *supra* note 58, at 82. Homosexual organizations proliferated during the Weimar Republic. *Id.* The elections of 1933 marked the end of the German homosexual emancipation movement. *Id.* at 104–05. In May 1933, the Nazis targeted the Institute of Sexual Science in Berlin, which had been founded by Magnus Hirschfeld. *Id.* In order to rid Berlin of “un-German spirit,” the Nazis looted the building and later burned over 12,000 books taken from its libraries in a public ceremony. *Id.* at 104.

78. Edward Carpenter was a British social activist who espoused socialism and was vocal on the topic of the intermediate sex. See generally SHEILA ROWBOTHAM & JEFFREY WEEKS, *SOCIALISM AND THE NEW LIFE: THE PERSONAL AND SEXUAL POLITICS OF EDWARD CARPENTER AND HAVELOCK ELLIS* (1977).

79. The founder of the Scientific-Humanitarian Committee, Magnus Hirschfeld, petitioned the Reichstag to repeal section 175. SIMON LEVAY, *QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY* 232 (1996). He stressed the biological origin of homosexuality and argued that “no moral blame should be laid on a person for possessing the capacity for such feelings.” *Id.* (quoting Hirschfeld). Hirschfeld noted that the cause of homosexuality was “virtually proven.” *Id.* He also claimed that “scientific research . . . had asserted without exception, that this way of love is constitutional.” Magnus Hirschfeld, *Scientific Humanitarian Committee, Petition to the Reichstag* (1897), in *WE ARE EVERYWHERE* 135 (Mark Blasius & Shane Plelan eds. 1997).

80. See TERRY, *supra* note 58, at 55–56 (discussing progression from “congenital defect” to a “perversion” caused by the “stresses and strains of psychosexual development”).

81. KATIE SUTTON, *SEX BETWEEN BODY AND MIND: PSYCHOANALYSIS AND SEXOLOGY IN THE GERMAN-SPEAKING WORLD, 1890S–1930S* 75 (2019) (discussing natural sexual variations).

82. Krafft-Ebing created gradations of inversions, in some ways foreshadowing the famous Kinsey scale, which measured the degree of same-sex desire on a rating scale of zero to six. However, Krafft-Ebing’s scale measured both the strength of object choice and the relative degree of gender nonconformity. See DEAN HAMER & PETER COPELAND, *SCIENCE OF DESIRE: THE GAY GENE AND THE BIOLOGY OF BEHAVIOR* 58 (2011) (describing the Kinsey Scale).

83. See TERRY, *supra* note 58, at 56 (describing psychoanalytic model of homosexuality “as perversions of the normal sex drive caused by the stresses and strains of psychosexual development” as opposed to “a hereditary or congenital defect that manifested itself in sexual inversion”).



theory characterized homosexuality as a perversion of the normal sex drive, which occurred during the course of an individual's natural psychosexual development, from a state of original bisexuality.<sup>84</sup>

Initially, the psychoanalytic model did not endorse a therapeutic response to homosexuality, based on the conviction that homosexuality represented a perversion of the sex drive rather than a neurosis.<sup>85</sup> In Freud's 1935 "Letter to an American Mother," he reassured a mother who was worried about her son by noting that "many highly respectable individuals of ancient and modern times have been homosexuals."<sup>86</sup> He explained that "homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development."<sup>87</sup> Freud also opined that it was "a great injustice to persecute homosexuality as a crime."<sup>88</sup>

In the United States, this relatively benign view changed drastically in the 1940s, with the reappraisal of homosexuality by a group now referred to as the "American Freudians."<sup>89</sup> They rejected the Freudian concept of an initial state of bisexuality, assumed the potential for universal heterosexuality, and theorized homosexuality was a phobic response to the opposite sex.<sup>90</sup> In particular, they believed that homosexuality was often caused by a sexual encounter with an older predatory homosexual.<sup>91</sup> This led to a distorted view of the homosexual lifecycle, where older homosexuals indoctrinate young children, who then grow up to be sexual predators.<sup>92</sup>

Unlike Freud, the American psychoanalysts believed that homosexuality was responsive to therapeutic intervention, because it was a phobic or neurotic

---

84. *Id.*

85. *Id.* at 309.

86. Sigmund Freud, *Letter to an American Mother*, 107 AM. J. OF PSYCHIATRY 787 (1951), available at Fordham University Internet History Sourcebook, <https://sourcebooks.fordham.edu/pwh/freud1.asp>.

87. *Id.* Freud also advocated that homosexuals should be eligible for membership in a psychoanalytic training institute. Vernon Rosario, *An Interview with Martha J. Kirkpatrick*, in AMERICAN PSYCHIATRY AND HOMOSEXUALITY: AN ORAL HISTORY 216 (Jack Drescher and Joseph P. Merlino, eds. 2007).

88. *See id.* Freud expressed his objection to the criminalization of homosexuality as early as 1903 when he wrote: "I am of the firm conviction that homosexuals must not be treated as sick people for a perverse orientation is far from being a sickness. Homosexual persons are not sick, but they also do not belong in a court of law!" RICHARD C. PILLARD, *The Search for a Genetic Influence on Sexual Orientation*, in SCIENCE AND HOMOSEXUALITIES 227 (Vernon A. Rosario ed., 1997).

89. Pillard notes that this shift did not occur until after Freud's death in 1939. *Id.* at 227–28.

90. BAYER, *supra* note 2, at 28–29.

91. TERRY, *supra* note 58. The first Diagnostic and Statistical Manual of Mental Disorders ("DSM-I") published in 1952 included homosexuality as one of the most severe sociopathic personality disorders. The classification of homosexuality as a mental illness began to emerge in the 1930s, a result of the growing popularity of Freudian psychoanalytic theory. *Id.* at 18–22. At that point, "the pathologizing influence of psychiatry and the promise of a cure influenced both the criminal law and public policy regarding homosexuality." *Id.* at 20 (discussing sexual psychopath laws and indeterminate commitments).

92. *Id.* at 144.

response.<sup>93</sup> This therapeutic optimism led psychiatrists to develop an arsenal of procedures and protocols designed to cure homosexuals, including, at one time or another, electro-shock therapy, aversion therapy, and even pre-frontal lobotomies and other forms of psychosurgery.<sup>94</sup> The first *Diagnostic and Statistical Manual of Mental Disorders (DSM-I)* published in 1952 listed homosexuality as among the most severe sociopathic personality disorders.<sup>95</sup> The severity of the diagnosis meant that individuals could be involuntarily committed to a mental institution for treatment.<sup>96</sup> It also made them unfit parents and ineligible for military service, as well as most other jobs.<sup>97</sup>

The theory of homosexuality espoused by the American Freudians informed a wide range of criminal laws, which were designed to disrupt the sexual predator lifecycle and isolate homosexuals.<sup>98</sup> It also gave rise to a vicious stereotype that continues to live on in anti-LGBT propaganda: that homosexuals prey on children.<sup>99</sup> Sexual psychopath laws authorized the admission of an individual charged with a sex crime to a mental institution for an indeterminate period of treatment before standing trial for the underlying criminal charge.<sup>100</sup> Throughout the 1950s, federal, state, and local governments engaged in surveillance of suspected homosexuals and homophile organizations.<sup>101</sup> Homosexuals were also discharged in great numbers from government employment as the result of periodic “witch hunts,” which were carried out on the federal, state, and local levels.<sup>102</sup>

Perhaps surprisingly, during this period, many homosexuals welcomed the account of homosexual development offered by the American Freudians, and many willingly entered therapy hoping to find a “cure” for their condition.<sup>103</sup> The small homophile movement that began in the 1950s endorsed medical and

93. BAYER, *supra* note 2, at 33. For example, in a 1962 study Irving Bieber, an American psychoanalyst, reported that “a heterosexual shift is a possibility for all homosexuals who are strongly motivated to change.” *Id.* Bayer notes that “throughout the 1960s, Bieber’s name became synonymous with all that was hateful in American psychiatry.” *Id.* at 80.

94. WILLIAM N. ESKRIDGE, JR. & NAN HUNTER, *SEXUALITY, GENDER, AND THE LAW* 172 (1997) (reporting 2000 pre-frontal lobotomies performed on sex offenders between 1938–1946).

95. BAYER, *supra* note 2, at 39 (explaining DSM).

96. *See generally* DUBERMAN, *supra* note 52.

97. *See* LILLIAN FADERMAN, *THE GAY REVOLUTION: THE STORY OF STRUGGLE* 3–50 (2016).

98. *See* TERRY, *supra* note 58, at 273 (describing “the historical emergence of the sexual psychopath”).

99. *Id.* This theory justified the conflation of the homosexual with the pedophile.

100. *Id.* (describing “the historical emergence of the sexual psychopath”); ESKRIDGE, *supra* note 59, at 43–44, 61–62 (describing sexual psychopath laws).

101. *See id.*, at 74–76 (noting the FBI began keeping files on reported homosexuals “no later than 1937”).

102. *Id.* at 70; *see also* JOHN D’EMILIO, *SEXUAL COMMUNITIES, SEXUAL POLITICS* 40–53 (1983).

103. At the time, these views represented the best scientific thought, and conditions for LGBT people were quite difficult. *See generally* BAYER, *supra* note 2, at 9 (noting “for much of the first half of this century many homosexuals who were willing to express themselves publicly welcomed the psychiatric effort to wrest control of the social definition of their lives from moral and religious authorities”); DUBERMAN, *supra* note 52. Bayer suggests that the view among homosexuals at the time was, “better sick than criminal.” *See* BAYER, *supra* note 2, at 9; *see also* DUBERMAN, *supra* note 52; BETTY BERZON, *SURVIVING MADNESS: A THERAPIST’S OWN STORY* (2002).

psychiatric research into not only the cause, but also the cure, of homosexuality.<sup>104</sup> For example, the two largest homophile organizations, the Mattachine Society, founded in 1950, and the Daughters of Bilitis (DOB), founded in 1955, both adopted a neutral stance regarding scientific research into homosexuality and included commitments to such research in their official statements of purpose.<sup>105</sup> The cooperative relationship between the homophile organizations and psychiatry was not officially severed until 1968, when the North American Conference of Homophile Organizations adopted a platform that declared “Gay Is Good” and unequivocally rejected the belief that homosexuals were mentally ill.<sup>106</sup>

### C. GAY LIBERATION MOVEMENT AND THE END OF DIAGNOSIS

Historians generally point to the 1969 Stonewall Riots in New York City as the beginning of the Gay Liberation movement.<sup>107</sup> Influenced by the New Left, Gay Liberation quickly eclipsed the more cautious and assimilationist homophile movement with confrontational politics and radical calls for autonomy and self-determination.<sup>108</sup> Gay liberationists forcefully challenged the classification of homosexuality as a mental illness, because they saw it as a major obstacle to achieving equal rights and full acceptance.<sup>109</sup> They pointed to new scientific studies that showed no difference between homosexual and non-homosexual test subjects and argued for the declassification and deletion of homosexuality from the *Diagnostic and Statistical Manual*.<sup>110</sup> Under sustained pressure from gay activists, the American Psychiatric Association (APA) voted to declassify

104. See BAYER, *supra* note 2, at 70–88 (describing the early homophile movement); see also MINTON, *supra* note 65, at 238–41.

105. The first paragraph of the DOB’s Statement of Purpose included “sponsoring public discussions on pertinent subjects to be conducted by leading members of the legal, psychiatric, religious and other professions; by advocating a mode of behavior and dress acceptable to society.” *Statement of Purpose (1955)*, in WE ARE EVERYWHERE 328 (Mark Blasius & Shane Phelan eds. 1997).

106. BAYER, *supra* note 2, at 88; see also LEVAY, *supra* note 79, at 222 (describing adoption of “Gay is Good” slogan). The Mattachine Society of Washington had voted three years earlier in 1965 to disaffirm the psychoanalytic model of homosexuality: “The Mattachine Society of Washington takes the position that in the absence of valid evidence to the contrary, homosexuality is not a sickness, disturbance or other pathology in any sense but is merely a preference, orientation or propensity on a par with, and not different in kind from, heterosexuality.” BAYER, *supra* note 2, at 88. Homophile pickets at medical conventions began as early as 1968, when activists picketed an American Medical Association convention to demand the inclusion of pro-gay views and speakers. *Id.* at 92.

107. The Stonewall riots began on June 27, 1969, when police raided a gay bar, the Stonewall Inn, in Greenwich Village. See generally MARTIN DUBERMAN, STONEWALL (1993) (discussing the history of Stonewall through the lives of six individuals). The disturbances continued sporadically for several days. *Id.* at 203–09.

108. See ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 31 (1996) (“No longer content to solicit tolerance and acceptance, more radical groups began to model themselves on New Left social movements and to critique the structures and values of heterosexual dominance.”).

109. See generally BAYER, *supra* note 2 (describing efforts to declassify homosexuality as a mental illness).

110. See generally LEVAY, *supra* note 79.

homosexuality in December 1973, prompting one newspaper to declare, “20 Million Gain Instant Cure.”<sup>111</sup>

The Gay Liberation movement was short-lived, but its emphasis on freedom of choice, autonomy, and sexual liberty ushered in a new way of talking about sexuality and gender in the United States.<sup>112</sup> This focus on individual agency was even reflected in the wording of the first anti-discrimination protections adopted during the 1970s at the municipal level, which routinely used the term *sexual preference*.<sup>113</sup> To the contrary, later protections opted for the term *sexual orientation*, in order to signal something more than a mere preference that was either immutable or difficult to change.<sup>114</sup>

Despite high expectations, the declassification of homosexuality did not lead to immediate legal or political gains.<sup>115</sup> Sodomy remained criminalized in the majority of states.<sup>116</sup> No state-wide antidiscrimination protections were enacted until nine years later, in 1982,<sup>117</sup> although some local governments had extended protections on the basis of sexual preference.<sup>118</sup> Moreover, the 1973 declassification of homosexuality was partially because of the newly created category of “ego dystonic homosexuality,” which applied when an individual was bothered by their homosexuality.<sup>119</sup> It remained in the *Diagnostic and Statistical Manual* until 1989.<sup>120</sup> Declassification of homosexuality as a mental illness may have been a necessary step to ensure “liberation,” but it was in no way sufficient, because the label of mental illness was never the only cause of LGBT subordination. We will

111. *Id.*

112. For a discussion of the history of the Gay Liberation movement, see JAGOSE, *supra* note 108, at 30–43 (discussing history of Gay Liberation from the 1969 Stonewall riots until the mid-1970s).

113. See Mary Ziegler, *Perceiving Orientation: Defining Sexuality After Obergefell*, 23 DUKE J. GENDER L. & POL’Y 223, 231–36 (2016) (discussing the debate over the terms sexual preference and affectional preference).

114. Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 149 (John D’Emilio, *et al.* eds. 2002).

115. Throughout the 1970s, states began to repeal their sodomy laws, but the process was slow. Ten years after declassification, only the following states had repealed their sodomy laws: Illinois (1962), Connecticut (1971), Colorado (1972), Oregon (1972), Delaware (1973), North Dakota (1973), Ohio (1974), New Hampshire (1975), New Mexico (1975), California (1976), Maine (1976), West Virginia (1976), Washington (1976), Indiana (1977), South Dakota (1977), Vermont (1977), Wyoming (1977), Iowa (1978), Nebraska (1978), New Jersey (1979), Alaska (1980), Wisconsin (1983). Jeremy Quittner, *Are You Breaking the Law? Where Does Your State Stand on Sodomy Laws?*, THE ADVOCATE 52 (Aug. 20, 2002). By the time *Lawrence v. Texas* was decided in 2003, thirteen states still had sodomy laws. *Lawrence*, 539 U.S. 558 (2003) (invalidating Texas homosexual criminal sodomy law).

116. Quittner, *supra* note 115.

117. ESKRIDGE, *supra* note 59, at 361.

118. Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337, 338 (1998) (describing the protections that came from municipalities passing “domestic partnership ordinances,” which extended some employee benefits to same-sex couples).

119. BAYER, *supra* note 2, at 209–17.

120. *Id.*

see this theme again in the next section with respect to the 2003 landmark ruling, *Lawrence v. Texas*, which invalidated criminal sodomy laws.<sup>121</sup>

It is also important to recognize that the declassification of homosexuality by the APA did not completely get rid of the notion that homosexuality was a disease that must be cured. The belief in a “cure” is reflected in the harmful practice of conversion therapy. The discredited theories of the American Freudians remain an integral part of the lexicon of conversion therapists.<sup>122</sup> Reparative therapists such as Joseph Nicolosi, who founded the National Association of Reparative Therapists (NARTH), claim they only seek to treat individuals who are distressed by their homosexuality and who otherwise would be denied the opportunity to seek treatment.<sup>123</sup> Nicolosi referred to these individuals as “non-gay” gays because, *inter alia*, they desired the traditional markers of a heterosexual lifestyle.<sup>124</sup> According to this post-1973 psychoanalytic model, same-sex desire is a “defensive detachment” *from* members of the same sex, as opposed to a phobic reaction *to* members of the opposite sex.<sup>125</sup> The “defensive detachment” typically stems from a hurtful experience with the parent of the same sex.<sup>126</sup> As a result, the individual stops identifying with members of the same sex and “needs for love, dependency and identification which are normally met through the medium of such an attachment, remain unmet.”<sup>127</sup> Under this theory, individuals suffering from this defensive detachment turn to homosexuality as a “reparative device.”<sup>128</sup> It operates as an “attempt to fulfill a deficit in wholeness of one’s original gender.”<sup>129</sup> So-called “reparative therapy,” such as that advocated by Nicolosi, is designed to address this gender deficit and produce “good heterosexual functioning.”<sup>130</sup>

---

121. *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating Texas homosexual criminal sodomy law).

122. Timothy F. Murphy, *Freud and Sexual Reorientation Therapy*, 21 J. OF HOMOSEXUALITY 28 (1992).

123. JOSEPH NICOLOSI, REPARATIVE THERAPY OF MALE HOMOSEXUALITY (1991) (discussing reparative therapy). Nicolosi died in 2017. Richard Sandomir, *Joseph Nicolosi, Advocate of Conversion Therapy for Gays, Dies at 70*, N.Y. TIMES (Mar. 16, 2017) (noting that Nicolosi claimed to have “cured” one-third of his patients). In 2019, Amazon removed Nicolosi’s books from its site. Gwen Aviles, *Amazon Removes Controversial Books by ‘Father of Conversion Therapy’*, NBC NEWS (July 3, 2019), <https://www.nbcnews.com/feature/nbc-out/amazon-removes-controversial-books-father-conversion-therapy-n1026446>.

124. NICOLOSI, *supra* note 123 at 3–6. The factors that identified one as predisposed to ego-dystonic homosexuality are similar to those identified by Nicolosi, *id.*, in addition to internalized “negative societal attitudes towards homosexuality,” BAYER, *supra* note 2, at 177 (quoting Spitzer). Spitzer noted that those “features associated with heterosexuality” may be considered “incompatible with a homosexual arousal pattern.” *Id.*

125. *See, e.g.*, ELIZABETH MOBERLY, PSYCHOGENESIS: THE EARLY DEVELOPMENT OF GENDER IDENTITY 67 (1983); NICOLOSI, *supra* note 123.

126. MOBERLY, *supra* note 125, at 98.

127. *Id.* at 67.

128. *Id.*

129. *See* NICOLOSI, *supra* note 123, at 109 (discussing reparative therapy).

130. *Id.* at 165; *see also* Sandomir, *supra* note 123 (quoting Nicolosi that “in homosexuals the drive [for romantic love] is an attempt to fulfill a deficit in wholeness of the original gender”).



Many ex-gay ministries also base their counseling programs on the gender deficit theory of homosexuality, although some eschew any psychological explanations as unbiblical and prefer to rely solely on Scripture for therapeutic guidance.<sup>131</sup> All major medical associations have rejected the practice of attempting to “change” sexual orientation.<sup>132</sup> Gender deficit theories also inform attempts to “change” gender identity, which are sometimes conflated with sexual orientation conversion efforts.<sup>133</sup> As gender identity has become a more visible issue, medical organizations have amended their anti-conversion statements to include gender identity.<sup>134</sup>

Increasingly, jurisdictions are taking steps to prohibit conversion therapy for children under the age of eighteen, including twenty states and the District of Columbia.<sup>135</sup> As explained in Section IV, success of the state-level bans on conversion therapy has led to various legislative initiatives to roll back this trend and carve out exceptions for conversion therapy, based on religious or moral beliefs. A particularly hot-button topic is whether parents have the right to make health care decisions on behalf of their minor children. For example, the 2016 Platform of the Republican National Committee specifically affirmed the right of parents to choose controversial “treatment or therapy” for their children.<sup>136</sup> Ironically, this asserted parental right seems to contradict legislative efforts to prohibit parents from authorizing gender-confirming medical treatment for their minor children.<sup>137</sup>

Although homosexuals were officially “cured” in 1973, transgender individuals remained under the stigma of a mental disorder until much more recently.<sup>138</sup> Gender identity disorder (GID) was classified as a mental disorder subject to

131. Marisa Iati, *Conversion Therapy Center Founder Who Sought to Turn LGBTQ Christians Straight Says He’s Gay, Rejects ‘Cycle of Self Shame’*, WASH. POST (Sept. 5, 2019), <https://www.washingtonpost.com/religion/2019/09/03/conversion-therapy-center-founder-who-sought-turn-lgbtq-christians-straight-now-says-hes-gay-rejects-cycle-shame/>.

132. See *supra* note 30 (listing statements of medical organizations opposed to conversion therapy).

133. Anderson, *supra* note 28; see also André Van Mol, *New Study on Sexual Orientation Change Efforts*, CHRISTIAN MED. & DENTAL ASS’N (Aug. 23, 2018), <https://cmda.org/new-study-on-sexual-orientation-change-efforts/> (noting the importance of “weekend gender-affirming retreats”).

134. For example, the statement of the American Academy of Child and Adolescent Psychiatry was approved in 2018 and includes sexual orientation, gender identity, and gender expression. American Academy of Child and Adolescent Psychiatry, *The AACAP Policy on “Conversion Therapies”* (2018), available at [https://www.aacap.org/AACAP/Policy\\_Statements/2018/Conversion\\_Therapy.aspx](https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx). However, the statement of the American Academy of Pediatrics was adopted in 1993 and only refers to sexual orientation. *Homosexuality and Adolescence*, *supra* note 30, at 631.

135. *Anti-Conversion Therapy*, HUM. RTS. CAMPAIGN (Mar. 4, 2020), <http://www.hrc.org/state-maps/anti-conversion%20therapy/pdf> (last visited Mar. 6, 2020).

136. Conley, *supra* note 31.

137. For example, a proposed bill in Illinois would amend the medical conduct act to make it professional misconduct for a physician to prescribe gender-confirming medical treatments or perform surgical intervention on a patient under the age of eighteen. H.R. 3515, 101st Gen. Assemb. (Ill. 2019), <http://www.ilga.gov/legislation/billstatus.asp?DocNum=3515&GAID=15&GA=101&DocTypeID=HB&LegID=120154&SessionID=108> (last visited March 6, 2020).

138. Dean Spade, *Mutilating Gender*, THE TRANSGENDER STUDIES READER 315, 315–32 (Susan Stryker & Stephen Whittle eds. 2006).

medical intervention until 2013.<sup>139</sup> After considerable lobbying by LGBT groups, the APA eventually recognized the risk of stigmatization that attached to a GID diagnosis and reclassified GID as Gender Dysphoria in the latest addition of the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)*.<sup>140</sup> The new classification of Gender Dysphoria focuses on the distress caused by the condition and “removes the connotation that the patient is ‘disordered.’”<sup>141</sup> However, in many instances, a positive diagnosis of Gender Dysphoria remains necessary to access gender medical intervention, thereby acting as a gatekeeper for gender-affirming care.<sup>142</sup>

#### D. “BORN THIS WAY”<sup>143</sup> AND BIO-SCIENCE

Both the American Freudians and Gay Liberationists believed that individuals either became LGBT or chose to be LGBT, as opposed to the sexologists whose theories of inversion looked to nature rather than nurture.<sup>144</sup> The declassification of homosexuality and the emergence of the contemporary LGBT rights movement marked the beginning of a renewed understanding of sexual orientation and, by extension, gender identity as innate human characteristics.<sup>145</sup> To quote Lady Gaga, LGBT individuals are simply “Born This Way.”<sup>146</sup>

Beginning in the 1990s, a number of highly publicized scientific studies pointed to the possibility that sexual orientation has a genetic or other biological cause.<sup>147</sup> This research represented a departure from the psychoanalytic school and a return to the belief that sexual orientation and gender identity was innate

139. *Id.*

140. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) § 302.6 (5th ed. 2013).

141. AM. PSYCHIATRIC ASS’N, *Gender Dysphoria* (2013), available at <https://www.psychiatry.org/psychiatrists/practice/dsm/educational-resources/dsm-5-fact-sheets>.

142. Grinker, *supra* note 20.

143. Lynn Neery, *How ‘Born This Way’ Was Born: An LGBT Anthem’s Pedigree*, NPR (Jan. 30, 2019), <https://www.npr.org/2019/01/30/687683804/lady-gaga-born-this-way-lgbt-american-anthem>.

144. See TERRY, *supra* note 58 (discussing difference between congenital and psychosexual development approach).

145. Hunter Schwarz, *A Majority of Americans Now Think that Gays Were Born That Way*, WASH. POST (May 21, 2015, 10:29 AM), <https://www.washingtonpost.com/news/the-fix/wp/2015/05/21/a-majority-of-americans-now-think-gays-and-lesbians-are-born-that-way/>.

146. Autumn Edwards et al., THE COMMUNICATION AGE: CONNECTING AND ENGAGING 174 (2013) (noting that Lady Gaga’s song has become “an anthem as well as inspiration for today’s gay and lesbian youth”).

147. See, e.g., Natalie Angier, *Report Suggests Homosexuality is Linked to Genes*, N.Y. TIMES, July 16, 1993, at A1 <https://www.nytimes.com/1993/07/16/us/report-suggests-homosexuality-is-linked-to-genes.html> (discussing 1993 study by Dean Hamer regarding a potential genetic marker, popularly referred to as the “gay gene”); Malcolm Gladwell, *Genes Tied To Sexual Orientation; Study of Gay Men Bolsters Theory*, WASH. POST, Dec. 17, 1991, at A1 (discussing the 1991 twin study by J. Michael Bailey and Richard Pillard); Christine Gorman, *Are Gay Men Born That Way?*, TIME (Jun. 24, 2001), <http://content.time.com/time/magazine/article/0,9171,157793,00.html> (describing LeVay’s 1991 study of the hypothalamus of gay men).

and inborn.<sup>148</sup> The revived emphasis on nature, rather than nurture, occurred at a time when gay rights advocates were shifting their litigation strategy from Due Process claims to Equal Protection arguments, because the former had been effectively foreclosed in 1986 by *Bowers v. Hardwick*.<sup>149</sup> The possibility of a “gay gene” or other biological determinate seemed to fit neatly into the then-existing paradigm of “immutability” required to trigger suspect classification and strict scrutiny under the Fourteenth Amendment.<sup>150</sup>

The early studies of a “gay gene” came from three distinct areas of research: neuroanatomical research, heredity studies concerning the incidence of homosexuality in families, and genetic linkage studies.<sup>151</sup> Simon LeVay’s 1991 study reported anatomical differences between homosexual and heterosexual men in the portion of the hypothalamus responsible for sex drive, known as the INAH-3.<sup>152</sup> His study suggested a correlation between INAH-3 size and sexual orientation in men, but failed to establish a causal link.<sup>153</sup> The best known heredity study of the period was a twin study by J. Michael Bailey and Richard Pillard, which was also published in 1991.<sup>154</sup> The study reported an increased likelihood that identical twins would both be gay if one twin were gay.<sup>155</sup> Dean Hamer’s 1993 genetic linkage was widely reported as having identified the “gay gene.”<sup>156</sup> Hamer pursued a genetic marker to account for the higher incidence of homosexuality

148. The renewed emphasis on nature over nurture occurred at the same time that science was beginning to unlock the explanatory power of the human genome. Heidi Chial, *DNA Sequencing Technologies Key to the Human Genome Project*, 1 NATURE ED. 219 (2008) (“The Human Genome Project was a 13-year-long, publicly funded project initiated in 1990 with the objective of determining the DNA sequence of the entire euchromatic human genome.”).

149. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that homosexual sodomy was not protected under the Due Process clause in light of our nation’s history and tradition).

150. *United States v. Carolene Products, Co.*, 304 U.S. 144, 153 n.4 (1938).

151. See *infra* text accompanying notes 153–59 (discussing the three different types of studies).

152. Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, SCL., Aug. 30, 1991, at 1034; see also LEVAY, *supra* note 79, at 146–48 (discussing results of study).

153. Criticism of LeVay’s findings takes issue with the size of the study, the conclusions he reached regarding the sexual orientations of the subjects, and the fact that a large percentage of the subjects died as a result of complications associated with HIV/AIDS. Lisa Keen & Suzanne B. Goldberg, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 53–54 (1998).

154. Gladwell, *supra* note 147, at A1, A4. Reporting the story on its front page, *The Washington Post* article announced that “scientists have uncovered new evidence that genetic factors may play an important—if not dominant—role in determining whether males become homosexual.” *Id.*

155. However, the Bailey and Pillard study, like the other heredity studies, also suggests environmental factors and does not establish that homosexuality is genetically predetermined. After concluding that sexual orientation is “likely to be powerfully influenced by an innate, inherited predisposition[.]” Pillard acknowledged that “social influences are not dismissed.” Richard C. Pillard, *The Search for a Genetic Influence on Sexual Orientation*, SCI. & HOMOSEXUALITIES 235–36 (Vernon A. Rosario ed., 1997).

156. Dean Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, SCL., July 16, 1993, at 321. Hamer’s study became widely known as the “gay gene” study. See, e.g., Jerry E. Bishop, *Research Points Toward a ‘Gay’ Gene*, WALL ST. J., July 16, 1993, at B1.

identified among the maternal relatives of gay men.<sup>157</sup> Hamer found statistically improbable similarities in the q28 region of the X chromosome that led him to conclude that “we have now produced evidence that one form of male homosexuality is preferentially transmitted through the maternal side and is genetically linked to chromosomal region Xq28.”<sup>158</sup>

These studies were front-page news and the coverage was overwhelmingly positive.<sup>159</sup> As early as 1991, Peter Jennings, then-anchor for the ABC evening news, announced that “new evidence . . . about what causes a man to be homosexual . . . suggests that the answer, to a very large degree, may be found in a person’s genetic inheritance.”<sup>160</sup> The studies were also widely praised by gay men and lesbians who believed that their findings confirmed what they already intuitively knew, namely that they were indeed “born that way.”<sup>161</sup>

Since the 1990’s, the search for the gay gene and definitive proof that sexual orientation is biologically determined has continued in earnest, and researchers have added gender identity to their agendas.<sup>162</sup> A recent study purported that facial recognition technology could predict sexual orientation—giving new credence to the concept of “gaydar.”<sup>163</sup> Although the weight of the scientific evidence remains inconclusive, the assorted studies suggest a genetic or other biological link with regard to sexual orientation and gender identity.<sup>164</sup> Despite the absence of scientific certainty, there has been a tremendous shift in public opinion regarding whether one is born gay or chooses to be gay.<sup>165</sup> Presently, a majority

---

157. *Id.* (identifying higher incidence of homosexuality in maternal uncles and sons of maternal aunts).

158. *Id.*

159. See Angier, *supra* note 147; see also HAMER & COPELAND, *supra* note 82, at 17–19 (discussing media reaction to 1993 study).

160. ABC News Transcript, World News Tonight with Peter Jennings, Dec. 17, 1991.

161. Andrea Ford & Bill Billiter, *Researcher’s Findings Stir Debate on Homosexuality*, L.A. TIMES, Aug. 31, 1991, at B1 (reporting gay activists “praised” LeVay’s findings). Hamer reports that after his 1993 study was released his “mailbox filled with letters from people thanking me for doing the study.” HAMER & COPELAND, *supra* note 82, at 18.

162. Francine Russo, *Is There Something Unique about the Transgender Brain? Imaging Studies and other Research Suggest that there is a Biological Basis for Transgender Identity*, SCI. AM. (Jan. 1, 2016), <https://www.scientificamerican.com/article/is-there-something-unique-about-the-transgender-brain/>; Daniel Trotta, *Born this Way? Researchers Explore the Science of Gender Identity*, REUTERS (Aug. 3, 2017, 1:16 AM), <https://www.reuters.com/article/us-usa-lgbt-biology/born-this-way-researchers-explore-the-science-of-gender-identity-idUSKBN1AJ0F0>.

163. Heather Murphy, *Why Stanford Researchers Tried to Create a ‘Gaydar’ Machine*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/science/stanford-sexual-orientation-study.html>.

164. Published in 2017, a genome-wide association study identified several genes “plausibly relevant to the development of sexual orientation.” Sanders et al., *Genome-Wide Association Study of Male Sexual Orientation*, NATURE.COM (Dec. 7, 2017), <https://www.nature.com/articles/s41598-017-15736-4.pdf>; see also Peter Dockill, *We May Have Just Identified Genetic Evidence of Male Sexual Orientation*, SCI. ALERT (Dec. 7, 2017), <https://www.sciencealert.com/we-just-identified-genetic-evidence-male-sexual-orientation-gay-gene>.

165. Jeffrey Jones, *Majority in U.S. Now Say Gays and Lesbians Born, Not Made*, GALLUP (May 20, 2015), <http://news.gallup.com/poll/183332/majority-say-gays-lesbians-born-not-made.aspx> (reporting results of Gallup polls from 1977 to 2015).

of Americans believe that gay men and lesbians were born that way,<sup>166</sup> whereas only thirteen percent of those surveyed in 1977 thought that homosexuality was inborn.<sup>167</sup>

There is one segment of society that has steadfastly rejected the notion that sexual orientation and gender identity are inborn. Opponents of LGBT rights contend that the “gay lifestyle” and being transgender are both choices.<sup>168</sup> Take, for example, the heated rhetoric around the state-level bathroom bills, which often raises the specter of a male sexual predator who claims that he is a woman to gain access to the ladies restroom.<sup>169</sup> The volitional nature of both sexual orientation and gender identity is key to anti-LGBT arguments against any sort of protected status for LGBT people, because if their identity is volitional, then they are not a real minority.<sup>170</sup> Moreover, the assertion that being LGBT is a choice is the premise of both conversion therapy and the conviction that it is possible to change one’s sexual orientation and gender identity.<sup>171</sup> Ex-gay and ex-transgender organizations and ministries exist to spread the word that being LGBT is a choice and that it is possible to change.<sup>172</sup> By focusing on the element of choice and the ability to change, anti-LGBT advocates place the emphasis squarely back on acts and behavior, rather than individuals with a distinct identity. In so doing, anti-LGBT advocates attempt to not only destabilize LGBT identities, but to eradicate them completely because they believe that being LGBT is not a choice that anyone should make.

### III. LAW

The previous section charted the ascendancy of the role of science in the subordination and liberation of LGBT people and how the medicalization of LGBT

166. *Id.* The number of people who believe that gay men and lesbians were “born that way” reached as high as fifty-one percent in 2015. *Id.*

167. *In Depth Topics A to Z: Gay and Lesbian Rights*, *supra* note 19.

168. For example, when Dr. Ben Carson was a candidate for president, he ignited a firestorm when he asserted that being gay was a choice. Jose Real, *Ben Carson Says Being Gay is a Choice, Points to Prison as an Example*, WASH. POST (Mar. 4, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/03/04/ben-carson-says-being-gay-is-a-choice-points-to-prison-as-an-example/?utm\\_term=.385b235e30d3](https://www.washingtonpost.com/news/post-politics/wp/2015/03/04/ben-carson-says-being-gay-is-a-choice-points-to-prison-as-an-example/?utm_term=.385b235e30d3).

169. Manny Fernandez & Mitch Smith, *Houston Voters Reject Broad Anti-Discrimination Ordinance*, N.Y. TIMES (Nov. 3, 2015), <https://www.nytimes.com/2015/11/04/us/houston-voters-repeal-anti-bias-measure.html> (quoting slogan against ordinance “No Men in Women’s Bathrooms”).

170. Alan Medinger, *You are Not a Homosexual*, JOEL225.ORG (MAR. 3, 2020), <https://joel225.org/you-are-not-a-homosexual/> (“The formation of the gay sub-culture and its associated political movement over the past 25 years, has been largely an effort to give an identity to people who feel homosexual attractions.”).

171. For a discussion of conversion therapy, see *supra* text accompanying notes 27–31.

172. Anti-LGBT advocates have been showcasing individuals who identify as “ex-gay” at least since 1998 when they launched a national advertising campaign. Laurie Goodstein, *The Architect of the ‘Gay Conversion’ Campaign*, N.Y. TIMES, Aug. 13, 1998, at A10. Anti-LGBT organizations have also increasingly sought to align with ex-trans ministries. Zack Ford, *Focus on The Family Promotes Dangerous ‘Ex-Trans’ Ministries*, THINK PROGRESS (Oct. 25, 2012, 5:05 PM), <https://thinkprogress.org/focus-on-the-family-promotes-dangerous-ex-trans-ministries-136ecc5a724a/>.



people informed their position under the law. This section focuses on the major legal challenges to secure LGBT rights, which began at approximately the same time science turned its attention to investigating a biological cause for homosexuality. Beginning in the mid-1990s, the legal advances in LGBT rights started to focus on the recognition of same-sex relationships and, ultimately, marriage equality.<sup>173</sup> The high-profile U.S. Supreme Court cases of *Romer v. Evans* and *Lawrence v. Texas* established important constitutional benchmarks—but did not expressly endorse any higher level of scrutiny for LGBT people.<sup>174</sup> At the state level, considerable gains were also made through both favorable state supreme court cases and legislative initiatives.

It is tempting to look back at these legal advancements and see a clear trajectory of positive progressive change, but that is far from the reality. Many gains were partial, such as the differing forms of relationship recognition adopted by the various states: domestic partnerships, registered domestic partners, reciprocal beneficiaries, and civil unions.<sup>175</sup> Some of the initial gains were later overturned or superseded by citizens' initiatives and other forms of direct democracy.<sup>176</sup> For example, in California, same-sex couples were granted the right to marry under a state supreme court case in 2008, only to have that right overturned by Proposition 8 several months later.<sup>177</sup> Litigation was necessary to establish that the couples who married after the court decision, but before Proposition 8 passed, would remain legally married.<sup>178</sup> Throughout this period, LGBT rights became subject to extreme regional variation, as individuals who were married in one state would see that status change as they travelled through sister states.<sup>179</sup> The constant upheaval caused by these divisive ballot initiatives further politicized LGBT lives and identities, while once again challenging their basic humanity.

---

173. See generally GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* (Basic Books) (2005).

174. *Lawrence*, 539 U.S. 558; *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (applying rational basis and finding no legitimate state interest).

175. For example, Hawai'i enacted The Reciprocal Beneficiaries Act in 1997. 7 Act 383, Session Laws of Hawai'i 1997; HAW. REV. STAT. § 572C (West 2019) (creating the statutory category of reciprocal beneficiary and an entitlement to approximately sixty rights and responsibilities associated with marriage). Two years later, Vermont enacted civil unions that extended all the rights and responsibilities of marriage. Act Relating to Civil Unions, § 3, 2000 Vt. Adv. Legis. Serv. 91 (LexisNexis) (codified at VT. STAT. ANN. tit. 15, §§ 1201–1207 (West 2004)).

176. See, e.g., Chris Cillizza & Sean Sullivan, *How Proposition 8 Passed in California—and Why it Wouldn't Today*, WASH. POST (Mar. 26, 2013), [https://www.washingtonpost.com/news/the-fix/wp/2013/03/26/how-proposition-8-passed-in-california-and-why-it-wouldnt-today/?utm\\_term=.4f566f78e878](https://www.washingtonpost.com/news/the-fix/wp/2013/03/26/how-proposition-8-passed-in-california-and-why-it-wouldnt-today/?utm_term=.4f566f78e878).

177. *Id.*; *Prop 8 and DOMA: The Road to Gay Marriage*, LA TIMES (Apr. 21, 2014), <https://www.latimes.com/local/la-me-gay-marriage-sg-storygallery.html>.

178. *Strauss v. Horton*, 207 P.3d 48, 68–69 (2009) (holding Proposition 8 did not void existing marriages).

179. The Defense of Marriage Act (DOMA), Pub. L. 104–199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (1996)), *invalidated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Section 2 of DOMA purported to authorize states to refuse to recognize same-sex marriages from sister states in order to stop the potential spread of same-sex marriage. *Id.*

The advent of nationwide marriage equality did not fully resolve these regional disparities. Instead, it resulted in a serious equality gap—or perhaps an equality leap, because there were no general LGBT anti-discrimination protections at the federal level<sup>180</sup> or in the majority of the states.<sup>181</sup> Accordingly, in the majority of states, a same-sex couple who exercised their constitutional right to marry could be legally fired or evicted from their homes or denied service at a place of public accommodation.<sup>182</sup> They could be denied medical care or financing to purchase a home due to their sexual orientation.<sup>183</sup> Even fewer states extend protections based on gender identity.<sup>184</sup> In addition to facing bias and discrimination, transgender individuals continue to face numerous obstacles regarding safety, legibility, and inclusion, as evidenced by “bathroom bills” and other bills designed to deny or demonize the existence of transgender identity.<sup>185</sup> The following section reviews the major legal challenges to securing LGBT rights in chronological order, beginning in the mid-1990s—at the same time science was working to identify a biological cause for same-sex attraction—and ending with nationwide marriage equality in 2015.<sup>186</sup>

#### A. DON’T ASK, DON’T TELL AND *BAEHR V. LEWIN*

In 1993, the Hawai’i state supreme court decided *Baehr v. Lewin*,<sup>187</sup> a breakthrough case that indicated legal recognition of same-sex relationships could be attainable under state law.<sup>188</sup> It was the same year that Dean Hamer’s genetic

180. At the federal level, there were no explicit anti-discrimination protections in the employment context until 2020 when the U.S. Supreme Court decided *Bostock v. Clayton County*, 590 U.S. \_\_\_\_ (2020). Additionally, sexual orientation and gender identity are included under the Violence Against Women’s Act and the Mathew-Shepard-James Bryd Hate Crimes Act, 34 U.S.C.A. § 12291(b)(13)(A) (West through P.L. 116-91); 18 U.S.C. § 249(a)(2) (West through P.L. 116-91).

181. For an up-to-date discussion of state-level anti-discrimination protections in employment, see *Employment Map*, *supra* note 12. For an overview of anti-discrimination in housing, see *State Maps of Laws & Policy—Housing*, HUM. RTS. CAMPAIGN (June 11, 2018), <https://www.hrc.org/state-maps/housing> [hereinafter *Housing Map*]. For an overview of anti-discrimination in public accommodations, see *State Maps of Laws & Policy—Public Accommodations*, HUM. RTS. CAMPAIGN (June 11, 2018), <https://www.hrc.org/state-maps/public-accommodations> [hereinafter *Public Accommodations Map*].

182. *Employment Map*, *supra* note 12; *Housing Map*, *supra* note 181; *Public Accommodations Map*, *supra* note 181.

183. *Housing Map*, *supra* note 181; *Public Accommodations Map*, *supra* note 181.

184. *Employment Map*, *supra* note 12; *Housing Map*, *supra* note 181; *Public Accommodations Map*, *supra* note 181.

185. The National Conference of State Legislatures has been tracking “bathroom bills” since 2013. Joellen Kralik, “*Bathroom Bill*” *Legislative Tracking*, NAT’L CON. ST. LEG. (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.

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

187. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (finding marriage ban violated the Equal Rights Amendment to the Hawai’i State Constitution and, therefore, the state must establish a compelling state interest).

188. The debate within the LGBTQ community over marriage can be traced to an exchange that took place between Paula Ettlebrick and Tom Stoddard in responsive articles published in 1989 in *OUT/LOOK Magazine*. Paula L. Ettlebrick, *Since When is Marriage a Path to Liberation?*, *OUT/LOOK: NAT’L GAY & LESBIAN Q.*, Fall 1989, at 9, 14–17; Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, *OUT/LOOK: NAT’L GAY & LESBIAN Q.*, Fall 1989, at 9–13.

linkage study reported to have discovered the “gay gene,”<sup>189</sup> but the Culture Wars were at their height.<sup>190</sup> Appeals to traditional morality vilified and demonized gay sexuality.<sup>191</sup> The HIV/AIDS epidemic was still unmediated by the medications that would eventually allow individuals to live with the disease, and the number of AIDS-related deaths in the U.S. for that year alone exceeded 45,000.<sup>192</sup> Congressional hearings on the military’s “Don’t Ask, Don’t Tell” policy<sup>193</sup> purported to expose the “Gay Agenda”<sup>194</sup> and document the threat that openly gay service members would pose to national security.<sup>195</sup> There was only one recurring gay character on television,<sup>196</sup> and sixty-six percent of Americans believed that sexual relations between persons of the same sex were “always wrong.”<sup>197</sup>

In the wake of *Baehr v. Lewin*, the LGBT rights movement began to concentrate on the legal recognition of same-sex relationships, especially marriage equality.<sup>198</sup> The HIV/AIDS epidemic had painfully revealed how vulnerable

189. See *supra* text accompanying notes 124–126 (discussing genetic linkage studies).

190. DIDI HERMAN, *THE ANTI-GAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 55 (1997) (defining the term Culture Wars as “struggles over ideas and values, rights and responsibilities”).

191. See *id.*

192. Dennis H. Osmond, *Epidemiology of HIV/AIDS in the United States*, tbl.3 (March 2003), <http://hivinsite.ucsf.edu/InSite-KB-ref.jsp?page=kb-01-03&ref=kb-01-03-tb-03&no=3> (last visited Mar. 5, 2020).

193. David F. Burrelli, “Don’t Ask, Don’t Tell:” *The Law and Military Policy on Same-Sex Behavior*, CONG. RES. SERV. (Oct. 14, 2010), <https://fas.org/sgp/crs/misc/R40782.pdf>.

194. The Gay Agenda is a pejorative term for the policy goals of the LGBT rights movement. See HERMAN, *supra* note 190, at 80. It is also the title of an influential anti-gay 1992 video, *The Gay Agenda*, that was produced and widely distributed by the Springs of Life Ministries. *Id.* at 81. It contained salacious and shockingly inaccurate statistics on the sexual practices of gay men. *Id.* at 78, 80–81. The statistics cited in the video were based on a widely disputed study conducted by the Family Research Institute led by Dr. Paul Cameron, who was a proponent of reparative therapy. David Colker, *Statistics in “Gay Agenda” Questioned; Videotape: Critics Say Figures on Sex Practices Cited by Doctor Are Not Reliable*, L.A. TIMES, Feb. 22, 1993, at A16. The video was sent to members of Congress and widely distributed within the Pentagon during the “Gays in Military” debate. See Carleton R. Bryant, *Pro-Ban Forces Circulate Graphic Video on Gays*, WASH. TIMES, Jan. 26, 1993, at A10. It was also screened by the Joint Chiefs of Staff. HERMAN, *supra* note 190, at 80.

195. HALLEY, *supra* note 5, at 34.

196. Daniel Cerone, “*Melrose*’ Takes Center Stage When He is Publicly Assaulted and Fired From His Job,” L.A. TIMES (Oct. 26, 1992), [http://articles.latimes.com/1992-10-26/entertainment/ca-733\\_1\\_melrose-place](http://articles.latimes.com/1992-10-26/entertainment/ca-733_1_melrose-place). The character was Matt Fielding, played by the actor Doug Savant. *Id.*

197. Karlyn Bowman et al., *Polls on Attitudes on Homosexuality and Gay Marriage*, AM. ENTERPRISE INST. 4 (Mar. 2013) <http://www.scribd.com/doc/131666438/Polls-on-Attitudes-on-Homosexuality-Gay-Marriage#page=4> (last visited Mar. 5, 2020). The article described the results of polling conducted between 1973 and 2010 by the National Opinion Research Center at the University of Chicago. *Id.* When pollsters first asked the question in 1973, homosexuality was still classified as a mental illness, and seventy-three percent of the respondents believed that homosexuality was “always wrong.” *Id.*

198. The landmark case from the Supreme Court of Hawai’i sent shockwaves through the legal community because marriage equality was no longer merely a theoretical concept. Michael Sant’Ambrogio & Sylvia A. Law, *Baehr v. Lewin and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 712 (2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1855065](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1855065). The state supreme court had based its ruling on the state constitution. *Id.* at 713. As a result, the decision would not be subject to appeal to the U.S. Supreme Court. *Id.* However, such decisions were subject to voter initiatives, referendums, and legislative preemption. *Id.* at 751. As the attention devoted to marriage

same-sex relationships and chosen family structures were, because they existed without legal protections.<sup>199</sup> In *Baehr v. Lewin*, the Hawai'i Supreme Court ruled that the failure to issue marriage licenses to same-sex couples presumptively violated the Equal Rights Amendment to the Hawai'i Constitution because the denial constituted discrimination based on gender.<sup>200</sup> The Supreme Court of Hawai'i remanded the case to the trial court to determine whether the prohibition against same-sex marriage could be justified by a compelling state interest.<sup>201</sup> After extensive fact-finding and hearings, the trial court ruled in 1996 that the state had failed to prove a compelling state interest.<sup>202</sup>

While an appeal was pending from that ruling, the Hawai'i legislature passed the Reciprocal Beneficiaries Act in 1997 to avoid judicially mandated same-sex marriage.<sup>203</sup> The legislation extended some rights that were associated with marriage to same-sex couples, as well as to certain different-sex couples.<sup>204</sup> The following year, while the case was on appeal to the state supreme court, the voters amended the Hawai'i state constitution to provide that the definition of marriage could only be changed by legislative action.<sup>205</sup> The Supreme Court of Hawai'i eventually affirmed the trial court decision in favor of marriage equality, but the constitutional amendment had rendered the court's decision moot, because the court no longer had the power to alter the definition of marriage.<sup>206</sup> The reaction

---

equality intensified, it sometimes eclipsed other issues and led to disagreements within the LGBT rights movement regarding priorities. *Id.* at 707.

199. CHAUNCEY, *supra* note 173, at 98–104 (explaining effect of HIV/AIDS epidemic on chosen family). As Chauncey explains, “AIDS raised the emotionally charged question of who counted as family in the most profound ways.” *Id.* at 99. He also notes that the push for the recognition of same-sex relationships can also be traced to the Lesbian Baby Boom that started in the 1980s. *Id.* at 105. For a discussion of the importance of “chosen family” in the LGBTQ community, see generally KATH WESTON, *FAMILIES WE CHOOSE* (1997).

200. *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993).

201. The Supreme Court of Hawai'i remanded the case to be considered under the appropriate constitutional standard of strict scrutiny. *Baehr*, 852 P.2d at 48 (“HRS 572-1, on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex [and] establishes a sex-based classification.”). The trial was postponed for three years; it finally started in 1996 on the same day the U.S. Senate approved DOMA. CHAUNCEY, *supra* note 173, at 125.

202. At this stage of the litigation, the name of the case was changed to *Baehr v. Miike*, to reflect the name of the new state director of health who had replaced Lewin as the defendant of record. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*21 (Haw. Cir. Ct. 1996), *aff'd* 950 P.2d 1234 (Haw. 1997).

203. See Act 383, 1997 Haw. Sess. Laws; HAW. REV. STAT. § 572C (West 2018).

204. The Reciprocal Beneficiary Act extends some rights and benefits to same-sex partners, primarily those rights related to property interests, but the status of reciprocal beneficiaries is not limited to same-sex couples; it is available to two single adults who are not eligible to marry. HAW. REV. STAT. § 572C-1.

205. Haw. Const. art. I. § 23 (2004) (“The legislature shall have the power to reserve marriage to opposite-sex couples.”). In 2013, the Hawai'i state legislature passed SB 1, the Hawaii Marriage Equality Act of 2013. Associated Press, *Hawaii: Same-Sex Marriage Becomes Law*, N.Y. Times (Nov. 13, 2013), <http://www.nytimes.com/2013/11/14/us/hawaii-same-sex-marriage-becomes-law.html>. Hawai'i had previously passed civil union legislation in 2012.

206. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*21 (Haw. Cir. Ct. 1996), *aff'd* 950 P.2d 1234 (Haw. 1997). *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999) (ruling constitutional amendment rendered lower court decision moot).

by the Hawai'i legislature and the voters set the stage for future struggles over marriage equality in other states, as voters rushed to amend their state constitutions to prohibit same-sex marriage, and some legislatures begrudgingly created a second-class status for same-sex couples to avoid an outright grant of marriage.<sup>207</sup>

#### B. THE DEFENSE OF MARRIAGE ACT AND *ROMER V. EVANS*

For defenders of traditional values, *Baehr* represented a direct threat to the moral foundations of society, and advocates mobilized on both the state and federal level.<sup>208</sup> By 2006, forty-five states had laws or constitutional amendments restricting marriage to a union of one man and one woman, and a number of states had both.<sup>209</sup> Many states eventually amended their state constitutions to prohibit not just same-sex marriage, but also the grant of any of the “incidents of marriage” to same-sex couples.<sup>210</sup> These broader amendments were designed to prohibit not only marriage, but also any nonmarital form of relationship recognition, including civil unions, domestic partnerships, municipal registries, and even the grant of domestic-partner employee benefits to public employees.<sup>211</sup>

Three years after the initial ruling in *Baehr*, Congress enacted the Defense of Marriage Act (DOMA) in 1996 to stem the potential tide of marriage equality and to ensure that federal benefits would be restricted to different-sex married couples.<sup>212</sup> The 1993 decision from Hawai'i established that state constitutions could be interpreted to require marriage equality.<sup>213</sup> Without DOMA, the federal government would have been required to recognize same-sex marriages that were

---

207. In 1996, fifteen state legislatures enacted marriage prohibitions. CHAUNCEY, *supra* note 173, at 126–27. Hawai'i was the first state to amend its state constitution to include a DOMA restriction in 1998. *Id.* at 125 (discussing Hawai'i decision as a “historical breakthrough”).

208. See generally HERMAN, *supra* note 190 (describing development of a “pro-family” political strategy). George Chauncey writes that, “‘defending marriage’ as the union of one man and one woman had special symbolic significance for the opponents of gay rights.” CHAUNCEY, *supra* note 173.

209. Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23, n. 231 (2006).

210. See, e.g., OKLA. CONST. art. II, § 35A (2007) (“Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”). This type of prohibition had been held to prohibit the grant of domestic partner benefits to public employees. *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524 (Mich. 2008).

211. These laws were referred to as “mini-DOMAs with teeth.” See Steve Sanders, *Next on the Agenda for Marriage Equality Litigators*, SCOTUS BLOG (June 26, 2013, 5:40 PM), <http://www.scotusblog.com/2013/06/next-on-the-agenda-for-marriage-equality-litigators/> (“[M]ini-DOMAs are understood to deny legal recognition to the marriages of same-sex couples who migrate from states where such marriages are perfectly legal.”).

212. The Defense of Marriage Act, Pub. L. 104–199, 110 Stat. 2419, enacted September 21, 1996.

213. *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993) (finding marriage ban violated the Equal Rights Amendment to the Hawai'i State Constitution and, therefore, the state must establish a compelling state interest).



valid under state law for all federal purposes.<sup>214</sup> Moreover, the Full Faith and Credit Clause of the U.S. Constitution could have required states to recognize same-sex marriages performed in other jurisdictions.<sup>215</sup> DOMA addressed both of these eventualities through two substantive provisions: it adopted a restrictive federal definition of marriage as a union of one man and one woman,<sup>216</sup> and it authorized states to refuse to recognize out-of-state same-sex marriages.<sup>217</sup>

DOMA was enacted with overwhelming bipartisan support.<sup>218</sup> It was introduced and passed in the months leading up to the 1996 presidential election, and both presidential candidates supported the legislation. Republican presidential candidate Senator Bob Dole introduced DOMA in the Senate, where it passed by a vote of eighty-five to fourteen.<sup>219</sup> DOMA passed the House of Representatives by a vote of 342 to 67.<sup>220</sup> With veto-proof majorities in both houses of Congress, President Clinton, who was running for reelection, signed DOMA into law in September 1996.<sup>221</sup> The notoriety associated with DOMA led the major opinion polls to begin to include questions on marriage equality.<sup>222</sup> In 1996, only twenty-seven percent of Americans thought that same-sex marriages should be legal.<sup>223</sup>

Appealing mainly to morality, history, and religion, the testimony in the Congressional Record provides a glimpse of what was considered acceptable political discourse at the time.<sup>224</sup> Members of Congress invoked images of the

214. See, e.g., *Boyer v. Comm’r*, 732 F.2d 191, 194 (D.C. Cir. 1984) (holding that the law of the state of domicile controls).

215. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L. J. 1965 (1997).

216. DOMA, Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (1997)), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013) (added a definition of “marriage” and “spouse” to Title 1 of the United States Code, also known as the Dictionary Act).

217. Section 2 of DOMA also purported to authorize states to refuse to recognize same-sex marriages from sister states in order to stop the potential spread of same-sex marriage. Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (1997)), *invalidated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *Windsor* did not address this section of DOMA or the Full and Faith and Credit concerns; this section was nullified by *Obergefell v. Hodges*. See *id.*

218. The debate was not entirely in favor of DOMA; representatives of Parents and Friends of Lesbians and Gays (PFLAG) testified before both House and Senate Committees, as did constitutional law scholars. See Defense of Marriage Act, 1996: Hearings on S.1740 Before the Senate Committee on the Judiciary on the Defense of Marriage Act, 1996 WL 387312 (July 11, 1996) (testimony of Cass R. Sunstein, Professor of Law, University of Chicago); 142 Cong. Rec. S5931-01, S5931-33 (daily ed. June 6, 1996) (written statement of Laurence H. Tribe).

219. Senate Bill 1740 was introduced in the Senate on May 8, 1996 by Senator Nickles of Oklahoma and Senator Dole of Kansas. See S. 1740, 104th Congress (1996). An identical bill, H.R. 3396, had been introduced in the House the day before. See H.R. 3396, 104th Congress (1996).

220. 142 CONG. REC. D735-01 (daily ed. July 12, 1996).

221. President Clinton signed House Bill 3396 slightly after midnight on September 23, 1996, without ceremony. Todd S. Purdum, *Gay Rights Groups Attack Clinton on Midnight Signing*, N.Y. TIMES (Sept. 22, 1996), <https://www.nytimes.com/1996/09/22/us/gay-rights-groups-attack-clinton-on-midnight-signing.html>.

222. Bowman et al., *supra* note 197.

223. *Id.*

224. For example, Senator Coburn asserted that “over 43 percent of all people who profess homosexuality have greater than 500 partners.” 142 CONG. REC. H7441-03, H7444 (daily ed. July 11,



fall of ancient Rome and discussed marriage equality in the most alarmist and disparaging terms.<sup>225</sup> They warned that the “flames of hedonism” were threatening to consume the nation.<sup>226</sup> The Report of the U.S. House of Representatives Judiciary Committee found that marriage in 1996 was in a precarious state—“reeling because of the effects of the sexual revolution, no-fault divorce and out-of-wedlock births.”<sup>227</sup> The Report stressed the “nexus between marriage and children”<sup>228</sup> and advised great caution before embarking on a “radical, untested and inherently flawed social experiment.”<sup>229</sup> It explained that DOMA was necessary to further four government interests: (a) defending and nurturing the institution of traditional marriage, (b) defending traditional notions of morality, (c) protecting states’ sovereignty and democratic self-governance, and (d) preserving scarce government resources.<sup>230</sup>

Senator Byrd (D-WV) used expressly religious objections to explain his support for DOMA, as he had with respect to his opposition to the Civil Rights Act of 1964.<sup>231</sup> During the DOMA hearing, Senator Byrd held up his family’s King James Bible on the floor of the Senate and read from Genesis and the Gospel of St. Mark to support DOMA.<sup>232</sup> After he finished reading from the Bible, the Senator warned: “Woe betide that society . . . that fails to honor that heritage and begins to blur that tradition which was laid down by the Creator . . . .”<sup>233</sup> He ended his statement with the story of Belshazzar and the omen of the writing on the wall,<sup>234</sup> concluding: “The time is now . . . Let us defend the oldest institution, the

---

1996) (statement of Rep. Coburn) (continuing that homosexuality is a “perversion” and “immoral”). Representative Funderburk warned that “if homosexuals achieve the power to pretend that their unions are marriages, then people of conscience will be told to ignore their God-given beliefs and support what they regard as immoral and destructive.” *Id.* (statement of Rep. Funderburk). Many members stressed how same-sex marriage would undermine “traditional marriage.” *Id.* at H7487 (statement of Rep. Delay noting “road to social deterioration”).

225. Senator Gramm repeatedly referred to “5,000 years of recorded history” as proof that the traditional family would not support a same-sex couple. 142 CONG. REC. S10,100-02, S10,105 (daily ed. Sept. 10, 1996) (statement of Sen. Gramm).

226. Invoking the image of Nero fiddling while Rome burned, Representative Barr warned: “The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit.” 142 CONG. REC. H7480-05, H7482 (daily ed. July 12, 1996) (statement of Rep. Barr).

227. H.R. Rep. No. 104-664, pt. 5, at 23, 25 (1996).

228. *Id.* After asserting the “irreplaceable role that marriage plays in childrearing and in generational continuity,” the House Report defined marriage as “a relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society’s way of signaling to would-be parents that their long-term relationship is socially important—a public concern, not simply a private affair.” *Id.* at 23.

229. *Id.* at 49.

230. *Id.* at 40.

231. Eugene Robinson, *Robert Byrd: A Story of Change and Redemption*, WASH. POST (June 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/28/AR2010062803119.html>.

232. 142 CONG. REC. S10, 100-02, S10, 109 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd reading from the first chapter of Genesis).

233. *Id.* at S10, 110.

234. *Id.*

institution of marriage between male and female, as set forth in the Holy Bible. Else we, too, will be weighed in the balances and found wanting.”<sup>235</sup> Senator Jesse Helms was much more succinct in his use of Biblical authority. He simply restated the old chestnut: “God created Adam and Eve—not Adam and Steve.”<sup>236</sup>

Once DOMA was enacted, it took eight years before the first state—Massachusetts—mandated marriage equality, in 2003.<sup>237</sup> Even when same-sex couples could legally marry under state law, DOMA ensured that they were still treated as if they were unmarried for all federal purposes.<sup>238</sup> For example, a legally married same-sex couple living in Massachusetts could file their state income taxes jointly, but had to file their federal taxes as if they were unmarried.<sup>239</sup> The United States General Accountability Office identified 1,138 federal statutory provisions under which marital status is a factor in determining or receiving benefits, rights, and privileges.<sup>240</sup> These provisions included favorable joint tax rates, Social Security spousal benefits, and pension rights.<sup>241</sup>

The same year that Congress enacted DOMA, the U.S. Supreme Court decided *Romer v. Evans* and declared that Amendment 2 to the Colorado state constitution, which was enacted by a citizen’s initiative, violated the Equal Protection Clause of the Fourteenth Amendment.<sup>242</sup> Amendment 2 prevented the enactment of any laws or regulations that recognized sexual orientation as a protected class.<sup>243</sup> Ruling that a “state cannot so deem a class of persons a stranger to its laws,”<sup>244</sup> *Romer* signaled the end to the barrage of citizens’ initiatives that were designed to disenfranchise LGBT people from the political system by prohibiting the enactment of LGBT discrimination protections or what anti-LGBT advocates characterized as “special rights.”<sup>245</sup> Although the Court rejected the notion that

235. *Id.*

236. 142 CONG REC. S10, 067-01, S10, 067 (daily ed. Sept. 9, 1996) (statement of Sen. Helms) (attributing the statement to an African-American Baptist minister).

237. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948–49 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates the state constitution).

238. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (1997)) (providing that for all federal purposes marriage is between one man and one woman).

239. Carlton Smith & Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24 COLUM. J. GENDER & L. 29, 33 (2012).

240. In 2004, the U.S. General Accounting Office found 1138 federal laws implicated by DOMA. U.S. GENERAL ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

241. *U.S. v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (describing how “[u]nder DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways”).

242. *Romer v. Evans*, 517 U.S. 620 (1996).

243. *Id.* at 624 (quoting COLO. CONST. ART II, § 30(b)).

244. *Id.* at 635.

245. The “special rights” argument was used effectively in the Amendment 2 citizens’ initiative in Colorado. Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167, 172 (1997). Backed by Colorado for Family Values, the initiative sought, by amendment to the state constitution, to repeal local gay rights ordinances and prohibit the enactment of any future state or local gay civil rights laws. *Id.*

basic civil rights were “special rights,”<sup>246</sup> this characterization continues to inform many conservative objections to identity-based politics and movements, especially LGBT rights.<sup>247</sup>

### C. MARRIAGE AND LAWRENCE V. TEXAS

A year after DOMA was enacted, states began experimenting with alternative forms of relationship recognition, such as civil unions and reciprocal beneficiaries, which granted some or all of the benefits of marriage.<sup>248</sup> Hawai’i was the first mover in 1997 when it legislatively created the legal category of reciprocal beneficiaries.<sup>249</sup> It was followed in 1999 by Vermont, which became the first state to extend the full rights and responsibilities of marriage to same-sex couples in the form of a civil union.<sup>250</sup> In 2003, Massachusetts became the first state to recognize same-sex marriage when the Massachusetts Supreme Court held in *Goodridge v. Department of Public Health* that the Massachusetts Constitution requires equal treatment of same-sex couples with respect to marriage.<sup>251</sup> Although some other states followed suit,<sup>252</sup> the vast majority of states took another route, enacting laws or amending their state constitutions to prohibit same-sex marriages.<sup>253</sup> The result was a confusing patchwork of state and federal

246. With respect to the “special rights” argument, the majority found that “this reading of the amendment’s language is implausible.” *Romer*, 517 U.S. at 626.

247. See, e.g., S.A. Miller, *Ben Carson Vows No ‘Extra Rights’ for LGBT Community in Public Housing*, WASH. TIMES (Jan. 12, 2017), <https://www.washingtontimes.com/news/2017/jan/12/ben-carson-no-extra-rights-lgbts-public-housing/>.

248. For example, the Hawai’i legislature enacted rights for reciprocal beneficiaries. HAW. REV. STAT. § 572C (West 2018); 1997 Haw. Sess. Laws. 1211.

249. *Id.*

250. Act Relating to Civil Unions, § 3, 2000 Vt. Adv. Legis. Serv. 91 (LexisNexis) (codified as amended at VT. STAT. ANN. tit. 15, §§ 1201-1207 (West 2004)). The Vermont legislation was in response to a decision of the state supreme court. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (holding that same-sex couples are entitled under the Vermont state constitution to all of the protections and benefits provided by marriage).

251. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948–49 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates state constitution and citing *Lawrence* approvingly).

252. In 2004, the California legislature extended to “registered domestic partners” substantially all the rights and responsibilities enjoyed by spouses under California law. CAL. FAM. CODE §§ 297, 297.50, 290, 298.5 (West 2004) (establishing procedure for “Registered domestic partners”). In 2005, the California legislature passed legislation that would have legalized same-sex marriage, but Governor Schwarzenegger vetoed the bill. Dean E. Murray, *Schwarzenegger to Veto Same-Sex Marriage Bill*, N.Y. TIMES (Sept. 8, 2005), <http://www.nytimes.com/2005/09/08/national/08arnold.html>. Also in 2004, Maine enacted legislation establishing a statewide domestic partner registry and extending to same-sex couples certain health care decision-making authority and inheritance rights equivalent to spouses. 2004 Me. Legis. Serv. Ch. 672 (H.P. 1152) (L.D. 1579) (West) (codified as amended at 22 ME. REV. STAT. ANN. § 2710 (2004)). By 2004, five states extended some form of state-wide recognition for same-sex relationships. The states were: Hawai’i, Vermont, Massachusetts, California, and Maine. CAL. FAM. CODE §§ 297, 297.50, 290, 298.5 (West 2004); HAW. REV. STAT. § 572C (2018); ME REV. STAT. ANN. tit. 22, § 2710 (2004); VT. STAT. ANN. tit. 15, §§ 1201–1207 (West 2004); *Goodridge*, 798 N.E.2d at 948–49.

253. By 2006, forty-five states had laws or constitutional amendments restricting marriage to a union of one man and one woman, and a number of states had both. See Knauer, *supra* note 209.

laws where a same-sex couple might be legally married in their state of domicile but not in a sister state and not for any federal purpose.<sup>254</sup>

The same year that the Massachusetts Supreme Court mandated marriage equality, the U.S. Supreme Court decided *Lawrence v. Texas*, holding that criminal sodomy statutes violated the concept of liberty guaranteed under the Fourteenth Amendment.<sup>255</sup> *Lawrence* expressly overruled the Court's 1986 decision in *Bowers v. Hardwick*.<sup>256</sup> The majority recognized that criminal sodomy laws, although rarely applied, had been used to justify a host of additional legal and social disabilities.<sup>257</sup> As Justice Scalia argued in his blistering dissent in *Romer*, if a state could still criminalize the behavior that defined the class, it was logical that the state could also disfavor the class in other instances.<sup>258</sup> At the time of the *Lawrence* decision, consensual, non-commercial sodomy was still a crime in thirteen states.<sup>259</sup>

Despite the favorable court rulings in 2003, opinion polls showed that only thirty-seven percent of Americans believed that same-sex marriage should be legal, and a majority of Americans still considered homosexuality to be "always wrong."<sup>260</sup> Although it would take ten more years before the Supreme Court invalidated the restrictive federal definition of marriage prescribed by DOMA,<sup>261</sup> the years following *Lawrence* saw many positive advancements, including the enactment of state-level anti-discrimination protections,<sup>262</sup> the repeal of "Don't Ask, Don't Tell,"<sup>263</sup> the enactment of both federal and state-level hate crimes

254. Peter Applebome, *A Doubly Trying Tax Season for Same-Sex Couples*, N.Y. TIMES (Feb. 9, 2013), <http://www.nytimes.com/2013/02/10/business/yourtaxes/same-sex-couples-may-find-tax-time-doubly-trying.html>; see also Tara Siegel Bernard, *Tax Changes for Gay Married New Yorkers*, N.Y. TIMES (Aug. 3, 2011, 3:02 PM), <http://bucks.blogs.nytimes.com/2011/08/03/tax-changes-for-gay-married-new-yorkers/>.

255. *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating Texas homosexual criminal sodomy law).

256. *Id.* at 578 ("Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.")

257. Justice Kennedy wrote that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Id.* at 579.

258. Justice Scalia wrote: "If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct." *Romer v. Evans*, 517 U.S. 620 (1996). Justice Scalia argued that the Coloradans who had passed Amendment 2 were "entitled to be hostile toward homosexual conduct," even though Colorado had repealed its sodomy statute. *Id.* (emphasis added).

259. Associated Press, *Supreme Court Strikes Down Texas Law Banning Sodomy*, N.Y. TIMES (June 26, 2003), <https://www.nytimes.com/2003/06/26/politics/supreme-court-strikes-down-texas-law-banning-sodomy.html>.

260. Bowman et al., *supra* note 197. In 2004, fifty-eight percent replied that homosexuality was "always wrong." *Id.*

261. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (holding that Section 3 of DOMA violated the Due Process and Equal Protection clauses of the Fifth Amendment).

262. Currently, twenty-one states and the District of Columbia prohibit discrimination in employment based on both sexual orientation and gender identity. *Employment Map*, *supra* note 12.

263. The Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321, 124 Stat. 3516 (codified as amended at 10 U.S.C. § 654 (2012)).

legislation,<sup>264</sup> and the addition of anti-bullying and safe schools initiatives.<sup>265</sup> Transgender issues increased in visibility, and a growing number of states included “gender identity” as a protected class.<sup>266</sup> LGBT characters became ubiquitous on television, as well as in movies.<sup>267</sup> Openly LGBT politicians were no longer the exception, and a majority of Americans reported they would vote for an openly gay presidential candidate.<sup>268</sup>

#### D. MARRIAGE EQUALITY—U.S. v. WINDSOR AND *OBERGEFELL V. HODGES*

By the time the U.S. Supreme Court decided *U.S. v. Windsor* in 2013 and declared the definitional portion of DOMA unconstitutional,<sup>269</sup> twelve states recognized same-sex marriage,<sup>270</sup> fifty-three percent of Americans were in favor of

264. Twenty states and the District of Columbia have hate-crime protections that include both sexual orientation and gender identity. *State Maps of Laws & Policies—Hate Crimes*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps/hate-crimes> (last updated Jan. 2, 2020). Another eleven states have hate-crimes laws that protect on the basis of sexual orientation but not gender identity. *Id.* Fifteen states have hate-crimes laws that do not specially include either category, and five states have no hate-crimes laws. *Id.* At the federal level, the Matthew Shepard and James Byrd Hate Crimes Prevention Act of 2009 protects on the basis of both sexual orientation and gender identity. 18 U.S.C. § 249(a)(2).

265. Twenty states and the District of Columbia have anti-bullying protections that specially address sexual orientation and gender identity. *State Maps of Laws & Policies—Bullying*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps/anti-bullying>, (last updated Jan. 23, 2020). However, two states, Missouri and Nebraska, forbid any special protections on account of sexual orientation and gender identity. *Id.*

266. Of the twenty-two states that extend anti-discrimination protections on account of sexual orientation, only one, Wisconsin, does not also include gender identity. *Employment Map*, *supra* note 12.

267. In GLAAD’s 2017 annual report of LGBT characters on television, it found the highest percentage of LGBT characters since the history of the Report. *Where We are on Television—’17-’18*, GLAAD, [http://glaad.org/files/WWAT/WWAT\\_GLAAD\\_2017-2018.pdf](http://glaad.org/files/WWAT/WWAT_GLAAD_2017-2018.pdf). The Report found that 6.4 percent of the regular characters in primetime scripted shows identified as LGBT. *Id.* Despite these impressive numbers, diversity remains a challenge. *Id.* at 3 (noting that “the LGBTQ characters who make it to TV screens tend to be white gay men, who outnumber all other parts of our community in representation on screen”).

268. See Julie Moreau, *Growing Number of LGBTQ Candidates Seek Political Office in 2018*, NBC NEWS (Jan. 29, 2018), <https://www.nbcnews.com/feature/nbc-out/growing-number-lgbtq-candidates-see-political-office-2018-n841961>. A 2015 Gallup poll found that seventy-four percent of respondents would vote for a gay or lesbian candidate for president. See Justin McCarthy, *In U.S., Socialist Candidate Least Appealing*, GALLUP NEWS (June 22, 2015), <http://news.gallup.com/poll/183713/socialist-presidential-candidates-least-appealing.aspx>. The relative success of Pete Buttigieg’s campaign for the Democratic nomination for president is an example of the electorate’s willingness to seriously consider an openly gay candidate. *Contra* Nathaniel Frank, *Is the Country Ready for a Gay President? Don’t Trust the Polls*, N.Y. TIMES (Dec. 4, 2019), <https://www.nytimes.com/2019/12/04/opinion/pete-buttigieg-polls.html>.

269. *United States v. Windsor*, 570 U.S. 744, 769 (2013) (holding that Section 3 of DOMA violated the Due Process and Equal Protection clauses of the Fifth Amendment); see also Sheryl Gay Stolberg, *After Rulings, Same-Sex Couples Grapple with Diverging State Laws*, N.Y. TIMES (Jun. 28, 2012), <http://www.nytimes.com/2013/06/29/us/after-rulings-same-sex-couples-grapple-with-diverging-state-laws.html> (noting that Edie will be entitled to a refund “with interest”).

270. *State Maps of Laws & Policies—Marriage Equality and Other Relationship Recognition*, HUM. RTS. CAMPAIGN.



marriage equality,<sup>271</sup> and pollsters had stopped asking whether homosexuality was “always wrong.”<sup>272</sup> The five-to-four decision in *Windsor* invalidated the restrictive federal definition of marriage as a union between one man and one woman.<sup>273</sup> Justice Kennedy authored the majority opinion and spoke in sweeping terms regarding the disabilities that DOMA imposed on married same-sex couples, noting that the federal definition of marriage “demean[ed] the couple, whose moral and sexual choices the Constitution protects.”<sup>274</sup>

Two years later, the U.S. Supreme Court recognized in *Obergefell v. Hodges* that same-sex couples had a fundamental right to marry, guaranteed under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>275</sup> In a landmark five-to-four decision, the Court invalidated state laws prohibiting same-sex marriage and further held that no state had the right to refuse to recognize a same-sex marriage performed in another state.<sup>276</sup> As a result of the decision, marriage equality is now the law in the United States. Public opinion polls show that sixty-seven percent of Americans approve of same-sex marriage.<sup>277</sup>

By the time *Obergefell* affirmed a fundamental right to same-sex marriage in 2015,<sup>278</sup> a broad religious marriage exemption had been introduced in Congress, and similar bills were pending in, or had been enacted by, nearly a dozen state legislatures.<sup>279</sup> As explained in the next section, religious exemptions to perform marriage services—and religious exemptions more generally—are designed to

271. Bowman et al., *supra* note 197, at 32. In 1996, only twenty-seven percent believed that same-sex marriage should be recognized. *Id.*

272. *Id.* at 4.

273. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C. § 1738C (1997)), *invalidated by* United States v. Windsor, 570 U.S. 744 (adding a definition of “marriage” and “spouse” to Title 1 of the United States Code, also known as the Dictionary Act).

274. *Windsor*, 570 U.S. at 744.

275. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

276. *Id.* at 2607–08.

277. Based on polling in 2018, sixty-seven percent of Americans now support marriage equality. *In Depth Topics A to Z: Gay and Lesbian Rights*, *supra* note 19.

278. *Obergefell*, 135 S. Ct. at 2605.

279. The First Amendment Defense Act (FADA) was introduced in the U.S. House and Senate ten days before the *Obergefell* decision. The First Amendment Defense Act, H.R. 2802, S. 1598, 114th Cong. (2015). FADA provides that the federal government can take no action against individuals who act “in accordance with a religious belief or moral conviction that marriage is . . . [between] one man and one woman.” *Id.* Some of the state-level marriage exemptions followed the federal model, whereas others were more limited in scope. *See, e.g.*, S.B. 377 Gen. Sess. (Ala. 2015) (ending state issuance of marriage licenses); H.B. 1879, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (authorizing denial of service for “private businesses, religious organizations, and individuals authorized to perform marriages”); Louisiana Marriage and Conscience Act of 2015, H.B. 707 (La. 2015) (substantially similar to FADA); MICH. COMP. LAWS SERV. § 722.124e (LexisNexis 2020) (allowing a religious exemption limited to child services and adoption); H.B. 1107, S 555, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015) (prohibiting the use of taxpayer funds for the licensing of same-sex marriage and for the salaries of employees who issue marriage licenses to same-sex couples subject to termination); Minnesota Freedom of Conscience Act, S.B. 2158, 89th Reg. Sess. (Minn. 2015) (authorizing denial of service by religious entities and private persons); N.C. GEN. STAT. § 51-5.5 (2020) (establishing recusal mechanism for county clerks and magistrates from performing and issuing same-sex marriages); S.B. 788, 55th Leg.



protect individuals and entities that discriminate against LGBT people, provided the discrimination is based on religious or moral grounds. In *Romer v. Evans*, the Court labeled these sorts of objections to LGBT people as animus,<sup>280</sup> but they were on clear display during the Congressional hearings on DOMA.<sup>281</sup> They also continue to serve as the basis for contemporary anti-LGBT initiatives,<sup>282</sup> although they have been tempered and have lost much of the brimstone. Broad exemptions allow individuals who harbor anti-LGBT beliefs to engage in discrimination, notwithstanding legal protections for LGBT people.<sup>283</sup> Accordingly, these sorts of exemptions have the potential to severely blunt much of the progress made with respect to LGBT rights.

#### IV. RELIGION AND MORALITY

Since marriage equality, there has been a resurgence of policy initiatives based on religious objections to LGBT people and identities.<sup>284</sup> Even though religious objections have historically served as the basis for anti-LGBT views,<sup>285</sup> express appeals to religion, such as those expressed during the DOMA hearings, were largely absent from the marriage equality debates of the 2000s. Instead, anti-LGBT views were couched in terms of traditional morality and disdain for “special rights.”<sup>286</sup> Writing for the majority in *Lawrence v. Texas* in 2003, Justice Kennedy referenced the history of religious objections, noting that not that long ago there was broad public consensus against homosexuality “shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”<sup>287</sup> *Lawrence* made it clear that even “profound and deep

---

Sess., Reg. Sess. (Okla. 2015) (allowing government officials and clergy to refuse to officiate); H.B. 3022, 121st Gen. Assemb., Reg. Sess. (S.C. 2015) (prohibiting taxpayer funds for the licensing of same-sex marriage and for employees who issue marriage licenses to same-sex couple subject to termination) and H.B. 3150, 121st Gen. Assemb., Reg. Sess. (S.C. 2015) (using substantially similar to FADA); TEX. FAM. CODE ANN. § 2.601 (West 2015) (authorizing religious organizations to refuse to “solemnize” same-sex marriage or provide services in relation to same-sex marriage); UTAH CODE ANN. § 63G 20-101 et seq. (LexisNexis 2015) (authorizing religious organizations and clergy to refuse to “solemnize” same-sex marriage or provide services in relation to same-sex marriage).

280. The majority found that the “sheer breadth” of Amendment 2 was “so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but *animus* toward the class it affects; it lacks a rational relationship to legitimate state interests.” *Romer v. Evans*, 517 U.S. 620, 636 (1996).

281. See *supra* text accompanying notes 224–35 (discussing Congressional hearings).

282. See *infra* text accompanying notes 284–320.

283. *Id.*

284. Linda Griffin, *Marriage Rights and Religious Exemptions in the US*, OXFORD HANDBOOKS ONLINE (May 2017), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-19> (“Same-sex marriage opponents’ exemption quest intensified dramatically post-Obergefell’s requirement that all states permit same-sex marriage. Since then, many believers across the United States have demanded exemptions entitling them to refuse governmental, professional, commercial, and religious services to LGBT couples.”).

285. See generally VERN L. BULLOUGH, *HOMOSEXUALITY: A HISTORY (FROM ANCIENT GREECE TO GAY LIBERATION)* 17–31 (Plume, 1st ed. 1979).

286. See Nagel, *supra* note 245 (explaining “special rights” argument).

287. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

convictions accepted as ethical and moral principles” could not justify enforcing “these views on the whole society through operation of the criminal law.”<sup>288</sup> *Romer v. Evans* also rejected the claim that Colorado’s Amendment 2 was designed to protect the “personal and religious objections” of landlords and employers, finding instead that Amendment 2 was motivated by animus.<sup>289</sup>

Despite these clear denunciations by the Court, marriage equality has spurred a new wave of anti-LGBT laws and policies. This section reviews the new generation of anti-LGBT initiatives by dividing them into two basic camps: (1) laws and policies that impose disabilities on LGBT people and (2) laws and policies that empower religious and moral objectors to discriminate against LGBT people (i.e., religious exemptions). Although these laws vary in their approach, they all seek to eradicate LGBT identities, whether from public life entirely or from more targeted venues, such as schools, places of public accommodation, or the military.<sup>290</sup> They use the signature strategies of the politics of eradication—conversion, containment, and redefinition. There are initiatives that seek to ensure parents have access to conversion therapy for their children.<sup>291</sup> Other initiatives restrict the access of LGBT people to certain spaces.<sup>292</sup> And some initiatives even seek to define LGBT people out of existence.<sup>293</sup>

For reasons discussed below involving ideological polarization, these laws and policies tend to flourish in the so-called “Red States” and should be expected under a Republican administration.<sup>294</sup> These appeals to religion and morality continue to proliferate even though an increasing number of religious denominations have embraced LGBT people, and even though there is no longer a blanket religious condemnation of LGBT people.<sup>295</sup> Accordingly, this new generation of anti-LGBT laws raises Establishment Clause questions, as well as questions regarding the role of pluralism in an increasingly secular society, because these laws seek to privilege specific religious beliefs associated with certain denominations or faith traditions.<sup>296</sup>

---

288. *Id.* at 570.

289. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

290. See *infra* text accompanying notes 322–39 (describing different proposed anti-LGBT laws and policies).

291. Conley, *supra* note 31.

292. See *infra* text accompanying notes 339–41 (describing “bathroom bills” that require people to use the bathroom for the sex they were assigned at birth).

293. See *infra* text accompanying notes 336–39 (describing federal policy change to deny transgender identity).

294. See *infra* text accompanying notes 297–302 (describing ideological polarization regarding LGBT rights).

295. David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RES. CTR. (Dec. 21, 2015), <http://www.pewresearch.org/fact-tank/2015/07/02/where-christian-churches-stand-on-gay-marriage/>.

296. See *infra* text accompanying notes 413–36 (describing Establishment Clause concerns).

## A. IDEOLOGICAL POLARIZATION

The current popularity of religious and moral justifications for anti-LGBT initiatives may seem hard to reconcile, given the advancements in LGBT rights and visibility and the shift in public opinion, as described in the last section. By the time the Court decided *Obergefell* in 2015, a majority of the American public approved of same-sex marriage.<sup>297</sup> This approval level is a far cry from the mere twenty percent of the population who approved of interracial marriage after *Loving v. Virginia*.<sup>298</sup> Moreover, the majority of the mainline Protestant denominations, as well as most branches of Judaism and the Unitarian Universalists, have all embraced same-sex marriage and LGBT individuals.<sup>299</sup> Prohibitions against marriage equality remain in the teachings of the Catholic Church and among Evangelical Protestants,<sup>300</sup> but such views no longer enjoy universal acceptance across American faiths.<sup>301</sup>

Favorable opinion polls citing high levels of approval for LGBT rights hide hard truths about increased polarization over social issues.<sup>302</sup> Although it is true that sixty-seven percent of the general population support same-sex marriage, that number drops to only forty percent among Republicans,<sup>303</sup> and thirty-four percent among white Evangelicals.<sup>304</sup> In 2018, nearly one-in-four Americans still believed that homosexuality should be criminalized, and close to one-in-three believed that same-sex relationships were immoral.<sup>305</sup> A full one-half of those surveyed believed that homosexuality was a choice.<sup>306</sup> In terms of gender identity, over one-half of Americans believed that a person's sex was determined at birth.<sup>307</sup> But when these opinions are viewed along party lines, the numbers change drastically, and the difference is most stark with respect to transgender issues.<sup>308</sup> For example, in 2017, fifty-four percent of Americans believed that a person's sex was determined at birth, but that number goes up to eighty percent

---

297. Bowman et al., *supra* note 197, at 82. In 1996, only twenty-seven percent believed that same-sex marriage should be recognized. *Id.* at 32.

298. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

299. Masci & Lipka, *supra* note 295.

300. *Id.*

301. *Id.* The fastest growth in support for same-sex marriage has been among religious Americans, especially white mainline Protestants, Catholics, and Jews. See Robert P. Jones, *Religious Americans Support Gay Marriage*, THE ATLANTIC (Apr. 28, 2015), <http://www.theatlantic.com/politics/archive/2015/04/religious-americans-support-gay-marriage/391646/>.

302. Cameron Brick & Sander van der Linden, *How Identity, Not Issues, Explains the Partisan Divide*, SCI. AM. (Jun. 19, 2018), <https://www.scientificamerican.com/article/how-identity-not-issues-explains-the-partisan-divide/>.

303. *Fact Sheet: Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> (last visited Mar. 5, 2020).

304. *Id.*

305. *In Depth Topics A to Z: Gay and Lesbian Rights*, *supra* note 19.

306. *Id.*

307. Brown, *supra* note 39.

308. *Id.*

among Republicans.<sup>309</sup> Accordingly, it makes sense that when Republicans are in power, they seek to enact anti-LGBT policy initiatives.

At the state level, current anti-LGBT laws and religious exemptions are largely, but not exclusively, contained to the so-called “red states.”<sup>310</sup> Currently, only twenty-one states and the District of Columbia have anti-discrimination protections for LGBT people.<sup>311</sup> There are no blanket protections at the federal level.<sup>312</sup> Unsurprisingly, the states without anti-discrimination protections also tend to be red states.<sup>313</sup> What this means, however, is that many of the anti-LGBT laws introduced in these states are not actually necessary, because there are no anti-discrimination protections for LGBT people. Accordingly, there is no need to exempt individuals who object to LGBT people, because it is currently legal to discriminate based on sexual orientation and gender identity in these states.<sup>314</sup> The introduction of anti-LGBT laws and religious exemptions in these states is unnecessary and, thus, primarily serves a signaling function expressing an official rejection of LGBT identities and rights.

At the federal level, Republican control opens the door to anti-LGBT laws and policies, as has been the case in the transition from the Obama administration to the Trump administration. Under the Obama administration, there were tremendous policy gains within the executive branch to advance LGBT rights.<sup>315</sup> However, because these gains were not statutory, and the majority were not even regulatory, it has been relatively easy for the Trump administration to reverse many of the Obama-era advancements.<sup>316</sup> For example, in 2016, the Obama administration directed public schools to allow students to use bathrooms that align with their gender identity, even if that conflicted with the gender on their

309. *Id.*

310. The one exception is Illinois. *Religious Exemption Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/img/maps/citations-religious-exemption.pdf> (last updated Jan. 24, 2020); see also 745 Ill. Comp. Stat. Ann. 70/2 (Westlaw through P.A. 101-629).

311. *Employment Map*, *supra* note 12. For an overview of anti-discrimination in housing, see *Housing Map*, *supra* note 181; *Public Accommodations Map*, *supra* note 181.

312. At the federal level, the Matthew Shepard and James Byrd Hate Crimes Prevention Act of 2009 protects against hate crimes on the basis of both sexual orientation and gender identity. See 18 U.S.C. § 249 (2018). The 2020 U.S. Supreme Court case *Bostock v. Clayton County* held that discrimination on the basis of sex for purposes of Title VII includes sexual orientation and gender identity. *Bostock v. Clayton County*, 590 U.S. \_\_\_\_ (2020).

313. The states without blanket protection in employment for sexual orientation and gender identity are: Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin (does not protect gender identity). *Employment Map*, *supra* note 12.

314. See *State Maps of Laws & Policies—Hate Crimes*, *supra* note 264.

315. See generally Scott Horsley, *Not Always A ‘Thunderbolt’: The Evolution Of LGBT Rights Under Obama*, NPR (June 9, 2016), <https://www.npr.org/2016/06/09/481306454/not-always-a-thunderbolt-the-evolution-of-lgbt-rights-under-obama>.

316. Under the current Trump administration, numerous Obama-era administrative gains have been reversed. See generally Maril, *supra* note 44.

birth certificates.<sup>317</sup> The policy was announced by the Department of Education in the form of a “Dear Colleague Letter,” which is a common form of sub-regulatory guidance used by the Department.<sup>318</sup> Dear Colleague Letters explain how the Department interprets the relevant laws and regulations that apply to educational contexts. In this case, the interpretation announced in the letter was based on a determination that barring transgender students from public-school bathrooms which matched their gender identities was a form of sex discrimination prohibited under Title IX.<sup>319</sup> At the time, the issue of access to bathrooms and locker rooms for transgender students was the subject of several ongoing and high-profile court cases, most notably the case brought by Gavin Grimm.<sup>320</sup> In February 2017, a little more than a month into the Trump administration, the Department of Education rescinded the guidance by issuing a new Dear Colleague Letter, stating that the first one had been based on insufficient legal analysis.<sup>321</sup>

### B. ANTI-LGBT LAWS AND POLICIES

The first category of laws and policies are initiatives that place legal disabilities directly on LGBT people. Today, these measures generally fall into three categories: anti-transgender laws that reject the concept of gender identity and enforce the belief that one’s sex is determined at birth,<sup>322</sup> anti-marriage laws that deny the validity of same-sex marriage,<sup>323</sup> and anti-protection laws that limit the ability of

317. U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (extending protections under Title IX for transgender students).

318. *Id.*

319. *Id.*

320. *Grimm v. Gloucester School Board*, ACLU (Nov. 27, 2019), <https://www.aclu.org/cases/grimm-v-gloucester-county-school-board?redirect=cases/gg-v-gloucester-county-school-board>.

321. U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, DEAR COLLEAGUE LETTER (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> (withdrawing policy guidance on transgender students). The notice contends that the Obama-era directives did not “contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.” *Id.* at 1. See also Sandhya Somashekhar et al., *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), [https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643\\_story.html](https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html).

322. For example, a proposed bill in Indiana requires schools to use a student’s “biological sex” to determine the terms of participation in sports and other activities. See H.R. 1525, 121st Gen. Assemb., Reg. Sess. (Ind. 2019) (unenacted). The bill describes biological sex as “the physical condition of being male or female, as determined by an individual’s chromosomes and identified at birth by the individual’s anatomy.” *Id.* § 2.

323. The proposed Tennessee Natural Marriage Defense Act declares that natural marriage between a man and a woman is the policy of the state and that the decision of the U.S. Supreme Court in *Obergefell* is null and void. See H.R. 0892, 110th Gen. Assemb. (Tenn. 2017) (not enacted) and S. 0752, 110th Gen. Assemb. (Tenn. 2017) (not enacted), <http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB0892&ga=110>. It further prohibits state and local agencies from “[g]iving force or effect to any court order that has the effect of violating Tennessee’s laws protecting natural marriage.” *Id.*; Gwen Aviles, *‘Tennessee Natural Marriage Defense Act’ Seeks to Strip Gay Marriage Rights*, NBC NEWS (Feb. 12, 2019), <https://www.nbcnews.com/feature/nbc-out/tennessee-natural-marriage-defense-act-seeks-strip-gay-marriage-rights-n970596>.

municipalities to pass laws providing protections based on sexual orientation and gender identity.<sup>324</sup> Although some lawmakers are openly hostile to the LGBT community and make openly anti-gay statements, the full-throated Biblical condemnation that accompanied the enactment of DOMA is much less common today.<sup>325</sup> This is not to say that all public anti-LGBT statements are more subdued in the present. In 2019, a West Virginia state legislator who championed anti-LGBT legislation was asked in a televised interview how he would react if his children, a boy and a girl, told him they were gay.<sup>326</sup> With a smile, he responded that he would instruct each child on gender-specific behavior and then “see if they could swim.”<sup>327</sup> The legislator was denounced by colleagues on both sides of the aisle because of the implication that the legislator would drown his own children if they identified as LGBT.<sup>328</sup>

By far, the majority of new anti-LGBT legislation and policy is directed at transgender people and is designed to mandate that sex is determined at birth and unalterable.<sup>329</sup> The goal of these measures is the eradication of transgender identity, plain and simple. They advance the view that transgender identity is somehow delusional and that the state and third parties should not be forced to respect such a delusion. The strong adherence to sex assigned at birth is contrary to the prevailing opinions of those in the scientific and medical communities,<sup>330</sup> and it often stems from strong religious beliefs about the nature of men and women and appropriate gender roles.<sup>331</sup> Recently, there have been a number of cases where hospitals affiliated with the Catholic Church have denied appropriate medical care to transgender patients.<sup>332</sup> Catholic hospitals must comply with the Ethical

---

324. These laws are similar to Amendment 2, which was the subject of *Romer*, but are framed differently in an attempt to avoid a finding of animus.

325. See *supra* text accompanying notes 193–94 (describing Congressional testimony).

326. AJ Willingham, *A West Virginia Lawmaker is Facing Calls to Resign After Comparing LGBT People to the KKK*, CNN (Feb. 13, 2019), <https://www.cnn.com/2019/02/12/us/eric-porterfield-west-virginia-lgbt-kkk-comments-trnd/index.html>.

327. *Id.*

328. *Id.* See also Jake Zuckerman, *How a 3 a.m. Bar Fight Left a WV Delegate Blind*, CHAR. GAZETTE-MAIL (Mar. 2, 2019), [https://www.wvgazette.com/news/politics/how-a-a-m-bar-fight-left-a-wv-delegate/article\\_a8c8c035-2ac9-5af0-9389-f2d0815b1065.html](https://www.wvgazette.com/news/politics/how-a-a-m-bar-fight-left-a-wv-delegate/article_a8c8c035-2ac9-5af0-9389-f2d0815b1065.html) (noting “he seemed to imply drowning them”).

329. The ACLU maintains a list of anti-LGBT legislation that is introduced at the state level that is updated weekly. Four months in to the 2019 legislative cycle, the express anti-LGBT laws (as opposed to laws creating religious exemptions) are almost exclusively targeted toward transgender people. *Legislation Affecting LGBT Rights Across the Country*, ACLU, <https://www.aclu.org/legislation-affecting-lgbt-rights-across-country> (last visited February 24, 2020).

330. See *supra* text accompanying notes 141–43 (describing reclassification in the DSM).

331. The role of religion is evident from the large number of proposed and enacted religious exemptions that now expressly include references to gender identity. See, e.g., H.B. 1523, 30th Leg. (Miss. 2016); MISS. CODE ANN. §11-62 (2016).

332. See, e.g., Erin Allday, *Transgender Man Sues Over Eureka Hospital’s Refusal to Perform Hysterectomy*, S.F. CHRON. (Mar. 25, 2019), <https://www.sfchronicle.com/health/article/Transgender-man-sues-over-Eureka-hospital-s-13707502.php>.



and Religious Directives written by the U.S. Conference of Catholic Bishops.<sup>333</sup> The denial of trans-competent health care is especially problematic because of the large number of religiously affiliated hospitals in the United States. One out of six hospitals in the U.S. is owned by or affiliated with the Catholic Church.<sup>334</sup> Moreover, in forty-six United States areas, Catholic hospitals are the “sole community hospital,” which means there are no other hospitals within a thirty-five mile radius.<sup>335</sup>

At the federal level, the Trump administration is considering a global policy change that would introduce a federal definition of gender, which provides that a person’s sex is determined at birth.<sup>336</sup> In this way, the initiative is similar to the legislative definition of marriage that was introduced at the federal level by DOMA. A blanket policy would also avoid the piecemeal reversal of the Obama-era administrative gains. One of the most significant gains that President Trump reversed is the policy that allowed transgender people to serve openly in the military.<sup>337</sup> Under the new Trump policy, transgender individuals may continue to serve, but they must do so in the gender they were assigned at birth.<sup>338</sup> Moreover, they will need a doctor’s certificate stating that they have been stable in their sex assigned at birth for at least thirty-six months and have not transitioned.<sup>339</sup>

Like “Don’t Ask, Don’t Tell” before it, the transgender military policy attempts to make a specious distinction between status and conduct. Under “Don’t Ask, Don’t Tell,” a gay servicemember was free to serve, provided they did not engage in any prohibited homosexual conduct, including the simple declaration: “I’m gay.”<sup>340</sup> Similar arguments are used in other contexts to justify discrimination. For example, a person who wishes to exclude LGBT people may claim that they have no quarrel with LGBT *people* and only wish them goodwill, but they find the *acts* associated with LGBT people objectionable. Thus, a photographer would base refusing to photograph a same-sex wedding on an objection

---

333. *Ethical and Religious Directives for Catholic Health Care Services*, U.S. CONF. CATH. BISHOPS 4 (June 2018), <http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf>. The Ethical and Religious Directives mandate that health care providers follow religious standards set by the Pope, bishops, and Vatican councils. The Conference of Catholic Bishops periodically reissues the Directives—they are currently in their sixth edition.

334. Julia Kaye et al., *Health Care Denied*, ACLU 22 (May 2016), <https://www.aclu.org/report/report-health-care-denied?redirect=report/health-care-denied>.

335. *Is Your Health Care Compromised?*, CATH. FOR CHOICE 6 (2017), [http://www.catholicsforchoice.org/wp-content/uploads/2017/01/2017\\_Catholic-Healthcare-Report.pdf](http://www.catholicsforchoice.org/wp-content/uploads/2017/01/2017_Catholic-Healthcare-Report.pdf).

336. Emanuella Grinberg, *What It Means for the Trump Administration to Legally Define ‘Sex’*, CNN (Oct. 25, 2018), <https://www.cnn.com/2018/10/24/politics/transgender-protections-hhs-memo-defining-sex/index.html>.

337. Kheel, *supra* note 40.

338. *Id.*

339. *Id.*

340. HALLEY, *supra* note 5 (outlining policy).

to marriage equality rather than on a general objection to gay men and lesbians.<sup>341</sup> LGBT advocates also tried to walk the status-versus-conduct line after *Bowers v. Hardwick*.<sup>342</sup> In both cases, the distinction fails, because the objectionable acts or conduct are constitutive of the identity.<sup>343</sup>

At the state level, these anti-transgender measures have taken many forms. The most well-known are the “bathroom bills” which bar access to—or even criminalize—the use of gender-appropriate facilities by transgender people.<sup>344</sup> Some states are attempting to amend their criminal indecent exposure laws to include transgender people who expose their genitalia or buttocks in a bathroom that is not consistent with the sex they were assigned at birth.<sup>345</sup> These laws specifically provide that a diagnosis of gender dysphoria is not a defense to a criminal charge.<sup>346</sup> The stated rationale for bathroom bills is they are necessary to ensure safety of women because of the fear that men will pretend to be women to invade sex-segregated spaces.<sup>347</sup> Of course, the real danger and threat of violence exists when transgender people are forced to use bathrooms that are not congruent with their gender identity.<sup>348</sup>

Other laws have been introduced to deny transgender students the ability to participate fully in sports<sup>349</sup> or to silence any mention of transgender identity in

341. Conor Friedersdorf, *Refusing to Photograph a Gay Wedding Isn't Hateful*, THE ATLANTIC (MAR. 5, 2014), <https://www.theatlantic.com/politics/archive/2014/03/refusing-to-photograph-a-gay-wedding-isnt-hateful/284224/> (making the case that not all refusals are rooted in bigotry). In the widely reported case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a baker claimed the right to refuse to make a wedding cake for a same-sex couple in violation of the Colorado non-discrimination law, due to his religious beliefs regarding marriage equality. See 138 S. Ct. 1719 (2018). The Supreme Court found the Colorado Civil Rights Commission exhibited hostility towards religion and violated the baker’s Free Exercise rights. *Id.* at 1729. It did not reach the merits as to the baker’s claim that he was entitled to a religious exemption from the Colorado non-discrimination law. *Id.* at 1732.

342. 478 U.S. 186 (1986).

343. See HALLEY, *supra* note 5, at 55 (discussing theory of speech acts).

344. Amber Phillips, *The First Major Poll on ‘Bathroom Bills’ Is Good News for Transgender Advocates*, WASH. POST (May 10, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/05/10/the-first-major-poll-on-bathroom-bills-is-here-and-its-good-news-for-transgender-advocates/?utm\\_term=.6882d538f449](https://www.washingtonpost.com/news/the-fix/wp/2016/05/10/the-first-major-poll-on-bathroom-bills-is-here-and-its-good-news-for-transgender-advocates/?utm_term=.6882d538f449).

345. For example, a bill pending in Washington state adds a person who “[i]s a biological male and intentionally makes any open and obscene exposure of his person in a restroom facility that is designated for use by women” to the definition of “indecent exposure.” H.B. 2088, 66th Leg., Reg. Sess. (Wash. 2019), <https://app.leg.wa.gov/billsummary?BillNumber=2088&Year=2019&Initiative=false>. The bill contains an identical provision for what it refers to as a “biological woman.” *Id.*

346. See, e.g., H.B. 0194, 111th Gen. Assemb., (Tenn. 2019), <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1151>.

347. Emma Ockerman, *The Biggest Argument for ‘Bathroom Bills’ Was Destroyed by This Study*, VICE NEWS (Sept. 12, 2018), [https://news.vice.com/en\\_us/article/pa8dby/the-biggest-argument-against-bathroom-bills-was-destroyed-by-this-study](https://news.vice.com/en_us/article/pa8dby/the-biggest-argument-against-bathroom-bills-was-destroyed-by-this-study).

348. Jeff Brady, *When a Transgender Person Uses a Public Bathroom, Who Is at Risk?*, NPR (Mar. 15, 2016), <https://www.npr.org/2016/05/15/477954537/when-a-transgender-person-uses-a-public-bathroom-who-is-at-risk>.

349. See H.R. 1525, 121st Gen. Assemb., Reg. Sess. (Ind. 2019) (unenacted).

the course of instruction at public schools.<sup>350</sup> A number of states have introduced laws authorizing health care discrimination against transgender people.<sup>351</sup> Some states have prohibited funds from being used for transgender medical care.<sup>352</sup> A pending bill in Illinois would prohibit a physician from providing certain care to transgender individuals under the age of eighteen.<sup>353</sup> Some states have taken steps to make it more difficult for transgender people to get official identification documents with their correct name and gender.<sup>354</sup> These laws deny the existence of transgender identity and block access to trans-competent medical care. Broader religious exemptions, described below, would allow medical-care professionals to refuse to treat transgender people entirely, as well as refuse to treat individuals based on sexual orientation.<sup>355</sup>

### C. RELIGIOUS EXEMPTIONS

There is no question that religious beliefs which express animus towards LGBT individuals and which deny their right to exist enjoy absolute protection under the Free Exercise Clause.<sup>356</sup> However, when religious beliefs translate into public action, they traditionally step over the line and become subject to state regulation.<sup>357</sup> In *Employment Division v. Smith*, the U.S. Supreme Court held that the First Amendment does not require religious or moral exemptions to laws of

---

350. H.B. 1108, 2019 Leg. Assemb., 94th Sess. (S. D. 2019), [https://sdlegislature.gov/Legislative\\_Session/Bills/Bill.aspx?Bill=1108&Session=2019](https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=1108&Session=2019) (prohibits certain gender dysphoria instruction in public schools).

351. For example, the proposed Texas Health Care Right of Conscience Act provides wide religious exemptions for providers and health care facilities when dealing with transgender patients. S.B. 1107, 86th Leg., (Tex. 2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=SB1107>.

352. A proposed bill in Alaska prohibits the state expenditure of funds for gender reassignment treatment or surgery. H.B. 5, 31st Leg., 1st Sess. (Alaska 2019), <http://www.akleg.gov/basis/Bill/Detail/31?Root=HB%20%20%205>.

353. H.B. 3515, 101st Gen. Assemb., Reg. Sess. (Ill. 2019), <http://www.ilga.gov/legislation/billstatus.asp?DocNum=3515&GAID=15&GA=101&DocTypeID=HB&LegID=120154&SessionID=108> (titled the Youth Protection Act).

354. Evan Urquhart, *A Proposed Utah Bill Defining Biological Sex Points to the Future of Anti-Trans Legislation*, SLATE (Feb. 6, 2019), <https://slate.com/human-interest/2019/02/utah-biological-sex-transgender-birth-certificate.html>.

355. See *infra* note 417 (describing religious exemptions for medical providers).

356. *Cantwell v. Connecticut*, 310 U. S. 296, 303–04 (1940) (“Thus the Amendment embraces two concepts . . . freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.”).

357. See generally *Reynolds v. United States*, 98 U.S. 145 (1878). In *Reynolds*, the Court quoted *Memorial and Remonstrance*: “[T]hat it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.” *Id.* at 163 (quoting James Madison, *Memorial and Remonstrance* (1785)). It then concluded: “In these two sentences is found the true distin[c]tion between what properly belongs to the church and what to the State.” *Id.*

general applicability that are not otherwise targeted at religion.<sup>358</sup> Accordingly, a county clerk who refuses to issue a marriage license to a same-sex couple could face internal discipline or criminal charges for failure to discharge their official duties or a federal lawsuit for deprivation of civil rights.<sup>359</sup> Religious exemptions are designed to provide greater protection than demanded by the First Amendment and would protect the clerk from any adverse actions, provided the refusal was based on their religious belief that marriage is between one man and one woman.<sup>360</sup>

Three years after *Smith* was decided, Congress enacted the Religious Freedom Restoration Act (RFRA) that statutorily overruled *Smith* by codifying pre-*Smith* case law and allowing individuals to challenge federal action that “substantially burden[s] free exercise.”<sup>361</sup> The government then has an opportunity to defend the practice that allegedly burdens free exercise, by showing that it serves a compelling state interest and is the least restrictive alternative.<sup>362</sup> Many states also have RFRA in place, some of which are much more expansive than the federal version.<sup>363</sup> Targeted religious exemptions, however, are very different from a RFRA claim, which requires balancing the interests involved. Instead, religious exemptions provide a blanket exception from a law of general applicability and, in the context of LGBT rights, insulate religious objectors from the increased legal and social acceptance of LGBT individuals. Although religious exemptions have been used in the healthcare field for many years, they only came to prominence in the LGBT area after marriage equality.<sup>364</sup> They uniformly cover both religious and moral beliefs because of the Establishment concerns discussed below. These measures represent a departure not just from First Amendment jurisprudence, but also from the tradition of enacting robust civil rights protections without individual religious carve-outs. The absolute exemption provided under these laws extends state protection beyond questions of individual belief and

---

358. *Empl. Div. v. Smith*, 494 U.S. 872, 875–890 (1990).

359. See *infra* text accompanying notes 410–12 (discussing North Carolina’s recusal law for county officials).

360. John Mura & Richard Pérez-Peña, *Marriage Licenses Issued in Kentucky County, but Debates Continue*, N.Y. TIMES (Sept. 4, 2015), <http://www.nytimes.com/2015/09/05/us/kim-davis-same-sex-marriage.html> (discussing Kim Davis, the county clerk of Rowan County, Kentucky who refused to issue marriage licenses to same-sex couples).

361. Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (*invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997)). RFRA recites that its purpose is “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.” 42 U.S.C.A. § 2000bb(b)(1) (West, Westlaw through P.L. 116-91). In *Employment Division v. Smith*, Justice Scalia said that imposing a higher standard was not something that should be “discerned by the courts,” but rather that “accommodation” should be left “to the political process.” 494 U.S. at 890.

362. Religious Freedom Restoration Act (RFRA), Pub. L. No. 103–141, 107 Stat. 1488 (1993).

363. *State Religious Freedom Restoration Acts*, NAT’L CON. ST. LEG. (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>; see *infra* text accompanying notes 352–54 (describing more expansive laws).

364. See Griffin, *supra* note 284.

conscience and instead covers public acts that in other contexts would clearly be recognized as discriminatory regardless of their religious motivation.<sup>365</sup> This section covers both RFRAs and the more targeted religious exemptions.

### 1. Religious Freedom Reformation Acts

Under RFRA, a governmental action that places a substantial burden on an individual's exercise of religion is prohibited unless the government can show that the action is the least restrictive means of furthering a compelling state interest.<sup>366</sup> RFRA originally applied to both state and federal governmental action, but it was declared unconstitutional as applied to the states in the 1997 U.S. Supreme Court decision of *City of Boerne v. Flores*.<sup>367</sup> Since that time, twenty-one states have passed their own "mini-RFRAs."<sup>368</sup> In 2006, the Court affirmed that RFRA continues to apply to federal action in *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*.<sup>369</sup> The Court revisited what constitutes a "substantial burden" for purposes of RFRA in *Burwell v. Hobby Lobby* in 2014 and affirmed that RFRA protection could extend to for-profit corporations.<sup>370</sup>

---

365. For example, if a business owner in a jurisdiction with a non-discrimination law refused to provide goods or services to a same-sex couple, the business owner would be subject to a claim of discrimination. See, e.g., James Esseks, *Can Businesses Turn LGBT People Away Because of Who They Are? That's Up to the Supreme Court Now*, ACLU BLOG (Jun. 26, 2017), <https://www.aclu.org/blog/lgbt-rights/lgbt-nondiscrimination-protections/can-businesses-turn-lgbt-people-away-because-who>.

366. 42 U.S.C. § 2000bb(a)(5) (West, Westlaw through P.L. 116-91).

367. See generally *City of Boerne v. Flores*, 521 U.S. 507 (1997).

368. *State Religious Freedom Restoration Acts*, NAT'L CON. OF ST. LEG. (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>. The states are: Alabama, ALA. CONST. art. I, §3.01 (West, Westlaw through Dec. 3, 2018); Arizona, ARIZ. REV. STAT. ANN. § 41-1493.01 (West, Westlaw through Feb. 18, 2020 of 2d Reg. Sess. of 54th Legis.); Arkansas, ARK. CODE ANN. § 16-123-404 (West, Westlaw through 2019 Reg. Sess. of 92nd Ark. Gen. Assemb.); Connecticut, CONN. GEN. STAT. § 52-571B (West, Westlaw through 2019 Jan. Reg. Sess. and 2019 July Spec. Sess.); Florida, FLA. STAT. § 761.01 *et seq.* (West, Westlaw through 2019 1st Reg. Sess. of 26th Legis.); Idaho, IDAHO CODE ANN. § 73-402 (West, Westlaw through 2020 2d Reg. Sess. of 65th. Idaho Legis.); Illinois, 775 ILL. COMP. STAT. 35 / 1 *et seq.* (West, Westlaw through P.A.101-629); Indiana, IND. CODE ANN. § 34-13-9 *et seq.* (West, Westlaw through 2020 2d Reg. Sess. of 121st Gen. Assemb.); Kansas, KAN. STAT. ANN. § 60-5301, *et seq.* (West, Westlaw through 2019 Reg. Sess. of Kan. Legis.); Kentucky, KY. REV. STAT. ANN. § 446.350 (West, Westlaw through 2020 Reg. Sess.); Louisiana, LA. REV. STAT. ANN. § 13:5231, *et seq.* (West, Westlaw through 2019 Reg. Sess.); Mississippi, MISS. CODE ANN. § 11-61-1 (West, Westlaw through 2019 Reg. Sess.); Missouri, MO. REV. STAT. §1.302 (West, Westlaw through 2019 1st Reg. and 1st Extra. Sess. of 100th Gen. Assemb.); New Mexico, N.M. STAT. ANN. § 28-22-1, *et seq.* (West, Westlaw through 2d Reg. Sess. of 54th Legis. 2020); Oklahoma, OKLA. STAT. tit. 51, § 251, *et seq.* (West, Westlaw through 1st Reg. Sess. of 57th Legis. 2019); Pennsylvania, 71 PA. STAT. AND CONS. STAT. ANN. § 2403 (West, Westlaw through 2020 Reg. Sess. Act 8); Rhode Island, 42 R.I. GEN. LAWS § 80.1-1, *et seq.* (West, Westlaw through 2020 2d Reg. Sess.); South Carolina, S.C. CODE ANN. § 1-32-10, *et seq.* (West, Westlaw through 2019 Sess.); Tennessee, TENN. CODE ANN. § 4-1-407 (West, Westlaw through 2020 1st Reg. Sess. of 111th Tenn. Gen. Assemb.); Texas, TEX. CIV. PRAC. & REM. CODE ANN. § 110.001, *et seq.* (West, Westlaw through 2019 Reg. Sess. of 86th Legis.); Virginia, VA. CODE ANN. § 57-1, *et seq.* (West, Westlaw through 2019 Reg. Sess.).

369. *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

370. *Burwell v. Hobby Lobby*, 134 U.S. 682, 691 (2014). In *Hobby Lobby*, two closely held for-profit corporations, Hobby Lobby and Conestoga Wood Specialties, challenged the contraceptive mandate of the Affordable Care Act (ACA) on the grounds that it substantially burdened the religious exercise of



After *Hobby Lobby*, many states introduced legislation to broaden their existing state RFRA or to enact a state-level RFRA that would provide as much protection, or more, than the federal statute.<sup>371</sup> Proposals were introduced to remove the requirement that the burden on religious exercise must be “substantial,” providing instead that any burden on religious exercise will trigger strict scrutiny.<sup>372</sup> Other bills specifically included for-profit and nonprofit organizations.<sup>373</sup> Much of the state-level RFRA activity occurred while *Obergefell* was pending before the Court, leading many commentators to suggest that it was motivated by the increasing awareness that marriage equality was inevitable.<sup>374</sup>

Shortly before the Court issued its decision in *Obergefell*, Indiana enacted RFRA legislation amid considerable controversy regarding the impact such laws could have on LGBT individuals.<sup>375</sup> At the same time, an expanded RFRA was also pending in Arkansas.<sup>376</sup> The original version of the Arkansas bill would have required the state to show not only that the offending action furthered a

the owners of the corporations. *Id.* at 703. The ACA contraceptive mandate required employers to include insurance coverage for certain methods of birth control for their employees and provides significant monetary penalties if they refuse to provide such coverage. *Id.* at 682. The ACA required employer health plans to provide “preventive care and screenings” for women without “any cost sharing requirements.” 42 U.S.C. §300gg-13(a)(4) (2015). Regulations promulgated by the Health Resources and Services Administration (HRSA), a component of the U.S. Department of Health and Human Services (HHS), specified that preventative care included all FDA-approved contraceptives but provided an exception for certain religious organizations. 45 C.F.R. §§ 147.130–147.131 (2015). The combined law and regulatory scheme were referred to as the “contraceptive mandate.” *Hobby Lobby*, 134 U.S. at 682. Employers who failed to satisfy the contraceptive mandate were subject to penalties. 26 U.S.C. §4980D(a)–(b) (2015).

371. The National Conference of State Legislatures reports that seventeen states introduced RFRA legislation in 2015. *2015 State Religious Freedom Restoration Legislation*, NAT’L CONF. OF ST. LEG. (Sept. 3, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx>. For example, Oklahoma, South Carolina, and Texas already have a RFRA but introduced legislation this year to expand the existing law. *Id.* The states of Colorado, Georgia, Hawai’i, Maine, Michigan, Montana, Nevada, North Carolina, South Dakota, Utah, West Virginia, and Wyoming considered enacting a RFRA for the first time. *Id.* Arkansas and Indiana have enacted RFRA. *Id.*

372. For example, a proposed amendment to the Texas state constitution would have deleted the requirement that the burden must be “substantial” and required the government to show that the state action is the “least restrictive means” of furthering a “compelling state interest.” H.R. Res. 55, 84th Leg., Reg. Sess. (Tex. 2015).

373. The 2015 Indiana RFRA specifically includes “a partnership, a limited liability company, a corporation, a company, a firm, a society, a joint-stock company, an unincorporated association, or another entity[.]” S. 101, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).

374. Garrett Epps, *What Makes Indiana’s Religious-Freedom Law Different?*, THE ATLANTIC (Mar. 30, 2015), <http://www.theatlantic.com/politics/archive/2015/03/what-makes-indianas-religious-freedom-law-different/388997/>.

375. In March 2015, Indiana enacted an expanded RFRA that immediately drew the ire of LGBT-rights advocates and corporate leaders who denounced the law as being designed to provide a cover for anti-LGBT discrimination. Monica Davey et al., *Indiana and Arkansas Revise Rights Bills, Seeking to Remove Divisive Parts*, N.Y. TIMES (Apr. 2, 2015), [http://www.nytimes.com/2015/04/03/us/indiana-arkansas-religious-freedom-bill.html?\\_r=0](http://www.nytimes.com/2015/04/03/us/indiana-arkansas-religious-freedom-bill.html?_r=0). Facing increasing pressure from economic interests, the Indiana legislature amended the law to clarify that its purpose was not to discriminate on the basis of sexual orientation or gender identity. *Id.*

376. *Id.*



compelling state interest, but also that the action was “essential” to achieving a compelling state interest.<sup>377</sup> Walmart and other corporations doing business in Arkansas came out against the bill.<sup>378</sup> In response, the Governor of Arkansas asked the legislature to revise the bill to mirror the federal RFRA.<sup>379</sup> The Governor then signed the revised bill into law in April 2015.<sup>380</sup>

In both Indiana and Arkansas, the controversy surrounding the state RFRA centered on protecting LGBT individuals from discrimination.<sup>381</sup> However, neither piece of legislation specifically mentioned LGBT individuals or marriage.<sup>382</sup> By design, RFRA is broad statutes that apply to all religious exercise.<sup>383</sup> They are indifferent as to whether the exercise is by a member of the Native American Church or a mainline Protestant denomination. They protect the free exercise of religious belief against substantial government interference, but also balance free exercise interests against the importance of the offending governmental action.<sup>384</sup> As discussed in greater detail below, religious anti-LGBT exemptions have none of these qualities.<sup>385</sup> They target a particular religious belief, namely the belief that marriage is a union between one man and one woman or that transgender people should not exist.<sup>386</sup> They then conclusively presume that this belief takes priority over any government law or action advancing or protecting same-sex marriage or other LGBT rights, without any need to establish a substantial burden or opportunity to justify that burden by showing a compelling state interest.<sup>387</sup> There is no required balancing of the interests involved.

## 2. First Amendment Defense Acts

The First Amendment Defense Act (FADA) was introduced in both the U.S. House and Senate ten days before the U.S. Supreme Court announced its decision in *Obergefell*.<sup>388</sup> It is a federal religious marriage exemption that prohibits the federal government from taking any discriminatory action against a person on the

---

377. H.B. 1228, 90th Gen. Assemb., Reg. Sess. (Ark. 2015).

378. Davey et al., *supra* note 375.

379. *Id.*

380. *Id.*

381. Howard Friedman, *10 Things You Need to Know to Really Understand RFRA in Indiana and Arkansas*, WASH. POST (Apr. 1, 2015, 6:00 PM), <http://www.washingtonpost.com/news/acts-of-faith/wp/2015/04/01/10-things-you-need-to-know-to-really-understand-rfra-in-indiana-and-arkansas/>.

382. As amended, the Indiana statute provides that the law does not authorize the denial of goods or services on account of sexual orientation or gender identity, nor does it provide a defense to a claim of discrimination. S. 50, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).

383. 42 U.S.C. § 2000bb (2019).

384. 42 U.S.C. § 2000bb-1(b) (2019).

385. *See infra* Section IV.C.2–3 (discussing religious exemptions).

386. *See infra* Section IV.C.3 (discussing targeted religious exemptions).

387. *See infra* Section IV.C.3 (discussing targeted religious exemptions).

388. FADA currently has 172 co-sponsors in the House. *H.R. 2802—First Amendment Defense Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/2802> (last visited Mar. 9, 2020). It has thirty-seven co-sponsors in the Senate. *S. 1598—First Amendment Defense Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/1598/text> (last visited Mar. 9, 2020).

basis, wholly or partially, that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.<sup>389</sup>

“Discriminatory action” is defined broadly and covers the areas of taxation, federal contracts, licensing and accreditation, employment, and federal benefits.<sup>390</sup> Consistent with the Court’s ruling in *Hobby Lobby*,<sup>391</sup> FADA defines “person” to include both for-profit and nonprofit entities.<sup>392</sup> It also covers persons “regardless of religious affiliation or lack thereof.”<sup>393</sup> Although FADA holds religious objectors harmless from a potentially wide range of federal sanctions, it has been most closely associated with the concern that religious educational institutions could lose their federal tax exemption if they discriminate against same-sex couples or LGBT individuals more generally.<sup>394</sup> The basis for this concern is the 1983 U.S. Supreme Court decision, *Bob Jones University v. United States*, where the Court ruled that the IRS could revoke the university’s federal tax exemption on account of its policy against interracial dating.<sup>395</sup> The Court rejected a First Amendment claim that the IRS action violated the Free Exercise clause.<sup>396</sup>

FADA, like the other targeted religious exemptions discussed below, protects objections based on religious or *moral convictions*.<sup>397</sup> In free exercise cases, the Court adds the term “moral conviction” in order to avoid establishing a religion, thereby violating the First Amendment in an attempt to enforce First Amendment freedoms.<sup>398</sup> Courts have resisted defining what constitutes a religion or evaluating individual religious beliefs.<sup>399</sup> They will only inquire as to whether the religious belief is sincerely held, not whether it is true or false.<sup>400</sup> Religion is defined,

389. The First Amendment Defense Act, H.R. 2802, S. 1598, 114th Cong. § 3(a) (2015).

390. *Id.* § 3(b).

391. *Burwell v. Hobby Lobby*, 134 U.S. 682, 694–720 (2014).

392. H.R. 2802, S.1598 § 6(3).

393. *Id.*

394. Nathaniel Cary, *Religious-Based Schools Fear Loss of Tax Exemption*, GREENVILLE NEWS (Aug. 8, 2015, 7:14 PM), <https://www.greenvilleonline.com/story/news/education/2015/08/07/sex-marriage-religion-schools-tax-exempt/31310685/>.

395. *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983). See Nicholas Frankovich, *Christian Schools Need to Do More than Plead for a Religious Exemption*, NAT’L. REV. (Oct. 21, 2019), <https://www.nationalreview.com/2019/10/christian-schools-same-sex-marriage-religious-exemptions-wont-save-them/> (“The opinion that they should lose their tax-exempt status if they oppose same-sex marriage continues to work its way into the mainstream.”).

396. *Id.* at 603–04.

397. The First Amendment Defense Act, H.R. 2802, S. 1598, 114th Cong. (2015).

398. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (stating that the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers”); *United States v. Seeger*, 380 U.S. 163, 183–84 (1965) (non-religious objections can play the same role in an individual’s life as religious convictions).

399. The Establishment Clause applies to the states through the Fourteenth Amendment. *Everson*, 330 U.S. at 15.

400. *United States v. Ballard*, 322 U.S. 78, 81 (1944) (holding the jury could only consider whether religious beliefs were sincerely held, not whether they were true).

in the most abstract terms, as a system of belief that deals with ultimate concerns, such as fundamental questions regarding human existence and what makes life worth living.<sup>401</sup> Take, for example, an employee of the U.S. Social Security Administration (SSA) who refuses to process claims from surviving same-sex spouses. In determining whether the employee was protected by FADA, courts would not be permitted to inquire as to whether the belief was central to the employee's religion or whether it was a valid interpretation of their particular creed.<sup>402</sup> It could not judge the plausibility of the religious claim.<sup>403</sup> The belief could represent an entirely idiosyncratic interpretation that was not supported by the doctrine of their denomination or by any denomination.<sup>404</sup> The belief also could be based on a deeply held secular moral code,<sup>405</sup> which is why many of the religious marriage exemptions expressly include "moral conviction" as a protected category in addition to religious belief.<sup>406</sup>

The addition of "moral conviction" to religious exemptions signals an effort to protect everyone who is opposed to LGBT rights. Moral disapproval has long served as the basis of the legal disabilities imposed on LGBT individuals.<sup>407</sup> If the religious marriage exemptions safeguard individuals with moral objections, as well as religious objections, then it is difficult to see who would not be protected.<sup>408</sup> As a result, the religious marriage exemptions have the potential to be applied very broadly and could serve as an attractive pretext for anti-LGBT discrimination and bigotry.<sup>409</sup> Returning to the example of the employee at SSA, assume that instead of harboring a religiously informed objection, the employee is an unrepentant bigot with a strong hatred for LGBT individuals. Their refusal

---

401. *Malnak v. Yogi*, 592 F.2d 197, 208–210 (3d Cir. 1979) (Adams, J., concurring).

402. *Empl. Div. v. Smith*, 494 U.S. 872, 889 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims." (internal citations omitted)). In his concurrence, Justice Stevens stated: "As we reaffirmed only last Term, [i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds." *Id.* at 887.

403. *Id.* at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

404. *Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 714 (1981) (holding that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

405. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (stating that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers"); *United States v. Seeger*, 380 U.S. 163 (1965) (holding that non-religious objections can play the same role in an individual's life as religious convictions).

406. *See, e.g.*, The First Amendment Defense Act, H.R. 2802, S. 1598, 114th Cong. (2015) (including both religious belief and moral conviction).

407. *Lawrence v. Texas*, 539 U.S. 558, 570 (2003).

408. It is hard to see other motivations, but perhaps individuals could adhere to the discredited scientific views of homosexuality that maintained that homosexuality was a sociopathic disorder. *See generally* BAYER, *supra* note 2.

409. Jay Bookman, *Should Anti-Gay Bigotry Be Legally Protected as Religious Faith?*, ATLANTA J. CONST. (Sept. 1, 2015), <http://jaybookman.blog.ajc.com/2015/09/01/should-anti-gay-bigotry-be-legally-protected-as-religious-faith/>.

to process claims by surviving same-sex spouses would be based on their strong and sincere “moral conviction” that marriage should be between one man and one woman. Under FADA, there would be no meaningful distinction between the bigoted employee and the devout employee. Of course, there is also no difference between the two from the perspective of the surviving same-sex spouses, whose claims languish in the bureaucracy. The actions of the employees have the same effect, regardless of their motivation. FADA would trump internal civil service rules and federal civil rights protections, meaning that the employee could not be held accountable for their refusal to perform their assigned duties.

Since its introduction, FADA has been endorsed by numerous conservative organizations, including the Catholic Council on Bishops, the Family Research Council, and the Heritage Foundation.<sup>410</sup> It has also served as a model for action on the state level, where the FADA model has been expanded to include anti-transgender religious or moral beliefs that “male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics by time of birth.”<sup>411</sup> They also include protection for government employees, such as county clerks who object to issuing marriage licenses to same-sex couples.<sup>412</sup> For example, in North Carolina, a magistrate or recorder of deeds who refuses to issue or record a marriage license could be charged with “willfully failing to discharge duties,” which is a Class 1 misdemeanor.<sup>413</sup> In 2015, the North Carolina legislature amended the law, over the governor’s veto, to provide a recusal mechanism for magistrates and recorders of deeds who refused to issue or record a marriage license “based upon any sincerely held religious objection.”<sup>414</sup>

### 3. Targeted Religious Exemptions

Targeted religious exemptions differ from FADAs in their scope. Whereas a FADA can act as an omnibus religious exemption provision, many states have pursued very specific exemptions around certain issues and in particular contexts.<sup>415</sup> These specific religious exemptions cover religious and moral objections

---

410. Ryan T. Anderson, *Want Religious Freedom? Then Let’s Pass the First Amendment Defense Act*, DAILY SIGNAL (July 16, 2015), <http://dailysignal.com/2015/07/16/want-religious-freedom-then-lets-pass-the-first-amendment-defense-act>; *USCCB Chairmen Give Strong Support for the ‘First Amendment Defense Act’*, U.S. CONF. CATH. BISHOPS (June 19, 2015), <http://www.usccb.org/news/2015/15-096.cfm>; *Religious Liberty after Obergefell: Why Congress Must Act Now to Pass the First Amendment Defense Act*, FAM. RES. COUNCIL (July 16, 2015, 12:45 PM), <http://www.frc.org/events/religious-liberty-after-obergefell-why-congress-must-act-now-to-pass-the-first-amendment-defense-act>.

411. H. 1392, 191st Leg. (Mass. 2019).

412. See *infra* note 413.

413. N.C. GEN. STAT. § 14-230 (2015).

414. N.C. GEN. STAT. § 51-5.5 (2015) (establishing recusal mechanism for county clerks and magistrates); *14 NC Magistrates Use Recusal Law Focusing on Gay Marriage*, WSCOTV.COM (July 8, 2015, 5:15 AM), <https://www.wsocv.com/news/local/14-nc-magistrates-use-recusal-law-focusing-gay-mar/31903851/>.

415. A number of states have laws that are centered on foster care and adoption. Julie Moreau, *Religious Exemption Laws Exacerbating Foster and Adoption ‘Crisis,’ Report Finds*, NBC NEWS (Nov.

in a wide range of situations where LGBT individuals are trying to navigate through the world.<sup>416</sup> States have adopted religious exemption laws that allow religious objectors to refuse to provide medical care and to refuse to follow professional standards.<sup>417</sup> For example, a bill pending in Texas allows mental-health professionals, including guidance counselors and substance-abuse counselors, to refuse to provide services that would violate a “sincerely held religious belief.”<sup>418</sup> A similar Texas bill covers health care facilities but is broadened to include moral convictions.<sup>419</sup> There are also religious exemptions which allow adoption and foster-care agencies to refuse to provide services that violate their religious convictions.<sup>420</sup> Other bills require public universities to allow discrimination by student organizations if this discrimination is based on religious or moral beliefs.<sup>421</sup>

The most common targeted religious exemption is for objections to marriage equality. The *Obergefell* decision prompted outrage on the part of opponents to marriage equality. Some of the harshest and most immediate criticisms were directed toward the U.S. Supreme Court and its perceived activist stance.<sup>422</sup> Many of the candidates for the Republican presidential nomination advocated creative ways to circumvent or block the Court’s decision.<sup>423</sup> In addition to the

22, 2018, 12:23 PM), <https://www.nbcnews.com/feature/nbc-out/religious-exemption-laws-exacerbating-foster-adoption-crisis-report-finds-n939326>.

416. Mississippi has a law that allows businesses and government officials to deny services to LGBT people on religious grounds. H.B. 1523 (Miss. 2016).

417. *See, e.g.*, HB95, 2017 Leg., Reg. Sess. (Ala. 2017) (granting health care service providers the “authority to refuse to perform or to participate in health care services that violate their conscience; immunity from civil, criminal, or administrative liability for refusing to provide or participate in a health care service that violates their conscience.”).

418. SB 85, 86th Leg., (Tex. 2019).

419. HB 2892 (Tex. 2019).

420. Moreau, *supra* note 415 (reporting ten states have religious exemptions for foster care and adoption).

421. Samantha Sokol, *Trending: State Legislation That Allows College Student Groups to Use Religion to Discriminate*, AMS. UNITED BLOG (Apr. 4, 2019), <https://www.au.org/blogs/wall-of-separation/trending-state-legislation-that-allows-college-student-groups-to-use> (three states have passed laws—Arkansas, Iowa, South Dakota, and three states have bills pending—Missouri, Montana, Texas).

422. Ryan T. Anderson, *Judicial Activism on Marriage Isn’t The End—Here’s What To Do Now*, THE HERITAGE FOUND. (June 29, 2015), <https://www.heritage.org/life/commentary/judicial-activism-marriage-isnt-the-end-heres-what-do-now> (characterizing the decision as “unadulterated judicial activism”).

423. *See, e.g.*, Eric Bradner, *Huckabee Calls for MLK-Like Passive Resistance to Gay Marriage Ruling*, CNN (June 29, 2015, 8:50 AM), <http://www.cnn.com/2015/06/28/politics/mike-huckabee-gay-marriage-mlk/>; Ted Cruz, *Constitutional Remedies to a Lawless Supreme Court*, NAT’L. REV. (June 26, 2015, 5:39 PM), <http://www.nationalreview.com/article/420409/ted-cruz-supreme-court-constitutional-amendment>; Mark Hensch, *Jindal: ‘Let’s Just Get Rid of the Court’*, THE HILL (June 26, 2015, 2:56 PM), <http://thehill.com/blogs/ballot-box/presidential-races/246301-jindal-lets-just-get-rid-of-the-court>; Daniel Strauss, *Scott Walker Calls for Constitutional Amendment to Let States Define Marriage*, POLITICO (June 26, 2015, 11:55 AM), <http://www.politico.com/story/2015/06/scott-walker-ban-gay-marriage-constitutional-amendment-119470.html>; *see also* Jonathan Topaz & Nick Gass, *Republican Presidential Candidates Condemn Gay-Marriage Ruling*, POLITICO (June 26, 2015, 11:01 AM),

criticism of the Court, there was a strong call to respect religious freedom.<sup>424</sup> For example, President Obama's statement on the *Obergefell* decision included the following caution:

I know that Americans of goodwill continue to hold a wide range of views on this issue. Opposition in some cases has been based on sincere and deeply held beliefs. All of us who welcome today's news should be mindful of that fact; recognize different viewpoints; revere our deep commitment to religious freedom.<sup>425</sup>

Concerns about the rights of religious objectors were expressed in both the majority and dissenting opinions in *Obergefell*.<sup>426</sup> Toward the end of his majority opinion, Justice Kennedy acknowledged that some religions and individuals hold a "sincere conviction that, by divine precepts, same-sex marriage should not be condoned."<sup>427</sup> He affirmed that the First Amendment protects "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered."<sup>428</sup> In his dissent, Chief Justice Roberts charged that Justice Kennedy's assurances were lacking.<sup>429</sup> He noted that although "[t]he majority graciously suggests that religious believers may continue to 'advocate' and 'teach' their views of marriage . . . [t]he First Amendment guarantees . . . the freedom to 'exercise' religion."<sup>430</sup> Justice Thomas echoed this concern in his dissent when he warned that the Court's ruling could have "potentially ruinous consequences for religious liberty."<sup>431</sup> Justice Alito's dissent stressed how quickly the tables can turn and a newly recognized right can be used to "vilify Americans who are unwilling to assent to the new orthodoxy."<sup>432</sup> While making the case for the protection of "rights of conscience," Justice Alito concedes "the harsh treatment of gays and lesbians in the past," but warns that "the

---

<http://www.politico.com/story/2015/06/2016-candidates-react-supreme-court-gay-marriage-ruling-119466> (overview of candidate reactions to *Obergefell* in the 2016 GOP primary).

424. Press Release, Barack Obama, Remarks by the President on the Supreme Court Decision on Marriage Equality (June 26, 2015), <https://www.whitehouse.gov/the-press-office/2015/06/26/remarks-president-supreme-court-decision-marriage-equality>.

425. *Id.*

426. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

427. *Id.* at 2607.

428. *Id.*

429. *Id.* at 2625 (Roberts, C.J., dissenting).

430. *Id.* (emphasis in original) (internal citations omitted). Proponents of the religious marriage exemptions have seized the distinction between "exercise" and "belief," arguing that if First Amendment protections do not extend to actions, then the Constitution only protects freedom of worship. Daniel Davis, *The New RFRA: Pro-First Amendment Bill Gains Steam in the House*, TOWN HALL (July 13, 2015), <http://townhall.com/tipsheet/danieldavis/2015/07/13/the-new-rfra-profirst-amendment-bill-gains-steam-in-the-house-n2024782>.

431. *Obergefell*, 135 S. Ct. at 2639 (Thomas, J., dissenting).

432. *Id.* at 2642 (Alito, J. dissenting).



Nation will experience bitter and lasting wounds” if Americans with “traditional ideas” are marginalized.<sup>433</sup>

The more targeted the religious exemptions, the more likely that they will violate the Establishment Clause.<sup>434</sup> The religious marriage exemptions provide special treatment and absolution from the law for a particular religious viewpoint, namely that marriage must be between one man and one woman.<sup>435</sup> They are similar to the spiritual healing exemption to the Delaware abuse and neglect law, considered by the Delaware Supreme Court in *Newmark v. Williams*.<sup>436</sup> The court noted that the exception was “enacted as a result of a Christian Science lobbying effort” and “mirrors the Christian Science belief.”<sup>437</sup> Although the court did not reach the question of the constitutionality of the spiritual healing exemption, it concluded that “any statute passed as the result of the efforts of one religious group to benefit that one particular group . . . bears a strong presumption against its validity as a direct violation of the Establishment Clause.”<sup>438</sup>

## V. CONCLUSION

The longevity of the politics of eradication may seem surprising, given the objective gains that LGBT people have made in terms of legal rights, political empowerment, and social acceptance described in this Article. However, the fundamental belief that LGBT identities are not legitimate remains a stubborn article of faith among many Americans. This belief continues to inform cross-institutional efforts to devise cures, containment strategies, and legal definitions that challenge the very existence of LGBT people. It fuels the present-day practice of conversion therapy<sup>439</sup> and efforts to define gender identity out of existence.<sup>440</sup> It is expressed in the Trump administration’s virulently anti-LGBT policies,<sup>441</sup> as well as the recent deluge of anti-LGBT initiatives at the state level.<sup>442</sup> And it serves as the basis for religious and moral exemptions for individuals (including corporations) who wish to discriminate openly against LGBT people without legal repercussions.

433. *Id.* at 2643 (Alito, J. dissenting).

434. See Griffin, *supra* note 284 (noting that “the expansion of the statutory-exemption regime—with its patchwork of arbitrary exemptions—threatens the neutral constitutional order”).

435. For example, Kansas has a targeted religious exemption that permits businesses to refuse to serve married same-sex couples. Kansas Exec. Order 15-05 (2015).

436. *Newmark v. Williams*, 588 A.2d 1108 (Del. 1991).

437. *Id.* at 1112 n.7. See also David Margolick, *In Child Deaths, a Test for Christian Science*, N.Y. TIMES (Aug. 6, 1990), <http://www.nytimes.com/1990/08/06/us/in-child-deaths-a-test-for-christian-science.html> (lobbying by Christian Science Church in forty states).

438. *Newmark*, 588 A.2d at 1112 n.7.

439. See *supra* text accompanying notes 28–32.

440. See *supra* text accompanying notes 291–294.

441. See generally Maril, *supra* note 44.

442. The ACLU maintains a list of anti-LGBT legislation that is introduced at the state level that is updated weekly. *Legislation Affecting LGBT Rights Across the Country*, ACLU (last visited Mar. 08, 2020), <https://www.aclu.org/legislation-affecting-lgbt-rights-across-country>.

The politics of eradication presents an especially nihilistic form of subordination because it is based on the conviction that LGBT people should not, or do not, really exist.<sup>443</sup> Accordingly, it is not focused on a debate over whether or how to address existing disparities or whether or how to level the playing field for LGBT people. Under the politics of eradication, any government recognition of LGBT people or their families risks legitimizing and acknowledging the reality of LGBT lives and identities. Take, for example, Craig Northcott, the district attorney of Coffee County, Tennessee, who bragged that he refused to prosecute same-sex partners for domestic violence because “[t]here’s no marriage to protect with homosexual relationships, so I don’t prosecute them as domestic.”<sup>444</sup> Or consider the social worker at a Miami hospital who told Janice Langbehn that Janice would not be permitted to see her domestic partner, who had just suffered what proved to be a fatal aneurysm, because they were in “an anti-gay city and state.”<sup>445</sup>

To counter the politics of eradication, LGBT people must continue to challenge the belief that LGBT people and identities are not valid and must continue to assert the basic humanity of LGBT people. The fields of science and medicine now affirm LGBT identities, and, in many instances, the law has worked to advance the dignity of LGBT people. However, there remains much work to be done, particularly in the context of religion and morality, where specific beliefs and teachings reject LGBT identities and, at times, demonize LGBT people. These beliefs spur the demand for anti-LGBT legal initiatives and expanded religious exemptions. Although the harm wrought by anti-LGBT initiatives may be clear, it is important not to minimize the danger of expanded religious exemptions to LGBT people and their families. Religious exemptions elevate bigoted anti-LGBT beliefs and teachings that are framed as sincerely held religious beliefs or moral convictions. They not only allow such beliefs to go unchallenged, they also entitle them to special government protections.

On this point, it is useful to borrow a page from history because the United States has a strong record of refusing to accept bigotry and hatred as articles of faith. People sometimes forget that when the Civil Rights Act of 1964 was enacted, a number of mainstream denominations supported segregation as Biblically ordained.<sup>446</sup> Notwithstanding this support, Congress repeatedly

---

443. John O’Leary-Hawthorne & Andrew Cortens, *Toward Ontological Nihilism*, 79 PHIL. STUD. 143 (1995) (discussing a “radical cluster of metaphysical pictures” where “the concept of the object has no place in the perspicuous characterization of reality”).

444. Deanna Paul, *This ‘Good Christian’ Prosecutor is Overlooking Domestic Violence Charges for Same-Sex Couples*, WASH. POST (June 5, 2019), <https://www.washingtonpost.com/nation/2019/06/05/this-good-christian-prosecutor-is-overlooking-domestic-violence-charges-same-sex-couples/> (claiming domestic violence charges carry enhanced punishments).

445. Tara Parker-Pope, *Kept from a Dying Partner’s Bedside*, N.Y. TIMES (May 18, 2009), <https://www.nytimes.com/2009/05/19/health/19well.html> (quoting hospital social worker).

446. See Jane Dailey, *The Theology of Massive Resistance: Sex, Segregation, and the Sacred after Brown*, in MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 151, 152, 161 (Clive Webb, ed. 2005); see also Gustav Niebuhr, *Baptist Group Votes to Repent Stand on Slaves*,

rejected calls for broad religious exemptions.<sup>447</sup> In 1968, the U.S. Supreme Court rejected a claim from a restaurant owner who argued that the public accommodation provisions of Title II violated “his sacred religious beliefs”<sup>448</sup> regarding the separation of the races as “patently frivolous.”<sup>449</sup> Arguably, the future of LGBT rights will remain uncertain until attempts to label anti-LGBT bigotry as sincerely held religious beliefs are dismissed out of hand as “patently frivolous.”<sup>450</sup> Until then, religious exemptions have the potential to make marriage equality a hollow victory and further erode the rights of transgender people. As the saying goes, “LGBT rights are human rights.”<sup>451</sup>

---

N.Y. TIMES (June 21, 1995), <http://www.nytimes.com/1995/06/21/us/baptist-group-votes-to-repent-stand-on-slaves.html>.

447. See Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 448 (1966).

448. *Newman v. Piggie Park Enters.*, 256 F. Supp. 941, 945 (1966) (D.S.C. 1966). The District Court refused to consider Bessinger’s free exercise claim. *Id.*

449. *Newman*, 390 U.S. at 402, n. 5.

450. *Id.*

451. The United Nations did not recognize that LGBT rights are human rights until 2011. See United Nations High Commissioner for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation*, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011), [www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41\\_English.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf). It also bears mentioning that there is no reason that a politics of eradication need be limited to LGBT rights; today, a similar political impulse is at play in the context of the immigration crisis. Cf. Elliot Spagat, *Trump Expands Fast-Track Deportation Authority Across US*, AP (July 22, 2019). The question in many circles is no longer how to assimilate undocumented immigrants or reform the immigration system but, rather, how to expedite the deportation process. *Id.*