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FOREWORD

In the Spring of 2012, *The Law Journal for Social Justice* hosted *Legally Gay: A Symposium*. In this, our third edition, we present articles from that symposium. The articles cover not only issues of gay and lesbian rights, but how they support and are supported by the culture in which they exist.

Our keynote speaker, Robert N. Minor, is Professor Emeritus of Religious Studies at University of Kansas. His article addresses characterizations about the history and tradition of marriage and the family, and the problems contemporary misunderstandings create.

City University of New York Professor of Law Richard F. Storrow confronts the burdens facing both single people and homosexual couples who require fertility treatments to have children. His analysis extends beyond legal constraints, to cultural impediments such as unwilling doctors and clinics that believe medical technology should be used for heterosexual couples.

Madelaine Adelman is an Associate Professor in Justice and Social Inquiry at Arizona State University. Professor Catherine Lugg teaches at the Graduate School of Education at Rutgers University. Their article confronts the phenomena of LGBT activism largely ignoring public school employees, which usually focuses instead on students and corporate employees.

Carrie Sperling is Associate Clinical Professor of Law at Sandra Day O’Connor College of Law at Arizona State University. She reviews the development of homosexual legal rights over the past two decades, focusing on how language shapes the our understanding of what is at stake and what has been achieved.

Jennifer Johnson is a practicing attorney in Los Angeles and a graduate of the Sandra Day O'Connor College of Law at Arizona State University. Her article discusses the need for and difficulties with hate crimes legislation.

Attorney Regina M. Jefferies discusses gay marriage in the context of immigration. She addresses interpretations of “marriage” and “spouse” under the Immigration and Nationality Act.
We are extremely proud of this edition, and are grateful to all of our authors for taking part in this important discussion. *The Law Journal for Social Justice* is proud to continue in the tradition set by our inaugural symposium of ensuring that marginalized voices receive the attention and serious contemplation necessary for a society to call itself just.

Laura Clymer and Michael Malin
*Editors-in-Chief, The Law Journal for Social Justice*
ARGUING ABOUT FAMILIES – GAY, STRAIGHT OR NEITHER

By Robert N. Minor*

A lot of very bad arguments take place using the word “family.” By that, I mean they are based in falsehoods about the history and psychology of families. They are steeped in very creative, and current-position-affirming mythology, and void of what we historians call data. And they are found in every sphere, from religion to politics to law.

In fact, “family” is less a clear, established concept in popular discussion and more a multi-valent symbol akin to the American flag, the National Anthem, and apple pie. You can’t be against it, whatever it is, without losing elections, friends, and media attention.

“Family” is emotionally charged, politically useful, and psychologically evocative. Since we have all experienced “families” of some sort (dysfunctional, abusive, addictive-centered, poor, privileged, indulgent, patriarchal, loving, nurturing and/or accepting), we are all scarred for better or worse by those experiences.

One can not bring up the idea of family or the “marriage” that is supposed to go with it, without triggering the symbol’s emotional meanings.

Linguist George Lakoff argues that “family” is so basic a symbol that it is what he calls a frame through which we see our values, our country, our world, and ourselves.\textsuperscript{1} Definitions of the family over which conservatives and liberals disagree appeal to radically different and deeply held frames called “family.”

And these frames trump everything else. In his most popular book, Lakoff summarizes research: “It is a general finding about frames that if a strongly held frame doesn’t fit the facts, the facts will be ignored and the frame will be kept.”\textsuperscript{2}

I. Marriage, the symbol

“Marriage,” as well, is a loaded word. Marriage is not just a legal and economic concept in our culture. If it were, legal “marriage” for LGBT\textsuperscript{3} people would already be as successful politically as civil unions have been among the electorate.

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* The author is a Professor Emeritus of Religious Studies at the University of Kansas where he taught for 33 years and was chair of the Religious Studies Department for six years. He received his Ph.D. in Religion from the University of Iowa in 1975 and an M.A. in Biblical Studies from Trinity Divinity School in Chicago. A national resource for information on gender issues and gay/straight relationships for organizations, businesses, educational institutions, and media outlets such as NBC and USA Today, Robert N. Minor, Ph.D. has been speaking, consulting, and leading workshops for fifteen years. Dr. Minor is the Founder of the Fairness Project and author of several books, including: SCARED STRAIGHT: WHY IT’S SO HARD TO ACCEPT GAY PEOPLE AND WHY IT’S SO HARD TO BE HUMAN.

\textsuperscript{1} GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE: THE ESSENTIAL GUIDE FOR PROGRESSIVES 4-6 (Collete Leonard et al. eds., 2004).

\textsuperscript{2} Id. at 37. See also GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK (2nd ed. 2002); GEORGE LAKOFF, THE POLITICAL MIND: A COGNITIVE SCIENTIST’S GUIDE TO YOUR BRAIN AND ITS POLITICS (2008).

\textsuperscript{3} LGBT will be my abbreviation for lesbian, gay, bisexual, transgender, questioning, and other people who might be identified by some scholars as “queer,” that is, not self-identified as heterosexual and/or not straight.
“Marriage,” too, is a multi-valent symbol like motherhood, Santa Claus, and the flag. It not only symbolizes an ideal people go on about and LGBT people would like to get in on, but a guilt-inducing reality — guilt-inducing because it’s working very poorly for most people.

LGBT people hold a marriage ideal itself in their hopes. In terms of human rights, the argument is why don’t they have the right to every sick, failing institution straight people have.

But it’s the actual felt reality of marriage in the light of the ideal that culture tells us marriage symbolizes that keeps it an issue for those who would deny it to LGBT people.

Marriage for many symbolizes dashed hopes. Fifty percent of first-time marriages end, with that percentage increasing for second and third marriages.\(^4\)

That doesn’t mean the other fifty percent are personally living in the bliss that we’ve all been told marriage is supposed to bring us.

We’re not just talking about people who stay together with abusive spouses because exiting is scary, or those who feel that they are stuck because they could never do any better. Living as if one has compromised one’s life, done the best they could, settled for inevitable disappointment, just agreed to make it through, and spent time justifying this status to oneself “till death do them part” is what marriage as a straight-defined relationship has become for many.

It wouldn’t have been so bad if “marriage,” the symbol, hadn’t promised so much more. It wouldn’t be so disappointing if it hadn’t been idealized and pushed by our social, economic, and religious institutions, and most media.

Its expectations are so high that when they almost inevitably don’t materialize, “marriage” becomes more a symbol highlighting the personal failings to meet the ideal for those who embrace it. Something about them — their character, their personality, their bad choices, their inadequacies — the symbol reminds them, is to blame for their disappointment.

It’s not their problematic definition of the institution itself that is the problem.

The symbol is full of mythology represented in that ideal, commercially lucrative marriage ceremony\(^5\) followed by a honeymoon that (if it’s your true love) lasts forever, the intertwining of the two in harmony, and the sex that will become increasingly fulfilling as they grow emotionally closer.

Marriage, the symbol, is supposed to involve happily-ever-after-ness, or, at least, personal fulfillment. It’s supposed to save us from our loneliness, emptiness and meaninglessness, prove that someone wants us, and provide a companion who always accepts us just the way we are, warts and all.


\(^5\) Think of magazines such as Brides, Modern Bride, Elegant Bride, Get Married, or Southern Weddings in particular, but it’s found throughout almost all women’s magazines and in the obsessive glorification of celebrity weddings in entertainment magazines. According to a 2006 survey by the Conde Nast Bridal Group, seventy-two billion dollars per year are spent on weddings while over two million couples get married each year with the average wedding costing over $27,000, up nearly 100% since 1990.

Why, then, jokes such as: scientists have found a food that stifles peoples’ sex drives – wedding cake? Why, then, the wives who report being lonely in their marriages? Why the men who have become workaholics rather than finding their fulfillment at home? Why, then, the complaints that the romance is gone, “the honeymoon is over,” and the incessant justifications that all this is actually normal? Why, then, the feeling that this person one has married has not fulfilled the needs they were supposed to fill in marriage? Why does the grass start looking greener elsewhere even when one has committed to always keep it fertilized and mowed in the marriage one is inhabiting?

As long as the symbol claims to represent ideals that are probably unrealistic or seldom realizable, marriage is more likely to evoke (symbolize) one’s personal failure to have attained these ideals. Its very claims will constantly remind us we, in contrast, have failed if we venture to consider it carefully.

There might be some who have the ideal. They’re out there somewhere, but they’re not us.

George Bernard Shaw described “marriage” famously back in 1908:

The actual result is that when two people are under the influence of the most violent, most insane, most delusive, and most transient of passions, they are required to swear that they will remain in that excited, abnormal, and exhausting condition continuously until death do them part. And though of course nobody expects them to do anything so impossible and so unwholesome, yet the law that regulates their relations, and the public opinion that regulates that law, is actually founded on the assumption that the marriage vow is not only feasible but beautiful and holy, and that if they are false to it, they deserve no sympathy and no relief.

When asked, many married people are in denial. Honestly facing their marriage’s disappointments, for those who have not divorced, would enforce the sense of their personal failure at it all.

So denial is rife. Evidence those who are totally surprised that there is anything wrong with their marriage when a spouse announces they’re unhappy and wants a divorce.

It’s not that all the fifty-percent that are still together are unhappy. But we can suspect that the principle that those who are the least secure are more likely to project their problems on others seems to be in play in the political discussion.

To the extent that marriage really symbolizes disappointment, failure, and insecurity, to that extent I must “protect” it all the more and project my emotional problems on others, like LGBT people. I overreact by denying it to others.

If marriage were actually successful now, LGBT people wouldn’t be its scapegoats. But marriage is an institution dominated by straight, that is conditioned, roles that are not inherently heterosexual, roles of what a husband and wife, lovers, etc. should be.

The future of marriage, as it looks now, is not bright in itself. Our broader culture would rather blame than take a deep look at what we are expecting from a very sick institution.

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It would be nice to believe sooner than later that LGBT people will be allowed to participate legally in this symbol. Less likely is the fact that the institution will become a more successful one.

II. “Marriage” and “family” – a reboot

Marriage needs to be redefined for it to be a fulfilling means of relating to another human being. But instead we blame its current problematic state, saying that it is a deterioration of something better, and claim that we need to go back to that more traditional ideal.

Historian Stephanie Coontz has taken on both “family” and “marriage” to explode the myths involved in our culture’s backward nostalgia. In Marriage, A History: From Obedience to Intimacy, or How Love Conquered Marriage, she reminds us that what we want to believe is a “traditional” definition of marriage is far from historically accurate or traditional. In The Way We Never Were: American Families and the Nostalgia Trap, she does the same for what is being called the “traditional family” by those who look backwards for an ideal. In both works she shows how myths, not the realities, of “marriage” and “family” have affected not only public perceptions but public policy.

Too much emotional baggage is dependent upon marriage and the nuclear family -- more than any single relationship or institution can emotionally bear. Their creation as special and preeminent relationships outside of the rest of our relationships has distorted their place in our culture. Both marriage and family have taken the place of everything that a larger community had taken and apparently must retake.

“Family,” which is a symbol tied to marriage in our culture, suffers from the same misunderstandings as “marriage.” “Traditional family” is a meaningless symbol, filled with the desires those who use the term wish it would fulfill.

The idea of the nuclear family that gets pushed by almost all parties no matter what their sexual orientations is in no way and no where “traditional.” As Coontz shows, “the ‘traditional’ family of the 1950s was a qualitatively new phenomenon. At the end of the 1940s, all the trends characterizing the rest of the twentieth century suddenly reversed themselves.”

“The values of the 1950s families also were new. The emphasis on producing a whole world of satisfaction, amusement, and inventiveness within the nuclear family had no precedents.”

It is important to note that in the 1950s, what happened as the result of this change in the ideal of a family was a growing emphasis on this nuclear family as the center of it all, which meant less loyalty to society or a sense of responsibility for society as a whole. Concern for my family as opposed to all outside it was turned into such arguments that ones

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8 See E.J. Graff, What is Marriage for? (2004) (providing arguments for why the gay and lesbian community should fight for the right to marry, including the basic protection of financial assets and the accountability for resources brought to and earned in the relationship).


11 Id. at 25.

12 Id. at 27.
own family will suffer if the government helps others. “The government is taking my money and using it to help others.”

Belief that my family would take care of all of my needs, meant that society was beginning to lose its purpose.

This new definition of family counters all historical evidence. Yet today’s ideal of the nuclear family whether its members are heterosexual or like those on the popular TV show, “Modern Family” promotes it anyway.

For those who want to believe this nuclear family is somehow biblical to buttress their arguments, historian Rosemary Radford Ruether, in Christianity and the Making of the Modern Family, argues that this was never a biblical ideal either. The New Testament “vision of the church as an alternative family was itself in profound tension with existing social constructions of the family in Jewish and Greco-Roman worlds” as it is in disagreement with the American 1950’s family of myth.

By contemporary standards, the New Testament depicts an anti-“family” position. Jesus of the Gospels has little good to say about the family.

To replace a father and mother in this definition with two fathers or two mothers, then, will not make families better (or worse), no matter how it produces legal marriage equality. To question what it means when we use the words “father” and “mother” and how our gendered expectations limit these roles to males and females would be another place to begin in the healthy re-defining of “family” in order to eliminate the problems with what is now being called “traditional.”

Sociologists Judith Stacey and Timothy Biblarz of the University of Southern California, spent five years reviewing 81 studies of one- and two-parent families, including gay, lesbian, and heterosexual couples. “At this point no research supports the widely held conviction that the gender of parents matters for child well-being,” they conclude. "It's more about the quality of the parenting than the gender of the parents," says Stacey of New York University, co-author of the comprehensive review.

In reality, Coontz shows in her research:

[Despite all the difficulty of making generalizations about past families, the historical evidence does suggest that families have been most successful wherever they have built meaningful, solid networks and commitments beyond their own boundaries. We may discover that the best thing we will
ever do for our own families, however we define them, is to get involved in community or political action to help others.\textsuperscript{19}

So accepted was this idea that families are an institution to promote good citizenship in society at large that for most of Western history, it was considered shameful to display too much exclusive attachment toward one’s spouse. In 1774, for example, a popular British fashion magazine, \textit{Lady's Magazine} lectured its readership that: "the intent of matrimony is not for man and his wife to be always taken up with each other, but jointly to discharge the duties of civil society, to govern their families with prudence, and educate their children with discretion."\textsuperscript{20}

So, if the success of families in general is dependent upon their larger commitments to society, the families of LGBT people will be successful to the extent that they are free from the ideal that fails straight families. They are likely to be healthier if they do not huddle in their nuclear form, as a place to be sheltered from, rather than open to active involvement in, the community around them.

Yet the desire to think of family as a place to huddle together in safety from the world around it, rather than to be a base to work to make that world a real community is a key part of the straight (no matter what the gender of the members) family today. It is called the “traditional” family.

The hurt that LGBT people have experienced from the discrimination of the broader society, which includes denial of experiencing “family,” easily makes this huddling seem even more desperately to be a safe harbor against the stormy “out there.”

Historian Elaine Tyler May reminds us:

The legendary family of the 1950s...was not, as common wisdom tells us, the last gasp of ‘traditional’ family life with deep roots in the past. Rather, it was the first wholehearted effort to create a home that would fulfill virtually all its members’ personal needs through an energized and expressive personal life.\textsuperscript{21}

For the first time, in the 1950s, Coontz demonstrates, men and women were encouraged by the broader culture to root their identities and self-images in limited and limiting familial and parental roles.\textsuperscript{22} “Public images of Hollywood stars were consciously reworked to show their commitment to marriage and stability.”\textsuperscript{23} Acceptance of the family as the locus of all meaning became a mark of one’s attainment of middle-class status and its upward mobility.

But what is called “tradition” in itself has no historical value. It is a word used to create value for those in the present by choosing some elements of the past one wants to value and ignoring all the rest. “Traditional family values” are a group of concepts chosen from all those in history while ignoring many, or most, others.

There is probably nothing more common to families from the earliest times as cockroaches. They can be traced back to the dinosaurs. But no one I know of argues that

\textsuperscript{19} COONTZ, supra note 10, at 287-88.
\textsuperscript{22} COONTZ, supra note 10, at 27.
\textsuperscript{23} Id.
these persistent, common to all families, creatures should be valued. We have chosen to give them a negative value and therefore they are not a part of “traditional families” and their “values.”

III. Arguing for marriage and family

A key to the success of “family” is to question the idea that “traditional” families are those of the 1950s. It is the radical notion that we reject the family as the primary institution in culture and instead, see it as a grouping that remains open to communities, friends, and everything that use to be called the “village” that it takes to raise a child. The family will have to be a place that encourages its members to love beyond itself, a base for creating the change that promotes a broader humanity.

LGBT people should have the right to decide how they want to live in a dysfunctional or a more functional model of “family” and “marriage.” That seems like legal common sense to me.

Since “traditional marriage” and “traditional family” are actually new creations, an interesting argument to be made in the fight against state and federal marriage amendments arises. It has the potential to take back the debate because it’s about the Constitution and the First Amendment’s guarantee of religious freedom.

There’s no doubt that the need for marriage equality is first and foremost about the civil and legal benefits that currently come with government recognition and approval of two people’s legal commitment to each other. It might be that the ultimate solution to the issue is to recognize marriage as only a civil issue with its legal benefits for everyone. Couples could then add the blessings to their union of a religious institution of their choice if they desired.

Yet the history of marriage in US culture and consciousness is one enmeshed with religious images, sanctions, and overtones. What happens if we take those connections in American consciousness seriously.

There is an established legal history in this country that state governments license religious leaders. In fact, the major civil benefit of such government licensure is that ministers, rabbis, priests, and other state-approved leaders can then perform marriages for the government.

Most marriage ceremonies are performed in churches and by clergy, and many pro-marriage-equality clergy would love to be able to perform them for the many LGBT people who’d prefer to get married in a religious setting.

The language of marriage as “sacred” invokes religious images for many. Linguist George Lakoff recommends, in fact, that in the fight for marriage equality advocates use the idea of sanctity, even if it’s not religious.24

“Sanctity is a higher value than economic fairness,” he advises.25 “Talking about benefits is beside the point when the sanctity of marriage is in dispute. Talk sanctity first.”26

The arguments behind the federal and state marriage amendments are essentially religious. Right-wing think-tanks play on what have been the dominant cultural religious sentiments, but they also know that they must act as if their crusade is not the imposition of

24 LAKOFF, supra note 1, at 46.
25 Id. at 50.
26 Id.
a sectarian religious understanding. So, they couch their arguments in terms of inaccurate history, poor science, rejected psychological theories, and statistics unsupported by the social sciences.

Based on anti-marriage equality understandings of the Bible, tradition, and God, amendment proponents argue that same-sex marriages don’t suit a “traditional” model of one man and one woman. One need not look deeply into the Hebrew Bible or Old Testament to see that even among the Patriarchs, Ten Commandments-giver Moses, and hero-kings such as David and Solomon polygamy was common and traditional.

Even early members of the Church could be polygamists. Otherwise, why would the writer of the first letter to Timothy say that he should pick from the diverse membership, men for church leaders who were “the husband of [but] one wife?”

These clear Biblical practices must be explained away by the proponents of a marriage amendment to make an argument that supports their sectarian understanding. Likewise, “traditional” has to be defined quite selectively to eliminate all the cases of polygamy in world history.

It surely is the height of irony that the Mormon Church has been a major funder of amendments claiming that traditional marriage has been between one man and only one woman. Even its second prophet and president, Brigham Young, married some 50 women.

But, it’s time also to recognize that there are many religious people who believe that the Bible, tradition, and God actually require them to confirm same-sex commitments. Their religious beliefs about morality, love, commitment, and marriage demand that they recognize and celebrate loving commitment wherever it is found.

These mainstream religious people believe that government has no business telling God, the Church, and any two consenting adults whom they can and cannot love. Unitarian Universalists, the United Church of Christ, and the Central Conference of American Rabbis have spoken out of their faith to testify that affirming same-sex marriages is a response of true belief. It arises out of the very central tenets of their faith.

Amending the Constitution under the guise of a relatively new, now sectarian, definition of “marriage” and “family” to forbid these religions from performing same-sex marriages violates both clauses of the First Amendment of the Constitution’s Bill of Rights. It’s both the “establishment” by the government of one religious position as well as “prohibiting the free exercise” of the religion of others. It’s religious discrimination at its core.

The Defense of Marriage Act, the proposed Federal Marriage Amendment, state marriage amendments must be put to rest permanently because they are anti-American. The Federal Marriage Amendment is not only anti-American because it would be the first amendment to write discrimination of a group of people into the Constitution.

The Defense of Marriage Act and state marriage amendments are also anti-American because they destroy religious freedom. They forbid the religious practice of clergy, denominations, and religious communities that believe they are divinely called to affirm the love of two adults who happen to be of the same gender. They amount to sectarian religious abuse of the Constitution by promoting one religious position over others.

27 1 Timothy 3:2.
Even so, arguing for marriage and family equality as well as non-discrimination in the workplace, public accommodations, and the area of partner benefits, still comes out of what sounds like a self-hating position that enforces huddling.

Let me close by discussing this since it is central to much relevant discussion of LGBT people.

The position is expressed as an argument for equal rights: “I wouldn’t choose to be gay if I had a choice.” One can hear the sadness in this response when gay people say something like: “With all of the oppression, prejudice, hate, abuse, death, and self-doubt that comes upon gay people, why would I choose this life?”

Here is a clear example for social scientists of actual victimization installing the victim role in a group of people — I’d do anything to stop the pain, even be someone I am not, if I only could. No matter how it apparently is that sexual orientation is not a choice, this reaction reflects the self-hate of a societal victim role installed through real past victimization.

The argument that LGBT people can’t help being LGBT may be based in the best scientific and experiential evidence available. The current consensus among researchers is that sexual orientation is not a choice, though to date there are no replicated scientific studies supporting any specific biological etiology for anyone’s sexual orientation.29

The argument might temporarily be useful as a political strategy. It has brought some straight allies into the fold. But in the long run it plays into the marginalization of LGBT people as less than “normal.” And it must be noted that the acceptance of the belief that “race” was immutable and not a choice did not end slavery and racism.

The argument’s larger problems are, first, it takes the “straight” role, not merely a heterosexual orientation, as the model for life. It is the straight role that is affirmed with all of its obvious systemic conditioning about manhood and womanhood. Heterosexual people who step out of the role are also treated the way non-heterosexual people are.

But whether it is the role or the orientation that one desires, saying “I would not choose, but can’t help it” does not begin with arguments that affirm the worth and value of non-heterosexual human beings or any people that step out of the “straight’ role that is acted out against non-heterosexual people. It merely speaks as if LGBT people are powerless victims.

Second, this argument colludes with the false assumption that non-heterosexual is a deviation from a human norm. It is arguing that LGBT people should be forgiven, put up with, tolerated, and maybe even accepted, for this deviation, disability, or flaw because they could not help it.

It in no way changes or challenges the standard of judgment involved. LGBT people were born with this fault and, the poor things, can’t help it. They are flawed victims of life’s game of chance, “biological errors.”30

Third, it assumes that if there were an authentically free choice, people would choose the straight role or even heterosexuality. There is no evidence for this because there is nothing about our society that would enable a free choice of heterosexuality.

29 Similarly, no specific psychosocial or family dynamic cause for someone’s sexual orientation (heterosexual, bisexual, homosexual, et. al.) has been identified, including histories of childhood sexual abuse. See generally, AM. PSYCHOL. ASS’N, SEXUAL ORIENTATION AND HOMOSEXUALITY (2008), available at http://www.apa.org/helpcenter/sexual-orientation.aspx.

30 This is the designation used numerous times by conservative radio talk show host Dr. Laura Schlessinger. See Words of Dr. Laura, STOP DR LAURA: A COALITION AGAINST HATE (Dec. 8, 1998 et al.), http://www.stopdrlaura.com/laura/.
Heterosexuality and the straight role are enforced by fear and terror at every turn. Some writers have even called this “compulsory heterosexuality.” As I argue in Scared Straight, the straight role is not a free human choice but a dysfunctional, fear-based survival mechanism imposed on all people regardless of sexual orientation. And its goal is to maintain the system and its gender conditioning the way it is.

The idea that LGBT people should have equality in all issues because sexual orientation or gender identity are immutable conditions might be the best that can be done legally. But it is not a healthy argument. It promotes the value of a destructive straight role and idealizes the straight, dysfunctional version of institutions such as marriage and the family.

It does not begin with the non-victim stance that sexual orientation, including homosexual and bisexual orientations, are “gifts,” “natural,” meant to be, or God-given if that is the language one prefers. If we reject victim role thinking, the only reason to end gay oppression and heterosexism to promote equality is that love should be honored wherever it is found and however ineloquently it might be expressed in order to counter the fear-based nature of society and its conditioning. The real issue should be love, not fear.

That means clarity about “marriage” and “family” beyond what today we are all supposed to be convinced is “traditional.” It means re-evaluating the concepts in the light of the existence of a larger society and the fact that these limiting institutions cannot fulfill what humans need from their village. It means lifting a burden that marriage and family cannot bear on their own. And it means recognizing that these institutions will be successful to the extent that they are a part of the greater community that is large enough to have the array of resources human beings need for fulfillment.

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32 MINOR, supra note 7.
THE RHETORIC OF SAME-SEX RELATIONSHIPS

By Carrie Sperling*

So far, my legal career has spanned just over two decades. But those two decades have been perhaps the most exciting decades in the development of legal rights for gay and lesbian citizens. In reflecting on these past two decades, I will turn my focus to language – how it shapes our struggles and enshrines our victories. The stories we craft as civil rights lawyers and activists have changed the legal landscape. Hopefully, my essay will convince other lawyers that advocacy centers on language, story, and metaphor – that through our language, we move people to see another way, to look beyond the stereotypes and consider homosexuals as human beings who share common ancestry and who often share common values. My story begins with Bowers v. Hardwick and ends with Diaz v. Brewer – a case in which I am currently a plaintiff.

Along the way, I hope to offer a different perspective – one seated in the work I do, as well as the life I live. My legal career has been tied, in one way or another, to bringing justice to groups often ignored or mistreated by our legal system. I began by working with the ACLU, then representing inmates on death row, and finally representing wrongly convicted prisoners. I also teach legal writing to law students. I focus on telling stories, using words to convey difficult principles, and using what we know about human psychology to craft language that persuades. Finally, I am a lesbian. Although I do not consider myself an expert in the field often described as sexual orientation and the law, I am certainly an interested, and self-interested, observer.

In this essay, I don’t attempt to convey an exhaustive analysis of the case law regarding sexual orientation and claims of discrimination. Instead, I have selected a few cases to illustrate a narrow point – that the way we frame our lives and our relationships, the language we use to litigate our cases and to advance our cause in the public sphere, changes the legal rights we enjoy. A lawyer’s craft is language, and his or her words can transform issues and change the way we perceive legal concepts and claimants.

We see the power of words to reframe issues in our everyday lives. A change in words recasts the rich as “job creators,” so that raising taxes on top earners would logically destroy jobs.1 People residing in this country without proper documents are labeled “illegals” – creating an illusion that they are engaging in criminal activities just by their very being.2 Of

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2 E.J. Montini, Arpaio’s Toughest Opponent: Himself, ARIZ. REPUBLIC, Jan. 20, 2012, at B1 (quoting Maricopa County Sheriff Joe Arpaio, “President Obama and a band of his merry men might as well erect their own pink neon sign at the Arizona-Mexico border saying welcome all illegals to the U.S., our home is your home”).
course, this relabeling provides justification to round them up and confine them to prison. It also justifies endless detention of people who have committed a mere civil offense. We have not labeled people who commit other, more politically correct transgressions of the law—like speeding or littering—as “illegals.” In those circumstances we don’t define the entire person by the transgression, and, therefore, we tend to treat these people in a more humane way. A simple change in words can transform our outlook and can change our behaviors, often in ways we don’t notice and might never consciously choose to endorse. 3

In the civil rights context, our words heal, normalize, shift the debate, frame issues anew, and sometimes even cause disgust. Much of this happens outside our intentions and without our planning it, but it has profound effects on the legal rights we enjoy.

This Essay will focus on a few cases that lend insight to the way language framed the issues or predicted the outcomes. I hope to convince you that equal rights are gained not simply through carefully crafted legal arguments, but also through effective use of language. Language plays a powerful role in lifting us up, humanizing us, motivating us toward greater aspirations, and creating a context that transforms our lives. More specifically, this essay explores two of the most powerful tools of persuasion—metaphors and stories 4—and their use in cases that have affected the rights of gays and lesbians for nearly three decades.

I. Bowers v. Hardwick: Did a sodomy metaphor impede gay rights for almost two decades?

Writers use metaphors to describe difficult or unfamiliar concepts. A metaphor transfers characteristics from objects that are familiar to those that are not, and in so doing, creates a comparison or analogy that might not have been apparent before. Therefore, a metaphor is not merely a way to see or to say, it is a way to think and to know. 5 In this way, metaphors are persuasive because they can frame our conception of an abstract concept by superimposing the properties of a dissimilar concept that is easier to comprehend. 6 Metaphors are effective because they often operate outside our conscious awareness. 7

History has given us proof of metaphor’s power, and courts have grappled with persistent metaphors that arguably subvert legal reasoning. For example, the Supreme Court’s use of Thomas Jefferson’s metaphor—that the First Amendment erected a wall of

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3 See, e.g., Carrie Sperling, Priming Legal Negotiations through Written Demands, 60 CATH. U. L. REV. 107, 131 (2010) (citing a priming study by John A. Bargh et al., Automaticity of Social Behavior: Direct Effects of Train Construct and Stereotype Activation on Action, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230 (1996)) (“When a person’s recent perceptions incidentally and unknowingly influence his behavior, his behavior has been “primed.” For instance, when people play a word game that contains terms “relevant to the elderly,” like grey, old, wrinkle, and Florida, they walk more slowly after finishing the word game than people who played a word game with “age non-specific words” like birds, tree, and book. Unbeknownst to the players with the first set of words, they were primed to conjure the “elderly” stereotype. By unconsciously priming this stereotype, the players behaved more like their perception of the stereotype, that is, they walked more slowly.”).


6 Id. at 169.

7 Id. at 176 (citing George Lakoff and Mark Johnson, Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought 47 (1999)).
separation between church and state – long went unquestioned. Only in recent First Amendment jurisprudence have the Justices begun to argue that the Framers may not have intended to separate the two entities in such an absolute way. Justice Harlan crafted the metaphor in Plessy v. Ferguson that “our Constitution is color-blind.” This principle, that the Constitution cannot see differences in color and that the color of one’s skin must be irrelevant to any constitutional claim, was indeed seen as dangerous by Justice Brennan in University of California Regents v. Bakke, despite its frequent use in court opinions. More recently, the Supreme Court used metaphors of corporations as people and money as speech to overturn more than a century of campaign finance law in Citizens United v. Federal Elections Commission.

Social cognitive psychologists have confirmed the power of metaphor. Although metaphors are perhaps seen as an ornamental figure of speech, social cognitive theory has demonstrated that metaphors are a cognitive tool or mechanism that people use to understand abstract concepts. More than simply a linguistic device that compares dissimilar things, metaphor’s power to shape our thoughts and feelings stays with us even when the metaphor is not expressly stated.

Humans seem powerless to ignore the imprint of the metaphor. For example, we often describe generous and caring people metaphorically without even realizing we are doing so. They are warm instead of cold. Researchers have demonstrated that simply invoking a sense of warmth affects people’s perceptions of others. One study showed that when participants simply hold a warm beverage (as opposed to a cold beverage), they rate themselves as being emotionally closer to their friends and family. Building on the personal warmth metaphor, another study asked participants to recall a time when they were socially excluded and then asked them to guess the room temperature. Participants who recollected social exclusion guessed the temperature at an average of five degrees colder than a control group even though the room temperature was the same for both groups.

These findings from social cognitive theory demonstrate that metaphors actually shape how people conceptualize the world. And the power of the metaphor to shape our perceptions extends beyond the written or spoken word. We actually feel colder when we

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10 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
11 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 327 (1978) (“Against this background [of slavery and segregation], claims that law must be “color-blind” or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities.”).
14 Id. at 1049.
15 Id.
16 Id.
17 Id. at 1050.
think of social exclusion. We view people as more caring when we can feel warmth. We attribute more piety to people whose photographs are exalted into a higher versus a lower vertical presentation.\(^\text{18}\)

Metaphors also figure prominently in our language of morality, and those metaphors are closely tied with concepts of physical cleanliness.\(^\text{19}\) A disgusting act can soil one’s reputation. One can have a dirty mind. We wash our hands of morally reprehensible acts. Our acts may be cleansed through a particular act of contrition. Researchers have shown that, like other metaphors, exposure to concepts related to cleanliness influences people’s moral attitudes and the strength of their judgments.\(^\text{20}\) For example, when exposed to bad smells, people judge others’ behaviors to be more morally repugnant.\(^\text{21}\) On the other hand, participants who washed their hands before making a moral judgment delivered a less severe judgment of the person in the moral dilemma.\(^\text{22}\)

People have long used metaphors to describe the act of sodomy, or “the heinous act not fit to be named.”\(^\text{23}\) These metaphors often draw attention to the perceived unnaturalness or uncleanness of the act.\(^\text{24}\) The word sodomy, itself, comes from scripture — a biblical story in which God punishes the people of Sodom and Gomorrah after the men of the city threatened to rape Lot’s male visitors.\(^\text{25}\) As in the story of Sodom and Gomorrah, sodomy metaphors frequently pit one person or group of people as the aggressor against another person or group, the victim.\(^\text{26}\) Sodomy metaphors also frame the act as one of aggression — as if only one party to the act could have consented to it.

Curiously, Laurence Tribe and others used that metaphor when they argued before the Supreme Court on behalf of Michael Hardwick in *Bowers v. Hardwick*.\(^\text{27}\) Hardwick had been arrested under Georgia’s sodomy statute for committing sodomy with another man in his own bedroom.\(^\text{28}\) He and the other man were discovered when police entered his home to serve a warrant.\(^\text{29}\) Georgia’s sodomy statute prohibited sodomy practiced between

\(^\text{18}\) Id. at 1048-49.
\(^\text{19}\) Id. at 1051.
\(^\text{21}\) Id.
\(^\text{22}\) Landau, *supra* note 13, at 1051.
\(^\text{25}\) For example, you can purchase a bumper sticker from a conservative website that reads, “Bend Over. Here It Comes.” The “O” in the “Over” is the trademark “O” from Obama’s 2008 campaign. The message seems to be that Obama’s policies are metaphorically raping the citizens of the United States. CONSERVATIVEBUYS.COM, http://conservativebuys.com/cgi-bin/shop/shop/bumperstickers.tshirtcrusade-336788647+bend-over-sticker-bumper-10-pk.html.
\(^\text{26}\) See generally Brief for Respondent, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) 1986 WL 720442. In law school, I remember the constant jokes about the plaintiff’s name and its unfortunate relationship to his constitutional claim. Of course, having a hard wick metaphorically expresses the physical condition of a male being ready for or engaging in the act of sex with an erect penis. Just the mention of the case name would elicit subdued laughter from a class of first-year constitutional law students.
\(^\text{27}\) DAVID A.J. RICHARDS, The Sodomy Cases: *Bowers V. Hardwick* and *Lawrence V. Texas* 77-78 (2009).
\(^\text{28}\) Id. at 78.
consenting adults, no matter their sex, even in the privacy of their own homes. Hardwick challenged the law, claiming that the statute violated citizens’ fundamental right to privacy. Linda Edwards uncovered a pervasive sodomy metaphor running throughout Hardwick’s Supreme Court brief in her article Once Upon a Time in Law: Myth, Metaphor, and Authority. Her article focuses on the narrative captured in the brief—a rescue myth in which a precious right to consensual sex between adults in the privacy of their own homes was being threatened by the State of Georgia. Edwards compares the myth told in the Bowers v. Hardwick brief to the great biblical rescue myths of the baby Moses and the baby Jesus. Edwards describes the narrative as part of a “masterful brief” that “very nearly won this difficult case.” But the brief failed, Hardwick’s conviction remained, and the State’s ability to criminalize private, consensual sodomy remained the law of the land until Lawrence v. Texas in 2003. Experts have advanced many different arguments to explain why the Bowers Court split five to four in favor of upholding Georgia’s criminal statute. The case was winnable, it seems. In addition to the five to four split, Justice Powell later expressed that he probably made a mistake by siding with the majority in Bowers. In fact, he later explained that “[w]hen [he] had the opportunity to reread the opinions a few months later, [he] thought the dissent had the better of the arguments.” Of course, that’s exactly what makes metaphors so powerful. It targets our intuitive, fast-thinking cognition and does so outside the awareness of our rational, skeptical cognition. It causes us to go with our gut instinct rather than to sift through the evidence carefully. Amazingly, just 17 years after the Bowers decision, the Court directly overruled itself in an opinion that could be seen as placing the Bowers decision in the same category as Plessy v. Ferguson—wrong from the start. Lawrence Tribe later attributed the loss, at least in

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30 Brief for Respondent, supra note 27, at 1-2.
31 Id. at 5.
33 Id. at 902.
34 Id. at 903.
35 Id. at 907.
38 Edwards, supra note 32, at 907. Justice Powell originally voted to affirm the lower court’s decision—rendering the Georgia statute unconstitutional. His deliberation in Bowers seemed deeply conflicted. He supported the Court’s earlier privacy decision in Roe v. Wade, and he believed that punishing the kind of consensual act in which Hardwick engaged, in his own home, with a felony conviction would be cruel and unusual punishment. But Justice Powell had a Mormon law clerk, Michael Mosman, who strongly advocated overturning the lower court’s decision. He argued that if the Court were to strike down the Georgia statute, it would “open the doors to unchecked sexual freedom.” Id. at 104.
39 Id. at 104.
40 For a more extensive discussion of intuitive processing and more skeptical, rational processing, see generally DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011).
41 See generally id.
42 163 U.S. 537 (1896).
part, to the Court’s singular focus on the act of sodomy rather than the private intimate relationships between homosexual and heterosexual couples.\textsuperscript{44} However, the Hardwick brief brought this into focus, drawing attention to the act by incorporating a sodomy metaphor throughout. As Edwards points out, in developing the brief’s rescue myth, the brief brought the State of Georgia to life.\textsuperscript{45} Georgia became an actor with human attributes who, by enforcing this heinous law, was literally sodomizing the citizens of Georgia.\textsuperscript{46} But the State of Georgia was not involved in a consensual act. “[U]nlke the lovers in the case, the State’s act is violent and nonconsensual.”\textsuperscript{47}

As Edwards masterfully illuminates, the sodomy metaphor plays a role throughout the brief.\textsuperscript{48} From the beginning, the brief defines the issue for the Court as such: “whether a state must have a substantial justification when it reaches that far into so private a realm.”\textsuperscript{49} The brief describes the State’s desire to “invade . . . the zone of privacy,”\textsuperscript{50} and the law against sodomy as “a law that so thoroughly invades individuals’ most intimate affairs.”\textsuperscript{51} Tribe argues that the Constitution requires the state to “give especially substantial justification to the individual whose personal dwelling it would enter in order to control,”\textsuperscript{52} while framing the State’s position as one where it “may extend the arm of the criminal law into ‘the most intimate’ of human relationships”\textsuperscript{53} or “extend its criminal authority deep inside the private home.”\textsuperscript{54}

Like any metaphor, the sodomy metaphor running throughout the Hardwick brief most likely evoked an implicit response from the members of the Court. The Court was being asked to protect a fundamental liberty – the liberty to engage in the act of sodomy. But the Hardwick brief portrayed the act of sodomy, through the use of metaphor, as violent, nonconsensual, and repulsive – an act, the reader might be reminded, that sacred scripture condemns. Never mind that the brief portrayed the State of Georgia as the aggressor, the metaphor most likely evoked a response of disgust from the Justices on the Court.\textsuperscript{55} Much like a research participant asked to judge someone’s moral culpability after being exposed to an unpleasant odor, the Justices were more likely to make more severe moral judgments about Hardwick’s act and, therefore, more willing to uphold the ban on sodomy.\textsuperscript{56}

When the Supreme Court accepted the invitation to once again rule on a state statute criminalizing sodomy – this time only sodomy between homosexual participants – it was not

\textsuperscript{43} Tribe, supra note23, at 1914; Lawrence v. Texas, 539 U.S. 558, 578 (2003) (“Bowers was not correct when it was decided, and it is not correct today.”).
\textsuperscript{44} Id. at 1901.
\textsuperscript{45} Edwards, supra note32, at 901.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Brief for Respondent, supra note27, at 5.
\textsuperscript{50} Id. at 7.
\textsuperscript{51} Id. at 4.
\textsuperscript{52} Id. at 9.
\textsuperscript{53} Id. at 9.
\textsuperscript{54} Id. at 14.
\textsuperscript{55} See, e.g., John A. Terrizzi, Jr., et al., Disgust: A Predictor of Social Conservatism and Prejudicial Attitudes Toward Homosexuals, 49 PERSONALITY & INDIVIDUAL DIFFERENCES 587 (2010).
\textsuperscript{56} Id. In fact, Justice White’s majority opinion has been criticized as an “intellectual hit-and-run incident” by his biographer, Denis J. Hutchinson, and Chief Justice Burger’s concurrence as “rhetorically shrill,” noting his citation with approval of the historical fact that homosexuals were once put to death for engaging in acts of sodomy. Richards, supra note 28, at 93, 98.
asked to focus on the act itself, but on the relationships that the State of Texas sought to criminalize.\textsuperscript{57} Nor was the Court primed by an allusion to a violent, non-consensual act. Instead, John Lawrence and Tyrone Garner’s Petition for Certiorari made sure the Court understood that their crime was to violate Texas’s “Homosexual Conduct” law by engaging in “consensual, adult intimacy that is an integral part of forming and nurturing long-term relationships.”\textsuperscript{58} Because the law targeted only same-sex sodomy, the Petitioners did not have to frame the State as intruding into the most intimate personal realms of its citizens. Instead, the Petitioners could frame the State as playing favorites — elevating the sexually intimate relationships of heterosexuals while condemning homosexuals.\textsuperscript{59} Petitioners invited the Court to see the law as a “discriminatory prohibition on all gay and lesbian couples, requiring them to limit their expressions of affection in ways that heterosexual couples, whether married or unmarried, need not.”\textsuperscript{60} The Petition did not focus on bedrooms or sex acts; it did not draw attention to unwanted intrusion. Instead it blamed the Texas criminal law for “tear[ing] at gay relationships and stigmatiz[ing] loving behavior that others can engage in without the brand of ‘lawbreaker.’”\textsuperscript{61}

The Court accepted the Petitioners’ invitation to look beyond the “atomistic individuals torn from their social contexts” and focused on “the equal liberty and dignity . . . of . . . people as they relate to, and interact with, one another.”\textsuperscript{62} And Justice Kennedy, writing for the majority, made it clear that the Court is protecting homosexual relationships when it protects the intimate conduct that accompanies those relationships. “When sexuality finds overt expression in intimate conduct with another person,” Justice Kennedy wrote, “the conduct can be but one element in a personal bond that is more enduring.”\textsuperscript{63}

Many have opinions about what caused the Court to change its focus from the sexual act to the intimate relationship.\textsuperscript{64} Some credit the Court’s change in composition.\textsuperscript{65} Others argue that society’s growing acceptance of homosexuals should get the credit.\textsuperscript{66} It is quite possible that Professor Tribe is right, that “Lawrence [v. Texas] is a story . . . of shifting societal attitudes toward homosexuality, sex, and gender,”\textsuperscript{67} more than it is a story about the power of metaphor to construct reality and drive the readers’ judgments. But even though our views about homosexuals may have changed between 1986 to 2003, there is at least an

\textsuperscript{58} Id. at 1.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 8.
\textsuperscript{61} Id.
\textsuperscript{62} Tribe, supra note23, at 1989.
\textsuperscript{63} Id. at 1904-05.
\textsuperscript{67} See Tribe, supra note23, at 1896.
argument to be made that the language used to construct the Hardwick brief’s narrative slowed the progress of lesbian and gay rights for almost two decades.68

II. Shahar v. Bowers and the dangers of exposing lesbian love

Metaphors describe the gay and lesbian experience, and many of them focus on the secrecy and shame that often accompanies the simple state of being homosexual. Metaphors like in the closet versus out of the closet, or simply out, describe our attempts at hiding our sexuality, and the sense of safety that it provides us.69 We go into closets often for protection. Being out of the closet exposes us to danger.

Playing on this aspect of homosexual life is the metaphor of being openly gay, or honest about one’s sexuality. However, the act of outing oneself or another seems more confrontational than simply being honest about one’s sexuality. Perhaps that’s because people who display their homosexual orientation openly are often met with metaphorical responses such as, “don’t put your sexuality in my face,” or “stop forcing your sexuality on me.” So there is an aspect of the closet that protects the heterosexual public from our displays of affection and even from our acknowledgments about who we love.

This secrecy is adaptive given the fact that many in the public find homosexual displays of affection somewhat revolting. For example, researchers have uncovered implicit biases against gay men displaying affection in public.70 Although many Americans say that gay men and lesbians should have the right to be affectionate in public, they express more disgust and negative moral judgment when shown two men kissing than when shown a man and a woman kissing.71 So the closet serves two purposes. It protects homosexuals from negative moral judgment and, at the same time, protects heterosexuals from feelings of disgust.

This theme of coming out and provoking disgust ran throughout a case litigated just a decade after the Bowers v. Hardwick decision. In that case, Robin Shahar sued the same Georgia Attorney General, Michael Bowers, who had defended Georgia’s sodomy law. This time, Bowers defended his right to withdraw Robin Shahar’s employment offer when he found out she had participated in a lesbian “marriage.”72 Curiously, Bowers never argued that he could refuse to employ Shahar because she would likely engage in illegal activity—privately committing sodomy with her female partner. Instead, he focused on her openness about marrying another woman. In fact, Bowers explicitly argued that, “Shahar's Offer Was Withdrawn Because Of Her Conduct Of Holding Herself Out As Marrying Another Woman, Not Because Of Her Status As A Homosexual.”73

Robin Shahar worked at the Georgia Attorney General’s Office while she was in law school. Bowers made her a permanent offer of employment, but during the summer before

70 See Jesse Bering, Equal Right to Kiss? Why You May Be Disgusted by Gay Behavior Without Knowing It, SCIENTIFIC AMERICAN (June 18, 2009), http://www.scIENTIFICamerican.com/article.cfm?id=unconscious-disgust-gay-behavior.
71 Id.
72 Shahar v. Bowers, 114 F.3d 1097, 1099 (11th Cir. 1997).
73 Brief for Appellee at 8, Shahar, 114 F.3d 1097 (No. 93-9345) 1994 WL 16126193 (emphasis added).
her job was to begin, Ms. Shahar invited friends, family, and congregants to her “wedding” ceremony. The wedding was not legal, and Shahar didn’t seek legal sanction. Georgia did not and still does not recognize marriage between same-sex couples. Nevertheless, her rabbi performed the ceremony, and the congregation joined in the celebration of Robin’s union with her female partner, Francine. But when Bowers learned of the upcoming “wedding,” he withdrew Shahar’s offer of employment.

In her lawsuit, Shahar claimed that when Bowers retracted her offer of employment, he violated her rights of intimate and expressive association, freedom of religion, and equal protection of the law. As the Eleventh Circuit noted, “the facts [were] not much in dispute.” Interestingly, the only fact seemingly in dispute was just how open Shahar was about her marriage.

Shahar’s lawyers did their best to frame her marriage as private. They painted the picture of a plaintiff who disclosed her sexuality only to willing recipients of the information, including her family, close friends, and a few people in the office. First, the brief describes Shahar as essentially closeted at work but, “in certain circumstances, open about her sexual orientation and her relationship.” It went further to point out that Shahar did not out herself to Bowers. It was her “planned religious marriage [that] alerted . . . Bowers, for the first time, to the facts that Shahar was a lesbian and that she was, in certain circumstances, open about her sexual orientation and her relationship.”

The religious ceremony took center stage in Shahar’s brief. The brief took pains to describe her wedding as private, an “invitation-only event” in a “reserved area” of a public park, and quoted Shahar’s deposition testimony, “We very much viewed our ceremony as a private, religious celebration in front of the gathered community of our family and friends.” The brief also highlighted the fact that even though Shahar told a department administrator that she was getting married over the summer, “Shahar did not mention the lesbian nature of her upcoming ceremony to Coleman because he was not someone she knew well.” Although Shahar told a couple of people she worked with about the ceremony, the brief highlights the fact that the disclosure was not planned – it happened when she saw her co-workers in a restaurant while making wedding plans with her partner.

Shahar’s attorneys portrayed Bowers’ learning about her upcoming marriage as the result of “second- and third-hand” gossip and not the result of a revelation intentionally unleashed by Shahar.

Bowers disagreed with Shahar’s portrayal of herself as mostly closeted and her wedding as mostly private. His response brief jumped right into the dispute over just how open Shahar had been: “Far from being a private religious affair, Shahar invited 270 people to her

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75 Brief for Appellant at 4-5, Shahar, 114 F.3d 1097 (No. 93-9345) 1994 WL 16126194.
76 Id. at 2.
77 Shahar, 114 F.3d at 1100.
78 Brief for Appellant, supra note75, at 1 (emphasis added).
79 Id. at 1 (emphasis added).
80 Id. at 5.
81 Id.
82 Id.
83 Id.
84 Id. at 7.
‘Jewish, lesbian-feminist, out-door wedding.’

The guest list was a significant fact according to Bowers. It included “two employees of the Department of Law, various practicing attorneys, several of Shahar’s colleagues from Emory University, and some of Shahar’s partner’s co-workers at the Federal Penitentiary.”

Bowers also focused on her behavior while clerking in the summer. While Shahar claimed she was mostly closeted at work, Bowers said she “announced to various co-workers her intention to ‘marry’ a woman,” “told her supervisor . . . she was a lesbian,” asked “whether she should bring her female partner to a [work-related] social gathering,” and “told some of her fellow summer clerks that she had a relationship with a woman.”

Even though Bowers claimed to value honesty, he was offended that “Shahar listed her ‘marital status’ as ‘engaged’ [on her employment form] and altered the form to volunteer that her ‘future spouse’ was a woman.”

Bowers was concerned not just with Shahar’s disclosures at work. He emphasized that Shahar and her partner changed their last names after their wedding by filing a public petition. Shahar, he said, reached out to her insurance company, receiving a “married” rate from Allstate, and she even told her doctor that she was “married” to a woman. Finally, Bowers found the fact that “Shahar and her partner [were] also considering having children together” relevant to his decision to withdraw her employment offer.

After admitting that “the Attorney General's past employment practices demonstrate that he does not use sexual orientation as a basis for making employment decisions,” Bowers’ brief got straight to the point of why Shahar had to go: “The Attorney General Had A Legitimate Interest In Shahar’s Conduct Of Holding Herself Out As Marrying Another Woman Because It Is Contrary To Georgia Law.” Shahar, it seems, would have been welcomed into the office if she had just stayed in the closet.

The Eleventh Circuit Court of Appeals sided with the Attorney General, carrying forward the underlying metaphor of Shahar’s openness about her sexuality being forced upon Bowers’ office. Adopting Bowers’ version of the facts, the court noted how Shahar shared with a couple of co-workers that she was getting married to a woman. The court described how these co-workers revealed this information about Shahar’s wedding to others in the office. “This revelation,“ you could almost hear the court gasping, “caused a stir.”

Pointing out that Shahar displayed a wedding ring and changed her last name in a public filing, the court demonstrated its concern – “These things were not done secretly, but openly.” In siding with Bowers, the court noted that “Staff Attorneys inherently do (or must be ready to do) important things, which require the capacity to exercise good sense and

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85 Brief for Appellee, supra note 73, at 6.
86 Id. at 5.
87 Id.
88 Id. (emphasis added).
89 Id. at 7.
90 Id.
91 Id.
92 Id. at 8.
93 Id. at 10.
94 Shahar, 114 F.3d at 1100.
95 Id. at 1101.
96 Id.
97 Id. at 1107.
discretion." Shahar failed to exercise good sense and did not “appreciate the importance of appearances” when she decided “to ‘wed’ openly – complete with changing her name – another woman (in a large ‘wedding’).” Evidently, because Shahar had not exercised discretion in her personal life, by keeping her homosexual relationship hidden, Bowers could assume that her presence would call into question the entire Office’s credibility. Therefore, the court reasoned, he had sufficient reason to revoke her offer of employment.

Despite the fact that sodomy was still a crime in Georgia when Shahar brought her suit, Bowers did not attempt to brand Shahar a criminal, and thereby justify her dismissal. Instead, the entire lawsuit revolved around the issue of Shahar’s cheek – publicly holding herself out as “married” to another woman. It was the act of disclosure, not the act of sodomy, that sank Shahar’s ship.

III. **Diaz v. Brewer: How will the story end?**

In 2009, the Arizona legislature passed a law that stripped many state employees of an essential part of their employment packages – the ability to provide their domestic partners with health insurance through the state’s health care plan. The legislature was reacting to an earlier move by Governor Janet Napolitano. Before leaving office, Napolitano used the regulatory power of the Governor’s office to change the definition of dependent for the purpose of state health coverage. Her action meant that, along with 19 other states, Arizona would provide a health insurance option for unmarried couples who were not or could not otherwise get married. Because of Napolitano’s action, many gay and lesbian state employees in long-term, committed relationships took advantage of the benefit their heterosexual co-workers had long enjoyed and put their partners on their state health insurance plans.

After Napolitano’s departure, the legislature and Governor Jan Brewer acted quickly to limit coverage to only legally recognized spouses and children. They offered several reasons for the change. They argued that family health coverage is an “optional” subsidy, and that removing unmarried partners from the state health care plan would save the state money during a time of enormous deficits. They also said that stripping unmarried employees of this coverage would further the state’s interest in promoting marriage – presuming all of the unmarried partners would get married to retain their benefits. Of course,

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98 Id. at 1104.
99 Id. at 1105.
100 Id. at 1110.
101 It was not until the next year, in 1998, that the Georgia Supreme Court struck down Georgia’s sodomy statute as violative of the Georgia constitution. Powell v. State, 510 S.E.2d 18, 26 (Ga. 1998).
104 Diaz, 656 F.3d at 1010.
105 Motion to Dismiss at 5, Collins, 727 F. Supp. 2d 797 (No. 09-2402), 2010 WL 544391 (counting 18 states plus the District of Columbia).
106 Diaz, 656 F.3d at 1010.
107 Id. at 1011.
108 Id. at 1010.
109 Motion to Dismiss, supra note105, at 8.
110 Id. at 10.
the Governor and the legislature knew that gay and lesbian state employees could not simply get married. But they argued in that case that access to health care is not a right, and the state presumably can parcel it out in whatever fashion it chooses, preferring some employees over others.

I, along with many other gay and lesbian state employees, had used the state health care system to provide health coverage for my partner. As many other partners of state employees did, my partner canceled her existing insurance plan to move onto my plan. This process was relatively easy—moving from a self-funded plan for the self-employed to a group plan. There are no health screenings and no denials for age or physical condition. But transferring from a group plan to a self-employed plan is not so easy. Many gay and lesbian employees found that their partners either could not purchase health insurance on the open market or would find it prohibitively expensive. And even if purchased, the quality, choice, and coverage of the plans were severely limited compared to the state plans.

On the verge of losing our coverage, I joined several other gay and lesbian state employees and sued Arizona Governor Jan Brewer and some of the state’s top-level administrators. We relied on Lambda Legal Defense to expertly guide us through litigation in the Federal District Court in Arizona. Throughout the litigation, I have listened to others’ opinions about the likelihood for success. Many of the people I spoke to gave us little hope. They saw this as a difficult case to win, especially in Arizona. But this case was very different from other gay rights cases. We were not claiming protection for our conduct in the bedroom. We were not forcing ourselves on the citizens of Arizona by displaying our affections openly. We were simply seeking equal compensation for the same work, and we were protecting ourselves and our partners from the devastating consequences that lack of health insurance coverage can bring to anyone.

Yes, the language of this case differed from Bowers and Shahar. Gone were references to unnatural acts and open indiscretion. But I’m convinced that our case has been successful, so far, because it tells a familiar story. Like metaphor, story is one of the most persuasive tools a writer can use. Stories operate, like metaphor, on an unconscious level. They provide for us a way to understand ourselves, our world, and our place in the world. Stories give events meaning. They also function as mental shortcuts. We tend not to question stories when they unfold in a predictable way.

\[\text{Sources:}\]

111 In 2008, the Arizona voters passed Proposition 102, a constitutional amendment that defined marriage as between one man and one woman. ARIZ. CONST. art. XXX, § 1.

112 Motion to Dismiss, supra note 105, at 13.

113 Diaz, 656 F.3d at 1011.

114 Id.

115 Id.

116 Amended Complaint for Injunctive and Declaratory Relief, Collins, 727 F. Supp. 2d 797 (No. 09-2402), 2010 WL 545309.


118 See Linda L. Berger, The Lady, or the Tiger? A Field Guide to Metaphor and Narrative, 50 WASHBURN L.J. 275, 281 (2011) (“Like metaphor, stories are entangled in culture, resulting in common archetypes, myths, and master stories that help construct social and cultural norms, both by shaping them directly and by supporting particular ways of interpreting experiences.”); Edwards, supra note 32, at 886; Robbins, supra note 4, at 774.

Cultures have shared stories. And once a familiar story gets started, we have expectations about where it should go and how it should end. Stories are shared between the storyteller and the audience, and the audience is often unwilling to allow the story to stray too far outside a certain narrative coherence. In *Thinking, Fast and Slow*, Daniel Kahneman discusses the cognitive underpinnings of story through his experience watching *La Traviata*, a Verdi opera. In the opera, a young aristocrat and a young woman of ill repute fall in love. The young man’s father persuades the young woman to give him up. She does. She becomes ill and death seems certain. The young man is alerted, and he journeys to see her. He arrives at her side just before her death. Kahneman asks why we care so deeply that the young woman’s lover arrives in time. If she had lived another 5 years but had never reunited with her lover, we would likely rate her life as less desirable. As Kahneman explains, we search for meaningful endings, and we place more significance on endings than on what happens mid-way through the story. Like Verdi, when lawyers advocate for their clients they are conveying their client’s story not on a blank tablet, but in a culture of stock stories with which the reader is intimately familiar.

When we tell our clients’ stories, we do so knowing that our audience has a desire to see the story resolved in a fitting way. It is within this context that we urge the audience — in many cases, a court — to provide a meaningful ending.

Since the release of the film *Philadelphia* in 1993, the American public has become acquainted with the story of the gay protagonist. Tom Hanks won the Academy Award for playing the role of Andrew Beckett, an ambitious, closeted gay man at a large law firm. He had been diagnosed with HIV/AIDS, but he hadn’t disclosed this fact to the law firm. He was fired from the firm when his condition became apparent to some of his co-workers. At first, no lawyer would take his case, but eventually a homophobic black lawyer played by Denzel Washington agreed to sue the firm for employment discrimination.

Through the course of the litigation, Beckett’s health deteriorated, but the filmmakers focused on Beckett’s committed, supportive, and loving relationship with his partner Miguel Alvarez, played by Antonio Banderas. Alvarez rushed to the hospital to be with Beckett, confronted doctors about Beckett’s care, changed his IV, shared an intimate dance with Beckett, and spent time with his loving family. In the midst of the stressful trial, Beckett collapsed. At the hospital, Beckett’s friends and family gathered knowing that he was probably near death. Of course, if Beckett had died before the jury delivered its verdict, we would feel cheated — as if the young man in the opera never made it back to his lover’s side. But the jury awarded Beckett $4.5 million, and his lawyer, who once said that what gay men do made him sick, rushed to the hospital to deliver the news. Once Beckett learned of the
victory, his friends and family cleared the room and the camera focused on an intimate moment between Beckett and Alvarez. As Alvarez leans toward his lover, Beckett proclaims that he’s ready to die.

Despite our propensity to react with disgust when we are confronted with disease\textsuperscript{125} or homosexual sex acts,\textsuperscript{126} these filmmakers were able to refocus our disgust and the heightened moral judgment that accompanies it. Audiences focused their moral judgment squarely on the big law firm that so arbitrarily discriminated against one of its best attorneys simply because he was gay and ill. Perhaps the filmmakers did this by focusing on the relationship and not the sex. In fact, only one scene depicted a short kiss, and other scenes showing Hanks and Banderas in bed were cut from the final production. By portraying a lover dutifully attending to his dying partner’s needs, the film created a universal story where love is all-important and bigotry is to be conquered.

\textit{Diaz v. Brewer} follows a similar, and now familiar, storyline. Gay and lesbian employees were singled out and stripped of an important part of their employment packages. Taking compensation away from some employees and not from others would likely strike most people as unfair. But the State didn’t simply reduce the compensation packages of gay and lesbian employees; it also left these employees and their partners in uncertain territory, threatening their partners’ ability to access health care at all.

Looking at how the case has progressed so far, the judges seem to be drawn into this narrative framework. The District Court granted our motion for a preliminary injunction, allowing our partners to continue on the state insurance plan until the litigation is resolved.\textsuperscript{127} The court also denied Defendants’ Motion to Dismiss, finding a cognizable claim in our potential loss of coverage.\textsuperscript{128}

Defendants appealed the District Court’s decision, and the Ninth Circuit accepted briefing and scheduled oral arguments. During oral arguments, the judges peppered the attorneys with questions. Those questions provided a window into how the judges saw the story unfolding. Yes, the State sought to remove all domestic partners, homosexual and heterosexual, from the State’s health care plan. But as Judge Mary Schroeder, one of the three judges sitting for argument, twice reminded counsel for Defendants, “opposite-sex couples could do something about it”;\textsuperscript{129} they could get married. The arguments began to unfold as a give-and-take about whether gay and lesbian employees were being treated unfairly and whether the unfair treatment would have potentially devastating consequences for their partners.

Counsel for the State dismissed the idea that Plaintiffs’ loss of health coverage could cause them irreparable harm,\textsuperscript{130} and his responses to questions about what would happen if coverage was suddenly wiped away showed that he really didn’t understand the story needed a satisfactory ending. Like the law partners at Andrew Beckett’s firm who simply wanted to be rid of Andrew, the State’s attorney had no concern for the end result, and his answers to the judges’ questions were inaccurate and alarming.

\textsuperscript{125} See Terrizzi, \textit{supra} note55.
\textsuperscript{126} See \textit{id}.
\textsuperscript{127} \textit{Collins}, 727 F. Supp. 2d at 814.
\textsuperscript{128} \textit{Id}. at 807.
\textsuperscript{130} \textit{Id}.
First, counsel for the State said he assumed that the employees’ partners would be covered by AHCCCS, Arizona’s Medicaid plan – a plan he described as “the plan of last resort.” Judge Sidney Thomas, also concerned about how this story would end, corrected the mistake. He pointed out the additional injustice in the case – AHCCCS is for low income citizens, and Plaintiffs’ partners would not qualify. That’s because AHCCCS treats co-habiting couples like married couples when it comes to qualifying for health care. The State counts both partners’ incomes. Judge Thomas rhetorically asked, “Aren’t gays and lesbians in a Catch-22?” Of course, he never believed he needed to be because his story ends when Andrew Beckett walks out of the law firm with his belongings in hand. So the State’s attorney was never able to provide an answer to the question because, he said, “[AHCCCS] is too complicated a process to prognosticate.” Judge Schroeder, perhaps trying to force the State’s attorney to provide a different ending, seemed disturbed: “If it’s too complicated to figure out and . . . you know you could get hit by a truck the next morning so that you face . . . an incredibly complicated prospect, that seems like it’s a pretty bad situation.” The judges seemed unwilling to leave the story where the State would – without a health plan and with an uncertain future.

Judge Schroeder later authored the Ninth Circuit’s opinion upholding the District Court. In it, she reached out to Justice Robert H. Jackson, repeating his oft-quoted language:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Once this framework was established, the opinion blessed the District Court’s ruling as “consistent with longstanding equal protection jurisprudence holding that ‘some objectives, such as ‘a bare ... desire to harm a politically unpopular group,’ are not legitimate state interests.’” With her attention turned to the unfair treatment levied on one group of state employees, Judge Schroeder wrote the ending to the story, or at least the first chapter, by leaving the injunction in place and allowing the lawsuit to go forward. When I imagine what her ending looks like, it ends much like Beckett’s story ends – with the employee at

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131 Id.
132 Id.
133 Id.
134 Id.
135 Id.
136 Id.
138 Id. at 1014-15.
139 Id. at 1015.
her partner’s bedside. They are not distressed about how they will afford to pay for the care, nor are they knee-deep in financial forms attempting to obtain uncertain coverage through the State’s “plan of last resort.” Instead, they are finding comfort in the certainty that their love (and their adequate health care plan) will see them through even this tragic accident.

IV. Conclusion

Our society’s view of gay and lesbian people has changed dramatically in the last 25 years. Perhaps our change in attitudes is responsible for the recent gains homosexuals have made in the courts. That is one explanation. But it is difficult to ignore the striking role that language and storytelling plays in our jurisprudence. Narrative and metaphor are powerful vehicles that drive readers’ cognitive processes. We, as advocates, should be cognizant of the direction we take our readers by paying attention to our plots, our protagonists, and our villains. We should treat language as the building blocks of justice. And we should be paying attention to the interdisciplinary research in areas such as narratology and psychology. When Martin Luther King, Jr. spoke of justice, he often used metaphor. But when he proclaimed that “the arch of the moral universe . . . bends toward justice,” he almost certainly did not mean that it naturally or inevitably bends that way. Our words and our stories must serve as the force that pushes the law closer to justice. If we are to succeed in advancing our cause, our words must infiltrate our readers’ minds and hearts, and lead them to a just ending.

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140 See Berger, supra note 118, at 277 (“Although they are as old as rhetoric, it is hard to understand the continuing objections to the study and use of metaphor and narrative in legal arguments.”).

141 See Jamie Stiehn, Oval Office Rug Gets History Wrong, WASH. POST (Sept. 4, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/03/AR2010090305100.html (arguing that the quotation attributed to King was actually a paraphrase of a quotation by abolitionist Theodore Parker).


143 See id. (arguing that President Obama has failed in his storytelling and has failed to put weight behind King’s metaphorical “arch.”).
PUBLIC SCHOOLS AS WORKPLACES: THE QUEER GAP BETWEEN “WORKPLACE EQUALITY” AND “SAFE SCHOOLS”

By Madelaine Adelman and Catherine Lugg*

Recent attempts by lesbian, gay, bisexual, and transgender (LGBT) activi

1 “LGBT” is an acronym used to refer to a diverse group of people. It signals the linkages among transphobic and heterosexist bias, discrimination and violence; it also signals the ongoing history of organizing for social change among sexual minorities and gender non-conforming persons. The term “LGBT” is commonly used within the Workplace Equality Movement. Within the Safe Schools Movement, particularly among youth, “LGBT” is joined by other terms including “queer” and “gender queer,” both of which point to the constructed and contested nature of sexual and gender identities, and the rejection of binary understandings of sexual orientation (gay or straight) and gender identity (masculine or feminine). The term “queer” is also a reclamation project involving a term that has been (and continues to be) deployed against LGBT people. In this article, we will use “LGBT” and “queer” to reflect local usage as much as possible, noting that the authors themselves make strategic decisions about terminology, depending upon context and purpose.

school life, including the academic curricula, co-curricular programming, employee recruitment and retention, and professional development. For example, most students participate in sexual health education classes where the diversity of human sexuality is either ignored or stigmatized and learn from textbooks that do not address LGBT people or their history. Students are often barred from bringing same-gender dates to the prom and from starting Gay/Straight Alliance student clubs. Anti-LGBT language is used to motivate or punish student athletes. Peer-to-peer anti-LGBT bias often goes uninterrupted by educators or is expressed by educators themselves. Meanwhile, LGBT parents are silenced or excluded from the school community, and educators are passed over for hire, or fired, for being open about their minority sexual orientation or gender identity, on or off school grounds. Even major anti-bullying and character education programs such as Olweus or Character Counts, which urge youth and adults alike to not tolerate name-calling, rarely name anti-LGBT bias as one of the most common forms of bullying or provide specific resources to address it. Most schools neither recognize nor address anti-LGBT bias and discrimination.

Despite this pervasive hostile school climate, until recently, little was known about anti-LGBT bias and discrimination in public schools. Few outside of the LGBT community


Pat Griffin, Homophobia in Sport: Addressing the Needs of Lesbian and Gay High School Athletes, 77 High Sch. J. (Special Issue) 80 (1993-1994); Pat Griffin, Strong Women, Deep Closets: Lesbians and Homophobia in Sport (Becky Lane et al. eds., 1998).


BLOUNT, supra note 2; KAREN M. HARBECK, GAY AND LESBIAN EDUCATORS: PERSONAL FREEDOMS, PUBLIC CONSTRAINTS (1997).
were concerned with LGBT-related school climate issues. Indeed, even within the LGBT community, few organizations were willing or able to address LGBT-related school climate issues due to the persistent, albeit unwarranted, stigma regarding “recruitment” of youth by those expressing same-sex desire and/or gender non-conformity.\(^\text{10}\) Public schools in the U.S. constitute an institutional source of anti-LGBT bias and discrimination, but limited systematic attention has been paid to it.

New public attention to anti-LGBT bias and discrimination in school can be traced to media coverage of anti-LGBT violence and the deaths by suicide of a number of youth, some of whom identified as LGBT.\(^\text{11}\) Surviving peers and parents often linked the tragic loss of life to the anti-LGBT school climate. Persistent anti-LGBT bullying and harassment may have been a contributing factor or a precipitating event in the lives of these young people who died by suicide, although suicidality is a complex dynamic, and it is inaccurate to identify a direct, unmediated causal relationship between bullying and suicide.\(^\text{12}\) Nonetheless, the stark narrative of youth lost due to an uninterrupted anti-LGBT school climate mobilized public investment into (mostly generic) bullying prevention programs and interventions. As a result, bullying, previously dismissed by adults as either a rite of passage or as endemic to youth culture but ultimately harmless, has now been recognized as a significant social problem with long-term implications by the U.S. Secret Service (2002), U.S. Department of Education (2010), U.S. Department of Health and Human Services (2012), and state legislatures, as harmful, pernicious, and worthy of legislative action.\(^\text{13}\) Such attention has increased public awareness of and debate regarding anti-LGBT bias and discrimination; students continue to report a hostile school environment.

I. Student perspectives on anti-LGBT bias and discrimination

Much of what is known today about anti-LGBT bias and discrimination in schools is based on students’ experiences of everyday harassment and its effect on individual academic achievement and well-being.\(^\text{14}\) In national surveys, LGBT students report being bullied and

\(^\text{10}\) Erving Goffman, Stigma: Notes on the Management of Spoiled Identity (1963); Moral Panics, Sex Panics; Fear and the Fight over Sexual Rights (Gilbert Herdt ed., 2009); Nancy J. Knauer, Homosexuality as Contagion: From the Well of Loneliness to the Boy Scouts, 29 Hofstra L. Rev. 401 (2000); Lugg, Thinking about Sodomy, supra note 2.


harassed at a higher rate than heterosexual students. The overwhelming majority of middle and high school students either sometimes or frequently hear anti-LGBT remarks at school. LGBT students report being verbally harassed because of their sexual orientation (84.6%) or gender expression (63.7%) and physically assaulted because of their sexual orientation (18.8%) or gender expression (12.5%). Overall, students’ reports suggest that anti-LGBT bias and discrimination is the rule rather than the exception in school.

Not surprisingly, the level of anti-LGBT bias and discrimination in public schools negatively affects students’ sense of safety and belonging at school, as well as school attendance, academic achievement, and personal well-being. Specifically, as the level of victimization increases, a student’s sense of safety and belonging at school decreases, along with their school attendance and academic achievement. On the other hand, as victimization increases, emotional well-being decreases, indicated by elevated levels of depression and anxiety. Recent research suggests a need to probe for differential experiences and effects of anti-LGBT bias and discrimination based on students’ age and grade, race/ethnicity, sexual orientation, gender expression, and region. But, in short, a hostile school climate constitutes an unhealthy environment for school-age LGBT youth.

Hewing closely to these new data on student experience, much of the institutional response to anti-LGBT bias and discrimination has focused on raising student and educator awareness of bullying and harassment, and reforming and implementing local, state, and federal non-discrimination and anti-bullying policies and laws. Anti-bullying policies range in term of their scope, but most provide the public school community with a definition of bullying and a procedural reporting mechanism and punitive response to peer-based bullying. Comprehensive anti-bullying policies, evaluated as the most effective type of


18 Id.
19 Id.
20 Horn et al., supra note 14; KOSCIW et al., Who, What, Where, supra note 14; Lance T. McCready, When Fitting In Isn’t an Option, or, Why Black Queer Males at a California High School Stay Away from Project 10, in TROUBLING INTERSECTIONS OF RACE AND SEXUALITY: QUEER STUDENTS OF COLOR AND ANTI-OppRESSIVE EDUCATION 37 (Kevin K. Kumashiro ed., 2001); LANCE T. MCCREADY MAKING SPACE FOR DIVERSE MASCULINITIES: DIFFERENCE, INTERSECTIONALITY AND ENGAGEMENT IN AN URBAN HIGH SCHOOL (2010).
21 Joseph P. Robinson & Dorothy L. Espelage, Inequities in Educational and Psychological Outcomes Between LGBTQ and Straight Students in Middle and High School, 40 EDUC. RESEARCHER 315 (2011).
22 U.S. DEP’T OF EDUC., supra note 13.
anti-bullying policy,23 include an enumerated definition or description of bullying, naming the categories upon which students are commonly targeted, including race/ethnicity, religion, and sexual orientation or gender identity/expression. As of this writing, thirteen states have enumerated policies for public schools. Some also mandate training, although few require explicit inclusion of anti-LGBT bias. Notably, this displacement of anti-harassment policies by anti-bullying policies has been swift if not necessarily smart.24

School policy reform at the district, state and federal levels has been a key focus of the Safe Schools Movement.25 Other efforts to improve the school climate include the establishment and growth of Gay/Straight Alliance students clubs, and development and delivery of LGBT-inclusive curricula. Underlying this range of safe schools strategies is the call to adults to be a visible and vocal affirming presence in schools. GLSEN, for example, argues that:

Though both straight and LGBT students will benefit from having openly LGBT educators, coaches and administrators, staff members need not be “out” or LGBT themselves in order to be good role models. By demonstrating respectful language, intervening during instances of anti-LGBT harassment, and bringing diverse images into the classroom in safe and affirming ways, all staff members can be model human beings for the students with whom they work.26

Such student-centered protective and pro-active measures have merit and contribute to the long-term transformation of public schools from hostile to more inclusive and affirming environments. Included in this way, the attention paid to school staff within the Safe Schools Movement tends to focus on the role educators may play in either perpetuating or interrupting the anti-LGBT climate. Public school employees are viewed as either part of the problem or part of the solution, as demonstrated in the National Education Association’s recent report on LGBT students, referencing the effect of homophobia and heterosexism on school personnel:

GLBT school personnel face tremendous societal and legal pressures to stay “in the closet” at school, especially in front of students. This can lead to feelings of isolation and a diminished sense of safety or belonging, which in turn can hamper their efforts to teach and mentor students. “Many GLBT and even heterosexual school personnel don’t feel comfortable mentoring GLBT students because of their own personal risk.”27

26 Ten Things Educators Can Do...To Ensure that Their Classrooms are Safe Spaces for ALL Students, GLSEN (May 1, 2005), http://www.glsen.org/cgi-bin/iowa/all/library/record/1796.html.
Public school employees do intervene more frequently into anti-LGBT bullying when provided guidance by anti-bullying policies that explicitly include sexual orientation and gender identity/expression. While students will achieve greater educational outcomes and secure a more positive sense of belonging and well-being as a result of affirmative school staff, we draw attention here to the related but separate concerns of public school employees when it comes to LGBT issues. What remains relatively unexamined and marginalized in terms of public attention and policy analysis, are the professional lives of thousands of adults who go to public schools every day in order to earn a living.

Building on the research and resources of LGBT-related public school climate issues for youth, and LGBT-related work climate issue for adults, here we harness the emerging social science literature on school workers’ particular vulnerabilities to, and varied effects of, the anti-LGBT climate and identify how LGBT public school workers have navigated this uneven climate over time. We turn first to a brief overview of the need for, and the current shape of, workplace equality efforts.

II. Anti-LGBT bias and discrimination at work

In most of the United States, it is perfectly legal to discriminate against employees based on their actual or perceived sexual orientation and/or gender identity. Currently, twenty-nine states lack legal protections for employees based on sexual orientation, and thirty-four states lack legal protections for employees based on gender identity. A mosaic of executive orders, state statutes, city and county ordinances, and district policies does provide legal protections for some public and private sector employees based on sexual orientation and/or gender identity. Yet, no comprehensive federal law bars such discrimination.

Research on anti-LGBT bias and discrimination has been conducted across the country, reaching those who benefit from employment non-discrimination policies, as well as those who do not. Findings from these studies echo and build on social science research and critical legal scholarship on other forms of now-illegal employment discrimination, such as racism and sexism. Notably, many LGBT persons experience multiple forms of privilege and oppression at the same time. For example, sexual minority women of color can experience heterosexism, sexism and racism. As a result, anti-LGBT bias and

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discrimination, and legal efforts to address it, do not necessarily affect all persons in the same way.32

What is known about anti-LGBT bias and discrimination at work comes from a combination of national surveys of self-reported workplace experiences, wage comparisons between LGB and heterosexual employees, analyses of discrimination complaints filed with the Government Accountability Office, and scenario-driven experimental studies.33 LGBT employees who are out at work experience (and fear) discrimination, while those who are not openly gay or transgender at work also fear the threat of being “outed” at work. Employees report being fired or denied employment because of their actual or perceived sexual orientation or gender identity/expression. They also report being denied promotion or being given negative performance evaluations due to anti-LGBT bias. Some LGBT employees have faced anti-LGBT verbal harassment and/or physical abuse, as well as vandalism at work. Gay men workers report unequal pay or benefits as well, although sexism seems to more adversely affect lesbian women’s pay and benefits more than heterosexism. In particular, transgender employees report significant levels of discrimination and unemployment.34 Overall, the number of LGBT employees who report discrimination on the job decreased in the recent Out & Equal (2009) workplace equality survey, but the numbers remain high (44% in 2009 versus 56% in 2008), suggesting that a large number of LGBT individuals work within a hostile environment, where each must determine if, when, and how it is safe to “come out” and be their full selves at work or continue to “cover” their identities through social conformity and assimilation.35 This is similar to the hostile public school environment reported by LGBT students, who also decide if, when, and how to disclose their sexual orientation or gender identity.

And, like the negative effects on education and well-being for students who face an unwelcoming or hostile school climate, LGBT workers report a range of negative consequences of an unwelcoming or hostile work site.36 These consequences include diminished mental and physical well-being associated with stigma- and stress-related health disparities.37 Not surprisingly, LGBT employees who experience anti-LGBT bias and

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36 Sears & Mallory, supra note 30.

discrimination also report lower levels of creativity and productivity and work, aligned with lower levels of job satisfaction. Hostile work environments can lead to employee burnout, as well as loss of human talent, when those who are able to do so leave the workplace.

Advocacy organizations in the United States that seek to create inclusive work environments free of discrimination against LGBT employees have focused their efforts primarily on the corporate and business world. Organizations such as Diversity Inc., Lambda Legal, Out & Equal Workplace Advocates, and Pride at Work provide employers and employees with a set of best practices and resources to help them create such “workplace equality.” 38 One commonly recommended workplace equality tool is the Employee Resource Group (ERG). In the corporate world, ERGs are often organized around identity affinities such as ethnicity, sexual orientation, religion, family status, or gender. ERGs organized around sexual orientation and gender identity/expression provide social support and professional mentoring for LGBT employees. ERGs commonly participate in community philanthropy, either financially or through in-kind donation of professional services to relevant non-profit organizations. For LGBT ERGs, this may translate into working with Gay/ Straight Alliance student clubs in schools39 or local (or national) LGBT organizations. Members of ERGs also may participate in corporate recruitment, mentoring and retention of employees by being visible and “out” representatives of their constituent group. ERG participation requires this level of visibility or willingness to be associated with the affinity group.

In terms of improving the work climate, ERG members and other workplace equality supports also advocate for positively recognizing LGBT employees and their families using internal and external communication strategies including marketing, inclusive nondiscrimination and anti-harassment policies, company and health benefits, and LGBT-inclusive professional development or diversity education within the corporation. 40 In some corporations, employee-centered efforts are complemented by the management-centered work of a Chief Diversity Officer, and/or Diversity Council, whose responsibilities may include overseeing equitable talent development and advancement of employees, and diversification of the supply chain. 41

According to recent metrics, workplace equality (and diversity management more broadly) has advanced significantly in U.S. companies, particularly within the top-earning corporations. 42 For example, this year “all 100 firms on Fortune’s Best Companies to Work

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For list . . . have non-discrimination policies that include sexual orientation.” 43 This success suggests that marketplace-driven arguments for workplace equality are persuasive, that is, companies will adopt LGBT-friendly policies, programs, and practices, if they make good business sense. Recent research in which scholars analyzed statements that corporations issued when adopting non-discrimination and/or domestic partner benefit policies, reinforces this common American capitalist axiom. In these statements, companies explain they are able to recruit and retain the best talent, attract and serve a diverse customer base, increase productivity among the workforce, secure business from public sector contracts that require diversity, and that a diverse workplace generates the best ideas and innovations.44 These findings counter the corollary market-based argument that such changes would be unacceptably costly and burdensome for business.

Allied organizations also enforce workplace equality protections afforded by non-discrimination policies to LGBT workers (e.g. American Civil Liberties Union, Lambda Legal, National Center for Lesbian Rights, National Center for Transgender Equality), while other organizations, such as the Human Rights Campaign (HRC)’s Corporate Equality Index (www.hrc.org), and the National Gay and Lesbian Chamber of Commerce (www.nglec.org), help drive consumers to LGBT-owned or LGBT-friendly corporations and businesses across the country, that is, those with inclusive policies that support LGBT employees and their families.

Overall, Badgett and others argue that workplace equality has socio-political and economic consequences not only for those who are directly protected by new initiatives such as anti-discrimination policies or who are covered by inclusive domestic partner benefits (i.e. LGBT employees, spouses and partners, and children).45 Workplace equality matters each time when it is achieved in a non-profit or government agency, business, or corporation because of its potential affirming effects on the majority of people who work on site or do business with the company or agency: heterosexual and gender conforming co-workers and customers, that is, individuals who do not consider themselves queer. These non-queer co-workers and customers at job sites that successfully support workplace equality have the opportunity to knowingly work alongside people who are out at work. Research indicates that heterosexuals who personally know someone LGBT are more likely to have positive attitudes and support at least some LGBT rights.46 Attitudinal research indicates a positive shift in this direction, particularly for those who have close friends or family members who are out.47 Despite this shift in public opinion, “it remains the case that substantial

percentages of people – particularly in certain regions and in rural areas – continue to oppose the idea that LGBT educators even be hired to teach their children.”48 Indeed, this perspective has been incorporated into efforts to curb the federal Employment Non-Discrimination Act (ENDA).49 Workplace equality can be considered a long-term strategy for creating cultural and legal transformations, but the market-based successes of the Workplace Equality Movement have not been felt as strongly in the education world.

III. Public Schools as workplaces for LGBT employees50

The perspectives of LGBT public school employees add to our understanding of the school community for all of its members, youth and adults alike, while also drawing attention to the particular vulnerability of LGBT school employees within the wider workplace equality struggle. LGBT school workers can be considered both the canary in the coalmine – some of the first workers on the front line targeted with homophobia – and some of the last coal miners to fight their way out of the transphobic and heterosexist-poisoned mine. This is due to a combination of historical and contemporary factors.

As Jackie Blount argues in her study of U.S. public school workers, “Among the women and men in this country who have founded schools, inspired their students, administered their districts, and otherwise sustained these institutions of promise, there always have been those who have desired others of the same-sex or wish to transgress traditional gender bounds.”51 Yet their stories have rarely been told. As a result of the work by Blount and others, the existence and contributions of those with same-sex desire and/or gender non-conforming expression who worked in schools are just now beginning to be revealed. These narratives of life as a gay, lesbian, bisexual, and/or transgender school worker contain tropes of strength and resilience along with stories of institutionalized invisibility, silence, oppression, and violence. LGBT school workers have had to simultaneously navigate, resist, and transform the hostile work environments in which they are employed. As LGBT visibility in society has increased, so too has the backlash against the suitable employability of LGBT persons in schools. This was true for school workers in the late nineteenth and early twentieth centuries, when the very category of the gender variant “homosexual” was first being formed, and school personnel were increasingly forced to demonstrate their gender conformity and heterosexuality as it is in the late twentieth century and today, when contemporary forms of criminalization and surveillance regulate LGBT people in schools.53

The intimate lives of Americans have historically been subjected to all manner of government scrutiny, and the regulation of “homosexuality” and gender non-conformity among public employees specifically has been at the center of this enterprise.54 Laws

48 BIEGEL, supra note 2, at 49.
50 This section draws on Lugg & Adelman, forthcoming. CATHERINE LUGG & MADELAINE ADELMAN, LEGAL, POLITICAL AND POLICY CONTEXT OF LGBT ISSUES IN EDUCATION RESEARCH (K. Graves et al. eds., forthcoming).
51 BLOUNT, supra note 2, at 1.
52 Id. at 79.
53 Lugg, Religious Right, supra note 2.; Lugg, Thinking about Sodomy, supra note 2.
54 MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY
governing consensual sexual behavior and sexuality vary; what is permissible in one state can be forbidden or tightly constrained in another. Many laws regulating sexual behavior have been selectively enforced. Consequently, all laws regulating consensual sexual behavior have a strong surveillance aspect to them: One never knows where, when, or if these laws might be put into play. These laws also have the power to stigmatize because regulations concerning sexuality have always carried strong social penalties and sanctions, including public humiliation. Mere mention of one’s sexual status invites stigmatization, thus reducing an individual’s political and civil (including parental and employment) rights in some instances.

In particular, sodomy laws have played a part of a three-legged stool of oppression and stigmatization that specifically target queer people. This stool asserts that we are: (1) heretical; (2) medically pathological; and (3) criminal. The first and still remaining leg of this stool asserts that queers are heretical, that is, our mere existence violates traditional Biblical norms regarding same-sex sexual behavior. Like other heresies, queerness is portrayed as highly contagious and disgusting, and it should be either minimized or eliminated.

The second rationale of the 3-legged stool is that queers are medically pathological. Queers had been pathologized for over 50 years by various medical communities, and these professionals stressed that this “pathogen” was highly contagious. This reason began crumbling in the late 1940s with the publication of the first Kinsey study and was officially dismantled in 1973, when the American Psychiatric Association withdrew “homosexuality” and “bisexuality” from its list of mental disorders (Diagnostic and

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58 See GOFFMAN, supra note 10.


61 Id.; Knauer, supra note 10.


63 See JACKIE M. BLOUNT, DESTINED TO RULE THE SCHOOLS: WOMEN AND THE SUPERINTENDENCY 1873-1995 100 (1998); Eskridge, supra note 60; Knauer, supra note 10.

64 D’EMILIO, supra note 56, at 35-36; TERRY, supra note 62, at 298-314.
Statistical Manual of Mental Disorders).\textsuperscript{65} Nevertheless, ex-gay movement claims regarding the malleability of sexual orientation persist.\textsuperscript{66}

The final leg on the “stool of oppression” asserts that we are intrinsically criminals. While male-on-male sodomy (specifically anal sex) had long been criminalized in the U.S., most other same-sex consensual sexual behavior was not criminalized until the 1920s.\textsuperscript{67} Furthermore, only beginning in the 1920s does queer identity become synonymous with queer behavior and vice-versa.\textsuperscript{68} U.S. sodomy laws were subsequently revised and expanded in the hopes of rooting out suspected “perverts and deviants” from all manner of public employment and public life.\textsuperscript{69} By the early 1920s, every U.S. state had criminalized queer sex.\textsuperscript{70} Penalties upon conviction were varied, depending upon the state in which the offense was committed: from a few weeks in jail, to forced institutionalization in a mental hospital where treatments included electro-shock and lobotomy, to possible castration for male offenders, to life in prison.\textsuperscript{71}

Sodomy laws, in conjunction with morality clauses in public educators’ employment contracts, have been used to keep queer educators either closeted, their identities hidden, or to fire them if revealed or “outed”.\textsuperscript{72} During the 1950s and 1960s, when most of the anti-queer witch-hunts shaped the culture of public schooling in the U.S., queer students and employees fell under each leg of the stool of oppression (heretical, pathological, and criminal). Consequently, both took great care in covering their identities—if they could.\textsuperscript{73}

Public school workers have had to be particularly careful with sexual orientation and gender identity management. Based on her study of Florida’s purge of gay and lesbian teachers, education scholar Karen Graves has argued that:

[A]spects of the teaching profession distinguish it from other types of public employment..., leaving teachers especially vulnerable to homophobic

\textsuperscript{65} Cruz, supra note 62, at 312; D’Emilio, supra note 56, at 238.

\textsuperscript{66} Tanya Erzen, Straight to Jesus: Sexual and Christian Conversions in the Ex-Gay Movement (2006).


\textsuperscript{68} Eskridge, supra note 54; Leslie, Creating Criminals, supra note 56; Steven Seidman, The Social Construction of Sexuality (2003).

\textsuperscript{69} Canaday, supra note 54; Eskridge, Democracy, supra note 67; Eskridge, supra note 54; Karen L. Graves, and They Were Wonderful Teachers: Florida’s Purge of Gay and Lesbian Teachers (Joan Catapano & Breanne Erterm eds., 2009); Johnson, supra note 54; Leslie, Creating Criminals, supra note 56; Leslie, Lawrence, supra note 56; Terry, supra note 62.

\textsuperscript{70} Eskridge, Democracy, supra note 67; Eskridge, supra note 54; Seidman, supra note 68.

\textsuperscript{71} Edward Alwood, Straight News: Gays, Lesbians, and the News Media (1996); Cruz, supra note 62; Eskridge, Democracy, supra note 67; Eskridge, supra note 54; Terry, supra note 62.

\textsuperscript{72} Eva DuBuisson, Comment, Teaching from the Closet: Freedom of Expression and Out-Speech by Public School Teachers, 85 N.C. L. Rev. 301 (2006); Suzanne E. Eckes & Martha M. McCarthy, GLBT Teachers: The Evolving Legal Protections, 45 Am. Educ. Res. J. 530 (2008); Graves, supra note 69; Harbeck, supra note 9; Lugg, Thinking about Sodomy, supra note 2.

\textsuperscript{73} Jackie M. Blount, Homosexuality and School Superintendents: A Brief History, 13 J. Sch. Leadership 7 (2003); Blount, supra note 2; DuBuisson, supra note 72; Karen L. Graves, Storming a “Refuge for Practicing Homosexuals”: Before the Movement, Presentation at the History of Education’s Annual Convention (Oct. 2006); Graves, supra note 69; Ronnie L. Sanlo, Unheard Voices: The Effects of Silence on Lesbian and Gay Educators (1991).
persecution. For instance, the expectation that educators act as exemplars for students has led to intense public scrutiny of teachers’ personal lives and restricted professional autonomy. The fact that schoolteachers work with children opened the door to homophobic fears – unsubstantiated but persistent – that gay and lesbian teachers would ‘recruit’ students; this fear reinforced demands that teachers act in accordance with a narrow standard of normative behavior…. Public perceptions of schoolteachers as guardians of the dominant ideology along with restrictive professional structures, such as contracts that forbade specific personal behavior engendered conservative thought and demeanor…. Historically, teacher organizations have not supported colleagues who transgressed social norms and, thus, teachers have been easy targets for state suppression of gay and lesbian people. 74

Indeed, over time, public school administrators have taken great care in how they hired and fired school personnel, routing out the “odd” or “peculiar” female spinsters and male bachelors, while searching for those who fulfilled social expectations for gender-conforming heterosexuality, including marriage for both men and women. 75 In the postwar economy, women were pushed out of administrative positions, and pulled toward elementary education and home economics; men returning from military service were placed into administrative positions and rewarded for their “manly” physical prowess. 76 Extending the purge of suspected homosexuals from the military and other government positions, to secure the nation from so-called “sex perverts” during the Cold War era, 77 new fears about the purported corrupting influence of homosexuals over children had school boards across the country screening school personnel for any possible “homosexual contagion.” Systematic McCarthy-style investigations took place of those suspected to be gay or lesbian educators. 78

Ironically, in the midst of the terrifying 1950s, the American Law Institute recommended that all non-commercial, consensual, private sexual behavior be de-criminalized. 79 What this meant for queer people, was that their legal status should be decriminalized and laws criminalizing same-sex sexual behavior should be repealed. By the 1970s, bolstered in part by the nascent “gay rights movement,” as well as the APA’s reformed stance on homosexuality, twenty-one states decriminalized same-sex consensual sexual behavior. 80 However, the 1970s also saw the rise of backlash against gay rights and the homophobic targeting of “militant homosexual teachers” by Anita Bryant, John Briggs, and others across the country, who portrayed gay men and lesbians who worked in schools as dangerous pedophiles, intent on turning their children into homosexuals. 81 This became a politically and financially effective rallying cry for the emerging Protestant Right. During the 1980s, the movement to legislatively repeal sodomy laws became entangled with the purity politics of the growing Protestant Right, which also focused on the danger of “homosexual teachers” to public schoolchildren. 82

74 GRAVES, supra note 69, at 120-21.
75 BLOUNT, supra note 63; BLOUNT, supra note 73; BLOUNT, supra note 2.
76 BLOUNT, supra note 2, at 81-85.
77 JOHNSON, supra note 54.
78 BLOUNT, supra note 2; GRAVES, supra note 69; HARBECK, supra note 9; Lugg, supra note 59.
80 Lugg, Thinking about Sodomy, supra note 2.
81 BLOUNT, supra note 2; GRAVES, supra note 69; Lugg, Religious Right, supra note 2.
82 BLOUNT, supra note 2; Eskridge, supra note 60; Lugg, Religious Right, supra note 2.
At the same time, the movement to de-criminalize queer sex also received a crippling “one-two” punch. The first was the emergence of AIDS, which struck down a generation of gay men who were well-versed in political action, and brought with it a rabid anti-queer hysteria.\textsuperscript{83} The second blow came in the 1986 U.S. Supreme Court’s 5-4 decision in \textit{Bowers v. Hardwick}, which ruled that the Georgia statute banning consensual sodomy was constitutional.\textsuperscript{84} In upholding the law, the court stated that there was no constitutional right to “homosexual sodomy.”\textsuperscript{85} Nor did LGBT people have a right to privacy if “homosexual conduct occurs in the privacy of the home.”\textsuperscript{86} During this period of conservative political retrenchment, reformers shifted their focus to the judiciary and sued under both the Federal and various state constitutions.

While the movement to de-criminalize queer identity did progress into the 1990s, the devastating \textit{Hardwick} decision enabled individual states, and the U.S. military, to maintain both criminal bars as well as other policies that stigmatized queer Americans. Furthermore, a growing Protestant Right made the repression of U.S. queers a central focus of their political action.\textsuperscript{87} By the dawn of the 21\textsuperscript{st} century, we remain criminals and heretics in many parts of the United States. Most queer public school teachers remain closeted,\textsuperscript{88} while queer public school administrators were and are deeply closeted.\textsuperscript{89}

Some of this fear is a legacy of the Cold-War era witch-hunts that began in the early 1950s and crashed over public schools in successive waves.\textsuperscript{90} This did not abate until the early 1990s.\textsuperscript{91} But since the 1970s, the Protestant Right, and others wishing to counter LGBT rights, have consistently and insistently argued that openly queer educators present a unique moral and physical threat to the impressionable youth of America.\textsuperscript{92} Their objections center on the heretical and contagious nature (in their world-view) presented by “open homosexuality.”\textsuperscript{93} Supreme Court Justice Antonin Scalia succinctly expressed this worldview when he wrote in his dissent in \textit{Lawrence v. Texas}, joined by Chief Justice Rehnquist and Justice Thomas, that:

\begin{quote}
Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view
\end{quote}

\textsuperscript{84} Bowers v. Hardwick, 478 U.S. 186 (1986).
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 195-96.
\textsuperscript{87} BLOUNT, supra note 2; Eskridge, supra note 60; Lugg, Religious Right, supra note 2.
\textsuperscript{88} DuBuisson, supra note 72; JACKSON, supra note 49.
\textsuperscript{90} Eskridge, Democracy, supra note 67; Eskridge, supra note 60; JOHNSON, supra note 54.
\textsuperscript{91} Lugg, Thinking about Sodomy, supra note 2.
\textsuperscript{92} DuBuisson, supra note 72; William N. Eskridge, Jr., No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review, 75 N.Y.U. L. REV. 1327 (2000); Eskridge, supra note 60.
\textsuperscript{93} DuBuisson, supra note 72; Eskridge, supra note 92; Eskridge, supra note 60; Knauer, supra note 10; Lugg, Religious Right, supra note 2.
this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.94

As a result of this worldview within the education community, since the 1990s, there have been several high profile cases of teachers being harassed by students, parents, and co-workers, threatened with dismissal, and actually dismissed for being publicly out about their queer status.95 Most others have been subject to differential treatment and a hostile work environment, types of discrimination often “difficult to address legally.”96 Countless others continue to manage their identities and carefully monitor their activities on and off campus in an effort to thwart suspicion.

Public school workers’ vulnerability to anti-LGBT bias and discrimination is not limited to direct surveillance of their individual identity or comportment, that is, who and how they are, but also indirectly based on what they are allowed to teach or discuss. This is because, in contrast to those who work in the business world, the public education workplace itself is a recognized battle site within the ongoing religious culture war.97 Who gets to say what about sexuality in U.S. public schools remains one of its keenest fights.98 When school-based struggles over sexuality-related content erupt in some form -- whether over comprehensive and medically accurate sexual health education,99 enumerated anti-bullying policies,100 or LGBT-inclusive social studies textbooks101 — the suitability and scrutiny of LGBT people emerges along with it, and public school workers become potential collateral damage. This occurs even when the issue at hand is not school-related, such as the protracted dispute over same-sex marriage in California,102 when opponents used the specter of innocent school children being forced to learn about gay people as the political key to their campaign. Workplace equality in the education world has to engage this additional layer of vulnerability, along with the lack of legal protections afforded by current non-discrimination policies.103

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95 See Stuart Biegel, Unfinished Business: The Employment Non-Discrimination Act (ENDA) and the K-12 Education Community, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 357 (2011); DuBuisson, supra note 72; Eckes & McCarthy, supra note 72; Lugg, Sissies, supra note 2.
96 Eckes & McCarthy, supra note 72, at 538; see Tiffany E. Wright, LGBT Educators’ Perceptions of School Climate, 91 Phi Delta Kappan 49 (2010).
97 JAMES W. FRASER, BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA (1999); THE INSTITUTIONS OF AMERICAN DEMOCRACY: THE PUBLIC SCHOOLS (Susan Fuhrman & Marvin Lazerson eds., 2005); Russell et al., supra note 14; The Role of Religion in 21st-Century Public Schools (Steven P. Jones & Eric C. Sheffield eds., 2009).
103 NAT’L EDUC. ASSOC., supra note 30.
IV. Public School workers navigating anti-LGBT bias and discrimination

Systematic purges, whispered rumor campaigns, public denials, silent resignations, and self-censorship characterized the intimidation and discipline endured for decades by school personnel who possessed same-sex desire and non-conforming gender expression. However, growing patterns of individual resistance and collective action can be found as well. Inspired by the rising civil rights movement, and the nascent sexual liberation, feminist and gay liberation movements, LGBT public school workers began to take a stand against ambiguous morality clauses and the wholesale assumption that being a gay educator was pathological, criminal and/or sinful. Individual employees began to fight LGBT-related discrimination in court, groups of public school personnel offered support to each other, and organizational infrastructure grew to create institutional changes in workplace policies that could protect public school workers.

According to education and legal scholar Stuart Biegel, individual school workers have relied primarily on the Fourteenth Amendment Equal Protection Clause to pursue justice in anti-LGBT workplace discrimination cases. Several of these cases stand out as early turning points, even when plaintiffs received negative or mixed outcomes, because they indicate a growing lack of willingness to accept the assumption that the public knowledge of one’s sexual orientation constitutes a sufficient rationale for legal termination of a career in public education. Overall, he suggests that California’s Morrison v. State Board of Education decision in 1969 was foundational for LGBT school employees because it determined a narrow means by which morality clauses found in most educator contracts should be interpreted by public school districts. Biegel argues that later cases, where the courts rejected anti-LGBT employment discrimination indicate a legal trend toward accepting gay people and transgender people (e.g. the Dana Rivers settlement) as suitable public school employees. Notwithstanding the positive trend, he states that:

Disclosure of a person’s sexual orientation or gender identity in many K-12 institutions can still lead to the loss of employment opportunities and the discrediting of one’s professional and personal standing. All too often, LGBT educators today are confronted with the message that they had better remain as closeted as possible. For some public school workers, this is an unacceptable message, and they have organized collectively to change it.

Drawing on skills and networks from gay liberation organizations, in the mid-to-late 1970s, LGBT public school teachers began to collectively organize, while individual court cases were pursued with the support of newly identified colleagues and the backing of newly

104 BLount, supra note 2.
105 Id.; Biegel, supra note 2; Biegel, supra note 95; Coming Out of the Classroom Closet: Gay and Lesbian Students, Teachers and Curricula (Karen M. Harbeck ed., 1992); Harbeck, supra note 9; Lugg, Religious Right, supra note 2; Catherine A. Lugg, One Nation Under God? Religion and the Politics of Education in a Post-9/11 America, 18 EDUC. POL’Y 169 (2004).
106 Biegel, supra note 2; Biegel, supra note 95.
108 Biegel, supra note 2, at 57.
110 Biegel, supra note 2, at 53-54.
111 Biegel, supra note 95, at 397.
formed organizations. In New York City, for example, educators gathered to establish the Gay Teachers Association, which broke the social isolation experienced by closeted teachers while still ensuring them the secrecy they desired to protect their job status. The GTA advertised meeting dates and times along with the assurance that “closet rights” would be “respected.” GTA and other teacher association groups around the country went on to pursue policy changes to protect the rights of LGBT school employees through inclusion of “sexual orientation” in non-discrimination policies and in mainstream resolutions. Early political, financial, and legal support for LGBT educators from the National Education Association (NEA) and other groups such as the Gay Rights National Lobby, which later merged with the Human Rights Campaign, helped to shore up the effectiveness of such groups.

The NEA is the closest education system equivalent to other business-focused workplace equality organizations. Although its regional counterparts (e.g. Florida Education Association) have not all been supportive of LGBT employees, the national association has been a bold and early leader in the recognition of LGBT issues in education. As early as 1972, the NEA “funded the very first case ever litigated on behalf of an openly gay K-12 teacher – a federal lawsuit against the Montgomery County (Maryland) Board of Education.” The NEA has hosted a Gay Caucus since 1972, joined by an “ex-gay” caucus as well. In 1999, they published Strengthening the learning environment: A school employee’s guide to gay, lesbian, bisexual, and transgender issues, and in collaboration with partner organizations including GLSEN, designed training modules addressing student climate issues for its members. Additional NEA publications help educators understand their still precarious patchwork of legal rights as employees. Without a comprehensive non-discrimination employment policy at the federal level, or stronger state-level statutes, however, adults who work in schools will remain in a marginalized position within the struggle for workplace equality. Full equality, regardless of workplace, will be achievable when adults who work in K-12 public schools have the legally protected right to be out, and those who experience anti-LGBT bias and discrimination have the backing of effective legislation, policies, and bargaining agreements.

112 BLOUNT, supra note 2, at 125.
114 NAT’L EDUC. ASSOC., supra note 30.
115 BLOUNT, supra note 2, at 1.
119 NAT’L EDUC. ASSOC., KNOW YOUR RIGHTS: LEGAL PROTECTION FOR GAY, LESBIAN, BISEXUAL, AND TRANSGENDERED EDUCATION EMPLOYEES (2002); NAT’L EDUC. ASSOC., SEXUAL ORIENTATION AND GENDER IDENTIFICATION: ISSUES FOR BARGAINING AND ADVOCACY (2006); NAT’L EDUC. ASSOC., supra note 30.
120 BIEGEL, supra note 2; Biege, supra note 95; Eckes & McCarthy, supra note 72.
Meanwhile, the infrastructure continues to grow to transform the teaching and learning climate in K-12 schools through the efforts of organizations such as the Gay, Lesbian and Straight Education Network (GLSEN). However, these advocacy organizations must balance the politically powerful need for educators to come out and be counted as legitimate and valued employees in order to garner support for socio-legal change, with the fears school workers continue to have because they lack the legal protections to do so. LGBT public school employees face this tension on a daily basis: the desire to be out, and the assumption that doing so could likely lead to harassment, if not possible firing. Still, individual public school workers have found the courage to be their full selves on the job, and this has brought them significant personal and professional satisfaction. Janna Jackson, for example, found in her analysis of gay and lesbian teachers’ stories that eventually “just as confidence in teaching made participants more likely to come out, coming out created more confidence in teaching.” Personal stories such as those analyzed in Jackson’s 2007 study offer pragmatic and inspiring models to others employed by the public school system, one of the most vulnerable worksites for individuals who reject transphobic and heterosexist values. Fortunately, two related LGBT equality movements have the knowledge, resources, networks, and access to address this queer gap.

V. The queer gap between “workplace equality” and “safe schools”

The Workplace Equality Movement has exhibited signs of great success, with leading corporations rejecting transphobic and heterosexist values by affirming, at least in their stated policies, the personal and professional lives of their employees, regardless of sexual orientation or gender identity. A review of Diversity Inc.’s top 50 and the Human Rights Campaign’s Corporate Equality Index demonstrate this success. This success could be the result of business leaders wishing to have their pro-LGBT values reflected in their business plan, but it is safe to say for at least some of the corporations on the list, diversity management in general and LGBT equality in particular is linked to their competitive bottom line. Hiring and retaining the best employees translates in the long run into higher profits. This competitive bottom line has been shaped in part by government contract policies, which demand documentation of a diverse workforce and supply chain, along with effective marketing campaigns that reward businesses for embracing the LGBT workforce. Business has been pushed toward workplace equality, but the successful institutionalization of the Workplace Equality Movement means that employers are now being pulled toward it.

The Safe Schools Movement has also surged forward, buoyed by public attention to the tragic loss of young lives within the context of schools hostile to sexual minorities and gender non-conforming youth. Research indicates that the current learning environment in

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122 JACKSON, supra note 49, at 107.
K-12 schools is an unhealthy one for youth, with queer students being taught that they do not belong in their school community.\textsuperscript{124} At the same time, non-queer students are taught to conform or be subjected to bias and discrimination, and that it is acceptable to denigrate and devalue members of minority groups. The public has begun to rally behind the need to transform our school culture, and tools and resources to do so are now available. Most Americans, regardless of their religious, political, or philosophical orientation, agree that students should not be targeted with anti-LGBT harassment and violence.\textsuperscript{125} The pathway to achieve a harassment- and violence-free school is less clear, as is the level of support for an affirming school, where students are encouraged to be and become themselves by inclusive textbooks, co-curricular programming, and educators alike. Despite the empirical data that documents the need for students to have supportive adults employed by schools,\textsuperscript{126} the American public remains deeply divided in terms of the suitability of ‘out’ school workers.\textsuperscript{127} Limited attention within the Safe Schools Movement to the rights and well-being of public school workers reflects this ambivalence.

As a result of the Workplace Equality Movement’s focus on the business world, and the Safe Schools Movement’s focus on student safety and well-being, public school workers constitute a queer gap, left widely unprotected against anti-LGBT bias and discrimination. A range of solutions is available. First, a promising engagement between workplace equality and safe schools can be found within the unions, such as the National Education Association and the American Federation of Teachers (AFT). The AFT is affiliated with the AFL-CIO, whose constituent organization, Pride at Work, trains members how to secure LGBT-inclusive union contract language and supports the passage of a federal employment non-discrimination act. Union organizers are experts at securing worker rights; their motto, “An injury to one is an injury to all”, represents the spirit of worker solidarity and points directly to the need to protect everyone at work, regardless of sexual orientation or gender identity.\textsuperscript{128} Unfortunately, we have observed the increasing political marginalization of unions, particularly of public employee unions — at the very moment when workers’ economic stability has reached a low point.\textsuperscript{129} A coalition between the LGBT Workplace Equality Movement and the union movement could strengthen both.

Second, the Workplace Equality Movement could expand to include the public school system. Public schools are expected to operate like businesses (e.g. identify efficiencies in order to teach more students with fewer resources, reward employees with performance-based outcomes); the burgeoning charter school movement means that many schools now constitute businesses, and the privatization of school services such as food services and facilities management translates into many on-site employees already being employed by corporations, which may very well support workplace equality, such as Sodexo, one of the largest private school service providers. Perhaps workplace equality in public schools will

\begin{thebibliography}{99}
\item[124] Kosciw et al., supra note 7.
\item[125] Do Anti-Bullying Laws Push Gay Agenda?, supra note 100.
\item[126] Kim et al., supra note 27; Kosciw et al., Who, What, Where, supra note 14.
\item[127] Biegel, supra note 2.
\end{thebibliography}
emerge as an unintended consequence of the businessification and privatization of public schools.

Third, the Safe Schools Movement could turn more of its attention to the workers within public schools, beyond the investment it already makes to persuade educators to stand up for LGBT youth and others targeted with anti-LGBT bias and discrimination. The Safe Schools Movement is positioned well to make this shift, given the high number of public school workers already engaged in efforts to address the anti-LGBT school climate. Indeed, the leading Safe Schools Movement organization, GLSEN, was founded by teachers and has continued to attract significant number of teachers, counselors, and others who work in schools on the front lines with students, and who use its resources and programming. This additional focus on school employees as workers, not simply as either part of the problem or solution to safe schools, would require an increase in financial resources and a payment of political capital. Both requirements may be too risky for this nascent movement premised primarily on securing buy-in by a public newly convinced of the movement’s legitimacy. However, the gains garnered by the Safe Schools Movement cannot be fully implemented without a fully empowered and protected workforce.

In the meantime, school workers, those who labor in classrooms and cafeterias, school buses and sport teams, and playgrounds and principal’s offices will continue to embody the queer gap as they struggle for dignity at work. Their dignity may be achieved personally, by relying on the discretionary power of one’s colleagues and supervisor, or it may be achieved collectively, by drawing on the institutional power of a federal employment non-discrimination policy and an inclusive union contract. Either way, public school workers could be part of, and benefit from, a joining together of the Workplace Equality and Safe Schools Movements.
ONE OF THESE THINGS IS NOT LIKE THE OTHER: AN ANALYSIS OF MARRIAGE UNDER THE IMMIGRATION AND NATIONALITY ACT

By Regina M. Jefferies*

The United States’ immigration legal framework regulates the flow of people into the country by generally requiring some type of connection between the intending immigrant and an individual or business already present in the United States.  One of the primary features of the Immigration and Nationality Act (INA) is that the individual or business must “petition” for the intending immigrant’s admission into the country as a lawful permanent resident.  In the case of an individual petitioner, the petition must be predicated on a pre-existing familial relationship.  However, the INA strictly limits the universe of family members who may petition for an intending immigrant through its definition of the concepts of “family” and “spouse.”

This Article will focus exclusively on the “spouse” category and the interpretation of “marriage” within the immigration legal framework, including how the term has been defined and limited throughout time, as well as the legal effects of those limitations.

Prior to the 1996 passage of the Defense of Marriage Act (DOMA), no statute within the immigration legal framework restricted – or even touched upon – the application of the term “marriage” to only opposite-sex marriages.  In fact, the INA itself has never contained

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1 Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, § 204(b), 66 Stat. 163 (1952) [hereinafter INA of 1952]; INA § 201(b)(2)(A)(i) (2011); INA § 203(a) (2011).  This Article will only address the issue of obtaining lawful permanent residency, or a “green card,” through a family relationship and will not touch upon the issue of nonimmigrant (i.e. temporary) immigration status, or the employment-based lawful permanent residency process.  INA of 1952 § 205; 8 U.S.C. § 1151(b)(2)(A)(i), (c) (2012).

2 “Admission” should not to be confused with “entry” into the United States.  8 U.S.C. § 1101(a)(13)(A) (2012); see IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 55 (12th ed. 2010).  A person may be admitted to permanent resident status from within the United States and that “admission” is not considered an “entry” into the United States.  In re Adetiba, 20 I. & N. Dec. 506 (B.I.A. 1992); In re Connelly, 19 I. & N. Dec. 156 (B.I.A. 1984).  Admission is not only entry into the United States - the person must enter and be inspected and authorized.  You used to be able to enter anywhere along the border (even without inspection by an immigration officer), but the new term "admission" changed that.

3 The INA of 1952 established the current family preference system, which gives priority to the relatives of United States citizens.  Monique Lee Hawthorne, Family Unity in Immigration Law: Broadening the Scope of “Family”, 11 LEWIS & CLARK L. REV. 809, 810 (2007); INA of 1952 § 205; INA § 201(b)(2)(A)(i); INA § 203(a).


a statutory definition of “marriage.” 6 However, since DOMA’s application to the immigration legal framework, thousands of legally married same-sex couples have been prevented from petitioning for an alien spouse’s admission into the United States as a lawful permanent resident. 7 As a greater number of states recognize and officially sanction same-sex marriage as a fundamental right, the number of couples separated by this pernicious and illogical immigration policy continues to grow. 8

Despite the Obama Administration’s recent determination that Section 3 of DOMA is unconstitutional and its decision to no longer defend the law in court, the Administration has not stopped enforcing DOMA. 9 In the immigration context, this has meant that United States citizen and lawful permanent resident same-sex spouses still cannot petition for a foreign national spouse’s admission into the United States as a permanent resident. This has also meant that same-sex spouses cannot apply for relief from removal 10 based on their legal marriage to a United States citizen or lawful permanent resident of the same sex. 11 As however, did address this issue. See infra note 19.

6 The INA has, however, defined “husband,” “wife” and “spouse” over time. Immigration Act of 1924 § 28(n); INA of 1952 § 101(a)(35).


9 On February 23, 2011, Attorney General Eric Holder issued a statement confirming that the Obama Administration would no longer defend the constitutionality of Section 3 of DOMA in court. Press Release, Dep’t of Justice, Statement of the Att’y Gen. on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at http://www.justice.gov/opa/pr/2011/February/11-ag-222.html. Attorney General Holder explained that President Obama determined that Section 3 of DOMA, as applied to same-sex couples legally married under state law, violates the equal protection portion of the Fifth Amendment. Letter from Eric H. Holder, Jr., Att’y Gen., Dep’t of Justice, to The Honorable John A. Boehner, Speaker of the House (Feb. 23, 2011), available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. “Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch.” Id.

10 On April 1, 1997, Congress created new “removal” procedures for people who had previously been subject to “deportation” or “exclusion” hearings. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(c), 110 Stat. 3009 (1996) [hereinafter IIRIRA]. Several categories of relief from removal are only available to individuals with a “qualifying relative,” such as a United States citizen or lawful permanent resident spouse, child or parent. See 8 U.S.C. § 1229B(b)(1), (b)(2), (b)(6) (2012).

11 There has been some minor progress in this area, with the U.S. Department of Homeland Security’s recently issued prosecutorial discretion memorandum, which directs Immigration and Customs Enforcement (“ICE”), the agency charged with detaining, prosecuting and removing aliens, to focus on the agency’s enforcement priorities and exercise broader discretion. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to Field Office Dir.s., Special Agents in Charge & Chief Counsel (June 17, 2011), available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. Senior Obama Administration officials have confirmed that same-sex partners or spouses of United States citizens and lawful permanent residents are eligible for inclusion in the Memo’s reference to “family relationships.” Chris Geidner, Prosecutorial Discretion: Homeland Security announces implementation of changes that will enable some in same-sex relationships to avoid deportation, METROWEEKLY (Aug. 18, 2011), http://metroweekly.com/news/?ak=6513.
a result, thousands of individuals who would otherwise be immediately eligible to apply for lawful permanent residency live in limbo, unable to plan or begin their married lives free from fear of separation.

This Article will examine the current official application of the term “spouse” to only opposite-sex married couples, leaving same-sex marriage as the only type of marriage that may be legally entered into within the United States, but that is categorically invalid for immigration purposes. This Article will also demonstrate that the federally-imposed definition of marriage not only violates the Tenth Amendment, but cannot pre-empt a state law recognizing same-sex marriage for federal immigration purposes under the Supreme Court’s current Supremacy Clause jurisprudence. This Article is presented in three parts. Part I will address the development of the definitions of “marriage” and “spouse” for immigration purposes, as well as the current legal regime governing spousal immigrant visa petitions. Part II will examine the types of marriage recognized and unrecognized for purposes of an immigrant visa petition, as well as DOMA’s singular, blanket exclusion of lawfully performed same-sex marriages from consideration as a lawful marriage. Part III examines the serious Supremacy Clause and Tenth Amendment problems posed by applying DOMA to the INA, particularly in light of recent federal court decisions finding the application of DOMA unconstitutional in legal contexts other than immigration. This Article serves to both chronicle what has become DOMA’s steady march towards demise and to argue that the legal justifications for DOMA’s disposal in the immigration sphere already exist and lack only application.

I. An Overview of “Marriage” in U.S. Immigration Law

Prior to the passage of the Immigration and Nationality Act of 1952, immigration law in the United States consisted largely of a patchwork of provisions primarily focused on excluding immigrants based upon their country of origin. Not until 1952 did Congress develop the legal framework for petition-based immigration predicated upon family relationships. This policy of family reunification and preservation has become one of the

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13 Although unconsummated proxy marriages may be legally entered into within some of the United States and are not recognized under the INA, no blanket prohibition on proxy marriages exists. 8 U.S.C. § 1101(a)(35) (2012), INA of 1952, Pub. L. No. 82-414, §101(a)(35), 66 Stat. 163, 170. Moreover, the INA allows an alien party to an unconsummated marriage to cure the legal defect by sanctioning admission to the United States as a fiancée, which status may be later adjusted to that of a permanent resident. U.S. Dep’t of State, Visas 9 FAM. 40.1, n.1.3 (2008), available at http://www.state.gov/documents/organization/86920.pdf.


defining policy goals of modern immigration law, although the reality of the current immigration system falls far short of that goal. The stark difference between policy ideal and practical reality rings particularly true for same-sex families who have been excluded from participation in the family-based immigration system. This exclusion first took the form of agency policy and federal court decisions, because Congress did not include gendered terms in its statutory definition of “spouse,” leaving plenty of room for interpretation. However, the Defense of Marriage Act of 1996 explicitly codified the


For example, although the INA included “psychopathic personality” – not “homosexuality” – as a ground for exclusion, Congress and agencies charged with implementing immigration laws interpreted that term to encompass “homosexuals.” S. REP. NO. 1137, at 9 (1952) ("The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect . . . is sufficiently broad to provide for the exclusion of homosexuals and sex perverts"). In 1965, Congress amended the INA to exclude individuals “afflicted with . . . sexual deviation” from the United States, which was defined to encompass LGBTI individuals. INA of 1965, Pub. L. No. 89-236, § 212(a)(4), 79 Stat. 911 (1965). However, it was the 9th Circuit Court of Appeals decision in Adams v. Howerton, discussed in more detail below, which barred a legally married same-sex couple from classification as a married couple under the INA. Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982). The decision was based, in part, on the existence of the INA excluding individuals suffering from “psychopathic personality” and Congress’ intent for that term to include “homosexuals,” from immigrating to the United States. Id. at 1040-41. USCIS also continued the policy of non-recognition of same-sex marriages following the Howerton decision and the passage of DOMA. Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigration Servs., to Reg’l Dir., Serv. Ctr. Dirs. & Dist. Dirs. (Apr. 16, 2004), available at http://www.scribd.com/doc/22576819/Memo-From-William-Yates-on-Adjudication-of-Petitions-and-Applications-Filed-by-or-on-Behalf-of-Or-Document-Requests-by-Transsexual-Individuals-April-17, which says that, in enacting immigration and nationality laws, Congress intended the terms ‘spouse’ and ‘marriage’ to include only the partners to a legal, monogamous marriage between one man and one woman. Moreover, the 1996 Defense of Marriage Act (DOMA), 1 U.S.C. § 7, bans any Federal recognition of same-sex marriages for immigration purposes . . .

Immigration Act of 1924, Pub. L. No. 68-139, § 28(n), 43 Stat. 153 (1924); INA of 1952 § 101(a)(35); 8 U.S.C. 1101(a)(35) (2012). In Adams v. Howerton, the Ninth Circuit decision relied heavily on statutory construction to decide that the ordinary meaning of the term “spouse” does not encompass the parties in a same-sex marriage. 673 F.2d at 1040. The Ninth Circuit could not rely on the same reasoning today, as the ordinary meaning of the term, including the dictionary sources the court cited in the decision, has grown to include same-sex married couples. Daniel Redman, Noah Webster Gives His Blessing, Dictionaries recognize
blanket exclusion of legally married same-sex couples from the immigration statutory scheme for the first time.\footnote{DOMA, Pub. L. No. 104-199, § 3, 110 Stat. 2419, codifed at 1 U.S.C. § 7 (2012). The INA provision interpreted to exclude LGBTI immigrants was scrapped in 1990. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990). Though the Ninth Circuit decision in Adams v. Howerton has not been overruled, it is highly unlikely the Court of Appeals would continue to uphold the ruling in light of recent decisions and the fact that the court’s decision was largely supported by the existence of an INA exclusion provision that was later discarded, as well as evolving attitudes and acceptance of same-sex marriage (officially and unofficially). Howerton, 673 F.2d at 1040-41; Redman, supra note 20; see also In re Golinski, 587 F.3d 901 (9th Cir. 2009).}

A. The Development of the Definitions of “Spouse” and “Marriage”

In reviewing the development of the definitions of “spouse” and “marriage” in the immigration legal framework through an LGBTI\footnote{The acronym “LGBTI” refers to lesbian, gay, bisexual, transgender and intersex individuals.} lens, one must consider both the definitions themselves, as well as the evolving treatment of LGBTI individuals within federal immigration law. The INA has never defined the term “marriage“ and never explicitly excluded same-sex couples from the definition of “spouse,” “husband,” or “wife.” In fact, LGBTI individuals have never been explicitly mentioned in the immigration and nationality statutes. However, Congress has historically sought to exclude “homosexuals” from immigrating to the United States by implementing medical grounds of exclusion intended to encompass the term.\footnote{8 U.S.C. § 1101(a); INA of 1952 § 101(a); Immigration Act of 1924 § 28.} The tension between the open definition of “spouse” in the INA and the treatment of LGBTI immigrants, as a group, has led to the development of an inherently contradictory legal framework as it relates to same-sex couples.

The Immigration Act of 1924 provided the first broad definition of the terms “husband” and “wife” to exclude only “a wife or husband by reason of proxy or picture marriage.”\footnote{This is to say that the INA itself has never defined the term “spouse” to exclude same-sex married couples, though the INA did exclude “homosexuals” from immigrating to the United States until 1990. See INA of 1952 § 101(a)(35).} The Act did not outline any other requirements for the terms.\footnote{Christopher S. Hargis, Queer Reasoning: Immigration Policy, Baker v. State of Vermont, and the (Non)Recognition of Same-Gender Relationships, 10 LAW & SEXUALITY 211, 217 (2001).} The trend continued with the first major piece of immigration legislation, the INA of 1952, which combined the piecemeal immigration framework into a single act.\footnote{Immigration Act of 1924 § 28(n).} The INA of 1952 defined “spouse,” “wife,” or “husband” only to exclude a spouse, wife, or husband “by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.”\footnote{Id. at § 28(l) (defining the term “unmarried” as “an individual who at such time is not married, whether or not previously married”).} These broad statutory definitions align with the longstanding acceptance within immigration law of the common
law rule that a marriage is considered valid as long as the marriage was valid in the jurisdiction where it occurred. In fact, this remains the legal standard under the current regime, with limited exceptions, which this Article will address in detail.

The next major piece of immigration legislation, the Immigration and Nationality Act (INA) of 1965, did not alter the definition of “spouse,” “wife,” and “husband” contained in the INA of 1952. However, the INA of 1965 dealt a blow to LGBT immigrants when Congress codified the practice of excluding LGBT individuals from immigrating to the United States by adding “psychopathic personality” to the grounds of exclusion and interpreted that term to include “homosexuality.” With this action, Congress achieved a more explicit exclusion of LGBT individuals from immigrating to the United States. In 1982, the Ninth Circuit Court of Appeals issued its decision in Adams v. Howerton, providing further support for the exclusion of legally married same-sex couples from the immigration scheme. In Adams, the court held that immigration spousal privileges did not extend to a legally married same-sex couple, reasoning that the “ordinary meaning” of spouse did not encompass spouses of the same-sex and that the INA’s blanket exclusion of “homosexuals” clearly supported such a reading of the statute. In this one decision, the court effectively closed the INA’s previously non-gendered definition of “spouse” to same-sex couples.

Not until 1990, with the passage of the Immigration Act of 1990, did Congress officially repeal the classification of “psychopathic personality” as a ground for exclusion.

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30 Pinix, supra note 17(citing Thomas Alexander Aleinikoff et al., Immigration and Citizenship 302-03 (5th ed. 2003)).

31 In re Lovo-Lara, 23 I. & N. Dec. 746, 748 (B.I.A. 2005); U.S. Citizenship & Immigration Servs., Adjudicator’s Field Manual ch. 21.3(a)(2)(B), (C) (2012), available at http://www.uscis.gov/portal/site/uscis/menuitem.fb6d4f512a2342135be7e9d7a10e0dc91a0/?vgnextchannel=fa7e539dc4bed010VgnVCM1000000ed190aRCRD&vgnextoid=fa7e539dc4bed010VgnVCM100000ed190aRCRD; but see Id. at ch. 21.3(a)(2)(1) (regarding same-sex marriages).


33 See note 20, supra.

34 Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir. 1982). In 1971, Richard Adams, a United States citizen, met Anthony Sullivan, an Australian citizen visiting the United States as a tourist, and began a relationship. Adams v. Howerton, 486 F. Supp. 1119, 1120 (C.D. Cal., 1980). On January 7, 1974, Anthony’s tourist visa expired. Id. On April 21, 1975, the couple legally married in Boulder, Colorado and filed a family petition to classify Anthony as Richard’s “immediate relative” spouse, which would allow Anthony to become a lawful permanent resident. Id. The Immigration and Nationality Service (INS) denied the petition in 1975. Id. The couple appealed the denial of the petition and the district court ordered summary judgment for the INS. Adams, 673 F.2d at 1038. On appeal, the Ninth Circuit also ruled against the couple, finding that the ordinary meaning of the term “spouse” did not encompass the parties in a same-sex marriage and that rules of statutory construction compelled a finding that the INA definition of “spouse” would not include a legally married same-sex couple. Id. at 1040. The Ninth Circuit also relied heavily on the existence of the provision in the INA excluding individuals with “psychopathic personality” from immigrating to the United States, and Congress’ intent that the term include “homosexuals,” to provide support for its decision in Howerton. Id. at 1040-41.

35 Adams, 673 F.2d 1036.

36 In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which also did not amend the INA definitions of “marriage” or “spouse” and focused primarily on addressing the issue of unlawful immigration. Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986).
Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, which did not change, or even address, the statutory definitions of “spouse” or “marriage” and nationality laws, Congress intended the terms “spouse” and “marriage” to include only the partners to a legal, monogamous marriage between one man and one woman. Moreover, the 1996 Defense of Marriage Act (DOMA), 1 U.S.C. § 7, bans any Federal recognition of same-sex marriages for immigration purposes . . . .


With the number of jurisdictions recognizing same-sex marriage on the rise, the tension created by DOMA’s prohibition on the recognition of same-sex marriages under federal law and the immigration statutory scheme’s longstanding acceptance of marriages as valid if they were valid in the jurisdiction in which they were performed, cannot be sustained. This tension mirrors a similar legal discourse that has played out in recent years, relating to the extent of states’ rights under the Tenth Amendment to the U.S. Constitution. Nothing within the INA itself prohibits the federal government from recognizing valid, same-sex marriages conducted within the United States for immigration purposes. Only the application of DOMA to the INA prevents legally married same-sex spouses from enjoying the benefits of an immigration scheme fundamentally based upon family connections.

B. Current Legal Regime Governing Immigrant Visa Petitions

The Immigration and Nationality Act of 1952 forms the basis of the modern immigration scheme. Although the 1952 Act continued to restrict the number of immigrants coming into the United States through quotas based on national origin, it allowed certain groups of foreign nationals to immigrate without restriction. These “nonquota immigrants” notably included the children or spouse of a United States citizen. The Act of 1952 divided relatives falling outside of this narrow group into “preference”

47 Dan Fastenberg, A Brief History of International Gay Marriage, TIME (July 22, 2010), http://www.time.com/time/world/article/0,8599,2005678,00.html.
48 Id.
49 In re Marriage Cases, 183 P.3d 384 (Cal. 2008); CAL. CONST. art. I, § 7.5.
55 Id.
57 Id.
categories, with limitations on the number of immigrant visas issued to each category. In addition to creating a “preference” system for family immigration, the Act created a system by which any individual or business must file a petition with the Attorney General to classify a foreign national as an “immigrant” before the foreign national could enter the country as a lawful permanent resident.

Subsequent reforms to the INA scrapped the “nonquota immigrant” label and replaced it with the category of “immediate relative,” which includes the spouse, minor children, and parents of a United States citizen over the age of twenty-one. Like a “nonquota immigrant,” an “immediate relative” does not fall subject to a numerical quota. The Immigration Act of 1990 then redefined the family-based “preference” system by revising the relative categories. Under the current framework, the family-based preference system consists of four categories. The first category is reserved for sons and daughters (over the age of twenty-one) of United States citizens. The second category is split into two subcategories. The first sub-category is comprised of spouses and minor children of permanent residents and the second sub-category of unmarried adult sons and daughters of permanent residents. The third category is comprised of the married sons and daughters of United States citizens and the fourth category for the brothers and sisters of adult United States citizens. In dividing the groups in such a way, Congress created a system favoring certain family relationships over others with the spouse, minor children and parents of U.S. citizens given primacy.

The “petition” process that Congress created with the INA of 1952 remains an integral part of modern immigration law. In order to sponsor a relative for an immigrant visa, the petitioner and intending immigrant must meet a number of qualifications. The qualifications include filing the appropriate forms and providing documentation to establish both the status of the petitioner as a U.S. citizen or permanent resident, as well as the validity of the relationship. For spousal petitions, in addition to meeting these documentary requirements, the couple must also demonstrate that the marriage is “bona fide.” The intending immigrant’s classification as an “immediate relative” or “preference

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58 INA of 1952 § 201(a). In the “preference” scheme, the first category was comprised of highly skilled workers, the second of parents of United States citizens over the age of twenty-one, the third of spouses and children of lawful permanent residents and the fourth of brothers, sisters, son and daughters (over the age of twenty-one) of United States citizens. Id.

59 INA of 1952 §§ (a)(27), (a)(32) (distinguishing between employment-based immigrants, or those with a connection to a business, and family-based immigrants, those with a connection to a United States citizen or lawful permanent resident family member).

60 Id. at § 204(b).


62 Id.


64 Id.

65 Id.

66 Id.

67 Id.


69 The qualifications are outlined in the INA, but are also subject to regulations and application procedures set forth by the Attorney General. 8 C.F.R. § 204.2(a)(1), (2)(b)-(g) (2011); U.S. CITIZENSHIP & IMMIGRATION SERVS., supra note 31, at ch. 21.3(a)(1)(B).

70 8 C.F.R. § 204.2(a)(1), (2)(b)-(g).

relative” will determine how long the intending immigrant must wait to become a lawful permanent resident.\footnote{relative” will determine how long the intending immigrant must wait to become a lawful permanent resident.\footnote{56}}

A spousal petition may be initiated on behalf of an “immediate relative” spouse of a United States citizen, or the preference category spouse of a lawful permanent resident.\footnote{A spousal petition may be initiated on behalf of an “immediate relative” spouse of a United States citizen, or the preference category spouse of a lawful permanent resident.\footnote{56}} In the case of a United States citizen petitioning for an “immediate relative” spouse, the spouse is not subject to a numerical quota and does not have to wait for an immigrant visa to become available. Therefore, once the relative petition has been approved by USCIS,\footnote{In the case of a United States citizen petitioning for an “immediate relative” spouse, the spouse is not subject to a numerical quota and does not have to wait for an immigrant visa to become available. Therefore, once the relative petition has been approved by USCIS,\footnote{71}} the spouse becomes immediately eligible to apply for lawful permanent residency.\footnote{In the case of a lawful permanent resident petitioning for a “preference” spouse, the petition and lawful permanent residency process can take years to complete because visas in the preference category are numerically limited.\footnote{75}} However, regardless of whether filing an “immediate relative” or “preference” petition, after 1996, spousal petitions must not only meet the criteria set forth in the INA and agency regulations, they must also comply with the restrictions of DOMA.\footnote{C. Marriage and the INA

The federal government has long applied the principle that a marriage, if valid where celebrated, is valid everywhere to the INA and immigration adjudications.\footnote{C. Marriage and the INA

The federal government has long applied the principle that a marriage, if valid where celebrated, is valid everywhere to the INA and immigration adjudications.\footnote{77}} Indeed, the INA itself has invited a broad interpretation of its vague definition of the term “spouse” by (“A marriage that is entered into for the primary purpose of circumventing the immigration laws, referred to as a fraudulent or sham marriage, has not been recognized as enabling an alien spouse to obtain immigration benefits.”)\footnote{citing Lutwak v. United States, 344 U.S. 604 (1953)); In re M., 8 I. & N. Dec. 118 (B.I.A. 1958).\footnote{71}}

\footnote{INA § 203(a) (2011); 8 U.S.C. § 1153(a).\footnote{72}}

There are many other ways, beyond spousal petitions, that the definition of “spouse” can affect an individual’s eligibility for immigration benefits. For example, the spouse of an intending preference immigrant may be entitled to “accompany” or “follow to join” the principal intending immigrant. 8 C.F.R. § 204.21(d)(4), (g)(4) (2011). Moreover, an individual may be eligible for certain types of relief from removal if they have a qualifying “spouse.” See INA § 240A(b)(1)(D), (b)(2)(A), (b)(6)(A)(i). However, these types of scenarios will not be addressed, as they are beyond the scope of this article.\footnote{Immediate relatives and preference immigrants, where a visa number is available, may take advantage of a “concurrent filing” process, which for simplicity will not be discussed here. 8 C.F.R. § 103.2(a)(1) (2011); see also Concurrent Filing, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=32d80a5659083210VgnVCM100000082ca60aRCRD&vgnextchannel=32d80a5659083210VgnVCM100000082ca60aRCRD (last updated Apr. 22, 2011).\footnote{74}}

An intending immigrant can generally apply for lawful permanent residency through “adjustment of status” within the United States, or through an “immigrant visa” at a U.S. consulate abroad. INA § 245(a); INA § 204(a); 8 C.F.R. § 245.1(a) (2011); 22 C.F.R. § 42.21 (2011); 22 C.F.R. § 42.31, 32, 33 (2011).\footnote{An intending immigrant can generally apply for lawful permanent residency through “adjustment of status” within the United States, or through an “immigrant visa” at a U.S. consulate abroad. INA § 245(a); INA § 204(a); 8 C.F.R. § 245.1(a) (2011); 22 C.F.R. § 42.21 (2011); 22 C.F.R. § 42.31, 32, 33 (2011).\footnote{74}}

[1] U.S.C. § 7 (2012); 28 U.S.C. § 1738C (2012). Although the Ninth Circuit in Adams v. Howerton found that the ordinary meaning of the term “spouse” did not encompass the parties in a same-sex marriage and that rules of statutory construction compelled a finding that the INA definition of “spouse” would not include a legally married same-sex couple, that ruling only binds the immigration service with regard to cases arising within the Ninth Circuit. 673 F.2d 1036, 1040 (9th Cir. 1982). The ruling did not bind the immigration service with regard to any other jurisdiction, unlike DOMA, which applies to the entire United States.\footnote{1 U.S.C. § 7 (2012); 28 U.S.C. § 1738C (2012). Although the Ninth Circuit in Adams v. Howerton found that the ordinary meaning of the term “spouse” did not encompass the parties in a same-sex marriage and that rules of statutory construction compelled a finding that the INA definition of “spouse” would not include a legally married same-sex couple, that ruling only binds the immigration service with regard to cases arising within the Ninth Circuit. 673 F.2d 1036, 1040 (9th Cir. 1982). The ruling did not bind the immigration service with regard to any other jurisdiction, unlike DOMA, which applies to the entire United States.\footnote{76}}

See United States v. Sacco, 428 F.2d 264, 268 (9th Cir. 1970) (stating the general principle of recognizing the validity of a marriage if it is valid where celebrated); Cynthia M. Reed, Note, When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage, 28 COLUM. HUM. RTS. L. REV. 97, 101 (1996).\footnote{See United States v. Sacco, 428 F.2d 264, 268 (9th Cir. 1970) (stating the general principle of recognizing the validity of a marriage if it is valid where celebrated); Cynthia M. Reed, Note, When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage, 28 COLUM. HUM. RTS. L. REV. 97, 101 (1996).\footnote{77}}
not attaching many restrictions to the term. Practically speaking, this represents a rational approach to recognizing that individuals seeking to immigrate to the United States may have married in any number of jurisdictions throughout the world, and that marriage ceremonies may not be ritually or culturally identical to typical Western ceremonies. This approach also means that marriages that may not be accepted in some jurisdictions within the United States as a violation of public policy may still be considered valid for the purpose of petitioning one’s spouse for lawful permanent residency.

However, within federal immigration law, certain exceptions to the general rule of marriage recognition may exist where there is a strong public policy objection to a marriage, where the marriage evades the laws of the couple’s domicile at the time of marriage, or where the marriage is a “sham” and entered into for the purpose of evading immigration laws. As a practical matter, the question of whether a marriage should be recognized for immigration purposes is generally decided on a case-by-case basis. As an evidentiary matter, the immigration service evaluates whether the marriage was valid in the jurisdiction it was celebrated, whether there exists some public policy or other reason to render the marriage invalid for immigration purposes, and whether the marriage is bona fide.

This Article only focuses on the first two criteria as fairly broad criteria that allow for the recognition of a wide variety of marriages for immigration purposes. With the

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78 INA § 101(A)(35).
79 The BIA and federal courts generally require evidence of criminal liability in the state of domicile (or intended domicile) to find a public policy exception strong enough to invalidate an otherwise valid marriage. Titshaw, supra note 30, at 554 n.58 (2010); United States ex rel. Devine v. Rodgers, 109 F. 886, 887-88 (E.D. Pa. 1901) (refusing to recognize an uncle-niece marriage that constituted criminal incest in Pennsylvania); In re Hirabayashi, 10 I. & N. Dec. 722, 724 (B.I.A. 1964) (recognizing a Colorado marriage between first cousins residing in Illinois, since cohabitation between first cousins is no longer a crime under Illinois statutes); In re C----, 4 I. & N. Dec. 632, 633-38 (B.I.A. 1952) (recognizing the marriage of an uncle and niece in Rhode Island since Pennsylvania, their state of residence, did not view their cohabitation as criminal); In re M----, 3 I. & N. Dec. 465, 465-67 (B.I.A. 1948) (recognizing Italian marriage of uncle and niece when the couple's cohabitation "would not subject them to criminal prosecution" in Illinois). It should be noted that same-sex marriage is not criminalized in any of the United States. See generally, Lawrence v. Texas, 539 U.S. 558 (2003).
80 Reed, supra note 77, at 101-02. U.S. Citizenship and Immigration Services (“USCIS”) will refuse to recognize a marriage for immigration purposes where the couple married in a different jurisdiction for the purpose of evading the marriage laws of a state where at least one of the spouses resided prior to marriage and both intend to reside after the marriage. Id. at 114; see In re Zappia 12 I. & N. Dec. 439 (B.I.A. 1967) (holding that first cousins evaded Wisconsin law by marrying in South Carolina). It is critical to note that the immigration scheme narrowly interprets the criteria for a finding of "marriage evasion" and such findings are uncommon. Id.
81 This article does not discuss a “sham marriage” as a category of marriage, because a sham marriage touches on the issue of the bona fides of the marriage, not whether the marriage was legally entered into or valid in the jurisdiction where it was celebrated. A couple petitioning for a spouse must provide evidence of the bona fides of the marriage, regardless of what type of marriage is performed, unless the type of marriage is categorically prohibited. 8 C.F.R. § 204.2(a)(1)(ii) (2011).
82 Titshaw, supra note 30, at 550.
83 United States v. Sacco, 428 F.2d 264, 268 (9th Cir. 1970) (citing the general common law rule); In re P, 4 I. & N. Dec. 610, 613 (B.I.A. 1952) (acting Attorney General opinion) (“The status of 'wife' is necessarily dependent upon the validity of the marriage which created it.”).
84 Titshaw, supra note 30, at 550.
85 This Article does not address the question of bona fides of a marriage for immigration purposes, because whether a marriage is bona fide is a fact-driven inquiry regarding whether a couple has entered into a marriage solely for immigration purposes. 8 C.F.R. § 204.2(a)(1)(ii). This inquiry is undertaken after the first two steps have been analyzed. Titshaw, supra note 30, at 550.
exception of same-sex marriage, no federal public policy or definition of marriage exists to prevent the recognition of a marriage, legally conducted in the United States, for immigration purposes. 86

1. Types of Marriage Recognized for Immigration Purposes

Within the United States, at the federal and individual state levels, there exists the legal principle that a marriage, valid where celebrated, is valid everywhere. 87 This principle has its basis in common law and finds support in the doctrine of comity with regard to foreign marriages and judgments, and the Full Faith and Credit Clause of the United States Constitution. 88 Once determining whether a marriage is valid where celebrated, one must undertake an analysis of whether a strong public policy objection exists in the state of intended domicile, or with the federal government, that would invalidate the marriage for immigration purposes. 89 Consistent with these legal principles, the INA recognizes a number of types of marriage for immigration purposes that may not be legally entered into in many of the constituent states of the United States, as follows:

a. Common Law Marriage

Common law marriage is marriage based on cohabitation without an official ceremony or marriage registration. 90 As long as the couple live, or have lived, in a jurisdiction that recognizes common law marriage and the couple meets the marriage requirement of that jurisdiction, the marriage may be recognized for immigration purposes. 91 Currently, only ten states and the District of Columbia recognize common law marriage. 92 No federal public policy exists to prohibit recognition of common law marriage, nor does any federal definition of marriage exclude common law marriage, nor does any state or federal law criminalize common law marriage.

b. Customary Marriage

86 As federal law and every state within the United States criminalize polygamous marriage, polygamous marriage cannot be legally performed within the United States. Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862); see Reynolds v. United States, 98 U.S. 145, 161-67 (1878). Also, although the INA definition of “spouse” excludes a couple in an unconsummated proxy marriage, there are two critical distinctions between the INA’s treatment of this category of marriage and same-sex marriage. First, proxy marriages are not categorically barred from recognition under the INA, unlike same-sex marriage. Second, a spouse in an unconsummated proxy marriage can enter the United States as a fiancée in order to consummate the marriage and apply for lawful permanent residency. U.S. Dep’t of State, supra note 13. Same-sex married couples do not enjoy any benefits under the INA. See infra, Section II, A for a more detailed discussion of unconsummated proxy marriages.

87 Sacco, 428 F.2d at 268 (citing the general common law rule); Titshaw, supra note 30, at 564-65.

88 Titshaw, supra note 30, at 565; Reed, supra note 77, at 101-02.

89 Titshaw, supra note 30, at 550, 565; Reed, supra note 77, at 101-02. Beyond public policy exceptions, a marriage may also be found invalid for immigration purposes where the marriage has been entered into in order to evade the laws of the couple’s domicile at the time of marriage. In re Zappia, 12 I. & N. Dec. 439 (B.I.A. 1967) (finding that first cousins’ marriage in South Carolina evaded Wisconsin law).

90 Titshaw, supra note 30, at 562 (citing Common Law Marriage and Conditional Permanent Residence - Texas Declaration and Registration of Informal Marriage, 95 Op. INS Gen Couns. 8 (1995)).


Customary marriage occurs when the ceremony is not performed according to a legal proceeding, but rather according to local custom. A customary marriage may be recognized for immigration purposes if the civil authorities where the marriage was performed recognize the marriage. Customary marriage is actually recognized in the United States, as relates to Native American customary marriage. No federal public policy exists to prohibit recognition of customary marriage, nor does any federal definition of marriage exclude customary marriage, nor do any state or federal laws criminalize customary marriage.

c. Proxy Marriage

Proxy marriage occurs when one of the contracting parties is not present at the ceremony. Currently, a proxy marriage may be recognized for immigration purposes as long as the marriage is later consummated. Prior to the Immigration Act of 1924, the Gentleman’s Agreement of 1907 with Japan allowed Japanese men within the United States to bring a wife, including “picture brides,” into the United States. However, the Immigration Act of 1924 specifically barred recognition of unconsummated proxy marriages, due largely in part to a rise of racist sentiment against the Japanese. Within the United States today, California, Colorado, Montana, and Texas permit proxy marriages, including unconsummated proxy marriage. Currently, the INA continues to prohibit recognition of unconsummated proxy marriage. However, the INA does allow an alien who entered into an unconsummated proxy marriage to be processed as a fiancée and enter the United States to consummate the marriage. After the marriage has been consummated, the alien may apply for lawful permanent residency through their spouse. Therefore, although the definition of marriage in the INA excludes unconsummated proxy marriage, it

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94 Id.
95 Robert D. Cooter & Wolfgang Fikentscher, Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II), 46 Am. J. Comp. L. 509, 537–41 (1998). According to Cooter and Fikentscher, federal courts distinguish between Native American “tribal law,” which is created by native courts and addresses substantive matters such as what constitutes a valid marriage and “Indian law,” which is created by the federal government and addresses procedure and other issues specifically legislated by the federal government. See id. at 558–61. Federal courts generally defer to substantive findings of native courts with regard to “tribal law.” Id.; see also Laymon, supra note 93.
96 Titshaw, supra note 30, at 582.
97 INA § 101(a)(35) (2011). Despite the INA’s prohibition on unconsummated proxy marriages, a party of an unconsummated proxy marriage may enjoy immigration benefits as a fiancée, if the opposite party is a U.S. citizen. U.S. Dep’t of State, supra note 13.
98 A Japanese “picture bride” is part of an arranged marriage, usually brokered by friends and relatives who provide a bride’s parents in Japan with a picture and description of a potential Japanese groom living in the United States. Nancy F. Cott, Public Vows: A History of Marriage and the Nation 151 (2000). If the families agreed, the couple would marry by proxy in Japan and the bride would immigrate to the United States to meet and live with her husband. Id.
99 Id.
102 U.S. Dep’t of State, supra note 13.
provides an avenue for applicants to consummate the marriage and does not prohibit all types of proxy marriage. Moreover, there is no federal definition of marriage outside of the INA that prohibits recognition of unconsummated proxy marriages, nor does a general federal public policy on this issue exist, nor do any state or federal laws criminalize proxy marriages.

d. Marriage to a Minor

Although each state has a minimum age-of-consent for marriage, in analyzing whether a marriage to a minor is valid for immigration purposes, one must look to the law of the state or foreign country where the marriage was celebrated. In determining the validity of a marriage to a minor for immigration purposes, adjudicators also consider whether the marriage was void ab initio, or whether it was simply voidable upon renunciation or occurrence of another event. Presently, almost all states within the United States allow minors below 18 years old to marry, subject to certain conditions. No blanket federal public policy exists to prohibit recognition of marriage to a minor, nor does any federal definition of marriage exclude marriage to a minor.

e. Consanguineous Marriage

Consanguineous marriage is a marriage between close family members. Whether a consanguineous marriage will be valid for immigration purposes turns on the law of the jurisdiction where the marriage was celebrated and the couple’s state of domicile (or of intended domicile) in the United States. After determining whether a consanguineous marriage was valid in the jurisdiction where performed, the Board of Immigration Appeals (BIA) has found that because “immigration laws are silent on this point; recourse must be had to state law for expressions of such policy.” No federal public policy exists to

104 For the purposes of this article, “minor” is defined as a person under the age of eighteen.
105 Titshaw, supra note 30, at 574. For immigration purposes, the focus is more on specific aspects of the law of the place of celebration and less on the state of domicile or intended domicile. Id.
106 Titshaw, supra note 30, at 574. A marriage void ab initio is an “absolute nullity” and no action must be taken to render it invalid. In re Agoudemos, 10 I. & N. Dec. 444, 446 (B.I.A. 1964). A voidable marriage is generally valid for immigration purposes where no affirmative action has been taken to void the marriage. Id.; In re G---, 9 I. & N. Dec. 89 (B.I.A. 1960).
108 Though no state or federal law criminalizes the act of marrying a minor, even if the marriage is void ab initio or voidable, all states have varying laws that criminalize sexual activities involving minors. U.S. Dep’t of Health & Human Servs., Statutory Rape: A Guide to State Laws and Reporting Requirements, available at http://aspe.hhs.gov/hsp/08/sr/statelaws/summary.shtml (last visited May 4, 2012).
110 Titshaw, supra note 30, at 569.
111 Id.; In re T---, 8 I. & N. Dec. 529, 531 (B.I.A. 1960) (citing 37 Op. Att’y Gen. 102, 109-11 (1933)) (looking to the law of Poland, where the relationship was celebrated, to establish a presumption of validity, finding that Congress had deferred to the traditional state role in regulating marriage, so there was no applicable federal definition, and then examining whether a strongly held public policy was expressed in state law criminalizing the relationship or evasion of state marriage laws). In re Da Silva, 15 I. & N. Dec. 778 (B.I.A. 1976) (out-of-state marriage of uncle and niece does not violate New York public policy; thus, marriage is valid for immigration purposes); In re T---, 8 I. & N. Dec. 529 (same result in Pennsylvania); In re E---, 4 I. & N. Dec. 239 (B.I.A. 1951) (even though California prohibits that category of marriage, the marriage was valid for immigration where the state did not prosecute when the marriage was lawfully entered
prohibit recognition of consanguineous marriage, nor does any federal definition of marriage exclude consanguineous marriage.\footnote{112}

\textbf{f. Marriage Involving Transgender Spouse}

Although there remains much to be clarified in the realm of the recognition of the marriage of transgender individuals for immigration purposes, the Board of Immigration Appeals (BIA) has at least held that “heterosexual marriages” of transgender individuals are valid for immigration purposes.\footnote{113} In 2005, the BIA recognized that a marriage between a transgender individual who underwent sex reassignment surgery and had been issued a new birth certificate reflecting her female sex and a foreign-born man, lawfully conducted in North Carolina, was valid for immigration purposes. Currently, 29 states and the District of Columbia have explicit statutes allowing an individual’s birth certificate to be amended or reissued.\footnote{114} Furthermore, most states do not have any statute that permits or denies marriage rights to transgender individuals, but some states have either recognized or rejected marriages involving transgender individuals.\footnote{115} Federal public policy does not prohibit the “heterosexual marriage” of transgender individuals, and no federal definition of marriage specifically excludes a transgender spouse from marriage.\footnote{116}

In analyzing the categories of marriage listed above, as long as the marriage was entered into in a jurisdiction allowing for such marriages, no strong public policy objection exists in the state of intended domicile, or with the federal government, that would invalidate the marriages for immigration purposes. The inquiry would then move beyond these general questions of marriage validity and on to an individualized inquiry of whether the marriage is bona fide. With respect to each of these forms of marriage, the immigration framework adheres to the common law rule that a marriage valid where celebrated is valid everywhere.\footnote{117} In other words, the marriage is valid for immigration purposes because certain jurisdictions within the United States recognize each of the types of marriage as

\footnote{112}{“Congress has not expressed any public policy excluding a spouse on the ground of consanguinity . . .” Titshaw, supra note 30, at 569; \textit{In re T-...}, 8 I. & N. Dec. at 531 (citing 37 Op. Att’y Gen. 102, 109-11 (1933)).}

\footnote{113}{Essentially, the BIA held that marriages of transgender individuals who wed within jurisdictions that have recognized the individuals’ changed sex and recognize the marriages as heterosexuals are valid for immigration purposes. Titshaw, supra note 30, at 577; \textit{In re Lovo-Lara}, 23 I. & N. Dec. 746 (B.I.A. 2005). The BIA holding does not specifically require that a transgender individual undergo sex reassignment surgery, but only requires that the individual’s changed sex be recognized under the law of the state where they were married. \textit{In re Lovo-Lara}, 23 I. & N. Dec. at 753. This distinction is critical, because a transgender individual does not need to undergo surgical procedures in order to “transition” to another gender expression. \textit{See Transgender Issues 101, IMMIGRATIONEQUAL, \texttt{http://www.immigrationequality.org/issues/law-library/trans-manual/transgender-issues-101/} (last visited May 4, 2012). However, in January of 2009, USCIS amended the Adjudicator’s Field Manual (AFM) section 21.3(j) to require a transgender individual to undergo sex reassignment surgery before a marriage may be recognized for immigration purposes, contrary to the BIA’s decision in \textit{Lovo-Lara} which reaffirms the legal principle that the “validity of a marriage is determined by the law of the State where the marriage was celebrated.” \textit{In re Lovo-Lara}, 23 I. & N. Dec. at 753.}


\footnote{115}{\textit{Id.}}

\footnote{116}{\textit{In re Lovo-Lara}, 23 I. & N. Dec. at 753.}

\footnote{117}{Reed, supra note 77, at 101; United States v. Sacco, 428 F.2d 264, 268 (9th Cir. 1970) (citing the general common law rule).}
valid, even though these types of marriage do not enjoy recognition in all of the United States.

2. Marriages Not Recognized for Immigration Purposes

Where courts have found a marriage to violate federal or state public policy and to be invalid for immigration purposes, they have generally required evidence of criminal liability in the state of domicile (or intended domicile) to find a public policy exception strong enough to invalidate an otherwise valid marriage. Courts have also invalidated otherwise valid marriages where the couple was found to have married in another jurisdiction to evade the marriage laws of their state of domicile. The types of marriage discussed above are permitted in certain states, but lack widespread recognition and may even be criminally prohibited in other states. Yet, in each of those cases, as long as the marriage was valid in the state in which it was celebrated and the couple lives, or intends to live, in a state that does not criminally prohibit the relationship, the marriage should be recognized for immigration purposes.

Currently, only three types of marriage generally cannot be recognized for immigration purposes, though same-sex marriage is the only type of marriage that categorically can never be recognized as a result of DOMA and its application to the INA. They are polygamous marriage, unconsummated proxy marriage and same-sex marriage.

a. Polygamous Marriage

Polygamous marriage is marriage to more than one person. Although polygamous marriage is legally prohibited in all of the United States, an individual in a polygamous marriage may have their first marriage recognized for immigration purposes.

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118 Reed, supra note 77, at 101.
119 Titshaw, supra note 30, at 554 n.58; United States ex rel. Devine v. Rodgers, 109 F. 886, 887-88 (E.D. Pa. 1901) (refusing to recognize an uncle-niece marriage that constituted criminal incest in Pennsylvania); In re Hirabayashi, 10 I. & N. Dec. 722, 724 (B.I.A. 1964) (recognizing the Colorado marriage between first cousins residing in Illinois, since cohabitation between first cousins is no longer a crime under Illinois statutes); In re G---, 6 I. & N. Dec. 337, 338-39 (B.I.A. 1954) (finding a valid Italian marriage invalid for immigration purposes because it would be both invalid and subject to criminal prosecution in Pennsylvania); In re M---, 3 I. & N. Dec. 465, 467 (B.I.A. 1948) (finding Italian marriage of uncle and niece to be valid where the couple's cohabitation "would not subject them to criminal prosecution” in Illinois); In re E---, 4 I. & N. Dec. 239, 239-40 (B.I.A. 1951) (recognizing a Portuguese uncle-niece marriage in reliance on a letter from the deputy attorney general of the State of California saying that the couple would not be prosecuted for violation of California law).
120 In re Zappia, 12 I. & N. Dec. 439 (B.I.A. 1967) (finding first cousins’ evasion of Wisconsin law through marriage in South Carolina). The details regarding marriage evasion are beyond the scope of this Article.
124 Polygamy in Senegal, 93 Op. INS Gen. Couns. 98 (1993). In 1993, the INS General Counsel's Office found that a Senegalese man with two wives in Senegal was not excludable from the United States, since the INA excludes only "immigrant[s] coming to the United States to practice polygamy," “if his application for
prohibition of recognition of polygamous marriage for immigration purposes fundamentally differs from the prohibition of recognition of same-sex marriages. First, same-sex marriage is not criminalized by any of the United States or the federal government. Second, same-sex marriage may be legally entered into in six states within the United States and District of Columbia, and the number is growing. As polygamous marriage is criminalized throughout the United States, including by the federal government, and may not legally be entered into in any state within the United States, this category of marriage fundamentally differs from same-sex marriage. Moreover, even though polygamous marriage is criminalized by the federal government and may not be legally entered into within the United States, the immigration service will still recognize a polygamist’s first marriage for immigration purposes.\textsuperscript{125} Conversely, same-sex marriage is never recognized for immigration purposes, due to DOMA.

\textit{b. Unconsummated Proxy Marriage}

Unconsummated proxy marriage is a marriage between two people where at least one of the parties is not present at the ceremony and the couple has not consummated the marriage.\textsuperscript{126} The INA specifically excludes couples with an unconsummated proxy marriage from recognition as a “spouse” through the definition of that term.\textsuperscript{127} However, the INA’s non-recognition of this form of marriage also fundamentally differs from the categorical prohibition on recognition of same-sex marriage. First, neither the INA nor federal law includes a blanket prohibition on the entire category of proxy marriage from recognition for immigration purposes.\textsuperscript{128} Consummated proxy marriages are recognized for immigration purposes and where a couple married by proxy has not consummated the marriage, the alien spouse may be admitted to the United States as a fiancée to cure the legal defect.\textsuperscript{129} In the case of same-sex marriage, under no circumstances can the marriage confer immigration benefits on the alien spouse.\textsuperscript{130}

\textit{c. Same-Sex Marriage}

The only type of marriage legally permitted in a number of states within the United States, but that will not be recognized as valid for immigration purposes, is same-sex marriage.\textsuperscript{131} If the agencies and courts charged with implementing and interpreting immigration law were to follow the longstanding tests for marriage validity described above, a lawfully performed same-sex marriage would undoubtedly meet the criterion for recognition for immigration purposes. Currently, six states and the District of Columbia allow same-sex marriage, and no states criminalize same-sex marriage or same-sex

\textsuperscript{126} In re Balodis, 17 I. & N. Dec. 428, 429 (B.I.A. 1980); Laymon, supra note 93, at 365 n.53.
\textsuperscript{127} INA § 101(a)(35) (2011).
\textsuperscript{128} A party to an unconsummated proxy marriage may enjoy immigration benefits as a fiancée, if the opposite party is a U.S. citizen. U.S. Dep’t of State, supra note 13.
\textsuperscript{129} Id.
\textsuperscript{131} Although unconsummated proxy marriage is not recognized under the INA, the INA provides a mechanism for spouses in an unconsummated proxy marriage to cure the legal defect and consummate the marriage. U.S. Dep’t of State, supra note 13.
relationships. Therefore, as long as a same-sex, bi-national couple were married in a jurisdiction that allowed same-sex marriage and lived, or intended to live, in any of the United States, that marriage should be considered valid for immigration purposes.

However, with the passage of DOMA in 1996, Congress codified discrimination against same-sex couples within federal law and upended the federal government’s longstanding recognition of marriage as a matter for the states to define. Section 3 of DOMA, which defines “marriage” and “spouse” for all federal purposes, specifically prohibits recognition of same-sex marriage, regardless of whether the marriage was valid in the jurisdiction in which it was performed. In the immigration legal framework, DOMA operates to prohibit recognition of a same-sex marriage for immigration purposes, even where the marriage was performed in one of the United States where same-sex marriage is legal and even if the marriage does not violate the public policy of that state.

Ostensibly, DOMA sought to reinforce the power of states to refuse to recognize same-sex marriages legally performed in other states and was presented, in part, as a states’ rights measure. Yet, the practical, legal effect of DOMA has been to upend the federal government’s prior deferral to states on questions of validity of marriage and imbue the federal government with the sole authority to impose its definition of “marriage” and “spouse” on individual states. Nowhere in the current federal legal framework has Congress so clearly inserted itself in an area of authority reserved to the states, in order to specifically target a group of people for exclusion from the protection of federal law based upon a flawed policy that violates numerous provisions of the United States Constitution.

Still, nowhere are the massive contradictions wrought by DOMA more apparent than when DOMA is applied to the INA. The term “marriage” is not defined in the INA and is currently only defined by DOMA. For purposes of immigration law, Congress has always looked to state law to determine whether a marriage is valid, unless a rare, federal public policy exception applied to invalidate the marriage. Until the 1996 passage of DOMA, federal public policy only expressly prohibited polygamous marriage and un consummated proxy marriage from recognition for immigration purposes. However, these public policy prohibitions critically differ from DOMA’s prohibition in a couple of key respects. First, not only do all states within the United States and the federal government criminalize polygamous marriage, someone in a polygamous marriage may still have their first marriage recognized for immigration purposes.

Second, a proxy marriage may be recognized for immigration purposes, even where the marriage was performed in a state that did not recognize same-sex marriage. This is significant because DOMA, with its flawed policy that violates numerous provisions of the United States Constitution, is the product of Congress’s discriminatory and unconstitutional effort to exclude a group of people from the protections of federal law.

Oversight of Congress’s pernicious policy extends to immigration law, where the marriage does not violate the public policy of that state. In the immigration legal framework, DOMA operates to prohibit recognition of a same-sex marriage for immigration purposes, even where the marriage was performed in one of the United States where same-sex marriage is legal and even if the marriage does not violate the public policy of that state.

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137 Titshaw, supra note 30, at n.186, 187.


immigration purposes as long as it is consummated.\footnote{13} Moreover, the alien spouse of an individual in an unconsummated proxy marriage may be issued a fiancée visa to come to the United States to consummate the marriage and apply for lawful permanent residency.\footnote{14} The INA does not contain a blanket prohibition from recognition for immigration purposes on all proxy marriages or all spouses in a polygamous marriage.

Due to DOMA, the federal immigration framework only places a blanket prohibition from recognition for immigration purposes on same-sex marriage.\footnote{15} Although a number of states within the United States recognize and accept same-sex marriage as valid\footnote{16} and no state criminalizes same-sex marriage, DOMA renders the prior approach to evaluating marriage validity inoperable, while impermissibly intruding on a state’s right to define “marriage.” The resulting dichotomy in the immigration statutory framework sets the stage for an absurd case of the exception swallowing the rule. For example, a U.S. citizen who marries his 16 year-old cousin in Poland, but who lives in Arizona, might petition for his wife to enter the United States as a lawful permanent resident because such an arrangement, currently not legally sanctioned in Arizona, is not criminally prohibited in Arizona.\footnote{17} On the other hand, a U.S. citizen who lives in Iowa and marries her bi-national, same-sex fiancée in Iowa, where same-sex marriage is legally sanctioned, may not petition for her wife to enter the United States as a lawful permanent resident.\footnote{18}

Due in part to the growing number of states that allow same-sex marriage, the absurdity of legally married bi-national couples’ exclusion from federal immigration benefits has become increasingly visible. In February of 2011, the Obama Administration concluded that Section 3 of DOMA is unconstitutional and instructed the Justice Department to stop defending the policy in court.\footnote{19} Despite this development, the Administration announced that it would continue to enforce DOMA.\footnote{20} At the time of this writing, the effects of this change in policy on immigration law have been somewhat confusing and varied. Many foreign national spouses in removal proceedings have been removed,\footnote{21} others have been allowed to stay until the DOMA issue is resolved,\footnote{22} and USCIS has denied some applications for permanent residency by same-sex married couples and held others in limbo. However, there are a number of arguments that could be used before the administrative

\footnotesize{\begin{itemize}
\item[14] U.S. Dep’t of State, supra note 13.
\item[20] “Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch.” Id.
\item[22] Matters have been further complicated in light of a recent memo issued by the Department of Homeland Security on prosecutorial discretion, which notes that a foreign national’s marriage to a same-sex spouse is a factor to consider in deciding whether to grant a stay of removal, administratively close or terminate a case in removal proceedings, or take some other discretionary action. Morton, supra note 11; Preston, supra note 8.
\end{itemize}}
agencies charged with interpreting and implementing the immigration laws to challenge DOMA’s displacement of state marriage definitions in the immigration context, which could have a more immediate effect than a Congressional or a federal court decision overturning DOMA. These arguments are discussed below.

II. DOMA Disrupts the Long-Established Immigration Scheme Relating to Marriage and Cannot Continue to be Enforced

The United States Supreme Court and other federal courts have long relied upon state law to “define personal and family relationships,”¹¹⁵¹ which are regarded as primarily matters of state concern.¹¹⁵² This reasoning finds support not only in common law, which dictates that a marriage, if valid where celebrated, should be recognized as valid throughout the United States,¹¹⁵³ but also in the Tenth Amendment to the Constitution, which recognizes that any power not delegated to the federal government under the Constitution is expressly reserved “to the States respectively, or to the people.”¹¹⁵⁴ The immigration laws of the United States have also historically embraced this reasoning when defining “marriage” and “spouse.”¹¹⁵⁵ However, Congress’ passage of DOMA disrupts this long-standing legal scheme, by inserting a general, federal definition of marriage where Congress lacks the power to do so and where the Supremacy Clause jurisprudence of the Supreme Court requires the federal court to cast aside DOMA’s definition of “spouse” and “marriage” and recognize competing state constructions of the terms for immigration purposes.

A. Congress Cannot Pre-Empt State Authority to Define Marriage

One of the most basic principles underlying our federalist system is that “[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.”¹¹⁵⁶ Therefore, the federal government can “exercise only the powers granted to it.”¹¹⁵⁷ The Constitution specifically withholds from Congress “a plenary police power that would authorize enactment of every type of legislation.”¹¹⁵⁸ The Tenth Amendment to the Constitution further recognizes that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹¹⁵⁹ In determining the boundaries of federal and state power, the Supreme Court looks to whether an Act of Congress is authorized by Article I of the Constitution under the Commerce or Spending Clauses, or whether an Act of Congress intrudes upon state sovereignty preserved by the Tenth Amendment.¹¹⁶⁰

¹¹⁵¹ Kahn v. INS, 36 F.3d 1412, 1416 (9th Cir. 1994) (Kozinski, J., dissenting).
¹¹⁵² Titshaw, supra note 30, at 556 n.65.
¹¹⁵³ Reed, supra note 77.
¹¹⁵⁴ U.S. CONST. amend. X.
¹¹⁵⁵ Titshaw, supra note 30, at 566. The BIA has continued to affirm this principle. See also In re Lovo-Lara, 23 I. & N. Dec. 746 (B.I.A. 2005).
¹¹⁵⁸ Id. at 566; see also U.S. CONST. art. I, § 8.
¹¹⁵⁹ United States Dep’t of Health & Human Servs., 698 F. Supp. 2d at 246 (citing U.S. CONST. amend. X).
Whether an Act of Congress is authorized under either the Commerce or Spending Clauses of Article I of the Constitution requires an analysis of whether the Act contains “express jurisdictional elements” connecting the Act to an enumerated power. 161  DOMA does not contain such jurisdictional elements, therefore, this article will analyze the Act under both the Commerce and Spending Clauses.  First, the Commerce Clause endows Congress with the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” 162  However, Congress’ power is limited and:

[M]ust be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would eventually obliterate the distinction between what is national and what is local and create a completely centralized government. 163

The Supreme Court has therefore “identified three broad categories of activity that Congress may regulate under its commerce power.” 164  Congress may regulate the “use of the channels of interstate commerce,” 165  the instrumentalities of interstate commerce or persons or things in interstate commerce, 166  and activities that substantially affect interstate commerce. 167  DOMA’s definition of marriage clearly does not involve either of the first two categories of activity, as the definition does not implicate channels or instrumentalities of commerce, nor persons in interstate commerce.  Therefore, the analysis moves to the third category to determine whether a federal definition of marriage substantially affects interstate commerce.  According to the Supreme Court’s Commerce Clause jurisprudence, DOMA does not.

To determine whether an activity substantially affects interstate commerce, the Court looks to the nature of the activity regulated by the federal statute in question, whether any jurisdictional element establishes the federal cause of action, and whether the statute is supported by findings of the activity’s impact upon interstate commerce. 168  DOMA fails each of these tests.  First, by its own terms DOMA regulates a noncriminal, noncommercial activity and does not purport to be part of a larger regulation of economic activity. 169  Same-sex marriage is not, in any sense, economic activity. 170  The Supreme Court has consistently held that federal regulation of interstate activity must be “some sort of economic endeavor” to fall within Congress’ Commerce Clause authority. 171  DOMA’s regulation of the definition of marriage lacks this basic commercial character and does not fit within the

161 United States Dep’t of Health & Human Servs., 698 F. Supp. 2d at 246 (citing Morrison, 529 U.S. at 612; Lopez, 514 U.S. at 561-62).
163 Lopez, 514 U.S. at 556–57 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)); see also Morrison, 529 U.S. 598.
164 Lopez, 514 U.S. at 558 (citing Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264, 276 – 77 (1981)).
165 Lopez, 514 U.S. at 558 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964)).
166 Id. (citing Houston, E. & W.T.R. Co. v. United States, 234 U.S. 342 (1914)); see also Southern R. Co. v. United States, 222 U.S. 20 (1911)
167 Id. at 558–59 (citing NLRB, 301 U.S. at 37).
168 Morrison, 529 U.S. at 598.
169 Lopez 514 U.S. at 561, 580; Morrison, 529 U.S. at 598.
170 Id. at 599.
171 Id. at 611.
scope of cases where the Supreme Court has affirmed federal authority under the Commerce Clause.

Second, DOMA contains no jurisdictional element to establish the federal cause of action for inventing a federal definition of marriage.\textsuperscript{172} The Supreme Court has found that the presence of such a jurisdictional element “may establish that the enactment is in pursuance of Congress’ regulation of interstate commerce.”\textsuperscript{173} In fact, Congress flatly acknowledges in the legislative history of DOMA that “[t]he determination of who may marry in the United States is uniquely a function of state law.”\textsuperscript{174} However, “unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”\textsuperscript{175} In the case of DOMA, not only did Congress fail to include express jurisdictional language that would clearly convey its purpose, DOMA contains no language to demonstrate an “explicit connection with or effect on interstate commerce.”\textsuperscript{176} DOMA fails to include this language because the statute lacks the requisite nexus to interstate commerce.

Third, neither DOMA itself, nor its legislative history contains express congressional findings regarding the effects of same-sex marriage on the federal government or the states.\textsuperscript{177} Though formal findings are not required, the existence of such findings enable the court “to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce . . . .”\textsuperscript{178} Instead of discussing specific findings regarding the effects of same-sex marriage, the legislative history is replete with recitations of Congress’ moral disapproval of “homosexuality” and desire to “defend the institution of traditional heterosexual marriage”\textsuperscript{179} and “conserve scarce resources.”\textsuperscript{180} Any argument of a link between same-sex marriage and a substantial effect on interstate commerce is attenuated, at best. Moreover, this reasoning has been squarely rejected by the Supreme Court in several recent cases because it would allow “Congress [to] regulate any activity that it found was related to the economic productivity of individual citizens . . . .”\textsuperscript{181} For all of these reasons, DOMA’s attempt to regulate the definition of marriage in the United States violates the constitutional limitations on Congress’ exercise of authority under the Commerce Clause.

Turning to an analysis under the Spending Clause, the Constitution provides that “Congress shall have Power to Lay and collect Taxes . . . to pay Debts and provide for the common Defence and general Welfare of the United States . . . .”\textsuperscript{182} Congress’ exercise of the spending power is also limited and must satisfy five requirements: (1) it must be in pursuit of the ‘general welfare,’ (2) conditions of funding must be imposed unambiguously, so states are cognizant of the consequences of their participation, (3) conditions must not be ‘unrelated to the federal interest in particular national projects or programs’ funded under the challenged legislation, (4) the legislation must not be barred by other constitutional

\textsuperscript{172} Id. at 612.
\textsuperscript{173} Id.
\textsuperscript{177} United States v. Morrison, 529 U.S. 598, 599 (2000).
\textsuperscript{178} Id. at 612 (citing Lopez, 514 U.S. at 563).
\textsuperscript{179} H.R. REP. NO. 104-664, at 12.
\textsuperscript{180} Id. at 13, 18.
\textsuperscript{181} Lopez, 514 U.S. at 564.
\textsuperscript{182} U.S. CONST. art. I, § 8.
provisions, and (5) the financial pressure created by the conditional grant of federal funds must not rise to the level of compulsion.\textsuperscript{183}

As an initial matter, DOMA has a far broader impact on federal law than simply directing how federal money should be spent.\textsuperscript{184} DOMA provides a general definition of “marriage” and “spouse,” which impacts the application of 1,138 federal statutory provisions, not all of which relate to the expenditure of public funds.\textsuperscript{185} Therefore, it is unclear at the outset whether Congress possessed the power under the Spending Clause to enact DOMA, simply because DOMA does not regulate spending in many of the statutory provisions that it impacts.\textsuperscript{186} Still, DOMA violates at least four of the five requirements\textsuperscript{187} outlined in \textit{South Dakota v. Dole} and cannot sustain a finding that Congress acted pursuant to an enumerated power contained in the Spending Clause of the Constitution.

First, although Congress enjoys substantial deference to its judgment when determining whether an exercise of the spending power is in pursuit of the “general welfare,”\textsuperscript{188} Congress may not create a national definition of marriage in pursuit of an asserted federal interest in “defend[ing] the institution of traditional heterosexual marriage”\textsuperscript{189} if there is no interstate problem requiring a national solution. In cases where the Supreme Court has found the proper exercise of Congress’ authority under the Spending Clause, there existed some interstate problem that required a national solution.\textsuperscript{190} Same-sex marriage does not present an interstate problem, in part because it is not an interstate issue, but also because each state already has the authority to determine who may legally marry within its borders.\textsuperscript{191}

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\textsuperscript{184} See \textit{Massachusetts v. United States Dep’t of Health & Human Servs.}, 698 F. Supp. 2d 234 (D. Mass. 2010).
\textsuperscript{186} \textit{United States Dep’t of Health & Human Servs.}, 698 F. Supp. 2d at 247.
\textsuperscript{187} The United States Supreme Court recently addressed, at length, the fifth requirement of the \textit{South Dakota v. Dole} test in Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (2011), more widely known as the “Health Care Decision.” The Court’s reasoning in the Health Care Decision adds further support to the argument that DOMA cannot be held constitutional pursuant to Congress’ powers contained in the Spending Clause. While “Congress may use its spending power to create incentives for States to act in accordance with federal policies,” “when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism.” Nat’l Fed’n of Indep. Bus. v. Sebelius, No. 11-393, slip op. at 47. Put more plainly, “the Constitution simply does not give Congress the authority to require the states to regulate.” \textit{Id.} (quoting New York v. United States, 505 U.S. 144, 178 (1992)). In fact, when Congress acts under the Spending Clause the danger of coercion is even greater, “because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.” \textit{Id.}, slip op. at 48. Therefore, Congress’ imposition of DOMA cannot be upheld under the Spending Clause as it constitutes an improper implementation of regulation that Congress could not impose directly under its enumerated powers.
\textsuperscript{188} \textit{Dole}, 483 U.S. at 207.
\textsuperscript{190} \textit{Dole}, 483 U.S. at 208 (Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution.) Helvering v. Davis, 301 U.S. 619, 641–44 (1937) (finding a “great mass of evidence” to support Congress’ decision to award old age benefits and that the national problem required a national solution authorized under the Spending Clause).
\textsuperscript{191} This is evidenced in the case of same-sex marriage by differences between states regarding whether to legally recognize same-sex marriage. Numerous states have passed constitutional amendments defining “marriage” to exclude marriages between two people of the same sex, while other states do legally sanction same-sex marriage.
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Therefore, DOMA fails under this first requirement, because it fails to identify an interstate problem in need of a national solution.

DOMA also fails under the second requirement of *South Dakota v. Dole*, with regard to the unambiguous imposition of conditions of funding.\(^{192}\) Since DOMA is a general definitional statute, it does not impose any specific conditions of funding on states.\(^{193}\) Instead, DOMA has the secondary effect of denying funding to states where the state definition of marriage conflicts with the federal definition. As a result, states are unable to “exercise their choice [to accept federal funding] knowingly, cognizant of the consequences of their participation,”\(^{194}\) because many state “marriage” definitions that allow same-sex marriages are a result of court findings that any other definition violated the state constitution.\(^{195}\) Even where a state “marriage” definition does not depend on a court finding, states are unable to exercise a knowing choice because DOMA simply states that the federal marriage definition applies to “any Act of Congress,”\(^{196}\) whether present or future. Clearly, a state cannot exercise a choice where there is no choice to be made.

DOMA similarly fails under the third requirement of *South Dakota v. Dole* regarding the fact that conditions of funding must be related to the federal interest in particular national projects or programs funded.\(^{197}\) In DOMA’s case, Congress did not express a federal interest related to a particular project or program, nor did Congress bother to engage in a meaningful review of the particular projects or programs that would be affected.\(^{198}\) The Supreme Court’s jurisprudence on this point suggests that Congress must delineate specific national projects or programs that the purported federal interest seeks to address.\(^{199}\) Congress made no such delineation with DOMA and instead imposed a broad definition that it intended to apply to “any Act of Congress . . . any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States”\(^{200}\) without regard to how a federal interest in defining marriage would be served by refusing to provide funding or benefits to states and individuals operating under a different definition of marriage. For these reasons, DOMA’s conditions of funding cannot be related to the federal interest, in particular, national projects or programs funded and run afoul of this third requirement.

DOMA also fails to satisfy the fourth requirement of *South Dakota v. Dole*, which mandates that the legislation must not be barred by other constitutional provisions.\(^{201}\) At

\(^{192}\) *Dole*, 483 U.S. at 207.


\(^{197}\) *Dole*, 483 U.S. at 207.


\(^{199}\) *Dole*, 483 U.S. at 207; Massachusetts v. United States, 435 U.S. 444, 461 (1978); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) (“[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof”).


\(^{201}\) *Dole*, 483 U.S. at 207.
least one federal court has found that DOMA violates the equal protection principles of the Fifth Amendment to the Constitution and impermissibly imposes an unconstitutional condition on the receipt of federal funding.\textsuperscript{202} However, apart from the equal protection arguments, which will not be addressed in this article, DOMA also fails to satisfy the Tenth Amendment’s reservation of the power to regulate marriage to the states.\textsuperscript{203} Although the Tenth Amendment may not deprive “the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end,”\textsuperscript{204} the federal government must possess the authority to exercise a granted power in the first place. With regard to adopting a general definition of marriage, the “Constitution delegated no authority to the Government of the United States on [that subject].”\textsuperscript{205}

In the case of DOMA, those powers not delegated to the federal government under the Commerce and Spending Clauses are reserved to the states.\textsuperscript{206} The Tenth Amendment “is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.”\textsuperscript{207} Congress may only exercise its enumerated powers subject to the limitations imposed by the Constitution, including the Tenth Amendment.\textsuperscript{208} Whatever the extent of Congress’ disapproval of same-sex marriage, DOMA must be rooted in some constitutional power. Congress unquestionably failed in meeting this most basic requirement. Not only does DOMA find no basis in any of the powers given to Congress under the Constitution, it impermissibly intrudes into an area of law reserved to the states through centuries of jurisprudence.

The Supreme Court has long-held that “marriage is a social relation subject to the State’s police power.”\textsuperscript{209} In fact, the House Judiciary Committee’s Report on DOMA (“House Report”) explicitly acknowledges that “[t]he determination of who may marry in the United States is uniquely a function of state law.”\textsuperscript{210} To date, several states define marriage to include marriages between two, consenting adults of the same sex, thus conferring the same rights and responsibilities on all married couples under state law.\textsuperscript{211} Congress’ attempt to bar same-sex married couples from recognition under federal law impermissibly intrudes upon the authority of these states to regulate and define marriage.

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\item \textsuperscript{202} Massachusetts v. United States Dep’t of Health & Human Servs., 698 F. Supp. 2d 234, 248 – 49 (D. Mass. 2010).
\item \textsuperscript{203} U.S. CONST. amend. X.
\item \textsuperscript{204} Oklahoma v. United States Civil Serv. Comm’n, 330 U.S. 127, 143 (1947).
\item \textsuperscript{205} Haddock v. Haddock, 201 U.S. 562, 575 (1906) (“No one denies that the [S]tates, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce [and that] the Constitution delegated no authority to the Government of the United States on [that subject].”), overruled on other grounds by Williams v. North Carolina, 317 U.S. 287 (1942).
\item \textsuperscript{206} U.S. CONST. amend. X.
\item \textsuperscript{207} New York v. United States, 505 U.S. 144, 156 (1992) (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833)).
\item \textsuperscript{208} Id.
\item \textsuperscript{209} Loving v. Virginia, 388 U.S. 1, 7 (1967) (citing Maynard v. Hill, 125 U.S. 190 (1888)).
\item \textsuperscript{210} H.R. REP. NO. 104-664, at 3 (1996).
\item \textsuperscript{211} Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); VT. STAT. ANN. tit. xv, § 8 (2009); N.H. REV. STAT. ANN. § 1(a) (2009); D.C. CODE ANN. § 46-401(a), (b) (2011); N.Y. DOM. REL. LAW § 10-A (2011).
\end{itemize}
within their jurisdiction. Furthermore, with regard to federal immigration law, DOMA’s continued enforcement has rendered dysfunctional a well-established legal scheme relating to marriage recognition that impedes the objectives of our country’s family-based immigration framework, which are to keep families together, promote humanitarian values and family reunification. Therefore, not only did Congress exceed its authority in enacting DOMA, Congress created a massively dysfunctional and contradictory legal framework for determining what types of marriage may be considered valid under immigration law.

B. Challenging DOMA on Supremacy Clause Grounds

Family law is undoubtedly a matter of state law and the Supreme Court has “consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area.” Indeed, federal courts have repeatedly found federal jurisdiction lacking “over divorces that present no federal question.” However, when state family law does come into conflict with a federal statute, the Supreme Court limits its review under the Supremacy Clause to a finding of whether Congress has “positively required by direct enactment” the pre-emption of state law. In this analysis, state family law must do “major damage” to “clear and substantial” federal interests before federal law overrides the state law. Thus, “[t]he pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.”

In the context of federal immigration law, Section 3 of DOMA unequivocally fails the test for Supremacy Clause pre-emption for a number of reasons. As an initial matter, it is clear that a number of state laws providing full marriage rights for same-sex couples conflict with Section 3 of DOMA’s limitation of the terms “marriage” and “spouse” to only heterosexual couples for purposes of federal law. However, in cases where the Supreme

212 See Boggs v. Boggs, 520 U.S. 833, 848 (1997) (“As a general matter, ‘[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’”) (citation omitted); Haddock v. Haddock, 201 U.S. 562, 575 (1906) (“No one denies that the [S]tates, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce [and that] the Constitution delegated no authority to the Government of the United States on [that subject].”), overruled on other grounds by Williams v. North Carolina, 317 U.S. 287 (1942).
213 Pinix, supra note 17, at 455, n.25, 26.
215 Id. at 581 (citing Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930)).
216 Id. (citing Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).
217 Id. (citing United States v. Yazell, 382 U.S. 341, 352 (1966)).
218 Id. at 583.
219 Congress’ plenary power to determine the immigration laws of the United States does not change this calculus. Chae Chan Ping v. United States, 130 U.S. 581 (1889) (holding that Congress’ power to control immigration is rooted in the federal government’s power over foreign policy and its national sovereignty). The federal prohibition on recognition of same-sex marriage is not found in the INA or any immigration-related statute. Instead, DOMA stands apart from the immigration framework as a statute that Congress intended to apply generally to all federal laws and regulations. 1 U.S.C. § 7 (2012); 28 U.S.C. § 1738C (2012). Nowhere in the legislative history or text of DOMA does Congress mention immigration, or its intent to regulate immigration through DOMA. Id. As DOMA does not even purport to be an exercise of Congress’ plenary power over immigration, the argument that the Plenary Power Doctrine somehow controls DOMA’s application to the immigration framework is misplaced.
Court has found that state family law did “major damage” to “clear and substantial” federal interests, the cases dealt with a conflict between federal and state rules for the allocation of a specific federal entitlement. In other words, the cases involved a federal law of specific application, such as a federal homestead law that conflicted with a state inheritance law, or the survivorship rules for a military life insurance program that conflicted with state community property law.

These cases sit in stark contrast to DOMA, which simply sets forth a general federal definition of marriage that necessarily conflicts with the law of every state providing for same-sex marriage as those laws relate to the enjoyment of any spousal benefits under federal law. Therefore, the argument that state same-sex marriage laws are pre-empted by DOMA logically requires Congress to have “positively required by direct enactment” the wholesale pre-emption of state law as it relates to the definition of “marriage” and “spouse.” However, DOMA cannot possibly "positively require" states to abandon their own law concerning the basic definition of “marriage” and “spouse,” because defining and regulating marriage is unquestionably a matter of state law and one of the rights reserved to the states under the Tenth Amendment to the Constitution.

The next inquiry involves whether state family law allowing same-sex marriage does “major damage” to “clear and substantial” federal interests. However, in a Supremacy Clause analysis, DOMA undoubtedly fails the "clear and substantial" federal interest test. DOMA includes broad, sweeping language that applies the Act’s general definitions to “any Act of Congress, or [] any ruling, regulation, or interpretation of administrative bureaus and agencies of the United States.” Not only is it unclear what federal interest is served by imposing a general federal definition of marriage, the federal government has not identified a substantial interest, nor does it have the power under the Tenth Amendment to the Constitution, to develop its own general definition of marriage.

First, regarding the clarity of the federal interest, DOMA purports to “defend the institution of traditional heterosexual marriage” by refusing to recognize same-sex marriage under federal law. Congress argued that by not recognizing lawful same-sex marriages, DOMA would serve to “encourag[e] responsible procreation and child rearing.”

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222 McCune v. Essig, 199 U.S. 382 (1905) (federal homestead law prevailed over a daughter’s asserted inheritance); Yiatchos, 376 U.S. 306 (survivorship rules in federal savings bond and military life insurance programs override community property law); Free, 369 U.S. 663; Wissner, 338 U.S. 655. In fact, the Supreme Court noted in these decisions that the federal laws in question were “carefully targeted” to the congressional Congressional objectives. *Hisquierdo*, 439 U.S. at 584-85.


conserve scarce resources, \(^{226}\) and reflect Congress’ “moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.” \(^{227}\) However, Congress’ rationale was based entirely in generalities, devoid of evidence-based policy-making or even a logical connection between how federal interests would be served by simply refusing to recognize only same-sex marriages. \(^{228}\) In each of the cases where the Supreme Court has found a “clear and substantial” federal interest, the Act of Congress in question protected a specific federal benefit that formed part of a national scheme in order to “guarantee[ ] a national uniformity that enhance[d] the effectiveness of congressional policy.” \(^{229}\)

One significant difference between DOMA and prior Supremacy Clause cases decided by the Supreme Court is that DOMA does not create or provide a federal benefit or right, but instead withholds benefits and rights from a discrete class of people—same-sex married couples—within the federal legal scheme. \(^{230}\) Moreover, in cases where the Supreme Court has found a “clear and substantial” federal interest, the federal programs possessed specific objectives that would be harmed if the Court were to apply the conflicting state law. \(^{231}\) As DOMA is a definitional law of general application that does not identify a clear, specific federal interest as it relates to any particular area of federal law, courts would be hard-pressed to ascertain the specific objectives DOMA seeks to accomplish as it relates to individual federal programs. For example, DOMA never mentions immigration and does not provide any “clear and substantial” federal interest that would be served particularly in the realm of immigration law. \(^{232}\) Instead, one must read that Congress seeks to “encourag[e] responsible procreation and child rearing,” conserve scarce resources, \(^{233}\) and reflect Congress’ “moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.” \(^{234}\) by depriving same-sex married couples of the right to be considered married under the immigration laws.

This type of extrapolation does not fit with the body of Supremacy Clause pre-emption law handed down by the Supreme Court. Congress’ general objectives behind DOMA run contrary to the main purpose of our country’s family-based immigration framework, which is to keep families together, promote humanitarian values and family reunification. \(^{235}\) Continuing to exclude legally married same-sex couples from the protection of our nation’s immigration laws actually prevents married couples from engaging in “responsible procreation and child rearing” by allowing a government-sanctioned policy of intentional family separation, including the separation of children from their parents. \(^{236}\) In addition,

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\(^{226}\) H.R. REP. NO. 104-664.


\(^{228}\) H.R. REP. NO. 104-664.


\(^{231}\) Id. at 584.


\(^{235}\) Pinix, supra note 17, at 455 n.25, 26.

\(^{236}\) Marjorie Valbrun, Immigrant Children Face Uncertain Futures, Foster Care, HUFFINGTON POST (Jan. 25, 2012), http://www.huffingtonpost.com/2012/01/25/immigrant-children-face-u_n_1231668.html; Bobby Caina Calvan, Senator John Kerry Joins 16 Other Senators in Urging Delay of Deportation Rules on Same-Sex
failing to recognize same-sex marriages for immigration purposes wastes an immeasurable amount of scarce resources each year, as individuals who would otherwise be eligible for immigration benefits are placed into an expensive and time-consuming removal process that is already over capacity.\(^{237}\)

Finally, recognizing legally performed same-sex marriages under immigration law does not cause an injury to federal law that the Supremacy Clause forbids.\(^{238}\) Congress removed “homosexuality” as a ground of inadmissibility from the immigration legal scheme in 1990, ostensibly opening the way for lesbian, gay, bisexual and transgender individuals to freely immigrate to the United States.\(^{239}\) Therefore, moral disapproval of “homosexuality” no longer formed an independent moral or legal basis for exclusion under the immigration scheme. Similarly, the simple expression of Congress’ “moral disapproval of homosexuality” cannot form the basis of a “clear and substantial” federal interest, as is envisioned in the Supreme Court’s Supremacy Clause cases. The federal government has no “clear and substantial” interest in enacting its own general definition of marriage in an area of family law so clearly reserved to the states by the Tenth Amendment and centuries of case law, that complete federal pre-emption of a state’s general definition of marriage would engender an absurd result.

Any interest Congress might have in expressing its “moral disapproval of homosexuality” runs afoul of the basic goal of Supremacy Clause pre-emption that the Act of Congress in question “prevent[ ] the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy.”\(^{240}\) Instead, DOMA has the exact opposite effect in the area of immigration law. Federal courts have long dictated that a marriage, if valid where celebrated, should be recognized as valid throughout the United States.\(^{241}\) The immigration laws of the United States have also incorporated this principle of recognition when defining “marriage” and “spouse.”\(^{242}\) However, the continued application of Section 3 of DOMA to immigration law completely disrupts this long-standing and carefully crafted legal scheme. Never has there existed a national scheme to define marriage, nor a national uniformity among the states regarding who may legally marry within its borders. This reflects the founding principle that “[s]tates are not mere political subdivisions of the United States,” but sovereigns unto themselves.\(^{243}\) Therefore, in order to merit pre-emption under the Supremacy Clause, DOMA must supplant a state’s entire definition of marriage, which runs counter to centuries of case law and this country’s basic founding principles.


\(^{239}\) Titshaw, supra note 30, at 586 n.222.

\(^{240}\) Id. at 566.

\(^{241}\) Id. at 566.

III. Conclusion

The continued application of DOMA’s definition of “marriage” and “spouse” to the Immigration and Nationality Act to exclude legally married same-sex couples disrupts longstanding legal principles, as well as the power of individual states to determine and prescribe their own laws relating to family matters. The United States Supreme Court and the agencies charged with interpreting and implementing federal immigration laws have consistently adhered to the principle that a marriage, valid where celebrated, is valid for immigration purposes. Currently, six states and the District of Columbia allow same-sex marriage, including all of the rights and responsibilities that come with it. However, the federal government’s continued application of DOMA to deny same-sex married couples’ rights under the INA has resulted in an illogical system where same-sex marriages legally performed within the United States are invalid for immigration purposes.

Now that a number of states allow for same-sex marriage, the tools to dismantle DOMA lack only in application. It is clear that Congress possesses no enumerated or implied authority to invent a general definition of marriage for any purpose, as the power to regulate family law belongs to the states under the Tenth Amendment and their police power. Furthermore, in the context of federal immigration law, DOMA cannot pre-empt state laws that allow for same-sex marriage. State family laws allowing for same-sex marriage do not do “major damage” to “clear and substantial” federal interests, in large part because there is no federal interest in providing for a general definition of marriage. Therefore, DOMA’s application to the INA must be challenged on Supremacy Clause grounds, as well as on Tenth Amendment grounds, both before the agencies and the courts in order to stanch the tide of same-sex families being separated and left in administrative limbo for years on end.
HATE: AN EXAMINATION AND DEFENSE OF THE MATTHEW SHEPARD & JAMES BYRD, JR. HATE CRIMES PREVENTION ACT

By Jennifer Johnson*

You must not kill your neighbor, whom perhaps you genuinely hate, but by a little propaganda this hate can be transferred to some foreign nation, against whom all your murderous impulses become patriotic heroism.

Bertrand Russell

Introduction

As a teenager, I sat at Matthew Shepard’s memorial service in Saudi Arabia, where the Shepards and I resided.2 The phrase kept running through my head, ‘Who are we?’ We are all humans, yet violent hatred of someone because of that person’s innate characteristic is considered acceptable behavior to some. President Obama’s signing of the Matthew Shepard & James Byrd, Jr. Hate Crimes Prevention Act (HCPA) put America’s seal on the statement that hateful behavior is unacceptable and the federal government will not sit by while minority groups, including lesbian, gay, bisexual, and transgender (LGBT) individuals, are physically targeted because of their sexual identity and orientation. This statement, for the first time, meaningfully moves the queer community into a governmentally protected status. When Stanley Milgram studied the atrocities and success of Nazi hate in the 1960s, his experiments evidenced that the power of a leader and group motivation can persuade ordinary people to do extraordinarily evil things.3 Similarly, maybe the opposite is true. Perhaps the power of this statement, this legislation, can persuade ordinary people to extraordinarily look past a long history of deep-rooted hate, or at the very least, signal the depths of hatred’s wrong.

Hatred motivates murder and other forms of violence every day. But at what point does hatred become a hate crime? The term hate crime encompasses broad ideas such as “prejudice,” “bias,” “bigotry,” “sexism” and “homophobia,”4 and reaches its zenith when

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2 Matthew Shepard was a University of Wyoming student who was brutally tortured and murdered near Laramie, Wyoming in 1998. His murder brought national attention to hate crimes legislation due to the fact that an officer and an attacker’s girlfriend knew the crime to be motivated by hate due to sexual orientation.

3 JACK LEVIN, THE VIOLENCE OF HATE: CONFRONTING RACISM, ANTI-SEMITISM AND OTHER FORMS OF BIGOTRY 100 (Jeff Lasser et al. eds., 2nd ed. 2007).

4 Id. at 1.
those ideas are turned into action. A hate crime’s effect does not stop with the victim, but rather spear a message into the targeted community that fear should and will be a part of that community’s everyday reality. Hate crimes are about sending a message to intimidate and terrorize a minority group that may not even be directly involved in the actual crime itself. As the Republican Georgia Representative Dan Ponder, Jr. stated during one of the early hearings on the expansion of hate crimes legislation, “the gay person that is bashed walking down the sidewalk in midtown is a message to gay people.” Hate crimes legislation provides protection for individuals who are reached by these heinous acts without encroaching upon each individual’s personal beliefs and violating First Amendment protections.

This paper examines the background and perspectives of hate crimes legislation, the difficulties in prosecuting and reporting hate crimes, and the necessity for the HCPA. It also examines domestic, and international methods of combating hate crimes. Further, it squares the current legislation with the First Amendment and the Commerce Clause, as well as refutes criticisms and explores where the HCPA may provide future protections for the LGBT community. The HCPA successfully balances the First Amendment with minority protections and skirts any constitutional challenges.

I. Definitions & Explanations

Following the assassination of Martin Luther King, Jr., the first hate crimes legislation was enacted in 1968. If the victim was a participant in at least one of six federally protected activities, such as serving as a juror or attending public school, the law authorized federal authorities to investigate and punish crimes motivated by race, religion, and national origin. Retrospectively, the reach of the first hate crimes legislation was very limited in scope because the victim had to be participating in one of the defined, politically protected activities when targeted by a perpetrator for her minority status. Further, an early step towards providing sufficient data for the HCPA was the Hate Crimes Statistics Act, which was passed in 1990. This required the Department of Justice to report crimes that manifested prejudice based on several factors, including sexual orientation. These steps were laudable movements towards the implementation of the HCPA and provided a necessary protection to various minorities.


8 Id. at § 245(b)(2)(A) & (D).

9 These include race, color, religion, and national origin.

The HPCA defines a hate crime as “whoever . . . willfully causes bodily injury to any person . . . or . . . attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.” This language greatly expands the definition of protected groups to include individuals targeted because of their sexual orientation. Additionally, a preceding section of the HCPA includes race and skin color as protected from hateful criminal targeting. The HCPA also copiously broadens hate crime coverage by omitting the requirement that the victim be a participant engaged in at least one of a limited set of political activities during the actus rea of the perpetrator. The previous hate crimes legislation was a toothless attempt to protect racial minorities, whereas the current legislation provides the actual ability for the federal government to protect a greater number of minority individuals. The HCPA provides the federal government, through the Department of Justice (DOJ), the funding and authority to investigate and prosecute hate crimes or bias-motivated crimes and provides the DOJ the ability to aid state and local authorities for such investigations.

II. Necessity for the HCPA

Fueled by the constant innovation of hate-driven groups and the further realization that the protection of LGBT persons is necessary to spur forward equality and recognition in American society, the HCPA fills a void in the criminal justice system. The HCPA is necessary for three reasons: 1) to combat excessively harsh and planned group violence; 2) to prompt local law enforcement to fulfill its duties or have federal investigations take place; and 3) to provide a necessary assertion that violence because of someone’s identity is criminal on a higher level.

The most dangerous type of hate crime is one that is fueled by ideological perspectives, such as the case of skinhead violence. This type of violence is smart (not intelligent) and purpose-driven. It is premeditated violence carried out to further perceived racial dominance and purity, and is frighteningly rationalized based upon the radical beliefs of the perpetrators. Hate crimes legislation is necessary to counter these rationalized and organized hate crimes, which become even more dangerous in a group setting due to the “mob mentality.” The goals of this powerful breed of hate are not only to inflict suffering on the designated minority, but also to impassion the followers, inflict permanent harm on the opposition group, and eventually conquer the victim.

The HCPA has and will continue to provide a national legislative language against bias crimes, as well as a gap-filler when local laws and law enforcement fail to curtail or punish hate crimes. For example, what eventually became the nationally covered Jena 6 incident

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14 Id.

15 Id.

16 Whillock, supra note 5, at 32.

began as a smaller bias crime that, if prosecuted, may not have escalated into attempted murder.

The Jena 6 debacle began with white students hanging nooses under a tree where African-American students had asked to sit.\textsuperscript{18} The school district committee foolishly opted to label the incident a prank, and suspended the perpetrating students for three days.\textsuperscript{19} Shortly after, six African-American students attacked one of the students involved in the noose hanging. The young man who was attacked sustained minor injuries. However, all six African-American students were charged with attempted murder.\textsuperscript{20} This is an instance where local law enforcement failed to take action regarding a hate crime, thereby escalating the situation to a point of greater violence between the students. Had the HCPA been enacted, the initially targeted students, though their actions are not excusable or acceptable, would have had federal legal recourse as an option instead of resorting to violence. Unfortunately, the hate crimes legislation in effect only was applicable to certain federally protected activities.

The Jena 6 incident is a situation that escalated as a direct result of the lack of an adequate investigation into a perceived bias-crime by local law enforcement and by the school officials. Hate crimes legislation not only provides funding to local law enforcement, but also gives jurisdiction to the Department of Justice so that it may step in when local law enforcement is not effectively investigating crimes. Prior to this legislation, when a hate crime was brought to the attention of federal authorities, it was beyond federal jurisdiction to investigate, and there was nothing the federal government could do about the lack of accountability and effort on the part of state law enforcement. Bias crimes, particularly those that take place in schools where children are forming behavioral modes based upon perceived societal norms, need the scrutiny of the HCPA. Students need to be shown that hate crimes and scare tactics that provoke fear in others are both unacceptable and illegal.

The HCPA is essential for two reasons: 1) to benefit society by punishing offenders and thereby lessening the chance of violent escalation that feeds the culture of hatred; and 2) not to criminalize acts for the simple sake of criminalization, but rather to educate society on functioning as responsible and respectful citizens.\textsuperscript{21} One of the roles of criminal law should be to guide citizens, through this educative function, in the proper mode of societal values. Allowing hate crimes to go unpunished sends the wrong message to society. It sends a message that one group of citizens is less important than another, that these citizens are not worth governmental and legislative protection, or even worse, that the government tolerates, supports, and even endorses, these hateful actions.

III. Statistics

In recent decades, studies have shown that bigotry, in general, has been on the decline\textsuperscript{22} and current socio-cultural momentum favors increased LGBT rights.\textsuperscript{23} This may be directly

\textsuperscript{18} Id. at 226.
\textsuperscript{19} Id. at 227.
\textsuperscript{20} Id. at 228.
\textsuperscript{21} Frederick M. Lawrence, Memory, Hate, and the Criminalization of Bias-Motivated Violence: Lessons from Great Britain, in BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 140, 141 (Nancy L. Rosenblum ed., 2002).
\textsuperscript{22} LEVIN, supra note 3, at 12.
\textsuperscript{23} J. Brady Brammer, Religious Groups and the Gay Rights Movement: Recognizing Common Ground,
due to the inclusion of race, religion, and national origin as protected under previous hate crimes legislation, the landmark of the Civil Rights Act of 1964, or general political activism to protect minorities. Regardless of the source, a marked improvement in the fight against bigotry has undoubtedly followed the inception of hate crimes legislation in 1968.

Hate based on race and religion has plummeted in recent decades, practically ostracizing hateful disposition from the general mainstream society. A 1966 survey showed that 50% of white Americans held the bigoted view that African Americans were lazy, while in 2001 only 4% held this view. Between 1942 and 1968, a sizable amount of white Americans began to support the integration of schools, spurred forward by the 1954 decision of Brown v. Board of Education’s forced integration and dramatic shift in the Supreme Court’s equal protection policy. Historically, the innovation of judicial decisions, launched forward by activist organizations, have served as a catalyst, bringing about advances away from bigotry.

Hate and bias regarding sexual orientation have also appeared to decrease. The number of Americans who believe that homosexuals should have equal job opportunities has risen by more than 50% since 1977. These figures are undeniably attributable to the laudable activism of LGBT groups and the awareness that followed the onset of the AIDS epidemic in the United States. The percentage of Americans who believe that homosexuality is an acceptable “alternative” lifestyle increased from 34% in 1982 to 50% in 1999. From 1982 to 2005, the percentage of Americans who viewed the gay lifestyle as an acceptable lifestyle rose from 34% to 51%. Inversely, from 1982 to 2005, the percentage of Americans who thought a gay lifestyle was altogether unacceptable fell from 51% to 45%. One potential explanation for this is the significant public attention drawn to, and education about, the gay community during the onset of the AIDS epidemic of the 1980s. Aside from practical aspects of freedom of choice in lifestyle opinions of Americans, is the moralist, somewhat more internal, change in opinion. More than half of Americans previously polled said that homosexual relationships were morally wrong, but for the first time, in 2010, the number dipped to 43%, showing a significant decrease in the number of Americans believing homosexual relationships are morally wrong. Following the HCPA’s enactment and the

25 LEVIN, supra note 3, at 12; ROY L. BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA 90 (2009) (looking at overt discrimination and not taking into account latent bigotry seen as subordination as noted by critical race theorists).
26 LEVIN, supra note 3, at 11.
27 Id.
29 Polls show that the percentage of Americans believing that homosexuals should be given equal job opportunities increased from 56% in 1977 to 74% in 1992 and 88% in 2003.
30 LEVIN, supra note 3, at 12.
31 Id.
32 Id.
33 Id.
media coverage of the ‘Prop 8’ trial it is likely these statistics have or will change positively, as more citizens become aware of the issues and facts.

Following the visibility and progress of Lawrence v. Texas in 2003, scandals involving sexual abuse by Catholic priests may have caused a decrease in the percentage of Americans who thought that homosexuals should be allowed to be clergy or elementary school teachers. Additionally, between 2003 and 2005, those scandals may have caused a decrease in the percentage of Americans who support the legality of homosexual relationships from 60% to 52%. Significantly little has changed since 1977 when only 43% of Americans supported homosexual relations being legal; nonetheless, any improvement is notable and, as of 2009, the Gallup polls showed that 58% of Americans believed that relations between consenting adults should be legal.

The statistics above show a marked improvement in the status of LGBT individuals in the eyes of Americans and with the advent of the HCPA, this could potentially be amplified. The queer community has never been protected by hate crimes legislation before the enactment of the HCPA, and such legislation is not expected to eliminate the problem of bias entirely. Stereotyping and bigotry aimed at other minorities, however, has declined following the social motif behind prior hate crimes legislation. Should history serve as an indicator for the future, the LGBT community should be optimistic.

IV. Difficulties

One of the most elephantine problems is classifying hate and measuring hate when it becomes violent action. Over the past century, it has become more difficult to quantify hate due to technological innovations, cross-culturalization, and the blurring of traditional bigotry lines.

One of the marked difficulties in classifying “hate” stems from the technological changes that have taken place in the past decades. Where hateful rhetoric used to be secluded to masked horsemen, bulletins, pamphlets, and church sermons, the internet has taken their place as a major communication tool for the dissemination of hatred. It has made hatred easier. Now, hateful information can be posted anonymously without anyone having to do anything more than press a few buttons. While an inactive speech, this method of bigotry does fuel hateful action. However, the internet is also a major information tool for equality groups. Additionally, visibility of the LGBT community on mainstream television has increased as the media has begun to respect queer civil rights. Hate is not en vogue. For example, in 2001 when Jerry Falwell blamed the 9/11 attacks on gays, lesbians, feminists, and abortionists, virtually every media outlet publicly denounced him. As idealist critical race theorists point out, it is necessary to change the social narrative through

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35 Perry v. Schwarzenegger, 591 F.3d 1147 (9th Cir. 2010), cert. dismissed, 130 S. Ct. 2432 (2010).
37 LEVIN, supra note 3, at 13.
38 Id.
41 Id.
42 Id.
visibility in order to change a repressive structure of society. The HCPA is a progressive step in changing the queer narrative.

A further difficulty in classifying bigotry is that hate is no longer restricted to white-on-minority or vice versa, but rather crosses minority lines, which often blurs the perception of hate crimes. For example, in 1994, when prompted by the statement that Asian Americans were unscrupulous, a survey found that 27% of White Americans agreed; however, 46% of Latinos and 42% of African Americans did as well. Therefore, America’s historical “white” bigotry is no longer the norm, and the issue requires further analysis.

Another difficulty is the reporting of hate crimes. As a benefit of the recent legislation, the HCPA mandates and funds the FBI to compile data regarding hate crimes, including those of gender, gender identity, and sexual orientation of the victim. Previously, only the status of the victim was reported. However, victims are often too afraid to report these crimes. This fear stems from a number of sources: 1) fear of potential retaliation by the violator; 2) fear, for some homosexuals, of being ‘outed’ if the process does not remain confidential; 3) fear of not being accepted or supported by local law enforcement; and 4) in the case of immigrants who come from backgrounds under repressive regimes, distrust of authorities. These factors, and undoubtedly others, lead to a significant reporting problem.

In 2005, for example, the FBI officially labeled 9,000 offenses as hate crimes. However, the FBI still acknowledges that the numbers are vastly underreported. Furthermore, in 2007, the Department of Justice’s Uniform Crime Reporting Program reported 7,624 incidents of hate crimes distributed over 15.3% of the reporting agencies; 84.7% of the agencies reported no hate crimes. Some states have been more cooperative than others. In 2004, Alabama only claimed five hate crimes and Mississippi only claimed two. Either there is very little hate in those states or, more likely, there is a reporting problem.

Technological classification and dissemination, cross-culturalization, and reporting issues are only a few of the problems with addressing hate crimes. The HCPA works against some of the difficulties in classification as it provides for funding to report hate crime incidents, which may provide a greater incentive to report accurate information since it is not coming out of the state budget. Further, evidence reported of internet dissemination of hateful material provides an estimate of the purpose behind the violent acts. This, however, is merely a positive effect of a difficulty brought about by technological changes. Therefore, the HCPA serves to reduce some of the difficulties associated with quantifying hatred and hate crimes.

V. International Perspective

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43 BROOKS, supra note 25, at 96.
44 LEVIN, supra note 3, at 13.
46 Id.
47 LEVIN, supra note 3, at 16.
48 Id.
50 LEVIN, supra note 3, at 16.
To deny the countless deaths of a known event of genocide is to celebrate the deaths of the same victims and to intimate cynically that the doctrine of power which brought about their destruction is still in force, to be used when opportunity permits.

Dr. Israel Charny

Though the international arena does not share the same heightened protections on freedoms of speech and expression as provided by the United States via the First Amendment, the regulation by other countries of certain hate-filled speech that might lead to violence is instructive because this international perspective sometimes influences the Supreme Court. If foreign governments are regulating the arena when the hate or offensive idea is verbally expressed, and not yet at the point of action, a heightened punishment for physical action is certainly justified.

The European Union’s restrictive nature regarding hateful speech largely stems from the undoubted influence of the remnant wounds of WWII, and the gross atrocities that manifested from such vocalization and propaganda by the Nazis. The Nazis were devastatingly effective at instilling hatred because they dehumanized the targeted peoples and so openly instilled fear in the minority communities that were persecuted. A 1996 opinion issued by the Human Rights Committee upheld a French statute criminalizing the refutation of the Holocaust, stating that this restriction did not violate the human rights of the expresser, because those ideas were not necessary when compared to the right of the Jewish community to live in a society with “full human dignity and free from an atmosphere of anti-Semitism.” While the terror of skinhead violence stemming from such hate-speech resonates more harshly in post-WWII Europe, the message and its effects reach every culture and minority group.

As a means for coping with the global crisis of bias violence, Mark Hamm ponders a global definition of hate crimes because it is defined so variously across borders and is a global phenomenon that reaches every continent, regardless of culture. Creating solutions under the macro approach produces a more unified and effective result than allowing broad terms for solutions in the micro setting. Working simply in the micro setting could create greater errors in social control than are already presented. The misrepresentation of the AIDS epidemic serves as an example of the dangers of the restrictive nature of micro-scale labels. It evidences that erroneous doctrine can lead to damage on a larger scale, such as the millions of lives lost to a disease originally thought to solely affect homosexuals. Germany has gone so far as to ban organizations that question the democratic principles of the German Republic, specifically skinhead groups. In the United States, this ban would

51 Israel W. Charny, A Contribution to the Psychology of Denial of Genocide: Denial as a Celebration of Destructiveness, an Attempt to Dominate the Minds of Men, and a 'Killing' of History, in GENOCIDE & HUMAN RIGHTS: LESSONS FROM THE ARMENIAN EXPERIENCE 4 J. ARMENIAN STUD. (SPECIAL ISSUE) 289, 300 (1992).
52 Lawrence v. Texas, 539 U.S. 558, 573 (2003) (discussing the persuasive authority of the Wolfenden report which advised the repeal of punishment for homosexual acts and the ECHR case of Dudgeon v. United Kingdom, which held proscriptions on homosexuality invalid).
54 Id. at 186.
55 Id. at 177.
categorically violate the freedoms of association and expression. In 1991 alone, skinhead youth gangs perpetrated over 200 assaults against homosexuals in the United States as reported by Klanwatch.\(^57\)

Not all foreign countries are more protective than the United States in guarding citizens from hate. Contrarily, several foreign States fail in comparison to the United States’ record of protecting citizens from hate crimes. As mentioned above, a global language combating LGBT violence is necessary, especially given the recent Ugandan attempt to further codify violence into law. Though homosexuality was already illegal in Uganda and most of Africa, the new law was intended as an extension of the current law.\(^58\) Under the new law, not only are homosexuals doomed to life imprisonment, but those who test positive for HIV can be executed.\(^59\) Further, the law also would punish anyone who fails to report a homosexual to the government. This continues to take away the privacy of homosexuals and further isolates individuals because they will fear exposing themselves to their friends and family.\(^60\) Hopefully, with the United States’ condemnation of violence upon LGBT individuals and other countries and non-governmental organizations protesting this piece of legislation, its strength will be debunked. In the Ugandan instance, not only are the personal freedoms from hate and of security of person infringed upon, but also LGBT individuals’ freedoms of expression and association are completely restricted. Recently, human rights groups have been highly alarmed over the state of free speech and press rights in the country; along with greater suppression of homosexuals, new laws limiting the rights of the press come on the heels of the suspicious deaths of two journalists.\(^61\) Where the government of Uganda is restricting both sides of freedom, the HCPA conserves both aspects of freedom in the United States. The HCPA provides punishment that lends to freedom from hate, while also ensuring that the punishment does not infringe upon freedoms of expression and association. It is the job of the government to protect and assure these rights, and the HCPA in the United States is assuring these goals. Hopefully, these assurances will spread to other nations through diplomacy, such as the recent speech given by Secretary of State Hillary Clinton recognizing that LGBT rights are human rights.\(^62\)

It is necessary to strike a precarious balance between the freedoms from hate and the freedom of expression. The restrictions on rights vary depending on the era and subject matter of the restriction;\(^63\) however, the HCPA does not sway too far and errs on the side of protecting expression rights. In Sweden’s Supreme Court \textit{Åke Green Case}, under the

\(^{57}\) Id. at 174.


\(^{62}\) Hillary Rodham Clinton, Sec’y of State, Remarks at an Event Celebrating Lesbian, Gay, Bisexual and Transgender (LGBT) Month (June 22, 2010), available at www.state.gov/secretary/rm/2010/06/143517.htm.

\(^{63}\) ROBERT L. TSAIL, \textit{ELOQUENCE & REASON: CREATING A FIRST AMENDMENT CULTURE} (2008) (discussing the relativity and evolution of the First Amendment as it applies to various rights and how it has been used for social change).
standard of the European Convention on Human Rights, a pastor’s condemnation of homosexuality narrowly escaped prosecution. The pastor was only reprieved after his actions were balanced against the right to freedom of religion, and his religious freedom tipped the scales. Further, a 1994 opinion of the European Court of Human Rights went so far to determine, after a journalist reported on a xenophobic group, that regardless of the import of circulating the news, allowing a hateful message to be disseminated was unnecessary televisualing of hateful propaganda and the journalist’s conviction was upheld. Is usurping the freedom of the press too hefty of a price tag for eliminating hate? While it would certainly step on toes in the American system, it is instructive as to just how far other governments will go to prohibit xenophobic groups from spreading their propaganda, and just how seriously the matter is taken in other countries.

The juxtaposition of American Booksellers Association, Inc. v. William Hudnut, III and Regina v. Butler further highlights the dramatic difference between speech protection in the United States and in other countries. In American Booksellers, the Seventh Circuit struck down a statute that restricted violent pornography because the purpose was not neutral, but rather intended to only allow the treatment of women in an approved non-violent manner. While the fragility of women was set aside as an issue, the government’s ability to take a stance on this form of expression violated the First Amendment’s mandate of neutrality regarding the content of speech. The government is not allowed to look at the content of the speech, therefore, the effects on women was not an issue eligible for decision under the First Amendment. Neutrality towards the content of the speech means that a court cannot examine the content of the speech to see whether it is beneficial. Meanwhile, in Butler, the Supreme Court of Canada upheld a similar statute, finding that the harm caused by the seriously offensive materials denigrating women was more objectionable in society than this particular impairment of the right to freedom of expression. These distinct outcomes illustrate how deeply the United States values protection of speech, even against the harms of pornography, so heinously objectionable to women. Is the United States wrong to have such slack reins on speech at the direct expense of its citizens? Regardless, the legislation of the HCPA falls well outside the bounds of speech protected by the First Amendment.

The international community has a diverse array of approaches to hate crimes and freedoms of speech, ranging from strict protection of victims against speech rights, to absolute status criminalization of homosexuals. The United States’ approach creates protections without infringing on First Amendment freedoms, which still provides for protections of both sets of rights.

65 Id.
67 American Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985).
69 Bell, supra note 5, at 976.
70 American Booksellers Ass’n, 771 F.2d at 325.
72 It is debatable whether this is at the expense of the citizens, because it is almost as objectionable in a sexist manner to make something illegal purely because it is a woman that is being objectified in a seedy manner.
VI. Squaring Hate Crimes Legislation with the First Amendment

When the legislature purports to add the personal bigotry of the perpetrator as an element of a crime, it is merely recognizing punishment allotted for a greater harm inflicted than for a simple crime with no bias motive. The HCPA’s integration of personal bias into the motivation of the perpetrator does not breach the general proscription upon regulation of expressive conduct or intruding into the personal beliefs of the perpetrator, but rather, criminalizes selective conduct. Thought is not criminalized, and the American people are free to hate. However, the American people are not free to assault someone because of that hateful bias they freely hold. The legislature had a fine balance to strike between the personal liberties of free speech and the inability to regulate against Orwellian-thought crimes. Unlike its international counterparts, the HCPA strikes this balance. As long as the freedoms granted by the First Amendment do not allow the physical harm of a person because of their status, the HCPA does not come within the vicinity of freedoms of speech and expression.

To begin, the First Amendment, as stated by Martha Merrill Umphrey, requires neutrality in all government decisions related to religion. This neutrality should not extend merely from religion to religion, but also ‘avoid preferring religion to nonbelief’ and vice versa. This necessary avoidance of preferring religion to ‘nonbelief’ extends to avoidance of preferring certain religious ideas over activities that may conflict with segments of religious belief, even though they are not per se ideas of ‘nonbelief.’ Therefore, when a law protects a group that does not particularly align itself with all religious belief and also protects individuals because of religious belief, it is merely placing both groups on even footing. In the instant case, the HCPA includes violence against religious groups, as well as violence against individuals because of sexual identity.

The HCPA passes the standard established in R.A.V. v. City of St. Paul. It does not inappropriately amount to the government choosing one side of a bias-motivated crime of expression, but punishes a bias-motivated crime of action. In R.A.V., several teenagers were prosecuted under the St. Paul Bias-Motivated Crime Ordinance for burning a cross in the yard of an African-American family. This statute was held unconstitutional because it discriminated on the basis of the content of the perceived message. The statute, while criminalizing an act of

“plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor,”

74 Martha Merrill Umphrey et al., The Sacred in Law: An Introduction, in LAW AND THE SACRED 1, 12-15 (Austin Sarat et al. eds., 2007). This discussion of religion versus nonbelief in relation to the First Amendment is set against the backdrop of an exploration and various theories regarding the sacred nature of the Constitution.
75 Id.
77 Id. at 381.
also regulated the use of expression based on the underlying message of the action, rather than the action alone. Where there is some neutral reasoning for banning cross-burning or swastika burning, such as prevention of fires and safety concerns, this ordinance was explicitly directed towards the offender’s message instead of the action, thus failing the First Amendment’s general prohibition against governmental speech banning due to disapproval of the content. The ordinance applied only to certain words based on beliefs exclusive to “racial, religious, or gender-specific symbols” and not to other words, regardless of how offensive they may be. For example, the ordinance would not reach someone drawing graffiti that said “all races should burn” but would reach someone saying that “all African-Americans should burn.” Instead of including all hateful expressive conduct, the selectivity of the ordinance brought its demise.

Some restrictions on speech are allowed in specific, limited areas where the interest in public morality outweighs the necessity of a kind of speech, which is not characterized as expressive speech; these areas include things such as libel, child pornography, and certain nonverbal expressive activity such as “fighting words.” The Court distinguished these instances from the facts of R.A.V. because speech that produces particular secondary effects that are swept up within a statute directed at an action, rather than speech, is a legitimate form for regulating “speech.” The Court used Title VII’s prohibition on sex discrimination in employment as an example of an instance where sexually derogatory words may be used as evidence of discrimination. The Court emphasized that “acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”

The Court in Wisconsin v. Mitchell reaffirmed this message, while also slightly stepping back from its extreme anti-regulation position. In Mitchell, the Court upheld a Wisconsin statute that provided for an enhanced sentencing penalty if the offender selected the victim based on the “race, religion, color, disability, sexual orientation, national origin or ancestry of that person.” Further, the Wisconsin statute enhanced the penalty for bias crimes specifically because these crimes inflict a greater harm on society and the individual. The Court rejected the view that conduct can be labeled speech because it merely expresses an idea. In Mitchell, the defendant argued that because the statute

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78 Id. at 380, 385.
79 Id. at 382, 385.
80 Id. at 393.
81 Id. at 384 (excluding, most likely, proscription of content only libelous of the government).
82 Id. (suppressing child pornography does not amount to suppression of communication of particular ideas but rather censors a particular theme due to its harmful nature).
83 Id. at 385 (prohibiting burning a flag may be permissible because of a desire to prevent fires, but not because of a ban on dishonoring the flag).
84 Id. at 384 (criminalizing words based on the non-speech elements of inciting violence is permissible and the Court analogized this to the sound of a noisy truck that merely creates nuisance; however, the government may not regulate that nuisance based on favoritism or disfavor towards a certain message).
85 Id. at 389.
86 Id.
87 Id. at 390.
89 Bell, supra note 5, at 972.
90 Mitchell, 508 U.S. at 480.
91 Id. at 487-88.
92 Id. at 484 (citing United States v. O’Brien, 391 U.S. 367, 376 (1968)).
enhances the penalty for conduct based on bigoted beliefs more severely than the conduct without those beliefs, the First Amendment was violated.\textsuperscript{93} However, the Court noted that the motive of the defendant is often an important factor in criminal matters and sentencing and also upheld investigation into motive regarding antidiscrimination laws.\textsuperscript{94} Further, the defendant argued that evidence of prior speech and associations could be used as proof of intent and thus was overbroad and restrictive of free speech.\textsuperscript{95} The Court did not support the argument that someone would suppress bigoted opinions for fear of later committing a violent offense covered by the statute and therefore concluded that evidence of a person’s speech has long been used to prove motive or intent.\textsuperscript{96} This has occasionally been misinterpreted, as some scholars perceive the decision as holding that bigoted speech is not protected under the First Amendment.\textsuperscript{97} The speech is still protected and people are still allowed to opine, however, violence is never protected. Therefore, the perpetrator’s bigoted motive can be considered in a criminal prosecution.

The Court went further in \textit{Virginia v. Black} to clarify when cross-burning is protected “speech.”\textsuperscript{98} The Court held that it was lawful to ban cross-burning where the action had the intent to intimidate.\textsuperscript{99} Similarly, the HCPA targets the action, while considering the intent of the perpetrator. Because most criminal prosecutions consider the perpetrator’s intent in evaluating the crime, this consideration by hate crimes legislation is not novel.

Allowing punishment for action motivated by status animus is thus set out as a permissible government action. Laurence Tribe, in a Supreme Court Review article, artfully sets out four hypothetical statutes and analyzes them accordingly.\textsuperscript{100} Ordinance A would punish all assaults as felonies equally; Ordinance B would double the punishment for a felony motivated by racial hatred; Ordinance C would double the punishment based on the defendant’s beliefs; and Ordinance D would double the punishment based on the defendant’s attempt to communicate a racist message.\textsuperscript{101} Under Tribe’s analysis, the HCPA would fit under the hypothetical Ordinance B, which outlines a constitutionally acceptable punishment for action motivated by status animus. The HCPA punishes those who are motivated to harm a victim because of that victim’s status. The government must not punish beliefs that give rise to the act or the communication of beliefs, but as in Ordinance B, the government is allowed to legitimately punish the “facts” that were perceived by the perpetrator in committing the acts. This does not mean that the government is punishing the perpetrator’s beliefs about those facts, but rather the action motivated by those facts. In Ordinance B, the race of the victim is merely one of the facts perceived by the perpetrator in commission of the crime and is therefore punishable.\textsuperscript{102} Further, Ordinance B does not

\textsuperscript{93} Id. at 485.
\textsuperscript{94} Id. at 485, 487.
\textsuperscript{95} Id. at 488.
\textsuperscript{96} Id. at 489.
\textsuperscript{97} Bell, supra note 5, at 973.
\textsuperscript{98} Virginia v. Black, 538 U.S. 343, 368 (2003).
\textsuperscript{99} Bell, supra note 5, at 975.
\textsuperscript{101} Id. at 1-2.
\textsuperscript{102} Id. at 13.
violate the Equal Protection Clause because perpetrators of hate crimes are justifiably in a different circumstance than those who act for non-bias-motivated reasons.\(^{103}\)

The HCPA differs greatly from the legislation struck down in \textit{R.A.V.}, and while it is somewhat similar to the circumstances in \textit{Mitchell}, significant differences can still be found. Here, as the Court stated in \textit{R.A.V.}, “the subclass happens to be associated with particular ‘secondary effects’ of the speech, so that the regulation is ‘justified without reference to the content of the . . . speech.’”\(^{104}\) Therefore, though the speech happens to be used as a means to determine whether an act was motivated by the status of the subclass, the legislation is not regulating the speech, but the action. Similarly, if speech happens to prove a treasonous act, the treason is punishable and not the speech.\(^{105}\) As was noted in \textit{Mitchell}, bias-motivated crimes have the intended effect of provoking retaliation, emotionally harming the victim, and further intimidating the community surrounding the victim.\(^{106}\) In contrast to the situation in \textit{Mitchell}, the HCPA punishes the crime rather than merely adding a sentence enhancement. Therefore, as the HCPA does not address sentencing, the fear of potential Fifth Amendment double jeopardy is obsolete,\(^{107}\) and a single punishment is given for a single act.

Accordingly, because the HCPA does not specifically encourage the suppression of expression and rather criminalizes conduct, the legislation merely has to survive a rather lenient test: (1) it is within the power of the government; (2) it furthers important governmental interests; (3) the governmental interest is unrelated to suppression of free expression; and (4) any incidental restriction is no greater of a restraint on speech than is absolutely necessary to obtain the goal set forth by the proposed legislation.\(^{108}\) The HCPA easily passes this test, as the government’s Commerce Clause power to enact this legislation serves the important interest of protecting citizens from violence in interstate travel, specifically when citizens are targeted because of status.

\textbf{VII. Criticisms}

\textit{There are six admonishments in the Bible concerning homosexual activity and our enemies are always throwing them up to us usually in a vicious way and very much out of context. What they don't want us to remember is that there are 362 admonishments in the Bible concerning heterosexual activity. I don't mean to imply by this that God doesn't love straight people, only that they seem to require a great deal more supervision.}

\textit{Lynn Lavner}\(^{109}\)

While there are copious criticisms resounding in bigotry, there are several reasoned, though fallacious, criticisms of hate crimes legislation. Given the heightened nature of a criminal prosecution, in contrast to what is in large part the very civil nature of LGBT

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\(^{103}\) \textit{Id.} at 30.
\(^{105}\) \textit{Id.}
\(^{109}\) \textit{LYNN LAVNER, BUTCH FATALE} (Bent Records 1992).
activism, several more procedural concerns arise. These criticisms range from jurisdictional upset to stifled First Amendment rights, and each holds very little water when weighed against the actuality of the HCPA. Some critics even assert potentially unfair implementation of prosecutions; however, the HCPA asserts that the Attorney General must use neutral and objective criteria to assess hate crimes and in decisions to prosecute.\footnote{110}

Conservative religious leader and founder of the group Focus on the Family, Dr. James Dobson, and Andrea Lafferty of the Traditional Values Coalition, as well as others similarly situated, criticized the HCPA in its formative stages as they argued it would “muzzle” religious condemnation of homosexuality and was tantamount to calling religious sermons a hate crime.\footnote{111} Lafferty further said that those religious sermons could later be used as motive to prove a hate crime if the speaker committed a crime.\footnote{112} This critique is flawed.

First, the Act includes specific limiting language that “[n]othing in this division shall be construed to allow prosecution based solely upon an individual’s expression of racial, religious, political, or other beliefs or solely upon an individual’s membership in a group advocating or espousing such beliefs.”\footnote{113} Therefore, since the HCPA excludes beliefs or expression, that fear is null and void. Unless the expression is in the form of a violent act towards another person, it falls outside of the scope of the HCPA. Second, the idea that sermons and religious ideas could be used to formulate motive is firmly grounded in evidentiary procedure. It is not a novel idea that a perpetrator’s words or actions prior to committing a crime can be used to prove motive. It would be cowardice for an individual that commits a crime to hide behind religion as a shield for hateful motive. The Court in \textit{Mitchell} addressed this issue against the argument that free speech is suppressed for fear of later use at a criminal trial, stating that “[t]he First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.”\footnote{114}

The HCPA specifically addresses the spiritual facet of the legislation, stating that:

\begin{quote}
[n]othing in this division . . . shall be construed . . . in a manner that substantially burdens a person’s exercise of religion . . . speech, expression, or association . . . if such exercise of religion, speech, expression, or association was not intended to— (A) plan or prepare for an act of physical violence; or (B) incite an imminent act of physical violence against another.\footnote{115}
\end{quote}

Therefore, religious and other spiritual groups have nothing to fear as long as they are not planning to act with or incite violence.\footnote{116}


112}{Bymes, supra note 111.


116}{Nearpass, supra note 107, at 559, 561-62. Another argument concerns the Fifth Amendment double jeopardy clause for hate crime penalty enhancements, but does not address the situation in the context of the HCPA. The argument suggests that penalty enhancement at the sentencing phase does not give the defendant
Though not necessarily a criticism, a very real concern is the potential criminalization of speech, as a consequence of hate crimes legislation taken too far. However, the HCPA intentionally omits and expressly excludes any expression from its scope. This fear of overreaching largely stems from Adolf Hitler’s use of the Weimar Republic’s hate-speech law to publicize his cause and draw attention to his political strife, and it is exactly this type of inability to speak out against such unrighteous indignation that should be avoided and observed carefully when avoiding a moral panic. It is a fine balance to strike between allowing speech and criminalizing conduct, but the HCPA has successfully found such a balance.

VIII. Jurisdiction

America, where thanks to Congress, there are forty million laws to enforce the Ten Commandments.

Anatole France

In February of 2010, the Thomas More Law Center filed Glenn v. Holder in the Eastern District of Michigan on behalf of a group of pastors, stating that the HCPA violated the Constitution’s First, Fifth, and Tenth Amendments and the Commerce Clause. Though most of the claims had no merit and suffered from a lack of standing for most of the complaint, the Commerce Clause jurisdictional argument was the strongest argument toward striking down the HCPA. In September of 2010, the district court held that the plaintiffs had neither standing to challenge the Act nor claim ripeness.

the benefit of finality of judgment that the Fifth Amendment guarantees. The author of this theory fails to recognize the aim of hate crimes legislation. A perpetrator should not be shown lenience because his crime happened to not be categorized as a hate crime. The author uses the example of a child who has been murdered, providing for a different perpetrator sentence than a hate crime, which fails to recognize the general trend in sentencing enhancements when children are involved. Further, this theory does not recognize the community necessity of hate crimes legislation as separate from sentence enhancement. Since the reach of hate crimes extends beyond the directly involved victims and into a much larger community, a greater sentence is necessary and justified due to the greater harm inflicted. Regardless, the HCPA seeks only to punish the actual crime.

118 Id. at 392.
121 The Thomas More Law Center is a not-for-profit law firm dedicated to defending and promoting America’s Christian Heritage.
123 The complaint is best viewed in its entirety before examining the stronger jurisdictional contention. The complaint, put forth by several pastors, states that the HCPA would prevent the freedom of pastors to preach against homosexuality; the HCPA very clearly articulates that beliefs and words are not to be criminalized and in no way is the HCPA to apply to anything other than action. National Defense Authorization Act for Fiscal Year 2010, Matthew Shepard & James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4710(4), 123 Stat. 2190, 2841-42 (2009). The complaint also alleges that the HCPA creates a class of persons above others; however, the Plaintiffs fail to recognize that the testimony before Congress supported the greater punishment because of the greater harm towards the community of hate crimes. Complaint at 2, Glenn,738 F. Supp. 2d 718 (No. 1:10cv10429). There is no level of victim that is greater in HCPA enforcement, as the
The complaint’s jurisdictional claims questioned the power the legislature has to pass such hate crimes legislation. However, the legislature’s Commerce Clause power, as a mechanism to end racial bigotry, is as old as black and white seating sections; Congress was found to act within its Commerce Clause power when it enacted legislation forbidding restaurants’ racial discrimination, as it burdened interstate commerce. For many of the same reasons, an LGBT person may fear or avoid going to a state where hate crimes are more prevalent, which arguably affects the interstate travel and commerce of citizens. If the inability to serve individuals in a restaurant interferes with the flow of merchandise in interstate commerce, then direct criminal violence against status victims could have the chilling effect of bringing it altogether to a halt. As part of the Congressional findings for the HCPA, Congress noted that hate-crime violence affects interstate commerce by affecting movement of those forced to flee such violence. Also, select members or groups are prevented from purchasing goods or sustaining employment in various areas due to violence. Further, violent offenders cross state lines to commit acts further victimizing the group, and channels of interstate commerce are used to perpetrate the acts. Finally, the violence is often committed using articles sold within the scope of interstate commerce.

Two Supreme Court decisions pose some challenges to this seemingly obvious Commerce Clause rationale. Under the not-so-distant Rehnquist Court decisions, the Court held, in United States v. Morrison and United States v. Lopez, that there are specifically granted state rights in regards to discriminatory action and criminal action. These cases, therefore, question the validity of the HCPA. In United States v. Morrison, the Violence Against Women Act was struck down as being outside of the scope of Congress’s Commerce Clause power because it was a criminal statute that “had nothing to do with commerce.” The statute contained no jurisdictional limit that had an explicit connection to interstate commerce, and there were no express congressional findings regarding the effects

Plaintiffs contend; rather, more individuals are affected by hate crimes which leads to greater punishment. Also, one of the pastors argues that the HCPA was aligning homosexuals with the civil rights movement for African Americans; in no way does this compare to the civil rights movement, but this pastor also cannot deny the significant violence and bigotry that the LGBT community has faced throughout history. Complaint at 6, Glenn, 738 F. Supp. 2d 718 (No. 1:10cv10429). Further, the complaint focuses on homosexuals being the sole beneficiaries of the HCPA and insultingly overlooks the HCPA, which broadly names sexual orientation as only one of several groups that could be potential targets; specifically, the HCPA was named for the violence suffered by James Byrd, Jr., an African-American male dragged to his death by white perpetrators in Texas.

126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
133 Id.
134 Id.
on interstate commerce.\textsuperscript{135} Further, the dissent in \textit{Morrison} seems to flow towards the \textit{Gonzales} decision,\textsuperscript{136} stating that criminal activity can lead to economic repercussions, which makes it difficult to follow a strict test of only allowing economic activity to fall under Congressional Commerce Clause jurisdiction\textsuperscript{137} The reasoning in the \textit{Morrison} dissent, which is not controlling, that is strongly in line with \textit{Gonzales}, which is controlling, would likely validate the HCPA. Further, unlike the initial Violence Against Women Act legislation, Congress has presented voluminous evidence of the economic damage that stems from hate crimes.\textsuperscript{138}

In both \textit{Morrison} and \textit{Lopez}, the Court made the distinction between economic and criminal regulation. In \textit{United States v. Lopez}, the Court emphasized the fact that virtually everything could be extrapolated to reach some economic effect in order to be labeled an economic activity.\textsuperscript{139} However, unlike the HCPA, which regulates human action, in \textit{Lopez} a regulation was placed on an isolated item—a gun—at an isolated location—a school. Like the dissent’s discussion in \textit{Morrison}, a class of persons not subject to heightened scrutiny is protected under the HCPA from intrastate activity. However, the HCPA deals with a criminal remedy rather than the civil remedy of the Violence Against Women Act. It is somewhat difficult to see the economic relation to intrastate violence; however, the court in \textit{Lopez} emphasized the importance of evaluating evidence of interstate economic effects to understand the underlying economic effects of intrastate violence.\textsuperscript{140} Through this evaluation, it is evident that there has been a plethora of evidence regarding hate crimes and its economic effects. Also, it is likely that the older reasoning of \textit{Heart of Atlanta Motel, Inc. v. United States},\textsuperscript{141} where the Civil Rights Act of 1964 was upheld against a Commerce Clause challenge to regulate the intrastate activity of discriminatory hotel businesses, will have controlling effects on a court’s view of the HCPA.\textsuperscript{142} However, the HCPA deals with criminal punishment and \textit{Heart of Atlanta Motel} dealt with public accommodations. Regardless, the Civil Rights Act was written with somewhat broad language that can be extended to privately-owned public accommodations.\textsuperscript{143} The HCPA deals with interstate commerce somewhat more broadly, recognizing that criminal activity stills citizen travel and productivity in interstate commerce.

\textsuperscript{135} \textit{Morrison}, 529 U.S. at 610-12. Though not the focus of the \textit{Morrison} opinion, the statute dealt with a class of persons given only intermediate scrutiny protection in Supreme Court decisions. The HCPA however deals with various classes of individuals that are treated differently by Supreme Court decisions from the strict scrutiny level provided to various races to the lowest rational scrutiny applied to homosexuals. \textit{See} \textit{Brown v. Bd. of Educ.}, 347 U.S. 483 (1954); \textit{see also} \textit{Lawrence v. Texas}, 539 U.S. 558 (2003).

\textsuperscript{136} \textit{Gonzales v. Raich}, 545 U.S. 1 (2005).

\textsuperscript{137} \textit{Morrison}, 529 U.S. at 656-57.


\textsuperscript{139} \textit{Lopez}, 514 U.S. at 560.

\textsuperscript{140} \textit{Id.} at 563.

\textsuperscript{141} \textit{Heart of Atlanta Motel, Inc. v. United States}, 379 U.S. 241 (1964).

\textsuperscript{142} \textit{Id.} at 258-61. The distinction the Court has made between public and private actions in regards to discrimination cases can be found in some of the original civil rights litigation such as Justice Harlan’s dissent in \textit{Plessy v. Ferguson}. 163 U.S. 537 (1896); Justice Harlan was no racial equality martyr, but rather focused on public rights of citizens. Just as riding a public mode of transportation is a public service of the government, so too is the police power of the state to protect citizens.

\textsuperscript{143} \textit{Heart of Atlanta Motel}, 379 U.S. at 270.
The jurisdictional threat is eased with the more recent decision in the Commerce Clause line of cases, *Gonzales v. Raich*. This case pulled away from the states’ vast regulation rights. However, the *Gonzales* decision changed the focus to the economic nature of the illegal action. In *Gonzales*, the Court found the Controlled Substances Act to be a constitutional use of Congress’s Commerce Clause power. The Court emphasized that only a rational basis test was necessary for concluding that the illegal traffic of marijuana affected interstate commerce; this rationale follows *Wickard v. Filburn*, where it was held that even the smallest amount of local farming could be regulated by Congress because it eventually entered or had some, though perhaps miniscule, effect on interstate commerce in the aggregate. Therefore, if it can be upheld when Congress extrapolates that a small, medically useful size of an illegal substance affects interstate commerce enough to trigger the Commerce Clause jurisdiction, then it is rational to conclude that the great economic effects that hate crimes present also trigger Commerce Clause jurisdiction. Further, and most important, there is clear and monumental evidence of hate crimes affecting interstate commerce. On the other hand, there is little documentation of the actual effects that someone’s personal consumption for a medically documented illness swarming into the drug trade of interstate commerce, such as was the alleged fear of intrusion into interstate commerce in *Gonzales*.

While the Commerce Clause attack seems to be the strongest argument against the HCPA, a reasonable protection of citizen safety should certainly come under a necessary Commerce Clause use. Applying *Gonzales* to the HCPA requires a focus not on the economic or non-economic nature of the HCPA, but rather a look at the aggregate effect of the activity. This aggregate effect on interstate commerce need only be proven by whether a rational basis exists for concluding that the activity affects commerce. Therefore, given this low standard, it is rational to conclude that hate crimes that spread into the community affect commerce in the aggregate scale. The aggregate effect on nationwide commerce leads to a restriction on various groups’ travel to and from areas where there is a fear of violence. Further, Congress is explicitly authorized to protect persons in interstate travel, and if someone is restricted or forced into interstate travel because of fear it is within Congress’s power to protect citizens.

Therefore, while the Commerce Clause is the strongest argument against the HCPA, given the great weight of evidence presented to Congress regarding the impact on commerce coupled with the recent *Gonzales* decision and historical decisions, the HCPA is a reasonable use of Congress’s Commerce Clause power.

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144 Gonzales v. Raich, 545 U.S. 1, 1 (2005).
145 Id.
146 Id. at 9.
147 Id. at 22.
149 Id. at 125.
150 Gonzales, compared to the decision in *Emp’t Div. v. Smith*, 494 U.S. 872 (1990), seems reasonable, because in *Gonzales*, the interest of the Controlled Substances Act was up against medical use. While this is important, the interests of religious freedom, a sacred First Amendment right, were ignored against the Controlled Substances Act in the decision of *Smith*.
151 Gonzales, 545 U.S. at 22.
152 Id. at 19.
IX. From Lawrence to the HCPA: Criminalization to Protection

We are women and men who, from the time of our earliest memories, have been in revolt against the sex-role structure and nuclear family structure.

Martha Shelley\(^{154}\)

In 2003, \textit{Lawrence v. Texas}\(^{155}\) was decided and was the first step toward alleviating the restrictions on travel for homosexuals. Though homosexuals were able to travel without the fear of criminal prosecution in these states, the fear of private personal persecution persisted. With the inception of the HCPA, though these fears are not eliminated, protections are afforded to victims. The HCPA provides enormous benefit to those who are persecuted based on their sexual orientation, as hate crimes will no longer be overlooked when the victim is homosexual. Further, there are several arguments based in criminal theory that justify the necessity for hate crimes legislation. A crime targeting homosexuals is one ultimately focused on instilling hate and intimidation in the community at large, and that goal is deserving of criminal recognition and sanctions.

Given the nullity of the criticisms of the HCPA, there is, in actuality, an array of benefits to the LGBT community. Several groups, such as the Human Rights Campaign and the National Gay and Lesbian Task Force, assert the expressive and retributive justifications that punishing teaches the lesson that hate is wrong and therefore beneficially adjusts the moral compass of the community.\(^{156}\) However, this assertion leads to some analytical disjunction with the argument that the law should not legislate morality. Nevertheless, all criminal law is, in some manner, based upon the morality of societal norms. In focusing on morality, the argument might be made clearer if it was stated that such a moral compass should not be one guided by the ideals of only one group’s faith.

Further, Lambda Legal\(^{157}\) asserts hope that the HCPA will open the door for further legislative protections in other areas,\(^{158}\) such as employment.\(^{159}\) With the potential of the Employment Non-Discrimination Act,\(^{160}\) increased visibility and protection for ‘sexual

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\(^{157}\) \textsc{Lambda Legal}, \texttt{http://www.lambdalegal.org/about-us}, (last visited Jan. 13, 2012) (Lambda Legal is the oldest and largest national LGBT legal organization whose primary mission is to advance the civil rights of LGBT individuals).

\(^{158}\) For example, the recent repeal of Don’t Ask Don’t Tell. \textit{See} Julian Barnes et al., \textit{GOP Halts Repeal of ’Don’t Ask, Don’t Tell’}, \textsc{Wall St. J.} (Sept. 22, 2010), \texttt{http://online.wsj.com/article/SB10001424052748704129204575505742242737582.html}. \textit{But see}, Liz Halloran, \textit{With Repeal of ’Don’t Ask, Don’t Tell,’ An Era Ends}, \textsc{NPR} (Sept. 20, 2011), \texttt{http://www.npr.org/2011/09/20/140605121/with-repeal-of-dont-ask-dont-tell-an-era-ends}.

\(^{159}\) Statement from Kevin Cathcart, Executive Director, Lambda Legal, \textit{Hate Crimes Bill Passes Senate: Lambda Legal Urges President Obama to Sign Bill into Law} (Oct. 22, 2009), available at \texttt{http://www.lambdalegal.org/news/ny_20091022_hate-crimes-bill-passes}.

orientation’ status is a step in the right direction. This benefit follows the change in the social narrative of critical race theory and the slow evolution of social normalization of homosexuality.\(^{161}\) To extrapolate, the bounds of the social narrative will hopefully progress to one day categorize sexual orientation as a protected class requiring heightened scrutiny in judicial decisions.

Zylan points out various theories that reveal the benefits and justifications for hate crimes legislation.\(^{162}\) Additionally, justifications based on utilitarian theory, which perceive punishment as an evil that must be outweighed by social good, leads to the conclusion that the punishment of hate crimes leads to the social good of the possibility of minimizing anti-gay hatred; this necessitates the change in social norms that leads to the change in the emotion of hatred.\(^{163}\) The societal good of eliminating or even lessening hatred and protecting citizens is substantial given the dark past and present of violent hate crimes directed at LGBT individuals. Next, the expressivist justification, which highlights the symbolic importance of laws in setting an example for societal values, concludes that the HCPA provides the societal norm that this conduct is particularly disfavored in society for the community target and that the victims are valued members of society.\(^{164}\) The expressivist justification works in tandem with retributivist theory.

The retributivist theory requires that the punishment “fit the crime.”\(^{165}\) Expressivist justification is specifically enlightening for hate crimes legislation in light of retributivist theory\(^ {166}\) and leads to the conclusion that the goals of expressivism fit the punishment of hate crimes. In other words, given the communal target of hate crimes and importance of societal norms espoused by expressivists, the retributivist theory of the punishment fitting the crime is fulfilled. One problem with expressivist theory in relation to sexual-orientation targeting is the criminal law modus of determining the crime.\(^{167}\) The objective elements of criminal enforcement are often feared to lead to categorical stereotyping, which gives rise to the ‘homosexual panic defense.’\(^{168}\) However, this concern regarding application of the legislation is largely outweighed by its function.

The benefits of the visibility that the HCPA gave to the communal strife of LGBT citizens to fight against violence and victimization can already be seen.\(^{169}\) In In re E.P.L., the court used the fact that violence based on gender identity is so prevalent that it has been codified into a protective law, as a motivating factor for providing privacy to a transgender individual when faced with publication requirements for name changes.\(^ {170}\) Prior to the signing of the HCPA, there was no affirmative stamp of government recognition that LGBT individuals were targeted due to status. Though the individual could not state any specific violent acts against himself, the HCPA recognizes the potential for targeting individuals

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\(^{161}\) BROOKS, supra note 25, at 96.

\(^{162}\) Yvonne Zylan, Passions We Like...And Those We Don’t: Anti-Gay Hate Crime Laws And The Discursive Construction of Sex, Gender, and The Body, 16 MICH. J. GENDER & L. 1, 25 (2009).

\(^{163}\) Id. at 34-35.

\(^{164}\) Id. at 34-35.

\(^{165}\) Id. at 35.

\(^{166}\) Id. at 35-38.

\(^{167}\) Id. at 43.

\(^{168}\) Id. at 43-44. The homosexual panic defense was used during the trial of the perpetrators of Matthew Shepard’s death to say that they went temporarily insane, because they panicked at the fear of homosexual advances.


\(^{170}\) Id. at 621.
because of their sexual orientation to intimidate the community.\textsuperscript{171} Therefore, the court found this individual’s fears to be well-founded given the history of violence towards transgender individuals.\textsuperscript{172}

Given the HCPA’s broad range of benefits and potential boon to society, it is impressive that only seven years ago consensual homosexual sodomy was criminal in some states, and now violence against homosexuals is criminal. The long-fought battle of activists, and specifically the work of the Shepards, has made significant strides in developing the social narrative to include LGBT minorities in the nation’s story.

X. Conclusion

\textit{Dennis and I keep promising each other that there will come a time when the Matthew Shepard Foundation will become irrelevant, when it’s inconceivable that gay people were ever considered anything other than vital to what makes our world wonderful. When I really think about it, that’s the future I’m focused on.}

Judy Shepard, from \textit{The Meaning of Matthew}\textsuperscript{173}

In conclusion, the passage of the HCPA was an important step taken by our nation’s leadership towards erasing hate, without encroaching within the bounds of First Amendment liberties. Further, Congress was well within the Commerce Clause power to enact this necessary legislation to prevent crimes that evolve into much more than a mere act, but rather reaches lives beyond the victim. Therefore, it successfully skirts the criticisms based upon First Amendment and Commerce Clause arguments. The HCPA follows the precedent set by fellow nations devoted to protecting all citizens, without going quite as far in reach. Finally, this legislation puts a face with a name. Hate crimes are committed because of intolerant, misguided perceptions of an individual, not because of knowledge of the person. It is said that it is easier to harm a stranger than a friend, and the visibility of the HCPA marks a companion for those who have suffered.

\textsuperscript{171} Id.

\textsuperscript{172} Id.

\textsuperscript{173} \textsc{Judy Shepard \& John Barrett, }\textit{The Meaning of Matthew: My Son’s Murder in Laramie, and a World Transformed} 272 (2009).
MARITAL STATUS AND SEXUAL ORIENTATION DISCRIMINATION IN INFERTILITY CARE

By Richard F. Storrow*

Introduction

During a visit to her dentist in 1994 for a routine cleaning, Sidney Abbott disclosed on her patient information form that she was a carrier of the human immunodeficiency virus (HIV).1 Her dentist, Randon Bragdon, examined her teeth and found a cavity, but he refused to fill it outside a hospital setting.2 In her subsequent lawsuit against Bragdon for violating the Americans with Disabilities Act, Abbott testified that her HIV had influenced her decision not to have children.3 In 1998, the Supreme Court ruled in Abbott’s case that the Americans with Disabilities Act (ADA), enacted in 1990, protects those living with HIV and AIDS from discrimination because those conditions substantially limit the major life activity of reproduction.4

Bragdon v. Abbott was a watershed for people living with HIV and AIDS and remains a landmark in the landscape of ADA jurisprudence. It has significance, too, for the infertile, who see in the language of the Supreme Court an acknowledgment that infertility itself may be considered a disability.5 Whether one is infertile, however, is not as easy to determine as whether one is a carrier of HIV. Infertility requires a more contextualized diagnosis than does HIV and has been variously defined and understood. Does infertility exist only where a heterosexual couple cannot conceive a child after engaging in sexual intercourse for a certain period of time?6 Can gay and lesbian couples and single individuals also be infertile even if they do not engage in reproductive sexual activity? The lack of fixed agreement about what constitutes infertility raises questions about who is a deserving recipient of assisted reproductive treatment. The answers to those questions have important implications for those who need to employ assisted reproduction to have children and are hopeful of finding a medical professional willing to help them.

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2 Id.


This article addresses, in particular, the obstacles gay and lesbian couples and single individuals\(^7\) face when attempting to have children using assisted reproduction. As Marla Hollandsworth sees it, “[p]arenthood for gay men and lesbians has always been an issue of societal condemnation, social discomfort, and repudiation.”\(^8\) Single individuals, too, especially women, elicit opprobrium and bias when they choose to have children on their own.\(^9\) In the United States, where few laws exist that define who may and who may not have access to assisted reproduction, these groups will face discrimination primarily from unwilling physicians and laws that mandate insurance coverage only for those who meet a narrow and heterocentric definition of infertility. In other countries, laws may explicitly exclude gays, lesbians, and singles from eligibility for treatment. In still others, the differential application of the law may stymie the efforts of same-sex couples to use medical technology to have children. Individually, these laws may appear to have little impact on the reproductive desires of nontraditional families. Collectively, however, they are a reflection of the perspective that medical technology is most appropriately employed to enable heterosexual couples to have children.

This article unfolds in the following manner: Part I discusses statutory and other legal barriers that prevent gays, lesbians, and single persons from building their families with the use of assisted reproduction. This part is divided into two subsections, one that addresses laws that explicitly limit access to assisted reproduction to heterosexual couples and another that examines laws and policies that are not on their face discriminatory but, in their application, limit access by gays, lesbians, and singles. Part II explores the bias that some infertility clinics may display toward gays, lesbians, and singles who seek treatment. This part focuses on the United States, where laws prohibiting such discrimination are uncommon. It asks specifically whether either laws forbidding discrimination in public accommodations or medical ethics principles can effectively combat private discrimination against gays, lesbians, and singles seeking access to assisted reproduction.

Statutory and Other Legal Barriers

Statutory and other legal barriers to assisted reproduction tend to reify what scholars have identified as a heteronormative bias in the delivery of assisted reproduction.\(^10\)

\(^7\) For the purposes of this paper, the term “single individuals” encompasses single persons of all sexual orientations and gender identities.


Facially Discriminatory Regulation

Facially discriminatory regulation of assisted reproduction either gives married couples exclusive access or limits access to heterosexual couples. Other provisions are so readily identifiable as excluding gays, lesbians, and singles that they cannot with any seriousness be labeled neutral. For example, one of the most exclusionary statutory mandates, albeit rare,
is one that bars access to assisted reproduction unless the patients are able to demonstrate their “medical infertility.”

Although the Muslim world is relatively uniform in limiting access to assisted reproduction to heterosexual married couples, mandated exclusion of unmarried persons from access to assisted reproduction is unusual in developed countries. Oklahoma limits artificial insemination to use by heterosexual married couples, and some jurisdictions that allow surrogacy impose a similar requirement. Other developed countries, however, if they place any restrictions on who may have access to assisted reproduction, tend to draw the line at “stable” heterosexual couples. Even countries that ban egg and sperm donation, insisting on the importance of genetic links between parents and children, do not always require the couple seeking treatment to be married. Italy, for example, passed laws barring all but heterosexual couples who employ their own gametes from having access to assisted reproduction. This legal regime is recognized as the most restrictive in Europe. In passing the restrictions, the fashioning of which was of particular interest to the Roman Catholic Church, the legislature was expressing its belief that its formerly permissive stance caused harm to the reputation of the country and its physicians, harm to future children who would not be raised by their biological progenitors, and harm to donors from unsafe procedures or conditions that exploit their poverty or vulnerability.

In the early days of IVF, the Warnock Commission in Great Britain considered how reproductive technology should be regulated. Its ultimate recommendation was to limit treatment to heterosexual couples based on reproductive technology should be regulated. Its ultimate recommendation was to limit treatment to heterosexual couples based on reproduction. This legal regime is recognized as the most restrictive in Europe. In passing the restrictions, the fashioning of which was of particular interest to the Roman Catholic Church, the legislature was expressing its belief that its formerly permissive stance caused harm to the reputation of the country and its physicians, harm to future children who would not be raised by their biological progenitors, and harm to donors from unsafe procedures or conditions that exploit their poverty or vulnerability.

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raised in a heterosexual-couple-headed household. The legislation that was passed in 1990 based on these recommendations required the licensure of assisted reproductive treatment. Among the criteria necessary to consider in each case was the need of the child for a father. During the years that this factor was a required consideration, the Human Fertilisation and Embryology Authority (HFEA) permitted clinics to engage in a wide range of screening practices, including best-interests screening. The clinical application of the standard came under sustained attack by infertile couples and individuals, scholars, and even members of Parliament as varying widely across clinics and resulting in discriminatory and arbitrary screening within individual clinics. In response, the Human Fertilisation and Embryology Authority (HFEA) conducted a study on clinical screening practices in the United Kingdom. In a remarkable turnaround said to be motivated to “provide greater clarity and give clinics more confidence about deciding whether or not treatment is appropriate,” the HFEA has quite pointedly embraced the avoidance-of-harm principle in gatekeeping and has revised its code of practice with appropriate language. A new guidance issued by the HFEA in November of 2005 permits nothing beyond fitness screening. Henceforth, clinics in the United Kingdom must entertain a presumption in favor of providing treatment and may not refuse treatment unless there is evidence that the child is likely to suffer serious physical or psychological harm. The new approach has been fully implemented as of January 2006. In a further development in 2008, Parliament

33 Id. at 6 (“The involvement of a medical team in assisted conception means that certain third parties have some responsibility towards the child to be born. However, the importance of patient autonomy means that clinics should only refuse to provide treatment where there is evidence that the child is likely to suffer serious physical or psychological harm.”).
35 See id.
36 See id. at § 3.1.
altered the mandate to consider the child’s need for a father to read “the need for supportive parenting.”

This change was celebrated as a victory for same-sex couples and single women alike. A similar inclusive spirit was behind the enactment of New Zealand’s regulation of assisted reproduction in 2004 and recently concluded reform efforts in Victoria, Australia.

Some jurisdictions that have placed heterosexual marriage restrictions on access to assisted reproduction have been forced to dismantle their restrictions based on prevailing human rights norms. For example, two Australian states, Victoria and South Australia, originally enacted laws that excluded all but married heterosexual couples and heterosexual couples in “de facto” relationships from access to assisted reproduction. These laws spurred interstate travel by single women and lesbian couples wishing to obtain treatment. In subsequent lawsuits against these states, infertility physicians who wished to accept single women as patients claimed that these restrictions ran afoul of the prohibition on marital status discrimination in Australia’s federal Sex Discrimination Act. The courts in both cases found restraints on access based on marital status to be inconsistent with the Sex Discrimination Act. The ruling did not open up infertility treatment to single women and same-sex couples, however, as both jurisdictions’ statutes contained the requirement that the patient presenting for treatment be medically infertile, a requirement that single women and lesbian couples seeking treatment rarely fulfill.

After many years of struggling for equal treatment in Australia’s states and provinces, single women and lesbians celebrated the repeal, in December of 2008, of Victoria’s Infertility Treatment Act of 1995. Instead of requiring patients to be medically infertile, the new Assisted Reproductive Treatment Act gives access to assisted reproduction procedures to single women and lesbian couples whose “circumstances” satisfy the doctor

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that the patient is unlikely to have a child without medical assistance.\textsuperscript{47} Medically assisting a single woman or a woman in a same-sex couple to become pregnant creates a presumption, via an amendment to the Status of Children Act of 1974, that the patient’s female partner is also a parent of the child if she consents to a procedure, excluding self-insemination,\textsuperscript{48} by which her female partner becomes pregnant.\textsuperscript{49} The semen donor and/or egg donor is not a parent, whether or not he is known to the couple, or to a single woman undergoing the procedure.\textsuperscript{50} The most controversial amendment of the new law is the requirement that patients presenting for treatment provide a “national criminal records check” to their infertility physician, give permission to providers to perform child protection order checks on patients presenting for treatment,\textsuperscript{51} and submit to two sessions of face-to-face counseling.\textsuperscript{52} These requirements were for the purpose of ascertaining that:

No charges under clause 1 or clause 2 of the Sentencing Act 1991 have been proven against the patient and her partner and that a child protection check is provided which specifies that no child protection order has been made removing a child from the custody or guardianship of the woman or her partner.\textsuperscript{53}

The medical infertility requirement, where it is still the law, remains a significant barrier to treatment.\textsuperscript{54} The requirement continues to plague denizens of South Australia, making it necessary that applicants for treatment be “classified as infertile,”\textsuperscript{55} and forces lesbian couples to travel interstate to more permissive jurisdictions like New South Wales, Victoria, and the Australian Capital Territory.\textsuperscript{56} Moreover, there is no presumption under state law “of parentage for same-sex co-parents.”\textsuperscript{57} This can lead to problems between the co-parent and the child’s school and medical providers.\textsuperscript{58} The good news is that the South Australia legislature is close to dismantling the medical infertility requirement.\textsuperscript{59} Even so, Medicare does not reimburse women who are not medically infertile.\textsuperscript{60} This disparity of

\textsuperscript{47} Assisted Reproductive Treatment Act 2008, supra note 46, at s 10. This includes problems achieving pregnancy, carrying a pregnancy to term, or the possibility that without treatment the woman might give birth to a child with a genetic disease or abnormality.

\textsuperscript{48} Id. at s 3 (defining “treatment procedure”).

\textsuperscript{49} Id. at s 147.

\textsuperscript{50} Id.

\textsuperscript{51} Id. at s 42.

\textsuperscript{52} Porter, supra note 42, at 10.


\textsuperscript{55} Id. at 181.


\textsuperscript{57} Id.

\textsuperscript{58} Id.


\textsuperscript{60} Porter, supra note 42, at 10; Soren Holm, Infertility, Childlessness and the Need for Treatment: Is Childlessness a Social or a Medical Problem?, in CREATING THE CHILD: THE ETHICS, LAW, AND PRACTICE OF ASSISTED PROCREATION 65, 70 (Donald Evans ed., 1996).
approximately $10,000 between the cost that medically infertile women must pay versus what socially infertile women must pay will remain an effective bar keeping some from pursuing treatment.\textsuperscript{61}

South Australian legislators are right to call into question the view that there is a medical bright line separating those who may obtain treatment from those who may not.\textsuperscript{62} Medical infertility could result from conditions such as endometriosis, fibroids, blocked fallopian tubes or azoospermia,\textsuperscript{63} but it also has a social dimension. A purely medical definition of infertility would hold that a woman capable of becoming pregnant with someone other than her current male partner is not medically infertile:

Let us imagine a couple in which the wife has developed antibodies against specific antigens on her husband’s spermatozoa. This couple is infertile when seen as a couple, but taken separately they are in perfect health. With a change of partner each of them would be as fertile as anybody else.\textsuperscript{64}

The South Australian approach, however, appears to allow treatment in cases not so much of medical infertility but of reproductive incompatibility, introducing a social factor into the definition.\textsuperscript{65} Indeed, the statute itself speaks not only of infertility but of the appearance of infertility of the woman or her partner after they have engaged in the requisite twelve months of unprotected sexual intercourse.\textsuperscript{66} Reproductive incompatibility among heterosexual couples, not medical infertility, is thus the primary key to accessing infertility treatment in South Australia.

In order to bring single women into this discussion, as Stuhmcke does in her analysis and to further underscore the inescapable social dimension of infertility, I would go further and, borrowing a line from the insurance industry, argue that infertility is not a medical condition at all, because the condition itself cannot be cured through assisted reproduction.\textsuperscript{68} I am not here defending insurance companies that try to refuse coverage for infertility treatment but simply wish to point out how unmoored the notion of medical infertility is from any fixed, non-contextual reality. Commentators have noted that there is no fixed definition of infertility, but that it is more than anything a social construct.\textsuperscript{69} Individuals are not themselves infertile but are infertile only in relation to those with whom they seek to reproduce. Infertility has meaning, then, only when we consider these particular pairings. If only heterosexual couples can be infertile, then it is indisputably the same-sex feature of the lesbian couple that lies behind the refusal to provide in \textit{J.M.} and behind the restrictive medical definition of infertility itself.\textsuperscript{70}

\begin{small}
\begin{enumerate}
\item Porter, \textit{supra} note 42, at 10.
\item \textit{Id}.
\item \textit{Id}.
\item Holm, \textit{supra} note 60, at 70.
\item The analogy in the United States is to insurance companies that recognize infertility as existing only within heterosexual couples who turn out to be reproductively incompatible.
\item \textit{Id}.
\item See, \textit{e.g.}, Arthur Greil et al., \textit{The Social Construction of Infertility}, 5 \textit{Soc. Compass} 736 (2011).
\item Anita Stuhmcke, \textit{Limiting Access to Assisted Reproduction: JM v. QFG}, 16 \textit{AUSTL. J. FAM. L.} 245,
\end{enumerate}
\end{small}
Courts have routinely refused to recognize this more rarefied understanding of infertility. If we resort to the case law, we find that the courts that deem infertility a disorder invariably do so with the use of the arbitrary medical definition, entrenching even further the misguided view that only heterosexual couples can be infertile.\footnote{Id. at 252.}

I think infertility is better understood as a disability of which the effect on normal life activities can be diminished by medical intervention. This understanding would include not only heterosexual couples who wish to reproduce but cannot, but also gay and lesbian couples and singles who have similar goals. Whether medical intervention is required at all, therefore, would depend not upon marital status or sexual orientation but upon whether there is volition to reproduce in the first instance. Just as heterosexual couples who do not want to reproduce are not infertile, single women who wish to employ assisted reproduction are. This approach to infertility may have the disadvantage of lacking the physiological and copulative bright lines of the traditional medical definition, but it has the advantage of making transparent the otherwise hidden social dimension of any diagnosis of infertility. It has the further advantage of emphasizing that not all disabilities are medical conditions. Infertility is one of these. It is a social condition that interferes with a major life activity, as the Supreme Court recognized in \textit{Bragdon}.

The distinction between medical and social infertility does not have much influence in the United States, where regulations defining who may have access to assisted reproduction are virtually nonexistent.\footnote{\textsc{Nat’l Conference of State Legislatures, State Laws Related to Insurance Coverage for Infertility Treatment} (2012), \textit{available at} \url{http://www.ncsl.org/issues-research/health/insurance-coverage-for-infertility-laws.aspx}.} Instead, in the few states with statutes mandating that health plans include coverage to help the medically infertile pay for reproduction-assisting technologies, gays, lesbians, and singles will have to find other sources of financial support to pay for the treatments they need. These mandates take two different forms: one group requires insurers to offer infertility treatment to group plan sponsors; the other requires insurers to provide coverage.\footnote{\textsc{Ariz. Code Ann.} § 23-85-137 (West 2007); \textsc{Haw. Rev. Stat.} § 431:10A-116.5 (2012); \textsc{Md. Code Ann., Ins.}, § 15-810 (West 2012).} For example, Hawaii, Arkansas, and Maryland mandate insurance coverage for legally married couples.\footnote{\textsc{Hwang, supra} note 6.} This may be meant to express societal disapproval of reproductive technology for any but married couples, or it may be a statement about the responsibility of the insurance industry to assist only those with a medical condition. Either way, lesbian and gay couples and unmarried heterosexuals are excluded.

The legal definition of infertility in insurance legislation is informed by the medical definition of infertility, the inability of an opposite-sex couple to achieve a pregnancy after a year of engaging in regular and unprotected sexual intercourse.\footnote{\textsc{Hwang, supra} note 6.} Insurance laws in New Jersey, Hawaii, Maryland, California, Massachusetts, Connecticut, and Rhode Island, for example, all define infertility as arising from some medical condition that prevents pregnancy and is tied to some abnormality in the physiology of either the man or the woman...
who wishes to have a child with someone of the opposite sex. These definitions, if determinative of who is infertile, suggest that infertility refers to those whose gametes or gestational capacities render them unable to have a healthy child with their opposite-sex partner. This definition does not include those who wish to have and raise children with someone of the same sex or by themselves. As in South Australia, then, medical infertility in the United States is a dividing line between heterosexual couples who cannot achieve pregnancy and same-sex couples and singles who would also benefit from insurance coverage.

Facially Neutral Regulation

Many legal policies that impede gays, lesbians, and singles from having access to assisted reproduction are facially neutral. These include bans on reproductive tourism, laws that ban self-insemination and sperm donation by gay men, parentage laws that make it difficult to achieve legal recognition of a social parent, and immigration policies that restrict recognition of children born of surrogacy.

Some countries ban third-party gamete donation, thus limiting access to heterosexual couples. Such regimes may be accompanied by bans on reproduction tourism, as in Turkey’s ban on leaving the country for artificial insemination and New South Wales’ ban on international commercial surrogacy. Although the European Court of Human Rights recently declared that the availability of fertility tourism was a factor weighing against a finding that restrictions on human-assisted reproduction violate human rights, many people have no access to the means to pursue such travel, and most of the world lies outside of a free-trade zone that allows Europeans to escape restrictive reproductive laws by traveling to friendlier European countries. A gamete donation or surrogacy ban, coupled with a fertility tourism ban, is the strongest prohibition yet devised on the creation of families headed by gay and lesbian or single parents.

Related to bans on reproductive tourism are immigration policies geared toward deterring international commercial surrogacy. Such policies may exist in countries that either outlaw surrogacy or forbid its being the subject of a commercial transaction, leading citizens of such countries to travel to jurisdictions like India, the United States, or the Ukraine, where surrogacy is legal. Either way, such policies have a disparate impact on gay male couples or singles whose sole reproductive option is to engage a surrogate to contribute the gestational component to the creation of their children. Upon bringing a child back to the country that prohibits commercial surrogacy, numerous families have encountered serious problems. Not only will some governments refuse to recognize the parent-child relationships in such situations, but France recently refused to recognize the

78 Id. at 15-16.
81 Storrow, supra note 79, at 539-40 & 543.
twins born to a heterosexual married couple with the help of a surrogate in California as French citizens.\textsuperscript{84} The Spanish press has reported that Spain’s similar response to international commercial surrogacy has fallen disparately on the shoulders of gay men who cannot “hide” the fact that they have pursued surrogacy abroad.\textsuperscript{85} Although England, which permits uncompensated surrogacy, has dealt with such cases by applying the best-interests of the child standard embodied in its parenting order legislation,\textsuperscript{86} the problems plaguing those who seek to evade bans on surrogacy will not be resolved at any time in the near future. Even India’s proposal to pass legislation that would require potential parents to prove that surrogacy is permitted in their home country, that their sexual relationship is legal in India, and that the child to be born will be permitted entry on the same terms as would a biological child of the parents,\textsuperscript{87} would only likely induce potential parents faced with restrictive surrogacy laws at home to pursue surrogacy elsewhere. The worldwide problem has induced the Hague Conference on Private International Law to commence a study on the possibility for some form of broader response to the problems arising in the context of international commercial surrogacy.\textsuperscript{88}

Immigration laws that inhibit surrogacy, by refusing to recognize the parent-child relationships they create or denying children citizenship, bear a striking relationship to regulation that makes it difficult for a social parent to achieve legal parenthood status, whether by adopting their partner’s children or by petitioning for recognition as a functional parent. Although it is analogous to step-parent adoption, second-parent adoption, where it is available, does not require the legally recognized parent to be married to the party seeking to adopt the child.\textsuperscript{89} Where it is forbidden, such regulation clearly targets the formation of unmarried-couple families. Even where it is allowed, second-parent adoption requirements are more onerous than step-parent adoption requirements.\textsuperscript{90} Adoption as a second-parent provides a measure of protection to the non-biological parent of a couple whose relationship is not entitled to any legal recognition under state law or who choose not to seek it. It is a mechanism that has often been used by lesbian couples who have employed artificial insemination to have children. Without recognition as a second-parent, the non-biological parent risks having no right to a continuing relationship with the child if the legally recognized parent later wishes to exclude her and the court refuses to give any weight to her


\textsuperscript{85} de Benito, \textit{supra} note 82.

\textsuperscript{86} Storrow, \textit{supra} note 83, at 607-08.


\textsuperscript{90} \textit{Id.} at 336-47.
functiona

Second-parent adoption is not explicitly permitted in many states, however, and not all states recognize functional parenthood, forcing couples whose family formation efforts could benefit from legal recognition to consider whether they should relocate to a friendlier jurisdiction, run the risks that lack of recognition entails, or forego having children altogether. As a practical matter, prohibition on second-parent adoption and a refusal to recognize functional parenthood may be as ineffectual in inhibiting unmarried couples from pursuing assisted reproduction as are immigration laws aimed at combating international surrogacy, but these are nonetheless potential barriers to the formation of gay, lesbian, and single-parent-headed families via assisted reproduction.

Finally, several little-known attempts have been made to interfere with the ability of gays, lesbians, and singles to gain access to assisted reproduction. Judith Daar mentions a Virginia bill to require “all unrelated gamete donors [to] be identified in a woman’s medical chart.” She explains that although the bill is facially neutral, it would have a “dramatic impact” on single and lesbian women who are dependent upon anonymous sperm donation. Additionally, an FDA-recommended rule would establish a “ban on gay men as sperm donors unless they have been completely celibate for the preceding five years.” Obviously, this proposed rule is neither neutral nor free of stereotypes regarding who should be allowed to donate sperm, but it nonetheless does not specifically target who may have access to it. Moreover, the rule may not pose practical problems for most infertility patients, since it applies only to anonymous donors and does not disallow one’s choosing a gay man to be a known donor. Even so, the proposed rule is insidious in that it has been used as a makeweight argument by doctors who would prefer not to serve gay and lesbian patients. Finally, bans on self-insemination impact access by lesbians and single women to a common and relatively easy technique that assists them in conceiving children. One reason why self-insemination may be so common among lesbians and single women is that

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93 Id.
95 Id.
“[m]any women may prefer the comfort of home and appreciate a more familiar surrounding, as the insemination process, while not complicated, is quite personal and invasive.”

Barriers in the Clinical Setting

Where law is not the primary barrier to access, physicians, in their gatekeeping function, may effectively bar gays, lesbians, and singles from gaining access to infertility care. The medical infertility requirement was at the root of the sexual orientation discrimination case J.M. v. Q.F.G. In this case, a lesbian was refused treatment by a Queensland clinic whose semen donor program was restricted to heterosexual couples where the male partner proved unable to produce semen of sufficient quality to achieve pregnancy. J.M. sued under the Anti-Discrimination Act prohibiting discrimination on the basis of lawful sexual activity or partnership. The Court of Appeal of the Supreme Court of Queensland concluded that the refusal was not due to her lesbianism, but that she did not comply with the medical definition of infertility.

Here we find full judicial deference to a convention of the infertility industry to define infertility as “the inability to conceive after engaging in unprotected heterosexual intercourse over a period of 12 months.” Thus, it turns out that J.M. had not been rejected for her sexual activity but for her sexual inactivity, her refusal to engage in heterosexual intercourse for twelve months.

In the United States, the American Medical Association’s Code of Medical Ethics promulgated by doctors to self-regulate their profession, speaks in terms of helping patients who present with a “medical problem” or a “medical condition.” The ability to distinguish medical conditions from other disorders may tempt infertility physicians to judge that single women and lesbians who wish to reproduce do not present with a “medical” problem, but a social one. An infertility physician may thus conclude, as did Q.F.G., that medical ethics principles do not forbid her from refusing to treat gay or unmarried patients, since the refusal to assist arises from a benign choice to help only those who present with

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102 Id. at 246.
103 Id. at 249 n.19.
105 Hwang, supra note 6.
108 In a recent European example of such thinking, it was found that “[m]any clinics refuse to exchange oocytes between lesbians when the woman who will become pregnant is fertile because they judge this as a social indication not worth the medical investment.” Katrien Wierckx et al., Reproductive Wish in Transsexual Men, 27 HUM. REPROD. 483, 486 (2012) (citing W.J. Dondorp et al., Shared Lesbian Motherhood: A Challenge of Established Concepts and Frameworks, 25 HUM. REPROD. 812 (2010)).
medical issues. This justification for a refusal to treat has arisen in the past in connection with contraception and voluntary sterilization.  

Today, there is admittedly very little evidence to suggest that infertility patients in the United States are turned away by clinics based on whether they meet the test of medical infertility as was J.M. by the clinic in Queensland. But medical infertility may be a reason given to mask other forms of discrimination, some of which may be outlawed. This raises the possibility that physicians may be faced with a choice between violating anti-discrimination laws and expressing their objection by refusing to treat gay, lesbian, or single patients. Physician John Pearn has expressed his distaste for requiring doctors to treat problems of social infertility. Patrick O’Connell and Jacques Mistrot have gone even further in stating that doctors should not have to conform to anti-discrimination laws that force them to perform procedures that are an affront to human dignity. These are not simply extreme views but can arguably be found in the Code of Medical Ethics itself: a religious physician might be tempted to invest the medical ethics principle that physicians must act in the best interests of their patients with an admonition not to “assist [patients] in harming themselves.” Consider as well that the wording of both Opinions 10.01 and 10.015 speak in terms of “medical problems,” “medical condition,” and “alleviate suffering.” Such terms do not disable physicians from concluding that those presenting with “social” infertility do not have a “medical” problem. Under this reasoning, even a referral to another physician would not be necessary.

As noted above, there have been legislative reforms in some Australian jurisdictions to do away with the exclusionary medical-infertility requirement, but a single mother who desires artificial insemination to have a child and raise him alone, or a gay or lesbian couple seeking egg donation or IVF with a surrogate, may be subjected to discrimination for reasons that have nothing to do with their inability to have children without assisted reproduction. Clinicians may turn away single women, or lesbian couples not for failing  

109 In the landmark family privacy case Griswold v. Connecticut, the State of Connecticut argued in response to the physicians’ position that their practice was hindered by a statute barring the dissemination of information about contraceptives that counseling about and “issuing prescriptions . . . for contraceptives [have] nothing to do with the practice of medicine.” JOHN W. JOHNSON, GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY 119 (2005). The state’s attorneys characterized contraceptive advice as “social philosophy [that] must fall before the police power of the state.” Id. at 118.

110 See CLIVE WOOD, VASECTOMY & STERILIZATION 102 (1974) (“Some doctors, who naturally regard themselves as healers rather than social workers, do not regard such ‘non-medical’ sterilization as an appropriate operation for them to perform.”).

111 See N.Y. STATE TASK FORCE ON LIFE & THE LAW, supra note 15, at 186; see, e.g., Farr A. Curlin et al., The Author’s Reply, Religion, Conscience, and Controversial Clinical Practices, 356 NEW ENG. J. MED. 1889, 1891-92 (2007) (taking the position that where the physician concludes the condition is not a true sickness, the physician has no duty to refer the patient elsewhere for treatment).


115 O’Connell & Mistrot, supra note 113, at 1891.

116 AM. MED. ASS’N, supra note 106, at Ops. 10.01 & 10.015.

117 Pauline Irit Erera, Family Diversity: Continuity and Change in the Contemporary Family 111 (2002); M.M. Peterson, Assisted Reproductive Technologies and Equity of Access Issues, 31 J. MED. ETHICS 280, 281-82 (2005).
to present with a true medical problem or a problem of “medical futility,” but for being capable only of irresponsible or socially inappropriate parenthood. Individual physicians may object to assisting patients who request help in building families that will not be headed by married heterosexual couples. Although many physicians feel inadequate to the task of making such an assessment, others may feel bound by a set of values to do so and may believe such a decision falls comfortably within the ambit of their professional responsibility. Laws banning discrimination based on family status, marital status, or sexual orientation may help combat discriminatory decision making, but, sadly, in the United States at least, almost half the states have no statewide prohibition of either marital status or sexual orientation discrimination.

The United States infertility industry on the whole is not known for turning away patients. With no law regulating who an infertility clinic may accept for treatment, and a medical establishment actively opposed to regulation, it is more likely that clinics will be more committed to doing what is necessary to improve their success rates than with turning away patients on matters of philosophical or religious principle. This effort to boost success rates may cause clinics to “cherry-pick” patients in order to guarantee high success rates, misrepresent their success rates in order to attract more business, or even perform unsafe practices in the hope of increasing the likelihood of pregnancy. There is a law that requires clinics to report their statistics, but there is little oversight of this mandate and no mechanism to enforce it. These realities of infertility practice in the United States might suggest that discrimination against gays and lesbians by infertility clinics is not a significant problem.

The fact that infertility clinics have little incentive to discriminate against gays and lesbians does not mean that such discrimination does not exist, just that it is largely hidden. A few cases are worth mentioning. In Minnesota, a court granted summary

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118 Peterson, supra note 117, at 281-82 (noting that some clinicians purport to use “common sense” to judge what reproduction is “appropriate” and who has adequate parenting ability).

119 Storrow, supra note 29, at 2292.

120 Within states with no statewide prohibition, municipalities may choose to provide such protection. See, e.g., Tucson Code § 17-12(a) (outlawing sexual orientation and marital status discrimination in public accommodations), available at http://cms3.tucsonaz.gov/sites/default/files/oeop/Chapter%2017.htm.


123 Elizabeth Weil, Breeder Reaction, MOTHER JONES (Jul. 2006), http://motherjones.com/politics/2006/07/breeder-reaction.


125 REPRODUCTION AND RESPONSIBILITY, supra note 124, at 36.


127 REPRODUCTION AND RESPONSIBILITY, supra note 124, at 48-49.

judgment to a clinic accused of refusing to artificially inseminate a lesbian because of her sexual orientation.129 In Massachusetts, the parties settled a similar lawsuit before trial.130 In Florida, Dennis Barros and his same-sex partner planned to have a child with the help of a surrogate mother, but the clinic they chose refused to provide services.131 Other cases have involved single women and lesbians who alleged they were denied treatment because of their marital status or sexual orientation132 or where their lack of a partner was of concern to physicians.133 There is a body of empirical evidence suggesting that many clinics would be likely to turn away single women and lesbian couples.134 Stories of clinics that reject single women, gays, and lesbians are simply part of a larger culture clash between those who wish to bring religiously motivated discrimination into the public marketplace and protected classes seeking access to certain services.135 The lack of litigation over this form of discrimination in infertility clinics is evidence that, as a practical matter, if refused treatment at one clinic, applicants merely proceed to another.136

Whether infertility physicians should be permitted to refuse to perform procedures for those of whom they disapprove has been the subject of an ethics report produced by the

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129 See Harlow, supra note 126, at 207-12.
130 Id. at 212-13.
131 Barros v. Riggall, supra note 98. The clinic claimed it was applying a Food and Drug Administration guideline against using the sperm of sexually active gay men in infertility treatment. Littrell, supra note 97.
132 See N.Y. STATE TASK FORCE ON LIFE & THE LAW, supra note 15, at 185-86; Carol M. Ostrom & Warren King, Infertility Clinic Accused of Past Bias—Women Say Lesbians, Singles Turned Away by UW Facility, SEATTLE TIMES (Nov. 21, 1993), http://community.seattletimes.nwsource.com/archive/?date=19931121&slug=1733101; Press Ass’n, MPs Challenge Fertility Clinic Ban on Lesbians, THE GUARDIAN (U.K.), July 2, 2006, at 7, available at http://www.guardian.co.uk/uk/2006/jul/03/politics.gayrights (highlighting the political response to fertility clinics’ refusal to treat single women and lesbians).
133 John A. Robertson, Procreative Liberty and Harm to Offspring in Assisted Reproduction, 30 AM. J.L. & MED. 7, 30 (2004); Lesbian Denied Fertility Treatment Wins Complaint, CTV NEWS (Oct. 1, 2005), http://www.ctv.ca/CTVNews/Canada/20050930/invitro_lawsuit_050930/ (reporting on a ruling of the Quebec Human Rights Commission that ordered a fertility clinic to pay thousands of dollars of compensation to a woman who was refused fertility treatments because she was not accompanied by a man).

Access to Reproductive Technology and Their Use of Known Donors, 14 HASTINGS WOMEN’S L.J. 185, 199-200 (2003).

[For citation]
American Society for Reproductive Medicine (ASRM). ASRM issued a report related specifically to the provision of services to gays and lesbians. ASRM identified three important values at play in the ethical debate whether clinics may or must assist single individuals and gay and lesbian couples: reproductive autonomy, child welfare, and professional responsibility. The society concluded that the balance was best struck in favor of equal treatment of heterosexual couples, single persons, and gay and lesbian couples by infertility clinics. The society believes that in the absence of other factors, being single, gay, or lesbian is not an ethical basis for the denial of treatment.

Although discrimination against gays, lesbians, and singles may be ethically suspect, the stark reality is that there are, as noted above, very few laws that prohibit such discrimination. The following map illustrates the problem:

Where such laws do exist, it has been ruled that physicians’ offices are covered by the prohibition. This is no guarantee, however, that a physician will not make a decision to

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138 Id. at 1191.
139 Id. at 1192.
140 Id.
141 N.Y. STATE TASK FORCE ON LIFE & THE LAW, supra note 15, at 186 (citing Cahill v. Rosa, 89 N.Y.2d 14, 21 (N.Y. 1996)). Infertility clinics may fall outside the ambit of such legislation, however, if they are not considered places of public accommodation. Compare Duffy v. Ill. Dep’t of Human Rights, 820 N.E.2d 1186,
refuse or terminate treatment based on a patient’s sexual orientation or marital status. Compounding the problem of combating discrimination even where prohibitions exist are cases where physicians base their refusal to treat on a religious belief. The argument in such cases is not that the religious nature of the refusal renders it nondiscriminatory but that, as O’Connell and Mistrot point out, in matters of conscience, physicians should be exempt from anti-discrimination laws.\textsuperscript{142} Some physicians even urge that the Code of Medical Ethics provides cover for such refusals, as long as the refusal is a matter of conscience and a referral to another physician is made in good faith.\textsuperscript{143}

The best known case of this type is \textit{North Coast Women’s Health Care Group v. Superior Court}.\textsuperscript{144} The case presented the classic dilemma of a nontraditional family seeking help from a conservative medical establishment in order to have children. North Coast Women’s Care Medical Group contracts with insurers to provide infertility treatment to their subscribers.\textsuperscript{145} Guadalupe Benitez, a lesbian, received basic infertility treatment from North Coast under the terms of her employer-provided health insurance plan until it became clear she would require intra-uterine insemination.\textsuperscript{146} At that point, North Coast raised religious objections to helping her become pregnant, referred Benitez to a clinic not covered by her insurance, and reimbursed her for the cost of treatment at the new location.\textsuperscript{147}

Although the treatment at the new clinic was successful, Benitez brought suit under the Unruh Act, a California law specifically prohibiting sexual orientation discrimination in public accommodations.\textsuperscript{148} The California Supreme Court granted review after summary judgment for Benitez was overturned.\textsuperscript{149} The Court framed the issue as whether a physician is constitutionally insulated from the Unruh Act when the discrimination arises out of sincerely held religious beliefs.\textsuperscript{150}

Although the doctors claimed to have discriminatory motives only toward unmarried women, a group unprotected by the Unruh Act at the time the relevant incidents took place,

\textsuperscript{142} O’Connell & Mistrot, \textit{supra} note 113, at 1891.


\textsuperscript{144} 189 P.3d 959 (Cal. 2008).


\textsuperscript{146} \textit{N. Coast Women’s Care Med. Grp.}, 189 P.3d at 963-64.


\textsuperscript{148} \textit{N. Coast Women’s Care Med. Grp.}, 189 P.3d at 964-65.

\textsuperscript{149} \textit{Id.} at 959.

\textsuperscript{150} Issues Ordered Limited, Docket Entry of June 28, 2006, \textit{N. Coast Women’s Care Grp.}, 189 P.3d 959 (No. S142892) (citing California Rules of Court, Rule 29(a)(1)).
it was never definitively established whether they objected to treating unmarried women, lesbian couples, or both. The Supreme Court did not have to resolve this issue to rule that discrimination grounded in religious belief is not exempted from the Act’s ambit.\(^{151}\) In the wake of the Court’s decision that doctors with religious scruples are not exempt from the Act, North Coast and Benitez settled the lawsuit for an unspecified sum.\(^{152}\)

One of the oddest aspects of North Coast was that the doctors Benitez and Clark consulted had no objection to helping Benitez become pregnant at first.\(^{153}\) It was not until she required the technique of intrauterine insemination that their religious scruples were triggered.\(^{154}\) Even more peculiar was the obvious lack of agreement among physicians groups weighing in on the matter about whether the actions of North Coast’s physicians were permissible under the Code of Medical Ethics.\(^{155}\) The physician defendants, of course, argued that the Code of Medical Ethics permits doctors to refuse to treat a patient for religious reasons as long as they provide an immediate and effective referral to another physician who will perform the service.\(^{156}\) Just as in Bragdon, where the American Dental Association submitted an amicus curiae brief asking the court to rule in Bragdon’s favor,\(^{157}\) several medical societies believed that North Coast should prevail.\(^{158}\) But amid the flurry of filings of amici briefs discussing the medical ethics aspects of the case was an equal number taking Benitez’s side.\(^{159}\) The California Medical Association changed its mind in the middle of the lawsuit.\(^{160}\) The briefs of the various medical society amici exhibited striking disagreement about what the ethics rules governing their profession require.

It is generally accepted that a doctor may refuse the initial treatment of a patient for a nondiscriminatory reason,\(^{161}\) but once a doctor has agreed to treat a patient, she has a duty


\(^{153}\) N. Coast Women’s Care Med. Grp., 189 P.3d at 963 (indicating Benitez had been in North Coast’s care for almost a year before she was refused care).

\(^{154}\) Id. at 963-64.

\(^{155}\) Storrow, *supra* note 151, at 382-87.

\(^{156}\) Petitioners’ Answer to Brief, *supra* note 143, at 3-4.

\(^{157}\) O’Brien, *supra* note 3, at 272 n.133.


\(^{159}\) See, e.g., Brief for Anti-Defamation League et al. as Amici Curiae Supporting Real Party in Interest, N. Coast Women’s Care Med. Grp., 40 Cal. Rptr. 3d 636 (No. D045438); Brief for Gay and Lesbian Med. Ass’n et al. as Amici Curiae Supporting Real Party in Interest, N. Coast Women’s Care Med. Grp., 189 P.3d 959 (No. S142892).

\(^{160}\) Notice of Errata Regarding Amicus Brief of Cal. Med. Ass’n at 2, N. Coast Women’s Care Med. Grp., 40 Cal. Rptr. 3d 636 (No. D045438) (on file with author).

\(^{161}\) See AM. MED. ASS’N, *supra* note 106, at Op. 9.12 (prohibiting physician’s discrimination against potential patients on the basis of “race, color, religion, national origin, sexual orientation, gender identity, or any other basis that would constitute invidious discrimination.”); see also AM. MED. ASS’N, *supra* note 106, at
not to neglect or abandon that patient. The debate in the amici briefs, then, was whether North Coast’s physicians had breached any medical ethics rules in refusing to treat her but sending her to another physician from whom she received successful treatment. It is thus odd that none of the parties to, or amici in this case, considered the applicability of the Code of Medical Ethics provisions concerning the neglect of patients and when a physician may ethically refuse to treat a patient but must refer her elsewhere.

Opinion 8.11 of the Code of Medical Ethics reads, “[p]hysicians are free to choose whom they will serve. The physician should, however, respond to the best of his or her ability in cases of emergency where first aid treatment is essential. Once having undertaken a case, the physician should not neglect the patient.” Opinion 10.01 describes the fundamental character of a physician-patient relationship as a “collaborative effort” and a “mutually respectful alliance” in which the parties share the responsibility for making health care decisions. Within this framework, patients have the right to be treated with courtesy and dignity and have the right to continuity of health care. “The physician may not discontinue treatment of a patient as long as further treatment is medically indicated, without giving the patient reasonable assistance and sufficient opportunity to make alternative arrangements for care.” Added to this is the understanding from Opinion 10.015 that a physician-patient relationship is a fiduciary relationship in which the physician’s self-interest is subordinate to his duty to promote the patient’s best interests and advocate for her welfare. It may be possible to read into these provisions the anti-discrimination language of Opinions 9.12 and 10.05, the Opinions that captured the attention of the various players in North Coast, but one cannot do so directly, since those provisions apply to the acceptance or denial of potential patients by their own explicit terms. It may be a good idea to assume from the specific language of the Code of Medical Ethics Principles that a physician who decides to discriminate in the course of an ongoing physician-patient relationship is not respectful of the law, respectful of human rights and dignity, or even supportive of access to medical care for all people. Perhaps the Principles’ Preamble can be read together with Opinions 10.01 and 10.015 to conclude that it is simply not honorable or respectful for a physician to discriminate, because it is of no benefit to a patient, does not promote her best interests and welfare, and arguably exacerbates rather than alleviates her suffering. Unfortunately, the vague and general language of these provisions, when contrasted with the forceful nondiscrimination language embodied in the provisions applicable to potential patients raises doubt, as North Coast noted, about whether any provisions of the Code are suited to assist a court, or an American Medical Association disciplinary board for that matter, in resolving a case like North Coast.

Op. 10.05(2)(b) (prohibiting physician’s discrimination against potential patients on the basis of “race, gender, sexual orientation, or any other criteria that would constitute invidious discrimination”).

162 Storrow, supra note 151, at 382-87.
163 Id. at Op. 10.01.
164 Id. at Op. 10.01(5).
165 Id. at Op. 10.015.
166 Id. at prncs. I, III, and IX.
167 Id. at pmbl., Op. 10.01, Op. 10.015.
168 Id. at pmbl., Op. 10.01, Op. 10.015.
169 Petitioners’ Answer to Brief, supra note 143, at 6-7.
170 The AMA’s Council on Ethical and Judicial Affairs is vested with the power to “censure, or place on probation the accused physician or suspend or expel him or her from AMA membership as the facts may justify.” AM. MED. ASS’N COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, RULES IN CASES OF ORIGINAL
At first blush, the resolution to the questions raised here about medical ethics principles might appear straightforward. As a practical matter, Benitez did eventually receive what she was seeking without any additional expense. Or did she? Anti-discrimination statutes are meant to advance several compelling public interests beyond averting economic harm, among these, combating “humiliation, embarrassment, inconvenience to residents and non-residents alike, . . . breaches of the peace, inter-group tensions and conflicts and similar evils.” The scholarly literature on discrimination strongly indicates that discrimination incurs a deep psychic cost, no matter what the other more material damages might be.

Indeed Joann Clark, Benitez’s partner, eloquently captured the effect that discrimination has, whether the aim of acquiring medical treatment is achieved or not: “[Clark] commented, ‘I had no idea the depths that [discrimination] reaches. Personally and psychologically, it destroys you.’”

Conclusion

Gays, lesbians, and singles commonly encounter barriers when they seek assistance to have children. Some will choose to bypass the medical establishment entirely and will self-inseminate; others will choose to employ an infertility physician in their quest to have children. Because the practice of infertility medicine opens new and unfamiliar avenues to family formation, it also raises fierce anxieties in society about who should be allowed to become a parent and who should not.

In this debate, entrenched attitudes about marriage and procreation have been repackaged to express antipathy toward nontraditional families and functional parenthood unbuttressed by genetic or gestational connections. Unsurprisingly, then, many of the same battles about parentage and legitimacy that used to arise from concerns about the place of marriage in society continue to be fought against the backdrop of those who use reproductive technologies. Equally unsurprising is the prominent role of marital status and sexual orientation discrimination in this struggle. Legislatures have passed laws mandating the delivery of infertility care only to heterosexual couples. Administrative agencies have enforced laws, otherwise facially neutral, in ways that exclude gays, lesbians, and singles from pursuing parenthood. Finally, physicians, because they are the purveyors of the technology, may perceive that they are entitled to exclude certain individuals from having access to it based on the perception that certain classes of individuals lack the capacity to provide minimally adequate care.

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171 PITTSBURGH, PA., CODE § 651.01(e) (2006) (“Discrimination in . . . public accommodations . . . [creates] humiliation, embarrassment and inconvenience to residents and [non-residents alike and] tends to create breaches of the peace, inter-group tensions and conflicts and similar evils.”). available at http://library.municode.com/index.aspx?clientld=11163.


Several of the legal developments detailed in this article indicate a slight trend in the direction of relaxing restrictions on access to assisted reproduction by those not in heterosexual relationships. It is a given that the science of assisted reproduction will continue to evolve. In the future, it may even be possible for gay and lesbian couples to have children genetically related to both of them, without the necessity of donor gametes and surrogates. Such technology may not develop until far into the future. If that day ever arrives, it is to be hoped that discriminatory animus against gays, lesbians, and single individuals who wish to become parents will be a dim memory from a distant past.