

# Bureaucratic Agency: Administering the Transformation of LGBT Rights\*

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## ABSTRACT

*In the 1940s and 1950s, the administrative state served as a powerful engine of discrimination against homosexuals, with agency officials routinely implementing antigay policies that reinforced gays' and lesbians' subordinate social and legal status. By the mid-1980s, however, many bureaucrats had become incidental allies, subverting statutory bans on gay and lesbian foster and adoptive parenting and promoting gay-inclusive curricula in public schools. This Article asks how and why this shift happened, finding the answer not in legal doctrine or legislative enactments, but in scientific developments that influenced the decisions of social workers and other bureaucrats working in the administrative state. This phenomenon continues today, with educators resisting laws that limit transgender students' bathroom access.*

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*By uncovering this bureaucratic resistance, this Article demonstrates the administrative state’s dynamism and that bureaucracy can be an important site of legal change. Because bureaucrats are charged with enforcing legislation, their actions also have significant normative implications, raising separation of powers and democratic legitimacy concerns. However, the very structure of administrative bureaucracies creates conflict between the branches, as civil servants are hired for their professional knowledge and abilities, yet are also responsible for complying with legislative mandates that may contradict that expertise. This Article argues that bureaucratic resistance is inevitable, can be legitimate, and may be desirable.*

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INTRODUCTION

Over the course of fifty-five years, the American legal system has transformed from a regime that criminalized consensual sodomy to one that recognizes same-sex couples’ fundamental right to marry.<sup>1</sup> Within this jurisprudential revolution, one of the most startling reversals was in administrative law. In the 1940s and 1950s, the federal administrative state was a powerful engine of discrimination against homosexuals, with bureaucratic officials implementing antigay policies that reinforced homosexuals’ subordinate social and legal status. The same was true at the state and local levels, where administrative regulations influenced the

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); William N. Eskridge, Jr., *Dis-honorable Passions: Sodomy Laws in America 1861–2003*, at 387–408 (2008) (detailing the evolution of state sodomy laws from colonial times to *Lawrence v. Texas*).

everyday lives of gays and lesbians.<sup>2</sup> However, by the mid-1980s many bureaucrats had become incidental allies, subverting bans on gay and lesbian foster and adoptive parenting and promoting gay-inclusive curricula in public schools. In analyzing how and why this shift happened, this Article uncovers a mechanism for legal change that lies not just in doctrine or the decisions of legislators, but in the effect of scientific developments on bureaucrats working in the interstices of the administrative state.

Drawing on extensive original archival research and oral history interviews, this Article argues that changing psychiatric conceptions of sexual orientation drove the shift from the government's mid-century antigay administrative operation to the more liberal legal regime of the 1980s. In the 1940s and 1950s, the government relied on psychiatric theories of homosexuality to bar gay men and women from serving in the military, revoke security clearances of employees it suspected of being homosexual, and exclude homosexuals from the country under the Immigration and Naturalization Act.<sup>3</sup> When scientific understandings of homosexuality changed—from identifying same-sex sexual attractions as a sign of psychopathy to one of benign difference—it reframed the legal boundaries around gay and lesbian lives. The theoretical shift, which came from developments within scientific circles as well as from lobbying by gay and lesbian rights advocates, undermined criminal laws. These included sexual psychopath statutes, which had been used to commit gay men to psychiatric institutions, as well as consensual sodomy laws.

Equally important to legal change were shifting theories of the etiology of homosexuality, which contradicted the assumptions underlying the demands of elected officials. While many psychiatrists had once identified childhood molestation as the root cause of homosexuality, scientists increasingly investigated other explanations, including adult role models in children's lives. This theory, which the Religious Right made a centerpiece of its politics beginning in the 1970s, became the principal issue in custody disputes between homosexual parents and their heterosexual ex-spouses, with courts asking what effect gay and lesbian adults would have on the children's sexual orientation. To address the concerns of judges, researchers investigated and published studies that showed no difference between the sexual orientation of children of lesbian mothers, gay fathers, and heterosexual parents. The mental health professions

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2. *See, e.g.*, GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940*, at 336–39 (1994) (discussing how liquor licensing authorities used their regulatory authority as an excuse to close gay bars and arrest those bars' patrons).

3. ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO 19–20* (1991); MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 220–21* (2009); DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT 21, 128, 134* (2004).

became increasingly vocal in their support of homosexual parents, influencing the decisions of bureaucrats. Social workers in several states undermined bans on gay and lesbian foster and adoptive parenting, following scientific consensus that identified homosexual parents as equally fit as their heterosexual counterparts. Similarly, educators working for administrative agencies followed scientific viewpoints when they incorporated gay-inclusive curricular materials in the face of popular and legislative opposition.

The approach to legal change that this Article identifies, in which scientific research influenced bureaucratic administration in rights-promoting ways, is not just a phenomenon of the recent past, but persists in contemporary LGBT advocacy.<sup>4</sup> For several decades, transgender rights advocates have collaborated with executive agencies to secure administrative protections, including bathroom access rights.<sup>5</sup> In schools across the country, administrators have promulgated policies affirming the rights of transgender students to use the facilities associated with their gender identity, even in the face of strident public opposition. Like educators who were willing to challenge gay rights opponents on curricular issues in the early 1990s, educators who support transgender students today often rely on scientific research.

By uncovering this untold history of bureaucratic resistance, this Article demonstrates the dynamism of the administrative state and that bureaucracy can be an important site of legal change. Because bureaucrats are charged with enforcing legislation, their actions also have significant normative implications, raising separation of powers and democratic legitimacy concerns. However, the very structure of administrative bureaucracies creates conflict between the branches, as civil servants are hired for their professional knowledge and abilities, yet are

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4. This Article refers to “gay and lesbian rights” or just “gay rights” advocates when discussing the movement of the 1980s and early 1990s, as the movement’s scope had not yet expanded beyond these categories. It uses the term “LGBT” to refer to the contemporary rights movement, which formed in the late 1990s. While many communities have embraced a broader membership and vision of rights—including queer, intersex, and asexual individuals within their umbrella—the legal movement, for better or worse, has limited its focus to lesbian, gay, bisexual, and transgender issues. The Article also discusses identities according to the language individuals would themselves have used in that historical period, including homosexual and heterosexual. See Steven G. Epstein, *Gay and Lesbian Movements in the United States: Dilemmas of Identity, Diversity, and Political Strategy*, in *THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT* 66–68, 74–75 (Adam et al. eds., 1998); Amy L. Stone, *More than Adding a T: American Lesbian and Gay Activists’ Attitudes Towards Transgender Inclusion*, 12 *SEXUALITIES* 334, 335–36, 349 (2009).

5. Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 *SEATTLE J. FOR SOC. JUST.* 579, 620–21 (2010); *Law Reform and Transformative Change: A Panel at CUNY Law*, 14 *CUNY L. REV.* 21, 36 (2010).

also responsible for complying with legislative mandates that may contradict that expertise.<sup>6</sup> This Article argues that this type of bureaucratic resistance is inevitable, can be legitimate, and may be desirable.

This Article identifies certain circumstances under which bureaucrats are justified in resisting laws to protect minority rights, a topic that has received increasing attention since Donald Trump's election and inauguration.<sup>7</sup> From the outset, his presidency has been marked by bureaucratic dissent, which has come in the form of internal complaints, news leaks, social media protests, and outright defiance.<sup>8</sup> When the Trump transition team requested the names of Department of Energy employees who had attended climate change meetings, officials refused to comply and cast aspersions on his administration's motivations.<sup>9</sup> Hours after the President's inauguration, social media managers at the National Parks Service began tweeting veiled criticisms of the new president, from images that showed a significantly larger attendance at Obama's 2009 swearing-in ceremony to statistics on climate change, which the president had dismissed as a "hoax."<sup>10</sup> Although each tweet was quickly deleted, a new one followed from a different account in what one commentator aptly described as "a game of anti-Trump whack-a-mole."<sup>11</sup> These posts are what likely inspired a series of "rogue agency" accounts, critical and satirical feeds run anonymously by individuals claiming to be government

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6. Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1900, 1929 (2013).

7. Laura Rosenberger, *Career Officials: You Are the Last Line of Defense Against Trump*, FOREIGN POL'Y (Jan. 30, 2017), <http://foreignpolicy.com/2017/01/30/career-officials-you-are-the-last-line-of-defense-against-trump> [<http://perma.cc/PK6B-WGRZ>]; see also Oona Hathaway & Sarah Weiner, *Dissenting from Within the Trump Administration*, JUST SECURITY (Jan. 17, 2017, 08:15 AM), <http://www.justsecurity.org/36420/dissenting-trump-administration> [<http://perma.cc/J2ZY-WWVK>]; Jennifer Nou, *Bureaucratic Resistance from Below*, NOTICE & COMMENT (Nov. 16, 2016), <http://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou> [<http://perma.cc/VY7Z-GL8R>]; Andy Sullivan, *Should I Stay or Should I Go? U.S. Civil Servants Gird for Trump*, REUTERS (Nov. 22, 2016), <http://www.reuters.com/article/us-usa-trump-bureaucrats/should-i-stay-or-should-i-go-u-s-civil-servants-gird-for-trump-idUSKBN13H12F> [<http://perma.cc/5TSN-VZDT>].

8. Juliet Eilperin et al., *Resistance from Within: Federal Workers Push Back Against Trump*, WASH. POST (Jan. 31, 2017), [http://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c\\_story.html](http://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c_story.html) [<http://perma.cc/B2AT-LZFD>]; Gregory Krieg, *Going Rogue: Bureaucrats Find Ways To Resist Trump*, CNN (Feb. 2, 2017), <http://www.cnn.com/2017/02/02/politics/trump-opposition-going-rogue> [<http://perma.cc/A45G-SHEM>].

9. Joe Davidson, *Energy Dept. Rejects Trump's Request To Name Climate-Change Workers, Who Remain Worried*, WASH. POST (Dec. 13, 2016), <http://www.washingtonpost.com/news/powerpost/wp/2016/12/13/energy-dept-rejects-trumps-request-to-name-climate-change-workers-who-remain-worried> [<http://perma.cc/KAJ5-FP24>].

10. Krieg, *supra* note 8.

11. *Id.*

staffers. The Department of Homeland Security found these posts sufficiently unnerving that U.S. Customs and Border Protection (CBP) issued an administrative summons to Twitter for all records relating to the “alternative USCIS” account, including the user’s name and contact information.<sup>12</sup> After Twitter filed a lawsuit to quash the subpoena, CBP withdrew its request.<sup>13</sup>

The tweets may have appeared even less humorous to the President when bureaucrats began resisting his executive orders. Ten days into the new administration, acting Attorney General Sally Yates announced the Justice Department would not defend the President’s executive order blocking nationals from seven predominantly Muslim countries, explaining that she was not convinced the order was lawful.<sup>14</sup> She later cited her confirmation hearing before Congress, where she had promised she would not enforce actions she believed to be against the law, in justifying her action.<sup>15</sup> Although the President fired her hours after she defied his executive order, approximately 1,000 State Department diplomats voiced their opposition to the travel ban by joining a “memo of dissent.”<sup>16</sup> The State Department instituted the formal memo of dissent during the Vietnam War to ensure senior officials could hear alternative policy views.<sup>17</sup> In July 2017, after the President declared via Twitter that transgender individuals could no longer serve in the military, the head of

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12. Brian Feldman, *Twitter Sues Trump Administration To Protect Anonymous “Alt-Immigration” Account*, N.Y. MAG. (Apr. 6, 2017), <http://nymag.com/selectall/2017/04/twitter-sues-to-protect-alt-government-accounts-identity.html> [<http://perma.cc/PV8M-FUMM>]; Matt Ford, *The Trump Administration Withdraws Its Complaint About a Twitter Critic*, ATLANTIC (Apr. 7, 2017), <http://www.theatlantic.com/politics/archive/2017/04/twitter-lawsuit-trump/522231> [<http://perma.cc/29CQ-Z72B>]; David Morgan, *Government Science Goes Rogue on Twitter*, CBS NEWS (Jan. 26, 2017), <http://www.cbsnews.com/news/government-science-goes-rogue-on-twitter-resist> [<http://perma.cc/2X6P-PPP4>]; Andrea Noble, *The Resistance: Rogue Twitter Accounts Fuel Rebellion Against Trump*, WASH. TIMES (Feb. 20, 2017), <http://www.washingtontimes.com/news/2017/feb/20/rogue-twitter-accounts-form-resistance-against-tru> [<http://perma.cc/2MMA-R44C>].

13. Ford, *supra* note 12.

14. Elise Foley et al., *Acting Attorney General Says Justice Department Won’t Defend Trump’s Ban on Refugees, Travelers*, HUFFINGTON POST (Jan. 30, 2017), [http://www.huffingtonpost.com/entry/trump-ban-legal-challenges\\_us\\_588fcedbe4b0522c7d-3c9a99](http://www.huffingtonpost.com/entry/trump-ban-legal-challenges_us_588fcedbe4b0522c7d-3c9a99) [<http://perma.cc/P59E-VHTJ>].

15. Eli Watkins, *Yates on Trump’s Travel Ban: “Arguments Have To Be Based on Truth,”* CNN (May 8, 2017), <http://www.cnn.com/2017/05/08/politics/sally-yates-donald-trump-travel-ban> [<http://perma.cc/8BAF-V4S8>].

16. Jeffrey Gettleman, *State Dept. Dissent Cable on Trump’s Ban Draws 1,000 Signatures*, N.Y. TIMES (Jan. 31, 2017), <http://www.nytimes.com/2017/01/31/world/americas/state-dept-dissent-cable-trump-immigration-order.html> [<http://perma.cc/YC62-U9CW>]; Elise Labott, *Over 900 US Career Diplomats Protest Trump Order*, CNN (Jan. 31, 2017), <http://www.cnn.com/2017/01/30/politics/career-diplomats-dissent-memo> [<http://perma.cc/A37J-MSVY>].

17. See sources cited *supra* note 16.

the Coast Guard said “he would continue to support transgender troops under his command.”<sup>18</sup>

Unlike the state and local bureaucrats who are the subject of this Article, these examples illustrate resistance in the Trump administration by federal actors and address concerns beyond the rights of unrepresented minorities. However, these clashes demonstrate the varied ways in which bureaucrats can challenge government policies, regulations, and laws, as well as their increasing willingness to do so. Thus, while this Article addresses a particular subset of bureaucratic action, it implicates a broad range of conduct by a large number of individuals.

This Article uses the term “bureaucrat” to refer to those public servants who deliver government services as the frontline staff in public administration.<sup>19</sup> Although bureaucrats are often derided as office workers who robotically implement government regulations, this Article employs the term in its sociological sense. In that literature, its definition is much more expansive; it includes members of professional, knowledge-based communities who share norms and values and who exercise considerable discretion in their positions in the community.<sup>20</sup> Administrative agencies employ many different types of staff members, from political appointees to policy professionals, technocrats, civil servants, and front-line decisionmakers.<sup>21</sup> This Article highlights the influence of those who are charged with implementing the administrative state’s policies and regulatory apparatuses at the street level, typically social workers, teachers, and police officers.<sup>22</sup> Rather than elected representatives, most citizens’ encounters with government are mediated through

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18. Ron Nixon, *Coast Guard Still Supports Transgender Troops, Commandant Says*, N.Y. TIMES (Aug. 1, 2017), <http://www.nytimes.com/2017/08/01/us/politics/coast-guard-commandant-general-zukunft-transgender-troops.html> [<http://perma.cc/H9AW-386H>]; see also Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:55 AM), <http://twitter.com/realDonaldTrump/status/890193981585444864> [<http://perma.cc/57MA-Q78J>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:04 AM), <http://twitter.com/realDonaldTrump/status/890196164313833472> [<http://perma.cc/24QR-RKRV>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:08 AM), <http://twitter.com/realDonaldTrump/status/890197095151546369> [<http://perma.cc/W2P5-WZ3P>].

19. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES xi, 3 (reprt. 2010).

20. *Id.* at 14; Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1, 3 (1992); see also Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1250–51 (2016). For a definition of professions, see Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 743 (1988), and see also Sande L. Buhai, *Profession: A Definition*, 40 FORDHAM URB. L.J. 241 (2012).

21. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036–37 (2011); see also Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 538, 540–42 (2015).

22. LIPSKY, *supra*, note 19, at 3.



these types of bureaucrats, rendering the study of these administrators all the more important.<sup>23</sup>

The conventional wisdom from many of these interactions is that bureaucrats are myopic, unimaginative, and resistant to change, and there are indeed myriad examples of administrative retrenchment. Additionally, experiences with these bureaucrats have led to increased state regulation and concomitant repression for many citizens, particularly those who are from economically marginalized backgrounds or from communities of color.<sup>24</sup> However, this Article shows that the opposite is also true, with government administration serving as a site of legal transformation. In these accounts, those who benefited directly from bureaucratic resistance tended to be white and middle class. Thus, this Article does not challenge depictions of the administrative state as a site of contentious and problematic power imbalances, but rather provides a parallel narrative, in which the bureaucracy also served as an avenue for legal reform.

In presenting this history and its contemporary implications, this Article makes four distinct contributions to legal scholarship. First, it reorients the legal history of gay and lesbian rights, which has relied on Michel Foucault's model to focus on the ways in which the administrative state and scientists foreclosed rights claims.<sup>25</sup> Foucault identified how sex became a matter of governmental concern, with the state deploying scientific evidence to police, administer, and control public life.<sup>26</sup> Foucault's framework emphasized how social discourse on sexuality contributed to the creation of a gay and lesbian identity, and to the social exclusion and legal persecution of homosexual men and women.<sup>27</sup> This Article reframes Foucault-based legal scholarship by demonstrating how the administrative state and scientific researchers came to serve as a source of liberation, rather than unmitigated repression.<sup>28</sup>

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23. *Id.* at 14.

24. Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 602–08 (2011); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1491–99 (2012).

25. CANADAY, *supra* note 3, at 140, 146, 151; DANIEL WINUNWE RIVERS, *RADICAL RELATIONS: LESBIAN MOTHERS, GAY FATHERS, AND THEIR CHILDREN IN THE UNITED STATES SINCE WORLD WAR II* 181–86 (2013); MARC STEIN, *SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM GRISWOLD TO ROE* 175–80, 185–89 (2010).

26. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 23–26, 30–31 (1978).

27. *Id.* at 43–44. While Foucault identifies both the state and medicine as repressive institutions, he also emphasizes how they are influenced by the subjects they help produce. *Id.* at 95–97; Felicia Kornbluh, *Queer Legal History: A Field Grows Up and Comes Out*, 36 LAW & SOC. INQUIRY 537, 541 (2011).

28. As such, it demonstrates a different dimension of the “sex bureaucracy,” a reference for the ways in which administrative agencies regulate sexuality. Historically, that regulation served to deter, correct, and if necessary, punish transgressive behavior. See generally Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL.



Second, by analyzing how bureaucrats administered law and resolved competing claims, this Article emphasizes the need to disaggregate the leviathan that is the administrative state. It joins recent work exploring the limits of administrative law scholarship, which foregrounds the external restraints on administrative action, emphasizing political and legal oversight and accountability.<sup>29</sup> That literature's focus is particularly problematic since, as Edward Rubin notes, much of the government's interactions with its citizens, and a great deal of its work, occurs in the implementation of policies.<sup>30</sup> This Article builds upon his point, identifying the value of including administrative governance in scholarship on administrative law, and arguing that the scope of inquiry should also expand beyond the federal and towards the state and local.<sup>31</sup> The challenge of approaching legal studies through this lens is in the multiplicity of actors and the difficulty of deriving general conclusions from local politics, policies, and regulations.<sup>32</sup> However, municipal laws and local decisions are often more consequential for individuals than are federal decisions, and the day-to-day process of legal change unfolds in towns and cities.<sup>33</sup>

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L. REV. 881 (2016); Melissa Murray & Karen Tani, *Something Old, Something New: Reflections on the Sex Bureaucracy*, 7 CAL. L. REV. ONLINE 122 (2016).

29. Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014); Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1518–19 (2015); Edward L. Rubin, *Bureaucratic Oppressions: Its Causes and Cures*, 90 WASH. U. L. REV. 291, 291–92 (2012) [hereinafter Rubin, *Bureaucratic Oppressions*]; Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95 (2003) [hereinafter Rubin, *APA Administrative*]; Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1, 1 (2013); William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS. 61 (2015).

30. Rubin, *Bureaucratic Oppressions*, *supra* note 29, at 293.

31. Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 569–70 (2017); Olatunde C.A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROBS. 115 (2016). In adopting this approach, this Article also builds upon the work of scholars like Karen Tani and Sophia Lee, extending their insights on administrative constitutionalism to state and local bureaucracies, as well as beyond constitutional rights. See SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT* (2014); KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972* (2016); see also David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071, 1076 (2011) (arguing civil rights groups in the 1940s championed administrative regulation of job discrimination for its benefits over litigation).

32. Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 552–53 (2001); see also Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 558–60 (2014).

33. See TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG*

Third, this Article sheds new light on how the executive branch is an important site for law reform and legal norm formation. To date, accounts of LGBT rights successes have focused on the courts and lawyers, rather than on administrative agencies or bureaucrats.<sup>34</sup> Examining these other actors, and identifying how administrative agencies evolve to protect the rights of stigmatized minorities, highlights other mechanisms of legal change that are important for LGBT rights scholarship and other fields. The structural framework that this Article's historical study uncovers applies beyond LGBT rights claims and underscores the powerful role of science on a cadre of bureaucrats, demonstrating the need to look beyond law's traditional boundaries to understand change.<sup>35</sup>

Finally, this Article contributes to scholarship on administrative law, especially administrative constitutionalism, which focuses on agency resistance when constitutional concerns compete with statutory goals.<sup>36</sup> This Article extends that analysis by applying it to situations where scientific developments and legislative mandates conflict, leaving bureaucrats to decide how to balance two sources of authority that yield opposite results. As in the administrative constitutionalism context, bureaucrats' unwillingness to execute legislative enactments that infringe on minority groups' rights raises concerns about the separation of powers and democratic accountability. However, bureaucrats' professional expertise is also a legitimate source of authority, and their resistance can introduce minority viewpoints that would otherwise go unheard.

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HISTORY OF THE CIVIL RIGHTS MOVEMENT 135 (2011); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 385, 435 (2004).

34. See, e.g., MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 38–118 (2013) (identifying court cases as the catalyst for same-sex marriage bans); KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL 91–217 (2015) (detailing the *Perry v. Schwarzenegger* litigation); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1413–16 (2004) (criticizing marriage equality litigation for limiting the scope of the gay liberation movement); Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1985–87, 1992 (2006) (analyzing changing judicial norms in marriage equality decisions).

35. Scientific developments have influenced a wide range of legal issues; in education, for example, policies that once excluded special-needs children now affirmatively recognize their rights. See generally Mitchell L. Yell et al., *The Legal History of Special Education*, 19 REMEDIAL & SPECIAL EDUC. 229 (1998).

36. See generally WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010); LEE, *supra* note 31; TANI, *supra* note 31; Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1082 (2014); see also Metzger, *Administrative Constitutionalism*, *supra* note 6, at 1900, 1916–17; Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 483–84 (2010); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 522 (2015).

Part I presents a theory of bureaucratic resistance, analyzing how it can be consistent with other legal principles. While resistance by bureaucrats may seem anomalous, this Part explains that it can in fact support the rule of law and promote democratic legitimacy, and that it does not necessarily violate the separation of powers. These are the three most frequently raised objections to bureaucratic discretion. By explaining how bureaucratic resistance can be justified as a theoretical matter, this Part demonstrates that the examples of resistance this Article presents are not as subversive as they may at first seem.

With this background in place, Part II turns to the history of the administrative regulation of gay and lesbian rights. This Part traces the evolution of psychiatric theories of homosexuality, analyzing their influence on the legal regulation of gay and lesbian life in the 1940s and 1950s, as well as the scientific studies that led to the reform of sexual psychopath statutes and consensual sodomy laws. This discussion emphasizes the key role of scientific work in legal regimes and legal change. Part II then examines the declassification of homosexuality as a mental illness in 1973, identifying how this effort transformed psychiatrists into crucial allies for gay and lesbian rights. After the declassification, mental health professionals became key expert witnesses in lesbian mother and gay father custody cases, with their testimony determinative in many instances.

The events in Part II fostered a scientific consensus that influenced the bureaucratic actions set out in Part III. Part III analyzes how a set of administrators became allies, thereby shifting the Foucauldian framework. This Part identifies the ways in which civil servants in the mid-1980s and early-1990s helped promote gay and lesbian rights in the face of widespread social and political disapproval. Using case studies of social workers in New Hampshire and educators in New York City, this Part examines how social science research influenced their actions and details the contours of their resistance.

Part IV connects history to present by identifying similar bureaucratic resistance within educational policies for transgender youth. Educators are challenging policies that require transgender students to use bathrooms and changing facilities of their sex assigned at birth; their actions are supported by scientific evidence that establishes that doing so is harmful for individuals with gender dysphoria.<sup>37</sup> Like their historical predecessors, educators are engaging in bureaucratic resistance based on their expertise, with scientific developments influencing their exercises of discretion.

Part V concludes with the normative implications of this mechanism for legal change on behalf of minority rights. Drawing on the

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37. Gender dysphoria is a diagnostic term that refers to “the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender.” AM. PSYCHIATRIC ASSOC., *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 451 (5th ed. 2013).

historical and contemporary examples of bureaucratic resistance, it identifies some of the limits on resistance to rights-restricting legislation that contravenes bureaucratic expertise. This analysis provides insights as to when bureaucratic resistance is generally permissible.

This Article proceeds with three distinct, but related, arguments. First, bureaucrats are a source of legal change. Although they are responsible for implementing the law, their discretion allows them to introduce their own normative commitments, which can result in legal transformation. Second, this reform can come from scientific developments, which influence how bureaucrats exercise their discretion. Third, bureaucrats who are employed for their professional training, judgment, and skills not only resist laws that contradict their expert judgment, but this resistance can be both justified and desirable.

## I. THE GOVERNANCE PROBLEM

The fact that bureaucrats have an important role in lawmaking and in the process of law reform is all too rarely acknowledged.<sup>38</sup> Resistance often appears inapposite for bureaucrats—a role for others to play.<sup>39</sup> However, this Part demonstrates that administrative resistance can be justified from a theoretical standpoint. It sets out the competing concerns to illuminate why it is that the resistance in this Article is not as subversive as it may initially appear.

Bureaucratic dissent is not an anomaly in our legal system, which creates room for resistance within its organizational design. The same institutional mechanisms that promote democratic deliberation and encourage lawmakers to express dissent in federal and state constitutions, such as bicameralism, the Presentment Clause, and the Appointments Clause, also allow for resistance.<sup>40</sup> The federalist system permits, and sometimes appears to encourage, resistance. Federalism scholars have noted that states contest federal laws, sometimes by exploiting gaps in the statutes or, more controversially, through outright refusals to enforce

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38. For a discussion of the role of bureaucrats in law reform, see CHARLES R. EPP, *MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 19* (2009); and Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C.R.-C.L. L. REV. 291 (2014).

39. *But see* Joshua D. Clinton et al., *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 352 (2012) (arguing that “[g]overnment agencies are fundamentally political” and that their personnel “organize, lobby, and make public policy like other political actors”); Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225, 228 (identifying agency officials as political actors because “[p]olitical oversight is a basic feature of agency life”).

40. *See* CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 152–58 (2003); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1994–2003 (2011).

legal provisions.<sup>41</sup> For example, municipalities across the country have declared themselves “sanctuary cities,” enacting policies limiting cooperation between local law enforcement and federal immigration agents.<sup>42</sup> Their actions manifest their objections to national immigration policy—a resistance that the Tenth Amendment enables.<sup>43</sup>

Resistance also takes place within the branches of government, where officials may disagree as to their legal duties and obligations.<sup>44</sup> This again occurs both at the federal and state levels. One particularly notorious example occurred in California in 2008, when the state controller refused to implement Governor Arnold Schwarzenegger’s executive order to reduce the pay of all state employees to \$6.55 an hour, the federal minimum wage, until the legislature approved his budget.<sup>45</sup> The controller believed the order was unlawful and would irreparably harm the state’s almost two hundred thousand employees.<sup>46</sup> Although Schwarzenegger filed a lawsuit against the controller’s office to enforce the order, the Governor left office before it could be resolved and his successor did not pursue the case.<sup>47</sup> Thus, the legal system creates room for dissent within branches of government, across the federal structure, and between branches of government.

Resistance between the branches of government most often occurs through the judicial review process, rather than in the bureaucracy. At the federal level, courts enforce the Constitution both by invalidating statutes and also through resistance norms, such as the constitutional avoidance canon and the clear statement rule.<sup>48</sup> Resistance norms serve as a soft judicial limit on government authority to act, which “mak[es] it harder—but not impossible—to achieve certain legislative goals” that

41. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1271–72 (2009).

42. See Jennifer Medina & Jess Bidgood, *Cities Vow To Fight Trump on Immigration, Even if They Lose Millions*, *N.Y. TIMES* (Nov. 27, 2016), <http://www.nytimes.com/2016/11/27/us/cities-vow-to-fight-trump-on-immigration-even-if-they-lose-millions.html> [<http://perma.cc/WQX6-C3CU>].

43. *Printz v. United States*, 521 U.S. 898, 918–21 (1997); see also *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–83 (2012).

44. For a discussion of presidential control of administrative agencies, see David E. Lewis & Terry M. Moe, *The Presidency and the Bureaucracy: The Levers of Presidential Control*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 376–81 (Michael Nelson ed., 10th ed. 2014).

45. Evan Osnos, *On Saying No*, *NEW YORKER* (Nov. 21, 2016), <http://www.newyorker.com/magazine/2016/11/21/resisting-trump-from-inside-the-government> [<http://perma.cc/A8MW-C3MV>].

46. *Id.*

47. Shane Goldmacher, *Brown Drops Lawsuit To Impose Minimum Wage on Workers*, *L.A. TIMES* (Feb. 15, 2011), <http://latimesblogs.latimes.com/california-politics/2011/02/brown-drops-lawsuit-to-impose-minimum-wage-on-workers.html> [<http://perma.cc/ML3F-F2Y7>].

48. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 *TEX. L. REV.* 1549, 1596–98 (2000).

may encroach on constitutional principles.<sup>49</sup> For example, courts will accept a limit on federal jurisdiction, but only when Congress has made its intent clear.<sup>50</sup> They do so because legislatures may find themselves unable to resolve a contentious issue, and thus compromise by not settling the matter in the statute.<sup>51</sup> Proponents of limiting jurisdiction cannot later use this compromise to impose limits, but rather must, as a result of resistance norms, amass sufficient support and demonstrate an unequivocal consensus to make the restrictions clear.<sup>52</sup> Resistance norms allow courts to prevent legislative enactments from infringing on other normative commitments, while at the same time ensuring judicial respect for duly enacted laws that are unambiguous in intent. Ultimately, by applying a resistance norm, the federal judiciary is not restraining Congress so much as enforcing Article III.<sup>53</sup>

There is an important gap between the positive claim that bureaucrats can exercise resistance and the normative argument that they should express their dissent. Emerging scholarship on administrative constitutionalism, which refers to efforts by agencies to interpret, apply, and elaborate constitutional principles, has set out the competing concerns at issue when bureaucrats act beyond their legislative mandates.<sup>54</sup> This literature helps identify and address the objections to bureaucratic resistance, which are rooted in separation of powers, rule of law, and democratic legitimacy concerns.

The separation of powers arguments arise from the fact that administrative agencies do not have any inherent or independent authority to act; they can only implement what the legislature has authorized.<sup>55</sup> By resisting the legislature, administrators are not only substituting their opinions for those charged with enacting the law, but are also usurping the role of the judiciary, which is charged with reviewing the statutes' validity.<sup>56</sup> Thus, the idea of agencies fostering new normative commitments challenges the structure of the constitutional system that vests judicial power in courts and lawmaking authority in the legislative branch.<sup>57</sup> In many ways, "[t]he challenge to administrative constitutionalism's legitimacy . . . bears a close connection to the charge that the

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49. *Id.* at 1596.

50. *Id.* at 1552.

51. *Id.* at 1597. Likewise, legislatures enact ambiguous statutes that delegate decision-making to agencies to reach consensus on politically contentious decisions. Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 571–72 (2009).

52. Young, *supra* note 48, at 1598.

53. *Id.* at 1552.

54. See sources cited *supra* note 36.

55. Metzger, *Administrative Constitutionalism*, *supra* note 6, at 1917.

56. *Id.* at 1917–18; Jerry L. Mashaw, *Norms, Practices, and the Paradox of Defiance: A Preliminary Inquiry into Statutory Interpretation*, 57 ADMIN. L. REV. 501, 508 (2005).

57. Metzger, *Administrative Constitutionalism*, *supra* note 6, at 1920.



modern administrative state as a whole is at odds with basic features of the Constitution.”<sup>58</sup> An agency’s exercise of discretion that contravenes legislative enactments extends the concern about the role of the administrative state in the constitutional order one step further. In such a situation, it appears that the administrative agency is doing the opposite of exercising the authority it has been delegated.

However, bureaucrats who are hired specifically for their professional knowledge and judgment, and who then resist laws based on that expertise, are doing so based on delegated authority, which alleviates separation of powers concerns. Legislatures at both the state and federal level have limited time and resources, and thus delegate responsibilities to administrative agencies for their expertise.<sup>59</sup> Indeed, because of their specialized knowledge, bureaucrats may be in a better position to understand a legislative action’s effects on the individuals with whom they interact. As a result, there is a practical benefit to delegating authority to administrators.<sup>60</sup> The street level bureaucrats in this Article, who are more typical of state and local government, in turn, derive authority on-the-job from their status as professionals, where they are charged with using their education and outlook on a daily basis. Governments employ bureaucrats like social workers and educators, consign tasks to them, and ask them to utilize discretion because of their professional training, specialized knowledge, and unique skills.<sup>61</sup> In following their professional expertise, bureaucrats are complying with a directive from elected representatives. Thus, in exercising resistance, bureaucrats are not necessarily usurping the legislature’s authority.

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58. *Id.*

59. Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2041 (2011). Indeed, the Chevron doctrine is based in part on the idea that Congress may choose to delegate to an agency because “those with great expertise and charged with responsibility for administering the provision would be in a better position to” interpret a statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

60. Similarly, administrative constitutionalism scholarship argues that because of agencies’ expertise in the areas they regulate, they are both better at integrating constitutional concerns and more likely to recognize the constitutional significance of their actions. Metzger, *Administrative Constitutionalism*, *supra* note 6, at 1922–23 (arguing that “agencies approach constitutional questions and normative issues from a background of expertise in the statutory schemes they implement and the areas they regulate,” and consequently “are likely to be better at integrating constitutional concerns with the least disruption to these schemes and regulatory priorities”); Ross, *supra* note 36, at 525 (emphasizing that “[a]gencies are able to update constitutional applications more speedily than courts, and they are more connected to public sentiment and evolving societal settings).

61. Brian J. Cook, *The Representative Function of Bureaucracy: Public Administration in Constitutive Perspective*, 23 ADMIN. & SOC. 403, 424 (1992); Sidney Shapiro & Elizabeth Fisher, *Chevron and the Legitimacy of “Expert” Public Administration*, 22 WM. & MARY BILL RTS. J. 465, 473–74 (2013).



Bureaucratic resistance also raises rule of law concerns, as it appears to violate the principles that law should provide notice and be coherent.<sup>62</sup> Having “a government of laws, and not of men,” is a fundamental political commitment,<sup>63</sup> one that the administrative state must meet to sustain its legitimacy.<sup>64</sup> There are a number of dimensions to the rule of law, including that government actions must be authorized, justified, and procedurally fair.<sup>65</sup> The notice and coherence requirements are the ones that bureaucratic resistance most clearly implicate. The notice principle includes a number of other characteristics, including that laws should be public, clear, consistent, prospective, and stable, such that individuals can rely on executed laws to determine their actions.<sup>66</sup> When bureaucrats dissent from legislative enactments, this is no longer possible. However, if bureaucrats are transparent in their resistance, which all of the bureaucrats in this Article were, then this resolves the notice issue.

At first blush, bureaucratic resistance appears to introduce inconsistency into law, but it in fact may make the legal system more internally coherent. Administrative agencies must both implement laws consistently with respect to different individuals, as well as ensure that “the integrated body of its constituent statutes” is implemented “in a coherent, intelligent way.”<sup>67</sup> Although there are a range of external political and legal checks on administrative agency heads and policymakers, this is less true for bureaucrats, particularly at the state and local level.<sup>68</sup> There is a very practical reason for this: it is relatively easy to verify that a social services department has issued regulations that *accord* with the law, but it is much more complicated to ensure that social workers are complying with that regulation when they make placement decisions.<sup>69</sup>

62. Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1987 (2015).

63. Novanglus [John Adams], *Addressed to the Inhabitants of the Colony of Massachusetts Bay* (Mar. 6, 1775) (newspaper essay), reprinted in JOHN ADAMS & JONATHAN SEWALL, NOVANGLUS, AND MASSACHUSETTENSIS; OR POLITICAL ESSAYS 78, 84 (Boston, Hews & Goss 1819).

64. Stack, *supra* note 62, at 1986–87; see also PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 7–8 (2014) (arguing the administrative state violates historical rule of law principles); Nestor M. Davidson & Ethan J. Leib, *Regleprudence—At OIRA and Beyond*, 103 GEO. L.J. 259, 266–67 (2015) (discussing rule of law concerns in administrative state).

65. Stack, *supra* note 62, at 1987.

66. *Id.* at 2002.

67. Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1146 (2012).

68. Davidson & Leib, *supra* note 64, at 269–70; see also Gillian B. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1841 (2015); Rubin, *APA Administrative*, *supra* note 29, at 100–01; Simon, *supra* note 29, at 71–79. *But see* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 451–72 (2015) (discussing the institutional structures by which agency heads manage their staff and resources).

69. David A. Super, *Are Rights Efficient?: Challenging the Managerial Critique of Individual Rights*, 93 CALIF. L. REV. 1051, 1120 (2005); see also Matthew Diller, *The*

Likewise, departments of education may promulgate policies that follow legislative mandates, but educators have almost complete autonomy in their classrooms, which is both necessary and inevitable when educators are teaching pupils of diverse backgrounds.<sup>70</sup> State and local administrative agencies deliver the vast majority of government services to citizens, and these bureaucrats have an extraordinary amount of discretion in how they do so.

Professional knowledge serves as an informal limit on discretion, which is such a contested element of the administrative state.<sup>71</sup> Expertise provides a means of ensuring coherence, consistency, and unity across dispersed, street-level bureaucrats.<sup>72</sup> Scientific developments may allow individuals to predict how bureaucrats will exercise their discretion, augmenting the uniformity and reliability of the administrative process. Having bureaucrats follow their professional standards may thus provide a solution for a governance problem that is particular to municipal administrative agencies.

Bureaucratic resistance also gives rise to democratic legitimacy complaints, much like other areas of administrative law.<sup>73</sup> As Sidney Shapiro and his colleagues wryly commented, “[t]he history of administrative law in the United States constitutes a series of ongoing attempts to legitimize unelected public administration in a constitutional liberal democracy.”<sup>74</sup> However, resistance amplifies the democratic legitimacy concerns underlying the administrative state more generally. Bureaucrats are unelected government agents who create laws through administrative processes; their refusal to enforce legislative enactments nullifies representatives’ power.<sup>75</sup>

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*Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1126–27 (2000) (noting how, as a practical matter, administrative employees are accorded broad discretion). To the extent the fear is that bureaucrats will “be more intent on expanding their power than behaving like disinterested experts whose first allegiance is to the rule of law,” this is not the situation here. Richard A. Epstein, *Why the Modern Administrative State is Inconsistent with the Rule of Law*, 3 NYU J.L. & LIBERTY 491, 505 (2008).

70. How to balance accountability and yet maintain bureaucratic efficiency is a question that administrative scholars have struggled to resolve. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2339 (2001).

71. Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299, 1320–21 (1997); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 430, 436 (1999); Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 479–80 (2012).

72. Stack, *supra* note 62, at 2013–14.

73. Metzger, *Administrative Constitutionalism*, *supra* note 6, at 1901.

74. Shapiro et al., *supra* note 71, at 463.

75. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 174 (2015) (discussing the executive’s categorical non-enforcement of laws); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama*

Resistance based on expertise may compound this problem further, as science is explicitly nondemocratic and scientific knowledge is not value-neutral or apolitical.<sup>76</sup> Science cannot be separated from its social context, which renders certain research questions particularly salient and consequently yields certain normative stances.<sup>77</sup> Scientific communities have their own norms and values about the proper modes of decision-making, using those perspectives to evaluate questions with political implications.<sup>78</sup> That scientists are judging research studies according to the accepted methods of the profession should insulate those decisions from political pressure. However, experts do not always agree, leaving room for regulatory capture by interest groups.<sup>79</sup> This is a particular concern at the federal level, where scientific experts are involved in formulating administrative regulations.<sup>80</sup> Scientific support for a policy is supposed to connote objectivity, but that it not always the case.<sup>81</sup> Allow-

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*Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 836–56 (2013) (same); see also Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 705–07 (2014) (arguing that executive nonenforcement usurps Congress' function).

76. SHEILA JASANOFF, *THE FIFTH BRANCH: SCIENCE ADVISERS AS POLICYMAKERS* 229 (1990); Rebecca Roiphe, *The Most Dangerous Profession*, 39 CONN. L. REV. 603, 664–65 (2006). For a discussion of the interrelationship between the growth of the federal administrative state and professions, see BRIAN BALOGH, *THE ASSOCIATIONAL STATE: AMERICAN GOVERNANCE IN THE TWENTIETH CENTURY* 134–36 (2015). Resistance can also be self-aggrandizing, increasing administrators' authority at the expense of the legislature. See Metzger, *Administrative Constitutionalism*, *supra* note 6, at 1918.

77. DAVID S. CAUDILL & LEWIS H. LARUE, *NO MAGIC WAND: THE IDEALIZATION OF SCIENCE IN LAW* 28, 42 (2006); JASANOFF, *supra* note 76, at 13, 28, 42.

78. Susan Stefan, *Leaving Civil Rights to "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 656–58 (1992). For example, the ways in which psychiatrists have addressed the needs of transgender preadolescent youth reflect their conceptualization of gender dysphoria. Additionally, although recommending that patients live according to their gender identity has significant political implications, this does not make the instruction a political act.

79. David H. Hoffman et al., *Report to the Special Committee of the Board of Directors of the American Psychological Association: Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture*, SIDLEY AUSTIN LLP 14–16 (July 2, 2015) (describing the American Psychological Association's collusion with the Department of Defense to authorize torture), <https://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf> [<https://perma.cc/FY9A-HH4M>]; Jeremy A. Blumenthal, *Expert Paternalism*, 64 FLA. L. REV. 721, 725 (2012).

80. Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1603–17 (2008) (describing controversies when agency officials manipulated scientific evidence); Louis J. Virelli III, *Scientific Peer Review and Administrative Legitimacy*, 61 ADMIN. L. REV. 723, 729–32 (2009) (describing the role of science in policymaking).

81. Adrian Vermuele, *The Parliament of the Experts*, 58 DUKE L.J. 2231, 2235–36 (2009). One of the most powerful interest groups is the federal government, which finances the majority of the country's scientific research, either by providing funding to researchers or by conducting studies in government departments. Steven Goldberg, *The Reluctant Embrace: Law and Science in America*, 75

ing bureaucratic resistance based on expertise necessarily means ceding authority to scientists, who have their own biases, agendas, and ideologies that are not subject to external checks.

A lack of review can have extremely harmful consequences. Scientific research has been crucial for the gay and lesbian rights movement, but there is a long history of scientific “advances” hindering the rights of marginalized groups. For example, scientists and social workers were integrally involved in eugenics programs, which targeted low-income women and women of color for sterilization.<sup>82</sup> Scientific projects justified racial oppression and sex-based discrimination more generally, reinforcing legal structures of subordination.<sup>83</sup> Within the LGBT movement, the role of science continues to be contested on a number of different issues, including whether individuals can alter their same-sex sexual attractions.<sup>84</sup> Simply because science can have a positive effect does not mean that it necessarily will, and opening the door for civil rights gains also means accepting the possibility of scientific setbacks for rights projects.

At the same time, bureaucratic resistance may promote democracy, insofar as resistance provides room for a diversity of viewpoints, which may give voice to unrepresented, politically powerless minorities who would not otherwise be heard.<sup>85</sup> For that reason, Heather Gerken has argued that government actors who defy laws with which they disagree are furthering democracy, as their actions serve as “an alternative strategy for institutionalizing channels for dissent within the democratic process.”<sup>86</sup> Applying Gerken’s theory to bureaucrats who resist based on scientific developments, these administrators are promoting democratic legitimacy insofar as they create room for dissenting viewpoints to be

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GEO. L.J. 1341, 1353–54 (1987); *see also* Anahad O’Connor, *How the Sugar Industry Shifted Blame to Fat*, N.Y. TIMES (Sept. 12, 2016) (discussing the outside role of food industry funding and lobbying on nutrition science), <http://www.nytimes.com/2016/09/13/well/eat/how-the-sugar-industry-shifted-blame-to-fat.html> [<http://perma.cc/3QXX-S5G5>].

82. WENDY KLINE, *BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM* 54–60 (2001); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1443 (1991).

83. *See generally* STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1981); Paul A. Lombardo, *Phantom Tumors and Hysterical Women: Revising Our View of the Schloendorff Case*, 33 J.L. MED. & ETHICS 791 (2005); Osagie K. Obasogie et al., *Race in the Life Sciences: An Empirical Assessment, 1950–2000*, 83 FORDHAM L. REV. 3089 (2015). Scientific experiments have also reflected racist assumptions. *See, e.g.*, SUSAN M. REVERBY, *EXAMINING TUSKEGEE: THE INFAMOUS SYPHILIS STUDY AND ITS LEGACY* (2013).

84. *See* Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793 (2017).

85. Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1372 (2013); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1749 (2005).

86. Gerken, *Dissenting by Deciding*, *supra* note 85, at 1749.

voiced within the government.<sup>87</sup> Those perspectives may, in turn, become accepted more broadly, as in the case of gay and lesbian rights.

Introducing new voices through resistance can change constitutional commitments in favor of minority rights. Scholars have noted that “much of the law that constitutes our government and establishes our rights derives from legal materials outside the Constitution itself,” such as legislative enactments and administrative agencies’ interpretations of law.<sup>88</sup> In these academics’ accounts, administrative officials have transformed how legislators, courts, and the American public understand individual rights and the government’s responsibilities under the Constitution.<sup>89</sup> Bureaucratic expertise can play a transformative role in how lawmakers, lawyers, judges, and citizens understand the Constitution’s commitment to liberty and guarantee of equality. In this way, bureaucratic resistance based on expertise may overlap with administrative constitutionalism, with one reinforcing the other to create a more just legal system.

The potential benefits from bureaucratic resistance are significant, including the protection of minority rights and the introduction of unrepresented viewpoints into political debates, thereby promoting democratic deliberation. Resistance can also help ensure uniformity among street-level bureaucrats and coherence across statutory schemes. At the same time, resistance raises important concerns, including bureaucrats encroaching upon legislative authority—although if bureaucrats act within their delegated authority, their actions should not raise this separation of powers concern. Given that bureaucrats must have discretion to act so that public administration can effectively adapt to changing social realities, they will likely dissent from legislative policies at some point.<sup>90</sup> For that reason, bureaucratic resistance may be all but inevitable.<sup>91</sup> Thus, the governing structure makes room for bureaucratic

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87. Political process theorists, who argue that corrections to lawmaking should be concerned with ensuring participation rather than the substantive merits of the political choice, would disagree with Gerken. See JOHN HART ELY, *DEMOCRACY AND TRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980). But see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073–74 (1980).

88. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 413 (2007); see sources cited *supra* note 36. It is also informed by social movements, which can change the meaning of law. See, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 949 (2006); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006).

89. Metzger, *Administrative Constitutionalism*, *supra* note 6, at 1905–06; see sources cited *supra* note 36.

90. ELIZABETH FISHER, *RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM* 30 (2007).

91. See Metzger, *Administrative Constitutionalism*, *supra* note 6, at 1929 (describing administrative constitutionalism as “inevitable”).

resistance, which this Part has shown is not necessarily an unprincipled or unjustified action.

## II. SCIENTIFIC INTERVENTIONS

Although bureaucrats may sometimes legitimately resist, not all do. In the LGBT rights context, resistance was the product of a long historical connection between science, sexuality, and the regulatory state. Psychiatric authority was integral to the midcentury administrative state, which both drew from and reflected scientific theories of sexual deviation in its regulations. Administrative officials crafted policies based on the opinions of scientists, as well as justified their actions by pointing to expert knowledge. This was by design, as the administrative state expanded during the New Deal era to make scientific and other forms of expertise readily available to government authorities, and to ensure government policies would be implemented in accordance with those same precepts.<sup>92</sup> As a result, medical theories of homosexuality, which identified same-sex attraction as a form of psychopathy, contributed to discrimination against homosexuals for decades. Given that the medical model of homosexuality undergirded this legal regime, changes in scientific thought about same-sex sexuality had significant consequences for administrative law.<sup>93</sup>

This Part discusses the antigay legal regime in place in the mid-twentieth century, before tracing the gay-supportive social science evidence that emerged and analyzing that research's effects on criminal and family law. Those scientific changes gave rise to the bureaucratic resistance that this Article will take up in Parts III and IV, such that the administrative state began moving away from its antigay foundations.

### A. *Cold War Criminal Law Reform*

The midcentury federal administrative state both reflected and reinforced the idea that homosexuality was a flaw in psychosexual development, with executive agencies tying their legal regulations to psychiatric theories of sexual deviation.<sup>94</sup> The Immigration and Naturalization Service excluded and deported homosexuals as “psychopathic personalities,” relying on psychiatric certifications from the Public Health Service, while the Civil Service Commission revoked the security clearances of employees it suspected of being homosexual because of their “emotional instability.”<sup>95</sup> During World War II, the military attempted to

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92. Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 413–18 (2007).

93. As Part II discusses, some of the bureaucrats charged with enforcing the laws were themselves in the mental health professions, and thus aware of these shifts.

94. Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 YALE J.L. & HUMAN. 163, 220–21 (2008).

95. BÉRUBÉ, *supra* note 3, at 19–20; CANADAY, *supra* note 3, at 214–15, 220–21;



exclude homosexuals from service on the theory that they were mentally ill degenerates who were unable to control their desires and could not adjust to the rigors of military life.<sup>96</sup> After the War, the Veterans Administration denied benefits under the Servicemen's Readjustment Act, commonly known as the GI Bill, to those homosexual men it had discharged as "undesirable."<sup>97</sup> In doing so, it excluded them from one of the government's largest assistance programs and significantly impeded their reintroduction into civilian life.<sup>98</sup> Importantly, while the military issued undesirable discharges for a number of behaviors, their benefits denial policy only applied to homosexuality-based discharges, making clear the antigay animus underlying the decision.<sup>99</sup>

The Cold War exacerbated anxieties about homosexuality, which became even more contentious as homosexual subcultures flourished in the late-1940s.<sup>100</sup> At the same time, the Cold War emphasis on conformity rendered sexual perversity a potential threat to national security and stability.<sup>101</sup> Federal investigations into disloyalty and security risks targeted homosexuals in particular, based on the belief that they were emotionally unstable and susceptible to blackmail.<sup>102</sup> The federal government tried to purge itself of all homosexual employees, claiming that even "one homosexual can pollute a Government office."<sup>103</sup> In 1950, after an official revealed that the State Department had forced out ninety-one homosexuals as security risks, news reports on sexual perversity increased dramatically.<sup>104</sup> The pervasive depiction of homosexual men and women as national security risks gave local police forces around the country additional license to harass homosexuals throughout the 1950s, which further tied homosexuality to criminality in the eyes of the anxious public.<sup>105</sup>

Criminal laws reflected society's opprobrium, with gays and lesbians subject to a host of penal provisions, primary among which were sodomy laws. In almost every state, consensual sodomy was a felony that carried the same punishments as its forcible counterpart, with sentence lengths that reflected extensive social disapproval.<sup>106</sup> For instance, in

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JOHNSON, *supra* note 3, at 21, 134, 128.

96. BÉRUBÉ, *supra* note 3, at 8–12, 15.

97. Servicemen's Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284 (1944); BÉRUBÉ, *supra* note 3, at 164–69, 201–03, 230.

98. CANADAY, *supra* note 3, at 138.

99. *Id.* at 151.

100. JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970*, at 31–33, 40–41 (1983).

101. Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 Nw. U. L. REV. 1317, 1369–70 (1998).

102. D'EMILIO, *supra* note 100, at 42–43.

103. *Id.*

104. JOHNSON, *supra* note 3, at 1.

105. D'EMILIO, *supra* note 100, at 49.

106. PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* 137 (2000). In 1965, New York



Georgia and Nevada, a sodomy conviction could lead to life in prison; in Connecticut and North Carolina, offenders risked thirty- and sixty-year sentences, respectively. Other states, including Arkansas, Montana, Nevada, and Tennessee, had five-year minimum sentences.<sup>107</sup> Although prewar sodomy prosecutions had focused on cases involving force or child victims, this trend shifted in the 1950s to target consensual homosexual conduct, with sodomy arrests for consensual homosexual activity rising dramatically after World War II.<sup>108</sup> Many homosexuals were also arrested under vagrancy, disorderly conduct, and lewdness provisions.<sup>109</sup>

During this same period, sexual psychopath laws proliferated, with thirty states and the District of Columbia enacting versions of these statutes between 1937 and 1957.<sup>110</sup> Under these laws, courts sentenced defendants charged with or convicted of specified crimes to psychiatric institutions.<sup>111</sup> The statutes varied significantly in terms of what crimes triggered their application and how they defined sexual psychopathy, but they invariably applied to men convicted of consensual sodomy and were in fact used to institutionalize homosexual men.<sup>112</sup> Given that these laws were a response to publicity about violent sex crimes committed against children, and that both the medical profession and the public often equated homosexuality with pedophilia, it is not surprising that the statutes contained clear homophobic undertones.<sup>113</sup>

In 1948, Alfred Kinsey and his colleagues published a study that undermined many of the assumptions on which sexual psychopath and sodomy laws were based. Their book, *Sexual Behavior in the Human Male*, revealed that a significant percentage of adult men engaged in same-sex sexual activities, indicating this conduct was more normal than

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became the first state to reduce consensual sodomy from a felony to a misdemeanor. See 1950 N.Y. Laws 1271, 1278–79.

107. MORRIS PLOSCOWE, *SEX AND THE LAW* 201 (1951).

108. Stephen Robertson, *Shifting the Scene of the Crime: Sodomy and the American History of Sexual Violence*, 19 J. HIST. SEXUALITY 223, 240–42 (2010).

109. RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960s*, at 42–73 (2016); see also ESKRIDGE, *supra* note 1, at 94; Stanley Mosk, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643, 688 n.17, 694 (1965–1966); NEW YORK CITY MAYOR'S COMMITTEE FOR THE STUDY OF SEX OFFENSES, *REPORT OF MAYOR'S COMMITTEE FOR THE STUDY OF SEX OFFENSES* 66 (1940) [hereinafter NYC COMMITTEE REPORT].

110. Denno, *supra* note 101, at 1351; Schmeiser, *supra* note 94, at 219.

111. For a discussion of the different ways in which sexual psychopath laws were structured, see Tamara Rice Lave, *Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws*, 69 LA. L. REV. 549, 572–73 (2009).

112. ESKRIDGE, *supra* note 1, at 95; Karl M. Bowman & Bernice Engle, *A Psychiatric Evaluation of Laws of Homosexuality*, 29 TEMPLE L.Q. 273, 279–80 (1956).

113. Estelle B. Freedman, *Uncontrolled Desires: The Response to the Sexual Psychopath, 1920–1960*, 74 J. AM. HIST. 83, 92 (1987); John Pratt, *The Rise and Fall of Homophobia and Sexual Psychopath Legislation in Postwar Society*, 4 PSYCHOL. PUB. POL'Y & L. 25, 36 (1998).

deviant. His data showed that “at least 37 per cent [sic] of the male population has some homosexual experience between the beginning of adolescence and old age,” and that “persons with homosexual histories are to be found in every age group, in every social level, in every conceivable occupation, in cities and on farms, and in the most remote areas in the country.”<sup>114</sup> Kinsey reported that thirteen percent of the male population was “predominantly homosexual,” a larger percentage of the American populace than anyone had ever estimated.<sup>115</sup> Kinsey’s data about the prevalence of homosexuality showed that, if states enforced their sodomy and sexual psychopath laws, approximately 6.3 million men would be institutionalized.<sup>116</sup> This demonstrated that many criminal laws had widespread application but were rarely enforced. Kinsey became a vocal opponent of both consensual sodomy laws and sexual psychopath statutes, denouncing them as “completely out of *accord* with the realities of human behavior.”<sup>117</sup> Other social scientists and jurists agreed, setting in motion efforts to revise both types of laws.

State commissions that had been established to review sexual psychopath laws began advocating for their reform based on Kinsey’s findings.<sup>118</sup> Commissions in Illinois, Pennsylvania, Michigan, New Jersey, New York, and Virginia all questioned whether—in light of Kinsey’s findings—criminal laws could effectively be enforced.<sup>119</sup> In New Jersey, the state commission met with Kinsey before formulating its report, inviting him “to suggest what methods [he] consider[ed] most feasible for the handling of the sex deviate.”<sup>120</sup> Its report noted that, based on Kinsey’s work,

114. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 623, 627 (1948).

115. *Id.* at 625, 650, 665.

116. *Id.* at 665.

117. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 20 (1953).

118. Marie-Amélie George, *The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States*, 24 J. HIST. SEXUALITY 225, 237 (2015).

119. *See generally* ILLINOIS COMMISSION ON SEX OFFENDERS, REPORT OF THE ILLINOIS COMMISSION ON SEX OFFENDERS TO THE 68TH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS (1953) [hereinafter ILL. REPORT]; MICHIGAN GOVERNOR’S STUDY COMMISSION ON THE DEVIATED CRIMINAL SEX OFFENDER, REPORT OF THE GOVERNOR’S STUDY COMMISSION ON THE DEVIATED CRIMINAL SEX OFFENDER (1951); NEW JERSEY COMMISSION ON THE HABITUAL SEX OFFENDER, THE HABITUAL SEX OFFENDER: REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE HABITUAL SEX OFFENDER AS FORMULATED BY PAUL W. TAPPAN, TECHNICAL CONSULTANT (1950) [hereinafter N. J. REPORT]; PENNSYLVANIA JOINT STATE GOVERNMENT COMMISSION, SEX OFFENDERS: A REPORT OF THE JOINT STATE GOVERNMENT COMMISSION TO THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA (1951); VIRGINIA COMMISSION TO STUDY SEX OFFENSES, THE SEX OFFENDER AND THE CRIMINAL LAW: REPORT OF THE COMMISSION TO STUDY SEX OFFENSES TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA (1951).

120. Letter from Joseph P. Murphy, Chairman of New Jersey Commission on the Habitual Sex Offender, to Alfred C. Kinsey (Oct. 24, 1949) (on file with the Kinsey Institute for Research in Sex, Gender, and Reproduction, in correspondence folder

“there are sixty million homo-sexual acts performed in the United States for every twenty convictions in our courts.”<sup>121</sup> It thus concluded that the state needed to revise its sexual psychopath law to distinguish between homosexuals and dangerous offenders.<sup>122</sup> Likewise, the Illinois commission relied heavily on Kinsey’s work, consulting his studies and meeting with Kinsey on three separate occasions.<sup>123</sup> It ultimately recommended that “[p]unishments for homosexual acts be modified to discriminate between socially distasteful and socially dangerous conduct” and urged the legislature to decriminalize consensual homosexual sodomy committed in private.<sup>124</sup> In 1955, the legislature amended its sexual psychopath law so it would apply only to violent offenses or crimes against children.<sup>125</sup> Unlike Illinois and New Jersey, New York did not have a sexual psychopath law, but rather established a Committee on the Sex Offender to draft such a statute. The researchers and lawmakers involved in the effort also consulted Kinsey before preparing their reports and recommendations.<sup>126</sup> The law the Committee proposed, which the legislature enacted in 1950, both excluded consensual sodomy from its purview, and at Kinsey’s urging, also reduced consensual sodomy from a felony to a misdemeanor.<sup>127</sup> Although most of the state commissions reviewing sexual psychopath laws advised revisions based on Kinsey’s work, only a few were successful in persuading the state legislatures to adopt their recommendations.<sup>128</sup>

Kinsey’s work had its greatest effect on the American Law Institute’s (ALI) Model Penal Code (MPC), which excluded consensual sodomy from its sex offenses provisions. A group of distinguished lawyers, judges,

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labeled “New Jersey Commission on Habitual Sex Offender”); Letter from Paul W. Tappan, Technical Consultant to the New Jersey Commission on the Habitual Sex Offender, to Alfred C. Kinsey (Nov. 7, 1949) (on file with the Kinsey Institute for Research in Sex, Gender, and Reproduction, in correspondence folder labeled “Tappan, Paul W.”).

121. N. J. REPORT, *supra* note 119, at 13, 18.

122. *Id.* at 17.

123. ILLINOIS REPORT, *supra* note 119, at iv–v, 52; *Kinsey Praises Group Study on Sex Offenders: 4 Sectional Meetings Set for Today*, CHICAGO DAILY TRIB., Sept. 26, 1952; Letter from Alfred C. Kinsey to Marshall Korshak, Illinois State Senator and Chairman of the Illinois Sex Offenders Commission (July 18, 1952) (on file with the Kinsey Institute for Research in Sex, Gender, and Reproduction, in correspondence folder labeled “Illinois Sex Offenders Commission”).

124. ILL. REPORT, *supra* note 119, at 2.

125. 1955 Ill. Laws 1144, 1144–46 (currently codified at 725 ILL. COMP. STAT. ANN. 205/1.01).

126. ESKRIDGE, *supra* note 1, at 119; David Abrahamsen, *Study of 102 Sex Offenders at Sing Sing*, 14 FED. PROBATION 26, 31 (1950); Letter from David Abrahamsen, Director of Research Project, New York Psychiatric Institute, to Alfred C. Kinsey (Feb. 1, 1949) (on file with the Kinsey Institute for Research in Sex, Gender, and Reproduction, in correspondence folder labeled “Abrahamsen, David”).

127. 1950 N.Y. Laws 1271, 1278–79; ESKRIDGE, *supra* note 1, at 119.

128. George, *supra* note 118, at 235 tbl.1, 236 tbl.2.

and law professors founded the ALI in 1923; its mission was to clarify and simplify American laws, as well as adapt legal codes to meet changing societal norms.<sup>129</sup> The ALI undertook restatements of nine areas of law between 1923 and 1944, and thereafter expanded its work to formulating model statutory codes.<sup>130</sup> In 1950, the ALI turned its attention to criminal law due to the wide variation among states' criminal provisions. The organization launched the MPC project to inspire legislatures to update their penal codes and to help them in doing so. The MPC, which the ALI promulgated in 1962, became highly influential in legislative efforts to revise state criminal laws and led twenty-two states to repeal their consensual sodomy statutes by 1978.<sup>131</sup>

Kinsey's findings shaped the debate over whether to include consensual sodomy within the MPC, demonstrating social science research's impact on legal projects. Several members of the Advisory Committee on sexual offenses commented on the ways in which Kinsey's work had changed their views of sex offenses, appreciating how his research undermined consensual sodomy laws.<sup>132</sup> Louis Schwartz, the Associate Reporter responsible for drafting the sex offenses section, wrote to Kinsey requesting his comments and suggestions, emphasizing the ALI's "indebtedness to [Kinsey's] researches."<sup>133</sup> Schwartz's initial draft, which the Advisory Committee unanimously approved, excluded consensual sodomy.<sup>134</sup> However, the Council of the ALI, a volunteer board that reviewed draft sections, balked at the Committee's decision. It inserted a provision criminalizing consensual sodomy, albeit only as a misdemeanor.<sup>135</sup> The Council explained that, while some of its members personally

129. HERBERT F. GOODRICH & PAUL A. WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE, 1923–1961*, at 5–7 (1961); GEOFFREY C. HAZARD, JR., *THE AMERICAN LAW INSTITUTE: WHAT IT IS AND WHAT IT DOES 3* (1994).

130. *Institute Projects*, THE AMERICAN LAW INSTITUTE (2017), <http://www.ali.org/index.cfm?fuseaction=about.instituteprojects> [<http://perma.cc/R7HV-M25U>].

131. Mary Bernstein, *Nothing Ventured, Nothing Gained? Conceptualizing Social Movement "Success" in the Lesbian and Gay Movement*, 46 *SOC. PERSP.* 353, 364 (2003); Melinda D. Kane, *Timing Matters: Shifts in the Causal Determinants of Sodomy Law Decriminalization, 1961–1998*, 54 *SOC. PROBS.* 211, 214 (2007); Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 *BUFFALO CRIM. L. REV.* 297, 297–98 (1998).

132. George, *supra* note 118, at 253–54.

133. Letter from Louis B. Schwartz, Associate Reporter, Model Penal Code, to Alfred C. Kinsey (July 8, 1955) (on file with the Kinsey Institute for Research in Sex, Gender, and Reproduction, in correspondence folder labeled "Schwartz, Louis B.").

134. Draft of Article 207—Sexual Offenses 1–10 (Jan. 7, 1955) (on file with the Model Penal Code Records in the American Law Institute Archive at the University of Pennsylvania Law School Library, Box 8, Folder 8).

135. Council Draft no. 8 of Article 207—Sexual Offenses (Mar. 1, 1955) (on file with the Model Penal Code Records in the American Law Institute Archive at the University of Pennsylvania Law School Library, Box 5, Folder 6); Model Penal Code Tentative Draft no. 4, at 93 (Apr. 25, 1955) (on file with the Model Penal Code Records in the American Law Institute Archive at the University of Pennsylvania Law School

agreed with the Committee's position, they feared that excluding consensual sodomy "would be totally unacceptable to American legislatures and would prejudice acceptance of the Code generally."<sup>136</sup> Rather than jeopardize what would ultimately become a decade-long project, the Council opted to include consensual sodomy in the model code. The Council was aware that it would face a battle between scientific evidence and political exigency. While scientific findings influence law, they are rarely the only consideration. However, the Council did not have the final word.

The ultimate decision on whether to include consensual sodomy rested with the entire ALI membership, which voted to exclude the provision after hearing from Judge Learned Hand. Judge Hand drew from Kinsey's findings, making his determination based on the high rates of consensual sodomy that went unpunished. As he explained to his fellow ALI members, "criminal law which is not enforced practically, Mr. Chairman, is much worse than if it was not on the books at all."<sup>137</sup> Kinsey's work had called into question why the law criminalized an activity in which so many Americans—homosexual and heterosexual—engaged. The reform the ALI undertook was not a means to protect homosexual citizens, but rather to have the law more accurately reflect victimless social practices.<sup>138</sup>

Until 1980, sodomy law repeals came primarily from states rewriting their entire criminal codes, with the MPC influencing every single one of those revision efforts.<sup>139</sup> Even before the ALI finalized the MPC, states used its drafts as models for their criminal code reforms; Illinois became the first state to decriminalize consensual sodomy when it adopted the MPC draft in 1961.<sup>140</sup> Most state legislatures using the MPC to revise their criminal laws did not focus on the absence of a consensual sodomy provision.<sup>141</sup> In fact, legislatures in Arkansas and Idaho belatedly realized it was missing from their new criminal codes and separately enacted consensual sodomy prohibitions.<sup>142</sup> The gay liberation movement avoided

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Library, Box 7, Folder 3).

136. Model Penal Code Tentative Draft no. 4, *supra* note 135, at 276.

137. Advisory Committee Meeting Minutes 129 (May 19, 1955) (on file with the Model Penal Code Records in the American Law Institute Archive at the University of Pennsylvania Law School Library, Box 4, Folder 19).

138. Indeed, the MPC continued to criminalize solicitation to engage in consensual sodomy, a provision that police would use against gay men. ESKRIDGE, *supra* note 1, at 178.

139. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 106 (1999); Bernstein, *supra* note 131, at 363; John D'Emilio, *Back To Basics: Sodomy Law Repeal*, NATIONAL GAY AND LESBIAN TASK FORCE (Feb. 25, 1997), <http://www.qrd.org/qrd/orgs/NGLTF/1997/sodomy.law.repeal-02.25.97> [<http://perma.cc/BS8P-JR7G>]; Paul H. Robinson & Markus D. Dubber, *The American Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

140. Robinson & Dubber, *supra* note 139, at 326.

141. ESKRIDGE, *supra* note 139, at 106.

142. *Id.* Six other states decriminalized consensual heterosexual sodomy but

drawing attention to the MPC's sodomy law reform because they recognized the ALI's recommendation would be controversial.<sup>143</sup> Framing the reform as a gay rights issue would have been disastrous for the nascent gay rights movement.

In the mid-twentieth century, many laws categorized same-sex sexuality as pathological and discriminated against gays and lesbians on this basis. However, Kinsey's work made clear that same-sex sexuality was more pervasive than anyone had believed, raising questions about whether homosexuality was truly deviant behavior and undermining sexual psychopath and consensual sodomy statutes. His research influenced several legal projects that eased the state's restraints on gays and lesbians. Kinsey's study marked the start of new scientific perspectives about homosexuality and a new legal regime, both of which continued to evolve over several decades.

### B. *Diagnosing Change*

The power of social science in transforming legal regulations would become more pronounced in the years that followed, especially after the American Psychiatric Association (APA) declassified homosexuality as a mental illness. Gay rights activists lobbied the APA for the diagnostic change because the categorization of homosexuality as a mental illness had significant legal effects, and the scientific decision, in turn, had important consequences for gay rights. This Part traces the legal impetus for the diagnostic declassification, which the APA announced on December 15, 1973, as well as the declassification's effects on law.<sup>144</sup> It focuses on the important and unrecognized place of psychiatrists in law reform—a major shift from their previous role.

The change was in part a result of a different approach in gay rights organizing and visions of society. At the time of the MPC debates, a cohesive gay rights movement had not yet emerged. The homophile movement, founded in the 1950s, promoted the vision of gays and lesbians as respectable citizens, seeking legal change through educational campaigns.<sup>145</sup> It was not until the late 1960s that gay liberationists coalesced into a vocal, assertive group that demanded equal rights for gays and lesbians.<sup>146</sup> Drawing on the African American civil rights movement, which had become more militant in the 1960s, gay liberationists also adopted an increasingly aggressive posture towards institutions that

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kept its homosexual counterpart a crime. *Id.*; ESKRIDGE, *supra* note 1, at 176–84.

143. Bernstein, *supra* note 131, at 361.

144. Press Release, Am. Psychiatric Ass'n (Dec. 15, 1973) (on file with the National Gay and Lesbian Task Force Records at the Cornell University Carl A. Kroch Library, Collection No. 7301, Box 164, Folder 39).

145. RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 67–100 (1987); D'EMILIO, *supra* note 100, at 83.

146. D'EMILIO, *supra* note 100, at 152–53, 173.



impeded their push for equality, marking their opposition with rallies, marches, and picket lines.<sup>147</sup>

One of gay liberationists' main targets of reform was the APA's Diagnostic and Statistical Manual (DSM), which classified homosexuality as a mental illness. This designation indicated that homosexuality was a sign of emotional instability, which supported the federal government's efforts to fire gays and lesbians from civil service positions throughout the 1950s.<sup>148</sup> One of the many who had lost their jobs was Franklin Kameny, an astronomer with a PhD from Harvard University, who became a leader in the gay liberation movement.<sup>149</sup> Kameny, who devoted his life to legal change, identified homosexuality's status as a mental illness as "the albatross around the neck of the Gay and Lesbian movement."<sup>150</sup> He thus launched an attack on the classification of homosexuality in the DSM. To get the psychiatric profession's attention, he led pickets and interrupted the APA's annual meeting plenary in 1971, announcing: "Psychiatry is the enemy incarnate. Psychiatry has waged a relentless war of extermination against us. You may take this as a declaration of war against you."<sup>151</sup> To avoid disruption at the next year's conference, psychiatrists invited gay activists to appear on a panel to present their views. At the 1972 convention in Dallas, Texas, crowds of attendees gathered to hear a cloaked, wigged, and masked psychiatrist known only as "Dr. Henry Anonymous," who dramatically disclosed his homosexuality to the audience while speaking through a voice-distorting microphone.<sup>152</sup> Audience members were shocked to learn that Dr. Anonymous was only one of several hundred gay psychiatrists, who had been meeting clandestinely during the Association's annual conventions as the "Gay-PA."<sup>153</sup>

Although lobbying from gay liberationists pushed the APA to reconsider its diagnostic criteria, it was not the only driver of the declassification. Their challenges coincided with shifting views about the nature of homosexuality within the psychiatric profession. Kinsey's

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147. BAYER, *supra* note 145, at 83, 91; HENRY L. MINTON, *DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA* 252–53 (2001).

148. D'EMILIO, *supra* note 100, at 154, 162; JOHNSON, *supra* note 3, at 183.

149. JOHNSON, *supra* note 3, at 179–80.

150. MINTON, *supra* note 147, at 242; Evelyn Hooker, *The Changing Status of Gays and Lesbians: 1954–1985* (Aug. 24, 1985) (on file with the Evelyn Cadwell Hooker Papers at the UCLA Charles E. Young Research Library, Collection No. 523, Box 2, Folder 5.); Letter from Frank Kameny to Ralph Temple et al. (Dec. 16, 1973) (on file with the Frank Kameny Papers at the Library of Congress, MSS 85340, Box 122, Folder 9).

151. BAYER, *supra* note 145, at 105; DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 204 (2013).

152. BAYER, *supra* note 145, at 109; MINTON, *supra* note 147, at 258.

153. BAYER, *supra* note 145, at 110.



work indicated that same-sex sexuality was much more widespread than anyone previously thought, but it did not address whether homosexuals were pathological. Eight years after Kinsey published his work, Evelyn Hooker completed a study that tackled this issue. Her work revealed both that homosexuals were well-adjusted and that there was no psychological difference between homosexuals and heterosexuals.<sup>154</sup> Hooker presented her results before a packed audience at the 1956 American Psychological Association's annual meeting, unsettling her listeners and opening a debate on whether homosexuality indicated a mental illness.<sup>155</sup> As a result of her pioneering research, the National Institute of Mental Health (NIMH) selected Hooker to head the NIMH Task Force on Homosexuality, which issued its final report in October 1969.<sup>156</sup> The report called for tolerance and argued for both the repeal of consensual sodomy laws and an end to employment discrimination; as a result of its controversial conclusions, the Nixon Administration buried the report, delaying its publication until 1972.<sup>157</sup> Hooker's research spurred other mental health professionals to shift their thinking on homosexuality and to voice their dissent to the APA nosology, creating a network of scientists who joined gay liberationists in lobbying for the declassification of homosexuality from the DSM.<sup>158</sup>

In pressing for change, gay liberationists emphasized these shifts in psychiatric thought as well as the legal effects of the diagnostic category.<sup>159</sup> Rights groups noted the myriad ways in which homosexuality's status as a mental illness gave rise to discriminatory practices, particularly in employment. These went far beyond the Department of Defense denying security clearances to gays and lesbians because of their supposed mental instability, extending to much less sensitive work. The New York City Taxi Commission, for example, refused to license a homosexual driver until he had obtained a psychiatrist's certification of fitness.<sup>160</sup> To maintain his right to operate a taxi, the man had to visit a psychiatrist twice a year to renew the certification.<sup>161</sup>

Whether legal arguments should have a place in the decision to declassify homosexuality was a matter of debate both among psychiatrists and outside commentators, but they did sway scientists. Robert

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154. Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECHNIQUES 18, 30 (1957).

155. MINTON, *supra* note 147, at 228.

156. *Id.* at 236.

157. *Id.* at 237.

158. *Id.* at 234.

159. BAYER, *supra* note 145, at 125; Memorandum from Gay Organizations in New York City to Committee on Nomenclature of the American Psychiatric Association (1973) (on file with the National Gay and Lesbian Task Force Records at the Cornell University Carl A. Kroch Library, Collection No. 7301, Box 164, Folder 36).

160. Memorandum from Gay Organizations, *supra* note 159, at 10.

161. *Id.*

Spitzer, a member of the nomenclature committee, later explained his decision to support homosexuality's declassification in both scientific and legal terms. When asked how much his reasoning had to do with "true scientific logic," he answered: "I would like to think that part of it was that. But certainly[,] a large part of it was just feeling that they were right! That if they were going to be successful in overcoming discrimination, this clearly was something that had to change."<sup>162</sup>

From the outset, rights advocates and the APA's Board of Trustees worked to leverage the legal impact of the declassification. When the APA's Board of Trustees announced that it had deleted homosexuality from the DSM, it simultaneously issued a press release supporting the civil rights of homosexuals.<sup>163</sup> Kameny, with the help of gay activist Ron Gold, had drafted the civil rights resolution, which he circulated while the Board considered the declassification question. Kameny later explained the document as a means of countering the federal government's antigay claims in security clearance cases. In *Adams v. Laird*, the Department of Defense had successfully justified its revocation of security clearances based in part on homosexuals' assumed instability.<sup>164</sup> With characteristic flair, Kameny provided the resolution to Spitzer at a gay bar in Waikiki during the APA's 1973 conference.<sup>165</sup> The position paper garnered a great deal of support from psychiatrists who were concerned that the nosology had contributed to discrimination against gays and lesbians.<sup>166</sup> After the Board of Trustees approved the resolution, the National Gay and Lesbian Task Force immediately used it to argue for the repeal of sodomy laws and the introduction of antidiscrimination laws in states and cities around the country.<sup>167</sup>

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162. Jack Drescher, *An Interview with Robert L. Spitzer, MD*, reprinted in *AMERICAN PSYCHIATRY AND HOMOSEXUALITY: AN ORAL HISTORY* 50–51 (Jack Drescher & Joseph P. Merlino eds., 2007).

163. BAYER, *supra* note 145, at 3, 136–37. The APA was the third major psychiatric association to declassify homosexuality as a mental illness. The Group for the Advancement of Psychiatry adopted this position in 1966 and the National Association for Mental Health followed in 1970. However, since the APA published the DSM, its decision had a much greater impact than the declarations of the other societies. *Gays Lose "Deviate" Label*, Dec. 16, 1973 (on file with the ONE National Gay and Lesbian Archives at the University of Southern California Libraries, APA Subject File); *Position Statement on Homosexuality and Mental Illness*, NAT'L ASS'N FOR MENTAL HEALTH (Sept. 17, 1970) (on file with the ONE National Gay and Lesbian Archives at the University of Southern California Libraries, Psychiatry and Gays Subject File).

164. *Adams v. Laird*, 420 F.2d 230, 240 (D.C. Cir. 1969); Note from Franklin E. Kameny, President of the Washington, D.C. Mattachine Society (on file with the Frank Kameny Papers at the Library of Congress, MSS 85340, Box 122, Folder 10); Letter from Kameny, *supra* note 150.

165. Note from Kameny, *supra* note 164.

166. BAYER, *supra* note 145, at 129.

167. Press Release, Nat'l Gay and Lesbian Task Force, Psychiatric Turnaround (Dec. 15, 1973) (on file with the National Gay and Lesbian Task Force Records at the Cornell University Carl A. Kroch Library, Collection No. 7301, Box 164, Folder 40).

The declassification engendered a new relationship between scientists and gay rights advocates, with mental health professionals emerging as crucial allies in the struggle for legal change. Mental health groups issued a number of resolutions in support of gay and lesbian rights and weighed in as amici to lend their professional expertise to gay rights cases.<sup>168</sup> These efforts reflected a burgeoning scientific consensus that later undergirded the decisions of bureaucrats in the mental health and associated professions. The scientific viewpoints guiding those bureaucrats' actions were both the research and debates of scientists and the specific statements on gay and lesbian rights that professional associations promulgated over the course of several decades.

Even before scientific consensus developed on specific gay rights issues, and prior to the organizations becoming involved in litigation, the declassification had immediate legal effects. However, they were different than what gay liberationists had expected. With respect to federal security clearances and employment discrimination, some changes were already underway when the APA announced its decision. In 1969, the D.C. Circuit ruled in favor of a gay litigant who challenged his termination. The court determined, based on the plain text of the statute, that the civil service could not terminate an employee without showing that his private sexual conduct interfered with his work.<sup>169</sup> That decision led the Civil Service Commission (CSC) to reconsider its blanket exclusion policy in late 1972, announcing a change to its personnel manual on December 21, 1973, six days after the APA's decision.<sup>170</sup> Gays and lesbians could still lose their jobs, but only if their sexual conduct had an impact on their work.<sup>171</sup> In 1975, the CSC eliminated "immoral conduct" from the list of disqualifications for federal government service.<sup>172</sup>

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168. See David Scasta & Philip Bialer, *Position Statement on Issues Related to Homosexuality*, AM. PSYCHIATRIC ASS'N (2013) (combining policies "previously expressed in twelve separate position statements adopted between 1973 and 2011"), <http://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2013-Homosexuality.pdf> [<https://perma.cc/U826-9R75>]; Lesbian, Gay, Bisexual, and Transgender Concerns Office, *APA Policy Statements on Lesbian, Gay, Bisexual & Transgender Concerns*, AM. PSYCHOL. ASS'N (2011), <http://www.apa.org/about/policy/booklet.pdf> [<http://perma.cc/3SDP-FMMN>]; see also, e.g., *APA Amicus Briefs by Issue: Sexual Orientation (Discrimination)*, AM. PSYCHIATRIC ASS'N (2017), <http://www.apa.org/about/offices/ogc/amicus/index-issues.aspx#sexual-orientation> [<http://perma.cc/Z254-ZDXQ>]; *Amicus Briefs*, AM. PSYCHIATRIC ASS'N (2017), <http://www.psychiatry.org/psychiatrists/search-directories-databases/library-and-archive/amicus-briefs> [<http://perma.cc/6PN8-X5F5>].

169. *Norton v. Macy*, 417 F.2d 1161, 1168 (D.C. Cir. 1969); see also *Soc. for Individual Rights v. Hampton*, 63 F.R.D. 399, 402 (N.D. Cal. 1973).

170. *Singer v. U.S. Civil Serv. Comm'n*, 530 F.2d 247, 254–55 (9th Cir. 1976) (noting changes in the Civil Service personnel manual and civil service regulations); *Postal Service Dumps CSC's Anti-Gay Policy*, ADVOCATE, Dec. 20, 1972, at 24.

171. *Singer*, 530 F.2d at 255 n.15.

172. JOHNSON, *supra* note 3, at 210.

Thus, while social science was important in changing many legal norms, law reform also came from other sources. In this instance, although the CSC justified its decisions on homosexuals' supposed emotional instability, psychiatrists were not involved in assessing employees; rather, homosexual conduct served as incontrovertible evidence of a psychiatric condition that did not require diagnosis. Given that the government had severed the link between its employment decisions and the scientific justification, the shift in psychiatric views did not lead to any change.

It initially appeared that the declassification would have a more tangible effect on immigration law. The 1952 McCarran-Walter Act barred immigrants suffering from "psychopathic personalities," which included gays and lesbians, from entering the country.<sup>173</sup> In 1979, the Surgeon General announced that the Public Health Service (PHS) would no longer certify gay aliens as psychopathic personalities since homosexuality was no longer a mental illness.<sup>174</sup> However, that did not end the immigration exclusion. In 1983, the Fifth Circuit determined that "psychopathic personality" was "a term of art, not dependent on [a] medical definition," and thus that immigration law continued to bar homosexuals.<sup>175</sup> That same year, in *Hill v. INS*, the Ninth Circuit ruled that the Immigration and Naturalization Service (INS) could not exclude homosexuals without a certification from the PHS.<sup>176</sup> The Department of Justice consequently directed the PHS to issue certificates for "self-proclaimed homosexual aliens"—but only within the Ninth Circuit.<sup>177</sup> Everywhere else in the country, the PHS refused to be involved with the adjudication of homosexuals, and the INS continued to exclude gays and lesbians without a PHS certification. In 1990, Congress finally repealed the psychopathic personality provision, eliminating the immigration bar.<sup>178</sup>

Gay rights advocates had seen the classification of homosexuality as a mental illness as a significant impediment to rights claims. They consequently lobbied for a diagnostic change, mixing scientific evidence and

173. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163 (codified at 8 U.S.C. § 1182 (1988)); *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 120-21 (1967).

174. *In re Longstaff*, 716 F.2d 1439, 1444 (5th Cir. 1983).

175. *Id.* at 1450-51.

176. *Hill v. Immigration & Naturalization Serv.*, 714 F.2d 1470, 1481 (9th Cir. 1983).

177. Philip J. Hiltz, *Agency to Use Dormant Law to Bar Homosexuals from U.S.*, N.Y. TIMES (June 3, 1990), <http://www.nytimes.com/1990/06/03/us/agency-to-use-dormant-law-to-bar-homosexuals-from-us.html> [<http://perma.cc/72MN-AU8E>]; Letter from D. Lowell Jensen, Acting Att'y General, Dep't of Justice, to Dr. Edward N. Brandt, Jr., Assistant Secretary for Health, Dep't of Health and Human Services (Apr. 5, 1986), reprinted in 61 INTERPRETER RELEASES 377, 378 (1984).

178. Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978 (1990) (codified at 8 U.S.C. 1182(a) (1994)); Barney Frank, *American Immigration Law: A Case Study in the Effective Use of the Political Process*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 228-29 (John D'Emilio et al. eds., 2000).

legal arguments in their appeals. Doing so did not have the effect they were expecting on federal laws and policies, but it did have a significant impact at the state and local levels. There, new questions about psychosexual development dominated family law decisions, with scientific research stemming from custody cases that later influenced administrative law determinations.

### C. *Contesting Custody*

The APA's decision, while contested, marked the beginning of what became a scientific consensus that gays and lesbians were akin to heterosexuals in all but sexual object choice. Given the civil rights questions motivating the declassification, it is perhaps not surprising that an avowedly neutral and objective scientific profession became so involved in advocating for gay and lesbian rights. The declassification did not sever the ties between science and gay and lesbian rights, but rather created a different relationship. New legal questions emerged that turned on professional research and required psychiatric expert testimony, such that scientific evidence made gay rights victories possible.

Support from science was particularly key in the custody context, as the APA's declassification removed a barrier that had prevented lesbian mothers and gay fathers from seeking custody of their children. However, once gays and lesbians were no longer mentally ill, another question arose. The crucial issue became what impact homosexual adults would have on their children's psychosexual development, as courts were concerned that children raised by gays and lesbians would not be able to adopt traditional gender roles or heterosexual orientations.<sup>179</sup> To address these issues, lesbian mothers and gay fathers enlisted the help of psychiatrists and psychologists, who researched the question and presented their findings in court and scientific periodicals.<sup>180</sup> Thus, these studies were both determinative in the individual cases, and also created a broader medical consensus that adult homosexuality did not influence the sexual

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179. CARLOS A. BALL, *THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD* 27 (2012); SUSAN GLUCK MEZEY, *GAY FAMILIES AND THE COURTS: THE QUEST FOR EQUAL RIGHTS* 17 (2009); Nancy D. Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the Courts*, in *CREATING CHANGE*, *supra* note 178, at 312; KIMBERLY D. RICHMAN, *COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW* 28, 48, 53 (2009); RIVERS, *supra* note 25, at 67–72. Some courts also objected to placing children in a home with presumptive felons, as many states criminalized consensual sodomy until the Supreme Court ruled these laws unconstitutional in 2003. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Mom's Apple Pie*, LESBIAN MOTHERS NAT'L DEFENSE FUND (April 1975) (on file with the American Civil Liberties Union Records at the Princeton University Seeley G. Mudd Manuscript Library, Box 3000, folder labeled "Visitation Rights").

180. Marie-Amélie George, *The Custody Crucible: The Development of Scientific Authority About Gay and Lesbian Parents*, 34 *LAW & HIST. REV.* 487, 503–07 (2016) (discussing studies and their use in custody cases).

orientation of children. Law thus spurred scientific research, which later influenced the work of bureaucrats.

Lesbian and gay parents did not begin asserting their custody rights as a response to the declassification, but rather these cases were part and parcel of the gay rights movement that produced the diagnostic change. At the same time that gay rights activism forced mental health professionals to reconsider their position on homosexuality as a mental illness, it empowered homosexual parents to come out, leave their stilted marriages, and assert their custody rights in court.<sup>181</sup> Before the gay liberation movement, heterosexual parents would often blackmail their homosexual ex-spouses into waiving their custody rights, wielding the threat of disclosing the gay parent's sexual orientation to family, friends, neighbors, and coworkers.<sup>182</sup> Even as American society became increasingly tolerant of gays and lesbians, most Americans continued to identify homosexuality as fundamentally incompatible with parenthood, giving heterosexual ex-spouses the upper hand in custody negotiations.<sup>183</sup>

Custody cases produced a new relationship between gay rights activists and scientists, who became crucial allies in these disputes. In the mid-1970s, jurisdictions around the country instituted a "nexus requirement," which required a parent to produce expert evidence that the ex-spouse's homosexuality would harm their child.<sup>184</sup> The new requirement replaced the "per se" rule that identified homosexual parents as inherently unfit, which had prevented lesbian mothers and gay fathers from succeeding when petitioning for custody or visitation. The nexus requirement came about as a result of the fathers' rights movement, which challenged the presumption of maternal custody and demanded courts identify specific reasons for denying fathers equal custody rights.<sup>185</sup>

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181. KLARMAN, *supra* note 34, at 17–18, 22–26; RIVERS, *supra* note 25, at 53–54; ROBERT O. SELF, *ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S*, at 222–23, 230–31 (2013); MARC STEIN, *RETHINKING THE GAY AND LESBIAN MOVEMENT* 79–142 (2012).

182. Rhonda Rivera, *Where We Stand: Gay Parent Custody Problems*, METRO GAY NEWS, Feb. 1977 (on file with the National Gay and Lesbian Task Force Records at the Cornell University Carl A. Kroch Library, Collection No. 7301, Box 88, Folder 17).

183. Jil Clark, *Lesbian Mother Fights Loss of Visiting Rights*, GAY COMMUNITY NEWS, Oct. 17, 1981, at 3 (on file with the National Gay and Lesbian Task Force Records at the Cornell University Carl A. Kroch Library, Collection No. 7301, Box 88, Folder 19).

184. Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 635–36 (1996). As Suzanne Goldberg has argued, courts adopting new normative judgments about minority groups will often rely upon expert evidence to reject traditional, rights-restricting rationales. Goldberg, *supra* note 34, at 1975.

185. Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 113–14 (2016); Shapiro, *Custody and Conduct*, *supra* note 184, at 633.



Fathers' rights groups deployed feminists' equality rhetoric, which had undergirded divorce law reform, in their efforts, leading courts to develop the gender-neutral "best interests of the child" standard.<sup>186</sup> The shift came after a New York Family Court ruled the "tender years" presumption unconstitutional in 1973, with courts around the country following suit in quick succession.<sup>187</sup> Lesbian mothers and gay fathers were consequently fighting for custody during a period of shifting legal and scientific landscapes, creating an opportunity for social science research to effectuate legal change.<sup>188</sup>

Scientists undertook their research to provide the evidence the courts needed, skirting the boundaries between neutral science and advocacy.<sup>189</sup> In doing so, their work promoted gay parents' rights and helped shift scientific consensus and norms. The first scientist to conduct a research study on the impact of parental homosexuality on children was Richard Green, who was also one of the first psychiatrists to argue for the declassification of homosexuality as a mental illness in a peer-reviewed journal.<sup>190</sup> For Green, "the struggle to remove homosexuality from the APA's list of mental disorders was directly linked to the assertion that having lesbian or gay parents was not necessarily contrary to the 'best interests of the child.'"<sup>191</sup> While Green had always focused his research on sexual orientation and gender roles, he designed a study of lesbian mothers and their children in response to questions courts had raised.<sup>192</sup> Psychiatrist Martha Kirkpatrick likewise published a study identifying no difference between the future sexual orientation of children of heterosexual and homosexual women, citing lesbian custody cases as a primary motivator for undertaking the research.<sup>193</sup>

186. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 739–40 (1988).

187. *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285, 291 (N.Y. Fam. Ct. 1973); Diner, *supra* note 185, at 115 n.171.

188. Courts are a vital part of the social context of social scientific inquiries, which render certain research questions more salient than others. CAUDILL & LARUE, *supra* note 77, at 28, 42–43; JASANOFF, *supra* note 76, at 13; Jennifer L. Mnookin, *Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability*, 87 VA. L. REV. 1723, 1744 (2001).

189. DONNA J. HITCHENS & ANN G. THOMAS, *LESBIAN MOTHERS AND THEIR CHILDREN: AN ANNOTATED BIBLIOGRAPHY OF LEGAL AND PSYCHOLOGICAL MATERIALS* i (1980) (on file with the Phyllis Lyon and Del Martin Papers at the GLBT Historical Society, Collection No. 1993–13, Box 123, Folder 12).

190. Telephone Interview with Richard Green, Founding President of the Int'l Acad. of Sex Research (May 31, 2014); BAYER, *supra* note 145, at 112; *see also* Richard Green, *Homosexuality as a Mental Illness*, 10 INT'L J. PSYCHIATRY 77 (1972).

191. RIVERS, *supra* note 25, at 69.

192. Interview with Richard Green, *supra* note 190; Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 696 (1978).

193. Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Study*, 51 AM. J. ORTHOPSYCHIATRY 545, 545 (1981); Telephone Interview with



The scholarly inquiry quickly moved beyond psychiatrists into other academic disciplines, creating broader conversations on this question. In 1981, Ellen Lewin, an anthropologist at the University of California at Berkeley, published a study of eighty divorced lesbian and heterosexual mothers. She concluded that both groups had “fairly traditional notions about family” and provided male role models for their children, a fact that addressed judicial fears that children in lesbian households would not learn traditional gender roles and therefore would not become heterosexual.<sup>194</sup> In explaining her research agenda, Lewin also cited “the questions that the judicial system has raised” in lesbian custody cases; she entitled her preliminary report *Lesbianism and Motherhood: Implications for Child Custody*.<sup>195</sup> Lewin began her research after hearing about two lesbian mother custody battles in 1977, with the “fantasy that [she] would be called upon to be an expert witness in some of these cases.”<sup>196</sup> In the United Kingdom, Susan Golombok began her career studying lesbian mothers after she read an article that explained the need for social science research to support lesbian mothers’ claims.<sup>197</sup> Golombok initially conducted the research for her master’s thesis; esteemed child psychiatrist Michael Rutter learned about her work and offered to secure funding so Golombok could expand it into a doctoral dissertation project. Rutter had served as an expert witness in several lesbian mother custody cases and consequently appreciated the need for social science research to support lesbian mothers’ rights.<sup>198</sup> In asserting their custody rights, lesbian mothers in the United States drew upon all of these studies, which concluded that a parent’s sexual orientation did not have any influence on children.<sup>199</sup>

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Martha Kirkpatrick, former Clinical Professor, UCLA Med. Sch. (June 16, 2014).

194. Ellen Lewin, *Lesbianism and Motherhood: Implications for Child Custody*, 40 HUM. ORG. 1, 6–14 (1981).

195. *Id.* at 6.

196. Interview with Ellen Lewin, Professor of Anthropology, Univ. of Iowa (Sept. 19, 2014); Email from Ellen Lewin, Professor of Anthropology, Univ. of Iowa, to Joanne Meyerowitz, Arthur Unobskey Professor of History and Am. Studies, Yale Univ. (Aug. 19, 2014) (on file with author).

197. *Out of the Closet into the Courts: Eleanor Stevens Reports on Discrimination Against Lesbian Mothers in Custody Battles*, SPARE RIB, Sept. 1976, at 6–8.

198. Interview with Susan Golombok, Professor of Family Research, Univ. of Cambridge (Aug. 28, 2014).

199. *In re Adoption of Evan*, 583 N.Y.S.2d 997, 1001 n.1 (N.Y. Surrogate’s Ct. 1992); Brief for Appellant, *Teegarden v. Teegarden*. No. 38A04-0406-CV-212, 1994 WL 16461688, at \*16 n.4 (Ind. Ct. App. July 5, 1994); Brief for Appellee, *Bottoms v. Bottoms*, No. 94–1166, 1994 WL 16199380, at \*16 n.6 (Va. Dec. 28, 1994). The only studies that concluded otherwise were the work of controversial psychologist Paul Cameron, who the American Psychological Association expelled in 1983 following an ethics investigation. Although a number of scholars critiqued Cameron’s methodology and conclusions at length, the majority of the scientific community ignored his work, since his articles were published in low-ranked and non-peer reviewed journals. George, *supra* note 180, at 520–23.

Gay rights organizations and movement lawyers recognized that psychiatric testimony was crucial in custody disputes, emphasizing its role and circulating information about scientific studies and experts to lesbian and gay parents. The National Gay Task Force (NGTF), one of the first groups to address the rights of homosexual parents, prepared the *Gay Parent Support Packet*, which contained statements from ten renowned experts, including Drs. Richard Green, Evelyn Hooker, Judd Marmor, John Money, Wardell Pomeroy, and Benjamin Spock.<sup>200</sup> Spock, who the *New York Times* described as “arguably the most influential pediatrician of all time,” was the author of *Baby and Child Care*, the world’s second-best-selling book (after the Bible) for five decades.<sup>201</sup> The packet also included statements that supported gay parent custody rights from leading mental health organizations and listed useful psychiatric studies parents could introduce in court.<sup>202</sup> The NGTF first published the packet in 1973, but reissued it in 1979 to provide updated information for homosexual parents. Other gay and lesbian rights litigation groups emphasized the importance of psychological studies to custody cases, including the ACLU, Lesbian Mothers National Defense Fund (LMNDF), Lesbian Rights Project (LRP), and Lambda Legal Defense & Education Fund.<sup>203</sup> The attorneys at LMNDF and LRP drafted manuals for lesbian mothers that emphasized the role of expert testimony and highlighted the importance of psychiatric studies in custody determinations.<sup>204</sup>

With these studies in hand and the support of experts who testified on their behalf, lesbian mothers began securing custody of their children, but at a cost.<sup>205</sup> The research studies were a double-edged sword, because although they were necessary to convince courts, they also identified homosexuality as undesirable. By steadfastly maintaining that gay and lesbian households would not produce homosexual children, researchers “implicitly accept[ed] a view of homosexuality as a negative outcome

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200. *Gay Parent Support Packet*, NAT’L GAY TASK FORCE (1973) (on file with the National Gay and Lesbian Task Force Records at the Cornell University Carl A. Kroch Library, Collection No. 7301, Box 105, Folder 7).

201. *Id.*; Jane E. Brody, *Final Advice from Dr. Spock: Eat Only All Your Vegetables*, N.Y. TIMES (June 20, 1998), <http://www.nytimes.com/1998/06/20/us/final-advice-from-dr-spock-eat-only-all-your-vegetables.html> [<http://perma.cc/4VK5-5V7X>].

202. *Gay Parent Support Packet*, *supra* note 200.

203. Telephone Interview with Marilyn Haft, former ACLU litigator (June 26, 2014); Maureen Downey, *Custody Battle Illuminates Courts’ Bias: Lesbian Mom Loses Her Son and Her Job*, ATL. J.-CONST., May 21, 1987; DONNA J. HITCHENS, LESBIAN MOTHER LITIGATION MANUAL (1982) (on file with the Phyllis Lyon and Del Martin Papers at the GLBT Historical Society, Collection Number 1993–13, Box 124, Folder 3); HITCHENS & THOMAS, *supra* note 189; Michigan Supreme Court Awards Custody to Lesbian Mother (1979) (on file with the National Gay and Lesbian Task Force Records at the Cornell University Carl A. Kroch Library, Collection No. 7301, Box 88, Folder 14).

204. HITCHENS, *supra* note 203; HITCHENS & THOMAS, *supra* note 189.

205. George, *supra* note 180, at 497–99.

of development.”<sup>206</sup> In one sociological study, an interviewee perceptively noted, “to keep my children[,] I’ve had to agree to bring them up to be heterosexual, whatever that means, and I ask myself what does that say about being gay, which I am.”<sup>207</sup> Thus, while researchers’ work constituted a rights-promoting measure that cut against stereotypes, it also reinforced the notion that homosexuality was an aberration that needed to be prevented.<sup>208</sup>

Over the course of three decades, social scientists had introduced a radically new vision of homosexuality. Kinsey’s work revealed the extent to which “deviant” behavior was in fact quite common, spurring changes in criminal law. When the APA declassified homosexuality as a mental illness, mental health professionals became allies in efforts to secure custody rights for gay and lesbian parents. The studies they developed helped create a scientific consensus that parental homosexuality did not influence children’s sexual orientation, which would guide the work of civil servants in the administrative state. These normative shifts within the mental health professions had a profound impact on law, first in the courts and later by influencing the exercise of bureaucrats’ discretion.

### III. ADMINISTRATIVE ALLIES

While psychiatrists convinced courts to grant custody to lesbian mothers and gay fathers, using scientific studies that showed parental homosexuality did not affect children’s sexual orientation, political battles continued to be waged over the same issue. Many Americans remained unconvinced of homosexuality’s benign nature. In the 1970s, religious conservatives argued that the state could and should deny rights to gays and lesbians, lest they serve as role models to impressionable children who would then choose to become homosexuals themselves. This Part provides a brief overview of this political context to explain the extent to which scientific consensus deviated from the popular baseline, such that its influence on administrative actors would create a contest between regulators, legislators, and voters. Since these studies showed adult homosexuality did not influence children, bureaucrats utilized their discretion to resist legislative mandates, introducing new normative visions into the law.

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206. Diane Richardson, *Lesbian Mothers*, in *THE THEORY AND PRACTICE OF HOMOSEXUALITY* 156 (John Hart & Diane Richardson eds., 1981).

207. *Id.*

208. In critiquing the methodology and conclusions of these research studies, sociologists Judith Stacey and Timothy Biblarz recognized the difficult position for researchers who acknowledged differences between the children raised in heterosexual and homosexual households, given that this information could result in gay parents losing custody of their children. Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 *AM. SOC. REV.* 159, 178 (2001).

This Part then provides case studies of social workers in New Hampshire and educators in New York City, demonstrating how these bureaucrats relied on the scientific evidence developed in the lesbian mother and gay father custody cases. It uses the New Hampshire example because this was the only state to enact an explicit ban on gay and lesbian foster and adoptive parenting during this period; other states reached the same result by enacting prohibitions on unmarried couples or through administrative regulations.<sup>209</sup> Thus, the events in New Hampshire offer a clear case study of a dispute between the legislature and executive branch over gay and lesbian parenting. This Part then presents the New York City example, which was both one of the first curricular disputes and one of the most consequential. It spurred national debate, such that the events in New York City provide insight into much more than a single American city. These examples highlight how scientific developments complicate administrative governance and illustrate bureaucrats' role in effectuating legal change on behalf of a minority group.

#### A. *Political Context*

The Religious Right gained prominence in local, state, and federal politics in the late-1970s, entrenching opposition to gay rights advocacy at all levels of government.<sup>210</sup> The Religious Right originated in early twentieth-century Protestant fundamentalism, whose adherents focused on keeping evolution out of the nation's classrooms and returning Americans to the "fundamentals" of the Christian faith.<sup>211</sup> However, Christian conservatism gained new life in the Cold War, leading to Richard Nixon's election in 1968.<sup>212</sup> A growing coalition of Evangelicals and other conservative Christians became a visible and influential national political force in the 1970s, galvanizing in response to a variety of issues including the Equal Rights Amendment, *Roe v. Wade*,<sup>213</sup> and the gay liberation movement, all of which undermined traditional gender roles and the sanctity

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209. See generally Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 51 HARV. C.R.-C.L. L. REV. 363 (2016).

210. JANICE M. IRVINE, TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES 65, 69–72 (2002); Greg Goldin, *The 15 Per Cent Solution: How the Religious Right is Building from Below to Take Over from Above*, VILLAGE VOICE, Apr. 6, 1993, at 19.

211. See, e.g., KEVIN M. KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA (2015); MICHAEL LIENESCH, IN THE BEGINNING: FUNDAMENTALISM, THE SCOPES TRIAL, AND THE MAKING OF THE ANTI-EVOLUTION MOVEMENT (2007); WILLIAM MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA 16–22 (1996).

212. DARREN DOCHUK, FROM BIBLE BELT TO SUNBELT: PLAIN-FOLK RELIGION, GRASSROOTS POLITICS, AND THE RISE OF EVANGELICAL CONSERVATISM 229–30, 332–33 (2011); LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT 132–36, 143–46, 211–15 (2001); AMY L. STONE, GAY RIGHTS AT THE BALLOT BOX 4–5 (2012).

213. 410 U.S. 113 (1973).

of the nuclear family.<sup>214</sup> As a result, “conservative evangelicals created a furor over the state of the American family without precedent in the twentieth century.”<sup>215</sup> The 1976 presidential campaign drew attention to the increasing role of Evangelicals in politics, as well as the nation’s religious resurgence, such that *Newsweek* declared 1976 “The Year of the Evangelicals.”<sup>216</sup> The Evangelical emphasis on “traditional family” values shaped national politics, framing political debates for decades to come.<sup>217</sup>

The antigay activism of the Religious Right became a hallmark of its politics in 1977 after Anita Bryant launched a voter referendum campaign to overturn Miami’s sexual orientation nondiscrimination law.<sup>218</sup> The fear of homosexual role models was a central part of Bryant’s “Save Our Children” campaign, which conservatives described as necessary to counter “role modeling homosexuals, the ones who aren’t openly recruiting, but who don’t stay in the closet,” identifying the problem as “the homosexual who is blatant in his profession of his preference and who gives the impression to young people that this lifestyle is not odd or to be avoided, but just an alternative.”<sup>219</sup>

The campaign rhetoric, which emphasized the alleged danger that gays and lesbians posed to children, resonated with more than just Miami residents. After almost seventy percent of that city’s voters approved the law’s repeal, other conservative groups launched ballot initiatives around the country.<sup>220</sup> Voters in Wichita, Kansas; Eugene, Oregon; and St. Paul, Minnesota overturned their gay rights ordinances the following year.<sup>221</sup> In California, citizens rejected a statewide referendum to ban homosexual teachers from public schools.<sup>222</sup> While unsuccessful, that initiative reinforced a national antigay climate; it also taught conservative leaders, including Jerry Falwell and Louis Sheldon, how to organize ballot

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214. STONE, *supra* note 212, at 4–5; *see also* SELF, *supra* note 181, at 277–78; MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* ch. 6 (2015) (describing the varied conservative responses to the *Roe* decision); Gillian Frank, “*The Civil Rights of Parents*”: *Race and Conservative Politics in Anita Bryant’s Campaign against Gay Rights in 1970s Florida*, 22 J. HIST. SEXUALITY 126, 127 (2013).

215. SELF, *supra* note 181, at 349.

216. Kenneth L. Woodward et al., *Born Again!*, NEWSWEEK, Oct. 25, 1976, at 69; *see also* DOCHUK, *supra* note 212, at 365.

217. SETH DOWLAND, *FAMILY VALUES AND THE RISE OF THE CHRISTIAN RIGHT* 8–12 (2015).

218. Frank, *supra* note 214, at 141.

219. Morton Kondracke, *Anita Bryant is Mad About Gays*, NEW REPUBLIC, May 7, 1977, at 14; *see also* ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION’S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* 62 (1977).

220. CLENDINEN & NAGOURNEY, *supra* note 151, at 299, 303–04, 308; FRED FEJES, *GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA’S DEBATE ON HOMOSEXUALITY* 115–52 (2008).

221. *See* FEJES, *supra* note 220, at 172–74, 176–77; STONE, *supra* note 212, at 14.

222. *See* FEJES, *supra* note 220, at 183, 209.

measure campaigns, which became one of the main ways the Religious Right enacted antigay legislation in the 1980s.<sup>223</sup>

Religious conservatives deployed child protection rhetoric in their opposition to gay rights in the decades that followed. For much of the twentieth century, medical, social, and political discourse equated homosexuality with pedophilia, identifying child molestation as both the root cause and the product of same-sex sexual attraction.<sup>224</sup> The Religious Right repackaged and modernized these claims, arguing that the danger was psychological, not physical.<sup>225</sup> According to this theory, gay and lesbian adults would role model their sexual orientation, which children would unwittingly adopt.<sup>226</sup> The fear was one of indoctrination that presented homosexuality as a choice—one that children would elect if they were not taught that homosexuality was both dangerous and socially unacceptable.<sup>227</sup> Jerry Falwell, the founder of the Moral Majority, explained that allowing gays and lesbians to teach “might be an open invitation for [homosexuals] to subvert our young and impressionable children into their lifestyle.”<sup>228</sup> Likewise, Beverly LaHaye, who founded Concerned Women for America, a national lobbying group, warned that “[e]very homosexual is potentially an evangelist of homosexuality, capable of perverting many young people to his sinful way of life.”<sup>229</sup> As a result, religious conservatives argued it was important for the state to oppose gay rights, lest children mistakenly believe that homosexuality was an acceptable alternative they should elect. The Religious Right’s antigay activism gained newfound cultural salience because of the AIDS crisis, which popularly became known as the “homosexual plague.”<sup>230</sup>

As the Religious Right became a national political force, gay and lesbian families were becoming more common. In addition to lesbian mothers who sought and attained custody of their children from their heterosexual relationships, same-sex couples formed families through alternative reproductive technologies.<sup>231</sup> In the 1970s, the Lesbian Rights

223. See STONE, *supra* note 212, at 14–15.

224. Denno, *supra* note 101, at 1339, 1341–42; Freedman, *supra* note 113, at 103; Schmeiser, *supra* note 94, at 215.

225. 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, 1328, 1366 (2000); Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 608 (2013).

226. Eskridge, *supra* note 225, at 1328; Rosky, *supra* note 225, at 608.

227. Eskridge, *supra* note 225, at 1329; Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R.-C.L. 357, 359 (2009); Rosky, *supra* note 225, at 641; see also Clifford J. Rosky, *No Promo Hetero: Children’s Right to be Queer*, 35 CARDOZO L. REV. 425, 428 (2013).

228. IRVINE, *supra* note 210, at 173.

229. TIM LAHAYE & BEVERLY LAHAYE, *THE ACT OF MARRIAGE* 261 (1976).

230. STEIN, *supra* note 181, at 144; Eileen Keerdoja et al., “Homosexual Plague” *Strikes New Victims*, NEWSWEEK, Aug. 23, 1982, at 10.

231. GEORGE CHAUNCEY, *WHY MARRIAGE?: THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY* 105 (2004); Douglas NeJaime, *Marriage Equality and the*



Project of San Francisco did not receive many calls from lesbians who wanted information about donor insemination. By 1984, however, the group was receiving approximately thirty-five calls a month on this subject, a number that had quadrupled by 1989.<sup>232</sup> Between 1982 and 1989, the Sperm Bank of Northern California doubled the number of its lesbian clients.<sup>233</sup> Hundreds of women attended workshops on the legal implications of donor insemination that a prominent lesbian rights attorney offered.<sup>234</sup> Similarly, the Lesbian Mothers' National Defense Fund in Seattle received requests for information about alternative reproduction from women all over the United States.<sup>235</sup> Given the growing numbers of gay and lesbian families, the LGBT rights movement began focusing on parental and domestic rights in the late-1980s and early-1990s.<sup>236</sup> The HIV/AIDS crisis, which began in the early-1980s, also contributed to this shift. Partners of those with HIV/AIDS did not have legal relationships with their loved ones; as a result, hospitals denied them access to their partners and excluded them from the medical decisionmaking process.<sup>237</sup> That exclusion rendered the question of marriage and domestic relationships more salient to the LGBT community, such that family law became a focal point of rights advocacy.

Gays and lesbians were thus increasingly visible as parents when religious conservatives, with their focus on child protection, were gaining power in American society. The result was a political firestorm that waged around the country, which came to a head over gay and lesbian foster care and adoption policies, as well as gay-inclusive school curricula, which bureaucrats were charged with implementing.

## B. *Agency Resistance*

Debates over gay and lesbian foster and adoptive parenting became a national political issue in the mid-1980s. As elected officials promulgated bans on gay and lesbian foster and adoptive parenting, social workers subverted the policies because of scientific developments, creating gay- and lesbian-headed families. These civil servants went against popular sentiment and their legislative mandate, demonstrating the power of scientific paradigms on the law. In doing so, they identified gays and lesbians as fit parents deserving of respect. At the same time,

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*New Parenthood*, 129 HARV. L. REV. 1185, 1196 (2016); Gina Kolata, *Lesbian Partners Find the Means to be Parents*, N.Y. TIMES (Jan. 30, 1989), <http://www.nytimes.com/1989/01/30/us/lesbian-partners-find-the-means-to-be-parents.html> [<http://perma.cc/H8GC-XDRE>]; *Mother2: Lesbian Parenting Gains New Ground in Boston*, BOS. PHOENIX, July 28, 1989.

232. See RIVERS, *supra* note 25, at 174–75.

233. See *id.*

234. See *id.*

235. See *id.*

236. See KLARMAN, *supra* note 181, at 51; RIVERS, *supra* note 25, at 193.

237. See RIVERS, *supra* note 25, at 193.

by refusing to enforce the laws as the legislatures intended, they created a governance problem.

Scientific research demonstrated that gays and lesbians were fit parents at a time when the foster care system was in crisis, providing a solution to a mounting problem. In the 1970s, the foster system was overburdened, with ever-increasing numbers of children entering the system, but few being placed with adoptive parents or returned to their families.<sup>238</sup> In response to mounting criticism, Congress enacted the Adoption Assistance and Child Welfare Act in 1980, which provided financial incentives for state agencies that quickly found permanent placements for foster children to provide those children with stability.<sup>239</sup> The law had its intended effect: the number of children in foster care dropped sharply, and the time children stayed in foster care also declined. However, both of those figures quickly rose again as families struggled with the effects of an economic recession and the crack cocaine and HIV/AIDS epidemics.<sup>240</sup> Between 1986 and 1992, the number of children in foster care increased by 54 percent.<sup>241</sup>

Social workers, who had been struggling to find homes for children, began placing their wards in the homes of gay and lesbian parents.<sup>242</sup> In doing so, they were following the consensus of the mental health professions.<sup>243</sup> Mental health professional associations had issued position statements in favor of gay and lesbian foster and adoptive parenting based largely on the research studies developed in response to lesbian mother and gay father custody cases. Soon after the declassification, the American Psychological Association admonished that the “sex, gender identity, or sexual orientation of natural[] or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or

238. Kathy Barbell & Madelyn Freundlich, *Foster Care Today* 13, CASEY FAMILY PROGRAMS (2001), [http://www.hunter.cuny.edu/socwork/nrcfcp/downloads/policy-issues/foster\\_care\\_today.pdf](http://www.hunter.cuny.edu/socwork/nrcfcp/downloads/policy-issues/foster_care_today.pdf) [<http://perma.cc/4ZXG-ZP6H>].

239. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96–272, 94 Stat. 500, *amended by* Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (codified as amended at 42 U.S.C. §§ 670 *et seq.* (2012)).

240. Barbell & Freundlich, *supra* note 238, at 13.

241. *See id.*

242. Gays and lesbians often provided homes for harder to place children, including children of color and special needs children, or turned to international adoption from countries that welcomed same-sex parents. George, *supra* note 209, at 375, 378; *see also* LAURA BRIGGS, *SOMEBODY’S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION* 256–57 (2012).

243. Social workers have a close historical association with psychiatrists and psychologists, which explains why these bureaucrats were so responsive to scientific developments. REGINA G. KUNZEL, *FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890–1945*, at 115, 151–52, 169 (1993) (detailing how social work obtained professional legitimacy by employing psychological techniques and rhetoric).

placement cases.”<sup>244</sup> In 1980, the National Association of Social Workers (NASW) amended its code of ethics to prohibit discrimination on the basis of sexual orientation.<sup>245</sup> Six years later, the American Psychiatric Association also affirmed that homosexuals should be allowed to serve as foster parents, citing the wide body of clinical experience and research studies that demonstrated parental homosexuality was irrelevant to child development.<sup>246</sup> In 1987, the NASW announced it would be “working for the adoption of policies and legislation to end all forms of discrimination against lesbians and gay men at the federal, state, and local levels in all institutions.”<sup>247</sup> These announcements, from a number of different organizations, demonstrate that many professionals had reviewed the issue and come to the same conclusion.<sup>248</sup> They guided social workers’ decisions and provided empirical support for their politically unpopular choices.

Although it is possible that social workers decided to place children with gay and lesbian parents for reasons other than scientific consensus, the available evidence indicates otherwise. It is true that social workers on the whole tend to be politically liberal, such that social workers may have been more inclined to view these placements as more appropriate than other Americans.<sup>249</sup> However, liberal politics during this period were not necessarily committed to gay and lesbian rights. Any decision to support gay adoption was also a significant departure from the rest of American society, with only 29 percent of Americans supporting gay and

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244. AM. PSYCHOL. ASS’N, COMM. ON LESBIAN & GAY CONCERNS, AMERICAN PSYCHOLOGICAL ASSOCIATION POLICY STATEMENTS ON LESBIAN AND GAY ISSUES 2 (1991) (on file with the ONE National Gay and Lesbian Archives at the University of Southern California Libraries, American Psychological Association Subject File). The organization issued this statement in 1976. *Id.*

245. NAT’L ASS’N SOC. WORKERS, LESBIAN AND GAY ISSUES (1987) (on file with the Wendell Ricketts Papers at the Cornell University Carl A. Kroch Library, Collection No. 7681, Box 2, Folder 19).

246. *Board Discusses Treatment Book, Prospective Payment*, PSYCHIATRIC NEWS, Aug. 1, 1986, at 8.

247. NAT’L ASS’N SOC. WORKERS, *supra* note 245.

248. Professional organizations subject policy statements to many layers of review before adopting them, with each group following its own process. *See, e.g., Association Rules*, AM. PSYCHOL. ASS’N § 30–8 (2017), <http://apa.org/about/governance/bylaws/rules.pdf> [<http://perma.cc/Q9NK-M5L7>]. Since these organizations often lobby on behalf of their members, and therefore have vested interests in certain policies, having multiple groups concur on a principle indicates a broader agreement among scientists.

249. CHAUNCEY, *supra* note 231, at 150; *see also* LINDA CHERREY REESER & IRWIN EPSTEIN, PROFESSIONALIZATION AND ACTIVISM IN SOCIAL WORK: THE SIXTIES, THE EIGHTIES, AND THE FUTURE 62 (1990) (noting that 77 percent of social workers in 1984 identified as Democrats and that 4 percent “had left-wing commitments outside the Democratic Party”); Mitchell Rosenwald & Cheryl A. Hyde, *Political Ideologies of Social Workers: An Under Explored Dimension of Practice*, 7 ADVANCES SOC. WORK 12, 15 (2006) (analyzing social workers’ political ideologies as generally liberal).

lesbian foster and adoptive parenting in 1992.<sup>250</sup> More telling is the shift in social workers' placements before and after the scientists published their studies and scientific organizations issued their policy statements. Prior to this evidence becoming available, social workers—afraid of the effect the parents' sexual orientation could have on younger children—only placed self-identified gay and lesbian teenagers in the homes of homosexual adults.<sup>251</sup> After scientific evidence demonstrated this concern was unfounded, the types of placements social workers were willing to make expanded to children of all ages.

These placements spurred controversy, leading to legislative bans and executive prohibitions on gay and lesbian foster and adoptive parenting that government bureaucrats resisted. In 1985, after the *Boston Globe* reported that two young boys had been placed with a gay couple, Massachusetts Governor Michael Dukakis instituted a hierarchy for prospective foster parents that gave preference to “traditional family settings.”<sup>252</sup> The policy did not explicitly exclude gays or lesbians, but officials in the Dukakis administration stated that such placements were “highly unlikely” and the regulation became known as a ban on gay foster and adoptive parents.<sup>253</sup> Civil servants, particularly social workers, vocally denounced the policy, criticizing it at public forums and lobbying Dukakis to eliminate the hierarchy.<sup>254</sup> The Massachusetts chapter of the NASW joined a lawsuit challenging the ban; Dukakis ultimately revised the regulation in 1990 to settle the case.<sup>255</sup>

A similar contest broke out in New Hampshire that same year. There, bureaucrats resisted enforcing the ban with which they disagreed.<sup>256</sup> Like Massachusetts, the question of gay foster and adoptive

250. George, *supra* note 209, at 387–88, 419.

251. *Id.* at 375–78.

252. Kenneth J. Cooper, *New Policy on Foster Care: Parenting by Gays All But Ruled Out*, *BOS. GLOBE*, May 25, 1985, at 1.

253. *Id.*

254. See Civil Liberties Union of Massachusetts (CLUM), *Law Suit to Challenge DSS Foster Child Placement Policy*, *THE DOCKET*, Aug. 1985 (on file with the Wendell Ricketts Papers at the Cornell University Carl A. Kroch Library, Collection No. 7681, Box 1, Folder 11); Christine Guilfooy, *Outrage Grows Against Gay Foster Policy*, *GAY COMMUNITY NEWS*, June 8, 1985 (on file with the March on Washington—Gay and Lesbian Defense Committee Collection at The History Project, Collection No. 5, Box 1, folder labeled Newspaper Clippings: n.d., 1983–1985).

255. Complaint, *Babets v. Dukakis*, C.A. No. 81083 (Mass. Super. Ct. Jan. 30, 1986); see also Kay Longcope, *Foster-Care Ban on Gays is Reversed*, *BOS. GLOBE*, April 5, 1990, at 1; Press Release, Gay & Lesbian Advocates & Defenders, Massachusetts Changes Foster Care Regulations (Apr. 4, 1990) (on file with the National Gay and Lesbian Task Force Records at the Cornell University Carl A. Kroch Library, Collection No. 7301, Box 88, Folder 44); Press Release, Mass. Chapter of the Nat'l Ass'n of Soc. Workers, Statement on Proposed New DSS Foster Care Regulations (Nov. 25, 1985) (on file with the Wendell Ricketts Papers at the Cornell University Carl A. Kroch Library, Collection No. 7681, Box 1, Folder 11).

256. At the time Florida was the only state with a law prohibiting gays from

parenting became a subject of debate after a local paper reported that the state's child welfare agency had knowingly licensed a gay man as a foster parent.<sup>257</sup> The state House of Representatives quickly began debating a bill to bar "admitted homosexuals" from adopting a child or receiving foster care licenses.<sup>258</sup> The proposed law also prohibited licensing anyone whose household members were gay.<sup>259</sup> Representative Mildred Ingram, the bill's sponsor, claimed that homosexuals molested children at higher rates than heterosexuals and argued that gays and lesbians would role model their homosexuality to their wards. In rhetoric that mirrored Anita Bryant, Ingram asserted: "The only way for homosexuals to carry on their lifestyle is to proselytize."<sup>260</sup> However, after receiving assurances from the Judiciary Committee that the Division of Children, Youth and Families (DCYF) would stop placing children in the homes of gays and lesbians, and would address the issue through rulemaking procedures, the House voted down Ingram's proposal.<sup>261</sup>

Despite its agreement with legislators, DCYF proposed rules two-and-a-half months later that did not prohibit homosexual foster parents. The new rules only required foster parents to provide "a safe, nurturing, and stable family environment which is free from abuse and neglect."<sup>262</sup> The Director of DCYF, David Bundy, disagreed with the legislature's views on gay and lesbian foster parents, and wanted to maintain flexibility in child placements.<sup>263</sup> Jack Lightfoot, an attorney for Child and Family Services involved in the drafting, later explained the decision by pointing to social workers' expertise: he said the rules did not address sexual orientation "because the professionals didn't think it was an issue."<sup>264</sup>

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adopting children, although North Dakota prohibited placements with unmarried couples. MASS. EXEC. OFFICE OF HUMAN SERVS., REVIEW OF STATES' POLICIES REGARDING FOSTER PLACEMENTS 5–6 (1985) (on file with the Wendell Ricketts Papers at the Cornell University Carl A. Kroch Library, Collection No. 7681, Box 1, Folder 11). Four states—New York, New Jersey, New Mexico, and Vermont—had agency regulations or policies prohibiting discrimination on the basis of sexual orientation. *Id.*

257. See Paul R. Lessard, *Sexuality Issue Raised in Foster Child Care Case*, UNION LEADER, June 19, 1985, at 1.

258. Donn Tibbetts, *Rep. Files Bill to Ban Homosexuals from Running Foster Homes*, UNION LEADER, July 4, 1985, at 1.

259. See Norma Love, *Homosexual Parent Ban Bill Stirs Emotion*, UNION LEADER, Apr. 28, 1986, at 8.

260. *Id.*

261. Telephone Interview with Donna Sytek, N.H. Republican Party Chair 1981–1984 (Oct. 4, 2014); *Public Hearing on H.B. 21 Before Judiciary Comm.*, 1986 Leg. Sess. (N.H. Jan. 14, 1986) (minutes from hearing, H. Judiciary Comm.) (on file with the New Hampshire State Archives, House of Representatives File for H.B. 21 (1986)).

262. Foster Family Care Licensing Requirements, Rule He-C 6446, at 3, 13 (effective Aug. 28, 1986) (on file with the New Hampshire State Library).

263. Telephone Interview with David Bundy, President and CEO, Children's Home Society of America (Sept. 24, 2014).

264. Telephone Interview with Jack Lightfoot, Advocacy Director, Child and Family Services (Nov. 12, 2014).

The agency's victory over gay and lesbian foster and adoptive parenting was shortlived, as the legislature quickly reintroduced and enacted a ban amid debates that emphasized child protection.<sup>265</sup> As supporters explained, "the association of children with homosexuals in a social setting could turn these children into homosexuals."<sup>266</sup> Former state Supreme Court Justice Charles Douglas framed this perspective at one of the hearings in the following way: "A friend tells me that if you speak French at home around young children, they grow up learning how to speak French . . . . I think that same principle applies to young children who are raised by foster parents or who are in day care centers run by homosexuals."<sup>267</sup> Senator Jack Chandler put the issue more dramatically, analogizing child placements with gay and lesbian parents to "putting a pound of roast beef in a cage with a lion. You know it's going to get eaten."<sup>268</sup> His statement drew on the decades-long stereotype of gays as predators and child molesters, which the role modeling theory of homosexuality had not entirely displaced. Both chambers of the legislature approved the ban, and the Governor signed it into law.<sup>269</sup>

Despite the new statute, civil servants continued to approve gays and lesbians as foster parents, subverting the statute's aim because they believed doing so best served the needs of New Hampshire's children. After the law's enactment, DCYF mailed questionnaires to foster parents asking them to disclose their sexual orientation; however, ten percent objected to the intrusion on their privacy and refused to answer.<sup>270</sup> Bundy announced that since New Hampshire was facing a "critical shortage of foster homes," the state would not take any action against foster parents who declined to respond to inquiries about their sexuality.<sup>271</sup> Moving forward, social workers would not ask prospective parents about their sexual orientation.<sup>272</sup>

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265. See H.R. 70, N.H. Regular Sess. (1987); 1987 N.H. Laws 379; see also Jay Merwin, *Democrats Rap GOP Platform*, CONCORD MONITOR, Oct. 8, 1986, at B1; Michael Mokrzycki, *Governor Supports Bill to Prohibit Homosexuals from Being Foster Parents*, TELEGRAPH (Nashua), Feb. 19, 1987, at 1; Rod Paul, *Official Tries Again to Ban Gay Foster Parents*, TELEGRAPH (Nashua), Jan. 25, 1987, at A6.

266. N.H. House of Representatives, Judiciary Comm., Definition and Majority Response (Feb. 3, 1987) (on file with the New Hampshire State Archives, House of Representatives File for H.B. 70 (1987)); John Distaso, *Foster Parents Regulation Eyed*, UNION LEADER, Feb. 17, 1987, at 1, 8.

267. Distaso, *supra* note 266.

268. Clay Wirestone, *In 1987, the New Hampshire Legislature Targeted Gay People as Unfit for Parenting*, CONCORD MONITOR, June 30, 2013.

269. 1987 N.H. Laws 379.

270. Ben Stocking, *State May Relent for Some Foster Parents*, CONCORD MONITOR, Nov. 24, 1987, at A1, A6.

271. Pat Hammond, *Foster Parents Crisis Feared*, UNION LEADER, Sept. 27, 1987, at 1; see also Ben Stocking, *Lawmakers Split Over Enforcement of Gay Ban*, CONCORD MONITOR, Nov. 25, 1987, at B1, B12.

272. Telephone Interview with Bundy, *supra* note 263.



The legislature did not respond to the agency's announcement, and since there was "no support for the law" among DCYF employees, bureaucrats continued with their resistance.<sup>273</sup> Bundy later characterized the situation by saying "we came up with 'don't ask don't tell' way before Clinton."<sup>274</sup> In mid-1980s New Hampshire, few gays or lesbians were open about their homosexuality; throughout the country, passing was a common aspect of gay and lesbian life, which is why liberationists identified coming out of the closet as a political act.<sup>275</sup> Consequently, those who wanted to become parents simply kept their sexual orientation hidden.<sup>276</sup> Social workers' disobedience allowed gays and lesbians to foster and adopt children, albeit at the significant cost of suppressing their sexual identity. The state's law condemned gays and lesbians as harmful to children—an idea that social workers offset with individual placements.<sup>277</sup>

New Hampshire's social workers were not the only bureaucrats to resist bans on gay and lesbian foster and adoptive parents in the late-1980s and early-1990s. Indeed, civil servants in other states with antigay policies, such as California and Florida, likewise undermined their bans, helping gays and lesbians around the country to become parents.<sup>278</sup> These bureaucrats followed the letter, but not the spirit, of the law, raising important questions about the proper actions of professionals within the administrative state. Given that the role of the executive branch is to implement the law, not challenge or change it, the contest between a legislative mandate and professional expertise seems to have a clear answer. However, bureaucrats are also employed for their expertise and charged with using their discretion in implementing laws, thereby creating a governance problem that is more complicated than it initially appears.

In New Hampshire, as in the other states, the legislature created a situation in which bureaucrats had to choose between their professional judgment, which provided the basis for their authority as social workers, and a law that countermanded that same expertise. By exploiting a statutory gap, social workers found a means to balance their two sources of authority. These professionals were employed specifically to use their knowledge on child welfare. That they subverted the legislature's goal, with scientific principles shaping their discretion, demonstrates the

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273. Interview by Wendell Ricketts with Ellen Musinsky, at 2 (Aug. 9, 1988) (on file with the Wendell Ricketts Papers at the Cornell University Carl A. Kroch Library, Collection No. 7681, Box 2, Folder 12).

274. Telephone Interview with Bundy, *supra* note 263.

275. See SELF, *supra* note 181, at 220–21, 385–86; Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 816–20, 823–24 (2002).

276. Telephone Interview with Ellen Musinsky, Cofounder of the New Hampshire Women's Lobby (Oct. 1, 2014).

277. The legislature ultimately repealed the law in 1999. See 1999 N.H. Laws 43, 43–44.

278. George, *supra* note 209, at 51–58.

powerful role of scientific developments in administrative law.<sup>279</sup> The New Hampshire example also illustrates how developments in scientific understanding and agents of the administrative state moved towards a new role of supporting gays and lesbians in their struggle for legal rights.

The New Hampshire legislature may not have realized that it had enacted a statute with room for resistance. However, when the agency's director announced that the agency would not enforce the ban as intended, the legislature could have acted to clarify the prohibition and remove the ambiguity that made dissent possible. The legislature had the opportunity to weigh in on the social workers' decisions, but chose not to do so. Although this fell short of a silent endorsement, it nevertheless allowed the social workers' expertise to determine policy.<sup>280</sup> These events demonstrate how the administrative state can become a crucible for legal change.

### C. *Breaching the Schoolhouse Doors*

Much like the adoption debates, the fear of child indoctrination pervaded efforts to update school textbooks to incorporate materials on gays and lesbians in the late-1980s and early-1990s. Also, like the adoption context, many of these debates involved a divide between elected representatives and professionals within executive agencies, with the administrative state more responsive to the claims of gays and lesbians than its legislative counterpart.<sup>281</sup>

Gay rights advocates around the country argued for inclusive curricula both to protect the welfare of sexual minority youth and to create a more tolerant society. They supported their claims with an increasing number of scientific studies. In 1989, the U.S. Department of Health and Human Services published a report that revealed exceptionally high rates of suicide among gay and lesbian youth,<sup>282</sup> which experts attributed to social marginalization, family rejection, and harassment in schools by

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279. Notably, scientific principles provided a solution to a practical problem: a lack of homes for children. This may explain why social workers were willing to engage in rights-promoting resistance.

280. See generally DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928* (2001) (analyzing how agencies develop autonomy from legislators).

281. While educators, unlike social workers, are not members of the mental health community, they are knowledge-based professionals. See Haupt, *supra* note 20, at 1250–51. Teachers also tend to be motivated by professional norms and codes of ethics that include respect for diversity, an impetus towards inclusion, and a concern for the welfare of their students. Carol A. Bartell, *A Normative Vision of Teacher as Professional*, 25 *TCHR. EDUC. Q.* 24, 29 (1998); see also *Code of Ethics for Educators*, ASS'N OF AM. EDUCATORS (Feb. 23, 2010), <http://www.aateachers.org/images/pdfs/aae-codeofethicsforeducators.pdf> [<http://perma.cc/5G7B-PGY9>].

282. Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in 3 *REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE* 110 (1989); Lou Chibbaro, Jr., *HHS: Gay Youth More Likely to Try Suicide*, *WASH. BLADE*, Aug. 18, 1989, at 1, 4.

peers.<sup>283</sup> At the same time, studies demonstrated that schools' failure to educate young people about gays and lesbians contributed to homophobia and discrimination. Indeed, most acts of violence against gays and lesbians were committed by teenagers and young adults.<sup>284</sup> These research studies reinforced gay and lesbian rights advocates' calls for inclusive curricula that emphasized tolerance for sexual minorities.<sup>285</sup> When implementing gay-inclusive curricula, educators faced similar arguments as the ones social workers had encountered, namely that exposure to ideas about same-sex sexuality would result in children becoming homosexual. The battles over curricula thus turned on the same questions as those over foster and adoptive parenting, with bureaucrats coming into conflict with legislators.

One of the most contentious battlegrounds over instructional materials was New York City in 1991, where a first-grade multicultural teacher's guide became a national symbol of the country's culture wars. The city created the *Children of the Rainbow* curriculum after a group of white teenagers killed a black high school student in Brooklyn in 1989.<sup>286</sup> To promote tolerance and appreciation of cultural diversity, the New York City Board of Education adopted a resolution calling for the creation of a multicultural education curriculum focused on tolerance based on race, religion, national origin, sex, age, physical handicaps, and sexual orientation.<sup>287</sup> Part of the reason the resultant *Rainbow* guide became

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283. See, e.g., Anthony R. D'Augelli & Scott L. Hershberger, *Lesbian, Gay, and Bisexual Youth in Community Settings: Personal Challenges and Mental Health Problems*, 21 AM. J. CMTY. PSYCHOL. 421, 437–42 (1993); Curtis D. Proctor & Victor K. Groze, *Risk Factors for Suicide among Gay, Lesbian, and Bisexual Youths*, 39 SOC. WORK 504, 509 (1994).

284. Peter Freiberg, *Sex Education and the Gay Issue: What Are They Teaching About Us in the Schools?*, ADVOCATE, Sept. 1, 1987, at 42–43; see also Education Exploration Center, *A Sample for Social Change*, Spring 1981 (on file with the ONE National Gay and Lesbian Archives at the University of Southern California Libraries, Education Subject File).

285. Educators' associations generally supported efforts to make schools more inclusive and welcoming of gay students. In 1987, the American Federation of Teachers enacted a resolution calling for equal educational opportunities for gay and lesbian students, a principle the National Education Association endorsed the following year. *NEA Approves Sexual Orientation Advice for Students*, S.F. SENTINEL, July 15, 1988; *Teachers Pass Gay Rights Resolution*, S.F. SENTINEL, July 8, 1988; Pat Ordovensky, *NEA: Get Gay Teens Counseling*, USA TODAY, July 7, 1988.

286. Felicia R. Lee, *Intolerance Will Be Topic for Students*, N.Y. TIMES (Sept. 18, 1989), <http://www.nytimes.com/1989/09/18/nyregion/intolerance-will-be-topic-for-students.html> [<http://perma.cc/NG62-AQHJ>]; Steven Lee Myers, *How a "Rainbow Curriculum" Turned into Fighting Words*, N.Y. TIMES (Dec. 13, 1992), <http://www.nytimes.com/1992/12/13/weekinreview/ideas-trends-how-a-rainbow-curriculum-turned-into-fighting-words.html> [<http://perma.cc/T2FC-PGS5>].

287. New York City Board of Education, *Statement of Policy on Multicultural Education and Promotion of Positive Intergroup Relations* (Nov. 9, 1989) (on file with the Lesbian Gay Teachers Association Records at the NYC LGBT Community

so contentious was because of NYC's educational administrative structure. The Board of Education, which had two members appointed by the Mayor and five by each of the borough presidents, was responsible for setting high school policies and overseeing the city's educational system.<sup>288</sup> The actual drafting fell to the school system Chancellor Joseph Fernandez and his staff at the Department of Education, but the decision to use the materials was in the hands of the thirty-two district school boards, whose members were popularly elected for three-year terms.<sup>289</sup> As a result, the policy and the actual documents were created by administrative agencies, while the approval depended on quasilegislative bodies.<sup>290</sup>

The controversy over the *Rainbow* curriculum pitted educators in the Department of Education against elected school board members who opposed the materials, with the two groups ultimately compromising on a solution both could accept. None of the administrative agency staff expected the vitriolic opposition to the guide, which only referenced gays and lesbians on three of its 443 pages.<sup>291</sup> The guide urged teachers to discuss the value of every type of family household, "including two-parent or single-parent households, gay or lesbian parents, divorced parents, adoptive parents, and guardians or foster parents."<sup>292</sup> The guide also emphasized the need for teachers to help children develop a positive attitude towards gays and lesbians, to forestall later homophobic

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Center, Box 4, Folder 215).

288. Stanley S. Litow et al., *Problems of Managing a Big-City School System*, in BROOKINGS PAPERS ON EDUCATION POLICY 188 (1999). The Mayor appointed two members; each of the borough presidents appointed one. *Id.*

289. Sam Dillon, *New York School Fight Shifts to Elections for Local Boards*, N.Y. TIMES (Feb. 17, 1993), <http://www.nytimes.com/1993/05/17/nyregion/ousted-chiefs-due-to-rejoin-school-boards.html> [<http://perma.cc/BR2H-REY5>]; Sam Dillon, *Ousted Chiefs Due to Rejoin School Boards*, N.Y. TIMES (May 17, 1993), <http://www.nytimes.com/1993/05/17/nyregion/ousted-chiefs-due-to-rejoin-school-boards.html> [<http://perma.cc/DYD6-FHHY>]; Sam Dillon, *Queens Board Bars Curriculum on Gay People for 1st Graders*, N.Y. TIMES (Apr. 24, 1992), <http://www.nytimes.com/1992/04/24/nyregion/queens-board-bars-curriculum-on-gay-people-for-1st-graders.html> [<http://perma.cc/SXF7-B5QQ>]; NEW YORK CITY BOARD OF EDUCATION, COMMUNITY SCHOOL BOARD ELECTIONS 1 (1993) (on file with the Park Files at the NYC Municipal Archives, Collection No. 99-43, Box 9, Folder 320).

290. Although school boards are part of the executive branch, operating under education department officials, they are elected by voters. School boards are thus a hybrid legislative and administrative body. See generally Richard Briffault, *The Local School District in American Law*, in BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS (William G. Howell ed., 2005) (analyzing school board administrative structures).

291. Memorandum from New York City Public Schools to Reporters et al. 4 (Sept. 8, 1992) (on file with the Lesbian Gay Teachers Association Records at the NYC LGBT Community Center, Box 4, Folder 217).

292. N.Y.C. PUB. SCH., CHILDREN OF THE RAINBOW: FIRST GRADE 145 (1991) (on file with the Park Files at the NYC Municipal Archives, No. 99-43, Box 10, Folder 342).

discrimination and violence.<sup>293</sup> Included in its list of recommended readings were three books that became a focal point of the controversy—*Heather Has Two Mommies, Daddy's Roommate*, and *Gloria Goes to Gay Pride*—for their depiction of loving gay parents.<sup>294</sup>

A vocal contingent of parents and school board members attacked the guide, accusing the Board of Education of indoctrinating students and supporting immorality.<sup>295</sup> Four of the city school boards voted to reject the pages of the guide that addressed gays and lesbians.<sup>296</sup> Parents took to the streets, participating in six public demonstrations, including a rally outside the Department of Education that drew 2,000 attendees.<sup>297</sup> Mary Cummins, president of Queens School Board 24, sent a letter to the district's 22,000 parents accusing the curriculum's supporters of "prose-lytizing" homosexuality and asserting: "We will not accept two people of the same sex engaged in deviant sex practices as 'family.'"<sup>298</sup> Other opponents also made recruitment rhetoric a central part of their campaign, depicting reformers as opening the door to homosexual indoctrination.<sup>299</sup> They disseminated videos, posters, and pamphlets identifying the curriculum as a "gay recruitment campaign."<sup>300</sup> This argument proved effective, with parents expressing their fears that teaching anything about gays and lesbians would predispose their children towards homosexuality.<sup>301</sup> For example, Barbara Kay, a mother of three, was concerned that the *Rainbow* curriculum would encourage her children to be gay: "They're trying to confuse [children] and make them accept it for themselves."<sup>302</sup> Another New Yorker explained his opposition similarly: "It was the first time that someone was probably trying to woo our children into a [gay]

293. *Id.* at 372.

294. CHILDREN OF THE RAINBOW, *supra* note 292, at 158; Memorandum from New York City Public Schools to Reporters et al. 4 (Sept. 8, 1992) (on file with the Lesbian Gay Teachers Association Records at the NYC LGBT Community Center, Box 4, Folder 217); JOHN GALLAGHER & CHRIS BULL, *PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990s*, at 219–20 (1996).

295. IRVINE, *supra* note 210, at 154; Myers, *supra* note 286.

296. Steven Lee Myers, *Values in Conflict Schools Diversify the Golden Rule*, N.Y. TIMES (Oct. 6, 1992), <http://www.nytimes.com/1992/10/06/nyregion/values-in-conflict-schools-diversify-the-golden-rule.html> [<http://perma.cc/86WJ-93CD>].

297. *In N.Y., Educrats vs. Parents*, BOS. HERALD, Dec. 12, 1992, at 16; Donna Minkowitz, *Wrong Side of the Rainbow*, NATION, June 28, 1993, at 902.

298. Myers, *supra* note 296, at A20.

299. IRVINE, *supra* note 210, at 174.

300. Adam Entous, *Christian Right Targets 20 City School Boards*, N.Y. OBSERVER, Mar. 8, 1993; Mary Jordon, *Opposition to New York Curriculum Guide Continues to Explode*, DAILY CALIFORNIAN, Dec. 8, 1992, at 8; Dana Kennedy, *N.Y. School Chief in Flap with Parents over Gay Curriculum*, PHX. GAZETTE, Dec. 11, 1992, at B21; Minkowitz, *supra* note 297, at 902; IRVINE, *supra* note 210, at 156.

301. Richard Lacayo & Ann Blackman, *Jack and Jack and Jill and Jill*, TIME, Dec. 14, 1992, at 53; Peg Byron, *NYC Parents Protest "Children of the Rainbow,"* BAY AREA REP., Sept. 10, 1992.

302. Byron, *supra* note 301.

lifestyle.”<sup>303</sup> Some of the arguments were more extreme, with *Rainbow* opponents creating a video that claimed the gay movement’s goal was to “sodomize your sons.”<sup>304</sup> That argument drew upon the notion that homosexuality was the cause and product of childhood sexual molestation, thereby identifying abuse as a means of indoctrination.

These protests led elected school board members and motivated parents to fight city bureaucrats, but what is particularly striking about the tenor of the debate and its vitriolic rhetoric is that the *Rainbow* curriculum was a purely advisory document — and a teacher’s guide at that.<sup>305</sup> None of its pages were meant to be handed to children, nor were teachers required to use it as a manual for classroom activities. The *Rainbow* curriculum was written to help districts implement the Board of Education policy, which school boards were required to follow.<sup>306</sup> Under the regulation, teachers had to provide multicultural instruction that promoted tolerance for gays and lesbians; the only question was how and when they would do so.<sup>307</sup> The vast majority of districts were willing to incorporate discussions about gays and lesbians in later grades.<sup>308</sup> The quarrel centered on what information should be provided to young children. The fear the debate revealed was that these children, exposed to homosexuality at too early an age, would grow up to be gay or lesbian themselves.

New York’s parents and their elected representatives were not the only ones to express those fears, with school boards around the country mobilizing in response to the *Rainbow* curriculum to prevent gay-inclusive material from breaching their schoolhouse doors. In Merrimack, New Hampshire, the town’s school board passed a sweeping policy that banned any activity or instruction that had “the effect of encouraging or supporting homosexuality as a positive lifestyle alternative.”<sup>309</sup> Chris Ager, the board’s chairman, described the policy as a means “to keep our Merrimack schools free from promoting homosexuality.”<sup>310</sup> Ager explained that the small town, with a population of 22,000, needed to prevent materials like *Children of the Rainbow* and *Heather Has Two Mommies* from being introduced in schools.<sup>311</sup> To avoid violating the

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303. IRVINE, *supra* note 210, at 174.

304. IRVINE, *supra* note 210, at 156; Entous, *supra* note 300; Minkowitz, *supra* note 297, at 902.

305. Steven Lee Myers, *Few Using Curriculum in Dispute*, N.Y. TIMES (Dec. 6, 1992), <http://www.nytimes.com/1992/12/06/nyregion/few-using-curriculum-in-dispute.html> [http://perma.cc/5ZJB-JEUN].

306. *Id.*

307. *Id.*

308. IRVINE, *supra* note 210, at 154.

309. Rod Paul, *Sex and God Split Small Town in New England*, S.F. EXAMINER, May 9, 1996.

310. Chris Ager, *Letter to the Editor*, MERRIMACK VILLAGE CRIER, Aug. 1, 1995.

311. PERSON PROJECT, THE P.E.R.S.O.N. ORGANIZING MANUAL (Sept. 11, 1995) (on file with the Jessea Greenman/PERSON Project Records at the S.F. Public Library,



ban, teachers removed canonical works, including Shakespeare's *Twelfth Night*, from the curriculum; eliminated instructional materials, such as one that referenced Walt Whitman's homosexuality; and stopped teaching students about AIDS prevention.<sup>312</sup> School boards in towns from Anoka Hennepin, Minnesota, to East Allen County, Indiana, enacted similar measures.<sup>313</sup>

Some of these legislative actions had consequences that most people would now identify as absurd; however, they provide insight into the deepseated fears surrounding child indoctrination. In Elizabethtown, Pennsylvania, the school board approved a policy affirming that the district would never tolerate or accept "pro-homosexual concepts on sex and family."<sup>314</sup> One of the board members, Thomas A. Bowen, explained that the resolution was necessary in light of the *Rainbow* curriculum: "I think parents in New York wish they'd taken preemptive action before the superintendent introduced textbooks that present homosexuality as an approved alternative lifestyle."<sup>315</sup> As a result of the resolution, the town's administrators and music teachers prohibited the school band from performing "YMCA," as both the song and the Village People were "associated with the gay lifestyle."<sup>316</sup> The 1979 hit was not the only pop culture casualty in the fight to keep homosexuality out of schools. In Sawyers Bar, California, the school principal had to review episodes of *Sesame Street* before they could be shown to kindergarten classes after a parent objected that Bert and Ernie "promote homosexuality."<sup>317</sup> Questions about the fuzzy puppets' sexuality generated so much attention that the show's producers eventually issued a press release denying that Bert and Ernie were dating.<sup>318</sup> These cultural flashpoints underscore the anxieties around homosexuality and its effects on children, as well as why bureaucrats' stances in favor of gay-inclusive curricula were so consequential.

In New York, the bitter dispute ended when the Department of Education proposed a modified curriculum. By softening controversial passages in the first grade guide and agreeing that school districts could

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GLC 104, Box 10).

312. Nancy Roberts Trott, *School District Anti-Gay Policy Splits N.H. Town*, L.A. TIMES (Mar. 17, 1996), [http://articles.latimes.com/1996-03-17/news/mn-47986\\_1\\_school-district](http://articles.latimes.com/1996-03-17/news/mn-47986_1_school-district) [<http://perma.cc/TG8T-WFL4>].

313. Lisa Kim Bach, *East Allen Denounces Homosexual Behavior*, FORT WAYNE NEWS SENTINEL (Ind.), Dec. 20, 1995; Theresa Monsour, *Anoka Board Votes to Limit Teaching on Homosexuality*, ST. PAUL PIONEER PRESS, July 17, 1995.

314. Tom Wilson, *Elizabethtown "Pro-Family" Resolution*, PENN. EXPOSE, Oct. 22, 1996.

315. *School Officials in Pennsylvania Ban Village People*, CHURCH & STATE, Dec. 1996, at 17.

316. Wilson, *supra* note 314.

317. PERSON PROJECT, *supra* note 311.

318. Al Kielwasser, *Muppet Love*, BAY AREA REP., Jan. 6, 1994.

wait until sixth grade to address families headed by same-sex couples, the administrative agency was able to defuse the rancor, calm anxieties, and reach a compromise with the objecting school boards.<sup>319</sup> Gay rights advocates decried these changes, seeing them as a capitulation to intolerance.<sup>320</sup> Although these advocates did not win the war over the first grade curriculum, they succeeded in changing the debate's baseline in New York, from one over *whether* information on gays and lesbians belonged in schools, to one that asked *when* those lessons should be taught. In doing so, they challenged the notion that the state should protect children from learning about gays and lesbians, taking on the Religious Right's primary argument for opposing gay rights.

The resolution came from a compromise between the bureaucracy and the legislative body, demonstrating the influence of administrators. By incorporating information on gay and lesbian parents in the *Rainbow* curriculum, the Board of Education and the educators on its administrative staff identified these types of families as an ordinary element of American life, a view that many in their community contested—and that four school boards initially refused to endorse. In making this claim, these educators were presenting the scientific consensus that children's exposure to information on homosexuality was irrelevant to the development of future sexual orientation. Here, two sources of administrative authority—the bureaucrats' knowledge, training, and skills as professionals, and the dictates of elected representatives—conflicted, raising concerns about the proper role of administrators that this Article will take up again in Part V.

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319. Josh Barbanel, *Fernandez Modifies Parts of Curriculum About Gay Parents*, N.Y. TIMES (Jan. 27, 1993), <http://www.nytimes.com/1993/01/27/nyregion/fernandez-modifies-parts-of-curriculum-about-gay-parents.html> [http://perma.cc/2BHM-24CG]; Argie K. Johnson, *Much Study Went into New York City's Rainbow Curriculum*, N.Y. TIMES (Jan. 18, 1993), <http://www.nytimes.com/1993/01/18/opinion/l-much-study-went-into-new-york-city-s-rainbow-curriculum-164793.html> [http://perma.cc/GMH3-BZB2]; Kennedy, *supra* note 300, at B21; Beth Bentley, *The Rainbow Curriculum Controversy*, N.Y. NEWSDAY, Dec. 11, 1992.

320. *Revisions Made in Children of the Rainbow Curriculum*, LGTA NEWSLETTER, Mar. 1993, at 1 (on file with the Lesbian Gay Teachers Association Records at the NYC LGBT Community Center, Box 1, Folder 32); Letter from Mindy Chermak et al., Steering Comm., Lesbian and Gay Teachers Ass'n, to Joseph Fernandez, Chancellor, NYC Public Schools (May 16, 1992) (on file with the Lesbian Gay Teachers Association Records at the NYC LGBT Community Center, Box 6, Folder 283); Letter from Paula L. Ettlbrick, Legal Director, Lambda Legal, to Joseph A. Fernandez, Chancellor, NYC Public Schools (Oct. 29, 1992) (on file with the Lesbian Gay Teachers Association Records at the NYC LGBT Community Center, Box 4, Folder 217); Letter from Marjorie Hill, Director, Office for the Gay and Lesbian Community, City of New York, et al., to Joseph A. Fernandez, Chancellor, NYC Public Schools (Oct. 27, 1992) (on file with the Park Files at the NYC Municipal Archives, No. 99-43, Box 9, Folder 312).

In New York, as in New Hampshire, scientific consensus conflicted with popular beliefs, leading to contests between civil servants and elected officials. The bureaucrats, who were hired for their expertise, drew upon scientific developments in exercising resistance. Their actions contrast sharply with the midcentury administrative state, in which regulators and legislators concurred on antigay policies. Shifts in scientific theories undergirded changes in the implementation of law, with both contributing to support for gays and lesbians. These events show a move away from the antigay regime, with both scientists and the administrative state becoming sources of support for gays and lesbians.

#### IV. PAST AS PROLOGUE: TRANSGENDER STUDENTS

Scientific developments had a profound impact on how professionals working in administrative bureaucracies implemented the law, with executive agencies more sympathetic to the claims of gays and lesbians than legislators. Bureaucrats, drawing on their expertise, resisted legislative enactments and popular pressure that identified gays and lesbians as harmful to children. The dynamic this Article presents is not just one of the recent past, but continues today. In debates over transgender bathroom access rights, some administrative agencies have been more responsive to transgender rights claims than legislators. Much as in the gay rights context, scientific consensus is providing important support for administrators, although LGBT<sup>321</sup> social, political, and legal activism also plays an important role. This Part details bureaucratic resistance in schools, where a number of educators have followed medical guidelines in protecting the rights of transgender students, much as their colleagues did in supporting gay-inclusive curricula in the early 1990s.

The contest over transgender bathroom access rights, with its tension between legislatures and bureaucracies, has in many ways evolved in parallel to the debates over gay and lesbian rights. Elected officials around the country have made opposition to transgender rights a central part of their legislative agenda—with bathroom access becoming a focal point of this effort.<sup>322</sup> In the first two months of 2016, legislators filed forty-four antitransgender bills in sixteen states.<sup>323</sup> North Carolina drew

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321. National gay and lesbian rights groups added transgender to their mission statements in the late 1990s and early 2000s. Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, WIS. L. REV. (forthcoming 2018) (manuscript at 39), <http://papers.ssrn.com/abstract=3028221> [<http://perma.cc/23CV-FM36>].

322. This is, of course, not true of every legislature. In 2013, California enacted a statute requiring schools to allow pupils to “participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.” 2013 Cal. Legis. Serv. 85 (A.B. 1266) (West 2017) (codified at CAL. EDUC. CODE § 221.5).

323. *Anti-Transgender Legislation Spreads Nationwide, Bills Targeting*

widespread attention when it enacted H.B. 2, a law that instructed public agencies to “require every multiple occupancy bathroom or changing facility” to be “designated for and only used by persons based on their biological sex.”<sup>324</sup> North Carolina’s law was not the first time that bathroom access had become a political flashpoint in LGBT rights. In 2015, for example, voters repealed Houston’s Human Rights Ordinance after opponents claimed that its gender identity protection would allow men to use women’s bathrooms.<sup>325</sup> The Department of Justice responded to H.B. 2 by issuing letters to public agencies and officials, asserting that North Carolina’s statute violated three federal civil rights laws.<sup>326</sup> H.B. 2 spurred national controversy, with companies and celebrities announcing boycotts of the state until legislators repealed the law.<sup>327</sup> A little more than one year after enacting H.B. 2, North Carolina modified the bathroom provisions.<sup>328</sup>

Despite the increasingly hostile debates over transgender bathroom access in legislatures, educators within administrative agencies have been quietly securing necessary accommodations for transgender students, much like teachers in the gay-inclusive curricular context.<sup>329</sup> These educators have been willing to support transgender students in the face of considerable opposition in part because of scientific standards for the care of youth with gender dysphoria.<sup>330</sup> There are likely other

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*Transgender Children Surge*, HUMAN RIGHTS CAMPAIGN (2016), <http://assets.hrc.org/files/assets/resources/HRC-Anti-Trans-Issue-Brief-FINAL-REV2.pdf> [<http://perma.cc/NP6V-D3P9>].

324. Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3 (H.B. 2).

325. Janell Ross, *Houston Decided It Had a Problem: Its LGBT Nondiscrimination Law*, WASH. POST (Nov. 4, 2015), <http://www.washingtonpost.com/news/the-fix/wp/2015/11/04/houston-decided-it-had-a-problem-its-lgbt-nondiscrimination-law> [<http://perma.cc/D5QM-WWMG>].

326. Complaint for Declaratory Relief, *Berger v. U.S. Dep’t of Justice*, No. 5:16-cv-00240-FL, 2016 WL 2642261 ¶¶ 1, 7 (E.D.N.C. May 9, 2016).

327. *NBA Moves North Carolina All-Star Game Over “Bathroom Bill,”* BBC (July 22, 2016), <http://www.bbc.com/news/world-us-canada-36863216> [<http://perma.cc/Y4AW-X76W>]; Matt Miller, *Here’s Every Person and Business Boycotting North Carolina for Its LGBT Discrimination*, ESQUIRE (Apr. 13, 2016), <http://www.esquire.com/news-politics/news/a43931/north-carolina-anti-lgbt-law-boycott> [<http://perma.cc/HJU4-Q5EK>].

328. Restrooms and Toilets—Preemption, 2017 N.C. Sess. Laws 4 (H.B. 142).

329. Brief for School Administrators from California, District of Columbia, Florida, Illinois, Kentucky, Massachusetts, Minnesota, New York, Oregon, Washington, and Wisconsin as Amici Curiae Supporting Plaintiff-Appellant, *G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 2015 WL 6585235 (4th Cir. Oct. 28, 2015) (identifying administrative processes for promoting the rights of transgender students).

330. A 2015 survey found that 4.5 percent of California youth between the ages of twelve and seventeen were gender nonconforming. Press Release, UCLA Center for Health Policy Research, *The Poor and People of Color Benefited Most from Affordable Care Act*, New Data Show (Dec. 14, 2016), <http://healthpolicy.ucla.edu/newsroom/press-releases/pages/details.aspx?NewsID=261> [<http://perma.cc/5WHR-MHLF>].

reasons motivating this support, including the personal relationships they have developed with the students. However, objective scientific evidence helps bolster their arguments and can convince those who are not personally invested in individual pupils. The consensus among medical professionals is that adolescents with gender dysphoria should have their gender identity affirmed, as gender dysphoria at this age typically persists into adulthood.<sup>331</sup> Treatment for these adolescents includes medical interventions, such as hormone suppressants to delay the onset of puberty, as well as social affirmations of gender identity.<sup>332</sup> According to scientific research, it is best when families and communities address adolescents with gender dysphoria according to their gender identity.<sup>333</sup> A logical extension of this research is that teachers' failure to act accordingly could cause their students psychological harm. Scientific consensus makes it clear to educators what course of action is in these adolescents' best interests.

The psychological community is divided, however, as to what constitutes optimal treatment for preadolescent children, as studies have shown that gender dysphoria in childhood often does not persist through adolescence.<sup>334</sup> In longitudinal studies of children treated in clinics for gender dysphoria, only 6–23 percent of preadolescent boys, and 12–27 percent of girls, later identified as transgender adults.<sup>335</sup> Thus, while transgender adolescents and adults have stable and permanent gender identities, the same is not always true of prepubertal children, leading to divisions among psychologists as to whether it is better to affirm these children's asserted gender identity or work to decrease their crossgender identification.<sup>336</sup> There is growing evidence as to the benefits of the affirmative approach, a position that is based on the notion that the benefits of affirming the child's gender identity outweighs the possible distress the child might later face if he or she later transitions back.<sup>337</sup> Practitioners

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331. Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 832, 842 (2015).

332. *Id.* at 842, 846.

333. *Id.*

334. *See id.* at 841–42; Jack Drescher & Jack Pula, *Ethical Issues Raised by the Treatment of Gender-Variant Prepubescent Children*, in LGBT BIOETHICS: VISIBILITY, DISPARITIES, AND DIALOGUE S17 (2014); World Professional Association for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, reprinted in 13 INT'L J. TRANSGENDERISM 165, 172 (2011).

335. Drescher & Pula, *supra* note 334, at S17. Most of the children in these studies whose gender dysphoria desisted later identified as gay or lesbian. *Id.* at S18; WPATH, *supra* note 334, at 172.

336. Drescher & Pula, *supra* note 334, at S17; Am. Psychol. Ass'n, *supra* note 331, at 842; WPATH, *supra* note 334, at 176.

337. Jack L. Turban, *Transgender Youth: The Building Evidence Base for Early Social Transition*, 56 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 101, 102 (2017); Drescher & Pula, *supra* note 334, at S18–S20; WPATH, *supra* note 334, at 176.

who attempt to keep the child in his or her natal gender role, on the other hand, want to forestall the child's later difficulty of a second transition.<sup>338</sup> The most prominent advocate of this latter treatment method, psychologist Kenneth Zucker, who led the Child Youth and Family Gender Identity Clinic in Toronto, was recently dismissed amid allegations that his clinic shamed and traumatized children.<sup>339</sup> Unlike in the gay and lesbian context, scientists have not reached a consensus on prepubescent children with gender dysphoria, although there appears to be a growing commitment to gender identity affirmation.

Scientific views as to best treatment practices for adolescents with gender dysphoria have shaped the administrative responses to transgender student rights, much as they did in the gay rights issues detailed in this Article. In eight states and the District of Columbia, departments of education have promulgated policies to support and protect transgender students.<sup>340</sup> These address a range of issues, including updating school records, using appropriate pronouns, ensuring access to the sex-segregated

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338. Drescher & Pula, *supra* note 334, at S20; WPATH, *supra* note 334, at 176. Other proponents of this approach have identified adult transgender identity as an undesirable outcome due to the social stigma associated with transgender identity and the invasive medical procedures that transgender individuals often undertake. Drescher & Pula, *supra* note 334, at S18; Kenneth J. Zucker et al., *A Developmental, Biosychosocial Model for the Treatment of Children with Gender Identity Disorder*, 59 J. HOMOSEXUALITY 369, 391 (2012).

339. Jesse Singal, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired*, N.Y. MAG. (Feb. 7, 2016), <http://nymag.com/scienceofus/2016/02/fight-over-trans-kids-got-a-researcher-fired.html> [<http://perma.cc/RD3U-5PQP>]. His ouster was linked to efforts to ban conversion therapy, a practice intended to manage, reduce, or eliminate a person's same-sex sexual attractions. *Id.*; see also Jack Drescher, *Controversies in Gender Diagnoses*, 1 LGBT HEALTH 10, 11 (2014). For a more recent example of this controversy, see Dawn Ennis, *Human Rights Campaign Sets Sights on John Hopkins After Controversial Trans Report*, NBC (Sept. 1, 2016), <http://www.nbcnews.com/feature/nbc-out/hrc-sets-sights-johns-hopkins-after-controversial-sexuality-gender-report-n641501> [<http://perma.cc/QD2V-EUC4>]; see also LAWRENCE S. MAYER & PAUL R. MCHUGH, *SEXUALITY AND GENDER: FINDINGS FROM THE BIOLOGICAL, PSYCHOLOGICAL, AND SOCIAL SCIENCES* 105–08 (2016).

340. Those states are California, Colorado, Connecticut, Maryland, Massachusetts, New York, Oregon, and Washington. See Office of Elementary and Secondary Educ. & Office of Safe and Healthy Students, *Examples of Policies and Emerging Practices for Supporting Transgender Students*, U.S. DEP'T OF EDUC. (May 2016), <http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf> [<http://perma.cc/9R-WD-4XCY>]; Note, *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1730 (2014). The California and Connecticut policies were promulgated in response to legislation that protected against discrimination based on gender identity. *Id.*; *California Law Allows Transgender Students to Pick Bathrooms, Sports Teams They Identify With*, CBS NEWS (Aug. 12, 2013), <http://www.cbsnews.com/news/california-law-allows-transgender-students-to-pick-bathrooms-sports-teams-they-identify-with> [<http://perma.cc/FU94-LJZM>]; Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 293 (2013).



activities and facilities that align with the students' gender identity, accommodations to dress codes, respecting transgender students' privacy, and fostering respectful school communities.<sup>341</sup> School districts in another seven states without statewide policies have also adopted similar guidelines, and school sports leagues governing five states have announced that transgender students may play on the sports team of their gender identity.<sup>342</sup> In 2015, the National Education Association—the largest association of professional educators—coauthored a guidebook identifying the ways in which educators may best support transgender students.<sup>343</sup> That guide emphasized that transgender students must be granted access to the restrooms and locker rooms that accorded with their gender identity, and that students who were uncomfortable with using facilities with a transgender student should be given the option of using a private facility, such as the bathroom in the nurse's office.<sup>344</sup> These recommendations ensured that transgender students were not set apart from their peers or marked as different. Of course, not all school personnel have welcomed transgender students or respected their gender identities.<sup>345</sup> The legal landscape is murky at best, as the Department of Education recently rescinded its interpretive guidance,<sup>346</sup> issued in 2015 and reinforced in a 2016 “Dear Colleague” letter, which had maintained schools “must treat transgender students consistent with their gender identity.”<sup>347</sup>

341. Office of Elementary and Secondary Educ. & Office of Safe and Healthy Students, *supra* note 340.

342. *Id.*; Skinner-Thompson & Turner, *supra* note 340, at 289–94; Igor Bobic, *Minnesota Gov. Mark Dayton Unloads on “Hate Mongering” Against Transgender Students*, HUFFINGTON POST (Dec. 6, 2014), [http://www.huffingtonpost.com/2014/12/06/mark-dayton-transgender\\_n\\_6281232.html](http://www.huffingtonpost.com/2014/12/06/mark-dayton-transgender_n_6281232.html) [<http://perma.cc/NJF2-8DJ7>].

343. Asaf Orr & Joel Baum, *Schools in Transition: A Guide for Supporting Transgender Students in K–12 Schools*, NAT'L EDUC. ASS'N 1–3 (2015), <http://www.genderspectrum.org/staging/wp-content/uploads/2015/08/Schools-in-Transition-2015.pdf> [<http://perma.cc/6D7J-6JXX>].

344. *Id.* at 25.

345. *Mathis v. Fountain-Fort Carson School District 8*, Determination, Colorado Division of Civil Rights, No. P20130034X (June 17, 2013), [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf) [<http://perma.cc/52R3-X6TW>]; Mark Walsh, *District Settles Federal Complaint by Transgender Student*, EDUCATION WEEK'S SCHOOL LAW BLOG (July 24, 2013, 6:46 PM), [http://blogs.edweek.org/edweek/school\\_law/2013/07/district\\_settles\\_complaint.html](http://blogs.edweek.org/edweek/school_law/2013/07/district_settles_complaint.html) [<http://perma.cc/8ZBJ-C2AS>]; *Doe v. Regional Sch. Unit 26*, 86 A.3d 600, 602–03 (Me. 2014); *Doe v. Yuntis*, No. 001060A, 2000 WL 33162199, at \*1–2 (Mass. Super. Ct. Oct. 11, 2000).

346. Letter from U.S. Department of Justice & U.S. Department of Education to Colleagues (Feb. 22, 2017), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx> [<http://perma.cc/E5JX-VL2F>].

347. Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, U.S. DEP'T OF EDUC. 25 (Dec. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf> [<http://perma.cc/R9S3-A67B>]; Letter from U.S. Department of Justice to Colleagues 3 (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<http://perma.cc/2BWR-KKHC>].

As a result, administrative agencies and democratically elected school boards sometimes take opposing sides, creating a contest much like the battle over curricula in New York City. In *Grimm v. Gloucester County School Board*, school officials were supportive of the student's transition and ensured teachers and staff would treat the student as a boy.<sup>348</sup> In addition to changing school records to reflect the student's new male name, the guidance counselor contacted teachers to explain that the student should be addressed with his new name and gender pronoun.<sup>349</sup> School officials allowed the student to use the boys' restroom until the school board, responding to community member complaints, adopted a policy restricting the use of school restrooms and locker rooms to students with "the corresponding biological genders."<sup>350</sup> The public hearings on the policy were replete with hostile and vitriolic rhetoric; one speaker called the student "a 'freak' and compared him to a person who thinks he is a 'dog' and wants to urinate on fire hydrants."<sup>351</sup> The Fourth Circuit initially held that the student had a right to use the boys' restroom, giving deference to the Department of Education's interpretation of Title IX,<sup>352</sup> however, after the Department of Education rescinded its interpretive guidance, the U.S. Supreme Court vacated and remanded that decision.<sup>353</sup> The Fourth Circuit recently sent the case back to the district court to determine whether the case had become moot as a result of the student's graduation.<sup>354</sup>

Similar contests are continuing, with schools needing to resolve the competing claims of its transgender students and parents who object to students using the facilities associated with their gender identities. In Manchester, Michigan, the local Board of Education maintained its non-discrimination policy in the face of a standing room-only crowd of angry parents, who had gathered in response to a transgender student using the girls' restroom, citing its legal obligations.<sup>355</sup> The school superintendent told parents that if any children "felt uncomfortable or threatened" by the transgender student, they could use the staff restrooms.<sup>356</sup> This statement indicated that students who did not want to share facilities

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348. *G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 822 F.3d 709, 714–15 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (No. 16–273) (granting *certiorari* to review interpretive guidance and remanding after Department rescinded guidance).

349. *Id.* at 731.

350. *Id.* at 716.

351. *Id.*

352. *Id.* at 723.

353. *Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, 137 S. Ct. 1239 (2017).

354. *Grimm v. Gloucester Cty. Sch. Bd.*, 869 F.3d 286, 290–91 (4th Cir. 2017).

355. Nathaniel Siddall, *Transgender Student's Use of School Restroom Sparks Debate in Manchester*, DAILY TRIB. (Feb. 19, 2015), <http://www.dailytribune.com/article/DT/20150219/NEWS/150219546> [<http://perma.cc/PP7V-635T>].

356. *Id.*

with their transgender peers should be seen as the minority, and that the majority supported transgender bathroom rights. This discursive shift is quite similar to debates over gay-inclusive education materials; when educators introduced comprehensive curricula, religious conservatives responded that these materials should not be in schools. To allay their concerns, school districts did not eliminate the offending lessons, but rather allowed individual students to opt out, turning vocal objectors into silent minorities.<sup>357</sup>

In North Carolina, the University of North Carolina (UNC) resolved the issue much like New Hampshire's social workers—it took advantage of a statutory gap to engage in resistance. UNC is a quasi-agency, in that it is not run directly by the state, yet North Carolina's General Assembly elects the school's board and enacts laws that regulates its activities.<sup>358</sup> UNC's President, Margaret Spellings, explained that the University was required under H.B. 2 to label multiple-occupancy bathrooms with single-sex signage and provide notice of the law to students and employees.<sup>359</sup> However, the law did not require the University to change its nondiscrimination policies. As a result, should any transgender students or employees be forced to use restrooms inconsistent with their gender identity on campus, UNC would investigate those complaints as violations of the school's nondiscrimination policy.<sup>360</sup> In making these announcements, Spellings contested the legislature's action by identifying the interstitial space between the statute and the Uni-

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357. Steven Lee Myers, *Queens School Board Suspended In Fight on Gay-Life Curriculum*, N.Y. TIMES (Dec. 2, 1992), <http://www.nytimes.com/1992/12/02/nyregion/queens-school-board-suspended-in-fight-on-gay-life-curriculum.html> [<http://perma.cc/E9C9-2KJ5>]; Erica Gordon Sorohan, *School Districts Reach Out to Gay and Lesbian Youth*, SCH. BD. NEWS, June 19, 1990, at 12 (on file with the Jessea Greenman/PERSON Project Records at the S.F. Public Library, GLC 104, Box 4, folder labeled "Hate Violence P21").

358. *UNC-Chapel Hill Faculty Handbook*, U.N.C. CHAPEL HILL (2017), [http://facultyhandbook.unc.edu/organization-and-governance/#Board\\_of\\_Governors](http://facultyhandbook.unc.edu/organization-and-governance/#Board_of_Governors) [<http://perma.cc/4Y8K-6NNC>]. For a discussion of other ways in which public universities are like state agencies, see Jennifer R. Scullion, *When Are Universities and Executive Agencies "State Actors" for Antitrust Immunity?*, NAT'L L. REV. (June 24, 2016) (analyzing when universities are subject to antitrust challenges), <http://www.natlawreview.com/article/when-are-universities-and-executive-agencies-state-actors-antitrust-immunity> [<http://perma.cc/FR8V-RFRC>]; and Laura A. Jeltema, *Legislators in the Classroom: Why State Legislators Cannot Decide Higher Education Curricula*, 54 AM. U. L. REV. 215, 220–34 (2004) (discussing the various ways in which public universities are and are not like state agencies).

359. Memorandum from Margaret Spellings, President, University of North Carolina, to U.N.C. Chancellors at 1–2 (Apr. 5, 2016), [http://www.northcarolina.edu/sites/default/files/public\\_facilities\\_guidance\\_memo\\_0.pdf](http://www.northcarolina.edu/sites/default/files/public_facilities_guidance_memo_0.pdf) [<http://perma.cc/9XM2-UXDX>].

360. Brief for U.N.C. in Response to Plaintiffs' Motion for Preliminary Injunction at 6, 15, *Carcaño v. McCrory*, 1:16-cv-00236 (M.D.N.C. June 9, 2016), ECF No. 50; Declaration of President Spellings at 4, *Carcaño v. McCrory*, 1:16-cv-00236 (M.D.N.C. May 27, 2016), ECF No. 38.

versity's policies. Much like social workers in New Hampshire in 1987, the University complied with the minimum requirements of the law, but did not acquiesce in the legislature's aims. Spelling's actions made clear that the legislature had to enact a stronger statute to attain its goals, as administrators would not fill in the gaps with discrimination. The North Carolina legislature ultimately replaced H.B. 2 when it became clear the N.C.A.A. would not hold any tournaments in the state as long as the so-called "bathroom bill" was in place.<sup>361</sup> The new law prevents any state agency, including UNC, from regulating access to multiple-occupancy restrooms, showers, or changing facilities without authorization from the General Assembly.<sup>362</sup>

Although the historical and contemporary accounts parallel one another in many ways, there is an important difference between the two. In the debates over gay rights, the focus was on the effect that gay and lesbian adults might have on children. Under sexual psychopath statutes, gay men were considered physical threats; after the declassification of homosexuality from the DSM, the concern then became the psychological impact of a gay or lesbian role model. In both, children were neutral objects who might improperly be influenced by the adults in their lives. By contrast, transgender children, not adults, are the agents driving the contests over their place in schools. The question might be how adults should respond to the children's behavior, but not whether the gender identity expression is inherent to the child.<sup>363</sup> It is not yet clear if and how this will change advocacy strategies or legal results, but it is a shift worth noting.

Despite this different framework, the problem remains the same. When school boards issue policies and legislatures enact minority rights-restricting laws that teachers defy, this creates a governance dilemma much like the situation in New Hampshire. Like social workers, educators are hired for their special training, education, and skills, and it is their professional judgment that is leading to resistance. The circumstances under which bureaucratic dissent is justified is a normative question that the next Part will take up.

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361. Marc Tracy, *N.C.A.A. Ends Boycott of North Carolina After So-Called Bathroom Bill Is Repealed*, N.Y. TIMES (Apr. 4, 2017), <http://www.nytimes.com/2017/04/04/sports/ncaa-hb2-north-carolina-boycott-bathroom-bill.html> [<http://perma.cc/CHE2-9SUT>]; Mark Abadi, *The NCAA Reportedly Imposed a 48-Hour Ultimatum on North Carolina to Repeal Its "Bathroom Law,"* BUSINESS INSIDER (Mar. 28, 2017), <http://www.businessinsider.com/ncaa-hb2-deadline-north-carolina-bathroom-law-2017-3> [<http://perma.cc/M7LH-ZE3W>].

362. 2017 N.C. Sess. Laws 4 (H.B. 142).

363. Within that debate, the question is whether to prioritize the welfare of transgender or cisgender children. A similar contest is playing out over antibullying policies. Daniel B. Weddle & Kathryn E. New, *What Did Jesus Do?: Answering Religious Conservatives Who Oppose Bullying Prevention Legislation*, 37 NEW ENG. J. CRIM. & CIV. CONFINEMENT 325, 325–27 (2011).

## V. JUSTIFYING RESISTANCE

Psychiatric theories of sexuality have had a profound impact on the law, affecting both what regulations are promulgated and how the law is implemented. Examining law as it has been applied on the ground to protect LGBT rights reveals a process of legal change with significant normative implications, demonstrating the importance of studying law in action. This Part argues that the social workers' and educators' actions were justified by applying Part I's theoretical insights as to separation of powers, rule of law, and democratic legitimacy. From this analysis, it draws broader conclusions about when bureaucratic resistance may be legitimate.

### A. *Separation of Powers*

Even though the social workers and educators in these accounts resisted rights-restricting legislative mandates, they did not violate the separation of powers because they were acting within their delegated authority. This is because they were motivated by their specialized knowledge, rather than political leanings, religious ideology, or personal preferences. Additionally, the resistance was only resistance, not defiance, and thus the bureaucrats did not arrogate the legislature's role.

In New Hampshire, social workers were responding to research studies on the parental effects of homosexuality and the scientific consensus that developed in response. Until the mid-1980s, social workers only placed self-identified homosexual teenagers in the homes of gay and lesbian foster and adoptive parents, as they were afraid that children would learn homosexuality from their adult role models.<sup>364</sup> It was only after researchers established there was no connection between parental homosexuality and children's future sexual orientation that social workers expanded placements in gay and lesbian homes to include heterosexual and young children.<sup>365</sup> Scientific evidence may have coincided with social workers' political views, although liberal politics in the mid-1980s were not committed to gay and lesbian rights in the way they are today.<sup>366</sup> As a result, although social workers tend to identify with the political left, this does not mean they necessarily supported gay and lesbian rights.<sup>367</sup> When explaining their opposition to a ban on gay and

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364. George, *supra* note 209, at 375.

365. *Id.* at 378; George, *supra* note 180, at 510–15. These decisions were thus very different than the ones Wendy Wagner documented at the EPA, where bureaucrats deployed science as a guise for policymaking. As this Article demonstrates, not all uses of science in the administrative state are necessarily charades. Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1640 (1995).

366. George, *supra* note 209, at 387–88.

367. See REESER & EPSTEIN, *supra* note 249, at 62; Rosenwald & Hyde, *supra* note 249, at 15.

lesbian foster and adoptive parenting, social workers cited studies and the state of scientific knowledge, not personal preferences or politics.<sup>368</sup>

In some situations, expertise was only one of several motivating factors, but this does not necessarily render their resistance illegitimate. In North Carolina, UNC's resistance to H.B. 2 was likely motivated by student protests and a desire to avoid legal liability, rather than scientific consensus as to what was best for transgender individuals. The UNC president initially reported that the school would comply with H.B. 2, but changed her response after the federal government and the ACLU filed lawsuits against UNC.<sup>369</sup> Given that other educators around the country are resisting laws and policies on the basis of expert medical views, which maintain that transgender adults and adolescents should live in accordance with their gender identity, UNC's justification could be valid if it was at least one of Spellings's motivations and not a post-hoc rationalization.<sup>370</sup>

As a corollary to the question of motivation, the scientific evidence at issue fell within the scope of the bureaucrats' expertise, reinforcing the principle that the actions were within the bureaucrats' delegated authority. Social workers and educators are expected to be aware of the latest research on child welfare, and thus it seems appropriate for them to respond to this evidence. This is not to say that bureaucrats need to review the studies or analyze their methodology. Many learn of developments by discussing them with their colleagues, attending workshops, participating in trainings, and reading books and articles.<sup>371</sup> The bureaucratic resistance in these examples was based on expertise within the knowledge base the professional groups could be expected to have, which diminishes the separation of powers concerns.

In addition to the substantive question of expertise, these actions were justified because bureaucrats limited their dissent to resistance, rather than defiance. Resistance in the administrative context can take a range of forms, falling on a spectrum from calculated noncompliance to covert expressions of disagreement.<sup>372</sup> Bureaucrats are able to

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368. George, *supra* note 209, at 390–91, 404.

369. *Spellings on HB2: UNC System Is "Caught in the Middle,"* ABC EYEWITNESS NEWS (May 9, 2016), <http://abc11.com/politics/spellings-on-hb2-unc-system-is-caught-in-the-middle/1330996> [<http://perma.cc/K448-M7H8>]; Jane Stancill, *Groups Criticize UNC System for Following House Bill 2*, CHARLOTTE OBSERVER (Apr. 7, 2016), <http://www.charlotteobserver.com/news/local/education/article70558347.html> [<http://perma.cc/TC2Y-GRP3>]. That litigation relies substantially on the medical harms transgender individuals will suffer because of the law. *See generally* Complaint, *Carcaño v. McCrory*, No. 1:16-cv-236 (M.D.N.C. Mar. 28, 2016), ECF No. 1.

370. Under *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), courts review agency actions under the rationales the agencies articulate at the time.

371. Jeanne C. Marsh, *Using Knowledge About Knowledge Utilization*, 47 Soc. WORK 101, 101 (2002).

372. Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist*



express their dissent in all areas in which they exercise discretion, which includes a wide variety of activities—from allocating resources to prioritizing tasks and interpreting statutory obligations.<sup>373</sup> For example, Joseph Landau has identified the ways in which immigration officials undermined the Defense of Marriage Act (DOMA), which limited marriage for federal purposes to opposite sex couples, through exercises of discretion.<sup>374</sup> Because of DOMA, many gay and lesbian foreign nationals in relationships with U.S. citizens and permanent residents could not obtain family-based immigration status.<sup>375</sup> To remedy the harm the statute imposed on these couples, immigration officers moved to administratively close pending cases or granted deferred action status to prevent citizens and permanent residents from being separated from their loved ones.<sup>376</sup> Resistance in this example came in the form of discretion.

It is clear that, although bureaucrats have a great deal of autonomy, they cannot simply defy unambiguous laws, but rather must find a means for expressing resistance that does not elide the separation between the branches of government. In New Hampshire, bureaucrats exploited a statutory gap; the president of UNC has done the same. By following the strict letter of the law, the University is expressing its dissent and challenging the legislature's claim that its goals are to promote the privacy and security of all citizens, rather than to discriminate against transgender individuals. These bureaucrats' actions are defensible, based on reasonable statutory interpretation. However, were legislatures to respond by enacting laws that remove the ambiguities, bureaucrats would then have to comply with the statutes. Resistance does not mean ignoring the rule of law.

## B. *Rule of Law*

Respecting the rule of law means more than maintaining the role of the legislature—it also requires providing notice as to the law and coherence in its administration. The bureaucrats in this Article seem to have violated this principle in notable ways, as their practices introduced inconsistency and instability into the law by diverging from how the legislatures interpreted the law. However, their transparency may have remedied this harm. Additionally, by operating according to a national

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*the Law*, 40 FLA. ST. U. L. REV. 601, 603 (2013); see also Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POL. 129 (2013) (identifying various forms of disclosure, including ones aimed at inspiring litigation to challenge agency rules, as channels of bureaucratic dissent).

373. Shinar, *supra* note 372, at 643, 645.

374. Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1202–04 (2016); Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 636–43 (2012).

375. Landau, *supra* note 374, at 1199.

376. *Id.* at 1202–04.

scientific consensus, their actions may have introduced greater coherence into local administrative practices. Ultimately, it is possible that bureaucratic resistance did more to promote the rule of law than to undermine it.

In each instance of resistance in this Article, bureaucrats were candid about their interpretations, such that elected officials could respond. In New Hampshire, the agency head gave a press conference delineating how social workers would enforce the statute.<sup>377</sup> Likewise, in the transgender student context, educators have made public statements about their understanding of laws and policies.<sup>378</sup> Surprisingly, legislatures did not shut down the resistance, which were rooted in latent ambiguities, but rather allowed it to continue. Gillian Metzger has identified the benefits and pitfalls of requiring transparency for administrative constitutionalism, noting that “[a]dministrative constitutionalism may well flourish best in the shade.”<sup>379</sup> Although this may be true, this Article shows that open resistance can endure.

Transparency seems essential to the legitimacy of expertise-based resistance, as compared to administrative constitutionalism, because the legislature has only authorized bureaucrats to act under specific circumstances, and has the right to limit those bureaucrats’ exercise of discretion.<sup>380</sup> Professional expertise, unlike the Constitution, is not the highest authority under which government officials function, and thus it is all the more necessary for bureaucrats resisting based on their expertise to be transparent in their actions. Given the middle ground that bureaucratic expertise occupies, it is all the more imperative for administrators to be transparent about their actions. Like judicial resistance norms, bureaucratic resistance based on expertise should not make it impossible for legislatures to achieve their ends unless the Constitution prohibits the statutory scheme. Transparency also allows individuals to file suit to vindicate any rights that bureaucratic resistance may violate, thereby safeguarding rule of law principles.<sup>381</sup>

In addition to providing notice as to how administrators were going to be applying the law, and implementing policies in a consistent way, the bureaucrats in this Article promoted the rule of law by making the legal system more coherent. Bureaucrats at the local level are dispersed and enjoy a particular amount of discretion that national scientific consensus helped unify. New Hampshire’s social workers based their resistance on

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377. See Part III.B, *supra*.

378. See Part IV, *supra*.

379. Metzger, *supra* note 6, at 1931.

380. In some situations, not following scientific consensus could create tort liability concerns. Government employees do not stop being members of their professions, and in fact continue to be held to the standards of their profession during their employment. Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. 671 (2017).

381. Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 735 (2011) (emphasizing the need for judicial review of “agencies’ principled use of science”).

psychiatric consensus, reflected in the position papers of the American Psychiatric Association, the American Psychological Association, and the code of ethics of the National Association of Social Workers. Having bureaucrats follow the same professional standards and expectations limits how they will exercise their discretion, ensuring uniformity in their execution of laws.

Not all expertise-based resistance provides administrative coherence, as it requires scientific consensus to be well articulated and stable. Scientific theories emerge, develop, and are then debated, contested, and reformulated. It typically takes decades of research and discussion for scientific consensus to form, based on shared reasoning, standards, and notions of validity.<sup>382</sup> Dissenting opinions may gain traction and become accepted principles, or disputes might continue to divide the scientific community.<sup>383</sup> New studies may lead researchers to revise their theories, leading to changing perspectives on established views. Indeed, gay rights advocacy became possible because scientists revisited their outlook as to the nature and origins of homosexuality. Legal progress is often possible because of the scientific developments, but the fact that scientific “truth” changes and evolves raises the question of when a theory has become a stable and certain fact. Science now supports the principle that differences in sex, race, and sexual orientation do not denote inferiority, but the same field once steadfastly maintained the opposite. That there are individual dissenters, or even vocal groups of outliers, does not mean scientific orthodoxy is invalid, but these are important issues to consider.<sup>384</sup>

Teachers who resist policies that restrict bathroom access for transgender adolescents are on solid scientific ground, but the question becomes more difficult in situations involving preadolescent children. There, the scientific community has not come to a consensus, although individuals’ doctors may make treatment recommendations that encourage bureaucratic resistance. In those cases, it seems that educators are motivated by a mixture of scientific principles and constitutional arguments, in that they are protecting what they identify as the constitutional rights of their students. This combines two models of agency resistance, expertise and administrative constitutionalism, which may provide a different justification for bureaucratic resistance. What this example demonstrates is that not all science-based resistance is necessarily justified, as expertise cannot become so expansive as to encompass any type of bureaucratic knowledge, lest it open the door to self-serving, power-preserving retrenchment and dissent.<sup>385</sup>

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382. See Haupt, *supra* note 380, at 680.

383. *Id.*

384. *Id.* at 691.

385. For a discussion of bureaucratic retrenchment, see JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 68 (1983).

### C. *Democratic Legitimacy*

In addition to supporting the rule of law and maintaining separation of powers, this Article's examples of bureaucratic resistance furthered democratic legitimacy by promoting the rights of gays, lesbians, and transgender individuals. Bureaucrats' transparency proved integral to this rights project because of the expressive element of their actions. Laws not only authorize, proscribe, and regulate conduct, but also contain normative messages that shape society.<sup>386</sup> As a result, the law "matters for what it says in addition to what it does."<sup>387</sup> The effect of New Hampshire's prohibition on gay and lesbian foster and adoptive parenting reached further than the families the law targeted; it sent a message that homosexuals were excluded from the polity that extended far beyond the state's borders. It was only by being open about their resistance that social workers could counter their elected representatives' normative claims about gays and lesbians. Likewise, although educators could subtly undermine antitransgender policies, their open resistance serves a valuable expressive function. In this way, resistance can both benefit individuals whose rights are vindicated and provide an expressive effect that reaches much further.

By being transparent, bureaucrats both legitimated their dissent and infused it with expressive value that helped change normative commitments in favor of minority rights.<sup>388</sup> The majority of Americans eventually agreed with New Hampshire's social workers that gays and lesbians were fit parents, which ultimately supported marriage equality and other gay rights claims.<sup>389</sup> Bureaucratic resistance promoted democratic legitimacy by introducing new and otherwise unrepresented viewpoints into the law.

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The conflict between legislatures and bureaucrats is likely inevitable, but the legitimacy and desirability of resistance is not. Bureaucrats should not be permitted to usurp the legislature's authority, undermine the democratic process, or destabilize the rule of law. Although the

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386. See generally RICHARD H. McADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 166 (2015); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996).

387. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 373 (2000).

388. Stack, *supra* note 62, at 1988.

389. See Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 877–79 (2014) (identifying one of the major reasons for overturning same-sex marriage bans as their harm to the children of gays and lesbians). Adoptive parenthood itself played a significant role in promoting marriage equality. Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 311 (2015) (describing adoption as the "stealth path to marriage equality").

expertise in this Article promoted the rights of a minority group, new developments are not always rights-enabling.

The examples of resistance in this Article help identify when bureaucratic dissent is legitimate, although they cannot provide a comprehensive test from which to judge whether bureaucratic resistance is appropriate. They demonstrate that resistance can be legally justified when it is: 1) within the scope of the bureaucrats' experience; 2) limited to resistance and not defiance; 3) transparent; 4) based on stable, national scientific consensus; and 5) undertaken to promote the rights of minorities. This is not to say that resistance is necessarily justified when all five factors are present, only that they enable bureaucratic resistance to be both legal and desirable.

### CONCLUSION

Bureaucrats came to identify gays and lesbians in a new way over the course of the twentieth century due to shifting scientific theories of homosexuality. As psychiatric understandings of same-sex sexual attraction changed, administrative agents went from being significant sources of oppression to allies who supported gay and lesbian parenting and households headed by same-sex couples. These changes in scientific views as to the causes and consequences of homosexuality had a profound impact on how bureaucrats implemented regulations, influencing the decisions of social workers and educators. Teachers today may increasingly find themselves in similar positions as their historical counterparts, particularly as a growing number of legislatures consider laws limiting bathroom access according to sex assigned at birth.

These changes outside the law had a significant impact on how bureaucrats approached their legal obligations, revealing a mechanism of law reform that occurs outside of courts and legislatures. This Article's conceptualization of administrative actors reframes traditional conceptions of the executive, which does not just implement law, but also introduces legal change. As such, questions of governance are as important for scholars of LGBT rights as they are for administrative law theorists.

Complicated questions arise when bureaucrats' expertise conflicts with legislative preferences. While bureaucratic resistance implicates separation of powers and democratic legitimacy concerns, these civil servants are hired to use their professional judgment, and thus conflict between their expertise and their legislative mandates are inevitable. Under certain circumstances, bureaucrats may be justified in resisting legislative enactments that contradict their professional judgment, and bureaucratic resistance may even be desirable, since it creates room for minority viewpoints that might otherwise not be heard.

The popular image of bureaucracy is a place where innovation takes a number, only to languish in the waiting room. The account this Article presents, however, identifies the administrative state as a dynamic locus of contestation and change. Bureaucracy is more than the means by which law is implemented, as, in fact, administrators can lead legal transformations.