LGBT ELDER LAW: TOWARD EQUITY IN AGING

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On June 16, 2008, Del Martin and Phyllis Lyon, longtime lesbian activists who were both well into their eighties, became the first same-sex couple to marry legally in California.[1] Widely covered in the press, their wedding ceremony was presided over by San Francisco Mayor Gavin Newsom, as a jubilant crowd of supporters and a scattering of protestors waited outside City Hall.[2] The elderly couple had been together for fifty-five years.[3] They started the first lesbian organization in the 1950s and authored the groundbreaking book, *Lesbian/Woman* in 1972—when homosexuality was still classified as a mental illness by the American Psychiatric Association ("APA").[4] The couple's long-standing commitment to the movement for LGBT equality, and to each other, made them the obvious choice for this historic first.[5] Martin died a little over two months later at the age of eighty-seven.[6]

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[1] *See In re* Marriage Cases, 183 P.3d 384, 452 (Cal. 2008) (holding an individual's homosexual orientation is not a sufficient basis for withholding or restricting fundamental right to marry guaranteed under California Constitution); Jesse McKinley, *A Landmark Day in California as Same-Sex Marriages Begin to Take Hold*, N.Y. TIMES, June 17, 2008, at A19; *see also* William Grimes, *Del Martin, Lesbian Activist, Dies at 87*, N.Y. TIMES, Aug. 27, 2008, at C10 (noting that "Ms. Martin and Ms. Lyon may have been the oldest, and were certainly first and the most celebrated"). In November 2008, voters approved Proposition 8, a ballot proposition that amended the California state constitution to restrict marriage to a union between a man and a woman. Debra Brown, California Secretary of State, Election Night Results, State Ballot Measures, Statewide Results, http://vote.sos.ca.gov/Returns/props/59.htm (last visited Nov. 20, 2008). On November 19, 2008, the California State Supreme Court agreed to hear a legal challenge to Proposition 8 on the grounds that it violates the state constitution. Strauss v. Horton, No. S168047 (Cal. filed Nov. 19, 2008); *see also* News Release, Judicial Council of California, California Supreme Court Takes Action on Proposition 8 (Nov. 19, 2008), *available at* http://www.courtinfo.ca.gov/presscenter/newsreleases/NR66-08.PDF.

[2] *See* McKinley, *supra* note 1, at A19 (noting "[o]utside City Hall, several hundred supporters and protesters chanted, cheered and jeered in equal measure, giving an unruly carnival feel to the scene, complete with a marching band playing wedding songs and signs reading 'Homo Sex is Sin'").

[3] Grimes, *supra* note 1, at C10.

[4] *Id.* The APA declassified homosexuality as a mental illness in 1973. *See generally* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1987) (describing history of controversy relating to declassification of homosexuality and its deletion from the *Diagnostic and Statistical Manual III*).

[5] It was actually the couple's second attempt at legal marriage. Grimes, *supra* note 1, at C10. Martin and Lyon were married in 2004 in San Francisco when the Mayor of San Francisco ordered the City Clerk to start issuing marriage certificates to same-sex couples. The Mayor issued the order in February 2004 in advance of the implementation of the *Goodridge* decision of the Massachusetts Supreme Judicial Court. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates the Massachusetts Constitution); *see also* Dean E. Murphy, *Bid to Stop San Francisco From Letting Gays Marry*, N.Y. TIMES, Feb. 14, 2004, at A10. By the time the California courts enjoined the practice one month later, 4,037 same-sex couples from forty-six states had married. Dean E. Murphy, *San Francisco Married 4,037 Same-Sex Pairs from 46 States*, N.Y. TIMES, Mar. 18, 2004, at A2. The Supreme Court of California later declared the marriages invalid. Lockyer v. City & County of San Francisco, 95 P.3d 459, 463 (Cal. 2004).

[6] Grimes, *supra* note 1, at C10.

In many ways, Del Martin and Phyllis Lyon have come to represent the public face of the LGBT members of the Greatest Generation.[7] They belong to the generation who served their country during World War II, weathered the storms of the McCarthy Era, witnessed the birth of Gay Liberation, and lived long enough to see the fall of repressive sodomy laws and the legal recognition of same-sex relationships.[8] Although this is an inspiring narrative, its happy ending is far removed from the reality experienced by a significant number of our LGBT elders.[9]

Based on the limited research available and considerable anecdotal evidence, the lives of many LGBT elders are solitary and closeted, plagued by fear of disclosure and financial insecurity.[10] LGBT elders face the daily challenges of aging isolated from family, detached from the larger LGBT

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[7] William Strauss and Neil Howe authored a definitive text on American Generations. WILLIAM STRAUSS & NEIL HOWE, GENERATIONS: THE HISTORY OF AMERICA'S FUTURE, 1584–2069 (1991). They refer to the generations who fought in World War II (and I) as the "G.I. Generation." *Id.* at 261. According to Strauss and Howe, this generation was born from 1901 through 1924. *Id.* The term "Greatest Generation" was popularized with the commercial success of Tom Brokaw's book of the same name. TOM BROKAW, THE GREATEST GENERATION (1998).

[8] *See* Jesse Harlan Alderman, *Gray Gay Housing Becomes Smart Business*, COLUMBIA NEWS SERVICE, Mar. 1, 2005, http://jscms.jrn.columbia.edu/cns/2005-03-01/alderman-greygays. Alderman quotes a LGBT elder housing advocate, David Aronstein:

> If you think of a [seventy-year-old] lesbian, she would have been in her late teens in the McCarthy era . . . She was forming her own identity in a time of witch hunts and fear. This can make older people more distrustful of medical personnel and other outsiders.

Id.; Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating Texas homosexual sodomy law); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates the Massachusetts Constitution).

[9] This article considers LGBT elders to be those individuals born between the years of 1914 and 1944. *See infra* text accompanying notes 108–15.

[10] Several recent policy papers have addressed the absence of comprehensive research on LGBT elders. *See, e.g.*, LISA BENNETT & GARY J. GATES, HUMAN RIGHTS CAMPAIGN FOUND., THE COST OF MARRIAGE INEQUALITY TO LESBIAN, GAY AND BISEXUAL SENIORS (Jan. 29, 2004), *available at* http://www.hrc.org/documents/cost_of_marriage.pdf; SEAN CAHILL, KEN SOUTH & JANE SPADE, POLICY INST. OF THE NAT'L GAY & LESBIAN TASK FORCE FOUND., OUTING AGE: PUBLIC POLICY ISSUES AFFECTING GAY, LESBIAN, BISEXUAL, AND TRANSGENDER ELDERS (Nov. 9, 2000), *available at* http://www.thetaskforce.org/reports_and_research/outing_age; FUNDERS FOR LESBIAN & GAY ISSUES, AGING IN EQUITY: LGBT ELDERS IN AMERICA (2004), *available at* http://www.workinggroup.org/files/AgingInEquity.pdf; NAT'L GAY & LESBIAN TASK FORCE, MAKE ROOM FOR ALL: DIVERSITY, CULTURAL COMPETENCY & DISCRIMINATION IN AN AGING AMERICA (May 18, 2006), *available at* http://www.thetaskforce.org/reports_and_research/make_room_for_all. MAKE ROOM FOR ALL concludes that "[t]he challenges facing the elder LGBT community include isolation; poverty; ageism; racism; gender discrimination; lack of traditional family support; lack of recognition of same-sex families — including non-traditional 'constructed families' of choice; and inadequate access to healthcare, affordable housing, and caregiving services." *Id.* at 6.

For two compilations of recent research on LGBT elders see GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS (Gilbert Herdt & Brian de Vries eds., 2004) and LESBIAN, GAY, BISEXUAL, TRANSGENDER AGING: RESEARCH AND CLINICAL PERSPECTIVES (Douglas Kimmel, Tara Rose & Steven David eds., 2006).

community, and ignored by mainstream aging initiatives.[11] They encounter hostility and prejudice on the part of health care providers and feel silenced in institutional settings, such as assisted living facilities and nursing homes.[12]

At a time when LGBT individuals enjoy an unprecedented degree of social acceptance and legal protection, our LGBT elders are aging — and dying — alone and invisible, and are often denied the basic dignity of being able to share their memories of a life well lived without fear of rejection and reprisal.[13] The corrosive legacy of the pre-Stonewall views of homosexuality makes many LGBT elders reluctant to declare themselves and demand equal treatment from policy makers and health care providers.[14] Moreover, ageism within the LGBT community and homophobia within the mainstream senior community combine to alienate LGBT elders from these two natural constituencies.[15] This leaves LGBT elders especially vulnerable. They are unable to speak for themselves, and others are unwilling to speak for them.

This Article argues for broad-based reform to ensure equity in aging regardless of sexual orientation or gender identity. It also maintains that the current state of our LGBT elders illustrates the need for a more holistic approach to questions of LGBT identity and its concomitant demands for equality. LGBT elders have not been well represented by the existing ethnic model of LGBT identity nor have their concerns been at the forefront of calls for change.[16] This contemporary LGBT identity model has been instru-

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[11] *See, e.g.*, Jonathan Starkey, *Out of Isolation: Advocacy Group Assists Long Island Gays and Lesbians Who Grew Up in Less Accepting Times*, NEWSDAY, Feb. 1, 2008, at B06 (reporting "older gays live with fear, isolation, and feelings of inequality and discrimination").

[12] *See* Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders ("SAGE"), Post-Event Summary Report Prepared for the White House Conference on Aging 3 (Sept. 30, 2005), *available at* http://www.whcoa.gov/about/des_events_reports/PER_NY_09_28_05.pdf.

[13] As Jane Gross explains:

> The most common reaction, in a generation accustomed to being in the closet, is a retreat back to the invisibility that was necessary for most of their lives, when homosexuality was considered both a crime and a mental illness. A partner is identified as a brother. No pictures or gay-themed books are left around.

Jane Gross, *Aging and Gay, and Facing Prejudice in Twilight*, N.Y. TIMES, Oct. 9, 2007, at A1.

[14] As John Genke, a social worker for SAGE, an advocacy organization for LGBT seniors, explained, "Many of these people grew up before Stonewall, when gay people were harassed and prosecuted as criminals. Even though it's better now, that atmosphere still lingers." *Isolation an Age-old Issue for Gay Seniors*, DAILY NEWS, May 12, 2008, at 29. The Stonewall riots of 1969 are widely cited as the beginning of the contemporary gay rights movement. *See* ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 30 (1996). For a discussion of the characteristics of the pre-Stonewall generation see *infra* notes 102–37 and accompanying text.

[15] *See infra* notes 163–68.

[16] *See* JAGOSE, *supra* note 14, at 61 (explaining "ethnic model" of sexual orientation). The National Gay and Lesbian Task Force notes that "LGBT aging issues are not included in the work of most local, regional, or national LGBT organizations." NAT'L GAY

mental in the progressive political and legal strategy to advance the rights of LGBT individuals and normalize homosexuality and gender variance.[17] Accordingly, it emphasizes the positive and heteronormative aspects of LGBT lives and seldom spotlights the arguably negative or contradictory facets, such as internalized homophobia, ageism, domestic violence, relationship dissolution, disability, or addiction and substance abuse.[18] Nor does it highlight intersecting identities such as race, class, disability, or age.[19]

This overwhelmingly positive and traditional emphasis is reflected in the three signature issues of the contemporary movement for LGBT equality, each of which depicts LGBT individuals as *the same as* non-LGBT individuals: same-sex marriage,[20] workplace anti-discrimination protections,[21] and

& LESBIAN TASK FORCE, *supra* note 10, at 5. It continues that "LGBT elders are isolated, invisible, or marginalized within many of their LGBT communities." *Id.*

[17] This strategy rests on a two-part claim of identity and equivalence and is firmly locked in a heteronormative frame. *See* Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative,* 12 L. & SEXUALITY 1, 64–66 (2003) (explaining "arguments of equivalence"). It first establishes that LGBT individuals constitute a valid minority by asserting a common immutable LGBT identity. *Id.* at 64–65. It then argues that the LGBT minority is entitled to equal rights and should be granted the same level of protection afforded to other minority groups because they are *the same as* non-LGBT individuals. *Id.* at 65–66.

[18] *See, e.g.*, Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere and Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 325–26 (1999) (discussing reluctance to study negative aspects of same-sex relationships).

[19] For an extended discussion of the "multidimensionality" of identity and a critique of contemporary LGBT identity from the perspective of race, see E. Nathaniel Gates, *Estranged Fruit: The Reconstruction Amendments, Moral Slavery, and the Rearticulation of Lesbian and Gay Identity*, 18 CARDOZO L. REV. 845, 865 (1996). *See also* Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 141–43, 230–33 (1998) (discussing multivalent nature of identity from perspective of queer theory).

[20] The push for same-sex marriage is largely a state issue, but the Federal Defense of Marriage Act ("DOMA") has established a federal definition of marriage. DOMA was enacted in 1996 in response to the Hawaii Supreme Court decision in *Baehr v. Lewin.* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). DOMA adds a definition of "marriage" and "spouse" to Title 1 of the United States Code, also known as the Dictionary Act. 1 U.S.C. § 7 (2006); Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). It provides that for all federal purposes, marriage must be between "one man and one woman as husband and wife." 1 U.S.C. § 7 (2006). On the state level, currently two states (Connecticut and Massachusetts) allow same-sex marriage. Kerrigan v. Comm'r of Pub. Health, 957 A. 2d 407, 411–12 (Conn. 2008) (holding state statutory prohibition against same-sex marriage violated substantive due process and equal protection rights guaranteed under the state constitution); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding limiting access to protections and benefits of civil marriage violates the Massachusetts Constitution). The status of same-sex marriage in California is uncertain in light of the success of Proposition 8, which amended the state constitution to ban same-sex marriage, and the pending court case challenging the constitutionality of Proposition 8. *See supra* note 1 (discussing Proposition 8 and same-sex marriage in California).

[21] The Federal Employment Non-Discrimination Act ("ENDA") would prohibit discrimination in employment based on sexual orientation. Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. § 4 (2007); H.R. 3685, 110th Cong. § 4 (2007). *See also* David Herszenhorn, *House Backs Broad Protections for Gay Workers*, N.Y. TIMES, Nov. 8, 2007, at A1. The bill with language covering sexual orientation was passed by the House in November 2007. *Id.*

the military's "Don't Ask, Don't Tell" policy.[22] In other words, LGBT people marry and have children, hold jobs, and desire to serve in the military — just like everyone else.[23] Unfortunately, the needs and desires of pre-Stonewall elders are not reflected in this heteronormative, white, middle class, thirty-something version of the American Dream. Their concerns require a more nuanced theory of LGBT identity — one that extends over an individual's lifespan, incorporates pre-Stonewall LGBT history, and confronts difficult issues head on, including ageism and internalized homophobia. Such a theory would embrace not only the sameness of LGBT individuals, but also their differences.

The case of LGBT elders clearly shows that, in some respects, LGBT individuals are actually very different from their non-LGBT counterparts, as well as from each other.[24] For example, LGBT elders frequently rely on single generational "chosen families" to provide auxiliary support and care.[25] Proposals for LGBT equity in aging must consider the legal fragility of these "chosen families" and the fact that existing aging policies assume an individual has a multi-generational family of origin ready and able to provide support.[26] The recognition of same-sex relationships, while impor-

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[22] For a general discussion of the military policy on homosexuality see JANET HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 125 (1999). On one hand, the policy represented a positive change for gay and lesbian service members because the Department of Defense regulation provides that "sexual orientation is a considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct." Enlisted Administrative Separations, Dep't of Def. Instruction No. 1332.14 (Aug. 28, 2008), *available at* http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf. However, there is an important limitation. Any open avowal of homosexuality, including the simple statement "I'm gay," is sufficient to warrant separation from the service because it constitutes a prohibited act of homosexuality. 10 U.S.C. § 654(b)(2) (2006).

[23] Each of these three claims asserts that LGBT individuals are *the same as* non-LGBT individuals and, therefore, should be treated in an equivalent manner.

[24] *See* Brett Beemyn & Mickey Eliason, *Queer Theory in Practice, in* QUEER STUDIES: A LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ANTHOLOGY 165 (Brett Beemyn & Mickey Eliason, eds., 1996) (discussing potential within queer theory to acknowledge differences related to intersecting identities, such as race, gender, class, and ethnicity). Beemyn and Eliason describe queer theory's "*potential* to be inclusive of race, gender, sexuality, and other areas of identity by calling attention to the distinctions between identities, communities, and cultures, rather than ignoring these differences or pretending that they don't exist, as it often does now." *Id.*

[25] *See* Arnold H. Grossman, Anthony R. D'Augelli, & Scott L. Herschberger, *Social Support Networks of Lesbian, Gay, and Bisexual Adults 60 Years of Age and Older*, 55 J. GERONTOLOGY: PSYCHOL. SCI. 171–79 (2000) (arguing that elderly gay men and lesbians surveyed received more social support from friends, whereas heterosexual elderly individuals received more social support from family); Gilbert Herdt, Jeff Beeler, & Todd W. Rawls, *Life Course Diversity Among Older Lesbians and Gay Men: A Study in Chicago*, 2 J. GAY, LESBIAN & BISEXUAL IDENTITY 231, 240 (1997). For a general discussion of the importance of "chosen family" (i.e., non-biological kin) in the lives of LGBT individuals see KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 103–17 (1997). For a discussion of the importance of "chosen family" in the lives of LGBT elders see *infra* text accompanying notes 67–79.

[26] *See* FUNDERS FOR LESBIAN AND GAY ISSUES, *supra* note 10, at 7.

tant to LGBT elders, would not be sufficient to address this concern because they are, indeed, not the same as their non-LGBT peers.

Moreover, the experience of our LGBT elders demonstrates that there is no monolithic LGBT identity. The current ethnic model of LGBT identity has a strong essentializing tendency that presumes a sameness amongst LGBT individuals.[27] Queer theory, critical race theory, and feminist theory have all produced sustained critiques of this tendency and the resulting construction of a minority group comprised of stable LGBT subjects who, by default, are coded white, heteronormative, middle class, and largely male.[28] These now familiar critiques argue that the ethnic model foregrounds LGBT identity to such an extent that it elides other intersecting identities, such as race, gender, and class.[29] The study of LGBT elders adds another dimension to this critique because the essentializing impulse of the ethnic model also obscures an important generational element.[30] The pre-Stonewall generation is not the same as their "out and proud" post-Stonewall progeny. Their identities were formed at different times and under dramatically different circumstances. Thus, LGBT identity as it is lived and experienced is not only multivalent, it is also historically contingent.

Part I of this Article provides an introduction to the current generation of LGBT elders based on existing demographic data and a historical overview of pre-Stonewall views regarding homosexuality. Part II explains how the powerful combination of ageism and homophobia has rendered LGBT lives unthinkable in the popular imagination and divorced LGBT elders from their two natural allies: the LGBT community and the senior community.

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[27] For a discussion of the essentializing tendencies of the contemporary construction of LGBT identity and the queer theory critique, see Nancy J. Knauer, *"Simply So Different": The Uniquely Expressive Character of the Openly Gay Individual After* Boy Scouts of America v. Dale, 89 KY. L.J. 997, 1038–40 (2001).

[28] Queer theory posits the contingent nature of identity and offers the inclusive term "queer" as an alternative to other non-normative identity formations. Its unique positionality presents the opportunity to express race, gender, and class differences in a way that does not rest on unmarked assumptions of whiteness and masculinity. *See* Elizabeth Weed, *Introduction* to FEMINISM MEETS QUEER THEORY vii, x (Elizabeth Weed & Naomi Schor eds., 1997). Despite this potential, many agree that, as presently enacted, queer theory has yet to live up to its potential. *See* Evelynn Hammonds, *Black (W)holes and the Geometry of Black Female Sexuality, in* FEMINISM MEETS QUEER THEORY 136, 152 (urging queer theory to develop a "politics of articulation" with respect to difference rather than replicating the "politics of silence" practiced by some feminist and gay and lesbian activists); *see also* Gates, *supra* note 19, at 865 (describing "identity formation" as "an ongoing and multivalent process"); Darren Lenard Hutchinson, *Out and Unseen: A Racial Critique of Gay and Lesbian Legal Discourse*, 29 CONN. L. REV. 561, 583–635 (1997) (discussing essentialism in gay and lesbian legal theory from the perspectives of critical race theory and feminism).

[29] Gloria Anzaldúa explains, "Identity is not a bunch of little cubbyholes stuffed respectively with intellect, race, sex, class, vocation, and gender. Identity flows between, over, aspects of a person. Identity is a river—a process." Ruth Goldman, *Who is That Queer Queer? Exploring Norms Around Sexuality, Race, and Class in Queer Theory, in* QUEER STUDIES, *supra* note 24, at 173 (quoting Anzaldúa).

[30] *See* Knauer, *"Simply So Different", supra* note 27, at 1038–40 (discussing essentializing tendency).

Part III examines the three signature issues of the LGBT equality movement (same-sex marriage, ENDA, and Don't Ask, Don't Tell) from the perspective of LGBT elders. Part III then compares these issues to three distinct areas of concern for LGBT elders: the legal fragility of chosen family, financial insecurity, and the availability of LGBT-positive housing and eldercare. A brief conclusion reiterates that achieving equity in aging for LGBT elders requires a more holistic approach to both LGBT identity *and* advocacy.

I. LGBT ELDERS

There are an estimated three million LGBT individuals who are age sixty-five or older.[31] This number will increase significantly over the next decades with the advent of what has been referred to as the "Graying of America."[32] As the Baby Boomers age, a full twenty percent of the population will be sixty-five years of age or older by 2030.[33] By that time, the number of LGBT elders is projected to nearly double, meaning that there will be close to six million LGBT elders.[34]

This Section provides a summary of the regrettably scant demographic information currently available on LGBT elders and provides an important historical context for this population. Although the current political and social position of LGBT individuals bears no resemblance to the apocryphal notion of the sexual psychopath popularized by the American Freudians, this pre-Stonewall LGBT history remains relevant today because it informs the behavior of both LGBT elders and their non-LGBT peers.[35] Its legacy also stubbornly lingers in both our popular imagination and official policies long after its homophobic theories and practices have been repudiated.[36]

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[31] This is the most frequently cited estimate. NAT'L GAY & LESBIAN TASK FORCE, *supra* note 10, at 3. However, the U.S. Administration on Aging estimates that there are between 1.75 million to 3.5 million LGBT individuals aged 60 and older. U.S. Admin. on Aging, The Many Faces of Aging: Lesbian Gay, Bisexual and Transgender Older Persons, http://www.asaging.org/networks/lain/IntroAgingIssues_English.PDF (last visited Nov. 27, 2008). For a discussion on how the estimates are made, see Appendix A, in CAHILL, ET AL., *supra* note 10, at 83–84.

[32] *See* NAT'L GAY & LESBIAN TASK FORCE, *supra* note 10, at 3; Editorial, *The Graying of America*, BOSTON GLOBE, June 16, 2005, at A18.

[33] NAT'L GAY & LESBIAN TASK FORCE, *supra* note 10, at 3. The Baby Boomer generation is defined as individuals born during the years 1943–1960. STRAUSS & HOWE, *supra* note 7, at 299.

[34] NAT'L GAY & LESBIAN TASK FORCE, *supra* note 10, at 3.

[35] *See* JENNIFER TERRY, AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY 272–73 (1999) (describing "the historical emergence of the sexual psychopath").

[36] *See* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 44–48 (1990) (discussing "the unrationalized coexistence of different models" of homo/heterosexual identity); *see also* Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, *supra* note 17, at 12–17 (explaining overlapping justifications for condemnation of homosexuality).

A. The Numbers

Any discussion of equity in aging for LGBT elders is necessarily hampered by the dearth of empirical research available regarding the characteristics and circumstances of our LGBT elders.[37] The absence of empirical evidence is particularly acute in the case of transgender elders.[38] According to the most widely cited figure, there are approximately three million LGBT elders in the United States.[39] This estimate is based on the assumption that three to eight percent of the population identifies as LGBT.[40]

The absence of data on LGBT elders reflects the extreme heteronormative view toward individuals sixty-five or older who are paradoxically considered to be both asexual and heterosexual by default.[41] As explained more fully in Part II below, the forces of ageism and homophobia coalesce to render the notion of a LGBT elder unthinkable because elders are not sexual and LGBT individuals are too often viewed as only sexual. Accordingly, general aging research rarely collects information on sexual orientation and gender identity.[42] When survey instruments inquire about the sexual orientation or gender identity of clients or patients, health care providers frequently report that they have no elder clients or patients who identify as LGBT.[43] Given that service providers seldom acknowledge the existence of LGBT elders, it is not surprising that their policies and programs do not address LGBT-specific concerns.[44]

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[37] *See* CAHILL, ET AL., *supra* note 10, at 7–8.

[38] *See id.* at 7.

[39] *See, e.g.*, NAT'L GAY & LESBIAN TASK FORCE, *supra* note 10, at 71; Diane C. Lade, *Safe Haven: Gay Couples Dream of Equal Housing for Seniors*, SUN-SENTINEL, May 9, 2004, at 1B (estimating three to four million LGBT seniors); Rona Marech, *Retirement Homes, Without the Closets*, S.F. CHRON., Jan. 14, 2005, at A1 (quoting the rough National Gay and Lesbian Task Force estimates).

[40] *See* CAHILL, ET AL., *supra* note 10, at 8. The census does not explicitly collect data on sexual orientation or gender identity: it "allowed respondents to describe another household member as an 'unmarried partner.' By comparing the sex of the household members who call themselves unmarried partners, the Bureau of the Census and other researchers can identify unmarried couples made up of two men or of two women." M.V. BADGETT AND MARC A. ROGERS, LEFT OUT OF THE COUNT: MISSING SAME-SEX COUPLES IN CENSUS 2000 5 (2003), http://www.iglss.org/media/files/c2k_leftout.pdf.

[41] *See* Barker, *infra* note 164, at 53; Gross, *infra* note 169, at A1.

[42] One survey reported that fewer than thirty-five percent of social service agencies include questions regarding sexual orientation as part of their intake procedures. Georgia J. Anetzberger, Karen J. Ishler, Jeffrey Mostade & Marc Blair, *Gray and Gay: A Community Dialogue on the Issues and Concerns of Older Gays and Lesbians*, 17 J. GAY & LESBIAN SOC. SERVICES 23, 32 (2004).

[43] *See* CAHILL, ET AL., *supra* note 10, at 54 (citing Susan K. Fairchild, Gerald E. Corrino, & Mildred Ramirez, *Social Workers' Perceptions of Staff Attitudes Towards Resident Sexuality in a Random Sample of New York State Nursing Homes: A Pilot Study*, 26 J. GERONTOLOGICAL SOC. WORK 1, 1 ("When social workers were asked about their residents' sexual behaviors, no mention was ever made of homosexuality/lesbianism.").

[44] For example, a 2004 study found that less than twenty-five percent of social service agencies provided LGBT-specific programming. Anetzberger, et al., *supra* note 42, at 32.

Much of the existing research on LGBT elders is based on relatively small samples of primarily urban, white, middle class gay men and lesbians.[45] From this scattering of studies and a growing number of anecdotal reports, it is possible to make some general observations regarding the state of LGBT elders. That being said, it is clear that future policy recommendations would benefit greatly from additional research regarding income and asset levels, family ties, housing options, and experiences with homophobia and discrimination.[46] At a minimum, general aging research projects, such as the Federal Elder Abuse and Neglect Survey, could broaden their survey tools to include questions regarding sexual orientation and gender identity.[47]

The studies that do exist repeatedly show that isolation is a significant problem for LGBT elders.[48] LGBT elders are more likely than their non-LGBT peers to live alone.[49] LGBT elders are significantly less likely than their non-LGBT peers to be partnered or to have children.[50] One study found that fewer than one-fifth of LGBT elders lived with a partner as compared to one-half of non-LGBT seniors.[51] Living alone and being single are both considered to be risk factors that reduce the likelihood for successful aging.[52] In addition, ninety percent of LGBT elders did not have children, whereas only twenty percent of non-LGBT elders reported that they did not have children.[53]

According to the 2000 Census, LGBT elders who are in same-sex partnerships are distributed throughout the country, with elder same-sex partners living in ninety-seven percent of all counties in the United States.[54] The 2000 Census is an important source of information regarding LGBT elders;

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[45] *See* Stephanie Schmitz-Bechteler, *Those of a Queer Age: Insights into Aging in the Gay and Lesbian Community*, 2006 ADVOCATES' FORUM 26, *available at* http://www.ssa.uchicago.edu/publications/advforum/2006.pdf (summarizing survey demographics).

[46] *See* CAHILL, ET AL., *supra* note 10, at 70–71 (providing specific research recommendations).

[47] *See id.* at 70. Even once these changes are implemented, there may be resistance from members of the pre-Stonewall generation who may be deeply closeted and fearful of disclosure. The report also notes: "Other obstacles include methodological challenges, such as the difficulty of recruiting subjects; respondents' fear of self-disclosure; difficulties defining homosexual, bisexual, and transgender identity; and differentials in response rates based on type of survey conducted." *Id.* at 72.

[48] *See id.* at 10 (discussing "social isolation and ageism" within LGBT community).

[49] *See* FUNDERS FOR LESBIAN & GAY ISSUES, *supra* note 10, at 5.

[50] *See id.*; Brian de Vries & John A. Blando, *The Study of Gay and Lesbian Aging: Lessons for Social Gerontology*, *in* GAY AND LESBIAN AGING, *supra* note 10, at 7.

[51] CAHILL, ET AL., *supra* note 10, at 10.

[52] *See* Douglas C. Kimmel, *Issues to Consider in Studies of Midlife and Older Sexual Minorities*, *in* GAY AND LESBIAN AGING, *supra* note 10, at 265, 275. Kimmel explains that "[a] partner may also serve as a *buffer* against losses and someone who can aid with challenges of aging. A partner may also be a caregiver, a reason for living, or a spiritual soul mate who promotes successful aging just by being around." *Id.*

[53] CAHILL, ET AL., *supra* note 10, at 10.

[54] The Urban Institute, Gay and Lesbian Families in the Census: Gay and Lesbian Seniors, www.urban.org/url.cfm?ID=900627 (last visited Nov. 2, 2008).

however, the data is limited to elders living in same-sex partnerships.[55] This is because the 2000 Census asked respondents to identify their sex and whether they had an unmarried partner, but it did not ask respondents to identify their individual sexual orientation or gender identity.[56] The data provided by the 2000 Census has been characterized as grossly deficient because same-sex couples were reluctant to self-identify on a census form.[57] Nonetheless, this frequently cited number provides a minimum baseline assessment of same-sex couples.[58]

According to an analysis of the 2000 Census data, married elder couples earn 4.3 percent more than elder same-sex couples.[59] In addition, elder same-sex couples have 34.7 percent less retirement income than senior married opposite-sex couples.[60] Same-sex senior couples are more likely than opposite-sex senior married couples to still be paying a mortgage on their home.[61] This analysis is consistent with the finding of the San Francisco Human Rights Commission that homelessness is a growing problem among LGBT elders.[62]

Existing aging policies in the United States rely heavily on family members to arrange and coordinate the required support services and programs.[63] As partners age together, they can help each other navigate complicated eldercare systems. However, when an individual is widowed or single, the responsibilities for care and support most often fall on children and other family members.[64] LGBT elders do not have the security of this built in support system. As noted above, ninety percent of LGBT elders do not have

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[55] *Id.* Based on this data, researchers estimate that 11.8% of all same-sex couples include one partner age sixty-five or older. Bennett, *supra* note 10, at 13 n.1. With respect to the Baby Boom generation, this figure increases dramatically when measuring same-sex couples with one partner age fifty-five or older. *Id.* at 13 n.3. An estimated 23.4 percent of all same-sex couples include a partner age fifty-five or older. *Id.*

[56] *See* BADGETT & ROGERS, *supra* note 40, at 1.

[57] *Id.* at 1 (summarizing two empirical studies and concluding undercount is by approximately sixteen percent).

[58] For example, the Human Rights Campaign Foundation issued a report on the cost of marriage inequality for LGBT seniors based on an analysis of the 2000 Census data. *See* BENNETT & GATES, *supra* note 10, at 2.

[59] *Id.* at 4 (reporting average household income of $25,799 for opposite-sex married couples and $24,743 for same-sex unmarried couples).

[60] *Id.* at 5 (reporting opposite-sex senior couples earn an average of $6,647 in retirement income, whereas same-sex couples earn $4,936).

[61] *Id.* at 6 (reporting sixty-eight percent of opposite-sex senior couples have no mortgage, whereas only sixty-one percent of same-sex senior couples have no mortgage).

[62] *See* SAN FRANCISCO HUMAN RIGHTS COMM'N, AGING IN THE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITIES 13 (2003), *available at* http://www.sfgov.org/site/uploadedfiles/sfhumanrights/docs/finalreport.pdf (assessing needs of LGBT elders in San Francisco).

[63] *See* Urvashi Vaid, *Preface* to CAHILL, ET AL., *supra* note 10, at v.

[64] Judith C. Barker notes: "The moral obligation of lineal kin to provide care for one another is a taken-for-granted cultural value underpinning much interaction within natal families and is reflected in both social theory distinguishing family from other social groups and throughout social policy." Judith C. Barker, *Lesbian Aging: An Agenda for Social Research*, *in* GAY AND LESBIAN AGING, *supra* note 10, at 59.

children.[65] Instead, LGBT elders rely heavily on non-family members for practical, social, and even financial support.[66]

These non-family support networks have been referred to by a variety of names, including chosen family, structured family, and nontraditional families.[67] The stress of homophobia, both internal to the family and external, can test traditional family ties in ways that often leave LGBT individuals estranged from their families of origin.[68] This would have been particularly true for the pre-Stonewall age cohort. Today's LGBT elders came of age at a time when homosexuality was criminalized and pathologized.[69] If an individual's family knew that a loved one was homosexual, it would have been cause for shame and concern.[70] Even if the family did not have actual knowledge, the simple fact that a loved one failed to conform to the prevailing heterosexual norms would have been sufficient cause for alarm.[71]

The tendency for LGBT individuals to be estranged from their families of origin can place an unusual amount of importance on friendship groups who in turn provide the type of support and companionship that one would otherwise expect to receive from one's family of origin.[72] In the absence of relationships defined by the traditional legal markers of blood, marriage, or adoption, LGBT individuals traditionally place considerable emphasis on

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[65] CAHILL, ET AL., *supra* note 10, at 10.

[66] *See id.* at 8.

[67] Kimmel explains: "It is widely thought that most older lesbians, gay men, bisexuals, and transgendered persons develop groups of friends who function as if they were kin; this has been termed a *family of choice* and is thought to provide more support, in many cases, than the individual's biological or legal "family." Kimmel, *supra* note 52, at 268; *see also* de Vries & Blando, *supra* note 50, at 8–11 (discussing a family built around camaraderie and caring); Jacqueline S. Weinstock, *Lesbian Friendships at and Beyond Midlife: Patterns and Possibilities for the 21st Century*, *in* GAY AND LESBIAN AGING, *supra* note 10, at 177–210 (discussing "friends like family").

[68] *See* Barker, *supra* note 64, at 61–62 (discussing estrangement generally).

[69] This article considers LGBT elders to be those individuals born between the years of 1914 and 1944. *See infra* text accompanying notes 108–15. These individuals would have turned twenty-one years of age between 1935 and 1965. During that period, sodomy was criminalized and homosexuality was considered a mental illness. *See infra* text accompanying notes 122–32.

[70] *See* Barker, *supra* note 64, at 61 (stating "[m]any lesbians describe strained relationships or expulsion from families after they 'come out'").

[71] For a discussion of sexual and gender conformity following World War II, see generally LILLIAN FADERMAN, ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH CENTURY AMERICA 139–42 (1991).

[72] A 2005 survey of LGBT Baby Boomers or pre-seniors revealed a very high level of caregiving among LGBT individuals. METLIFE, OUT AND AGING: THE METLIFE STUDY OF LESBIAN AND GAY BABY BOOMERS 8–13 (2006), *available at* http://www.metlife.com/FileAssets/MMI/MMIStudiesOutandAging.pdf. Moreover, a high percentage of LGBT Baby Boomers were caring for nonrelatives or partners. *Id.* at 8. This provides statistical evidence of the importance of "chosen family" in the lives of LGBT individuals. *See id.*

"families of choice."[73] These fictive kin networks are extremely important in the lives of LGBT individuals, regardless of age.[74]

In one study, ninety percent of LGBT elders reported that their primary support group consisted of close friends.[75] This same study found that friendship groups provided seventy-two percent of the social support, sixty-four percent of the emotional support, fifty-four percent of the practical support, and thirteen percent of the financial support for LGBT elders.[76] These figures are consistent with the large number of LGBT individuals who report that they are in caregiver roles for non-family members.[77]

As explained in Part III, such chosen family structures are not recognized by the law, and this produces a host of difficulties when trying to organize and coordinate eldercare. Beyond the issue of legal recognition, however, LGBT chosen families have a much more fundamental shortcoming: LGBT chosen families are almost always single-generational, due in part to the ageism within the LGBT community and internalized homophobia, both of which are discussed in greater detail in Part II.[78] The single-generational nature of these chosen families poses obvious problems in the case of eldercare and deprives LGBT elders of the benefits of multi-generational support groups.[79] In the case of LGBT chosen families, the group's resources will be increasingly strained as the members of the group all age in unison. As the group members become progressively older and possibly more infirm, the level of care that they can provide to the other members of the group will naturally diminish.

The extent to which future generations of LGBT elders will rely on chosen families for support will likely decrease given the greater frequency with which same-sex partners are choosing to become parents and as homosexuality is normalized.[80] For the pre-Stonewall generation of LGBT elders, children were generally the result of heterosexual marriages. This age co-

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[73] *See* WESTON, *supra* note 25, at 103–17.

[74] *See id.*

[75] Grossman, et al., *supra* note 25, at 174.

[76] *Id.* at 175.

[77] *See* METLIFE, *supra* note 72, at 8.

[78] *See infra* text accompanying notes 164–69 for discussion of the combined impact of ageism within LGBT community and LGBT elders' internalized fear of being perceived as sexual predators.

[79] Intergenerational relationships are not common in the LGBT community. *See* Andrew J. Hostetler, *Old, Gay, and Alone? The Ecology of Well-Being Among Middle-Aged and Older Single Gay Men, in* GAY AND LESBIAN AGING, *supra* note 10, at 143, 159 ("Age-related divisions are exacerbated by the nature of intergenerational contacts in the gay community, which do not typically follow the heterosexual, extended-family pattern but rather involve strangers and non-kin interacting in bars and similar venues.").

[80] *See* Weinstock, *supra* note 67, at 194–200 (discussing increasing tendency to form recognized "families"). The recent trend in gay men and lesbians either having or adopting children has been referred to as the "gaybee boom" or "gayby boom." *See id.* at 179 (discussing the increasing frequency with which lesbians are deciding to have children); Elizabeth Birch, *We Have Our Own Networks. Get Used To It*, BROADCASTING AND CABLE, Aug. 15, 2005, at 30 (noting "we are in the middle of a 'gaybee boom'"); Erica Goode, *A Rainbow of Differences in Gays' Children*, N.Y.TIMES, July 17, 2001, at F18

hort was more likely to enter into heterosexual marriage due to a combination of social pressure, a later average age of coming out, and an earlier age of first marriage.[81] Of course, for the pre-Stonewall generation parenting was fraught with a host of legal concerns. Until relatively recently, a LGBT parent could legally lose custody and visitation rights to his or her children on account of his or her sexual orientation or gender identity, and in some states this is still the case.[82] Even in the absence of negative legal intervention, the pressures of pre-Stonewall homophobia could make effective parenting relationships difficult, and LGBT elders with children may be estranged from them for a variety of reasons.[83]

The isolation experienced by LGBT elders is often further complicated by health concerns. Twenty-seven percent of all elders report that they are in poor health, but there is no reliable public health data for LGBT elders.[84] In particular, the prevalence of HIV infection among gay men weighs heavily on the population of older gay men.[85] Little research has been devoted to aging with HIV since long-term HIV management only became possible af-

(noting increase in childrearing among gay men and lesbians "has been called the 'gayby boom'").

[81] For example, in 1950 the median age of first marriage was 20.3 years of age for women and 22.8 years of age for men, as compared with a median age of first marriage in 2003 of 25.3 for women and 27.1 for men. U.S. Bureau of the Census, Table MS-2, Estimated Median Age at First Marriage, by Sex: 1890 to Present (Sept. 15, 2004), http://www.2010census.biz/population/socdemo/hh-fam/tabMS-2.pdf. However, a recent study indicates that for LGBT individuals sixty and older the average age of coming out was twenty-three. *See* Anthony R. D'Augelli & Arnold H. Grossman, *Disclosure of Sexual Orientation, Victimization and Mental Health Among Lesbian, Gay, Bisexual Older Adults*, 16 J. INTERPERSONAL VIOLENCE 1008, 1015 (finding average age of "self-labeling" for LGBT men and women was 23.45 years of age). As of 2006, at least one survey found that the average age of coming out was thirteen. *Average Coming-Out Age Now 13, Surveys Says*, GAY.COM, Oct. 11, 2006, http://www.gay.com/news/article.html?2006/10/11/4.

[82] *See infra* text accompanying notes 233–35.

[83] *See* Barker, *supra* note 64, at 61–62 (discussing, specifically with regard to lesbians, costs of estrangement from natal family).

[84] *See* CAHILL, ET AL., *supra* note 10, at 6, 12.

[85] *See id.* at 14–15; *see also* E. Michael Gorman & Keith Nelson, *From a Far Place: Social and Cultural Considerations About HIV Among Midlife and Older Men*, *in* GAY AND LESBIAN AGING, *supra* note 10, at 73 (noting that older men have "been disproportionately affected by HIV/AIDS"). Gorman and Nelson note that:

> By the year 2002, there had been approximately 460,000 U.S. adult deaths from AIDS or AIDS-related causes, with the number of adult male deaths being on the order of 400,000. Of these deaths, some 267,000 of these were MSMs, a very large number when one considers the relatively small likely size of the gay/bisexual male population (some estimates range from [two to four percent] of the adult male population). By comparison, the United States experienced 57,000 combat deaths in Vietnam, 37,000 in the Korean conflict, and 404,000 combat-related deaths in World War II, but these combat deaths were spread over an entire generation and more, as well as across all geographical areas of the country, not primarily in a concentrated subgroup.

Id. at 76. *See generally* Susan L. Waysdorf, *The Aging of the AIDS Epidemic: Emerging Legal and Public Health Issues for Elderly Persons Living with HIV/AIDS*, 10 ELDER L.J. 47 (2002) (describing the rapid growth of HIV/AIDS in the elderly population).

ter the advent of protease inhibitors in the mid-1990s.[86] In addition to long-time survivors, fifteen percent of all new cases of HIV infection occur in men fifty years of age and older.[87] Despite this alarming rate of new infection, relatively few prevention efforts are targeted at older gay men.[88]

The population of HIV-positive elders is especially prone to isolation because many long-time survivors lost partners and friends to the disease and now face aging without peer support groups.[89] As noted above, LGBT elders depend on friendship groups to take the place of family. Thus, gay men who have lost partners and friends may find themselves not only widowed, but also orphaned.[90] Not surprisingly, elder long-time survivors are at an increased risk of suicide.[91]

Transgender elders also present some very specific health concerns, and research has just begun to catalogue their health needs.[92] For example, very little is known about the long-term effects of hormone therapy as individuals age.[93] In addition, those individuals who transitioned without medical intervention may be reluctant to seek medical help and may be unwilling to accept assistance from caregivers.[94] This was the case with famous jazz musician and transman, Billy Tipton, who died from a bleeding ulcer in 1989.[95] Tipton was unwilling to seek medical assistance, presumably because examination would have revealed his biological sex as female.[96] When Tipton died, it was reported that he had not seen a doctor in fifty years.[97]

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[86] *See* Wyatt Buchanan, *How AIDS Changed Us*, S.F. CHRON., June 4, 2006, at E1, E7 (stating "medical advances and human intervention have transformed AIDS here from a largely terminal illness into a generally chronic one"); *see also* Gorman & Nelson, *supra* note 85, at 81 (noting "lifesaving properties of 'the cocktail'").

[87] This is based on data for 2005. David Evans, *HIV Rates Declining in Some Older Americans*, AIDSMEDS, Dec. 7, 2007, http://www.aidsmeds.com/articles/hiv_seniors_older_2131_13622.shtml. Although the rate declined for African American and Latino men between 2001 and 2005, it increased for whites by 4.2%. *Id.*

[88] *See* CAHILL, ET AL., *supra* note 10, at 15.

[89] *See id.* at 106 n.118 (referencing Bertram Cohler, Aging, Generation, and the Course of Gay and Lesbian Lives 17-19 (Sept. 1999) (unpublished manuscript presented at National Institute of Mental Health conference on "New Approaches to Research on Sexual Orientation, Mental Health, and Substance Abuse")).

[90] *See* Gorman & Nelson, *supra* note 85, at 82–83 (discussing "acute sense of grief because of multiple losses" and "survivor's guilt").

[91] *See id.* at 83. Gorman and Nelson note that suicide attempts and suicide itself are higher among older gay men living with HIV, particularly those living in urban areas. *Id.*

[92] *See* elroi waszkiewicz, *Aging in Transgender People: An Annotated Bibliography*, TRANS-HEALTH.COM, 2002, http://www.trans-health.com/displayarticle.php?aid=74.

[93] *See* Justin Cascio, *Cancer Risks in the Trans Community*, TRANS-HEALTH.COM, http://www.trans-health.com/displayarticle.php?aid=26 (last visited Nov. 2, 2008).

[94] *See* CAHILL, ET AL., *supra* note 10, at 17.

[95] *See* AP, *Musician's Death at 74 Reveals He Was a Woman*, N.Y. TIMES, Feb. 2, 1989, at A18.

[96] *See id.*

[97] *See* Shannon Minter, *Legal and Public Policy Issues for Transgender Elders* 3 (2003), http://www.nclrights.org/site/DocServer/transelder.pdf?docID=1121.

Like the majority of Americans, older LGBT individuals surveyed report that they would like to age "in place."[98] However, the ability to age in place successfully often requires assistance from family, and this can be especially problematic for LGBT single generational families of choice. In addition, LGBT elders express trepidation with respect to mainstream senior housing options where they fear they will be unwelcome and experience discrimination.[99] This fear has given rise to a new niche in senior housing — the LGBT-positive senior housing development.[100] The handful of available units, however, does not begin to meet the need for affordable LGBT-positive housing.[101]

B. The Making of the Pre-Stonewall Generation

In order to address the needs of LGBT elders, it is important to understand that the identities of the current cohort of LGBT elders were forged within a historical period that is seemingly very remote to today's reality of legalized same-sex marriage and openly gay celebrities.[102] The pre-Stonewall generation came of age in a time when being "out and proud" was a sure fire way to get a Section VIII discharge from the military[103] or an appointment for electroshock therapy.[104] The closet was not only a survival mechanism; it was a way of life.[105] This historical context can explain much of the anxiety that LGBT elders report about disclosing their identity in an

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[98] CAHILL, ET AL., *supra* note 10, at 51. Aging "in place" means staying in one's apartment or home. *Id.*

[99] *See* Gross, *supra* note 13, at A1.

[100] *See* Judy Richter, *Bay Area Gay Senior Housing Closer to Reality*, S.F. CHRON., Mar. 30, 2008, at K8.

[101] *See id.*

[102] *Cf. In re* Marriage Cases, 183 P.3d 384, 452 (Cal. 2008) (holding that an individual's homosexual orientation is not a sufficient basis for withholding or restricting the fundamental right to marry as guaranteed under the California Constitution); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates the Massachusetts Constitution). In an article about the "gay generation gap," Glenda M. Russell and Janis S. Bohan refer to this as "the era of GSAs [Gay/Straight Alliances] and Elton John." Glenda M. Russell & Janis S. Bohan, *The Gay Generation Gap: Communicating Across the LGBT Generational Divide*, 8 POL. J. INST. FOR GAY & LESBIAN STRATEGIC STUD. 3 (2005), *available at* http://www.iglss.org/media/files/Angles_81.pdf (last visited Nov. 14, 2008).

[103] The dreaded Section VIII discharge was used to separate suspected homosexuals from military service. *See* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW 709 (2d ed. 2004). The Regulations authorized separation for "inaptness or undesirable habits or traits." *Id. See generally* ALLAN BERUBE, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II (1990) (describing the experiences of gays and lesbians who fought in World War II).

[104] *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 62 (1999) (describing a state hospital during this period where "people convicted of consensual sodomy were subjected to lobotomies, electrical and pharmacological shock therapy, and . . . castration").

[105] *See* FUNDERS FOR LESBIAN AND GAY ISSUES, *supra* note 10, at 5 (noting that " 'passing' as heterosexual has been a lifelong survival strategy" for the pre-Stonewall generation).

institutional setting or to a health care professional.[106] The willingness and ability of LGBT elders to conceal their identities contributes to their invisibility and the persistence of homophobic practices and heteronormative policies. As one study concluded: "The difficulty in undertaking change in an environment in which older gays and lesbians are profoundly silent cannot be underestimated."[107]

1. *History*

LGBT individuals who will turn sixty-five years of age in 2009 were born in 1944. If one considers a general range of LGBT elders to be between the ages of sixty-five and ninety-five years of age, then the eldest of the LGBT elders were born in 1914.[108] The thirty-year span between 1914 and 1944 encompasses two World Wars and the Great Depression. Naturally, the experiences of the newer members and the older members would have been very different. The oldest members lived through the Depression and World War II. The youngest members were born during World War II and grew up in a period of post-War affluence. Based on conventional attempts by sociologists to categorize these individuals, the current group of LGBT elders actually spans several different generations which are called by a variety of names, such as the G.I. Generation (1901-1924), the Silent Generation (1925-1942), and the Baby Boomer Generation (1943-1960).[109]

Despite this range, LGBT elders are united in a single generation because they all share the common experience of coming of age when the notion that one should be open and proud about her or his sexual orientation was unthinkable to all but a handful of free spirits and early homophile activists.[110] As members of the pre-Stonewall generation, they are familiar

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[106] *See id.* at 10 (noting that seventy-five percent of LGBT elders are not "completely open" about their sexual orientation with health care providers).

[107] William Kanapaux, *Homosexual Seniors Face Stigma*, 4 GERIATRIC TIMES (Nov./Dec. 2003) (quoting a report on LGBT seniors *in* 43 THE GERONTOLOGIST 192–202 (2003)).

[108] Of course, there are LGBT elders older than ninety-five, but the thirty-year convention is used for simplicity. Individuals aged eighty-five and older are the fastest growing segment of the senior population. FUNDERS FOR LESBIAN AND GAY ISSUES, *supra* note 10, at 3–4. Projections indicate that the number of this population will increase from four million in 2000 to nineteen million in 2050. *Id.*

[109] *See generally* STRAUSS AND HOWE, *supra* note 7 (describing the characteristics of each generation).

[110] LGBT elders who were born between 1914 and 1944 would have turned twenty-one between the years of 1935 and 1965. *See generally* BAYER, *supra* note 4, at 70–88 (describing the early homophile movement). The notion that one should be open about one's sexual orientation was popularized by the gay liberationists post-Stonewall. They theorized that the act of coming out would not only have a liberating effect on the individual, but could potentially transform society. *See* JAGOSE, *supra* note 14, at 38 (noting that "[g]ay liberationists promoted the coming-out narrative — an unambiguous and public declaration of one's homosexuality — as a potent means of social transformation"). Jagose writes:

with the closet and with isolation.[111] Coming-out stories from this generation tell of loneliness and struggle.[112] The narrators often repeat the common fear that no one else experienced same-sex attraction or that those who did experience such attraction were unnatural and, therefore, the narrator thought she was doomed to a furtive existence lived in the shadows.[113] Many accepted the prevailing medical diagnosis that homosexuality was a mental disorder and labored for years in psychoanalysis to try to affect a cure.[114]

By the time of the Stonewall riots in 1969, the older members of this generation would have been a mature fifty-five years of age, whereas the youngest members would have been just twenty-five.[115] Undoubtedly, individuals at opposite ends of the age range could have interpreted the significance of the events differently. Indeed, it is even questionable whether it makes sense to use the Stonewall riots as a clear dividing line.[116] The riots themselves were not widely reported by the media and arguably did not resonate in the daily lives of homosexuals.[117] The widely-covered media event occurred four years later in 1973 when the APA voted to declassify homosexuality as a mental disorder.[118]

> Here the logics of coming out assume that homosexuality is not simply a private aspect of the individual, relevant only to friends and colleagues. Instead, it is potentially a transformative identity that must be avowed publicly until it is no longer a shameful secret but a legitimately recognised way of being in the world.

Id.

[111] *See generally* DEL MARTIN & PHYLLIS LYON, LESBIAN/WOMAN 177–204 (1972) (describing "growing up gay" in pre-Stonewall America).

[112] *Id.*

[113] *Id.*

[114] For two accounts of psychoanalysis written by individuals who survived and went on to become gay activists and scholars see MARTIN DUBERMAN, CURES: A GAY MAN'S ODYSSEY (1991) and BETTY BERZON, SURVIVING MADNESS: A THERAPIST'S OWN STORY (2002).

[115] The Stonewall riots began on June 27, 1969 when police raided a gay bar, the Stonewell Inn, in Greenwich Village. *See generally* MARTIN DUBERMAN, STONEWALL (1993) (tracing six LGBT lives before, during, and after Stonewall). The disturbances continued sporadically for several days. *Id.* at 203–09.

[116] Jagose remarks: "Stonewall functions in a symbolic register as a convenient if somewhat spurious marker of an important cultural shift away from assimilationist policies and quietist tacts, a significant if mythological date for the origin of the gay liberation movement." JAGOSE, *supra* note 14, at 30.

[117] Leila J. Rupp notes:

> If Stonewall represented a new beginning, it would have been hard to tell that from the mainstream publicity. Other than the [*Village*] *Voice*, few papers gave the incident any attention. The *New York Times*, page 33 of the June 29 edition, carried a small article headlined "4 Policemen Hurt in 'Village' Raid: Melee Near Sheridan Square Follows Action at Bar." The *Washington Post*, the *Chicago Tribune* and even the *San Francisco Examiner/Chronicle* remained mute.

LEILA J. RUPP, A DESIRED PAST: A SHORT HISTORY OF SAME-SEX LOVE IN AMERICA 176–77 (1999).

[118] *See generally* BAYER, *supra* note 4 (discussing declassification).

Despite their lack of notoriety at the time, the Stonewall riots are routinely identified as the spark that began the contemporary LGBT civil rights movement.[119] The gay liberation movement grew in the years immediately following Stonewall.[120] Taking its cues from the student and feminist movements, gay liberation became a vocal civil rights movement that urged gay and lesbian individuals to declare themselves and leave the false security of the closet.[121] Early movement slogans declared that "Closets are for Clothes" and "Out of the Closet and Into the Streets."[122] The gay liberationists aggressively challenged the criminal sodomy laws and the continued classification of homosexuality as a mental disorder.[123] Armed with empirical studies and emboldened by liberationist ideology, gay activists were relentless in presenting their case that homosexuality was not a mental illness.[124] By the time the APA finally declassified homosexuality as a

[119] The Stonewall riots hold a cherished spot in LGBT history. *See* SCOTT BRAVMANN, QUEER FICTIONS OF THE PAST: HISTORY, CULTURE, AND DIFFERENCE 68–96 (1997). On the one-year anniversary of Stonewall, the first Gay Pride March was held in New York City. *Id.* at 71. Gay Pride is still celebrated in New York City on the last weekend in June to commemorate the riots. *See* JAGOSE, *supra* note 14, at 30.

[120] The liberation model of homosexuality was short-lived, spanning from the 1969 Stonewall riots until the mid-1970s. *See* JAGOSE, *supra* note 14, at 30–43 (describing liberationist strategy).

[121] Gay liberationists pursued a path of revolutionary social and political change which stressed autonomy and individual freedom. *Id.*

[122] Stacey D'Erasmo, *Out of the Closets and Into the Streets*, N.Y. TIMES, Apr. 4, 1999, at BR8 (reviewing *Tales of the Lavender Menace*); Alice Noble, *Domestic News*, United Press International, June 28, 1981 (describing San Francisco's Gay Pride Parade).

[123] Gay liberationist pickets at medical conventions began as early as 1968, when activists picketed an AMA convention to demand the inclusion of pro-gay views and speakers. *Id.* John D'Emilio observes, "Gay liberationists targeted the same institutions as homophile militants, but their disaffection from American society impelled them to use tactics that their predecessors would never have adopted." JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970, at 234 (1983). *See* JAGOSE, *supra* note 14, at 30–43.

[124] Kinsey's massive empirical studies on the human sexual response normalized homosexuality by establishing a relatively large percentage of the general population had some form of homosexual experience. *See* HENRY L. MINTON, DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA 159–95 (2002). Evelyn Hooker's empirical work with gay men disputed the psychoanalytic model of homosexuality as pathology when she reported that the homosexuals in her studies were no more maladjusted that the heterosexual subjects. *See* BAYER, *supra* note 4, at 49–51 (quoting Evelyn Hooker, *A Preliminary Analysis of Group Behavior of Homosexuals*, 41 Journal of Psychology 217, 219 (1956)). Hooker wrote:

> It would be strange indeed if all the traits due to victimization in minority groups were in the homosexual produced by inner dynamics of the personality, since he is also a member of an outgroup which is subject to extreme penalties involving, according to Kinsey, cruelties which have not been matched except in religious and social persecutions.

Id. at 53.

mental disorder, the APA and its members had been the subject of increasingly militant action from gay liberation groups.[125]

LGBT individuals who came of age in the post-Stonewall years had the benefit of a very public counter-narrative that stated "Gay Is Good."[126] No matter how marginalized and reviled the gay liberation movement might have been in certain quarters, it existed as a public symbol of pride and openness.[127] The birth of the contemporary LGBT rights movement had signaled the beginning of a new type of discourse concerning sexuality and gender. For individuals who came of age pre-Stonewall, there was no public pro-homosexual counter-narrative. They formed their ideas regarding homosexuality by reference to the established views expressed by religion, science, and the law.[128] In other words, the pre-Stonewall generation could choose among the categories of sinner, pervert, or felon.[129]

With this background, it is easy to understand that the collective silence practiced by the pre-Stonewall generation is not simply timidity or embarrassment in the face of potential societal disapproval. Homosexuality was considered a severe mental disorder that was "treated" with electro-shock therapy, aversion therapy, drugs, and even prefrontal lobotomies.[130]

Moreover, it was subject to a wide range of criminal sanctions.[131] Adult consensual sodomy was illegal in all states and sexual psychopath laws in

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[125] Gay liberation groups had a series of dramatic confrontations with the forces of organized psychiatry, such as the 1971 protest at the annual meeting of the APA where an activist declared, "[p]sychiatry is the enemy incarnate." *Id.* at 105.

[126] Actually, the official adoption of the slogan "Gay Is Good" occurred in 1968, one year before Stonewall at the North American Conference of Homophile Organizations. *See id.* at 90–91.

[127] The 1978 "Save Our Children" campaign orchestrated by former recording star, beauty queen, and orange juice spokesperson Anita Bryant is widely cited as the beginning of the contemporary anti-gay movement. *See* ESKRIDGE, *supra* note 104, at 131.

[128] At the time, religious condemnation of homosexuality was absolute. *See* DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 28–44 (1997) (discussing period from 1958–1965). Herman reports that homosexuality was mentioned along with "perversion" and "incest." *Id.* at 31. Science pathologized homosexuality, classified it as a severe mental illness, and created the category of a sexual psychopath. *See* BAYER, *supra* note 4, at 28–30 (discussing American Freudians); *see also* TERRY, *supra* note 35, at 272–73 (describing "the historical emergence of the sexual psychopath."). The law criminalized consensual sodomy in all states until 1961. *See infra* note 131 (describing criminal sodomy laws).

[129] If an individual appealed to religion, homosexuality was considered a form of "sexual sin and perversion." HERMAN, *supra* note 128, at 29. Prevailing science offered the diagnosis of a severe sociopathic personality disorder. *See* BAYER, *supra* note 4, at 39 (explaining the *Diagnostic and Statistic Manual of Mental Disorders* ("DSM")). The law criminalized consensual sodomy, thereby making homosexuals presumptive felons. *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 104 (2000) (explaining that even unenforced sodomy laws "create[ ] a criminal class whose members are treated as felons, even though they have been convicted of no crime.").

[130] *See* ESKRIDGE, *supra* note 104, at 62.

[131] Adult consensual sodomy was criminalized in all states until 1961, when Illinois repealed its sodomy law in connection with its adoption of the Model Penal Code. States were slow to repeal their sodomy laws. By the time the APA declassified homosexuality

some states authorized the psychiatric commitment of an individual charged with a sex crime for an indeterminate period of treatment before standing trial for the underlying offense.[132] Gay bars could be raided by the police for no cause and the patrons' names would then be published in the newspaper.[133] Obscenity laws could criminalize even relatively "tame" depictions of same-sex sexuality.[134] Homosexuals were dishonorably discharged from the armed services, and the military witch hunts that occurred toward the end of World War II prefigured the purges of homosexuals that took place in the Executive branch during the 1950s.[135] Homosexuals were classified as security risks because they were considered susceptible to blackmail, but they were also thought to be bad for morale.[136] In the words of a U.S. Senate Report, "[o]ne homosexual can pollute an entire office."[137]

2. *The Psychoanalytic Model of Homosexuality*

It is difficult to overestimate the importance of the 1973 declassification of homosexuality as a mental disorder. As one newspaper headline blared, "20 Million Homosexuals Gain Instant Cure."[138] Although declassification did not put an end to homophobia and discrimination, it did remove a powerful justification for the existing civil disabilities and criminal penalties imposed on homosexuals. At the time of declassification, today's LGBT elders ranged in age from fifty-nine to twenty-nine. They had come of age and spent much of their adulthood laboring under the stigma of mental illness. The construction of homosexuality as a mental disorder in-

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as a mental illness in 1973, only five additional states had repealed their sodomy laws: Connecticut (1971), Colorado (1972), Oregon (1972), Delaware (1973), and North Dakota (1973). *See* Jeremy Quittner, *Are You Breaking the Law? Where Does Your State Stand on Sodomy Laws?* THE ADVOCATE, Aug. 20, 2002, at 52. In 1986, *Bowers v. Hardwick* ruled that the criminalization of adult consensual sodomy did not violate the U.S. Constitution. Bowers v. Hardwick, 478 U.S. 186 (1986). Bowers was not overruled until Lawrence v. Texas in 2003. Lawrence v. Texas, 539 U.S. 558 (2003).

[132] ESKRIDGE, *supra*, note 104, at 42–43; *see also id.* at 61–62 (describing sexual psychopath laws).

[133] *Id.* at 64–65.

[134] *Id.* at 76–78 (discussing the years 1946–1961)

[135] *See* D'EMILIO, *supra* note 123, at 40–53. *See also* ESKRIDGE, *supra* note 104, at 67–74 (describing purges from federal and state government and military less-than-honorable discharges).

[136] *See* ESKRIDGE, *supra* note 104, at 69; *see also* High Tech Gays v. Def. Indus. Sec. Clearance Office, 668 F. Supp. 1361 (N.D.Cal. 1987), *rev'd in part,* 895 F.2d 563, 573 (9th Cir. 1990) (finding that denial of a Department of Defense security clearance on the basis of applicant's homosexual activity and potential susceptibility to coercion did not violate his constitutional rights), *reh'g en banc denied* 909 F.2d 375 (9th Cir. 1990). *See generally* Gregory B. Lewis, *Barriers to Security Clearances for Gay Men and Lesbians: Fear of Blackmail or Fear of Homosexuals?* 11 J. PUB. ADMIN. RES. & THEORY 539 (2001) (reviewing history of denial of security clearances for homosexuals).

[137] ESKRIDGE, *supra* note 104, at 69.

[138] SIMON LEVAY, QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY 224 (1996) (quoting headline from Philadelphia newspaper reporting on declassification of homosexuality as a mental disorder).

formed their self-image, as well as the legal and social response to homosexuality. It also fostered a complex relationship between LGBT individuals and the medical profession that arguably continues to the present day.

The oldest of today's LGBT elders turned twenty-one years old in 1935 and the youngest turned twenty-one in 1965. During this thirty-year period, the predominate view of homosexuality was the psychoanalytic model popularized by the American Freudians.[139] Under this model, homosexuality was considered a grave psychiatric disorder that stemmed from early childhood trauma and warranted therapeutic intervention.[140] The psychoanalytic model had replaced the preceding model advanced by the early sexologists who had categorized homosexuality as a congenital condition that they referred to as inversion or "contrary" sexual feeling.[141]

In 1935 the very concept of the homosexual as a distinct and identifiable type of individual was relatively new, and this may explain why some members of the pre-Stonewall generation report not knowing that there was even a word that described their feelings of same-sex attraction.[142] The early sexologists had identified homosexuality as a legitimate topic of inquiry in the late nineteenth century, but obscenity laws had largely confined explicit discussions of homosexuality to medical texts.[143] The early sexologists had posited that although homosexuality was not normal, it was natural biological variation.[144] Consistent with the unquestioned heteronormativity of the period, they considered sexual object choice to be inextricably linked with gender.[145] Thus, when a man desired another man he was experiencing

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[139] *See* Knauer, *supra* note 17, at 18–22.

[140] *See* BAYER, *supra* note 4, at 28–30.

[141] *See* R. VON KRAFFT-EBING, PSYCHOPATHIA SEXUALIS: WITH ESPECIAL REFERENCE TO CONTRARY SEXUAL INSTINCT: A MEDICO-LEGAL STUDY 187 (Charles Gilbert Chaddock trans., F.A. Davis Co. 7th ed. 1894); *see also* Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, *supra* note 17, at 12–17 (discussing inversion theory).

[142] *See* Bertram J. Cobler, *Saturday Night at the Tubs: Age Cohort and Social Life at the Urban Gay Bath*, *in* GAY AND LESBIAN AGING, *supra* note 10, at 212 (remarking that many of the pre-Stonewall generation "had no name for their same-gender attraction").

[143] For a discussion of the obscenity laws, see ESKRIDGE, *supra* note 104, at 46–48, 76–77, 117–18 (discussing the evolution of obscenity during the twentieth century). Sometimes even the sexologists ran into trouble with the authorities. For example, Havelock Ellis' text on inversion, SEXUAL INVERSION, was used as evidence to close a bookstore for selling obscene publications in 1898. *See* HAVELOCK ELLIS & JOHN ADDINGTON SYMOND, SEXUAL INVERSION (1897), *excerpted in* NINETEENTH-CENTURY WRITINGS ON HOMOSEXUALITY: A SOURCEBOOK, 66–67 (Chris White ed., 1999). The book itself was not charged with obscenity, but passages of it were read at the trial. *Id.* at 67.

[144] *See* Knauer, *supra* note 17, at 15 (describing theories of Krafft-Ebing and Ellis).

[145] Krafft-Ebing considered inversion to be a "process of development of the psychosexual character" that manifests as "a sexual instinct . which is the exact opposite of that characteristic of the sex to which the individual belongs." KRAFFT-EBING, *supra* note 141, at 187. Foucault observed that this theory of inversion "was characterized . . . less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself." 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 43 (Robert Hurley trans., 1978) .

"contrary" sexual feeling or inversion.[146] Although inversion was not viewed as equal to heterosexuality, the sexologists argued for legal and social reform on the grounds that the invert could not help his or her nature.[147] They also did not advocate therapeutic or medical intervention to "cure" inversion.[148]

As Freudian views of psychosexual development became generally accepted in the medical and scientific communities, experiential explanations for homosexuality replaced the congenital model of inversion.[149] Freudian psychoanalytic theory posited an original state of bisexuality and a natural progression out of that state toward heterosexuality.[150] Homosexuality, thus, represented a perversion of the normal sex drive that occurred at some point during an individual's natural psychosexual development.[151] The psychoanalytic model of homosexuality did not originally endorse therapeutic intervention because it characterized homosexuality as a perversion and not a neurosis.[152]

By the 1940s, however, this relatively benign view of homosexuality had been rejected by the American Freudians who ascribed strongly to the belief in universal heterosexuality and characterized homosexuality as a phobic response to the opposite sex.[153] Under this view, the cause of homosexuality was neurotic and, therefore, a condition that could be cured.[154] Psychiatrists experimented with various methods designed to redirect sexual

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[146] KRAFFT-EBING, *supra* note 141, at 187. For Krafft-Ebing, inversion was measured in terms of object choice and cross-gender performance. According to Krafft-Ebing, contrary object choice was often associated with cross-gender performance. An individual who exhibited strong cross-gender performance would be considered to have a more severe form of inversion. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, *supra* note 17, at 14–15.

[147] For example, Krafft-Ebing argued that the stigma attached to inversion can result in "mental despair . . even insanity and suicide . at the very least nervous disease" and, therefore, the law should "cease to punish them." KRAFFT-EBING, *supra* note 141, at 410. Ellis similarly noted that the invert was "a victim of social hostility." ELLIS & ADDINGTON, *supra* note 143, at 104.

[148] Nancy J. Knauer, *Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 416 (2000).

[149] *See* BAYER, *supra* note 4, at 21 ("Freud set himself in sharp opposition to those scientists who claimed that homosexuality was an indication of degeneracy.").

[150] *See* TERRY, *supra* note 35, at 56.

[151] *Id.* (describing psychoanalytic model of homosexuality "as *perversions* of the normal sex drive caused by the stresses and strains of psychosexual development" as opposed to "a hereditary or congenital defect that manifested itself in sexual inversion").

[152] *See* BAYER, *supra* note 4, at 26. On the topic of curing homosexuality, Freud wrote:

> One must remember that normal sexuality also depends upon a restriction in the choice of object; in general to undertake to convert a fully developed homosexual into a heterosexual is not much more promising than to do the reverse, only that for good practical reasons the latter is never attempted.

Id. (quoting Sigmund Freud).

[153] *Id.* at 28–29.

[154] *Id.* at 33.

orientation to conform to the heterosexual norm.[155] As noted above, these methods included psychotropic drugs, aversion therapy, electro-shock, and prefrontal lobotomies.[156]

When the first *Diagnostic and Statistic Manual of Mental Disorders* ("DSM-I") was published in 1952, it classified homosexuality as one of the most severe sociopathic personality disorders.[157] During this period, many homosexuals accepted this understanding of sexual orientation and willingly entered what was often an extremely arduous course of therapy.[158] Even the early homophile organizations which began to form during the 1950s endorsed the psychoanalytic model and cooperated with researchers.[159] Two major organizations within the homophile movement, the Daughters of the Bilitis and the Mattachine, did not formally reject the psychoanalytic model of homosexuality until 1968, when the movement began to lobby the psychiatric community to declassify homosexuality as a mental illness.[160] By that time, today's LGBT elders ranged in age from fifty-four to twenty-four years old.

This pressure to declassify homosexuality intensified with the advent of the gay liberation movement in the early 1970s.[161] When the APA voted in 1973 to remove homosexuality from the *DSM-II*, however, it did not declassify homosexuality completely. In an unstated recognition of intense societal pressure to conform to the heterosexual norm, the APA created the new category of mental disorder called "sexual orientation disturbance" for individuals who desired to change their sexual orientation.[162] The name was later changed to "ego-dystonic homosexuality" and remained in the *DSM-III* until it was finally deleted in 1987.[163]

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[155] *See* ESKRIDGE, *supra* note 104, at 62.

[156] *Id.*

[157] *See* BAYER, *supra* note 4, at 39 (explaining the *DSM*).

[158] *Id.* at 9 (noting "[f]or much of the first half of this century many homosexuals who were willing to express themselves publicly welcomed the psychiatric effort to wrest control of the social definition of their lives from moral and religious authorities").

[159] *See id.* at 70–88 (discussing early homophile movement and its relationship to psychiatry).

[160] *Id.* at 88. The North American Conference of Homophile Organizations adopted a platform rejecting the model of the homosexuality as a mental illness with the slogan "Gay Is Good." *Id.* at 91.

[161] *See supra* text accompanying notes 121–23 (describing resistance to classification).

[162] BAYER, *supra* note 4, at 137 (explaining new classification). The new classification was "for individuals whose sexual interests are directed primarily towards people of the same sex and who are either disturbed by, in conflict with, or wish to change their sexual orientation." (citing an American Psychiatric Association press release). *Id.*

[163] LEVAY, *supra* note 138, at 229. "Ego-dystonic homosexuality" is defined as "[a] desire to acquire or increase heterosexual arousal so that heterosexual relations can be initiated or maintained and a sustained pattern of overt homosexual arousal that the individual explicitly complains is unwanted as a source of distress." BAYER, *supra* note 4, at 176.

II. Ageism and Homophobia

The forces of ageism and homophobia impact the lives of LGBT elders in two important ways. First, ageist and homophobic constructions work in tandem to make the very notion of a LGBT elder a *non sequitur*. As portrayed in contemporary culture, seniors are not sexual.[164] Homosexuals, on the other hand, are by definition sexual.[165] Accordingly, a senior can not also be a homosexual. This misunderstanding of senior sexuality and LGBT identity plays an obvious role in the continued invisibility of LGBT elders.

Second, ageism and homophobia alienate LGBT elders from the two communities with whom they share the greatest affinity: the LGBT community and the larger senior community. The response of the LGBT community to the isolation and silence experienced by its elders stands in stark contrast to its response to the first wave of the HIV/AIDS epidemic when the community rallied its resources.[166] This lack of response is due, at least in part, to ageism within the LGBT community. Already marginalized by homophobia, the ageism within the LGBT community compounds the isolation experienced by LGBT elders and makes their situation even more precarious.[167] The needs of LGBT elders are also not addressed by the mainstream senior community.[168] Its failure to advocate for LGBT inclusion and LGBT-specific programs is, at a minimum, the result of pervasive heter-

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[164] Barker explains:

> Huge cultural roadblocks and assumptions abound about the impropriety of sexual activity or desire in old age. This general tendency to de-sex and de-sexualize the elderly as well as to depict them as a bundle of health problems waiting to happen, if not already being manifest, results in a view of old people as androgynous, dependent, and ineffectual. This reticence about sex occurs with respect to all older people, not just sexual minorities, and has been a long-standing issue besetting studies of sexuality.

Barker, *supra* note 64, at 53.

[165] *See id.* at 54 (discussing "assumed hypersexuality of the young and male sexual minority person").

[166] *See generally* Randy Shilts, And The Band Played On: Politics, People and the AIDS Epidemic (2000) (mapping early years of the HIV/AIDS epidemic).

[167] Hostetler explains: "The sexualized nature of so much of gay public life, paired with ageism and the fear of becoming (or being seen as) 'old, gay, and alone,' turns out to be a powerful deterrent to community." Hostetler, *supra* note 79, at 169.

[168] The controversy over the 2005 White House Conference on Aging provides an example of how difficult it is to get mainstream aging organizations and agencies to consider LGBT issues. *See White House Conference Leaves Out Gay Seniors, Activists Charge*, The Advocate (Dec. 15, 2005), *available at* http://www.advocate.com/news_detail_ektid23410.asp. Make Room for All, a publication of the National Gay and Lesbian Task Force, is a compilation of materials from an alternative summit that was held before the White House Conference. Nat'l Gay & Lesbian Task Force, *supra* note 10, at 4. The alternative summit was held because of the "fear[ ] that these complicated issues challenging an aging America would not be recognized or addressed at the once-a-decade federally mandated conference charged with settling federal aging policy." *Id.*

onormativity that obscures LGBT identities.[169] In some instances, the failure is due to outright homophobia.

A. *The Invisibility of LGBT Elders: The De-Sexualized Senior and the Hypersexual Homosexual*

The invisibility of the LGBT elders is not solely the result of the closet and the self-imposed silence discussed in the preceding section. It also is the result of the unique interplay of ageism and homophobia. In the case of LGBT elders, these two forces coalesce to render the very notion of a LGBT elder impossible. Mainstream culture largely ignores or denies senior sexuality.[170] Despite survey results that show contrary findings, seniors are perceived as asexual or at least no longer sexual.[171] In the popular imagination, sex over sixty-five is considered not only unappealing, but also unlikely.[172]

To the contrary, gay men and lesbians are often defined principally by reference to their sexuality — their sexual orientation. Anti-gay rhetoric, in particular, emphasizes the sexual aspects of the lives and relationships of gay men and lesbians.[173] If gay men and lesbians are defined primarily by their sexuality and seniors are not sexual, then it follows that seniors cannot be gay or lesbian. Or, if seniors purport to be gay or lesbian, then they are referring to a part of their life that is over, and that they have left behind.

Obviously, this thinking misapprehends the nature of human sexuality which studies show continues well past age sixty-five.[174] It also mischaracterizes gay and lesbian identity by privileging its sexual aspects over issues of relationships and chosen families. Gay men and lesbians are more than the sum of their sex acts.[175] During the last quarter of the twentieth

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[169] *See* Gross, *supra* note 13, at A1 (noting that "[a]dmissions forms for long-term care have boxes to check for marital status and next of kin. But none of the boxes match the circumstances of gay men or lesbians.").

[170] *See* CAHILL, ET AL., *supra* note 10, at 53–54 (discussing negative views of senior sexuality and especially of senior homosexual sexuality).

[171] *See* Barker, *supra* note 64, at 53 (describing the "tendency to de-sex and de-sexualize the elderly").

[172] The cut-off date might well precede age sixty-five. Barker notes that in some studies "older" simply means over 40 years of age. *Id.* With that caveat, she notes that there is "some data showing that most older respondents remain sexually interested and active if an appropriate opportunity arises." *Id.*

[173] For a discussion of this rhetoric, see HERMAN, *supra* note 128, at 76–82, 98–101.

[174] *See* Hosam Kamel & Ramzi R. Hajjar, *Sexuality in the Nursing Home, Part 2: Managing Abnormal Behavior — Legal and Ethical Issues*, 4 J. AM. MED. DIR. ASS'N 203, 204–05 (2003) (citing research that indicates nursing home residents continue to have an interest in sex regardless of age). *See also* CAHILL, ET AL., *supra* note 10, at 53 (discussing "sexphobia within assisted and congregate living situations").

[175] Although gay men and lesbians are more than the sum of their sex acts, sexual orientation necessarily does raise issues of sexuality. *See* Knauer, *"Simply So Different," supra* note 27, at 1043 ("[T]he statement that 'I am gay' does tell us something about the speaker's sexual behavior whether it be practiced or simply desired. It explains that, at least on some level, the speaker has a predilection towards, or even enthusiasm for, certain sexual acts that commonly fall within the definition of sodomy.").

century, there has emerged a well-defined gay and lesbian identity similar to existing minority and ethnic identity models.[176] The identity model has broad support among gay men and lesbians and has produced a vibrant gay and lesbian culture.[177] Its central organizing principle is pride and openness regarding one's sexual orientation.[178]

Following the lead of the sexologists and the psychoanalytic model of homosexuality, the identity model accepts the view that a homosexual is a distinct and identifiable type of individual.[179] However, it throws these two previous understandings of homosexuality on their heads by asserting that homosexuality is a positive attribute and that gay men and lesbians should be proud of their sexual orientation.[180] It also repudiates the theories of causation espoused by the psychoanalytic model of homosexuality and rejects the need for a cure. According to the identity model, sexual orientation is an "immutable, unchosen, and benign characteristic" that should be a source of pride and not shame.[181] In this way, the identity model has successfully recast the social meaning of homosexuality as a positive attribute.

Given the broad acceptance of the identity model by gay men and lesbians, it is clear that any policy discussion regarding equity for LGBT elders cannot be limited to merely securing the rights of LGBT elders to express their sexuality. The liberty interests affirmed by the Supreme Court in *Law-*

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[176] *See* JAGOSE, *supra* note 14, at 61 (referring to the identity model as the "ethnic model" of sexual orientation). Jagose notes that the identity-based politics of the contemporary gay civil rights movement are "committed to establishing gay identity as a legitimate minority group, whose official recognition would secure citizenship rights for lesbian and gay subjects." *Id.* For a detailed discussion of the identity model see Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, *supra* note 17, at 53–64.

[177] *See* JAGOSE, *supra* note 14, at 59 (suggesting that an identity-based politics became "increasingly favoured" and the "dominant agenda" by the mid 1970s). Of course, community support is not necessarily proof of the model's veracity. During its period of predominance, many homosexuals accepted the psychoanalytic model, just as many inverts subscribed to the views of the sexologists in years earlier. *See* Knauer, *Science, Identity, and the Construction of the Gay Political* Narrative, *supra* note 17, at 7.

[178] *See* JAGOSE, *supra* note 14, at 91 (discussing "organising affect of 'pride'").

[179] Foucault asserted that the modern homosexual appeared as a distinct and identifiable type of individual with the advent of the sexologists and their theories of inversion. FOUCAULT, *supra* note 145, at 43 ("The sodomite had been a temporary aberration; the homosexual was now a species.").

[180] Part of this "pride" is the desire to "come out" and be open and honest about one's sexual orientation. The gay liberationists first advocated "coming out as a personal and political strategy." *See* JAGOSE, *supra* note 14, at 91.

[181] Knauer, *Homosexuality as Contagion*, *supra* note 148, at 403. The identity model asserts the existence of a common gay or lesbian identity and establishes gay men and lesbians as a blameless minority group who are quite literally "born that way." Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, *supra* note 17, at 64–66. Given that sexual orientation is a benign characteristic, it follows that gay men and lesbians are *the same as* any other minority group or non-gay individuals generally. Obviously, if gay men and lesbians are the same as everyone else, they deserve equal treatment. *See id.*

rence v. Texas certainly apply with equal force to seniors.[182] Simply affirming the right of seniors to express their sexuality would not fully address the concerns of LGBT elders because sexuality is only one aspect of contemporary LGBT identity.[183]

When LGBT seniors report that they retreat to the closet, they do not necessarily mean that they have given up sex; rather, these seniors mean they have hidden evidence that they believe may identify them as homosexual. By retreating to the closet, elders mean that they have chosen to edit their pasts in order to avoid censure in the present.[184] To do this successfully, they have to redact many important details of their lives and choose their memories carefully.[185] Some report that they create an alternate set of memories to share with others, such that a same-sex partner might become a brother or simply a "best friend."[186] The pressure to edit is particularly acute in institutional settings with congregate living facilities such as nursing homes.[187] Accordingly, equity in aging for LGBT elders would allow LGBT

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[182] Media stories of elder abuse and nonconsensual sexual activity in nursing homes also raise legitimate concerns regarding exploitation of vulnerable populations. *See* Vivian S. Toy, *Not a Place to Leave a Relative*, N.Y. TIMES, Nov. 17, 2002, at 14LI1.

[183] Senior sexuality also raises issues of competency and public/private space in the case of seniors in institutional settings. *See* Andrew Casta-Kaufteil, *The Old & the Restless: Mediating Rights to Intimacy for Nursing Home Residents with Cognitive Impairments*, 8 J. MED. & L. 69, 71–75 (2004) (arguing in favor of sexual rights for nursing home residents with limited cognitive function); *see also* Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?* 20 N.Y.U. REV. L. & SOC. CHANGE 517 (1993–94) (discussing issues and questions concerning sexual activities of institutionalized patients with mental disabilities).

[184] *See* Gross, *supra* note 13, at A1 (explaining LGBT elders retreat to the closet "rather than face slurs or whispers"). Dr. Melinda Lantz, chief of geriatric psychiatry at Beth Israel Medical Center in New York, explains that "there is something special about having to hide this part of your identity at a time when your entire identity is threatened." *Id.* She notes that closeted seniors face "a faster pathway to depression, failure to thrive and even premature death." *Id.*

[185] The closet requires its occupants to practice an intense process of information management and retrieval. LGBT elders must foreswear their chosen families and abdicate their memories. They are denied the opportunity to retell stories and revisit past events. In this way, the isolation they experience literally leaves them alone with their memories. *See id.*

[186] *Id.* Gross notes:

> The most common reaction, in a generation accustomed to being in the closet, is a retreat back to the invisibility that was necessary for most of their lives, when homosexuality was considered both a crime and a mental illness. A partner is identified as a brother. No pictures or gay-themed books are left around.

Id.

[187] *See* CAHILL, ET AL., *supra* note 10, at 53. Cahill, et al. explain this phenomenon as follows:

> As GLBT old people enter assisted living situations, nursing homes, independent elderly housing or retirement communities, they are often presumed heterosexual and may feel the need to go back into the closet; often their long-term relationships are devalued and not recognized. Even if they have lived openly in the past, they may suddenly find themselves in situations where disclosing their sexual orientation or gender variance makes them vulnerable to discrimination or even abuse. The lack of sensitivity to sexual orientation in housing and supportive care

elders to express their full identities, as well as their sexuality, without fear of disapproval or reprisal.

B. *Ageism within the LGBT Community*

As noted in Part I, one of the main challenges faced by LGBT elders is the absence of an intergenerational support system. In many cases, the pre-Stonewall generation may be estranged from their family of origin, and they may not have had children of their own.[188] Unlike a family of origin, a chosen family is more likely to be single-generational.[189] This result is at least partly attributable to the strong strain of ageism that runs through the LGBT community, particularly the gay male community.[190] It may also be the result of reluctance on the part of older LGBT individuals to befriend younger people due to the resilience of the "sexual predator" stereotype, which characterizes older gay men and lesbians as predisposed to prey on youth.[191]

1. *Age Cohorts and Ageism within the LGBT Community*

Existing research on the "Gay Generation Gap" focuses primarily on the division between youth and those in middle age.[192] This emphasis on youth is consistent with the commonly held belief that ageism is a serious problem in the LGBT community.[193] Indeed, some researchers suggest that the rapid change in the status of LGBT individuals has resulted in a fractured LGBT community that is divided by social and political experiences into

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programs for elders often places GLBT elders in vulnerable and uncomfortable circumstances.

Id.

[188] *See* Barker, *supra* note 64, at 61–62 (discussing estrangement generally).

[189] *See* Hostetler, *supra* note 79, at 159 (discussing intergenerational interactions, including the fact that "age-related divisions are exacerbated by the nature of intergenerational contacts in the gay community, which . . . involve strangers and nonkin interacting in bars and similar venues").

[190] *See* de Vries & Blando, *supra* note 50, at 20. The prevalence of ageism has led to what researchers have referred to as "accelerated aging." *Id.* Gay man and lesbians will refer to themselves as "old" at an earlier age than their non-gay peers. *Id.*

[191] Russell and Bohan remark that cross-generational relationships in the LGBT community have not been studied and note that "the homophobic assumption that adults are a risk to youth . . . (however mistaken) has often impeded worthwhile interactions across generations." Russell & Bohan, *supra* note 102, at 1.

[192] *See, e.g., id.*

[193] The author Patricia Nell Warren expressed her frustration with the "youth culture" when she said:

> Community means all of us, numerically including the old. I won't use the term again till [sic] we've earned it . . . and I will do my part to help bring those changes about. Till [sic] then, we need to stop kidding ourselves. Age bias is destroying the very gay world that we're trying so hard to build.

CAHILL, ET AL., *supra* note 10, at 18 (quoting Warren).

highly compressed generations or age cohorts.[194] The same researchers report members of these abbreviated generations have difficulty relating to individuals who do not share their common social and political experiences.[195]

For example, the post-Stonewall generation is clearly divided by their experience with HIV/AIDS.[196] There is the natural division between those gay men who came of age before safer sex and those who have never known sexuality without the danger of a life-threatening disease.[197] However, even among the post-HIV/AIDS age cohort, there is also a very important distinction between those men who lived through the first wave of the HIV/AIDS epidemic and lost partners and friends and those who did not. The first post-HIV/AIDS age cohort came of age during a fearful time when older men were considered synonymous with disease.[198]

Conversely, the turn-of-the-century generation came of age at a time of optimism with openly gay celebrities and same-sex marriage announcements in *The New York Times*.[199] For many in this generation, HIV/AIDS is an undesirable but manageable chronic disease.[200] There are LGBT-oriented cable networks, LGBT characters on television, LGBT movies, and even LGBT cruises.[201] With widespread media coverage of LGBT issues, it is increasingly unlikely that a LGBT young person in 2009 would be terrified that he or she is "the only one" or not know at least one word to describe same-sex attraction.[202] Studies report that the turn-of-the-century generation of gay men and lesbians has difficulty relating to stories of isolation and suffering and that they actually resent what they perceive to be a "privileg-

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[194] *See* Russell & Bohan, *supra* note 102, at 2–3.

[195] *Id.*

[196] *Id.* at 3.

[197] *See* Bertram J. Cohler, *Saturday Night at the Tubs: Age Cohort and Social Life at the Urban Gay Bath, in* GAY AND LESBIAN AGING, *supra* note 10, at 212. Speaking of the turn-of-the century generation, Cohler notes:

> While enjoying enhanced tolerance and even legal protection for their same-gender desire, this generation has also borne the burden of knowing that sex with other men can lead to seroconversion, and they have been exposed to discussions about AIDS from the elementary school years to the present.

Id. This is very different from the gay male sexuality practiced and experienced during post-Stonewall and pre-HIV/AIDS period. *See* SHILTS, *supra* note 166, at 11– 24.

[198] As noted earlier, gay men aged fifty and older have borne the brunt of the epidemic. *See* Gorman & Nelson, *supra* note 85, at 77.

[199] According to *The Advocate*, over 1,000 daily papers now accept same-sex marriage announcements. *Over 1000 Daily Papers Announce Gay Weddings*, THE ADVOCATE, Aug. 21, 2008, *available at* http://www.advocate.com/news_detail_ektid59625.asp.

[200] *See* Buchanan, *supra* note 86, at E7 (reporting that a 19-year-old gay man compared HIV to diabetes).

[201] When talk show host Ellen DeGeneres legally married her long-time girlfriend, the actress Portia DeRossi, their wedding was splashed on the front page of People magazine. *See, e.g.,* Julie Jordan & Michelle Tauber, *Ellen & Portia's Wedding*, PEOPLE, Sept. 1, 2008, at 51.

[202] *See* Cohler, *supra* note 196, at 212 (noting that "many pre-Stonewall gay men had no name for their same-gender attraction").

ing of suffering" on the part of older generations of gay men and lesbians.[203] The turn-of-the-century generation has benefited from the outreach efforts made by the LGBT community and policy makers to improve conditions for LGBT youth[204] — efforts that were fueled by the very stories that the younger generation now fails to comprehend.[205]

Given that the post-Stonewall generations have difficulty relating to each other, perhaps it is not surprising that there has been so little outreach to the pre-Stonewall generation.[206] For many years, Services & Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders ("SAGE") was one of the few LGBT organizations that prioritized issues related to aging.[207] The large LGBT advocacy organizations, such as the Human Rights Campaign, the National Gay and Lesbian Task Force, and the National Center for Lesbian Rights have only recently added "aging" to their list of action issues.[208]

The few commentators who have addressed the failure of the LGBT community to address the needs of its elders have all pointed to persistent

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[203] Russell & Bohan, *supra* note 102, at 5–6.

[204] Many LGBT adults report horrific childhoods marked by bullying, violence, and isolation. These accounts, along with statistics indicating that LGBT youth are at a higher risk of suicide and are more likely to drop out of school, led organizations such as GLSSEN to advocate for anti-bullying laws, Gay-Straight Alliances, and youth-oriented activities, such as alternative proms. High profile court cases have helped secure the right of students to be free from harassment and to organize a GSA. Unfortunately, similar attention has not been directed toward improving the conditions of LGBT elders. *See id.* at 4–5 n.18 (discussing the myriad difficulties LGBT youth face); *see, e.g.*, Boyd County High School Gay/Straight Alliance v. Boyd County, 258 F. Supp. 2d 667, 688–91 (E.D. Ky. 2003) (prohibiting GSA violates Federal Equal Access Act); Colin v. Orange Unified School Dist., 83 F. Supp. 2d 1135, 1144–49 (C.D. Cal. 2000) (same), East High Gay/Straight Alliance v. Board of Education of Salt Lake City School Dist., 81 F. Supp. 2d 1166, 1184 (D. Utah 1999) (same).

[205] Gorman and Nelson provide the following quotation from an older gay man:

> I don't mean they should be grateful or anything, but if they could just imagine what it was like. Like many young guys seem to think that there was a decade of party and then AIDS. It isn't that simple, obviously, and I get the sense of little appreciation for the real political and social hurdles or the relatively low level of consciousness and organizational savvy that existed at the time. It took years of struggle and hard work by both men and women and lots of blood, sweat and tears. It didn't just happen.

Gorman & Nelson, *supra* note 85, at 83.

[206] *See* Russell & Bohan, *supra* note 102, at 2. Hostetler notes that "there remain relatively few other public spaces in which mature gay men and women can just socialize or 'sit and talk in a group.'" Hostetler, *supra* note 79, at 161 (referring to spaces other than bars and clubs).

[207] SAGE was founded in 1978 as Senior Action in a Gay Environment. It provides a wide range of services for LGBT elders. Its website states that "SAGE works with LGBT elders to address and overcome the challenges of discrimination in senior service settings, while also being an essential component in the creation of informal caregiving support, and development of new 'family' networks." SAGE, About Us, http://www.sageusa.org/about/index.cfm (last visited Nov. 14, 2008).

[208] *See* CAHILL, ET AL., *supra* note 10, at 20 (noting that the National Center for Lesbian Rights, the Lambda Legal Defense and Education Fund, and the Policy Institute of the National Gay and Lesbian Task Force only recently added aging to their issues).

ageism within the community as the primary cause.[209] The LGBT community, especially the gay male community, is commonly described as a youth culture.[210] Gay men report considerable anxiety about aging, and a generational divide can arise over the span of only ten years.[211] Within the LGBT community, bars have been a historically important meeting place and epicenter of community.[212] The primacy of the bar and club culture reinforces the preference for youth.[213] In a community where twenty-something gay men consider thirty-something gay men to be irrelevant, getting either group to take an interest in the lives and well-being of octogenarians presents an obvious challenge.

That being said, the current state of affairs of LGBT elders has strong parallels to the unnecessary anguish and suffering that occurred during the first wave of the HIV/AIDS epidemic as a result of homophobia and ignorance concerning the disease.[214] The difference is that LGBT elders have not

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[209] *See, e.g., id.* at 18:

> Ageism is the devaluing of, exclusion of, or discrimination against people because of their age. Like racism, sexism, classism, ableism, homophobia, and transphobia, it is systemic; operating across GLBT culture to enforce the value that what is "old" is less attractive, less important, less useful, less worthy of attention and resources.

Id.

[210] *See* Hostetler, *supra* note 79, at 159 (arguing that another author "underestimates the extent to which the gay community, in its public and institutional incarnations, centers around the needs of its (young) single citizens").

[211] *See* CAHILL, ET AL., *supra* note 10, at 16. Lesbians do not report the same level of anxiety with respect to aging and reports suggest that ageism is not as great a problem within the women's community. *Id.* With respect to the length of LGBT generations, Russell and Bohan write:

> [A] generation may span only a few years when those years are characterized by dramatic changes that have profound impacts on the identities of those who experience those events — particularly youth in the throes of identity consolidation. This seems very fitting for our understanding of contemporary LGBT generations, where events that were regarded as astonishing a decade or less ago are now frequent if not commonplace. The lives of those coming to LGBT identities in the shadow of such shifts are significantly different from the lives of those whose identity was formed earlier, different enough that they might easily be regarded as distinct generations.

Russell & Bohan, *supra* note 102, at 3.

[212] *See* Hostetler, *supra* note 79, at 154–59 (discussing research on concerns about growing older); CAHILL, ET AL., *supra* note 10, at 16 (referring to "accelerated aging" as "perhaps the most striking example of internalized ageism").

[213] *See* Erika Hiyasaki, *For Gays, A Generation Gap Grows*, L.A. TIMES, May 18, 2007, at A1.

[214] *See* NAT'L GAY & LESBIAN TASK FORCE, *supra* note 10, at 5:

> Similar to the challenges presented by the early years of HIV/AIDS in the LGBT community, we may find ourselves in the position of being forced to develop and attempt to fund an entire service sector for our elderly from within the LGBT community if we do not take policy, advocacy, and organizing action now.
>
> Even in those few places where there are some resources in our communities around aging — mostly in large cities and regions with active LGBT communities — the amount of awareness, coordinated services, funding, and support for work

been the beneficiaries of the type of mass community outreach that took place during the mid-1980s and brought a much needed level of compassion and caring to a tragic time. The wide spectrum of services provided by the community during the 1980s HIV/AIDS epidemic correspond to many of the needs presented by LGBT elders.[215] HIV/AIDS buddy programs provided companionship.[216] Community volunteers delivered hot meals, walked dogs, catalogued art works, and wrote wills.[217] The LGBT community raised money for research, educated law makers and the public, challenged the government and pharmaceutical companies, and otherwise humanized the face of a deadly epidemic.[218]

Unlike the HIV/AIDS epidemic, age segregation within the LGBT community works to keep the current crisis in LGBT elder care out of sight.[219] The post-Stonewall generations have fought hard for greater openness and protections from harassment and violence, but the most vulnerable members of the LGBT community live in silence and increasing isolation.[220] One way to advance the goal of equity in aging regardless of sexual orientation or gender identity would be to facilitate intergenerational dialogue. However, members of the post-Stonewall generations can also benefit from increased intergenerational exchanges.[221] To the extent that many LGBT individuals are estranged from their families of origins, LGBT elders can provide a different and valuable perspective based on experience — what gerontologists refer to as "wisdom."[222]

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with LGBT elders is nearly nonexistent. In rural areas, the situation is even more dire. What is clear is that the needs of LGBT elders everywhere dramatically outweigh the resources currently available to address them.

[215] *See, e.g.*, SHILTS, *supra* note 166, at 179 (describing how Gay Men's Health Crisis created "an entirely new social service network").

[216] *See, e.g.*, Maureen Dowd, *For Victims of AIDS, Support in a Lonely Siege*, N.Y. TIMES, Dec. 5, 1983, at B1 (discussing an early "buddy" program).

[217] *See id.* (noting that volunteers "clean apartments, do laundry, make dinner, pick up prescriptions, mail rent checks, walk dogs, take their patients to doctor's appointments and simply keep them company").

[218] *See* SHILTS, *supra* note 166, at 120–25, 204–08.

[219] *See* Russell & Bohan, *supra* note 102, at 2 (noting that "age-segregation is likely to be self-sustaining").

[220] *See, e.g.*, JAGOSE, *supra* note 14, at 30–44. "Gay liberationists . . challenged conventional knowledge about such matters as gendered behaviour, monogamy and the sanctity of the law" and protested "the continued pathologization of homosexuality" at the American Medical Association and American Psychiatric Association. *Id.* at 31, 37.

[221] Kimmel argues for "increas[ing] the intergenerational contact and knowledge within the lesbian, gay, and bisexual communities." Kimmel, *supra* note 52, at 265. He notes that such contact "is important because most lesbians, gay men, and bisexuals do not have role models for aging within their family of origin, as most heterosexuals do." *Id.*

[222] Russell & Bohan, *supra* note 102, at 4 (noting that "youth lack the resources and the wisdom of life experience to find and enact answers on their own").

2. *Internalized Fear of the Predatory Homosexual*

As discussed in Part I, the notion of the predatory homosexual played an integral role in the American Freudians' theory of causation and precipitated the enactment of the sexual psychopath laws in the 1930s.[223] Regardless of recent legal advances, the notion of the homosexual-as-pedophile remains a staple of anti-gay political rhetoric and continues to have currency in the popular understanding of homosexuality, as well as in law and public policy.[224] Most importantly, it also seems to have continued resonance for many elder LGBT individuals who report hesitation in pursuing intergenerational relationships for fear of being perceived as a predatory older homosexual.[225]

The fact that some LGBT elders have internalized the negative image of the predatory older homosexual presents a second barrier to the formation of intergenerational chosen families.[226] The resilience of this discredited stereotype also highlights the importance of understanding the historical background of the pre-Stonewall generation. The myth of the predatory homosexual was not only successful in influencing anti-gay attitudes. It also impacted the lives of members of the pre-Stonewall generation and the ways they structured their relationships.[227]

For the majority of their lives, the law aggressively policed the interactions between LGBT individuals and children and imposed severe legal disabilities on LGBT individuals in areas such as education, custody, and adoption.[228] Many of these legal restrictions have persisted long after the APA declassified homosexuality and the views of the American Freudians were discredited.[229] From the perspective of the pre-Stonewall generation, however, the current state of the law represents a significant improvement.

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[223] The theory of the predatory homosexual provided justification for the sexual psychopath laws enacted in the 1930s. *See* TERRY, *supra* note 35, at 272.

[224] *See* HERMAN, *supra* note 128, at 79 (discussing "the discourse of seduction" in anti-gay rhetoric).

[225] *See* Russell & Bohan, *supra* note 102, at 1 (stating that the fear of the predator stereotype "(however mistaken) has often impeded worthwhile interactions across generations").

[226] *See id.*

[227] LGBT elders came of age when the psychoanalytic narrative of the homosexual lifecycle began with the seduction of an innocent by an older homosexual. *See* Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, *supra* note 17, at 19 (discussing homosexuality in general as a phobic response). Under the theory of sexual orientation constructed by the American Freudians, this would trigger a phobic response to the opposite sex and the young victim would become a homosexual. *Id.* The victim would then mature into an unhappy and disaffected homosexual who would in turn prey on young children and the cycle would continue. *Id.*

[228] *See* ESKRIDGE, *supra* note 104, at 73, 136–37 (discussing investigations of gay teachers and custody laws); *see supra* text accompanying notes 236–238 (discussing legal restrictions on adoption).

[229] Some of the earliest skirmishes in the post-Stonewall culture wars have involved LGBT teachers and curriculum issues, such as Anita Bryant's 1977 "Save Our Children" crusade. *See* ESKRIDGE, *supra* note 104, at 131. The next year California voters defeated

For example, pre-Stonewall LGBT individuals could be fired from teaching jobs, lose custody of their children, and end up involuntarily committed in a mental institution.[230] Although LGBT teachers are still not protected from discrimination in a majority of states, for the most part, LGBT individuals will no longer automatically lose custody of their children, and they no longer risk civil commitment.[231]

Today, only a handful of states mandate that homosexuality must be described in negative terms when taught in their public school curricula.[232] There have been great advancements in the area of custody and visitation rights, but some judges still consider homosexuality to be per se evidence that an individual is an unfit parent.[233] For example, in 2002 the Chief Jus-

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a ballot initiative that would have banned homosexuals from teaching or expressing pro-homosexual views. *Id.* at 131–32.

[230] *See supra* text accompanying notes 113–31 (describing criminalization and diagnosis of homosexuality).

[231] Twelve states and the District of Columbia have laws prohibiting discrimination on account of sexual orientation and gender identity. These states are: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Eight additional states prohibit discrimination on account of sexual orientation. These states are: Connecticut, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin. Human Rights Campaign, Statewide Employment Laws & Policies (Aug. 21, 2008), http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf. For a discussion of the legal rights of teachers in the absence of anti-discrimination protection for sexual orientation see Mary L. Bonauto, Gay & Lesbian Advocates & Defenders, Overview of the Rights of Gay, Lesbian, and Bisexual Teachers (Jan. 1, 1999), http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/106-1.pdf.

[232] For example, the South Carolina Comprehensive Health Education Program provides that the mandatory health education programs to be implemented by local school boards "may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases." S.C. CODE ANN. § 59-32-30(A)(5) (2008). Alabama and Texas require that their sex education programs include an "emphasis" presented "in a factual manner and from a public health perspective" that "homosexuality is not a lifestyle acceptable to the general public." ALA. CODE § 16-40A-2(c)(8) (2008); TEX. HEALTH & SAFETY CODE ANN. § 163.002(8) (Vernon 2008). Both laws also contain outdated language to the effect that homosexual conduct is also criminal. Arizona does not require the teaching of negative "facts" about homosexuality, but instead forbids local school districts from teaching anything that: "[p]romotes a homosexual life-style [or, p]ortrays homosexuality as a positive alternative life-style." ARIZ. REV. STAT. ANN. § 15-716(c)(1-2) (2008).

[233] *See* ESKRIDGE, *supra* note 104, at 136–37 (discussing custody laws). The family law concept of the "best interests" of the child is a multifactor test that frequently denied custody to the parent in a same-sex relationship regardless of whether the court considered the parent to be per se unfit. *See* Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFFALO L. REV. 341, 364–69 (2002) (explaining "best interests" analysis). For example, in the much publicized case of *Bottoms v. Bottoms*, the Virginia Supreme Court applied a "best interests" of the child standard and awarded custody to the child's maternal grandmother. Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995). The court acknowledged that "a lesbian mother is not *per se* an unfit parent," but went on to stress that the "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth, Code § 18.2-361; thus, that conduct is another important consideration in determining custody." *Id.*

tice of the Alabama Supreme Court described homosexuality as "an inherent evil, and an act so heinous that it defies one's ability to describe it"[234] and concluded that it "creates a strong presumption of unfitness."[235] Although the majority of states now permit second-parent adoption,[236] Florida prohibits any adoption by a LGBT individual[237] and three other states specifically prohibit same-sex couples from jointly adopting a child.[238] Given that the myth of the predatory homosexual continues to inform our law and social policy,[239] it is not surprising that it remains an active consideration in the lives of LGBT elders.

C. *Homophobia and Heteronormativity within the Senior Community and Aging Services*

The senior community is a powerful political force.[240] Senior citizens are a reliable voting bloc and have considerable influence in partisan politics.[241] In terms of political clout, few organizations can rival the strength of the American Association of Retired Persons ("AARP").[242] Although seniors have been on the forefront of many social issues, such as health care reform and stem cell research, they have been reluctant to embrace LGBT

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[234] *Ex parte* H.H., 830 So. 2d 21, 37 (Ala. 2002) (Moore, J., concurring).

[235] *Id.* at 26 (stating sexual orientation was "sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others").

[236] Human Rights Campaign, Second Parent Adoption, http://www.hrc.org/issues/parenting/adoptions/2385.htm (last visited Nov. 2, 2008). Eight states permit second-parent adoption by statute or appellate level decisions. These states are: California, Connecticut, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont. In eighteen other states, trial court decisions permit second-parent adoption. The eighteen states are: Alabama, Alaska, Delaware, Hawaii, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, Texas, and Washington. *Id.*

[237] FLA. STAT. § 63.042(3). This law was upheld post-*Lawrence* by the 11th Circuit Court of Appeals in 2004. Lofton v. Sec'y of the Dep't of Children & Family Services, 358 F.3d 804 (11th Cir. 2004).

[238] MISS. CODE ANN. § 93-17-3 (2008) (2000 amendment prohibiting "couples of the same gender" from adopting); UTAH CODE ANN. § 78(B)-6-101(4) (prohibiting adoption by a person who cohabits without the benefit of marriage); *In re* Adoption of M.C.D., 42 P.3d 873 (Okla. Civ. App. 2001) (ruling unmarried couples may not adopt).

[239] Stereotypes propagated by both the congenital and psychoanalytic models of homosexuality continue to inform the popular understanding of homosexuality. For example, the theory of gender variance expounded by the sexologists and the concept of the sexual psychopath created by the American Freudians persist in the stereotypes associated with gay men and lesbians even though both models have been repudiated by the medical establishment. *See* TERRY, *supra* note 35, at 272-73.

[240] *See generally* ANDREA LOUISE CAMPBELL, HOW POLICIES MAKE CITIZENS: SENIOR ACTIVISM AND THE AMERICAN WELFARE STATE (2005) (case study of the political empowerment of senior citizens).

[241] *See id.* at 46–47.

[242] *See id.* at 79.

issues.[243] In some instances, this might be the result of outright homophobia or hostility toward LGBT individuals, but in other instances it is due to the invisibility of LGBT elders and the pervasive heteronormativity of our aging policies.

The empirical research regarding homophobia and discrimination by senior organizations, aging agencies, and eldercare providers is limited.[244] Anecdotal evidence seems to be confirmed by the existing survey data showing discriminatory attitudes and practices.[245] For example, in an earlier survey nearly half the federally funded Area Agencies on Aging ("AAAs") interviewed "reported that gay men and lesbians would not be welcome at the senior centers in their areas if their sexual orientation were known."[246] Seventy-two percent of LGBT elders surveyed reported that they were "'tentative' about using [AAA] services," and "[o]nly nineteen percent reported any involvement with a senior center."[247] The services provided include: meals and nutritional support, in-home care, transportation, daycare, emergency home repair, and general care coordination.[248]

Perhaps more importantly, some LGBT elders express concern that they *will be* subject to discrimination on account of their sexual orientation or gender identity.[249] In other words, LGBT individuals anticipate that as they age they will be treated poorly on account of their identity. This might explain why LGBT respondents are more fearful of growing older than their non-LGBT peers.[250] In a 2006 Metlife survey, forty-one percent of LGBT Baby Boomers who were between the ages of forty and sixty-one reported that they were worried about growing older.[251] Meanwhile, in the same

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[243] *See* Saul Friedman, *Gray Matters: AARP Flexes Its Muscle on Medicaid, Support for Gays*, NEWSDAY, Aug. 16, 2008, at B06 (stating that "AARP has been ahead of most straight seniors' organizations in publicizing and supporting efforts on behalf of gays and lesbians").

[244] *See* CAHILL, ET AL., *supra* note 10, at 36–38 (discussing research).

[245] For example, a study by the Gay and Lesbian Medical Association found that biased caregiving was widespread. *Id.* at 58. In addition, surveys of social workers have found an alarming high rate of intolerance toward LGBT elders. *Id.* at 54.

[246] *Id.* at 40. AAAs are local agencies established by the Older Americans Act which coordinate services and programs. *Id.* at 36–37. The purpose of AAAs is to "make it possible for older adults to remain in their homes and communities as long as possible." National Association of Area Agencies on Aging, About n4a, http://www.n4a.org/about-n4a/ (last visited Nov. 14, 2008) (noting there are 650 AAAs). AAAs "provid[e] a range of options that allow older adults to choose the home and community-based services and living arrangements that suit them best." *Id.*

[247] CAHILL, ET AL., *supra* note 10, at 41.

[248] *See, e.g.*, Appalachian Agency for Senior Citizens, Services and Programs, http://www.aasc.org/aasc/ServicesandProgramsPage.aspx (last visited Nov. 14, 2008) (showing range of services).

[249] This concern is also expressed by Baby Boomers who are not yet bona fide seniors. In the 2006 Metlife survey, thirty percent of LGBT Boomers reported concern that they would experience discrimination as they age. METLIFE, *supra* note 72, at 14.

[250] *Id.* at 13.

[251] *Id.*

study, thirty-three percent of non-LGBT Baby Boomers reported concern over aging.[252]

In the same 2006 study of LGBT Baby Boomers, a significant percentage expressly stated that they were worried that they would be subject to anti-LGBT bias as they grew older.[253] When asked to identify their "greatest concerns about aging," thirty-two percent of the men and twenty-six percent of the women cited anti-LGBT discrimination.[254] The LGBT Baby Boomers also evidence a significant lack of confidence in the medical professionals who would be responsible for their care.[255] Nineteen percent responded that they had "little or no confidence that medical personnel [would] treat them with dignity and respect as LGBT people in old age."[256] A full twelve percent of the lesbians surveyed responded that they had "no confidence that they would receive appropriate and unbiased treatment."[257]

It is not surprising that the pre-Stonewall generation who came of age during the predominance of the psychoanalytic model would approach the medical establishment and their non-LGBT peers with some level of trepidation. Nor is it surprising that non-LGBT elders, as an age cohort, have a higher incidence of homophobia than the general population.[258] However, the 2006 survey indicates that even the post-Stonewall LGBT Baby Boomers are highly skeptical and fearful when it comes to the ability of the medical profession to care for them in an unbiased manner.[259] This lack of confidence in the eldercare profession underscores the need for LGBT "cultural competency" initiatives and suggests that the crises in LGBT eldercare may not be limited to the particular circumstances of the pre-Stonewall generation.[260]

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[252] *Id.*

[253] *Id.* at 14.

[254] *Id.* The men and women reporting anti-LGBT discrimination as their biggest fear about aging increased to thirty-three percent for individuals in same-sex partnerships. *Id.*

[255] *See id.*

[256] *Id.*

[257] *Id.*

[258] *See* CAHILL, ET AL., *supra* note 10, at 17 (noting "[a]nti-gay attitudes are widespread among elderly people in the United States"); *see also* Simon Birch, *Out of the Closet*, GUARDIAN, July 25, 2001, *available at* http://www.guardian.co.uk/society/2001/jul/25/guardiansocietysupplement3 (noting older age groups are more homophobic).

[259] *See* METLIFE, *supra* note 72, at 14.

[260] *See* FUNDERS FOR LESBIAN & GAY ISSUES, *supra* note 10, at 15; Amber Hollibaugh, *The Post-Stonewall/Baby Boomer Generations' Impact on Aging in Gay, Lesbian, Bisexual & Transgender Communities, in* NAT'L GAY & LESBIAN TASK FORCE, *supra* note 10, at 71, 73. "Cultural competency" refers to programs established in institutions such as schools and nursing homes to address the particular needs of certain constituencies. One definition of cultural competency provides that it is "a set of congruent behaviors, attitudes, and policies that come together in a system, agency, or among professionals and enables that system, agency, or those professionals to work effectively in cross-cultural situations." Mark A. King, Anthony Sims, & David Osher, Center for Effective Collaboration and Practice, *How is Cultural Competency Integrated in Education*, http://cecp.air.org/cultural/Q_integrated.htm#def (last visited Nov. 14, 2008).

The fear that non-LGBT peers and eldercare professionals may be disapproving, or even overtly hostile, helps to keep LGBT elders silent. When LGBT elders retreat to the closet, they are seeking safety, but their silence also reinforces their isolation and makes it much more difficult to access their needs and design LGBT-specific programs.[261] Thus, the initial step in working for equity in aging regardless of sexual orientation or gender identity is to acknowledge the existence of LGBT elders and appreciate the unique characteristics of the pre-Stonewall generation, such as their inclination toward nondisclosure and their primary reliance on chosen family for support. This requires mainstream senior organizations and aging agencies to initiate LGBT cultural competency programs similar to those adopted with regard to ethnic and racial minorities that recognize and respond to these distinctive characteristics.

In addition to cultural competency programs, mainstream senior organizations and accreditation agencies can be instrumental in the adoption of LGBT anti-discrimination protections in private eldercare settings. These internal policies can address outright discriminatory acts, as well as provide a strong signal of inclusion and acceptance to LGBT elders. In some jurisdictions, these policies might duplicate protections granted under state or local law. Currently, twelve states and the District of Columbia provide protection on account of both sexual orientation and gender identity and an additional eight states provide such protection only on the basis of sexual orientation.[262] The scope of these laws varies, so it is unclear how many states would mandate non-discrimination in eldercare settings.[263]

In addition to the adoption of broad protections, it is also important to examine existing rules and internal policies for heteronormative assumptions that could negatively impact LGBT elders. For example, residential facilities often prohibit unrelated individuals from living together.[264] This is not an absolute ban on homosexuals, but it clearly excludes same-sex couples who reside in the vast majority of states which do not provide any legal recognition of same-sex relationships.[265] It also disadvantages members of a

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[261] One survey showed that ninety-six percent of all AAA's did not have LGBT-specific programming. CAHILL, ET AL., *supra* note 10, at 40.

[262] Twelve states and the District of Columbia have laws prohibiting discrimination in employment on account of sexual orientation and gender identity. Eight additional states prohibit employment discrimination on account of sexual orientation. *See* Human Rights Campaign, Statewide Employment Laws, *supra* note 231.

[263] Some of the anti-discrimination laws only apply to employment, whereas other laws, such as the New Jersey Law Against Discrimination ("LAD"), are very broad. *See, e.g.*, N.J. STAT. ANN. §§ 10:5-1–10:5-49 (West 2002) (codification of New Jersey's laws against discrimination).

[264] *See* CAHILL, ET AL., *supra* note 10, at 54.

[265] Eleven states and the District of Columbia provide some form of recognition of same-sex relationships. These states are: California, Connecticut, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Vermont, and Washington. Human Rights Campaign, Relationship Recognition in the U.S. (Oct. 15, 2008), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf.

chosen family group who are not recognized as being "related" for legal purposes. Whereas siblings or cousins might be permitted to live together, a same-sex couple or two life-long friends would not be permitted to live together because the relationship is not legally recognized. Cultural competency training would help to highlight these heteronormative assumptions that may otherwise seem unremarkable.

III. LGBT ELDERLAW ADVOCACY : LEGAL AND POLICY ISSUES

In terms of larger advocacy issues, many of the legal disabilities imposed on LGBT individuals are greatly magnified when applied to LGBT elders. For example, acts of discrimination or intimidation can take on an especially menacing hue when directed at a closeted elder who finds herself in poor health, dependant on others, and confined to an institutional setting. The vulnerability and isolation of LGBT elders intensifies the potential for harm and underscores why these issues should be of urgent interest to mainstream LGBT and senior advocacy efforts.

As noted in the Introduction, the three signature issues of the contemporary LGBT equality movement have been same-sex marriage, employment non-discrimination protections, and the military's Don't Ask, Don't Tell policy.[266] This section examines these topics from the perspective of LGBT elders to illustrate that LGBT elders present a distinct set of concerns and challenges that are not adequately incorporated in the mainstream LGBT agenda. These concerns are: the legal fragility of chosen families that extend beyond partners, financial insecurities linked to heteronormative aging policies, and the availability of LGBT-positive affordable housing and eldercare.

A. Same-Sex Marriage, Chosen Families, and Heteronormative Federal Aging Policies

Over the last fifteen years, same-sex marriage has become *the* signal issue in the struggle for LGBT equality.[267] The public discussion has been

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[266] Although *Lawrence v. Texas* has affirmed liberty interests in same-sex sexuality, subsequent case law has not extended these liberty interests to other settings, such as same-sex marriage or adoption. *See* Lofton v. Sec'y of the Fla. Dep't of Children & Families, 93 F. Supp. 2d. 1343 (S.D. Fla. 2000); 157 F. Supp. 2d 1372 (S.D. Fla. 2001), *aff'd*, 358 F.3d 804 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2005), *cert. denied*, 543 U.S. 1081 (2005). The majority in *Lawrence* rejected Justice O'Connor's notion that sexual orientation should trigger a "more searching review," and attempts to categorize sexual orientation as a protected class have been unsuccessful. State constitutional law may provide greater protection, as has been the case in California, Connecticut, Massachusetts, New Jersey, and Vermont with respect to the legal recognition of same-sex marriage.

[267] *See generally* GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY (2004) (discussing the history of the gay quest for equal rights in marriage from the mid-twentieth century to the present).

primarily focused on the range of spousal benefits that are denied to same-sex couples.[268] Of particular concern to LGBT elders are the spousal provisions of Social Security and Medicaid.[269] Beyond the question of benefits, however, the debate over same-sex marriage is ultimately about the ability to define one's family.[270] This is especially important for the large percentage of LGBT elders who rely on chosen family for support and caregiving.[271] For such individuals, although the recognition of same-sex partners is important, it will not be sufficient to ensure the security of their chosen family. Non-partner members of a chosen family will continue to be legal strangers, which means that LGBT elders must rely on contract and estate planning documents to delineate rights and responsibilities. Unfortunately, even the most comprehensive contract and planning documents are not sufficient to imbue chosen family with all the legal attributes of next of kin.[272]

1. *Same-Sex Marriage*

Given that marriage is traditionally a state law issue, the efforts to secure same-sex marriage have primarily involved state constitutional litigation and legislative reform. Eleven states and the District of Columbia now

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[268] It is often cited that there are 1138 federal statutory provisions under "which marital status is a factor in determining or receiving benefits, rights, and privileges." Letter from Dayna K. Shah, Associate General Counsel, United States General Accounting Office, to Honorable Bill Frist, Majority Leader, United States Senate (Jan. 23, 2004), http://www.gao.gov/new.items/d04353r.pdf.

[269] A surviving spouse qualifies for social security death benefits. 42 U.S.C. § 402 (2000)(i). The surviving spouse of a deceased retired worker receives one hundred percent of the deceased spouse's benefits. 42 U.S.C. § 402(e)-(f) (2000); 42 U.S.C. § 1396p(b)(2)-(2)(A) (2000) (providing, in pertinent part: "Any adjustment or recovery . . may be made only after the death of the individual's surviving spouse, if any . . . and only at a time . . . when he has no surviving child who is under age 21, or . . . is blind or permanently and totally disabled . . . "). In addition, no lien may be attached to the residence if a qualified sibling, son, or daughter of the decedent resides in the home. § 1396p(b)(2)(B). *See generally* Diane Lourdes Dick, *The Impact of Medicaid Estate Recovery on Nontraditional Families*, 15 U. FLA. J.L. & PUB. POL'Y 525 (discussing the use of liens in the context of nontraditional families).

[270] The debate over same-sex marriage often misses an important point regarding the status of same-sex partners in the absence of relationship recognition.

> A same-sex partner is a legal stranger who stands behind children, parents, siblings, grandparents, aunts and uncles, and even cousins in terms of priority and legal standing. As such, the question is often not whether a same-sex partner will be treated equally as a spouse, but whether a same-sex partner will be recognized at all. Marriage provides a way to make your partner family, to include your partner's name on a list which is otherwise determined solely in terms of biology and adoption.

Nancy J. Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261, 1270 (2006).

[271] *See supra* notes 72–79 and accompanying text (discussing percentage of LGBT elders who rely on chosen family).

[272] *See* Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, *supra* note 270, 1261, 1271–72.

provide some level of recognition for same-sex relationships.[273] Two states, Massachusetts and Connecticut currently allow same-sex marriage,[274] and an additional five states have marriage equivalents.[275] Three additional states extend a lesser level of recognition, such as the "reciprocal beneficiary" status that is available in Hawaii.[276] As a result, an estimated twenty-one percent of all same-sex couples live in a jurisdiction where they are entitled to some level of legal recognition.[277] In addition, numerous municipalities and private employers have recognized same-sex partnerships through the grant of domestic partner benefits.[278] Some municipalities have also instituted domestic partner registries.[279]

Despite these advancements, forty-five states prohibit same-sex marriage by either statute or constitutional amendment, and some states actually have both.[280] Of these states, seventeen have particularly aggressive provi-

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[273] *See* Human Rights Campaign, Relationship Recognition in the U.S., *supra* note 265.

[274] In 2003, the Supreme Judicial Court of Massachusetts held that limiting access to the protections and benefits of civil marriage to opposite-sex couples violated the state constitution. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948–49 (Mass. 2003); Kerrigan v. Comm'r of Pub. Health, 957 A. 2d 407, 411–12 (Conn. 2008) (invalidating prohibition against same-sex marriage under intermediate scrutiny). For a discussion of same-sex marriage in California, see *supra* note 1.

[275] In 2006, the Supreme Court of New Jersey held that limiting access to the protections and benefits of civil marriage to opposite-sex couples violated the state constitution, but it did not require the state to permit same-sex couples to marry. Lewis v. Harris, 908 A.2d 196, 200 (N.J. 2006). In response, the New Jersey state legislature enacted the Civil Union Act which extends all the benefits of marriage to same-sex couples who enter a civil union. *See* N.J. STAT. ANN. § 37:1–28 (West 2002 & Supp. 2008). Four additional states (California, New Hampshire, Oregon, and Vermont) and the District of Columbia offer same-sex couples rights equivalent to marriage. Human Rights Campaign, Relationship Recognition in the U.S., *supra* note 265.

[276] HAW. REV. STAT. ANN. § 572C-1 to -7 (LexisNexis 2005). Two other states (Maine and Washington) extend partial benefits to same-sex couples. Human Rights Campaign, Relationship Recognition in the U.S., *supra* note 265.

[277] Jon W. Davidson, *Celebrating Recent LGBT Legislative Advances*, Lambda Legal (May 30, 2007), http://www.lambdalegal.org/our-work/publications/facts-backgrounds/recent-lgbt-advances.html (explaining "more than 21 percent of all same-sex couples currently live in states where all of the state law rights of marriage are available to them.").

[278] According to the Human Rights Campaign, the majority of Fortune 500 companies now offer domestic partnership benefits. Human Rights Campaign, Domestic Partner Benefits, http://www.hrc.org/issues/workplace/benefits/domestic_partner_benefits.htm (last visited Nov. 5, 2008). Human Rights Campaign maintains a database of employers that offer domestic partner benefits. At present, the database indexes 8634 private sector employers and 305 colleges and universities. Human Rights Watch, Employer Database, http://www.hrc.org/issues/workplace/search.asp?form=private_quick_search.aspx (last visited Nov. 20, 2008).

[279] The San Francisco Human Rights Commission website maintains a comprehensive list of domestic partnership ordinances on the city and county level, including the requirements for registration and the rights conferred. San Francisco Human Rights Commission, State Domestic Partnership Registries, http://www.sfgov.org/site/sfhumanrights_page.asp?id=6283 (last visited Nov. 5, 2008). Domestic partner registries are largely symbolic, but the act of registration with local authorities also provides evidence of the relationship if it were to be challenged in litigation.

[280] Human Rights Campaign, Statewide Marriage Prohibitions (Sept. 19, 2007), http://www.hrc.org/documents/marriage_prohibit_20070919.pdf. The only states without a

sions that not only prohibit same-sex marriage, but also purport to prohibit all other forms of relationship recognition.[281] Moreover, the Defense of Marriage Act ("DOMA") provides that for all federal purposes marriage is only between one man and one woman.[282] This means that despite a valid marriage under state law, a legally married same-sex couple will not be eligible for the 1,138 federal statutory provisions under "which marital status is a factor in determining or receiving benefits, rights, and privileges."[283]

2. *Chosen Families and Legal Strangers*

The debate over same-sex marriage is ultimately about the right to define family. As noted above, this has particular importance for the LGBT elder with a "chosen family."[284] Regardless of how individuals choose to order their lives and their relationships, the law continues to privilege those relationships defined by blood, marriage, and adoption. In the absence of recognition of same-sex relationships, a same-sex partner is a legal stranger because there is no way to make a same-sex partner legal *family*. For LGBT elders with a chosen family, this legal disability extends beyond just their partner and includes all of their potential caregivers. A same-sex partner will be considered "next of kin" to some extent in eleven states,[285] but the other members of a chosen family remain legal strangers in all fifty states.

The consequence of this is that chosen family will be excluded from all of the rights and benefits afforded next of kin. For example, family members are included as heirs for purposes of intestate succession,[286] and they

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marriage prohibition are: Massachusetts, New Jersey, New Mexico, New York, and Rhode Island. *Id.*

[281] The seventeen states are: Alabama, Arkansas, Georgia, Kentucky, Idaho, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia and Wisconsin. *Id.* For example, the Oklahoma constitution provides, "Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." OKLA. CONST. art. II, § 35A (2007).

[282] The Federal Defense of Marriage Act ("DOMA") was enacted in 1996. It adds a definition of "marriage" and "spouse" to Title 1 of the United States Code, also known as the Dictionary Act. 1 U.S.C. § 7 (2006). DOMA provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

Id.

[283] *See* Shah, *supra* note 268, at 1.

[284] *See supra* notes 267–72 and accompanying text.

[285] The states are: California, Connecticut, Hawaii, Maine, Massachusetts, New Jersey, New York, Oregon, Vermont, and Washington (as well as the District of Columbia). *See* Human Rights Campaign, Relationship Recognition in the U.S., *supra* note 265. New York presents a unique case in that it will recognize out-of-state same-sex marriages. Martinez v. County of Monroe, 850 N.Y.S.2d 740, 742–43 (2008).

[286] For example, in the vast majority of states, if a same-sex partner dies without a will, the rules of intestate succession will distribute the partner's property to his closest

have standing to bring wrongful death actions.[287] In addition to these property rights, however, the law affords next of kin considerable decision-making authority with respect to who serves as a guardian, who has the authority to make medical treatment decisions, and who can authorize organ donation.[288] This type of decision-making authority is particularly critical for LGBT elders and would be a component of any comprehensive eldercare plan.

LGBT elders with chosen family must rely on contract and estate planning documents, such as wills, durable powers of attorney, and advance medical directives, to secure their chosen family. Of course, it is not possible to create "next of kin" through contract and planning documents: documents are subject to challenge by members of the legal family and there are some instances where it is not possible to draft against the presumptions that exist in favor of family ties defined by blood, marriage, and adoption.[289] For example, even where the decedent leaves an otherwise valid will in favor of a member of his or her chosen family, the will remains subject to challenge by the decedent's intestate heirs.[290] Moreover, there are a number of in-

relatives in the following priority: children, parents, siblings, nieces and nephews, grandparents, aunts and uncles, first cousins, and so on. *See* UNIF. PROBATE CODE § 2-103 (amended 1991) (establishing share of those other than surviving spouse). The Uniform Probate Code does not include intestate heirs beyond descendants of grandparents. UNIF. PROBATE CODE § 2-103(4) (amended 1991). A surviving spouse will generally receive the bulk of the estate. *See* UNIF. PROBATE CODE § 2-102 (amended 1991) (establishing share of surviving spouse). The share is reduced in certain circumstances if the decedent is survived by parents, children who are not also the children of the surviving spouse, or stepchildren who are the children of the surviving spouse. *Id.* If the partner is not survived by any relatives within the prescribed degrees of relationship, all property will escheat to the state. *See* UNIF. PROBATE CODE § 2-105 (amended 1991) (establishing priority of the state if no surviving relative exists within prescribed degree of relationship). A surviving same-sex partner who resides in a state that does not recognize same-sex relationships has no legal right to his or her partner's property upon death.

[287] *See* John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 953–54 (2001) (outlining history and statutory origin of wrongful death actions).

[288] *See* Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31, 46–49 (2002) (describing decision-making authority and same-sex couples).

[289] *See* Starkey, *supra* note 11, at B06 (quoting a fifty-nine-year-old lesbian discussing her fear over how she might be treated by her partner's family after her partner's death as saying, "you can't know how people are").

[290] The next of kin would have standing to contest the will on a number of grounds, including lack of testamentary capacity, undue influence, fraud, and duress. A will that favors a surviving same-sex partner could most easily be challenged under the doctrines of lack of mental capacity and undue influence, although such challenges would presumably be more difficult to bring in states that recognized same-sex relationships. In particular, claims of lack of mental capacity have been used to challenge the wills of gay men who died from HIV/AIDS. *See* Thomas J. Maier, *AIDS Victims' Bitter Legacy; Lovers and Relatives Battle for Estates in Disputes over Wills*, NEWSDAY, Oct. 2, 1988, at 4 (discussing a number of such challenges). Undue influence purports to void a will where the beneficiary induces the testator to favor that beneficiary over the next of kin whom the law considers to be the natural object of the decedent's bounty. *See* Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 578 (1997) (discussing elements of traditional undue influence doctrine). It is easier to prove where the beneficiary and the

stances where next of kin is given preference to the exclusion of all others. This would include hospital visitation policies that are restricted to "immediate family members" and nursing homes that do not allow partners to room together.[291]

Finally, there are some circumstances where custom and heteronormative practice are such that third parties will ignore contractual or beneficiary designations and defer to the wishes of the "family" as traditionally defined. Often these cases arise with respect to funeral or burial wishes. For example, there was a recent case where a cemetery refused to follow the instructions of a surviving partner regarding her partner's epitaph because the next of kin disapproved.[292] The cemetery chose to listen to the next of kin despite clear language in the will giving the surviving partner authority over the burial arrangements and acquiesced only after nearly three years of litigation.[293]

3. *The Link Between Financial Insecurity and Heteronormative Federal Policies*

For many LGBT elders, the uncertainty regarding property rights and decision-making authority is compounded by financial insecurity, some of which is directly related to the failure of the law to recognize same-sex relationships. Although the elimination of poverty among the elderly has been one of the success stories to come out of the Great Society policies of the

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testator were in a "confidential relationship" which includes any non-marital sexual/romantic relationship. *See id.* at 583–86. Accordingly, surviving same-sex partners will remain vulnerable to such claims in the absence of relationship recognition.

[291] *See, e.g.*, CAHILL, ET AL., *supra* note 10, at 54. In 2000, Bill Flanigan was denied the opportunity to see his dying partner because Flanigan was not "family." *See* Complaint at 2, Flanigan v. Univ. of Md. Med. Sys. Corp., No. 24 c 02001289 (Md. Cir. Ct. Feb. 2002), *available at* http://data.lambdalegal.org/pdf/118.pdf. The hospital denied Flanigan the right to see his partner even though his partner had executed a health care power of attorney in Flanigan's favor and the couple had registered as domestic partners in San Francisco. *Id.* By the time Flanigan was permitted to see his partner, he was unconscious and life-sustaining treatment had been administered contrary to his express wishes. *Id.* Flanigan later sued the hospital for negligence and intentional infliction of emotional distress. *Id.* at 3. The jury found for the hospital. Lambda Legal, Flanigan v. University of Maryland Hospital System, *available at* http://www.lambdalegal.org/our-work/in-court/cases/flanigan-v-university-of-maryland.html (last visited Nov. 14, 2008).

[292] Cynthia Friedman died at age thirty-five and left a will naming her partner of thirteen years, Sherry Barone, as executor. *See* Debbie Woodell, *Gay Partner Battles for Rights Even at the Grave*, AUSTIN AM.-STATESMAN, May 31, 1997, at C8. The will expressly authorized Barone to "arrange for the disposition" of Friedman's remains. *See* Murray Dubin, *Dispute Involving Headstone Epitaph Now A Federal Case*, PHILA. INQUIRER, June 26, 1997, at C01. The cemetery where Friedman was buried refused to inscribe her headstone with the epitaph directed by Barone because Friedman's parents objected to the use of the term "beloved life partner." *See* Claudia N. Ginanni, *Cemetery To Inscribe Headstone, Pay $ 15,000,* LEGAL INTELLIGENCER, Sept. 8, 1997, at 5. Shortly before the third anniversary of Friedman's death, the cemetery acceded to Barone's wishes as part of a settlement agreement reached in the federal lawsuit Barone brought against the cemetery. *See id.*

[293] *See* Ginanni, *supra* note 292.

1960s,[294] LGBT elders report significant concern regarding their financial security.[295] The limited data available shows that LGBT elders lag significantly behind their non-LGBT peers in terms of income, retirement savings, and home ownership.[296] Because this data is expressed in relative terms, it immediately raises the question of whether the discrepancy represents the combined effect of past discrimination and the ongoing federal policies that refuse to recognize same-sex partners.[297] As explained below, research has just begun to start to quantify the "costs" of such policies.[298]

The two federal programs of particular relevance to seniors are Social Security and Medicare/Medicaid.[299] Both programs provide special benefits applicable to spouses for which same-sex partners are not eligible regardless of whether the couple is legally married in their state of residence.[300] The repeal of DOMA would only solve this problem for couples in the two states that currently recognize same-sex marriage.[301] An alternative would be to allow the designation of a beneficiary other than a legal spouse. This type of targeted reform would provide relief to all same-sex couples regardless of where they reside, and, if the beneficiary definition is sufficiently broad, it could include chosen family as well as unmarried partners.[302]

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[294] *See* David Pratt, *The New Medicare Part D Prescription Drug Benefit*, 17 ALB. L.J. SCI. & TECH. 337, 339 (2007) (discussing change in poverty rates among seniors from one-third in 1959 to slightly over ten percent in 2001).

[295] *See* METLIFE, *supra* note 72, at 12. The study reports that "[i]n planning for their own future care needs, LGBT baby boomers' most serious worries are financial, with one-third reporting that how to pay for care is of most concern." *Id.*

[296] *See supra* notes 58–61 and accompanying text (discussing statistics).

[297] In any event, the financial hardship experienced by many LGBT elders refutes the stereotype of gay affluence that was popularized by anti-gay groups during the Culture Wars of the 1990s. *See* HERMAN, *supra* note 128, at 116–19. To the contrary, one study has shown a "slightly negative relation" between homosexuality and household income in forty metropolitan areas. CAHILL, ET AL., *supra* note 10, at 9.

[298] *See generally* BENNETT & GATES, *supra* note 10 (quantifying the effects of marriage inequality).

[299] Other areas of importance to LGBT elders that are beyond the scope of this article would include the rules governing access to low income housing and the federal income, estate, and gift taxes. *See id.* at 5–6. With respect to housing, low income families are entitled to a federal subsidy for the cost of their housing. *See* CAHILL, ET AL., *supra* note 10, at 32. The Housing Choice Voucher Program, commonly referred to as Section 8, is administered by the United States Department of Housing and Urban Development ("HUD"). *Id.* The HUD Section 202 Housing for the Elderly Program provides targeted federal assistance for housing projects developed for low-income seniors. *Id.*

[300] This is the effect of DOMA, which provides that for all federal purposes, marriage is only between one man and one woman. 1 U.S.C. § 7 (2006).

[301] *See id.*

[302] This type of reform was recently successful in the pension area. Tax-free rollover on death is not limited to spouses, but is available to all beneficiaries. The Pension Protection Act of 2006 extends the tax-free rollover privilege to non-spouses. 26 U.S.C. § 402(c)(11) (2006).

a. Social Security

Social Security is a major source of income for most seniors.[303] The amount that an individual is entitled to receive under Social Security is generally a function of how long an individual worked and how much he or she earned.[304] Upon the death of a spouse, the surviving spouse is entitled to receive up to one-half of his or her deceased spouse's Social Security benefit if that benefit was larger than the surviving spouse's individual benefit.[305] There are similar rules in the case of disability of the primary wage-earner.[306] These rules provide an obvious benefit for traditional opposite-sex married couples where the wife did not work outside the home and it is more likely that the husband will predecease.[307]

As a result of DOMA, same-sex partners are not entitled to a portion of their partner's Social Security benefit upon the death or disability of their partner even if they are legally married under state law.[308] The Human Rights Campaign estimates that this exclusion of surviving same-sex partners costs LGBT elders $124 million annually in foregone benefits.[309] This raises questions of equity and uniformity because the amount of the survivor's benefits is determined by the amount the deceased partner paid into the program.[310] Thus, a worker in a same-sex relationship who pays the same amount as a similarly situated worker in an opposite-sex marriage is entitled to fewer benefits because his or her partner is not eligible for survivor benefits.[311]

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[303] Sixty-two percent of seniors rely on Social Security payments for at least half of their income, whereas twenty-six percent of elders rely on Social Security for ninety percent or more. CAHILL, ET AL., *supra* note 10, at 25–26. For fifteen percent of seniors, it is their only source of income. *Id.*

[304] In order to be considered "fully insured," an individual must have worked a specified number of quarters. 42 U.S.C. § 414(a) (2000). The amounts of an individual's social security payments are then determined by the individual's reported wages and self-employment income. 42 U.S.C. § 403(a) (2000). Accordingly, periods of unemployment or underemployment will adversely impact the amount of an individual's benefits. This is particularly important in the case of LGBT elders whose earning potential and employment options could have been compromised by homophobia and past discrimination.

[305] A surviving spouse qualifies for social security death benefits. 42 U.S.C. § 402 (2000). The surviving spouse of a deceased retired worker receives one half of the deceased spouse's benefits. *Id.*

[306] *See* CAHILL, ET AL., *supra* note 10, at 26.

[307] This is due to a combination of the longer life expectancy for women and the higher age at first marriage for men. *See* Kate Zernike, *The Bell Tolls For the Future Merry Widow*, N.Y. TIMES, April 30, 2006, at 1.

[308] *See* 1 U.S.C. § 7 (2006).

[309] CAHILL, ET AL., *supra* note 10, at 26. *See also* Pratt, *supra* note 294, at 350–53. (discussing other costs).

[310] *See* BENNETT & GATES, *supra* note 10, at 4–5.

[311] *See id.*

b. Medicare and Medicaid

Medicare provides health insurance coverage for seniors and is now one of the largest federal programs.[312] Until recently, a major shortfall of Medicare coverage, however, was that it did not include coverage for prescription medications.[313] In the case of LGBT elders, this was especially relevant because of the high incidence of HIV/AIDS among older gay men and the number of transgender elders who require medication of some form.[314] A prescription benefit plan was implemented in 2006, but it remains subject to criticism for its coverage and complexity.[315]

Medicaid provides health insurance for low-income and disabled individuals regardless of age.[316] For low-income seniors, it covers certain expenses not fully covered by Medicare, such as nursing home long-term care and home health care.[317] The extremely high cost of long-term care has made Medicaid the only viable payment option for many middle-income seniors.[318] The income and asset thresholds imposed by Medicaid have given rise to a new controversial method of middle class estate planning, referred to as the Medicaid "spend down" because individuals have to spend or transfer their assets in order to qualify under the asset and income limitations imposed by the regulations.[319]

One important exception to the Medicaid asset limits is a rule designed to allow a spouse to stay in a jointly-owned marital home.[320] The regulations exclude the value of a jointly-owned marital home when determining eligibility.[321] This means that unlike married opposite-sex couples, same-sex

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[312] *See* Pratt, *supra* note 294, at 339–40. Medicare was created in 1965 and is now one of the largest federal programs. *Id.*

[313] *Id.* at 340. The high cost of prescription drugs and its impact on seniors has received considerable attention in recent years. Newspapers reported that otherwise law abiding seniors travel to Canada to have their prescriptions filled. *See* Randi Hutter Epstein, *Some Retirees Look Abroad for Prescription Drugs,* N.Y. TIMES, Sept. 24, 2002, at F5. Other seniors regularly skip doses to make their prescriptions last longer. *Id.*

[314] *See* Waysdorf, *supra* note 85, at 55, 75; *see also* CAHILL, ET AL., *supra* note 10, at 61 (discussing transgender medical care).

[315] Pratt, *supra* note 294, at 371–97 (outlining criticisms); *see also*, Jane E. Brody, *Time to Take Another Look at Medicare Drug Plans*, N.Y. TIMES, Nov. 7, 2006, at F7 (describing shortfalls of plan).

[316] *See* Laura Herpers Zeman, *Estate Planning: Ethical Considerations of Using Medicaid to Plan for Long-Term Medical Care for the Elderly*, 13 QUINNIPIAC PROB. L.J. 187, 188 (1998).

[317] *Id.* at 188–89.

[318] *See* John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J. L. & PUB. POL'Y 81, 86–97 (2004) (discussing "spend down strategy").

[319] *See* A. Frank Johns, *Three Rights Make Strong Advocacy for the Elderly in Guardianship: Right to Counsel, Right to Plan, and Right to Die*, 45 S.D. L. REV. 492, 510 (2000).

[320] 42 U.S.C. § 1396p(b)(2)-(2)(A) (2000) (providing, in pertinent part: "Any adjustment or recovery . . . may be made only after the death of the individual's surviving spouse, if any, and only at a time . . . when he has no surviving child who is under age 21, or . . . is blind or permanently and totally disabled . .").

[321] *Id.*

couples (or chosen family members) who jointly own their home will have to sell their home in order to allow the partner or family member to qualify for Medicaid.[322]

B. *Non-Discrimination in Employment, Health Care, and Housing*

LGBT elders are long-time survivors of homophobia and discrimination. At the federal level, the Employment Non-Discrimination Act ("ENDA") has been a focal point of efforts to end discrimination on account of sexual orientation and gender identity.[323] Twelve states now have laws that prohibit discrimination in employment on account of sexual orientation and gender identity.[324] Another eight states have laws that prohibit discrimination only on account of sexual orientation.[325] Some state laws are limited to employment, whereas others are much more comprehensive.[326] In addition, a large number of municipalities and counties have also enacted non-discrimination ordinances.[327]

Although LGBT elders may have been subject to anti-LGBT discrimination in the workforce in the past, the importance of employment as a venue for discrimination diminishes as they retire or prepare to leave the workforce. Instead, LGBT elders are concerned with the potential for discrimination in health care and other senior-specific venues such as assisted living facilities and nursing homes.[328]

1. *The Wages of Past Discrimination*

The financial difficulties reported by many LGBT elders may have roots in the prevailing homophobia of the time in which they came of age, as well as the forces of racism and sexism in the case of intersecting identi-

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[322] *See* CAHILL ET AL., *supra* note 10, at 58, 73.

[323] For a history of ENDA, which was first introduced in Congress in 1974 by Bella Abzug and Edward I. Koch, see National Gay and Lesbian Task Force, The Task Force's Commitment to Ending Discrimination Against Lesbian, Gay, Bisexual and Transgender Americans Has a Long History, http://www.thetaskforce.org/issues/nondiscrimination/narrative (last visited Nov. 5, 2008).

[324] *See* Human Rights Campaign, Statewide Employment Laws & Policies, *supra* note 231.

[325] *Id.*

[326] For example, the New Jersey Law Against Discrimination, *supra* note 263, prohibits unlawful discrimination in employment, housing, places of public accommodation, credit, and business contracts.

[327] *See* WAYNE VAN DER MEIDE, LEGISLATING EQUALITY: A REVIEW OF LAWS AFFECTING GAY, LESBIAN, BISEXUAL, AND TRANSGENDERED PEOPLE IN THE UNITED STATES (2000), *available at* http://www.thetaskforce.org/downloads/reports/reports/1999Legislating Equality.pdf (discussing local laws).

[328] The enactment of this form of anti-discrimination protection was recommended in 1994 by the Lesbian and Gay Aging Issues Network of the American Society on Aging and submitted to the White House Conference on Aging. CAHILL ET AL., *supra* note 10, at 51.

ties.[329] When the pre-Stonewall generation entered the workforce, career options were scarce for homosexuals.[330] This could have led many individuals to stay deep in the closet, whereas others could have been pushed to the margins of society.[331] At a time when military service was more widespread, a dishonorable discharge could seriously curtail future job opportunities, as would a criminal record.[332] In addition, women faced significant barriers with respect to workplace equity, and their earning power was drastically less than that of their male counterparts.[333] Transgender individuals also had few mainstream options.[334]

For the pre-Stonewall generation, these restricted employment options would have impacted earnings, as well as the ability to buy a home. When an individual is living paycheck to paycheck, saving for retirement or for a down payment on a home may not be feasible. LGBT elders who experienced persistent underemployment or unemployment will also be entitled to smaller Social Security payments because the size of one's Social Security payments is a function of one's reported income.

2. *Statutory Reform: ENDA, Fair Housing Act, and Older Americans Act*

ENDA has been pending in Congress in one form or another since 1994.[335] ENDA is limited to employment and, therefore, is less expansive than some of the anti-discrimination measures enacted at the state level.[336] This means that ENDA would be ineffective to address discrimination in the provision of health care, senior services, or housing. Protection in these ar-

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[329] *Id.* at 33.

[330] Homosexuality was classified as a serious mental illness, and there were no anti-discrimination protections. Moreover, in some spheres, there were affirmative policies against homosexual employees. For example, in 1950, Congress began hearings regarding the risk posed by homosexual federal employees. Berube, *supra* note 103, at 265–68. The recommendations provided that the government should coordinate information of homosexuals throughout the FBI and take actions to "get sex perverts out of Government and keep them out." *Id.* at 268. In an effort to keep homosexuals out of the federal workplace, President Eisenhower issued an Executive Order in 1953 providing that federal workers could be fired for "sexual perversion." *Id.* at 269. These policies were also adopted by state and local governments and private employees. *Id.* at 269–70. Wisconsin was the first state to include sexual orientation in its anti-discrimination law in 1982. *See* WIS. STAT. § 111.36(1)(d) (2007).

[331] *See* Kimmel, *supra* note 52, at 276 (explaining social and educational diversity of LGBT experiences).

[332] *See* BERUBE, *supra* note 103, at 228–32 (explaining effects of less-than-honorable or "blue" discharges).

[333] *See* Eileen Boris & Michael Honey, *Gender, Race and the Policies of the Labor Department*, 111 MONTHLY LAB. REV. 26, 28–29 (1988).

[334] *See* CAHILL ET AL., *supra* note 10, at 61, 119–20 n.286.

[335] *See* National Gay and Lesbian Taskforce, *The Taskforce's Commitment*, *supra* note 323 (discussing history of ENDA).

[336] *See supra* note 263 (discussing LAD).

eas would require comprehensive legislative and administrative reforms that extend far beyond the reach of ENDA.[337]

A few obvious examples of needed legislative and administrative reform would include amending the Fair Housing Act, the Public Accommodations provisions of the Civil Rights Act of 1964, and the Older Americans Act ("OAA").[338] Non-discrimination protection in public accommodations would ensure LGBT elders equal access to senior centers and National Aging Network AAA's.[339] In addition to prohibiting discrimination in the provision of services, it would also be possible to mandate LGBT-specific services, training, and research.[340]

The 2005 White House Conference on Aging recommended adding sexual orientation and gender identity in the definition of "minority populations" for purposes of the Administration on Aging.[341] This concession was hard fought and the cause of considerable controversy.[342] As a result of the efforts of LGBT aging advocates, the U.S. Administration on Aging now publishes a fact sheet titled "The Many Faces of Aging: Lesbian, Gay, Bisexual, and Transgender Older Persons."[343]

In addition to federal reform, there are many opportunities on the state level to address the concerns of LGBT elders with regard to health care, senior services, and housing in terms of licensing and regulations. Currently, California is the only state with special legislation designed to protect LGBT elders.[344] In addition, as described in Part III.D. of this Article, private providers are free to institute cultural competency programs in advance

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[337] Reform would have to be wide-reaching. For example, a number of administrative agencies conduct regular surveys could be required to include questions regarding sexual orientation and gender identity. *See* CAHILL, ET AL., *supra* note 10, at 37 (noting that this includes the Department of Health and Human Services, the Bureau of Labor Statistics, and the U.S. Census Bureau).

[338] *Id.* at 40 (discussing OAA). The OAA establishes the Administration on Aging and authorizes a range of services for individuals over sixty, distributing nearly one billion dollars a year in federal funding through state agencies and National Aging Network Area Agencies on Aging (AAAs). *See* Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (2000); Civil Rights Act of 1964, Title II, 42 U.S.C. §§ 2000a–2000a-6 (2000); Older Americans Act of 1965, 42 U.S.C. § 3001–3058ff (2000).

[339] This would require inclusion of both sexual orientation as a protected category and senior centers as a covered establishment.

[340] *See* CAHILL, ET AL., *supra* note 10, at 37. The National Elder Abuse and Neglect Survey does not collect data regarding sexual orientation or gender identity. *See* U.S. ADMINISTRATION ON AGING, NATIONAL ELDER ABUSE INCIDENCE SURVEY (1998), *available at* www.aoa.gov/eldfam/elder_rights/elder_abuse/AbuseReport_Full.pdf.

[341] 2005 WHITE HOUSE CONFERENCE ON AGING, THE BOOMING DYNAMICS OF AGING: FROM AWARENESS TO ACTION: REPORT TO THE PRESIDENT AND CONGRESS 86 (2005), *available at* http://www.whcoa.gov/about/about.asp#report.

[342] *See* Press Release, National Gay and Lesbian Task Force, Elder Advocates Challenge White House Conference on Aging (Dec. 13, 2005), http://www.thetaskforce.org/press/releases/pr902_121305.

[343] U.S. Admin. on Aging, *supra* note 31.

[344] *See* Gross, *supra* note 13, at A1 ("A new law encourages training for employees and contractors who work with the elderly and permits state financing of projects like gay senior centers.").

of a government mandate.[345] This would include a review of all policies to determine whether they disadvantage LGBT patients and residents, such as restricting visitation to "family members."[346]

Finally, it is important to distinguish discrimination from elder abuse and violence, which are always potential outcomes when discriminatory attitudes are directed at a vulnerable population. Currently, there is no reliable data regarding the prevalence of elder abuse among LGBT elders because existing surveys have not included sufficient data on sexual orientation or gender identity.[347] However, the San Francisco Human Rights Commission found that fifty percent of the LGBT elders surveyed by the Family Caregiving Alliance who received institutional care or who had *in-home* health care experienced discrimination and harassment on account of their sexual orientation or gender identity.[348] This means that even those LGBT elders who do manage to "age in place" are not immunized against anti-LGBT harassment and abuse because of the risk posed by home health aids. Poor health and infirmity can force LGBT elders to invite potential abusers into their homes.

C. Don't Ask, Don't Tell, Symbolic Messages, and Veterans' Services

In addition to same-sex marriage and ENDA, the repeal of the military's "Don't Ask, Don't Tell" policy has been a major goal of the movement for LGBT equality. The "Don't Ask, Don't Tell" policy mandates that all LGBT military personnel stay in the closet under threat of separation of service and loss of benefits.[349] According to the policy, homosexuality is no longer deemed "incompatible with military service," but a member of the armed services is subject to separation if the member acknowledges that he or she is gay.[350]

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[345] For a discussion of what these policies would include, see CAHILL, ET AL., *supra* note 10, at 53–55.

[346] *See infra* text accompanying notes 362–88.

[347] *See* CAHILL, ET AL., *supra* note 10, at 37, 68, 70, 75 (recommending change in policy).

[348] S.F. HUMAN RIGHTS COMMISSION, AGING IN THE LESBIAN, GAY, BISEXUAL COMMUNITIES 15 (2003), *available at, www.sfgov.org/site/uploadedfiles/sfhumanrights*/docs/finalreport.pdf. The Report states, "50% of the LGBT community receiving in-home or institutional care experience discrimination or harassment from their caregivers." *Id.* These figures were generated by the Family Caregivers Alliance, a national center on caregiving with a particular focus in the Bay Area. Family Caregiver Alliance, About FCA, http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=349 (last visited Nov. 14, 2008).

[349] *See* HALLEY, *supra* note 22, at 2–5.

[350] The Department of Defense regulations provide that "sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct." Enlisted Administrative Separations, Dep't of Def. Instruction No. 1332.14(8)(a)(1) (Aug. 28, 2008), *available at* http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf. However, there is an important limitation. Any open avowal of homosexuality, including the simple statement "I'm gay," is sufficient to warrant separation from the service because it constitutes a prohibited act of homosexuality. *See* 10 U.S.C. § 654(b)(2) (2006).

In terms of the absolute number of LGBT individuals affected by the ban, it has a much smaller reach than the other two issues.[351] The policy, however, sends a strong message about the closet and the limits of acceptable speech. In terms of LGBT elders, the military policy also affects LGBT veterans.[352] It is estimated that there are more than one million LGBT veterans.[353] Given the high rate of military service among seniors, it is likely that a disproportionate number of LGBT veterans are seniors.[354]

One of the benefits of military service is life-long veterans' benefits, including health care, disability compensation, survivor benefits, and burial benefits.[355] Veterans' health benefits are more comprehensive than those available under Medicare or Medicaid. For example, they include prescription coverage and nursing home care.[356] Accordingly, it would make sense that LGBT veterans would want to avail themselves of these benefits. A potential deterrent, however, is that veterans' health benefits are only dispensed by the veterans' health care system run by the United States Department of Veteran Affairs ("VA").[357] A prescription is only covered if it is written by a VA provider.[358] Nursing care is only covered if it is provided in VA nursing homes or affiliated facilities.[359]

LGBT elders report that the existence of the "Don't Ask, Don't Tell" policy provides added pressure to be closeted when interacting with VA health care providers.[360] They are less likely to discuss matters involving sexual orientation or gender identity, and they are less likely to include their

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[351] *See* GARY J. GATES, GAY MEN AND WOMEN IN THE U.S. MILITARY: ESTIMATES FROM THE CENSUS 2000 (2004), http://www.urban.org/UploadedPDF/411069_GayLesbianMilitary.pdf.

[352] *See* Gary J. Gates, Gay Veterans Top One Million, (July 9, 2003), *available at* http://www.urban.org/UploadedPDF/900642_Checkpoints_Gay_Veterans.pdf; *see also* Garrance Burke, *A Call for* ETERNAL EQUALITY: Seeking Acceptance, Gay Veterans Group Pushes for Memorial at SE Cemetery, WASH. POST, Sept. 13, 2003, at C1 ("1.3 million of the 25.1 million living veterans of U.S. wars are gay men or lesbians").

[353] *See* Burke, *supra* note 352, at C1.

[354] Almost one in four social security recipients are veterans. Anya Olsen, *Military Veterans and Social Security*, 66 SOC. SECURITY BULL. 2 (2005/2006), *available at* http://www.ssa.gov/policy/docs/ssb/v66n2/v66n2p1.html.

[355] U.S. Dep't of Veterans Affairs, Covered Services, http://www.va.gov/healtheligibility/coveredservices (last visited Nov. 29, 2008).

[356] *See* 38 U.S.C. § 1710A (2000) (providing nursing home care for veterans); 38 U.S.C. § 1722A (2000) (providing co-payment for veterans' medications).

[357] A dishonorable discharge is usually a bar to receiving veterans' benefits. *See* U.S. Dep't of Veterans Affairs, Federal Benefits for Veterans and Dependants, http://www1.va.gov/opa/Is1/index.asp (last visited Nov. 29, 2008).

[358] *Id.*

[359] *Id.*

[360] *See* CAHILL, ET AL., *supra* note 10, at 19 ("While there are thousands of veteran's organizations across the country serving 9.3 million elderly veterans, few at this point welcome GLBT vets. If GLBT vets want to avail themselves of the services these organizations provide, they must continue, however reluctantly, to live under an unofficial 'Don't Ask, Don't Tell' policy to get by.").

partners in decision making.[361] The closet officially mandated by the policy sends a strong message about how the institution views its LGBT veterans. In this way, it reinforces and condones homophobic or discriminatory opinions held by the administrators, health care providers, and staff.

D. A Final Word about the Need for LGBT-Positive Housing and Eldercare

It is worth noting that there is something extraordinary about the type of apprehension LGBT elders express regarding housing.[362] They are not voicing concern that they will be subject to some form of economic discrimination or that they will be denied access to housing.[363] Their fear is much more visceral.[364] LGBT elders are worried that they will be subject to abuse and mistreatment on account of their sexual orientation or gender identity while in an institutional setting.[365] In other words, they are afraid that as they age they will lose the ability to retreat to the relative safety of their homes because they will be forced to live in a place that is both unwelcoming and dangerous.[366]

All individuals, regardless of their sexual orientation or gender identity, report considerable anxiety when faced with the prospect of becoming dependant on others as they age,[367] but for LGBT elders this concern seems particularly acute.[368] Although only 7.4% of all seniors aged seventy-five and older live in nursing homes, the nursing home remains a strong symbol in the popular imagination where it is associated with dependency, neglect,

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[361] *See id.* at 19. The report qualifies this with the following: "GLBT vets report that the record of the VA in serving them is mixed. Staff in some VA hospitals has been very knowledgeable and supportive of GLBT veterans, and have even provided help with surgery and psychiatric support for transsexual vets."

[362] *See* Gross, *supra* note 13, at A1 (quoting chief of geriatric psychiatry at Beth Israel Medical Center in New York, "[t]here is something special about having to hide this part of your identity at a time when your entire identity is threatened," it is "a faster pathway to depression, failure to thrive and even premature death").

[363] *See id.* (discussing a same-sex couple who can afford and access nursing care, but will "hide their gayness, as they did for half a lifetime, rather than face slurs and whispers").

[364] *See id.* (reporting fear of loneliness in nursing homes is a "source of dread" for LGBT elders).

[365] *See id.* (noting that LGBT elders "live in fear of the day when they are dependent on strangers for the most personal care").

[366] *See id.* ("Elderly gay people . . . living in nursing homes or assisted-living centers or receiving home care, increasingly report that they have been disrespected, shunned or mistreated in ways that range from hurtful to deadly, even leading some to commit suicide.").

[367] METLIFE, *supra* note 72, at 13. The survey noted that: "A previous MetLife Mature Market Institute study of the overall baby boom generation's concerns about retirement found that LGBT baby boomers are more likely to worry about their later years than are their heterosexual counterparts (41% vs. 33%)." *Id.*

[368] *See* Gross, *supra* note 13, at A1 (stating that LGBT elders "dread becoming dependant").

and sadness.[369] Many LGBT elders report that they choose to be closeted in institutional settings or when dealing with health care providers for fear of reprisal and rejection.[370] As one LGBT elder explained, "as strong as I am today when I am in front of the gate of the nursing home the closet door is going to slam shut behind me."[371]

Like the majority of Americans, older LGBT individuals surveyed report that they would like to age "in place."[372] However, successful aging in place often requires assistance from family, and this presents obvious problems for LGBT elders who are much more likely not to have children or to be estranged from their children and their family of origin.[373] Single generational chosen families may be limited in how much support they can provide. For these reasons, LGBT elders may be more likely than their non-LGBT peers to require home health care assistance or to have to resort to other senior housing options, such as assisted living facilities or nursing homes.[374] The market has recently started offering a solution to the LGBT housing problem with the opening of LGBT-friendly senior housing developments. These developments have captured media attention to the exclusion of almost all other issues related to LGBT elders.[375] Despite the press attention, the demand for LGBT-friendly senior housing far outstrips supply.[376]

Although most accounts of LGBT abuse and harassment involve elder-care providers and other employees, residents and non-LGBT peers can also be a source of intimidation and threats.[377] Accordingly, anti-discrimination protections must also include anti-bullying rules for residents similar to those enacted as part of the "Safe Schools" initiatives and campaigns.[378]

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[369] *See* Haya El Nasser, *Fewer Seniors Live in Nursing Homes*, USA TODAY, Sept. 27, 2007, at 1A, *available at* http://www.usatoday.com/news/nation/census/2007-09-27-nursing-homes_N.htm.

[370] *See* Starkey, *supra* note 11, at B06.

[371] Gross, *supra* note 13, at A1 (quoting LGBT elder).

[372] CAHILL, ET. AL., *supra* note 10, at 51.

[373] *See id.* at 41.

[374] *See id.* at 53.

[375] *See e.g.*, Alderman, *supra* note 8 (discussing the gay housing market generally); A.J. Burton, *Gay Senior Housing on the Rise, While Straights Cry Foul*, GFN.COM, Dec. 19, 2006, *www.thetaskforce.org/TF_in_news/06_1221/stories/13_gfn_gayseniorhousing.pdf* (discussing complaints of reverse discrimination); Marech, *supra* note 39, at A1 (discussing retirement homes "without the closets"); Richter, *supra* note 100 (describing new Bay Area LGBT-friendly senior housing); Catherine Trevison, *Gay Retirement Homes Still Difficult to Market*, ST. PAUL PIONEER PRESS (Minn.), Mar. 20, 2008, at 7E (noting some developments have "difficulty filling").

[376] *See* Marech, *supra* note 39, at A1.

[377] *See* Gross, *supra* note 13, at A1.

[378] *See* Human Rights Campaign, Statewide School Laws and Policies (Aug. 27, 2008), http://www.hrc.org/documents/school_laws.pdf. Some LGBT organizations have "safe school" programs or campaigns that assess the incidence of anti-LGBT violence and bullying and proposed constructive steps for remediation. For example, the 2007 National School Climate Survey reports that 86.2% of LGBT students experience verbal harassment. JOSEPH G. KOSCIW, ELIZABETH M. DIAZ & EMILY A. GREYTAK, THE 2007 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND

Eldercare providers must also make sure that their policies do not serve to reinscribe the prejudices of the non-LGBT residents. For example, some nursing homes will move LGBT elders (or elders perceived to be LGBT) in order to appease the fears of other residents who claim that they are not comfortable with their LGBT peers.[379] The *New York Times* reported that one elderly gay man was moved to a floor for patients with dementia because the administration knew they would not complain about his orientation.[380] Of course, the LGBT elder did not have dementia and was perfectly aware of his surroundings. He later hanged himself.[381]

This shows that even where there is no direct abuse or discrimination, common policies in place at senior housing facilities can disadvantage LGBT elders. For example, some nursing homes have policies against same-sex partners living together in the same room and will separate partners.[382] This policy is also true in the case of many retirement communities which will not allow two unrelated individuals to buy into the community.[383] The restriction that the individuals must be "related" obviously impacts same-sex couples in the vast majority of states which do not recognize same-sex marriages. However, it also adversely affects LGBT elders and their chosen family members. Whereas two siblings could live together, two lifelong friends who consider each other "family" would not be able to live together even in a state where same-sex marriage is recognized.

In the case of same-sex couples, it may be possible to pursue legal action in jurisdictions with anti-discrimination protections. For example, in *Lewis and Taylor v. Westminster Oaks Retirement Community*, a lesbian

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TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 30 (2008), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1290-1.pdf; *see also* Greater Boston's Parents, Families & Friends of Lesbians and Gays, Greater Boston's PFLAG's Safe Schools & Communities Project, http://www.gbpflag.org/safeschools (last visited Nov. 2, 2008). For example, in 2008, the Florida legislature enacted anti-bullying legislation for all primary and secondary schools. FLA. STAT. ANN. § 1006.147 (West 2008). The legislation defines "bullying" as "systematically and chronically inflicting physical hurt or psychological distress on one or more students." § 1006.147(3)(a). The statute provides that this may involve: teasing; social exclusion; threat; intimidation; stalking; physical violence; theft; sexual, religious, or racial harassment; public humiliation; or destruction of property. § 1006.147(3)(a)(1)-(10).

[379] *See* Gross, *supra* note 13, at A1 (reporting that moving gay residents to placate homophobic residents is common).

[380] *Id.*

[381] *Id.*

[382] *See, e.g.*, CAHILL, ET AL., supra note 10, at 54; T.P.Galanis, *Aging and the Non-traditional Family*, 32 U. MEM. L. REV. 607, 624 (2002).

[383] *See infra* text accompanying notes 384–88 (discussing *Lewis & Taylor v. Westminster Oaks Retirement Community*). For example, Westminster Oaks operates twenty retirement communities throughout the state of Florida. It did not allow unrelated individuals to reside together. National Center for Lesbian Rights, Case Docket: Joy Lewis and Sheila Ortiz-Taylor v. Westminster Oaks Retirement Community, http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_lewis (last visited Sept. 4, 2008); *see also* Christopher Lisotta, *Lesbians Barred From Retirement Home*, GAY.COM, Apr. 1, 2004, http://www.gay.com/news/article.html?date=2003/04/01/2&navpath=/channels/business/money/.

couple reached a settlement with a national chain of retirement communities after alleging that the organization discriminated against them on account of their sexual orientation.[384] The women's first application for housing in 1999 was denied because it violated the community's policy against two unrelated persons living together.[385] The women reapplied four years later after they had entered into a Vermont Civil Union.[386] When their application was denied a second time, they sued under the county anti-discrimination ordinance that barred discrimination in housing on the basis of sexual orientation, as well as marital status and gender.[387] Although the terms of the settlement are confidential, the women stated that they were looking forward to becoming members of the retirement community and that they were pleased that the organization reaffirmed that its services were open to all on equal terms.[388]

IV. Conclusion

There are an estimated three million LGBT elders in the United States.[389] Based on the existing empirical data and growing anecdotal evidence, LGBT elders are isolated and fearful that they will experience anti-LGBT discrimination or abuse from eldercare service providers and non-LGBT peers.[390] This fear prompts many to retreat to the closet, particularly in institutional settings.[391] In so doing, our LGBT elders are spending their final years locked in an anxious silence, denied the basic dignity of sharing their memories.[392]

For many members of the pre-Stonewall generation the acknowledgment of their LGBT identities was a long and difficult process.[393] They came of age at time when homosexuality was criminalized and classified as a severe mental illness.[394] Many accepted the prevailing scientific view that homosexuality was a sickness and attempted a "cure" through psychotherapy and other means.[395] Although they lived to see significant gains with

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[384] *See* Lisotta, *supra* note 383.

[385] *Id.*

[386] *Id.*

[387] *Id.*

[388] National Center for Lesbian Rights, *supra* note 383.

[389] *See supra* notes 31–34 and accompanying text (discussing number of LGBT elders).

[390] *See supra* notes 48–53 and accompanying text (discussing isolation); *supra* notes 347–348 and accompanying text (discussing LGBT elder abuse).

[391] *See supra* notes 370–71 and accompanying text (discussing staying closeted in institutional settings).

[392] Gross notes an example of this is when "[a] partner is identified as a brother" in order to share stories. Gross, *supra* note 13, at A1.

[393] *See generally* Duberman, *supra* note 114 (tracking the diverse experiences of six LGBT individuals before, during, and after Stonewall).

[394] *See supra* notes 129–37 and accompanying text (discussing homosexuality as mental illness and its criminalization).

[395] *See generally* Duberman, *supra* note 114 (describing his pre-Stonewall years and search for a cure).

respect to LGBT equality, they are spending their final years frightened and closeted.[396] They are alienated from the larger LGBT community due to ageism and from the larger senior community due to homophobia.[397]

In order to achieve equity in aging for our LGBT elders it is first necessary to understand that LGBT elders differ from the post-Stonewall generations in a number of important respects. In particular, it is essential to recognize the continued role that pre-Stonewall views of homosexuality play in their conceptions of self and perceptions of others.[398] In this way, LGBT elders illustrate the historical contingency of LGBT identity, thereby providing another challenge to the homogenized identity model advanced by mainstream LGBT advocacy efforts.[399]

The interests of LGBT elders have not been well-represented by mainstream LGBT advocacy efforts because LGBT elders present a different set of interests and concerns. The existing LGBT identity model and advocacy agenda stresses that LGBT individuals are *the same as* non-LGBT individuals and has focused on three main issues: same-sex marriage, employment non-discrimination, and the military's Don't Ask, Don't Tell Policy.[400] As illustrated in Part III above, in each of these instances the interests of LGBT elders are only tangentially addressed.[401] Of more immediate concern to LGBT elders is the legal fragility of chosen families, financial insecurity caused by anti-LGBT aging policies, and anti-LGBT discrimination and harassment by eldercare workers and their non-LGBT peers. Above all, LGBT elders express an interest in LGBT-positive housing options.[402]

In order to represent LGBT interests, there needs to be a more holistic approach to LGBT identity *and* advocacy — one that acknowledges the differences among LGBT individuals, as well as the fact that in some instances LGBT individuals are different from non-LGBT individuals. These points of difference need not be points of division. As in the case of LGBT elders, however, these points of difference can be very instructive because they often indicate where one-size-fits-all policies will produce unequal results. Thus, reform efforts to secure equity in aging regardless of sexual orientation or gender identity must openly acknowledge that LGBT elders are different while asserting that they are nonetheless entitled to equal treatment.

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[396] *See supra* notes 370–71 and accompanying text (discussing retreating to the closet).

[397] *See supra* notes 164–69 and accompanying text (discussing ageism and homophobia).

[398] *See supra* notes 102–63 and accompanying text (discussing making of pre-Stonewall generation).

[399] *See supra* notes 28–29 and accompanying text (discussing critiques by queer theory, feminism, and critical race theory).

[400] *See supra* notes 20–22 and accompanying text (discussing these issues).

[401] *See supra* notes 258–61 and accompanying text (discussing issues from perspective of LGBT elders).

[402] *See supra* notes 98–101 and accompanying text (discussing LGBT elders housing options).