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The Dukeminier Awards Journal and the Williams Institute would like to thank Jeffrey S. Haber, Brondi Borer, Stu Walter, Chuck Williams, and the family and friends of Ezekiel “Zeke” Webber for their endowment gifts to fund individual prizes recognizing outstanding scholarship related to sexual orientation and gender identity law.

The Ezekiel Webber Prize is named after Ezekiel “Zeke” Webber, a UCLA Law student who died in 2004 at the end of his 2L year. During his time at UCLA, Zeke was extremely involved with the Williams Institute and the Public Interest Law Program.
Introduction

The Williams Institute and student editors at the UCLA School of Law are pleased to publish Volume 17 of the *Dukeminier Awards Journal*, which recognizes the best legal scholarship on sexual orientation and gender identity issues. Each year, we award Dukeminier prizes and publish this journal not only to recognize outstanding achievements in legal scholarship, but also to stimulate critical engagement with—and visionary thinking on—pressing issues of sexual orientation and gender identity. We also publish the journal in order to widely disseminate the important ideas and research contained in the winning articles to judges, legislators and other policymakers, professors and other teachers and researchers, lawyers and other advocates, and the public—with the goal that these articles inform ongoing legal, political, and academic debates. Because the *Dukeminier Awards Journal* is published by the Williams Institute in partnership with law students, the journal provides a unique educational opportunity for students to critically assess contributions to a vibrant and evolving field of study.

This year, we are pleased to announce the following winners:

- Susan Frelch Appleton, *Obergefell’s Liberties: All in the Family*, 77 Ohio St. L.J. 919 (2016)

For summaries of these articles’ arguments, I point you to the abstracts reproduced at the beginning of each. In addition, each year the *Dukeminier Awards Journal* publishes the winner of the Williams Institute’s annual student writing competition. This year’s winner is:


Eligible articles for this year’s prizes were published between September 2016 and August 2017. In late August 2017, the student editors of the journal ran search terms in legal scholarship databases to cast a wide net for relevant articles. The students then narrowed that large group to nearly 100 articles that the students deemed sufficiently focused on
sexual orientation and gender identity issues. At this stage, the students were not determining merit; instead, the students focused on the degree of attention to relevant issues, broadly understood. For example, an article that merely cited the U.S. Supreme Court’s decision in Obergefell v. Hodges likely would have not made the cut, but an article that included an in-depth discussion of Obergefell likely would have. I then closely reviewed all of the articles in this pool; I narrowed the pool further to seventeen finalists that, in my opinion, were the top articles in terms of impact, rigor, and originality.

We convened a committee to select the winners. The committee was comprised of the Williams Institute’s Executive Director (Jocelyn Samuels), two law professors who won Dukeminier prizes last year (Danaya Wright and Courtney Cahill), one representative of the journal’s student editors (Sarah Spiegelman), and myself. Each committee member and the student editors reviewed the finalists. The committee met in April 2018. Each year the committee members decide the precise selection criteria for that year, guided only by the goals of the Dukeminier Awards Journal noted above. This year, our criteria included scholarly contribution, rigor, sophistication, innovation, originality, impact, and quality of research and writing. We viewed each article holistically. The committee members also valued the idea of recognizing younger scholars, as well as scholars building a body of scholarship in this area; however, those factors were not determinative or even very significant to our decision. We extensively discussed the finalists in light of these criteria. We selected five articles for prizes this year. Two of the winning authors had previously won Dukeminier prizes. The committee decided to award the named prizes this year to the three winners who had not won previously. For the student note competition, the student editors and I selected the winner in December 2017, utilizing similar criteria to those noted above.

We hope that everyone finds the winning articles to be as insightful and provocative as we did.

Adam P. Romero
Arnold D. Kassoy Scholar of Law, and
Director of Legal Scholarship and Federal Policy
Williams Institute
Lecturer-in-Law
UCLA School of Law
May 2018
In Memory of Jesse Dukeminier

This journal is named in memory of Jesse J. Dukeminier (1925–2003), who was a member of the UCLA School of Law faculty for forty years. The journal celebrates scholarly excellence in the field of sexual orientation, and Jesse Dukeminier was an excellent scholar and gay man. His own scholarly eminence is unquestioned, but he never wrote on topics centered on sexual orientation, nor was he what one would call an activist in the cause of gay rights. His field was property law, and in that field he was most certainly a star. His casebook (Property, co-authored with James E. Krier) is, in substance and in number of adoptions, by far the leading casebook in the field. The same can be said of his casebook, Wills, Trusts, and Estates, co-authored with Stanley M. Johansen. He was a nationally known authority on the Rule Against Perpetuities, and he contributed to the law’s development not only in his scholarship but in the legislative process. Surely, however, the explanation for dedicating this journal to him lies elsewhere.

Jesse Dukeminier was a beloved teacher, among a handful of UCLA law teachers in the last generation who were revered by their students. (In his case it is not excessive to say “revered.”) His sexual orientation was no secret; his union with David S. Sanders, a prominent psychiatrist, began around the time Jesse joined the UCLA Law faculty, and was well known to all. Long before it became widely understood that Coming Out was an important act of social and political construction, Jesse was Out, without ceremony—indeed, without raising the subject, unless someone else raised it first. He went about his life, in work and in recreation, as himself. Precisely because he was so admired, he contributed to the cause of equal citizenship by carrying on his day-to-day living under the assumption that his sexual orientation, although very much a part of his sense of self, was not especially noteworthy.

For others who self-identified as gay, lesbian, bisexual, etc., Jesse’s behavior could help to ease the way to their own public acknowledgement of their sexual orientation. Imagine that the year is 1973, and that you are one of Jesse’s students, a gay man or lesbian who has remained largely closeted. You may think, “If this highly admired man is Out, why should I not be?” And for those acquaintances who self-identified as straight, Jesse’s presence in their lives helped them to redefine the meanings they
attached to sexual orientation. Such a person might think, “If Jesse is gay, then the negative things I have heard about a gay orientation have to be false.” Jesse was not vain, but he was aware of his high standing among his students, his colleagues, and his friends. So, without ever getting on a soapbox, he was—knowingly—a walking advertisement for the proposition that equal treatment for every person, of any self-identified sexual orientation, is the proper social norm, the entitlement of all persons. The difference in public attitudes on this subject from 1973 to present day is remarkable and has made itself felt in legislation and in Supreme Court decisions. In a quiet-but-public way that was very much his own, Jesse Dukeminier was one local leader in that change.

When the generous donation that was to become the Williams Institute was offered to our school, Jesse Dukeminier was one of a group of faculty who participated in the Institute’s design. He continued in active support of the Institute until his death. The UCLA Law School community is honored to dedicate this journal to his memory.

Kenneth L. Karst
2004, UCLA School of Law
Obergefell’s Liberties: All in the Family*

SUSAN FRELICH APPLETON**

ABSTRACT

This Article, part of a colloquium on the Supreme Court’s 2015 case Obergefell v. Hodges, which guaranteed a right of same-sex couples to marry, makes two principal contributions to our understanding of constitutional “liberty,” both with significance for family law. The first contribution is analytic. This Article joins the debate among the Obergefell Justices, including the four dissenters, about whether Fourteenth Amendment liberty only protects against interference by the state or whether it can also compel affirmative support or government action. On close inspection, this debate not only obscures complexities that defy a clear-cut binary but also camouflages diverse conceptions of liberty found in the majority opinion itself. Analysis of four different readings of “liberty” in Obergefell’s majority opinion reveals that marriage—the substantive issue in the case—and its distinctive features account for much of this messiness and multiplicity.

This Article also makes a theoretical contribution by exploring the relationship between constitutional law and family law that the Court’s liberty rulings have forged. The usual approach emphasizes the impact of constitutional doctrine on family law, specifically how the Court’s liberty rulings have required substantive changes in laws governing the family.

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By contrast, this Article turns to the unexamined mirror image, exposing and theorizing how family law principles, assumptions, and values have infiltrated and shaped constitutional doctrine, including doctrine disputed in Obergefell. A survey of the constitutional case law limiting obligations owed by the state reveals that these precedents are “all in the family,” in the sense that they all raise issues of concern to family law. These cases, along with those applying the Constitution to expand access to marriage and divorce, suggest the influence of family law’s policy of identifying private sources of support for dependent members of society. Had the Obergefell majority explicitly acknowledged and embraced this family law policy in recognizing a constitutional right to marry for same-sex couples, it could have avoided some of the criticism and confusion that the opinion has sparked.

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"The right of same-sex couples to marry . . . is part of the liberty promised by the Fourteenth Amendment . . . .”

I. INTRODUCTION

Family law and constitutional law stand firmly joined at the hip. A principal ingredient now binding these two domains is “the liberty promised by the Fourteenth Amendment,” the basis for the Supreme Court’s storied ruling in Obergefell v. Hodges, which guaranteed access to marriage for same-sex couples nationwide. Obergefell stands out as one of the most recent illustrations of the Court’s repeated reliance on liberty since the 1920s to review state regulation of family life. Over the years, the Court’s liberty rulings have come to protect childrearing decisions, reproductive choices, sexual activities, and intimate relationships, including those officially recognized and some created privately and informally.

3. Obergefell’s status as the most recent of such rulings was eclipsed a year later by Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2309–18 (2016), which clarified the standard of review applicable to abortion restrictions and struck down two measures enacted by Texas.
This application of liberty to family matters has not developed free from controversy. Especially in recent years, forceful dissents have accompanied the opinions for the Court, voicing an array of disagreements, often in particularly provocative terms. For example, in Obergefell Justice Alito condemned the majority for giving liberty “a distinctively postmodern meaning”—a dig about uncertain meanings that itself evokes multiple interpretations. Three other members of the Obergefell Court also issued dissenting opinions contesting the majority’s use of liberty.11

This Article on Obergefell makes two principal contributions to our understanding of constitutional “liberty,” both with significance for family law. The first contribution is analytic. This Article joins the debate among the Obergefell Justices, including the four dissenters, about whether Fourteenth Amendment liberty only protects against interference by the state or whether it can also compel affirmative support or government action. On close inspection, this debate—mired in longstanding efforts to maintain distinctions between negative/positive, private/public, and natural/legally constructed—obscures complexities that defy a clear-cut binary. Indeed, careful reading and analysis uncover diverse conceptions of liberty not only when comparing the Obergefell majority opinion to the dissents but also within the majority opinion itself. Marriage, the substantive issue in Obergefell, and its distinctive features account for much of this messiness and multiplicity.

This Article also makes a theoretical contribution by exploring the relationship between constitutional law and family law that the Court’s liberty rulings have forged. The usual approach emphasizes the impact of constitutional doctrine on family law, specifically how the Court’s liberty rulings have required substantive changes in laws governing the family and have challenged the abiding claim that this realm belongs to the states. By contrast, this Article turns to the unexamined mirror image, exposing and theorizing how family law principles, assumptions, and values have infiltrated and shaped constitutional doctrine, including

8. To list just a few recent examples, the Court produced no majority opinion on most of the issues presented in Casey, 505 U.S. at 843–44, and Troxel, 530 U.S. at 60; three Justices dissented in Lawrence, 539 U.S. at 586, 605; and four did so in both Windsor, 133 S. Ct. at 2696, 2697, 2711, and Obergefell v. Hodges, 135 S. Ct. 2584, 2611, 2626, 2631, 2640 (2015). Three of the eight Justices deciding the case dissented in Whole Woman’s Health, 136 S. Ct. at 2321, 2330.


10. See infra notes 187–200, 286–300 and accompanying text.

11. See Obergefell, 135 S. Ct. at 2616–23 (Roberts, C.J., dissenting, joined by Scalia and Thomas, J.J.); id. at 2627–30 (Scalia, J., dissenting, joined by Thomas, J.); id. at 2631–40 (Thomas, J., dissenting, joined by Scalia, J.).

12. For the traditional claim that family law is state law, see, e.g., Windsor, 133 S. Ct. at 2689–92. But see Jill Elaine Hasday, FAMILY LAW REIMAGINED 17–20 (2014) (rejecting as a myth the “canonical story” that family law is local).
doctrine disputed in *Obergefell*. Again, marriage and its peculiar properties play a central role in this investigation, which ultimately leads to a focus on the policy of identifying private sources of support for dependent members of society.

Part II of this Article introduces *Obergefell*, first setting out the Court’s choice of a ruling mainly grounded in liberty rather than equality and then noting the important divisions among the Justices that this particular choice provoked.\(^{13}\) Part III contextualizes these divisions, with Part III.A presenting the distinction assumed by the dissenters and Part III.B providing background from selected precedents to explain their challenges to the majority’s reliance on liberty. Part III.C takes a closer look at the majority opinion in *Obergefell*, invoking the frameworks that the Court has traditionally followed to identify four readings of Justice Kennedy’s majority opinion, each based on a different conception of liberty. Part IV adopts a wider lens. Part IV.A considers the implications of the assorted liberties identified in the foregoing analysis, examining both the promise and the limits of each reading while showing why such insights fail to yield meaningful forecasts of doctrinal developments to come. Part IV.B illuminates the dynamic relationship between family law and constitutional law, looking beyond the ways constitutional rulings have affected family law to hypothesize, through patterns in the case law, the ways that family law might well have guided constitutional law. These patterns help make sense of the tension in *Obergefell* about negative versus positive liberty (or private versus public rights) by establishing that the critical constitutional precedents are all family law cases—or “all in the family.” In turn, these patterns afford purchase for thinking about the future in a different way, based on family law’s core—albeit contested—policy of maintaining dependency as a private responsibility. The Conclusion speculates, consistent with this policy, that the Court might continue to rely on liberty to expand required recognition of personal relationships, notwithstanding *Obergefell*’s exaltation of marriage.

**II. OBERGEFELL AND ITS DIVIDED FOUNDATIONS**

In *Obergefell*, a fractured Supreme Court resolved a circuit split about whether states can exclude same-sex couples from their marriage regimes.\(^{14}\) In doing so, the Court confronted other divisions, most notably

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13. In emphasizing the Justices’ specific disagreements about liberty, I do not suggest that an equality-based rationale would have produced unanimity. In fact, I feel confident that, no matter what the ground the majority might have used to strike down bans against marriage for same-sex couples, the four Justices in the minority still would have dissented. See Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 117–30 (critiquing the various ways in which the dissenters invoke constitutional limits to support their preferred outcome).

to what extent to rely on due process versus equal protection and how to interpret the constitutional prohibition on “State depriv[ations] . . . of . . . liberty . . . without due process of law.” The following Parts examine these underlying fissures.

A. From Marriage Equality to Marriage Liberty

By the time the Supreme Court granted certiorari in the cases that became Obergefell v. Hodges, the social movement challenging traditional heteronormative marriage laws had undergone both a conceptual and a terminological evolution. Michael Boucai has called attention to the radical impulses animating the initial cases of the 1970s, in which he has found evidence of litigants’ efforts to advance sexual liberty and queer culture and to disrupt the very idea of marriage. In the ensuing years, however, gay rights advocacy pursued a more assimilationist strategy, making “like-straight” arguments against discriminatory laws and relying on narratives to “highlight the similarities between the human qualities inherent in childrearing in stable marriage relationships and the comparable human qualities—such as ‘friendship, play, knowledge’—inherent in stable homosexual relationships.”

As goals and strategies evolved, so too did vocabulary. One-time references to “same-sex marriage” later often became “gay marriage,” in part to emphasize the central role of homophobia in marriage restrictions and other discriminatory laws. Yet, by the time Obergefell reached the Supreme Court, common parlance, at least among the politically sensitive, if not the politically correct, exhibited a preference for the term

16. In Obergefell, the Court decided cases that came from Michigan, Kentucky, Ohio, and Tennessee. Obergefell, 135 S. Ct. at 2593.
19. Toni M. Massaro, Gay Rights, Thick and Thin, 49 STAN. L. REV. 45, 104 (1996) (footnote omitted) (quoting Stephen Macedo, Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism 211 (1990)). Of course, several gay rights activists challenged the assimilationist approach. E.g., Nancy D. Polikoff, Commentary, We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage.” 79 VA. L. REV. 1535, 1536 (1993) (summarizing opposing positions and contending that “the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism”).
“marriage equality,” more often even than “freedom to marry,” the name of a prominent advocacy organization with a leadership role in the movement. Obergefell’s historic ruling intervenes in both trajectories. First, it marks the triumph of the assimilationist approach, shown by the majority opinion’s rhetoric about the universality of marriage and its stories of the named plaintiffs’ shared lives, in sickness and in health and through the difficulties of chosen commitments, from parenting to military service.

Second, despite the contemporary emphasis on “marriage equality,” Obergefell relies on the protection of liberty in the Due Process Clause to perform the heavy lifting in the case, relegating the Equal Protection Clause to a secondary, supporting role. The Court begins its opinion by explicitly identifying liberty as the central issue posed—indeed, using the word three times—with only an indirect allusion to equality:

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

The majority goes on to hold, as quoted in this Article’s epigraph, that “[t]he right of same-sex couples to marry . . . is part of the liberty promised by the Fourteenth Amendment.” The opinion devotes over 3,000 words to its analysis of liberty, compared to less than half that many to explain the synergy between liberty and equality.

Further,


24. E.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) (“The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together.”).

25. See id. at 2594–95.

26. Id. at 2593.

27. See supra note 1 and accompanying text.

28. After stating why excluding same-sex couples from marriage violates liberty, the Court continues:

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Obergefell, 135 S. Ct. at 2602–03. The Court cites various precedents exemplifying the relationship between the two provisions, concluding that “[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality.” Id. at 2604. Further, in discussing equality, the Court makes a point of mentioning, albeit briefly, how marriage
the opinion leaves unaddressed a number of important questions that an application of the Equal Protection Clause might well have elicited, including whether the problematic classification rests on gender\textsuperscript{29} or sexual-orientation and what standard of review governs sexual-orientation discrimination.\textsuperscript{30}

The four dissenting opinions voice an array of objections. In one prominent refrain that echoes the “[w]ho decides?” approach used below by the U.S. Court of Appeals for the Sixth Circuit,\textsuperscript{31} the dissents decry the majority’s judicial usurpation of a legislative or political matter.\textsuperscript{32} Another recurring theme sounds an alarm about the threat to religious liberty posed by the ruling.\textsuperscript{33} For purposes of this Article, however, the most salient difference between the majority and each of the dissents can be found in the multiple understandings of liberty that emerge.

B. Contested Liberty

Justice Alito’s \textit{Obergefell} dissent pointedly raises one familiar controversy about liberty: the term’s uncertain content. According to Justice Alito:

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term “liberty” in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today’s majority, it has a distinctively postmodern meaning.\textsuperscript{34}

In a subsequent interview, Justice Alito elaborated, explaining that the majority’s notion of liberty is “the freedom to define your understanding of the meaning of life. Your—it’s the right to self-expression. So if all of this is on the table now, where are the legal limits on it?”\textsuperscript{35}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{29} See Mary Anne Case, \textit{Missing Sex Talk in the Supreme Court’s Same-Sex Marriage Cases}, 84 UMKC L. REV. 675, 675, 677 (2016).
  \item \textsuperscript{32} See \textit{Obergefell}, 135 S. Ct. at 2611–12, 2626 (Roberts, C.J., dissenting); \textit{id.} at 2627 (Scalia, J., dissenting); \textit{id.} at 2642 (Alito, J., dissenting).
  \item \textsuperscript{33} \textit{id.} at 2625–26 (Roberts, C.J., dissenting); \textit{id.} at 2638–39 (Thomas, J., dissenting).
  \item \textsuperscript{34} \textit{id.} at 2640 (Alito, J., dissenting).
\end{itemize}
\end{footnotesize}
This critique captures longstanding pushback against judicial rulings that purportedly “invent” new constitutional rights based on value judgments or popular opinion, with “judicial activism” as an oft-used, if imprecise, shorthand among opponents of such jurisprudence. A famous variation on this theme appears in Justice Scalia’s dissent in Lawrence v. Texas, where he attacked the Court’s evocative but elusive definition of liberty borrowed from an earlier abortion case—“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”—and dismissively dubbed it the “sweet-mystery-of-life passage.” At bottom, for Justice Alito in Obergefell, just as for Justice Scalia before him in Lawrence, “liberty,” as used by the majority, has different meanings for different people even when it comes to intimate life and family matters, so this crucial term could encompass anything and everything.

This critique is neither novel nor unexpected. Indeed, from its earliest applications of the Due Process Clause to family and personal matters, the Court itself has conceded such indeterminacy, confessing a reluctance to define “liberty” with “exactness”—even while providing at least a partial list of included elements. If constitutional liberty is to

(quoting Justice Samuel Alito in an interview with Bill Kristol).


40. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (“While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”); see also Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“Due process has not been reduced to any formula; its content cannot be determined by reference to any code.”). For judicial efforts over the years to formulate “tests” for applying liberty, compared to Obergefell’s approach, see Kenji Yoshino, A New Birth of Freedom?: Obergefell v. Hodges, 129 HARV. L. REV.
have some substantive content, who else but the Justices would have the burden of supplying it?41

I bracket this general and frequently noted problem to focus on a more particularized, and ultimately more productive, difficulty centered on the meaning of “liberty” in Obergefell. The dissents of Chief Justice Roberts and Justice Thomas articulate this difficulty most explicitly. The former challenges the majority for erroneously “convert[ing] the shield provided by constitutional liberties into a sword to demand positive entitlements from the State.”42 Echoing this objection, Justice Thomas claims that the majority departs from the established understanding of liberty “as freedom from government action, not entitlement to government benefits.”43 The two other dissents (by Justices Scalia and Alito) appear to agree, while making the point less directly.44

The binary animating the Obergefell dissents has tenacious roots. First, the dissents’ limited conception of liberty, as exclusively a barrier against state interference, recalls family law’s well-worn public/private divide, which has a long history, from the separate-spheres era45 to more recent feminist critiques debunking this dichotomy as altogether illusory.46 Under the traditional formulation, there is a “private realm of family life which the state cannot enter;”47 this sphere exists apart from the market and the state (both deemed public);48 and this private sphere

41. Of course, some of the Justices have tried to eschew substantive due process altogether, reading the clause to afford only procedural protections. See Obergefell, 135 S. Ct. at 2631–32 (Thomas, J., dissenting).
42. Id. at 2620 (Roberts, C.J., dissenting); cf. Kari E. Hong, Obergefell’s Sword: The Liberal State Interest in Marriage, 2016 U. ILL. L. REV. 1417, 1439 (contending that state intervention in the name of liberty and privacy can serve as a powerful tool to obtain benefits and protections); Catherine Powell, Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality, 84 FORDHAM L. REV. 69, 72 (2015) (contending that Obergefell “conflates, on the one hand, the negative duty of the state not to interfere in individual rights to exercise the freedom to marry (or not), and, on the other hand, any positive obligation of the state to support affirmatively individual rights to marry and the institution of marriage”). For an entirely different take on this language in the Chief Justice’s dissent, see Marc Spindelman, Obergefell’s Dreams, 77 OHIO ST. L.J. 1039 (2016).
43. Obergefell, 135 S. Ct. at 2631 (Thomas, J., dissenting).
44. See id. at 2630 (Scalia, J., dissenting) (“What possible ‘essence’ does substantive due process ‘capture’ in an ‘accurate and comprehensive way’? It stands for nothing whatever, except those freedoms and entitlements that this Court really likes.”); id. at 2640 (Alito, J., dissenting) (“For social democrats, [liberty] may include the right to a variety of government benefits.”).
46. E.g., Deborah L. Rhode, Feminism and the State, 107 HARV. L. REV. 1181, 1187 (1994); see also Ruth Gavison, Feminism and the Public/Private Distinction, 45 STAN. L. REV. 1, 10–43 (1992) (reviewing and critiquing feminist critiques of the public/private distinction).
belongs to women. Yet, one powerful feminist attack shows how the state is inextricably part of the private sphere simply by “determin[ing] what counts as private and what forms of intimacy are entitled to public recognition.” Other critics emphasize that family law has both private and public dimensions, with middle and upper class families enjoying the former’s deference to family decisionmaking and poor families subjected to the latter’s routine disrespect, including oppression by the child welfare system.

Second, we can connect the divide asserted by the Obergefell dissents with efforts in constitutional jurisprudence to distinguish “negative rights” from “positive rights,” with the former encompassing only freedom from state interference and the latter referring to guarantees of affirmative support from the state. Again, critical analysis has exposed the distinction as specious, given the state’s role in creating the “natural” or the “status quo” and the myriad forms of state support so taken for granted that they have become invisible.

Although the private/public distinction often surfaces in family law and the negative/positive distinction is more familiar in constitutional law, the two binaries (contested as they may be) share much in common even if the concepts they purport to identify do not match exactly. “Private” suggests a realm protected from state interference, similar to the notion of negative constitutional rights; by contrast, “public” suggests a realm in which the state plays a role, thus overlapping with the claim


49. _See id._


53. _See, e.g.,_ Godsoe, _supra_ note 51, at 116.


to state assistance inherent in the idea of positive constitutional rights.\textsuperscript{57} Moreover, both areas have elicited what I find to be persuasive critiques that operate principally in one direction, expanding what we should consider public and narrowing the private (perhaps to nonexistence). That is, these critiques reveal the public features of the nominally private realm or the state-constructed aspects of negative rights.\textsuperscript{58} Thus, although the two pairs are not entirely interchangeable, they share common features emphasized in the analysis that follows.

III. THE TRADITIONAL FRAMEWORK: DEVELOPMENT AND APPLICATION

The negative/positive or private/public distinction that the Obergefell dissents assume derives from frameworks that the Court established in earlier cases. This Part first sets out key features of these frameworks and their development and then shows, based on a close look at the majority opinion, how they explain—and also how they fail to explain—the tension in Obergefell.

A. Private Liberty and Public Marriage

The “conventional wisdom,” as Susan Bandes has called it, depicts constitutional liberty as a negative right or protection from active state interference.\textsuperscript{59} According to some accounts, this understanding derives from the language of the Fourteenth Amendment, which says that no state “shall . . . deprive any person of life, liberty, or property, without due process of law.”\textsuperscript{60} The Court has found such deprivations of liberty in laws restricting sex, reproduction, and childrearing, calling these activities “private” and thus signaling that they take place outside the public sphere and purportedly require no state action for individuals to undertake.\textsuperscript{61} Indeed, over the years liberty and privacy became connected

\textsuperscript{57} See supra note 54 and accompanying text. Isaiah Berlin’s notion of “‘negative’ freedom” tracks the conception of negative liberty or negative rights followed in constitutional law, although Berlin’s notion of “positive freedom” differs from the constitutional law counterpart. See ISIAH BERLIN, FOUR ESSAYS ON LIBERTY 122–34 (1969).

\textsuperscript{58} See supra notes 50–53, 55–56 and accompanying text; cf. Gavison, supra note 46, at 14–21.

\textsuperscript{59} Bandes, supra note 55, at 2273.


in this line of cases, which initially used the language of “liberty,” then invoked a “right of privacy,” later explained that the Fourteenth Amendment’s protection of liberty in the Due Process Clause provides the constitutional source for this right of privacy, and ultimately abandoned the “privacy” terminology altogether in favor of exclusive reliance on “liberty.” Interpreted against this background, liberty limits government intrusion in private domains, but it does not compel government to do anything.

This notion of liberty under the U.S. Constitution contrasts with guarantees in other bills of rights. For example, the “right to life” protected by Article 2 of the European Convention on Human Rights entails a government duty to prevent foreseeable loss of life in some circumstances. Similarly, the United Nations Convention on the Rights of the Child (UNCRC) includes several rights that assume affirmative support from the state, such as Article 6, which provides: “States Parties shall ensure to the maximum extent possible the survival and development of the child,” and Article 7, which provides: “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.” Indeed, the UNCRC’s protection of such positive rights might well help explain why the United States remains one of only a handful of countries refusing to adopt this convention.

On its face, a constitutional right to marry looks more akin to these guarantees recognized in other countries than to the ordinarily private conceptualization of liberty in the United States. Civil marriage requires active participation of the state. The state issues marriage licenses, recognizes couples as married after they have complied with applicable legal regulations, and provides a host of legal benefits based on the status of

64. See Roe, 410 U.S. at 153.
68. Id. art. 7, § 1. Article 7 goes on to say: “States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.” Id. art. 7, § 2.
Indeed, Nelson Tebbe and Deborah Widiss call civil marriage “a government program.” Civil marriage takes a couple’s personal relationship and makes it official, adding the state itself as a third “partner[].” So, even if the distinction between public and private is fuzzy and uncertain, marriage has many attributes that should place it on the public side of the line.

Family law’s famous “channeling function” helps explain why the state would make the policy decision to offer material marital benefits when nothing in the Constitution compels such privileged treatment: By rewarding marriage, the state incentivizes individuals to choose this official format for their sexual and intimate relationships, in turn providing a structure that assigns care and support duties to family members and manages consequences upon dissolution, relieving the state from the need to meet resulting dependencies. Some theorists conceptual-
ize privatizing dependency as family law’s animating purpose. Indeed, the state’s very interest in imposing private obligations and its control of marriage to advance this interest bolster the Obergefell dissenters’ position that marriage is public, not private. Considerable authority reinforces this conclusion, with classic statements in past cases asserting that marriage results from “public ordination” and describing marriage as “a great public institution.” The Obergefell majority quotes with approval this latter observation.

In short, the contrasting roles of the state in private family matters and in public marriage undergird the Obergefell dissenters’ claims that the majority improperly invoked liberty to overturn laws that limit marriage to cross-sex couples. As the dissenters see it, to say that same-sex couples have a right to marry compels state action, erroneously making liberty “a sword” and improperly conferring “entitlements.”

B. The Demise of the Welfare-Rights Thesis

The distinction that the Obergefell dissenters assume is not as clear-cut as they suggest, however. First, Obergefell is not the first “right to marry” case in which the Court relied, at least in part, on liberty. Notable predecessors include Loving v. Virginia, holding unconstitutional anti-miscegenation laws, and Zablocki v. Redhail, invalidating obstacles to marriage imposed on prospective spouses with outstanding support obligations. If marriage is public but liberty protects only negative or private rights, how would we explain these earlier cases? They go beyond keeping the state out of one’s personal choice of an intimate or sexual partner, by affording access to civil marriage and its state-conferred consequences based on such choice.

Second, until the 1970s or so, Supreme Court opinions protecting individual interests under the Fourteenth Amendment reflected sufficient ambiguity to invite speculation about the possible recognition of a

75. See, e.g., Fineman, supra note 56, at 44, 108–09, 208; see also Nancy Fraser & Linda Gordon, A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State, 19 Signs 309, 311 (1994) (arguing that “dependency” is “an ideological term” carrying “strong emotive and visual associations and a powerful pejorative charge”).
76. Maynard v. Hill, 125 U.S. 190, 213 (1888) (quoting Noel v. Ewing, 9 Ind. 37, 50 (1857)).
77. Id. (quoting Noel, 9 Ind. at 50).
79. Id. at 2620 (Roberts, C.J., dissenting).
80. Id.; see also id. at 2631 (Thomas, J., dissenting).
83. Before Loving, the Court had invalidated under the Equal Protection Clause anti-miscegenation laws that criminalized sex and cohabitation between unmarried interracial couples. McLaughlin v. Florida, 379 U.S. 184, 184 (1964).
constitutional right to minimum welfare or “minimum protection”—a right to have subsistence and other basic needs met even when active state support would be necessary to realize this right. Cases ensuring access to counsel and a transcript in a criminal appeal, mandating procedural safeguards before the denial of welfare benefits, and requiring for new arrivals in the state public assistance like that provided to long-term residents all suggested that—at least in some situations—the Constitution might confer affirmative entitlements from the state. This welfare-rights thesis was strengthened by case law of the era developing or affirming doctrines of unconstitutional conditions, irrebuttable presumptions, and public fora, all of which assumed a role for the state in the protection of constitutional liberties. Still, additional blurring of sharp lines between public and private arose from precedents that embraced a generous notion of the state action required for a violation of the Fourteenth Amendment and arguments of the day that would look beyond de jure school segregation to require constitutional remedies for de facto segregation as well.

Nonetheless, the welfare-rights thesis remained just that: a thesis. It arose from inferences based on case outcomes, rather than a definitive articulation by the Court during an era that also produced rulings

84. See Frank I. Michelman, The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 9–10, 35 (1969). In this article, Michelman based his analysis on cases decided under the Equal Protection Clause. Id. at 10.


89. See Michelman, supra note 84, at 12–13.


95. See Michelman, supra note 85, at 662–64; see also Michelman, supra note 84, at 10.
that could be read to undermine the thesis.96 We might see the process of developing this thesis as one resembling the legal-realist approach in which “decisions fall into patterns correlated with the underlying factual scenarios of the disputes” (rather than according to “the existing legal rules”).97

Although I consider a more comprehensive list of such cases later,98 at this juncture I use just a few selections to recount how the Court settled the ambiguity, in turn providing traction for the conventional wisdom about a strictly “negative Constitution”99 that drives the claims of the Obergefell dissents. In my examination of the Court’s opinions, the demise of the welfare rights thesis came in three key phases: two sets of abortion-funding cases, one from 1977100 and another from 1980,101 and—for anyone who failed to grasp their message or dismissed these cases as simply reflections of abortion exceptionalism102—a reinforcement thereof in a 1989 decision about child abuse.103 The following summary details why these precedents prove so important.

Four years after the Court had held, in Roe v. Wade, that the Due Process Clause protects a liberty-grounded right to privacy, which includes the right to decide whether to terminate a pregnancy within certain time limits,104 the Court rejected the argument that the Constitution requires government subsidies for women too poor to exercise the abortion right independently—even when the government in question is putting its financial thumb on the scale by subsidizing prenatal care and childbirth for such women.105 Although the criminal abortion prohibitions challenged in Roe evoked strict scrutiny because they infringed a


98. See infra notes 360–405 and accompanying text.

99. See Bandes, supra note 55, at 2273–78.


102. Objections to abortion invoked as a reason not to provide government support (via the enduring “Hyde Amendment”) or to avoid other types of “complicity” with the provision of such services have become an abiding feature of the legislative and judicial landscape. See Nicole Huberfeld, Conditional Spending and Compulsory Maternity, 2010 U. ILL. L. REV. 751, 768–81; Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 YALE L.J. 2516, 2518–21 (2015).


105. See Maher, 432 U.S. at 470.
right that the Court deemed fundamental, the selective funding scheme required only rational basis review, which the Court deemed satisfied by a state’s value judgment favoring childbirth over abortion. \(^{106}\) According to the Court, elective abortion, like other protected family liberties, is— in effect—a negative right that state inaction (here failure to subsidize) cannot infringe, \(^{107}\) even when the inaction impairs one’s ability to exercise the right. \(^{108}\) Put differently, the Court’s reliance on privacy in *Roe* \(^{109}\) foreclosed constitutional claims to public assistance.

The Court supported its conclusion by invoking other constitutionally protected rights rooted in liberty and emphasizing their purely negative character. For example, the majority noted that the parental right to choose private schooling for one’s children does not entail a right to government-provided tuition. \(^{110}\)

The 1980 abortion-funding cases explained that this analysis applies even to therapeutic abortions. \(^{111}\) In doing so, the Court made clear that an individual is not entitled to government assistance even when it is necessary to preserve her life or health. The Court categorized both poverty and any dangerous health conditions as “natural” situations that the state had not created and thus had no constitutional duty to remedy. \(^{112}\) With no fundamental right infringed, the Court applied rational basis review and again found this standard satisfied by an official policy preference for childbirth over abortion. \(^{113}\)

Particularly because of the Court’s repudiation of a right to subsidized abortion even when needed for a woman’s survival, these cases sounded a death knell for the notion of a constitutional welfare right and thus any more general jurisprudence of positive guarantees. \(^{114}\) The abortion-funding cases thereby resolved any conflicting signals in earlier cases.

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106. Id. at 478–79.
107. Id. at 475–77.
108. Id. at 471–74; see also Appleton, *supra* note 60, at 733–35.
111. *Harris v. McRae*, 448 U.S. 297, 316–18, 324–25 (1980). Although Congress has allowed various exceptions over the years to its ban on abortion funding, such as when a pregnancy endangers the woman’s life, the Court’s reasoning makes clear that the Constitution does not require any such exceptions. *See id.* at 316–18. In explaining this conclusion, the Court again made the analogy to parental rights to choose private schooling, which does not entail a guarantee of subsidized tuition. *Id.* at 318 (citing *Pierce*, 268 U.S. at 510).
112. *Id.* at 316–17.
113. *Id.* at 324–26.
opinions, rebuffing more expansive suggestions about government’s obligations and solidifying more miserly approaches.

The abortion-funding cases’ explicit distinction between negative and positive rights reverberated in other doctrinal developments. The abortion-funding cases contracted the understanding of unconstitutional conditions, claiming to limit that principle to situations in which the state “penalizes the exercise of [a] right.” In the meantime, the Court’s reliance on irrebuttable presumptions as means to a conclusion of unconstitutionality collapsed. And although the Court continues to invoke the public forum doctrine, critics interpret its narrowed reach as evidence of its demise. Finally, the once generous conceptualization of “state action” encountered retrenchments, consistent with the Court’s rejection of arguments for requiring remedies for de facto school segregation.

Any lingering possibility that, the abortion-funding cases notwithstanding, the Constitution might guarantee support for basic needs evaporated in 1989, with the Court’s decision in *DeShaney v. Winnebago County Department of Social Services*. In *DeShaney*, the majority determined that the state did not violate young Joshua DeShaney’s due process rights when it failed to protect him from severe injuries inflicted by his father—even though state child welfare officials knew or should have known of risks faced by Joshua and returned him to his father’s custody after previously removing him on grounds of child abuse. Simply

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115. See supra notes 84–85 and accompanying text.
121. See *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974); see also *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) (emphasizing the importance of placing “the responsibility for solutions to the problems of segregation upon those who have themselves created the problems”).
123. *Id.* at 192–94.
put, state inaction cannot be a deprivation of liberty, and liberty cannot encompass a right to affirmative protection by the state—even when the results are life-threatening injuries.\textsuperscript{124}

\textit{DeShaney}’s distressing facts included brutal beatings of a four-year-old, his potentially fatal coma, and resulting severe brain damage,\textsuperscript{125} along with the previous involvement of child welfare officials. Against that background, the Court’s clear rejection of the claim for state protection sent an unmistakable message purporting to limit liberty to negative rights, although the abortion-funding cases had established the same basic principle earlier. More than a decade after \textit{DeShaney}, the Court adhered to the view that the state has no affirmative obligation to protect individuals from family violence in a case with equally hideous facts—including the death of three children at the hands of their father and the police’s inaction despite the mandatory restraining order obtained by their mother.\textsuperscript{126}

I revisit these precedents and consider related cases below.\textsuperscript{127} For now, however, I note that one way to make sense of these precedents turns on the verb describing the state’s role, rather than the individual interest at stake.\textsuperscript{128} Although the abortion-funding cases and \textit{DeShaney} put health and life at stake, they presented no due process violations because, according to the majorities, the state inaction in those cases could not “depriv[e]” a person of liberty or of anything else for that matter.\textsuperscript{129} Under this analysis, embodied in the \textit{Obergefell} dissents, it would follow that the state’s failure to grant to same-sex couples a marriage license and the host of material benefits contingent on marriage cannot constitute a deprivation of liberty.

\begin{footnotes}
\item[124.] \textit{Id.} at 195–97, 201. The Court has acknowledged that states owe affirmative duties to those in state custody. \textit{See id.} at 199–200.
\item[127.] \textit{See infra} notes 360–405 and accompanying text.
\item[128.] \textit{See} Appleton, \textit{supra} note 60, at 731–37.
\item[129.] \textit{See} Michelman, \textit{supra} note 84, at 17 (“The due process clause inveighs only against certain ‘deprivations’ by the ‘state,’ occurrences which seemingly cannot occur by mere default.”). In the abortion-funding cases, the Court drew an apparently bright line between state action and inaction and stated that the latter does not constitute the “unduly burdensome interference with [a woman’s] freedom to decide whether to terminate her pregnancy.” \textit{Harris v. McRae}, 448 U.S. 297, 314 (1980) (quoting \textit{Maher v. Roe}, 432 U.S. 464, 473–74 (1977)). But the Court later abandoned that bright line, transforming the language into a test applicable even to active state restrictions on abortion. \textit{See Whole Woman’s Health v. Hellerstedt}, 136 S. Ct. 2292, 2300 (2016); \textit{Gonzales v. Carhart}, 550 U.S. 124, 146 (2007); Planned Parenthood of Se. Pa. v. \textit{Casey}, 505 U.S. 833, 874–77 (1992) (plurality opinion); \textit{see also} \textit{Whole Woman’s Health}, 136 S. Ct. at 2321, 2323–25 (Thomas, J., dissenting) (criticizing the abortion-specific standard and its interpretation here).
\end{footnotes}
C.  *Reading Obergefell*

Despite the *Obergefell* dissenters’ characterization of the majority’s improper treatment of the right to marry, the majority opinion in fact lends itself to multiple readings, each ascribing a different meaning to the key term “liberty.” This Part uses the opinion’s language, reasoning, and citations of authority, against the background of the Court’s traditional categorization, to examine each of four possible readings, demonstrating within this one case the instability and plasticity of the public/private or positive/negative divide. This analysis brings to the fore insights about marriage as a unique legal construct and thus about family law, marriage’s “home,” more generally.

1.  *A Public Liberty Reading of Obergefell*

   Let’s begin with the reading of the majority opinion that would concede the points made by the dissenters. Under this reading, Justice Kennedy (with presumably the other four members of the Court who join him) flatly disagrees with the conventional wisdom and the dissenters’ claims to the extent they purport to assert a universal rule that the liberty protected by the Due Process Clause must necessarily be private—that is, that liberty offers no support for claims that require state assistance. If Justice Kennedy rejects the conventional wisdom, then we can read his majority opinion to say that constitutionally protected liberty includes at least marriage (with the affirmative state action that institution contemplates) and perhaps other positive rights as well.


held unconstitutional a statute requiring indigent mothers to pay a fee to appeal the termination of their parental rights (TPR).\textsuperscript{135} While \textit{Maynard} assumes government involvement, the others all impose an affirmative obligation on government, whether granting a marriage license with all attendant privileges, recognizing for purposes of federal benefits a marriage valid under state law, or enabling a TPR appeal without cost.

The approach evident in these cases tracks the analysis in a precedent that the Court does not cite. In \textit{Boddie v. Connecticut}, the Court ruled that due process liberty guarantees indigent individuals access to divorce courts without paying a required filing fee.\textsuperscript{136} The Court explained:

\begin{quote}
[B]\textit{G}iven the basic position of the marriage relationship in this society’s hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.\textsuperscript{137}
\end{quote}

\textit{Boddie}’s observations transfer well from the divorce context to the context of civil marriage, where “the basic position of the marriage relationship in this society’s hierarchy of values” merits repeating and the state again wields a monopoly—given that civil marriage is attainable only with state participation. Divorce and civil marriage are two sides of the same coin, and divorce’s public features together with the applicability of \textit{Boddie}’s language to civil marriage strengthen the \textit{Obergefell} majority’s suggestion of liberty’s public dimension, protecting some number of positive rights, contrary to the conventional wisdom and the dissenters’ position.

2. \textit{Private Liberty Readings of Obergefell}

We can read Justice Kennedy’s majority opinion in very different ways, however. Under these alternatives, Justice Kennedy (and, again, presumably the Justices who join him) might well agree with the dissenters that liberty protects only freedom from deprivations by the state or negative rights. Certainly, a significant number of precedents invoked by the majority for more than a cursory citation, six cases, all fit this classic mold. They all rule unconstitutional criminal laws interfering with arguably private or autonomous action in matters of sex, reproduction, or childrearing,\textsuperscript{138} consistent with the libertarian approach sometimes

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{136} Boddie v. Connecticut, 401 U.S. 371, 374 (1971).
\item \textsuperscript{137} \textit{Id.}
\end{enumerate}
\end{footnotesize}
associated with Justice Kennedy. Put differently, these particular liberty cases all exemplify negative rights that form the conventional wisdom and provide common ground for the majority Justices and dissenters, notwithstanding their disagreements about which particular freedoms ought to be so recognized and notwithstanding scholarly insights about the often overlooked public aspects of such private rights.

a. Naturalizing Marriage

Under one reading, Justice Kennedy embraces the conventional wisdom, but includes marriage within the constellation of negative rights. That is, his opinion lends itself to an interpretation relying on a concept of liberty that, like the one articulated by the dissenters, is quintessentially private, not public, despite the “great public institution” quotation from Maynard v. Hill. Some scholars espouse this position, treating the right to marry as a “negative liberty” and failing to acknowledge the state’s active role.


139. See, e.g., Barnett, supra note 65, at 33–37.
140. For example, although he would agree that liberty, as applied in Lawrence v. Texas, protected a negative right, Justice Thomas dissented in that case. Lawrence, 539 U.S. at 605–06; see also supra notes 38–39 and accompanying text.

143. Anne Alstott takes this position, writing that “[e]very major constitutional right in family law that has been recognized by the Supreme Court sounds in negative liberty” and citing all the pre-Obergefell marriage cases among the examples. Anne L. Alstott, Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State, 77 Law & Contemp. Probs. 25, 27 (2014). Kenji Yoshino sees in marriage a negative right, in addition to a positive right:

[M]arriage is a negative right in that it creates a zone of privacy into which the state cannot intrude, as we see in privacy cases such as Griswold, which spoke of the “sacred precincts of the marital bedroom,” or in the testimonial privileges that permit spouses to refuse to testify against each other.

Yoshino, supra note 40, at 168–69 (footnote omitted) (quoting Griswold, 381 U.S. at 485). I disagree with both Alstott and Yoshino. For reasons stated above, the state’s active involvement in marriage necessarily distinguishes it from those constitutional family rights that “sound in negative liberty.” See supra notes 70–80 and accompanying text. Further, I see the protection accorded by the right to privacy or the recognition of testimonial privileges as positive—part of the package of benefits triggered by marital status. Put differently, state-granted marriage licenses provide the gateway to
Justice Kennedy invites this reading with rhetoric that naturalizes marriage by describing it as an inevitable practice among all humans from the beginning of time. For example, in Obergefell Justice Kennedy describes marriage as an “institution [that] has existed for millennia and across civilizations,”\textsuperscript{144} a “timeless institution,”\textsuperscript{145} and “one of civilization’s oldest institutions”\textsuperscript{146} that is “central[] . . . to the human condition”\textsuperscript{147} and “always has promised nobility and dignity to all persons, without regard to their station in life.”\textsuperscript{148}

This rhetoric situates marriage in human nature, making the state’s role invisible. Under this reading, Justice Kennedy’s opinion sees marriage as something people instinctively do and have always done.\textsuperscript{149} In other words, while Loving’s brief invocation of liberty emphasized “the freedom of choice to marry,”\textsuperscript{150} in Obergefell the focus becomes the marital status or relationship itself, with all its “natural” obligations and benefits. According to this view, the marital union predates the state and exists independently of the state, even if contemporary marriage practices accord the state a role.

So read, Obergefell evokes references to natural law,\textsuperscript{151} ecclesiastical (as opposed to civil) jurisdiction over marriage in medieval England,\textsuperscript{152} or even common law marriage\textsuperscript{153}—which, despite the use of the word “law” and the criteria for legal recognition—still provides in some states a route to marital status without state participation.\textsuperscript{154} Even today, when the state these benefits. See Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 951 (Mass. 2003) (discussing the “gatekeeping” function of the marriage-license statute).

144. Obergefell, 135 S. Ct. at 2594.
145. Id.
146. Id. at 2608. Several of the dissenting opinions share this view. See, e.g., id. at 2612 (Roberts, C.J., dissenting); id. at 2636 (Thomas, J., dissenting).
147. Id. at 2594 (majority opinion).
148. Id. (emphasis added).
149. For support for this view, see Joel A. Nichols, Misunderstanding Marriage and Missing Religion, 2011 Mich. St. L. Rev. 195, 197–201, which asserts that marriage is pre-political.
151. See R.H. Helmholz, Natural Law in Court: A History of Legal Theory in Practice 2 (2015) (“Natural law theory . . . begins, with an assumption of congruence between law and basic features of man’s nature as they are thought to have existed from the beginning of time. God himself was natural law’s source.”).
154. Of course, the state becomes involved and its criteria for legal recognition become determinative in disputes about whether a couple had a common law marriage or not. See, e.g., Winfield v. Renfro, 821 S.W.2d 640, 645 (Tex. Ct. App. 1991). Although such disputes mostly occur today at the time of the relationship’s dissolution,
role in marriage looms large, marriage reflects an amalgam of what the conventional wisdom would classify as public and private elements.\textsuperscript{155} As the majority asserts in \textit{Obergefell}, “Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm.”\textsuperscript{156} Indeed, marriage itself serves as both a religious practice and the means to a civil status.\textsuperscript{157} Illustrating this dual character, a legal marriage may be performed by either religious clergy or a state official.\textsuperscript{158}

Given Justice Kennedy’s rhetoric, however, perhaps the most apt reference would be to biologists’ and social scientists’ claims about pair bonding as an observable human activity.\textsuperscript{159} Justice Kennedy suggests that, left to their own devices, people marry. Accordingly, by portraying marriage as inherently “natural,” like—say—sex,\textsuperscript{160} the \textit{Obergefell} majority opinion can conclude that barriers to access violate this negative right.\textsuperscript{161} So understood, marriage restrictions operate like the sodomy restriction in \textit{Lawrence v. Texas}, because they deprive individuals of liberty and interfere with their personal choices and conduct.\textsuperscript{162} \textit{M.L.B.}, the TPR-transcript case, does not undermine this rationale, given that state intervention in the private family triggers the procedural protection and thus makes this precedent distinguishable.\textsuperscript{163}

suits to establish the relationship in ecclesiastical courts were a frequent feature of the medieval English regime of clandestine or “private marriage.” \textit{Helmholz}, supra note 152, at 30–31.

\textsuperscript{155} See supra note 59 and accompanying text.

\textsuperscript{156} Obergfell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

\textsuperscript{157} See id. at 2604–05 (identifying “civil marriage” as a fundamental constitutional right). \textit{See generally Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003).}

\textsuperscript{158} For a typical statute, see, e.g., \textit{CONN. GEN. STAT. ANN. § 46b–22} (West 2016).

\textsuperscript{159} See, e.g., Daniel Cere, \textit{Toward an Integrative Account of Parenthood, in What Is Parenthood? Contemporary Debates About the Family, supra note 2, at 19, 29 (presenting “durable male-female pair-bonding” as an abiding characteristic of human society, in contrast to “promiscuous patterns of mating characteristic of primate species like the bonobos or macaques”). Of course, to the extent that \textit{Obergefell} relies on this concept, it applies it to same-sex pairs, not just male-female pairs.}

\textsuperscript{160} Of course, many modern theorists understand sex and sexualities not as products of an inner drive but rather as performances of socially constructed scripts. \textit{See, e.g., Jeffrey Weeks, Sexuality 18–23 (3d ed. 2010); Ken Plummer, Symbolic Interactionism and Sexual Conduct: An Emergent Perspective, in Sexuality and Gender 20, 23–24 (Christine L. Williams & Arlene Stein eds., 2002).}

\textsuperscript{161} See Powell, supra note 42, at 72 (distinguishing right to marry from right to marriage).


Just in case an understanding of marriage by itself as private presents too much of a conceptual stretch, however, the *Obergefell* majority opinion uses an additional maneuver to support this reading. The opinion proceeds to merge marriage with the protected rights to be free from unwarranted state intrusion in matters of sex, reproduction, and childrearing, calling all these interests together “a unified whole.” With this fusion, the private character of the rights protected in cases about sexual and family autonomy overshadows the public attributes of marriage, perhaps making them less distinctive and noticeable.

b. *Equalizing Liberty or Liberating Equality*

A second path arrives at the same result, that is, a reading of the *Obergefell* majority opinion based on a conception of liberty that would ordinarily be described as “private” or “negative.” This reading returns to the past marriage cases but then veers in a different direction, given how the *Obergefell* majority emphasizes that two of them—*Loving* and *Zablocki*—along with *M.L.B.*, the TPR case, rest on both due process (liberty) and equal protection (equality). (The majority similarly describes *Eisenstadt v. Baird*, *Skinner v. Oklahoma*, and *Lawrence*—all traditionally considered negative liberty cases—and could have included *Windsor* here, too, which is a marriage case that rests on liberty as well as equality grounds.) The majority proceeds to reason that both due process and equal protection provide the basis for a constitutional right to same-sex marriage, an approach that Cary Franklin named in earlier work “marrying liberty and equality” and that Kerry Abrams and Brandon Garrett use to illustrate their concept of “intersectional rights.”

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164. *Obergefell* v. Hodges, 135 S. Ct. 2584, 2600 (2015). Perhaps Yoshino suggests a similar fusion when he discerns in marriage both a negative right and a positive right. *See supra* note 143 (discussing Yoshino’s view).

165. *See supra* note 135 and accompanying text.


Reliance on equal protection is significant because this guarantee protects against discriminatory distribution of state benefits, without making such benefits themselves constitutionally required as a matter of liberty.\textsuperscript{174} Thus, for example, if a state provided private school tuition for poor white children but not poor children of color, the scheme would violate equal protection even though the Constitution does not guarantee subsidized private schooling.\textsuperscript{175} To remedy such violations of equal protection, the state could either halt the subsidies for white children or extend them to all children.

That leaves \textit{Turner v. Safley},\textsuperscript{176} the inmate right-to-marry case, which—unlike the other marriage precedents—did not rely on equality along with liberty. Yet, the incarceration of the challengers in \textit{Turner} would trigger the special duties that the state owes to individuals in its custody, a principle reaffirmed in dicta in \textit{DeShaney}.\textsuperscript{177} \textit{Turner}’s custodial context distinguishes this precedent factually (and thus legally) from the pure private liberty cases\textsuperscript{178} and means that equality was unnecessary to activate affirmative government obligations.

Setting \textit{Turner} aside because of its distinctive prison context, then, we might understand \textit{Obergefell} to confine liberty simpliciter to the protection of negative rights, while looking to equal protection to compel a more even distribution of benefits once the state has made them available only to some.\textsuperscript{179} In \textit{Obergefell}, the Court was responding to a regime that denied to same-sex couples the benefits of marriage made available to cross-sex couples, in turn damaging the dignity of the former.\textsuperscript{180}

Of course, one might well ask why the Equal Protection Clause alone could not have done all the work necessary to reach the \textit{Obergefell} result. Certainly, this was a route open to the Court—whether based on sexual-orientation discrimination\textsuperscript{181} or sex discrimination.\textsuperscript{182} Indeed, the Solicitor General’s Brief for the United States made a forceful case

\begin{itemize}
  \item[174.] See Sullivan, supra note 90, at 1425 (“Of course, government may not distribute even ‘gratuitous’ benefits completely arbitrarily or at its discretion. Such gratuities, like all government action, must satisfy at least a requirement of minimal rationality.”).
  \item[175.] See supra note 110 and accompanying text.
  \item[178.] See, e.g., Roe v. Crawford, 514 F.3d 789, 793–98 (8th Cir. 2008) (applying \textit{Turner} to a challenge of a prison policy refusing to transport inmates for elective abortions).
  \item[179.] For a pre-\textit{Obergefell} argument embracing this approach, see Tebbe & Widiss, supra note 71, at 1377.
  \item[180.] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).
  \item[181.] See Nicolas, supra note 30, at 138.
\end{itemize}
for the unconstitutionality of gay marriage bans based exclusively on the Equal Protection Clause. Yet, the equal protection route was open as well in Lawrence v. Texas, where Justice Kennedy previously displayed his preference for liberty over equality (although—as we have seen—that case struck down state action, instead of requiring it). Despite this contrast between the two cases, called out by the Obergefell dissents, in both Justice Kennedy assigns liberty the starring role even while also giving equality a secondary part to play.

3. Feminist—or Critical—or “Queer” Liberty?

Instead of wondering whether to classify the Obergefell majority’s notion of liberty as private or public, negative or positive, we might see the opinion as a direct challenge to the dominant categorical approach altogether. The opinion defies standard legal binaries when it fuses into “a unified whole” positive and negative rights (or marriage, on one hand, and freedoms related to sex, reproduction, and childrearing, on the other). Blurring such boundaries evokes moves that often characterize feminist, critical, and queer theory, so such adjectives might serve as descriptors for this version of Obergefell’s liberty.

Under this reading, Obergefell’s liberty need be neither public nor private—or, it can be both—because any distinction is purely artificial, as feminists, among others, long have told us. Indeed, in delineating and maintaining a divide between public and private or positive and negative, the state performs substantial regulatory work. This is so in part because the legal discourse that expresses the conventional wisdom about liberty helps to construct the very categories it purports to describe.

183. Brief for the United States as Amicus Curiae Supporting Petitioners at 11, Obergefell, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004710, at *11. The brief argued that sexual-orientation discrimination evokes heightened scrutiny, which the States’ asserted justifications for gay marriage bans failed to satisfy.

184. Justice O’Connor wrote a separate concurring opinion in Lawrence because she would have invalidated the Texas sodomy prohibition on the basis of equal protection, instead of relying on liberty, which Justice Kennedy’s majority opinion used. Lawrence, 539 U.S. at 579–85 (O’Connor, J., concurring). Commentators nonetheless saw equality values at work in the majority opinion in Lawrence. E.g., Karlan, supra note 141, at 1449; Kenneth L. Karst, The Liberties of Equal Citizens: Groups and the Due Process Clause, 55 UCLA L. REV. 99, 101–02 (2007).

185. See, e.g., Obergefell, 135 S. Ct. at 2620 (Roberts, C.J., dissenting).

186. See Yoshino, supra note 40, at 168.

187. Obergefell, 135 S. Ct. at 2600.


189. See, e.g., Fineman, supra note 56, at 150–55.

190. See, e.g., Olsen, supra note 50, at 862 n.73.

191. See, e.g., Mary Joe Frug, Commentary, A Postmodern Feminist Legal
Upon close inspection, no law-free baseline exists from which the purely natural springs. 192

Critiques of the abortion-funding cases made a similar point when they emphasized that the failure to subsidize abortion did not take place in isolation but, instead, formed part of a program in which the state actively provided funding for prenatal care and delivery for poor pregnant women. 193 Similarly, the state acted in returning Joshua DeShaney to his father’s custody, and he was made worse off by the initial intervention of child welfare officials, whose participation might well have discouraged others from rescuing this child. 194 Indeed, that such child welfare systems exist across the states refutes any suggestion that family law focuses only on private matters. 195 And even axioms such as statements of a child’s “natural[]” dependence on parents for subsistence belie the role of law—that is, the state—in producing such realities. 196

From this perspective, we might see the Obergefell majority’s admixture of public and private liberty precedents to create “a unified whole” as a refreshing departure from the conventional wisdom and the public/private and positive/negative distinctions themselves. Likewise, by blending liberty and equality and eschewing the traditional tiers of constitutional scrutiny, 197 as Lawrence did as well, 198 the majority frees itself from the confining analysis required by categories. With the categories themselves as contingent and contested terrain, we might even have a potentially postmodern version of liberty, 199 but not in the way


192. Olsen, supra note 48, at 1506 (“The status quo itself [regarding families] is treated as something natural and not as the responsibility of the state.”); see also Hale, supra note 56, at 475–76.


194. See Bandes, supra note 55, at 2286–97.


196. See Olsen, supra note 50, at 851–52 n.46 (showing how children’s dependency is based on law); see also Hale, supra note 56, at 471 (“What is the government doing when it ‘protects a property right’?”).

197. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.5 (5th ed. 2015) (describing “the levels of scrutiny”).


199. See, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY
that Justice Alito has explained that label and without the derogatory implications of his remark.\textsuperscript{200}

\section*{IV. Unlocking Liberty and Privacy: The Marriage Key}

Although I find that each of the readings of “liberty” presented above plausibly derives from Obergefell’s language and the precedents invoked, some strike me as more compelling than others. In this Part, I explain why by taking a more evaluative and forward-looking stance. Part A shifts the focus from close analysis to the doctrinal and normative implications of each of the readings of “liberty.” Part B then “connects the dots” to develop a more expansive view of the interlocking trajectories of family law and constitutional law. Here, we see that family law and its core policies, including the special role of marriage, offer important cues about constitutional law, past, present, and future.

\subsection*{A. Whither Obergefell’s Liberties?}

It is tempting to mine the analysis and rhetoric of Obergefell for messages about doctrinal developments and decisions yet to come. For example, Kenji Yoshino, who embraces what I have called the “public liberty reading,”\textsuperscript{201} draws expansive conclusions from the majority opinion. Yoshino argues that Justice Kennedy might well have relied principally on liberty, instead of equality, “deliberately eliding the negative/positive liberty distinction” in order “to revamp the substantive due process inquiry \textit{tout court}” and yielding “radical implications,” including a different outcome in DeShaney.\textsuperscript{202}

I am inclined to take a more skeptical and cautious view, however. Despite the fun of making big-picture predictions, Obergefell’s text and its multiple readings leave uncertain what the case means beyond the immediate issue of same-sex marriage bans.\textsuperscript{203} Indeed, although Justice

\begin{itemize}
\item \textsuperscript{200} See supra notes 34–35 and accompanying text.
\item \textsuperscript{201} See supra notes 130–37 and accompanying text.
\item \textsuperscript{202} See Yoshino, supra note 40, at 168.
\item \textsuperscript{203} Obergefell did not resolve a variety of LGBTQ family law issues that have arisen in its wake. For example, a divided Michigan Supreme Court refused to review a holding below that a nonbiological parent cannot invoke the doctrine of equitable parentage in order to obtain standing in a custody case, although the dissenting judge would have reached a different result, given that the adults in question were prohibited from marrying before Obergefell. Mabry v. Mabry, 882 N.W.2d 539 (Mich. 2016). The U.S. Supreme Court found a \textit{per curiam} opinion necessary to compel Alabama to give full faith and credit to an adoption decree issued to a same-sex couple by a Georgia court. V.L. v. E.L., 136 S. Ct. 1017 (2016). Commentators are grappling with what marriage equality means for legal parentage and access thereto. See Martha A. Field, \textit{Compensated Surrogacy}, 89 WASH. L. REV. 1155 (2014); Douglas NeJaime, \textit{Marriage Equality and the New Parenthood}, 129 HARV. L. REV. 1185 (2016); see also Megan Jula, 4 Lesbians Sue over New Jersey Rules on Fertility Treatments, N.Y. TIMES (Aug. 8, 2016), http://www.nytimes.com/2016/08/09/nyregion/
Kennedy often writes for a majority, several observers see his opinions as idiosyncratic and unlikely to have staying power beyond his time as the Court’s “swing justice.” Whatever force such critiques might have had at the time Obergefell was announced, it acquired new salience with the unexpected death of Justice Scalia just months later, the political firestorm sparked by the effort to bring the Court back to full strength and the inability of an eight-Justice Court to decide some important cases of the 2015–2016 Term. All this “breaking news,” followed by the 2016 presidential election, coming so soon after Obergefell, recalls the lessons of legal realism, which highlight the difficulties of assessing the long-term doctrinal impact of even landmark opinions.

With these disclaimers, however, we can consider the provocative, and sometimes paradoxical, implications of each of the different readings presented above. This Part revisits each in turn.


209. As Brian Leiter has explained, legal realism has embraced several different approaches, with some emphasizing that facts rather than law determine how judges decide cases and others contending that the judges’ own personalities are the dominant factor. Leiter, supra note 97, at 280–81. At least for the former, case outcomes fall into discernable patterns. Id. at 281.
1. **The Public Liberty Reading**

The public conception of liberty revives the possibility of a minimum welfare right or other affirmative obligations of government as a matter of constitutional law. Under this reading, one could argue that marriage creates a wedge that might open the door to additional positive rights. This is precisely Yoshino’s position, as noted above. I would certainly welcome such developments, not only because of my disagreement with the reasoning and outcomes in the abortion-funding cases and *DeShaney*. In addition, given the rise of neoliberalism, the diminishing safety net accomplished through welfare reform, and growing economic inequality, a constitutional right to minimum subsistence becomes perhaps even more meaningful and urgent today than it was during the heyday of the welfare-rights thesis.

For these reasons, I wish I could share Yoshino’s optimism. As I see it, however, the very “neoliberal political culture” that accentuates the need for government support today makes recognition of such a constitutional right even less likely now than it was before, notwithstanding this reading of *Obergefell*. Indeed, the Court’s limitations on remedies for constitutional wrongs would present significant difficulties for enforcing a minimum-substance right, even if one were recognized.

Marriage and its unique properties, however, can help reconcile wishful thinking about welfare rights with the modern neoliberal turn. Even if we understand the constitutional right to marry as public and hence as a positive right, entry into marriage functions as a major gateway for private support obligations, explaining why the state incentivizes marriage. As the *Obergefell* majority points out: “just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the

211. See *supra* note 202 and accompanying text (summarizing Yoshino’s position).
212. See, e.g., David Harvey, *A Brief History of Neoliberalism* 2 (2005) (defining neoliberalism as “a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade,” with the state’s role operating “to create and preserve an institutional framework appropriate to such practices”).
215. See *supra* notes 85–92 and accompanying text.
217. See, e.g., Missouri v. Jenkins, 495 U.S. 33, 51 (1990) (calling for a causation-based approach that places “the responsibility for solutions to the problems of segregation upon those who have themselves created the problems”).
218. See *supra* notes 73–74 and accompanying text.
Courtney Joslin, among others, has called attention to the government-granted privileges and subsidies that marriage provides. To the extent a cost-benefit analysis is at work, the state gains (or assumes it gains) more than it loses from its investment in and support of marriage. Although marriage long predates contemporary talk of neoliberalism, neoliberals would have invented marriage had it not already existed! Marriage locates the primary source of support for dependents in the “private sphere,” consistent with neoliberalism’s deference to laissez-faire markets and the minimal state. If anything, our modern era has witnessed—consistent with neoliberalism—the extension of the private obligations once associated only with marriage to other relationships, most notably support duties for nonmarital children. Guaranteeing same-sex couples a right to marry entails yet additional expansion of these private obligations, in line with neoliberal values, even if, to achieve this end, states must now offer marriage-based benefits to a larger segment of the population.

221. Scholars have described neoliberalism as an ideology—in economics, politics, and law—that recalls classic laissez-faire doctrines and that has advanced “over the past few decades” or “post-postwar.” David Singh Grewal & Jedediah Purdy, Introduction: Law and Neoliberalism, 77 Law & Contemp. Probs. 1, 1, 4–5 (2014).
222. See Alstott, supra note 143, at 27; see also Fraser & Gordon, supra note 75, at 332 (“The genealogy of dependency also expresses the modern emphasis on individual personality.”).
223. For the legal developments that replaced discrimination against children born out of marriage, including the absence of paternal support obligations, with a doctrine of “personal responsibility” that imposes such obligations and relentlessly enforces them through both federal and state law, see Appleton, Illegitimacy and Sex, supra note 2, at 360–64. See also Elisa B. v. Superior Court, 117 P.3d 660, 669–70 (Cal. 2005) (recognizing mother’s former partner as the twins’ second mother so that the state may collect reimbursement for child support from her).
224. Before Obergefell, when states were considering domestic partnership laws, empirical studies showed that such reforms would have beneficial effects on state budgets by reducing the number of people eligible for means-tested public assistance. See, e.g., M.V. Lee Badgett et al., Williams Inst., The Impact of the Colorado Domestic Partnership Act on Colorado’s State Budget 4–7 (Oct. 2006), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lee-MacCartney-CO-DP-Benefits-Econ-Report-Oct-2006.pdf [https://perma.cc/BA7S-VRE7]. We can presume that the availability of marriage for same-sex couples would produce similar economic consequences.
225. Suppose a state or the federal government claims that it cannot afford to extend the material benefits of marriage to same-sex couples. In attempting to defend its ban on same-sex marriage, Massachusetts unsuccessfully argued that it had
These considerations counsel against imagining that Obergefell heralds a new dawn of enforceable positive or welfare rights. In fact, Justice Kennedy goes out of his way to describe marriage in exceptional terms, apart from the private support duties it triggers, suggesting that he regards the issue in Obergefell as distinctive. That, in turn, might well lessen the likelihood that Obergefell will function as an important precedent to secure other state benefits as a matter of constitutional law.

2. The Private Liberty Readings
   a. Naturalizing Marriage

Turning next to the first private conception of liberty, we can discern in the majority opinion a depiction of marriage as a “natural,” even inevitable, feature of human existence. Justice Thomas’s dissent articulates this view even more explicitly and forcefully (but for a different result). Given Justice Kennedy’s outcome, however, this reading raises intriguing questions about the precise relationship of the state to marriage. On the one hand, a view of marriage as natural lends support to proposals for “taking marriage private,” that is, proposals that would remove the state from the marriage business while leaving marrying as a purely religious or personal celebration, say, like a bar mitzvah or a first communion. Under such proposals, civil marriage, as we know it, would cease to exist, along with all the rewards and benefits the state attaches to the status of being married. We can find models for this approach in other countries, such as Israel, where marriage is strictly a religious institution open only to a narrow class of individuals who meet specified sectarian an interest, inter alia, in “preserving scarce State and private financial resources.” Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003). I presume that the governmental entity in question could distribute the available pool of benefits fairly among all married couples, even if that resulted in a reduction for those who previously enjoyed marriage before the inclusion of same-sex couples. In other words, if need be, the same pool of funds would be distributed among a larger number of married couples. See also infra notes 343–44 and accompanying text (noting how some marital benefits cost the state nothing).


227. Not only does Justice Thomas double down on a limited interpretation of “liberty” that protects only negative rights, but he also ascribes to the Framers’ understanding a natural right to marriage that fell within the broader definition of liberty . . . [and] would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioner have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one’s spouse—without governmental interference. Id. at 2636 (Thomas, J., dissenting); see also Nichols, supra note 149, at 197–201 (emphasizing pre-political and religious aspects of marriage).

requirements, with various civil remedies available when relationships dissolve, regardless of marriage. In the United States, such proposals have come from those who want the state to wash its hands of a patriarchal institution that denigrates families who do not conform. Such proposals have also come from those resisting constitutional protection for same-sex marriage—for example, an Alabama legislator who would prefer for the state to license no marriages at all than to include same-sex couples.

Certainly, abolishing civil marriage altogether would be a plausible remedy if the constitutional violation found in Obergefell had sounded exclusively or even primarily in inequality. Cross-sex couples would no longer have access to benefits denied to same-sex couples, eliminating the discrimination, unless the animus-driven motive for the abolition itself would run afoul of the Equal Protection Clause. Yet, as we have seen, Obergefell invokes liberty, not equality, as the principal foundation of its holding. Further, the opinion’s encomia to marriage make it hard to imagine that the majority, or at least Justice Kennedy, would countenance the state’s extricating itself from marriage at this point in history. State-operated, state-supported marriage now constitutes the status quo—the current baseline for this “natural” practice. As Pamela Karlan has written, “the government’s unbroken historical practice of providing official recognition and protection to family relationships has hardened into a

229. See, e.g., Zvi Triger, “A Jewish and Democratic State:” Reflections on the Fragility of Israeli Secularism, 41 Pepp. L. Rev. 1091, 1092 (2014) (setting out elements and “roots of the religious monopoly over personal status issues in Israel”); Ayelet Blecher-Prigat, “Divorcing” Marriage from the Law: The Case of Israel (unpublished working draft) (on file with author) (contending that Israel’s unique religious monopoly over marriage makes it an apt setting to explore proposals to abolish legal marriage).

230. See, e.g., Polikoff, supra note 70, at 126 (criticizing marriage as the wrong “dividing line” for the distribution of rights and responsibilities); Patricia A. Cain, Imagine There’s No Marriage, 16 QLR 27, 29 (1996).


liberty interest.” That would seem to be especially true of marriage. Against this background and with Obergefell’s treatment of restrictions on marrying portrayed as a deprivation of liberty, state withdrawal from marriage becomes constitutionally problematic. So, by naturalizing marriage and portraying it as protected activity comparable to sex, reproduction, and childrearing, Obergefell might paradoxically entrench, even require, state involvement—as a matter of liberty.

The majority’s naturalizing rhetoric has additional perverse effects. First, it embeds “civil marriage,” a “public institution,” in our intimate lives, notwithstanding judicial language celebrating personal freedom of choice in such matters. Second, it camouflages the disciplinary purpose and role of marriage. When the state seeks to guide sexual and domestic activities into marriage, it embraces marital norms (and laws) of exclusivity, fidelity, and obligation. Marriage domesticates and tames, a

233. Id. at 705–06. As Karlan explains, Particularly in contemporary society, where a passel of benefits and obligations depends on official recognition of family relationships, it is hard to imagine a government stepping out of the arena altogether and leaving individuals to negotiate their obligations to support children, their rights to employee benefits, and their divisions of property without any default rules set by the state.

234. Karlan continues: “Whether the state was required to create marriage in the first place, marriage has since become a privilege essential to happiness.”

235. See also Yoshino, supra note 40, at 173 (opining that an equality-based ruling would have allowed the state to level down by refusing to grant marriage licenses to all couples—an option foreclosed by a liberty-based ruling).


237. Id. at 2601 (quoting Maynard v. Hill, 125 U.S. 190, 213 (1888)).

238. See Appleton, Forgotten Family Law, supra note 2, at 41–46 (examining how family law rests on conflicting values, autonomy and regulation).

239. See supra notes 73–74 and accompanying text.

240. With respect to exclusivity, despite liberalization of marriage and divorce laws, still a person can have only one spouse at a time and, despite contemporary activism, bigamy prohibitions have escaped successful challenge. See, e.g., Brown v. Buhman, 822 F.3d 1151, 1155 (10th Cir. 2016). With respect to fidelity, as I have pointed out before, the emergence of unilateral no-fault divorce has made clear that this marital value is optional and that a marriage can continue with it or without it depending on personal choice. See Susan Frelich Appleton, Toward a “Culturally Cliterate” Family Law?, 23 BERKELEY J. GEND. L. & JUST. 267, 294–95 (2008) (noting how “in the prevailing no-fault divorce regime, adultery provides neither a necessary nor a sufficient condition for divorce, so marriages marked by adultery may or may not survive”).
truism that prompted some political conservatives eventually to support same-sex marriage.\textsuperscript{241} Whether or not marriage is “punishment,”\textsuperscript{242} its disciplinary purpose and role seem beyond dispute\textsuperscript{243}—a point emphasized in Justice Scalia’s \textit{Obergefell} dissent.\textsuperscript{244} Yet, by presenting marriage as an inherent aspect of human nature, disconnected from the state, \textit{Obergefell} masks such constraints.\textsuperscript{245}

Finally, by conjoining marriage with sex, reproduction, and childrearing (making them “a unified whole”),\textsuperscript{246} this first private-liberty reading of \textit{Obergefell} leaves nonmarital sex, reproduction, and childrearing as marginal practices.\textsuperscript{247} \textit{Obergefell}’s glorification of marriage, its history, and its rewards\textsuperscript{248} reinforces this message,\textsuperscript{249} for example, providing a new rationale for lower courts to reject financial and parentage claims after a nonmarital relationship ends.\textsuperscript{250} Indeed, \textit{Obergefell}’s eleva-
tion of marriage might itself reflect a “channeling” move, that is, an effort to encourage marriage and discourage other family forms and intimate associations, thus perhaps making certain negative rights less attractive to exercise and effectively working the very humiliation of children (and adults) living outside marriage that the majority condemns in restrictive marriage laws. As I have observed elsewhere, the opinion reads like “a public-service announcement designed to persuade the uncommitted to join the marital ranks,” possibly in an effort to counter the growing percentage of nonmarital families—a trend often called the “retreat from marriage.”

Even with its paradoxical and perverse implications, I find this reading well supported by the majority opinion’s language and its use of precedent. It assumes a special role for marriage but therefore leaves open Obergefell’s impact on other controversies, including those about parentage and nonmarital families that we can expect to follow in the case’s wake.

b. Equalizing Liberty or Liberating Equality

The second private-liberty reading, synthesizing liberty and equality, holds promise because it can help dismantle biased stereotypes about LGBTQ persons. In addition, like the public liberty reading, it

251. See supra note 73 and accompanying text.
256. See supra note 203.
257. Cary Franklin makes this point. Franklin, supra note 170, at 885–86.
can provide a foothold for positive rights, particularly a right to minimum welfare. Welfare rights acquire a more substantial constitutional basis when inequality becomes part of the analysis. As we have seen, an uneven distribution of benefits can present unconstitutional discrimination even if the underlying benefit is not itself guaranteed.\textsuperscript{258} Indeed, given the difficulty that some would have in classifying as a deprivation of liberty a state’s failure to take action or provide a particular benefit, it should come as no surprise that the key cases once interpreted to suggest the possibility of a minimum welfare right were decided on equal protection grounds.\textsuperscript{259} Today, with the clash between neoliberal values and the idea of a welfare right,\textsuperscript{260} incorporating equal protection into the analysis could prove even more significant. The remedy for the constitutional violation might well entail the extension of benefits to a larger population, as in \textit{Obergefell}.\textsuperscript{261}

Nonetheless, \textit{Obergefell}’s methodology, so read, could present risks for equal protection doctrine. Will the abandonment of tiers of scrutiny\textsuperscript{262} in the LGBTQ cases (even if valuable in that context)\textsuperscript{263} dilute the review of other sorts of discriminatory classifications? Does subsuming equal protection into liberty make the former so dependent on the latter that it has no force of its own? Recall how Justice Kennedy’s first gay rights opinion, in \textit{Romer v. Evans}, rested on the Equal Protection Clause,\textsuperscript{264} but it did not identify an applicable standard of review. Rather, it condemned unequal treatment that “raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons

\textsuperscript{258.} See text accompanying \textit{supra} notes 174–75.

\textsuperscript{259.} As Frank Michelman theorized in his classic 1969 article, citing a series of cases decided on equal protection grounds:

Let me then suggest that the judicial “equality” explosion of recent times has largely been ignited by reawakened sensitivity, not to equality, but to a quite different sort of value or claim which might better be called “minimum welfare.” In the recent judicial handiwork which has been hailed (and reviled) as an “egalitarian revolution,” a particularly striking and propitious note has been sounded through those acts whereby the Court has directly shielded poor persons from the most elemental consequence of poverty: lack of funds to exchange for needed goods, services, or privileges of access.

Michelman, \textit{supra} note 84, at 9 (footnotes omitted); \textit{see also id.} at 13. In later work, however, Michelman considered a broader range of cases. \textit{See Michelman, \textit{supra} note 85, at 663 & n.21.}

\textsuperscript{260.} \textit{See supra} notes 212–15 and accompanying text.

\textsuperscript{261.} \textit{See supra} notes 174–75 and accompanying text.

\textsuperscript{262.} Justice Thomas claims that, even when it uses distinct tiers of scrutiny, the Court manipulates them to achieve a preferred result. \textit{Whole Woman’s Health v. Hellerstedt}, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting). Thus, he writes, “[t]hese labels now mean little.” \textit{Id.} at 2328.

\textsuperscript{263.} \textit{See Franklin, \textit{supra} note 170, at 857; cf. Hunter, \textit{supra} note 245, at 113; Nico-\textit{las, \textit{supra} note 30, at 138.}

\textsuperscript{264.} \textit{See Romer v. Evans, 517 U.S. 620, 635 (1996).}
a conclusion applied in later gay rights cases as well. But not every inequality that we might think should be ruled unconstitutional will be recognized as a deprivation of liberty or a reflection of animosity against the class affected—even by Justice Kennedy.

Indeed, Justice Kennedy’s own opinions reflect a fluidity that complicates assessments of his approach to discrimination outside the gay rights context. For example, although his recent opinions on affirmative action and housing suggest a still evolving position, we can discern in Justice Kennedy’s earlier opinions a narrow understanding of both racial subordination and the continuing effects of past race-based discrimination—even if the views of some of his colleagues are narrower still. In addition, Justice Kennedy, who has at best a mixed record in sex discrimination cases, embraced paternalism and reinforced gender-based inequalities in his majority opinion in Gonzales v. Carhart, which upheld the federal ban on “partial-birth abortion,” in large part based on the assumption that women later regret their pregnancy terminations. True, this opinion rested on liberty, not equality, but it has obvious ramifications

265. Id. at 634.


267. Writing for the majority in an equal protection challenge to an affirmative action plan at the University of Texas, Justice Kennedy did not take the opportunity to invalidate all consideration of race in efforts to achieve diversity in higher education, despite signals in past cases that he was heading in that direction. Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2215 (2016). But see infra note 269 (citing past cases).

268. Writing for the majority, Justice Kennedy concluded that challenges to housing decisions with a disparate impact are cognizable under the Federal Housing Act. Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project Inc., 135 S. Ct. 2507, 2513, 2525 (2015). As the opinion explains, “antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.” Id. at 2518.


271. Gonzales v. Carhart, 550 U.S. 124, 132–33 (2007). For example, one basis cited for upholding the statute, which included no health exception, is anxiety about abortion regret: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.” Id. at 159. Although abortion jurisprudence has rested on liberty, not equal protection, Justice Ginsburg’s dissent emphasizes the importance of reproductive self-determination for gender equality and the many ways the statute and the majority opinion demean women, endanger them, and perpetuate their unequal treatment. Id. at 169–91 (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, JJ.).
for the legal treatment of women and their position in society, as Justice Ginsburg’s dissent pointed out.\textsuperscript{272} More recently, however, Justice Kennedy joined Justice Breyer’s majority opinion striking down burdensome and unnecessary abortion restrictions enacted under the guise of protecting women’s health.\textsuperscript{273} In fact, as the senior member of the majority in this new case, \textit{Whole Woman’s Health v. Hellerstedt}, Justice Kennedy must have assigned the opinion to Justice Breyer, with whom he has stood at odds in earlier abortion cases.\textsuperscript{274}

Taken together, Justice Kennedy’s opinions about racial and gender inequality defy easy synthesis and forecasts. These opinions leave open the question whether equal protection will survive its incorporation into liberty in \textit{Obergefell} to win other battles for social justice.\textsuperscript{275} Perhaps we can see \textit{Obergefell}’s less than fully developed concept of constitutional equality as a first step toward a more robust understanding that Justice Kennedy is gradually embracing—but we cannot know for sure.

In addition to general concerns about equality doctrine, however, “marriage equality” as a more particular focus should give us pause, even while we celebrate \textit{Obergefell} as a win for social justice. As Michael Warner emphasizes, marriage “is selective legitimacy.”\textsuperscript{276} Affording same-sex couples access to marriage still leaves the institution inherently exclusive.\textsuperscript{277} Further, marriage equality does little to address

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  \item \textsuperscript{272} Id. at 170–72, 183–86; see also Godsoe, supra note 247, at 151–55 (noting similarities in Justice Kennedy’s opinions in \textit{Obergefell} and \textit{Gonzales}).
  \item \textsuperscript{273} Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2292 (2016).
  \item \textsuperscript{274} In an earlier case challenging a statute similar to that in \textit{Gonzales}, Justice Breyer wrote the majority opinion striking down the statute, and Justice Kennedy dissented. Stenberg v. Carhart, 530 U.S. 914, 920–22, 956 (2000). With personnel changes on the Court, Justice Kennedy was able to include his view that such statutes are constitutional seven years later in \textit{Gonzales}, 550 U.S. 124, and Justice Breyer joined Justice Ginsburg’s dissent, id. at 169 (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, JJ.). That background makes especially interesting not only Justice Kennedy’s vote in \textit{Whole Woman’s Health}, but also the fact that he chose Justice Breyer to write the opinion. \textit{Whole Woman’s Health}, 136 S. Ct. at 2292; cf. Linda Greenhouse, \textit{The Not-So-Liberal Roberts Court}, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/07/opinion/the-not-so-liberal-roberts-court.html [https://perma.cc/J99D-9HME] (analyzing Justice Kennedy’s position in \textit{Whole Woman’s Health}).
  \item \textsuperscript{275} For commentary on Justice Kennedy’s jurisprudence of racial equality, see Heather K. Gerken, \textit{Justice Kennedy and the Domains of Equal Protection}, 121 HARV. L. REV. 104 (2007). On his jurisprudence of gender equality, see Cohen, supra note 270, at 694. In the meantime, Yoshino sees in \textit{Obergefell} a principle of “antisubordination liberty,” which he theorizes should help members of all subordinated groups. \textit{See} Yoshino, supra note 40, at 174–75.
  \item \textsuperscript{276} Michael Warner, \textit{Beyond Gay Marriage}, in \textit{Left Legalism/Left Critique} 259, 260 (Wendy Brown & Janet Halley eds., 2002); see also Seidman, supra note 13, at 137 (“The valorization of marriage and attack on the unmarried is also deeply reactionary. It comes at a moment when, as just noted, a huge percentage of marriages end in divorce—often acrimonious and wrenching—and when fewer and fewer Americans are choosing marriage in the first place.”).
  \item \textsuperscript{277} As Warner explains, “Marriage sanctifies some couples at the expense of
widening inequalities among families.\textsuperscript{278} To the extent such inequalities are economic, they stand as an unsurprising effect of keeping dependency private.\textsuperscript{279} To the extent the inequalities result from the marital/nonmarital “dividing line,” as Nancy Polikoff calls it,\textsuperscript{280} they highlight family law’s failure to pay attention to those outside marriage’s cover.\textsuperscript{281}

Highlighting such problems does not rule out the possibility of a sunnier outlook, however. Obergefell’s express concerns about the dignitary harm of excluding same-sex couples from a vaunted institution that has been open to others\textsuperscript{282} could suggest important work for the opinion’s equality thread, despite the more prominent role assigned to liberty.\textsuperscript{283} So understood, Obergefell’s impact might transcend marriage, paving the way for more equitable treatment of other nontraditional families\textsuperscript{284} and compelling an equal-dignity approach in the myriad disputes that can ensnare those who become parents as a same-sex couple.\textsuperscript{285} The critical question is whether marriage is and will be the sine qua non of Obergefell.

3. \textit{The Feminist—or Critical—or “Queer” Reading}

What I have called the feminist, critical, or “queer” reading shows promise in its defiance of the public/private and positive/negative binaries—and its methodological challenge to other categories as well. Using “postmodern” in a more approving way than Justice Alito did,\textsuperscript{286} we can say that this reading helps expose the work performed by legal language and the categories it creates.\textsuperscript{287} In turn, this reading takes an important step consistent with the insight that the state is inextricably part of family

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\textsuperscript{278.} See supra notes 214, 255 (citing authorities).
\textsuperscript{279.} See, e.g., Anne L. Alstott, \textit{Is the Family at Odds with Equality? The Legal Implications of Equality for Children}, 82 S. Cal. L. Rev. 1, 4 (2008); see also James S. Fishkin, \textit{Justice, Equal Opportunity, and the Family} 4 (1983) (“Once the role of the family is taken into account, the apparently moderate aspiration of equal opportunity produces conflicts with the private sphere of liberty—with autonomous family relations—that are nothing short of intractable.”).
\textsuperscript{280.} See Polikoff, supra note 70, at 126.
\textsuperscript{282.} E.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).
\textsuperscript{283.} See supra notes 26–30 and accompanying text.
\textsuperscript{284.} Joslin, supra note 253, at 7; Tribe, supra note 253, at 30–32.
\textsuperscript{285.} See supra note 203 (citing authorities); see also Jessica Feinberg, \textit{Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?}, 81 Mo. L. Rev. 331, 338–39 (2016); Douglas NeJaime, \textit{The Nature of Parenthood} (unpublished manuscript) (on file with author).
\textsuperscript{286.} See supra notes 34–35 and accompanying text.
\textsuperscript{287.} See, e.g., Frug, supra note 191, at 1046.
\end{flushleft}
and sexual life,\textsuperscript{288} constructing our human experience and very identity,\textsuperscript{289} regardless of the convenience of the “private sphere” label. Yet, \textit{Obergefell}’s naturalization of marriage, discussed above,\textsuperscript{290} could portend just the reverse, given how it disguises the state’s role in this “public institution.” Moreover, the categories created by marriage itself (marital and nonmarital) retain their prominence, perhaps newly magnified, after \textit{Obergefell}.

What are the possibilities for \textit{Obergefell}’s unconventional approach, as interpreted in this reading, to serve as a durable reformist tool? Attacking Justice Kennedy’s opinions for sloppiness and lack of rigor had become a cottage industry even before \textit{Obergefell}.	extsuperscript{291} Accordingly, one could understand the \textit{Obergefell} dissents’ censure of the conflation of positive and negative rights as a judicial version of this trope about sloppiness and lack of rigor. At the same time, these particular critiques might simply signal resistance to or discomfort with Justice Kennedy’s liberation from rigid categorical analysis (which, of course, the Fourteenth Amendment’s own words do not require). Moreover, these critiques of Justice Kennedy’s jurisprudence intimate that he writes alone, when—in fact—\textit{Obergefell} and his other category-defying gay rights opinions all commanded a majority.\textsuperscript{292} Finally, we should note the possibility that Justice Kennedy deliberately chose obfuscation in \textit{Obergefell} as a means of securing a majority without committing to what will happen next.

A darker view of such uncertainties emerges from the critique by Louis Michael Seidman, who finds the majority opinion riddled with

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\textsuperscript{288} See, e.g., \textit{Weeks}, supra note 160, at 99 (“[Q]uestions of sexuality are inevitably, inescapably, political questions.”).

\textsuperscript{289} See Rosenbury, supra note 191.

\textsuperscript{290} See supra notes 144–64 and accompanying text.


\textsuperscript{292} E.g., \textit{Lawrence} v. \textit{Texas}, 539 U.S. 558, 561 (2003). Several commentators have written favorably about Justice Kennedy’s approach in these cases. \textit{See generally} Abrams & Garrett, supra note 173 (endorasing Justice Kennedy’s approach in \textit{Obergefell} and offering a framework for future cases); Franklin, supra note 170 (endorasing the combined use of liberty and equal protection); Pamela S. Karlan, \textit{Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment}, 33 McGEORGE L. REV. 473 (2002) (examining how an approach that interweaves liberty and equality can produce better results); Yoshino, supra note 40 (analyzing how Justice Kennedy’s opinion in \textit{Obergefell} might have shifted substantive due process jurisprudence).
hypocrisy, deception, and manipulation, despite his support for the outcome. He finds particular fault with “lack of empathy and understanding” for those who are not married, whether by choice or necessity, and condemns the Court’s treatment of marriage as “deeply reactionary.” He asks the reader to take the position of a like-minded Justice:

Constitutionalism helped produce a victory in this case, but it did so through mechanisms we should be ashamed of. Should we embrace constitutionalism and use its tools so as to preserve this victory and, perhaps, win others as well? Put differently, if you or I were a Justice on the Supreme Court, should we sign Justice Kennedy’s opinion?

What if our vote was necessary to secure a majority?

Ultimately, “the real and daily human suffering” inflicted by gay marriage bans and the likelihood that our flawed constitutionalism will persist anyhow tip the balance for Seidman, who decides “yes, I would be tempted to join Justice Kennedy’s dreadful opinion.”

With the death of one of the most caustic detractors of Justice Kennedy’s jurisprudence, Justice Scalia, and the Court’s new composition still up for grabs even in the immediate aftermath of the 2016 election, we do not know who will actually face questions like Seidman’s and what each Justice’s inclinations will be. Open issues abound: How will the Court approach rights and interests other than marriage? How will it analyze classifications based on criteria other than sexual orientation, including race, gender, and class? What might be the consequences—both intended and unintended—of Obergefell’s reasoning and rhetoric? A postmodern lens foregrounds the contingencies and thus accentuates the uncertainties. Yet, while Justice Alito worries that the result will be too much constitutional protection, my take-away from Obergefell is the concern that there could be too little, based on Obergefell’s expressed reverence for marriage, Justice Kennedy’s past positions on race and gender inequalities, and deep divisions on the Court.

B. Synergistic Liberties: Constitutional Law and Family Law

Although the multiple readings of “liberty” yield precious little about what each will mean and how each will apply going forward, they do showcase marriage as a pressure point that presents paradoxes, raises

293. Seidman, supra note 13, at 145–46.
294. Id. at 137.
295. Id.
296. Id. at 143.
297. Id. at 145.
298. Seidman dismisses as fallacious the assumptions that “the Constitution provides a just basis for resolving disputes among people who would otherwise disagree” and “that we can discern the meaning of the Constitution without presupposing an extra-constitutional resolution of that disagreement.” Id. at 130.
299. Seidman, supra note 13, at 145.
300. See supra note 35 and accompanying text.
contradictions, and confounds traditional distinctions. Accordingly, this Part takes a different tack, looking beyond Obergefell’s text to contextualize this case in a wider exploration of the intersection of family law and constitutional law. This exploration not only addresses the expected impact of constitutional law on family law but also considers the less expected impact of family law on constitutional law. For the latter, patterns emerging from the constitutional case law along with family law policies offer a new way to theorize Obergefell—in turn suggesting possibilities for future directions, with marriage serving as a guide.

1. Constitutional Law’s Shaping Function

Just as there is a conventional wisdom about liberty as a negative right, there is a standard story about the relationship between constitutional law and family law. According to this standard story, constitutional law establishes boundaries or outer limits for permissible family laws, which are typically, but of course not always, state-made laws. For example, when the Supreme Court holds unconstitutional state restrictions on use of and access to birth control, the availability of abortion, or entry into marriage, states must follow, conforming their rules to the announced limits. Constitutional cases striking down gender-based and “illegitimacy” discrimination perform a similar function, disallowing certain family laws that once marked the field. Within the constitutional confines, however, states largely may govern families as they see fit. Because this understanding reflects the basic principle of constitutional supremacy, it should come as no surprise notwithstanding the oft-invoked maxim that family law belongs to the states. The process works the same way in those instances in which Congress makes federal family law, as it did when enacting the Defense of Marriage Act, which the Court invalidated in United States v. Windsor.

Certainly, the process might unfold in a contentious and disorderly way, but the basic generalization still holds true. For example, consider Roe v. Wade and its aftermath. Once Roe struck down all abortion laws exceeding the limits of the trimester timetable that emerged from

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304. For analysis of such equal protection cases and their impact on family law, see supra note 2 (citing authorities).
305. U.S. Const. art. VI, § 2.
306. See supra note 12 and accompanying text.
the Court’s application of strict judicial scrutiny, some states followed with new laws that fit the constitutional framework while others tried to weaken the announced limits or find untested loopholes. Some jurisdictions even enacted statutes directly challenging the constitutional limits in an effort to spur a Court with changed personnel to reconsider protection for abortion altogether. And, in fact, a Court majority subsequently revised the standard governing abortion laws when it moved from Roe’s strict scrutiny to the less demanding “undue burden” formulation, articulated by a plurality in Planned Parenthood of Southeastern Pennsylvania v. Casey and later applied by a majority in Gonzales v. Carhart to uphold what happened to be a federal ban on a particular abortion procedure. The Court’s latest encounter with abortion law only reinforces the obvious point: Whole Woman’s Health v. Hellerstedt is important precisely because it clarifies the undue burden standard, limiting states’ ability to impede access to abortion by means of onerous and medically unnecessary regulations of providers and clinics.

Similarly, consider the Court’s shift over time on gay sex and relationships. Per Bowers v. Hardwick, decided in 1986, states could criminalize same-sex sodomy without violating the Constitution. States lost that authority in 2003, when the Court overturned Bowers in Lawrence v. Texas, determining that such criminal prohibitions infringe the liberty protected by the Fourteenth Amendment and thus disabling states from making or enforcing such laws. In Windsor, the Court held unconstitutional Congress’s exclusion of same-sex couples, who were married under state law, from all federal marital benefits. Of course, Obergefell

309. Roe’s trimester timetable reflected the Court’s application of strict scrutiny, requiring a compelling state interest and narrow tailoring. See id. at 155–56, 163–64.
311. The Missouri statute challenged in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 56, 58 (1976), provides an early illustration of such efforts, with its requirements of, inter alia, written informed consent, spousal consent, and parental consent.
317 Lawrence, 539 U.S. at 578.
318. United States v. Windsor, 133 S. Ct. 2675, 2693–96 (2013). Because it was ruling on a federal statute, the Court applied the Due Process Clause of the Fifth
operates in a parallel fashion, disallowing states from rejecting same-sex couples from their official marriage regime.\textsuperscript{319} Across these cases, the Constitution (as interpreted by the Court) defines the parameters of permissible family laws.

This generalization leaves ample room for state family laws to influence constitutional interpretation. States may permit abortions beyond constitutional protection or recognize relationships beyond those constitutionally required, in time prompting the Court to revise earlier decisions. No doubt, the “‘laboratory’ of the States”\textsuperscript{320} allowed important state-level experimentation with marriage equality before the Supreme Court was ready to depart from its cursory conclusion in 1972 to the effect that the denial of marriage licenses to same-sex couples presented no constitutional issue.\textsuperscript{321} Despite approaches that might percolate up from the states into the Supreme Court’s constitutional analysis,\textsuperscript{322} the standard story still portrays the Court’s application of the Constitution as the determinative exercise of authority, however.

Writing about what she describes as the underexplored relationship between constitutional law and state family law,\textsuperscript{323} Anne Alstott succinctly captures this standard story when she observes that the state family law “pursues a limited mission shaped by the contours of constitutional law.”\textsuperscript{324} According to Alstott, at the same time that negative liberty performs this limiting or shaping function with respect to state family law, “[c]onstitutional law forecloses any legal claim to positive rights—to the resources needed to marry, to procreate, and to grow and develop.”\textsuperscript{325} As a result, states (and Congress) are free, as they see fit, to offer affirmative support or not for familial decisions and activities.

This summary gets it right, as far as it goes. Indeed, precisely because I share Alstott’s conceptualization, I have long begun my family law course with a study of constitutional outer limits, establishing the boundaries within which family law may operate.\textsuperscript{326} Only once we have

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  \item \textsuperscript{319} Obergfell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).
  \item \textsuperscript{320} Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 292 (1990) (O’Connor, J., concurring).
  \item \textsuperscript{321} Baker v. Nelson, 409 U.S. 810 (1972) (dismissing appeal “for want of a substantial federal question”), overruled by Obergfell, 135 S. Ct. at 2584. See generally Boucai, supra note 17 (presenting history of Baker and other early cases).
  \item \textsuperscript{323} See Alstott, supra note 143, at 41–42.
  \item \textsuperscript{324} Id. at 25–26 (emphasis added).
  \item \textsuperscript{325} Id. at 36.
  \item \textsuperscript{326} All six editions of the family law casebook that I co-author begin with a chapter on the constitutional parameters of family law. See, e.g., D. Kelly Weisberg & Susan Freligh Appleton, Modern Family Law: Cases and Materials 1–114 (1998);
recognized these outer limits can the class begin to explore the choices that states might make in regulating family life.

Yet, the tension in *Obergefell* about negative versus positive liberty and private versus public matters has also exposed how this standard story remains incomplete. In emphasizing how constitutional law shapes family law, this standard story fails to acknowledge how family law shapes constitutional law.

2. Family Law’s Influence on Constitutional Doctrine

   a. Family Law’s Contested Core: Maintaining Dependency as a Private Responsibility

   As scholars have noted when writing about particular family law topics and as this Article has pointed out, a goal of keeping dependency private carries much explanatory force even while evoking critical responses. For example, Alstott herself sees the privatization of dependency as a reflection of contemporary neoliberalism, while Laura Rosenbury describes it as the premier value in a hierarchy of general legal values, including equality, dignity, and federalism. Yet, I would pinpoint a more specific source for the privatization of dependency. I would identify this notion as the essence of family law—a goal that animates the field and runs through its different elements. This is the position taken by Martha Fineman dating back to her early critiques of the usual understanding and performance of family law.

   Many facets of family law exemplify this principle. Today’s aggressive child support policies and enforcement tools provide especially telling illustrations. The larger picture, however, also includes, *inter alia,*

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327. See supra notes 73–75 and accompanying text.

328. See Alstott, *supra* note 143, at 36.


330. See Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* 8–9, 227–28 (1995); see also Fineman, *supra* note 56, at 228 (“It is the family, not the state or the market, that assumes responsibility for both the inevitable dependent—the child or other biologically or developmentally dependent person—and the derivative dependent—the caretaker. The institution of the family operates structurally and ideologically to free markets from considering or accommodating dependency.”).

331. See, e.g., Turner v. Rogers, 564 U.S. 431, 443 (2011) (acknowledging “a highly complex system designed to assure a noncustodial parent’s regular payment of funds typically necessary for the support of his children”); State v. Oakley, 629 N.W.2d 200, 214 (Wis. 2001) (upholding, as a condition of probation, a requirement that the defendant can have no more children unless he shows that he can support all his children).
the public benefits that incentivize (or “channel”) pairs to marry, the legal recognition accorded to the family unit, the shield of privacy or autonomy that encapsulates it, the refusal to accord economic value to domestic labor, and the exclusion from the fold of those who provide caregiving services for compensation.

Among the various family law measures and constructs, marriage emerges as an ideal vehicle for operationalizing the principle that the needs of dependents must be met through private sources of support. In binding men to their wives and their wives’ children, traditional marriage creates legal obligations designed to address what Fineman calls inevitable dependency and derivative dependency. As the court of appeals explained in the case that became Obergefell, “[G]overnments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse.”


332. See supra notes 73–75 and accompanying text.

333. We can see the idea of the family unit in both the doctrine of coverture and the treatment of children, in addition to wives, as the property of the husband-father. See, e.g., Stephanie Coontz, Marriage, A History: How Love Conquered Marriage 186 (2006); Mary Ann Mason, From Father’s Property to Children’s Rights: The History of Child Custody in America, at xii (1994). Ongoing debates about “what is a family?” reveal the contemporary relevance of recognition as a family unit. See, e.g., Martha Minow, Redefining Families: Who’s In and Who’s Out?, 62 U. Colo. L. Rev. 269, 283 (1991).

334. See, e.g., Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing “the private realm of family life which the state cannot enter”); Parham v. J.R., 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”).

335. See, e.g., Katharine Silbaugh, Turning Labor into Love: Housework and the Law, 91 Nw. U. L. Rev. 1, 3–6 (1996). This principle certainly holds true while the family unit remains intact. Upon dissolution of marriage, however, courts recognize at least some of the value of domestic services. See Grossman & Friedman, supra note 240, at 196–200.


338. For definitions of these terms, see Fineman, supra note 56, at 34–37.

339. DeBoer v. Snyder, 772 F.3d 388, 404 (6th Cir. 2014), rev’d sub nom. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015). Of course, traditional marriage was inseparable from gender. See Nancy F. Cott, Public Vows: A History of Marriage and the Nation 3 (2000) (describing marriage as “the vehicle through which the apparatus of state can shape the gender order”); see also id. (“The whole system of attribution and meaning that we call gender relies on and to a great extent derives from the structuring provided by marriage.”).
marriage for same-sex couples can perform similar functions despite the absence of “accidental procreation” and diminished gender norms. Indeed, the couples depicted in Obergefell exemplify the private caregiving and support expected in marriage.

Against this background, the challenge that Obergefell poses for the conventional wisdom of negative liberty takes on new meaning. True, limiting liberty to exclusively negative rights advances the core policy of privatizing dependency, relieving the state from the cost of any constitutional “welfare right”—whether in the form of health care, subsistence, or protection from violence. Nonetheless, making an exception to this general rule for the “public institution” of marriage goes even further in promoting such objectives by firmly locating legal obligations for care and support outside the government.

Extending many of marriage’s material benefits to same-sex couples imposes no direct cost on the government, for example, the spousal share of an intestate’s estate, which would otherwise go to listed relatives, or designation as a surviving spouse on a death certificate, as sought by James Obergefell. By contrast, others come at a cost, including the federal estate tax exemption for surviving spouses won by Edie Windsor. Collectively, such material marital benefits, offered at the government’s option, played a key role in the developing legal recognition of the unfairness of barring same-sex couples from marrying. The channeling theory conceptualizes them all as incentives to marry, while the goal of keeping dependency private helps to explain why government would elect to provide such rewards.

b. An Expanded Shaping Story: All in the Family

Viewed through this lens, Obergefell offers a new story about the relationship between constitutional law and family law. It complements

341. See supra notes 24–25 and accompanying text.
342. Alstott refers to state family law as “subconstitutional” law, asserts that constitutional law shapes it, and describes its content as follows: “State family law nominally prescribes the duties associated with marriage, divorce, and parenthood. But a closer look reveals that the law privileges private ordering and deploys state power only to resolve private disputes.” Alstott, supra note 143, at 32–33; see also Anne L. Alstott, Private Tragedies? Family Law as Social Insurance, 4 HARV. L. & POL’Y REV. 3, 4 (2010) (“[F]amily law rules that establish financial relationships and liability between individuals constitute a form of social insurance. . . .”)
344. Obergefell, 135 S. Ct. at 2594–95.
346. See supra note 70 (citing authorities).
347. See supra notes 73–75 and accompanying text.
the standard shaping story with its mirror image. Under this mirror-image story, family law’s aim to keep dependency private shapes constitutional law—producing a regime that mostly consists of what the conventional wisdom would call negative liberty but that also includes marriage, despite characteristics that lead the *Obergefell* dissenters and others (including possibly the majority) to see it as a positive right. Earlier “right to marry” cases strengthen this argument, and so does the “right to divorce” recognized in *Boddie v. Connecticut*, because the financial responsibilities assigned by the state upon dissolution are even more readily enforceable than those arising within an intact union.

The development of the constitutional doctrine is consistent with this new account. As I have noted, at one time case outcomes indicated movement toward recognition of a right to minimum welfare even when affirmative government support would be necessary to realize this right. Cases about abortion funding and intimate violence brought such movement to a full stop. The welfare-rights thesis thus gave way to a modern conventional wisdom limiting constitutionally protected liberty to private, negative rights, notwithstanding marriage cases which, like *Obergefell*, defy this generalization. But this very defiance helps reveal new patterns in case outcomes.

Abortion funding and intimate violence share a common feature. Both belong in the domain of family law. As a result, the judicial repudiations of government responsibilities in both contexts embody—and thus constitutionalize—family law’s core policy of privatizing dependency. The abortion-funding cases make reproductive choice a private matter of “personal responsibility,” while also validating the expenditure of go-

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349. The classic case demonstrating that marital duties cannot be enforced while the union remains intact but only upon separation or divorce is *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953).

350. See supra note 114 and accompanying text.

351. See supra notes 59–61 and accompanying text.

352. See supra note 97 and accompanying text.

353. This is a term used in federal statutes pertaining to child support and comprehensive sex education. For example, the 1996 welfare reform measures, which emphasized child support, were enacted in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S. Code). One type of sex education qualifying for federal funding is called “personal responsibility education.” 42 U.S.C. § 713 (2012). The term reflects a broader ideology, however, communicating that sex and its consequences create private obligations. I have argued that this ideology accounts for some of the resistance against the mandate under the Affordable Care Act requiring employers to cover, through their health insurance plans, their employees’ prescription contraceptives without cost to the latter. See Appleton, *Forgotten Family Law*,...
ernment resources to influence intimate choices—here childbirth instead of abortion. 354

*DeShaney* and other cases that reject any state obligation to protect against intra-family deprivations of life and liberty also maintain dependency as a private problem. As Linda Greenhouse wrote in a poignant column marking Joshua DeShaney’s death in 2015, “Chief Justice Rehnquist couldn’t get past the fact that the actual injuries were inflicted not by government agents but by a private person.” 355 I would add that the actor was not just any “private person,” but a private person in the private family (a parent). The Court saw the custodial relationship exercised by Joshua’s father as a “natural” and private situation that the state did not create and thus had no duty to prevent or remedy.

Drawing on these precedents, we might conclude that, upon confronting issues clearly situated in family law, the Court definitively resolved the previously open question—based on conflicting signals extracted from precedents 356—whether the Constitution protects a right to minimum welfare. The Court rejected the welfare-rights thesis. 357 Perhaps the understanding of family as a site of privatized dependency proved so powerful that it stifled alternative conceptualizations, or perhaps the Court simply refused to challenge a fundamental tenet of family law. In turn, the rejection of the welfare-rights thesis cemented a more general conventional wisdom of the “negative Constitution.” 358

A more extensive review of the case law fleshes out this story. Although I have emphasized precedents about abortion funding and family violence because they offer the most explicit rejections of positive constitutional rights and because their place in family law seems obvious, other decisions supporting the conventional wisdom also turn out to concern family matters. Put differently, if we search for discernable patterns based on situational factors (rather than legal doctrine), as legal realists did 359 we can see that the most pertinent constitutional cases limiting liberty to negative rights are family law cases, too, even if they might belong in other fields as well.

First, consider *Dandridge v. Williams*, decided in 1970. 360 The Court rejected an equal protection challenge to a Maryland regulation that capped welfare benefits at $250 or $240 per month, regardless of family size, thus affording each member of a large needy family less assistance

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356. See *supra* notes 84–89 and accompanying text.
358. See *Bandes*, *supra* note 55, at 2272–73.
359. See *Leiter*, *supra* note 97, at 281.
than that received by members of smaller needy families. The State successfully argued the regulation encouraged employment outside the home. The case easily fits within family law because it raises questions of family size and what we now call “work-family conflicts,” which are closely related to the reproductive and childrearing choices implicated in iconic family liberty cases. Consistent with keeping dependency private, the Court leaves large families on their own to find a way to support adequately all their members.

Second, consider *James v. Valtierra*, decided in 1971, in which the Court rejected an equal protection challenge to a California law subjecting the development of low-rent housing projects to the will of the voters. Justice Marshall, joined by two other dissenters, highlighted the law’s discrimination against the poor, given that the referendum requirement did not apply to “[p]ublicly assisted housing developments designed to accommodate the aged, veterans, state employees, persons of moderate income, or any class of citizens other than the poor.” Housing and shelter are typical concerns of family law, as we can see in the field’s predecessor, the “law of domestic relations,” in family law’s continuing consideration of homemaking and domestic services, and even in its treatment of the “family home” upon dissolution of marriage.

Third, we have *San Antonio Independent School District v. Rodriguez*, decided in 1973. The Court declined to rule that Texas’s school financing system, which rests on property taxes in each district, violates equal protection despite the lesser educational opportunities it provides to children living in poor districts compared to their counterparts in more

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361. *Id.* at 486–87.
364. See *supra* notes 4–5 and accompanying text.
367. *Id.* at 144 (Marshall, J., dissenting).
370. E.g., CAL. FAM. CODE § 3802 (West 2004).
affluent districts.\textsuperscript{372} Without deciding whether an absolute denial of education would violate the Constitution,\textsuperscript{373} the Court found the Texas system rational, given the minimally adequate education afforded to each child and the merits of local control.\textsuperscript{374}

However tempted we might feel to consider public education a quintessentially state function, it maintains strong links to family law. Like families, schools help develop the next generation of citizens.\textsuperscript{375} Several cases about the “negative right” of parental autonomy focus on schooling choices and regularly appear in family law casebooks.\textsuperscript{376} More significantly, public schooling represents the default position for parents who do not exercise the option of private education or home schooling, which every state permits.\textsuperscript{377} As such, despite compulsory schooling laws, public education might be seen as a delegation of responsibilities that parents, at least in theory, could exercise themselves. For all these reasons, \textit{Rodriguez} lies at least within the “penumbras”\textsuperscript{378} of family law even if not at its center. And, thus, by leaving families in poor districts without constitutional recourse in their quest for equal educational opportunities, the case provides additional evidence that the Court proved particularly resistant to the welfare-rights thesis when confronting family matters.\textsuperscript{379}

\textit{Lyng v. Castillo}, decided in 1986, is a fourth case that fits the pattern.\textsuperscript{380} The Court upheld, against constitutional challenge, changes to the food stamp program that treated parents, children, and siblings living together as a single household and thus disadvantaged them in the receipt of benefits, in comparison to groups of unrelated persons and more distant relatives.\textsuperscript{381} Espousing a notion of negative liberty in its equal protection analysis, the majority saw no interference with family autonomy: “The ‘household’ definition does not order or prevent any group of persons from dining together.”\textsuperscript{382} Thus, applying the rational-basis test, the majority turned to “natural” family behavior: “Congress could reasonably

\begin{itemize}
\item \textsuperscript{372} \textit{Id.} at 23–25.
\item \textsuperscript{373} \textit{See id.} at 36–37.
\item \textsuperscript{374} \textit{See id.} at 24–25.
\item \textsuperscript{375} E.g., Anne C. Dailey, \textit{Developing Citizens}, 91 \textit{Iowa L. Rev.} 431, 452 (2006).
\item \textsuperscript{378} \textit{See Griswold v. Connecticut}, 381 U.S. 479, 484 (1965).
\item \textsuperscript{379} Yoshino invokes \textit{Rodriguez} as an example of the limitation of liberty to negative rights, but he does not mention any connection to family law. Yoshino, \textit{supra} note 40, at 160.
\item \textsuperscript{380} \textit{Lyng v. Castillo}, 477 U.S. 635 (1986).
\item \textsuperscript{381} \textit{Id.} at 638–39.
\item \textsuperscript{382} \textit{Id.} at 638.
\end{itemize}
determine that close relatives sharing a home—almost by definition—tend to purchase and prepare meals together while distant relatives and unrelated individuals might not be so inclined.” 383 In other words, Congress and the Court assumed that coresident family members care for one another by sharing meals and thus need less government support than unrelated persons living together. These assumptions initiate a circular process by incentivizing the very family care that the law assumes.

In contrast to the *Lyng* majority, Justice Marshall’s dissent saw the different rules for close relatives versus others in the distribution of benefits necessary for survival as an intrusion into family privacy because of its impact: “The importance of that benefit belies any suggestion that the Government is not directly and substantially influencing the living arrangements of families whose resources are so low that they must rely on their relatives for shelter.” 384

Jill Hasday discusses *Lyng* as one of several welfare cases constituting “family law for the poor.” 385 She argues that the “family law canon” unjustifiably omits these cases 386 and, regarding *Lyng* in particular, she exposes the “middle-class norms of family life” assumed by the statute and the majority opinion upholding it. 387 I accept Hasday’s contentions, but I make a different point. Indeed, I include these cases in my conception of family law, and I appreciate how they show the tenuous and conditional nature of family privacy for poor (or “public”) families, as other scholars have noted. 388 More significantly, however, I simultaneously emphasize these cases are part of constitutional law, too. As such, they help demonstrate how family law values, norms, and principles have contributed to that field—in particular the modern understanding of the “negative Constitution.” 389

Lest one think that all of these cases eschewing positive rights are “poverty cases” or exclusively “family law for the poor,” 390 consider as a fifth illustration *Washington v. Glucksberg* 391 and *Vacco v. Quill*. 392 In this pair of cases, decided in 1997, the Court refused to interpret constitutional

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383. Id. at 642.
384. Id. at 645 (Marshall, J., dissenting).
386. HASDAY, supra note 12, at 196.
387. Id. at 203.
388. See e.g., Bridges, supra note 52, at 116–17.
389. See Bandes, supra note 55, at 2272–73.
390. See supra note 385 and accompanying text.
liberty to include legal access to physician-assisted suicide,\textsuperscript{393} notwithstanding a constitutionally protected right to refuse lifesaving medical treatment, nutrition, and hydration that the Court at least assumed existed a few years before in \textit{Cruzan v. Director, Missouri Department of Health}.\textsuperscript{394} Although the Court recognized the commonalities between autonomy in the dying process and life-altering family decisions like the choice to have an abortion,\textsuperscript{395} the distinction between letting die and assisting suicide—or negative and positive liberty—proved decisive, as \textit{Glucksberg} suggests\textsuperscript{396} and \textit{Quill} expressly elaborates.\textsuperscript{397} Despite the absence of claims for government financial support for assisted suicide, the Court recalled traditional negative/positive rights binary in distinguishing “the freedom from being forced to stay alive . . . from the freedom \textit{to} choose death.”\textsuperscript{398}

Reminiscent of the abortion-funding cases,\textsuperscript{399} these cases portray illness as a “natural” situation that the state did not create and thus has no constitutional obligation to address. And they are cases that often involve heart-wrenching family dramas requiring excruciating decisions with an impact on all family members, as \textit{Cruzan} so poignantly illustrates.\textsuperscript{400} \textit{Glucksberg} and \textit{Quill} thus easily fit within a larger framework that leaves families and their members constitutionally on their own to solve their personal problems, from financial difficulties to health crises.

Finally, consider \textit{DeShaney}’s sequel some fifteen years later, \textit{Town of Castle Rock v. Gonzales}, decided in 2005.\textsuperscript{401} \textit{Castle Rock} refused to recognize any constitutional duty to enforce a mandatory restraining order issued against a violent husband-father, who murdered his children and

\begin{itemize}
\item \textsuperscript{393} \textit{Glucksberg}, 521 U.S. at 705–06; \textit{Quill}, 521 U.S. at 796–97.
\item \textsuperscript{394} \textit{Cruzan} v. \textit{Dir.}, Mo. Dep’t of Health, 497 U.S. 261, 279 (1990).
\item \textsuperscript{395} \textit{Glucksberg}, 521 U.S. at 726–28.
\item \textsuperscript{396} Yoshino invokes \textit{Glucksberg} as a precedent eschewing constitutional protection of positive rights that \textit{Obergefell} could challenge. Yoshino, \textit{supra} note 40, at 159, 168.
\item \textsuperscript{397} The Court rejected the argument that allowing patients to refuse treatment, thereby causing death, and prohibiting assisted suicide violates equal protection. \textit{Quill}, 521 U.S. at 807–08.
\item \textsuperscript{398} See Yoshino, \textit{supra} note 40, at 159.
\item \textsuperscript{399} See \textit{supra} notes 100–20 and accompanying text.
\item \textsuperscript{401} \textit{Town of Castle Rock} v. \textit{Gonzales}, 545 U.S. 748 (2005).
\end{itemize}
killed himself while local officials and police did nothing to respond to the wife-mother’s pleas for help.\textsuperscript{402} Citing \textit{DeShaney}\textsuperscript{403} and using language reminiscent of the abortion-funding cases, the majority concluded that even a mandatory restraining order confers no “entitlement” to state action.\textsuperscript{404} Certainly, \textit{Castle Rock} is a family law case. And like \textit{Glucksberg} and \textit{Quill}, the issues raised by \textit{DeShaney} and \textit{Castle Rock} have relevance to a broad range of families, not just those fighting poverty.\textsuperscript{405}

Should we dismiss as mere coincidence that such constitutional decisions happen to be “all in the family?”\textsuperscript{406} I think not. Nor should we read these cases exclusively as exemplars of constitutional doctrine writ large, disconnected from family law. Rather, one can see the family-law setting as integral to the present-day articulation of both the “negative Constitution”\textsuperscript{407} and the negative/positive rights distinction undergirding it. From this perspective, assumptions about duties within the private family, including personal responsibility for sex and its consequences and the dependency of family members, helped produce the outcomes and rationales in these cases. Put more modestly, the ambiguity that had allowed some theorists to infer a constitutional right to minimum welfare ultimately got fought out and rejected in the family law arena.\textsuperscript{408} Indeed, the family law arena might well have provided an especially apt setting for addressing such uncertainty, given the series of “negative rights” recognized there, including protection of contraception, abortion, and childrearing.\textsuperscript{409}

\textsuperscript{402.} \textit{Id.} at 750–54, 768.
\textsuperscript{403.} \textit{Id.} at 755, 768–69.
\textsuperscript{404.} \textit{Id.} at 763–66. The Court repeatedly uses the term “entitlement” in explaining what the Constitution does not give Gonzales and her children. \textit{See generally id.}.
\textsuperscript{405.} Although domestic violence occurs among all socioeconomic classes, various factors make some families more susceptible than others. \textit{See} HILLARY POTTER, \textit{BATTLE CRIES: BLACK WOMEN AND INTIMATE PARTNER ABUSE} 8 (2008) (citing “multiple marginalization factors”).
\textsuperscript{406.} In arguing for an affirmative “right to law” (tort law, in particular), John Goldberg writes:

Apart from \textit{DeShaney}, the decisions most often taken to establish the no-affirmative-rights principle are those declining to recognize a fundamental right to the provision by government of housing, education, and welfare payments. But to cite them for a general principle is to avoid asking whether there is something special about the rights claimed in those cases that distinguishes them from other kinds of affirmative rights.

\textsuperscript{407.} \textit{See} Bandes, \textit{supra} note 55, at 2272–73.
\textsuperscript{408.} \textit{See supra} notes 84–129 and accompanying text.
\textsuperscript{409.} Meyer \textit{v.} NEBRASKA, 262 U.S. 390, 399 (1923); Pierce \textit{v.} SOC’Y of SISTERS, 268 U.S. 510, 534–35 (1925); Griswold \textit{v.} CONNECTICUT, 381 U.S. 479, 485–86 (1965); Eisenstadt \textit{v.}
According to this story, family law policy has helped shape our contemporary understanding of a generalized constitutional principle and a “conventional wisdom.” 410 Such policy also provides an explanation for the blatant exceptions to the general principle: the marriage and divorce cases. Despite all the family law precedents I have listed, the Court has protected (indeed, often expanded) access to marriage and, to a lesser degree, divorce—notwithstanding the essential and active role of the state in these “public institution[s].” 411 Because marriage and divorce advance the project of privatized dependency, Obergefell and its predecessors offer additional evidence of family law’s influence on modern constitutional law. 412 Indeed, had such marriage and divorce cases been decided exclusively under the Equal Protection Clause, they could have permitted total abolition of marriage as the equalizing remedy, 413 in turn, undermining rather than supporting the privatization of dependency. Obergefell’s liberty rationale thwarts such possibilities.

Had the Obergefell majority explicitly acknowledged and embraced such family law policies as part of constitutional doctrine, it could have avoided some of the more problematic aspects of the opinion. It could have jettisoned the multiple understandings of “liberty” in favor of a more focused and coherent analysis. It could have avoided the overbreadth of the “public liberty” reading, 414 the paradox of “naturalizing” civil marriage, 415 and perhaps even the confusion engendered by blending liberty and equality 416 and departing from standard categorical analysis. 417


410. See supra note 59 and accompanying text.

411. See supra notes 130–37 and accompanying text.

412. I do not advance here a parallel hypothesis with respect to equal protection cases. Despite the fact that official gender-based roles long marked family law, constitutional rulings invalidating reliance on stereotyping reformed the field. See supra note 2 (citing authorities). Here, I do not discern patterns suggesting an expanded shaping story, in which the importance of gender discrimination in traditional family law has infiltrated and influenced constitutional law. Nonetheless, some vestiges of patriarchy persist, such as the presumption of legitimacy, see Huntington, supra note 281, at 178, while the line between “real differences” and stereotypes remains contested, see Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 73 (2001). Similarly, some critics challenge as overstated the “progress narrative” of a gender-neutral family law, see Hasday, supra note 12, at 97–132, and others lament the missed opportunity to decide Obergefell as a gender-discrimination case, see generally Case, supra note 29. Despite these shortcomings, we can conclude that gender roles have proven much less tenacious than the privatization of dependency—or that, perhaps, eliminating gender roles actually advances the privatization of dependency. See Susan Frelich Appleton, Gender Neutrality, Dependency, and Family Law (unpublished working draft) (on file with author).

413. See supra notes 231–35 and accompanying text.

414. See supra notes 210–26 and accompanying text.

415. See supra notes 227–56 and accompanying text.

416. See supra notes 257–85 and accompanying text.

417. See supra notes 286–300 and accompanying text.
It could have eliminated the encomia to marriage and resulting denigration of other family forms by articulating marriage’s instrumental value in securing private sources of support. And it could have answered some of the dissenters’ critiques about “swords” and “entitlements” by explaining why marriage, along with divorce, have long stood out as exceptions to the “negative Constitution.”

V. Conclusion

In the wake of Obergefell, several scholars predicted retrenchment in the gradual embrace of “relationship pluralism” that family law had witnessed in recent decades. These scholars—and I count myself among them—read Obergefell’s glorification of marriage to authorize legal favoritism for marriage and marginalization of other family forms. Put differently, in touting so many valuable and wonderful aspects of marriage, Obergefell could be interpreted to invite discrimination against nonmarital relationships, perhaps even opening the way for a “new ‘illegitimacy.’” Certainly, recent interpretations of Obergefell by the highest courts in Illinois and Michigan bear out these predictions.

Nonetheless, based on the analysis in this Article, I can now imagine an alternative scenario taking shape, perhaps all the more given the changes portended by the 2016 presidential election. In this reconsideration, marriage still looms large but perhaps merely as a template for other relationships that could have private support obligations attached. If family law norms and values continue to shape constitutional law and if affirmative recognition of other familial relationships, beyond marriage, would advance the project of keeping dependency private, new

418. See supra notes 251–55 and accompanying text.
419. See supra notes 42, 79–80 and accompanying text.
420. See Bandes, supra note 55, at 2272–73.
422. See Appleton, Forgotten Family Law, supra note 2, at 10, 53.
424. Blumenthal v. Brewer, No. 118781, 2016 WL 6235511, at *20 (Ill. Aug. 18, 2016) (declining to allow equitable remedies in postdissolution financial dispute between unmarried partners); Mabry v. Mabry, 882 N.W.2d 539 (Mich. 2016) (mem.) (declining to review denial of standing for custody by biological parent’s former unmarried partner); see also McGaw v. McGaw, 468 S.W.3d 435, 438 (Mo. Ct. App. 2015). But see Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016) (holding “that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody”).
“positive rights” under the banner of constitutional liberty should not come as a surprise. Constitutional protection of the relationship between nonmarital fathers and their children,425 once vulnerable (or even unacknowledged) under the “old illegitimacy,”426 shows how such expansion can occur and how such developments can facilitate neoliberal objectives.427 A more recent illustration can be found in some state courts that have extended parental status, including support duties, to partners of parents in the absence of biological, marital, or adoptive ties428 and have recognized both the financial and constitutional considerations at work in such situations.429 If this trajectory continues, those who have pushed for affirmative legal recognition of polygamy,430 of friendship,431 and of other intimate connections432 that could supply new private obligations just might succeed in their efforts.

As a normative matter, these emerging possibilities could present unsettling choices. If neoliberalism will produce more inclusive legal notions of family, do we want to pursue that path? Or would we be willing to let go of expanding family recognition in the hopes of achieving a more generally “supportive state”?433 Obergefell certainly does not mark the beginning of conversations about these questions, nor should it signal the end.

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427. For example, federal welfare reform, enacted in 1996, emphasized the relationship between unmarried fathers and their children as a means for securing child support. See Appleton, Illegitimacy and Sex, supra note 2, at 360–64.
428. E.g., Elisa B. v. Superior Court, 117 P.3d 660, 669–70 (Cal. 2005) (recognizing mother’s former partner as the twins’ second mother so that the state could collect reimbursement for child support from her).
429. E.g., Brooke S.B., 61 N.E.3d at 498 (observing that “a non-biological, non-adoptive ‘parent’ may be estopped from disclaiming parentage and made to pay child support in a filiation proceeding,” in deciding that a mother’s former partner should have standing to seek custody and visitation); Chatterjee v. King, 280 P.3d 283, 286, 288 (N.M. 2012) (recognizing adoptive mother’s former partner as the child’s second parent, based on “strong public policy favoring child support, which is important to both the child and the state” and interpreting the statute in a way that avoids equal protection concerns). For an argument for full constitutional protection of the liberty interests of non-biological parents, see NeJaime, supra note 285.
432. See generally Murray, supra note 421.
433. I borrow this phrase from Maxine Eichner. Eichner, supra note 50, at 53–62.
Expressive Ends: Understanding Conversion Therapy Bans

Marie-Amélie George

Abstract

LGBT rights groups have recently made bans on conversion therapy, a practice intended to reduce or eliminate a person's same-sex sexual attractions, a primary piece of their legislative agenda. However, the statutes only apply to licensed mental health professionals, even though most conversion therapy is practiced by religious counselors and lay ministers. Conversion therapy bans thus present a striking legal question: Why have LGBT rights advocates expended so much effort and political capital on laws that do not reach conversion therapy's primary providers? Based on archival research and original interviews, this Article argues that the bans are significant because of their expressive function, rather than their prescriptive effects. The laws’ proponents are using the statutes to create a social norm against conversion therapy writ large, thus broadening the bans’ reach to the religious practitioners the law cannot directly regulate. LGBT rights groups are also extending the bans’ expressive message to support the argument that sexual orientation is immutable and to reverse a historical narrative that cast gays and lesbians as dangerous to children. These related claims have been central to gay rights efforts for much of the twentieth century and continue to shape LGBT rights battles. While

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the expressive effects of the bans are important, the laws and the campaign around them may have a negative effect. LGBT rights organizations working on the laws do not distinguish between conversion therapy efforts aimed at changing sexual orientation and those targeting behavior. This is troubling, not only because it fails to acknowledge the needs of same-sex attracted individuals who wish to live in accordance with their religious beliefs, but also because it reinforces a limited view of gay identity. Many within the LGBT movement contest the identity model that legal advocates have championed, and that conception of sexual orientation may in fact hinder the movement’s long-term goals. Differentiating between the various types of conversion therapy would help remedy this by emphasizing the law’s need to respect and protect sexual decisions and expressions, as well as create a platform from which to promote a more expansive vision of LGBT rights.

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INTRODUCTION

LGBT\(^1\) rights groups have made bans on conversion therapy, a practice intended to manage, reduce, or eliminate a person’s same-sex sexual attractions, a primary piece of their legal agenda.\(^2\) These laws prohibit licensed mental health providers from offering conversion therapy to minors, identifying the practice as one that exposes minors to “serious harms.”\(^3\) However, mental health professionals have overwhelmingly rejected conversion therapy, such that most conversion therapy practitioners are religious and lay counselors to whom the laws do not apply.\(^4\) Conversion therapy bans thus present a striking legal puzzle: Why have LGBT rights advocates expended so much effort and political capital on laws that do not reach conversion therapy’s primary providers? This Article argues that the bans are significant because of their expressive function, rather than their prescriptive effects.

Conversion therapy bans emerged as a centerpiece of LGBT rights advocacy in 2012, when California became the first state to prohibit licensed mental health professionals from providing conversion therapy to minors.\(^5\) Four states and the District of Columbia quickly did the same, followed by several cities.\(^6\) On February 6, 2016, New York’s Governor,

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1. This Article uses the term “LGBT” to refer to the contemporary rights movement. While many communities have embraced a broader membership and vision of rights—including queer, intersex, and asexual individuals within their umbrella—the legal movement, for better or worse, has limited its focus to lesbian, gay, bisexual, and transgender issues. When discussing the movement of the 1970s, 1980s, and early 1990s, this Article refers to “gay and lesbian rights” or just “gay rights” advocates, as the movement’s scope had not yet expanded beyond these categories. Steven G. Epstein, *Gay and Lesbian Movements in the United States: Dilemmas of Identity, Diversity, and Political Strategy, in The Global Emergence of Gay and Lesbian Politics: National Imprints of a Worldwide Movement* 66–68, 74–75 (Adam et al. eds., 1998); Amy L. Stone, *More than Adding a T: American Lesbian and Gay Activists’ Attitudes towards Transgender Inclusion*, 12 *Sexualities* 334, 335–36, 349 (2009).

2. Conversion therapy is sometimes also referred to as reparative therapy or sexual orientation change efforts (SOCE). This article uses “conversion therapy,” as this term more accurately describes the religious “conversion” element of the practice. Reparative therapy is a specific approach to conversion therapy, popularized by Joseph Nicolosi and the National Association of Research and Therapy of Homosexuality (NARTH), while SOCE is an umbrella term that encompasses aversive, talk, cognitive, and reparative therapies aimed at changing same-sex attraction.


Andrew Cuomo, issued an executive order prohibiting insurers from covering conversion therapy practiced within the state.\textsuperscript{7} The state laws prohibit licensed mental health professionals, such as psychiatrists, psychologists, social workers, psychoanalysts, and counselors, from engaging in conversion therapy with minors, with conversion therapy defined as practices or treatments that seek to eliminate or reduce sexual or romantic attractions or feelings towards individuals of the same sex.\textsuperscript{8} Legislators have explicitly excluded from the definition of conversion therapy any counseling to individuals undergoing gender transition.\textsuperscript{9}

Laws prohibiting conversion therapy are currently pending in thirteen states, and LGBT rights advocates are working with legislators to introduce these types of statutes throughout the rest of the country.\textsuperscript{10} At the federal level, both houses of Congress are considering four different bans and resolutions against conversion therapy, and the Obama Administration issued a statement denouncing the practice.\textsuperscript{11} 2016 Democratic presidential candidate and former Secretary of State Hillary Clinton tweeted her support for the laws, stating, “It is time to put an end to conversion therapy for minors. We should be supporting LGBT kids—not trying to change them.”\textsuperscript{12} The Republican Party, on the other hand, affirmed its support for conversion therapy in its 2016 national platform.\textsuperscript{13} Despite the GOP’s opposition, the bans have garnered a great deal of public attention and support as a means of eradicating homophobia and protecting vulnerable queer youth, who are at a higher risk of suicide than their heterosexual peers.\textsuperscript{14}

Legislators and advocates discussing bans on conversion therapy rarely address the practice’s deeply religious dimension, nor do they

\begin{itemize}
  \item \textsuperscript{9} See supra sources cited in note 8.
  \item \textsuperscript{11} SAMHSA, supra note 10, at 37.39.
  \item \textsuperscript{12} Hillary Clinton, (@HillaryClinton), Twitter (Dec. 21, 2015, 11:06AM), twitter.com/HillaryClinton/status/679015185575645184.
  \item \textsuperscript{14} SAMHSA, supra note 10, at 2.
\end{itemize}
differentiate between the different types of conversion therapy that practitioners offer. Individuals typically seek conversion therapy to reconcile their religious beliefs and their sexual orientation. For some, this means developing opposite-sex attractions and identifying as heterosexual, while for others the goal is instead to alter their behavior so as to not act on their same-sex desires. Mental health professionals have rejected efforts to change sexual orientation as unethical, all but relegating this type of conversion therapy to religious ministries. The American Psychological Association has, however, endorsed “sexual identity exploration” therapy, a supportive approach aimed at helping devout individuals with same-sex attractions explore a range of options, including changing their behaviors, in a nonjudgmental setting. This type of therapy seems to be excluded from the laws’ definition of conversion therapy, although the statutory language is ambiguous. This lack of clarity is perhaps deliberate, as the LGBT campaign identifies any type of behavioral modification therapy, even if offered in supportive therapeutic settings, as rooted in antigay sentiment. From the point of view of campaign activists, it perpetuates the view of same-sex sexual attraction as something that needs to be avoided, and therefore is equally harmful as its moralistic counterpart.

This Article details how conversion therapy came to be primarily the province of religious and lay counselors, to explain why the laws have limited regulatory impact. It then argues that, given the laws’ narrow scope, their significance is in their expressive effects. The laws contribute

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15. Individuals who seek to change their sexual orientation aim to transform their underlying identity, while those who want to control their behavior fall somewhere between conversion and either passing or covering. Kenji Yoshino, Covering, 111 Yale L.J. 769, 786 (2002). Unlike passing or covering, where the “underlying identity is . . . modified only for popular consumption,” controlling sexual behavior so as to align with identity is a rejection of homosexuality. Id.


18. Telephone Interview with Samantha Ames, #BornPerfect Campaign Coordinator, National Center for Lesbian Rights (Oct. 26, 2015); Kate Kendell, Our Goal—End Conversion Therapy in Five Years, Nat’l Ctr. for Lesbian Rights (Nov. 18, 2014), http://www.nclrights.org/our-goal-end-conversion-therapy-in-five-years/.

19. Writing on conversion therapy has tended to focus on the bans’ constitutionality, rather than their effects, and as such has not delved into the laws’ substance. Clay Calvert et al., Conversion Therapy and Free Speech: A Doctrinal and Theoretical First Amendment Analysis, 20 WM. & MARY J. WOMEN & L. 525, 561–69 (2014); Christian S. Cyphers, Banning Sexual Orientation Therapy: Constitutionally Supported and Socially Necessary, 35 J. Legal Med. 539, 549–50 (2014); Patrick Bannon, Note, Intermediate Scrutiny vs. the “Labeling Game” Approach: King v. Governor of New Jersey and the
to a broad social norm against conversion therapy, thereby expanding the bans’ reach beyond mental health professionals. The laws’ criticisms of conversion therapy, particularly its ineffectiveness and potential for harm, apply to all providers, not just licensed mental health professionals. Additionally, LGBT rights groups have used the laws as an opportunity to promote movement norms that the bans implicate: immutability and child protection. Since the 1970s, antigay conservative groups have opposed gay rights arguments with two interrelated claims—that homosexuality is a choice and that gays and lesbians are harmful to children. According to these theories, because homosexuality is not innate it is undeserving of legal protections. At the same time, because this deviation occurs in childhood, children need to be protected from influences that could result in their becoming homosexual. This longstanding cultural war with religious conservatives continues to be fought over antidiscrimination laws, anti-bullying legislation, and adoption and foster care rights, often in the form of religious exemption laws.


therapy campaign is thus the latest chapter in a decades-old debate over the etiology of homosexuality and the place of gays and lesbians in American life.\(^{22}\)

While these expressive messages are extremely powerful and useful in promoting LGBT rights, the campaign for the bans may have a negative effect. There is no question that conversion therapy can be extremely traumatic and harmful, and that it is important to act against the egregious practices that result in isolation, depression, and suicide. However, the campaign’s unwillingness to differentiate between types of conversion therapy is normatively undesirable. For religious individuals who do not want to act on their same-sex attractions, psychological treatment rooted in a nonjudgmental model of homosexuality would have less harmful outcomes.\(^{23}\) In addition to promoting safer treatment, disaggregating the two types of conversion therapy—and the supportive model from its stigmatizing counterpart—could have important legal benefits for the LGBT movement as a whole. By conflating sexual orientation and expression, the campaign does more than reinforce sexual orientation’s immutability; it also asserts the primacy of immutability-based arguments and reduces the legal import of sexual autonomy protections. However, the law also needs to protect individuals’ consensual sexual practices. Immutability is not enough.

Litigation rights groups made the strategic decision to anchor rights in Equal Protection immutability claims, rather than Due Process privacy and autonomy arguments, three decades ago.\(^{24}\) That strategy has been successful, securing marriage equality in 2015, but it has also been contested within the movement as a conservative move.\(^{25}\) Queer theorists in particular criticize immutability arguments, arguing the LGBT movement instead should be protecting sexual object choice, expression, and behavior. It is possible for the law to do both, and for the conversion therapy campaign to promote immutability and autonomy. By differentiating between different types of conversion therapy, the laws can be drafted and discussed in such a way as to emphasize autonomy in sexual decisions and expressions, rather than simply re-inscribing the identity

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22. The bans’ proponents have also focused on the need to protect transgender youth. While this Article recognizes this important dimension of the laws, it emphasizes the bans’ effect on gay and lesbian rights because this has been the historical site of struggle between LGBT rights advocates and religious conservatives.

23. See supra sources cited in note 17.


paradigm. In this way, conversion therapy bans can serve as a platform from which to expand the contours of the current LGBT movement so as to make it more inclusive.

Part I unpacks the conventional narrative around conversion therapy bans by demonstrating that the laws do not reach the majority of practitioners and therefore have little practical effect. It draws upon unpublished archival documents from medical associations, scientific studies, judicial opinions, unpublished court filings, and newspaper articles to explain how conversion therapy shifted from a mainstream medical practice to a marginalized treatment, transferring the locus of conversion therapy to religious ministers and conservative religious groups. It also analyzes how conversion therapy is actually practiced, which demonstrates the highly religious nature of contemporary conversion and sexual identity therapy.

Part II explains the laws' impact by turning to the expressive power of conversion therapy bans. Drawing on extensive archival research, legislative histories, and interviews with both LGBT rights advocates and conversion therapy proponents, this Part traces the history of conservative opposition to gay rights. It examines the rhetoric of mutability and child protection within the context of antidiscrimination laws, school curricular reforms, and family law contests to explain how and why the reformulation of these dual arguments is so important for LGBT rights organizations. This Part bridges the literatures on the expressive function of law and social movement scholarship, demonstrating how the two are interrelated and emphasizing how the lawmaking process serves expressive ends.

Part III analyzes how the bans implicate the LGBT movement’s goals and strategy. LGBT rights groups have used the bans to promote the view that sexual orientation is immutable and fixed, and have also tied sexual behavior to identity. This has clear benefits for gay rights litigation but reinforces a particular vision that not everyone in the movement shares and limits future avenues for legal change. This Part thus complicates the narrative of the campaign and the bans as an unmitigated good, identifying how the laws, and the discourse surrounding them, further solidify the current approach of the LGBT rights movement. It also suggests how to reframe the campaign and rewrite the statutes so as to promote a different vision of LGBT rights. Thus, while the bans as they are currently formulated are problematic, they do not need to be.

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Although LGBT rights groups do not distinguish between different types of conversion therapy practices, conflating them has significant medical, theological, and legal implications. As a result, when discussing therapeutic practices this Article will identify “conversion therapy” as efforts to change sexual orientation, which is almost exclusively a
religious practice. For attempts to change behavior it will use “sexual identity therapy,” a term the mental health professions have adopted to emphasize the need for religious and sexual identity congruence. Both religious ministries and medical providers offer behavioral counseling but do so from very different perspectives—one is rooted in antigay morality, and the other is avowedly nonjudgmental. This Article only considers the therapeutic approach to sexual identity therapy as normatively desirable and will distinguish between the two contexts wherever necessary. It will use “conversion therapy bans” to describe the laws, even though they address both practices, as the rhetoric around the statutes does not differentiate between the categories.

I. **The Religious Practice of Conversion Therapy**

Conversion therapy bans prohibit licensed mental health professionals from helping minors alter their homosexual sexual orientations or attractions, and yet conversion therapy today is primarily the province of religious and lay counselors. This Part analyzes how conversion therapy changed from a medical to a religious practice, tracing psychiatric debates on this issue to explain how and why conversion therapy became discredited within the scientific profession as it became increasingly embraced by religious conservatives. It then examines the contemporary practice of conversion and sexual identity therapy, presenting the ways in which religion is integral to its participants, practitioners, and theoretical underpinnings. These discussions correct commentators’ mischaracterization of conversion therapy as a medical practice and provide the necessary background to understand what practical effect the laws have. These Sections also reveal that the ethical and legal issues around conversion therapy are more complicated than the rhetoric around the laws suggests.

A. **From Medicine to Morality**

The medical mainstream only began distancing itself from conversion therapy in the late 1980s, even though the American Psychiatric Association declassified homosexuality as a mental illness in 1973. Those debates over conversion therapy led dissidents to coalesce as a formal group to promote the increasingly marginalized practice, working with conservative political organizations to disseminate their views. As this Section demonstrates, concomitant to conversion therapy’s move out of the medical mainstream was its entry into evangelical politics, further reinforcing the relationship between conversion therapy and religion.

1. **Moving Out of the Medical Mainstream**

Before the declassification of homosexuality from the Diagnostic and Statistical Manual (DSM), medical efforts to alter sexual orientation

27. *Id.* at 23.
were a subject of debate, but many prominent doctors used a variety of biological and behavioral methods to eliminate homosexual attractions.\textsuperscript{28} The biological approaches included surgical interventions, like lobotomies, castrations, clitoridectomies, and cauterization of the spinal cord, as well as convulsive electric shock treatments and hormonal injections.\textsuperscript{29} Behavioral methods included cognitive therapy and aversive conditioning, such as pairing electric shocks or nausea-inducing drugs with homoerotic images.\textsuperscript{30} After the declassification, the psychiatric profession began to condemn these types of treatments, identifying aversive therapies as unethical and inhumane.\textsuperscript{31} The number of published studies of efforts to change sexual orientation decreased dramatically, although the profession continued to endorse non-aversive treatments.\textsuperscript{32}

Even after the declassification, the American Psychiatric Association identified conversion therapy as an appropriate treatment for individuals distressed by their homosexuality, keeping the practice within the medical mainstream. Indeed, at the same time as the American Psychiatric Association announced the declassification, it added a category to the DSM-II called “sexual orientation disturbance” to diagnose those who were disturbed by or wished to change their same-sex attractions.\textsuperscript{33} In preparing the DSM-III in 1977, the Task Force on Nomenclature renamed the category “Ego-Dystonic Homosexuality,” defining the diagnosis as applying to those with “a desire to acquire or increase heterosexual arousal, so that heterosexual relationships can be initiated or maintained . . . .”\textsuperscript{34} The diagnostic category thus identified conversion therapy as a viable goal, although the manual also noted that medical professionals disputed its effectiveness.\textsuperscript{35} The DSM-III’s comments on the viability of treatment for Ego-Dystonic Homosexuality were deliberately vague, the product of a fierce debate among the medical community over what treatment methods and goals were appropriate for individuals distressed by their same-sex attractions.

\begin{itemize}
  \item \textsuperscript{28} Id. at 22; Naoko Wake, Private Practices: Harry Stack Sullivan, the Science of Homosexuality, and American Liberalism 217 (2011); William J. Helmer, New York’s “Middle-Class” Homosexuals, Harper’s Mag., Mar. 1963, at 89–90.
  \item \textsuperscript{29} Susan L. Morrow & A. Lee Beckstead, Conversion Therapies for Same-Sex Attracted Clients in Religious Conflict: Context, Predisposing Factors, Experiences, and Implications for Therapy, 32 Counseling Psychologist 641, 642 (2004).
  \item \textsuperscript{30} Id.; Am. Psychological Ass’n, supra note 17, at 22.
  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} Id.; Am. Psychological Ass’n, supra note 17, at 24.
  \item \textsuperscript{33} Press Release, Am. Psychiatric Ass’n (Dec. 15, 1973) (on file with Carl A. Krock Library, Cornell University, National Gay and Lesbian Task Force Records, Collection No. 7301, Box 164, Folder 39).
  \item \textsuperscript{34} Id.
  \item \textsuperscript{35} Id. at 282.
\end{itemize}
While a vocal minority opposed any attempts to change a person’s sexual orientation, many professionals believed homosexuals could and should be helped to become heterosexual. These included Judd Marmor, a leading psychiatrist who had been influential in arguing for the declassification. Marmor emphasized that conversion was only for the “small minority of gay people [who] want that,” indicating that this type of treatment was inappropriate for most homosexual patients and thus that heterosexuality should not be the primary goal in the majority of cases. However, many in the medical profession took a more expansive view of conversion therapy, encouraging it as a treatment for potentially all gay patients. In 1981, four years after the DSM-III’s publication, the American Medical Association (AMA) issued a report on the health care needs of gay patients that emphasized the changeability of homosexuality. It maintained that physicians should not accept the “myth,” propounded by homosexual groups, that homosexuality could never be changed, as scientific studies had shown success in 30–70% of conversion efforts. It consequently recommended that medical professionals ask patients whether they are “content” with their homosexual orientation and refer patients to psychiatrists for treatment.

The psychiatric profession’s first move to cabin conversion therapy came in 1987, when the American Psychiatric Association removed Ego-Dystonic Homosexuality from the DSM-III-R. That change almost did not happen. The American Psychiatric Association’s Advisory Committee, which reviewed the provision, originally gave it very little attention, assuming the category should remain in the diagnostic manual. As a result, the Board of Trustees initially voted to include Ego-Dystonic Homosexuality in the revised DSM. The lack of debate


40. See Herrington, supra note 39, at 21.


42. Letter from Robert L. Spitzer, Chair, Work Grp. to Revise DMS-III, to Terry
angered members of the American Psychiatric Association Committee on Gay, Lesbian, and Bisexual Issues (GLB Committee), who protested they should be given an opportunity to make their case about the provision’s removal.\textsuperscript{43} Dr. Robert Spitzer, the head of the group preparing the DSM-III-R, dismissed their objections with a curt statement that the scientific issues were clear and the question was simply “a value judgment” as to whether it was “helpful to have a specific category that legitimizes treatment efforts directed at homosexuals (usually bisexual) who wish to develop a heterosexual arousal program.”\textsuperscript{44} From his perspective, Ego-Dystonic Homosexuality did not apply to all homosexuals but served as the correct diagnostic category for a subset of gays and lesbians who sought to change their sexual orientation.

The GLB Committee’s persistence led the Board of Trustees to reverse itself, removing the diagnostic category six months after its initial vote and signaling a decisive shift in its view of conversion therapy.\textsuperscript{45} By removing a specific category for homosexuals conflicted about their sexual orientation, the American Psychiatric Association indicated that gay men and lesbians seeking psychiatric help to change their sexual orientation were rare and the practice of conversion therapy was no longer a primary treatment method.\textsuperscript{46} Ego-Dystonic Homosexuality had been a compromise between clinicians who understood homosexuality as a pathological deviation and those who viewed homosexuality as a natural variant of sexual development.\textsuperscript{47} In eliminating the diagnostic category, the American Psychiatric Association made clear that the professional consensus was that homosexuality was a normal variation in human sexuality.\textsuperscript{48}

S. Stein et al. (Dec. 30, 1985) (on file with DSM-III & DSM-III-R Collection, Box 4, Folder labeled Ego-Dystonic Homosexuality).

\textsuperscript{43} Letter from James P. Krajeski to Robert Spitzer, Chairman, Work Grp. to Revise DSM-III (Apr. 9, 1986) (on file with DSM-III & DSM-III-R Collection, Box 4, Folder labeled Ego-Dystonic Homosexuality); Memorandum from Bob Spitzer to Revisionists (Dec. 11, 1985) (on file with DSM-III & DSM-III-R Collection, Box labeled Administration, Folder labeled Gen. Corr. 1986); Bob Cabaj, President’s Column, Ass’n of Gay & Lesbian Psychiatrists (Feb. 1986) (on file with the Charles E. Young Research Library, UCLA, Judd Marmor Papers, Collection No. 1795, Box 54, Folder 3).

\textsuperscript{44} Memorandum from Bob Spitzer, supra note 43.

\textsuperscript{45} Letter from Steven S. Sharfstein, Deputy Med. Dir., Am. Psychiatric Ass’n, to Peggy Hanley-Hackenbruck (Jul. 24, 1986) (on file with DSM-III & DSM-III-R Collection, Box 4, Folder labeled Ego-Dystonic Homosexuality). Spitzer received at least 140 letters opposing his committee’s plan to retain Ego-Dystonic Homosexuality as a diagnostic category. See DSM-III & DSM-III-R Collection, Box 5, Folder labeled Opposition Letters Regarding Retention of Ego-Dystonic Homosexuality; DSM-III & DSM-III-R Collection, Box 4, Folder labeled Ego-Dystonic Homosexuality.

\textsuperscript{46} Additionally, by making this change, the American Psychiatric Association finally removed the word “homosexuality” from its diagnostic manual, ending the ambiguity that had plagued the DSM-III-R. Letter from Stein et al., supra note 42.

\textsuperscript{47} Id.

\textsuperscript{48} Although the Board of Trustees eliminated Ego-Dystonic Homosexuality,
2. **Countering Conversion Therapy’s Proponents**

Conversion therapy proponents responded to the American Psychiatric Association’s removal of Ego-Dystonic Homosexuality with outrage, setting the stage for conflicts between these dissenters and the medical mainstream. As the debates became increasingly heated, medical professional organizations began issuing position statements on conversion therapy that condemned the practice as harmful and unscientific. Over the course of a decade, the medical mainstream shifted from merely not endorsing conversion therapy to actively repudiating the practice.

Dissenters from American Psychiatric Association’s decision, which indicated that sexual orientation change should no longer be considered a primary goal for therapists, created an alternative organization for medical practitioners who supported conversion therapy. Conversion therapy proponents initially coalesced around Charles Socarides, who was one of the most vocal opponents of the 1973 declassification decision. They also rallied around Joseph Nicolosi, a psychologist who promoted “reparative therapy,” which used psychoanalytic theories of arrested development to explain the causes of homosexuality. To encourage conversion therapy and the rights of its practitioners, Nicolosi, Socarides, and Benjamin Kaufman founded the National Association of Research and Therapy of Homosexuality (NARTH) in 1992. Since then, the organization has held annual conferences, published a regular newsletter for members, and provided pro-conversion therapy research materials on its website.

NARTH’s supporters became active in debates over conversion therapy, hoping to stop what they understood as medicine’s capitulation to gay rights activists. Reparative therapists characterized efforts to dis-

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51. Id. For a discussion of reparative therapy’s theoretical roots, see infra Part II.B.2.


53. Kaufman, supra note 52, at 424.

54. NARTH’s supporters believe this began in 1973 with the declassification of
credit conversion therapy as “politically motivated and nonscientific,” protesting what they saw as professional organizations’ unsupported bias against their work.  

To disseminate their views, NARTH and its members turned to prominent Religious Right groups, which provided an alternative platform to the mainstream medical organizations. Evangelical leaders like James Dobson brought information about conversion therapy to the homes of millions of Americans. Dobson founded Focus on the Family in 1977, becoming one of Time Magazine’s “most influential evangelicals in America” and producing an internationally syndicated radio program that had more than 230 million listeners when he retired in 2009. His 2001 book, Bringing Up Boys, which sold more than two million copies, emphasized the need for parents to be cognizant of youth “pre-homosexuality.” Dobson urged parents with “an effeminate boy or a masculinized girl” to read Joseph Nicolosi’s Preventing Homosexuality: A Parent’s Guide and to seek professional help. Dobson also emphasized that parents should consult Exodus International or NARTH, as “most secular psychiatrists, psychologists, and counselors would . . . take the wrong approach” by identifying sexual orientation as fixed and immutable rather than something that could be changed. Dobson was just one of many conservative leaders who advocated conversion therapy for youth to prevent adult homosexuality.

This alliance with NARTH benefited conservative organizations, which were able to draw upon conversion therapy as proof that homosexuality was a mutable characteristic and therefore undeserving of legal protections. Conversion therapy became such a useful political tool

homosexuality from the DSM. 

55. Nicolosi & Nicolosi, supra note 54, at 695; Nicolosi, Reparative Therapy of Male Homosexuality, supra note 54, at 123.


59. Dobson, supra note 57, at 123.

60. Am. Psychological Ass’n, supra note 17, at 71; Jason Cianciotto & Sean Cahill, Youth in the Crosshairs: The Third Wave of Ex-Gay Activism 2 (2006).

that conservative groups began endorsing and helping found conversion therapy ministries, run by lay counselors and pastors, which removed the practice even further from the medical realm. Thus, in addition to separating conversion therapists from mainstream medical practices, the deletion of Ego-Dystonic Homosexuality from the DSM made the Religious Right a central player in the debate over the etiology and (im)mutability of homosexuality.

The medical mainstream responded to NARTH and the Religious Right by issuing increasingly condemnatory statements on conversion therapy. These professional associations did not immediately denounce the practice, concerned about the lack of clinical studies on its effectiveness and the need to respect patient autonomy. In 1993, the American Psychiatric Association rejected a position paper that declared conversion therapy “improper and unethical” as “extreme and unjustified” since it interfered with patient autonomy and choice. However, in 1998, the organization adopted a statement against the practice, which read: “[The American Psychiatric Association] opposes any psychiatric treatment, such as ‘reparative’ or ‘conversion’ therapy, that is based . . . [upon a prior] assumption that the patient should change his or her homosexual orientation.” Two years later, the organization issued a firmer admonition. That position paper noted the absence of scientific research substantiating reparative therapists’ claims to cure individuals of their homosexuality. It thus implored “ethical practitioners [to] refrain from attempts to change individuals’ sexual orientation, keeping in mind the medical dictum to First, do no harm.”

The American Psychological Association similarly began taking formal positions on conversion therapy in the late 1990s, ultimately denouncing the practice in 2009. The organization first adopted a statement in 1997 at the urging of its members, who were alarmed by NARTH’s founding and the Religious Right’s promotion of conversion therapy. That resolution was the tepid declaration that “the ethics, efficacy, benefits, and potential for harm” of reparative therapies were

62. See infra Part I.B.
63. It is possible that professional associations were also hesitant to take a definitive stance on conversion therapy because they feared accusations that they had ceded to political pressure, a common critique of the 1973 declassification decision. See supra sources cited in note 54.
64. Jerry Wiener, Choices, PSYCHIATRIC NEWS, Nov. 18, 1994, at 3; “Reparative Therapy” Statement to be Refined, PSYCHIATRIC NEWS, June 17, 1994, at 6, 24.
66. AM. PSYCHIATRIC ASS’N, POSITION STATEMENT ON THERAPIES FOCUSED ON ATTEMPTS TO CHANGE SEXUAL ORIENTATION (REPARATIVE OR CONVERSION THERAPIES) (2000).
67. Id.
68. AM. PSYCHOLOGICAL ASS’N, supra note 17, at 12.
“under extensive debate.” In 2007, the American Psychological Association established the Task Force on Appropriate Therapeutic Responses to Sexual Orientation to review and evaluate the scientific literature on conversion therapy. It found that none of the published studies on conversion therapy met the methodological standards required to make any conclusions about efficacy or safety. Based on the qualitative data, the report the Task Force issued two years later concluded that conversion therapy is “unlikely to be successful and involve[s] some risk of harm”; it consequently urged the organization to issue a new resolution opposing conversion therapy. As a result, the American Psychological Association adopted a formal statement that identified the practice as ineffectual and called on mental health professionals to stop misrepresenting conversion therapy as a viable means of changing sexual orientation.

In its 2009 report, the American Psychological Association simultaneously developed a guideline for “sexual orientation identity exploration,” which allows therapists to work with a client on changing her sexual behavior to reconcile her sexual identity and religious beliefs. Sexual identity therapists adopt a client-centered approach, wherein counselors assess their clients’ religious beliefs, identities, and motivations to understand their clients’ perspectives and concerns. The aim of the therapeutic work is not to lead clients to a particular sexual orientation identity, or to promote or reject celibacy, but to help clients understand their own goals, the possible short- and long-term consequences, and how to cope with their decisions. Throughout the process, therapists are to emphasize acceptance and support, and above all the aim is for clients to “create a valued personal and social identity that provides self-esteem, belonging, meaning, direction, and future purpose, including the redefining of religious beliefs, identity, and motivations and the redefining of sexual values, norms, and behaviors.” Sexual identity therapy emerged as a means of providing an ethical treatment option for those distressed by the conflict between their same-sex attractions and

69. AM. PSYCHOLOGICAL ASS’N, APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION (1997).
70. AM. PSYCHOLOGICAL ASS’N, supra note 17 at 1.
71. Id. at 2.
72. Id. at v, 7.
73. AM. PSYCHOLOGICAL ASS’N, RESOLUTION ON APPROPRIATE AFFIRMATIVE RESPONSES TO SEXUAL ORIENTATION DISTRESS AND CHANGE EFFORTS (2009).
74. AM. PSYCHOLOGICAL ASS’N, supra note 17 at 60–62; Tom Waidzunas, THE STRAIGHT LINE: HOW THE FRINGE OF EX-GAY THERAPY REORIENTED SEXUALITY 4 (2015). This form of therapy coincided with a shift in how religious organizations approached conversion therapy, splitting the practice into those who believe sexual orientation is fixed and those who view it as a mutable characteristic. See infra Part II.B.
75. AM. PSYCHOLOGICAL ASS’N, supra note 17 at 63–64.
76. Id. at 61.
77. Id. at 62.
their religious values. These guidelines sought to provide the benefits of conversion therapy without its attendant harms.

Other professional organizations also rejected conversion therapy during this period. The AMA, which had endorsed the practice in 1981, reversed course in 1994, stating that social stigma caused most of the emotional disturbance gay men and lesbians felt about their sexual orientation. In 1999, the American Counseling Association declared that it opposed “the promotion of reparative therapy as a cure for individuals who are homosexual.” In 2000, the National Association of Social Workers’ National Committee on Lesbian, Gay, and Bisexual Issues endorsed a position statement that conversion therapies “cannot and will not change sexual orientation.” In 2009, the American Association for Marriage and Family Therapy adopted a policy stating there was “no basis” for conversion therapy.

By 2009, all of the major professional associations of mental health professionals had issued statements opposing conversion therapy, identifying it as both unethical and unscientific. Supporting these positions were research studies and articles on the effects, efficacy, and ethics of the practice, which burgeoned after NARTH’s founding. Scientists conducted the vast majority of research on conversion therapy between 1960 and 1981. However, beginning in 1999, as professional organizations became embroiled in debates over whether mental health professionals should continue to engage in the practice, researchers once again began publishing studies on the topic. The data did not show that conversion

83. Am. Psychological Ass’n, supra note 17 at 27.
84. Id. at 27, Appendix B. Of the fifty-five peer-reviewed studies the American Psychological Association Task Force identifies, forty-seven were from the period of 1960 to 1981, while only eight were from 1999 to 2004. Id. at Appendix B.
therapy never worked, but sufficient studies demonstrated that individuals suffered harm that professional organizations decided to warn against the practice. As the position statements demonstrate, conversion therapy had clearly exited the medical mainstream by 2009, relegating the practice to dissenting therapists, religious ministers, and lay counselors. The close association between NARTH and Religious Right groups also helped transfer the locus of conversion therapy to religious organizations.

B. Conversion Therapy in Practice

As the medical establishment reconsidered its views on homosexuality and conversion therapy throughout the late twentieth century, conversion therapy became the domain of religious practitioners, with non-licensed ministers and counselors coming to dominate the practice. The theories and methods these practitioners use combine psychoanalytic theory and theology, such that conversion therapy is very much a religious phenomenon in its execution. Thus, it is not just that conversion therapy is no longer part of the medical mainstream—it is also affirmatively a religious practice.

1. Religious and Sexual Conversion

Religious ministries promoting conversion therapy have existed since 1973, but increased in absolute numbers and relative to licensed therapists after mental health professionals turned away from conversion therapy; they now form the majority of conversion therapy practices. Conversion therapy ministries have their roots in evangelical Christianity, melding theology and psychology in their theories and methods. Frank Worthen founded the first such ministry after hearing God’s voice, which called on Worthen to abandon homosexuality. The born-again Worthen began attending church and closed his business to form Love in Action. The group began meeting every other week at the Church of the Open Door, a nondenominational Christian ministry, and became the first residential ex-gay program in 1979 after men and women began arriving at the sessions with suitcases. In 1976, Worthen and members

85. Telephone Interview with Scott McCoy, Senior Policy Counsel, S. Poverty Law Ctr. (Dec. 3, 2015).
87. ERZEN, supra note 50, at 3, 22–23.
88. Id. at 23.
89. Id. at 26–28. In 1995, John Smid relocated Love in Action (LIA) to Memphis, leading Worthen to open a new California ministry in the former LIA space named New Hope. Id. at 39.
of the Melodyland Christian Center, an Anaheim evangelical church, founded Exodus International, an umbrella organization for religious and lay conversion therapy groups.\(^{90}\) Exodus affiliates not only provided conversion therapy services, but also produced and distributed books, pamphlets, newsletters, teachers’ manuals, videotapes, audiotapes, and other home study materials to help people “come out of the homosexual lifestyle.”\(^{91}\) After its founding, Exodus expanded to include hundreds of member ministries, which included religious counseling, self-help, and lay support groups, and became the center of the ex-gay movement.\(^{92}\)

In addition to evangelical groups, other religiously based organizations proliferated to provide conversion therapy. In 1980, the New York Archdiocese created Courage, a support group to help Catholic men and women with same-sex attractions to live “chaste lives.”\(^{93}\) Courage now has more than 100 chapters worldwide and over 1,500 email subscribers.\(^{94}\) Evergreen International, founded in 1989, promoted conversion therapy for Church of Jesus Christ of Latter-Day Saints (LDS) members until 2014 when it merged with North Star, another support group for same-sex attracted Mormons.\(^{95}\) Additionally, in 1998, Jews Offering New Alternatives to Homosexuality (JONAH) became the first Jewish organization to provide conversion therapy.\(^{96}\)

There is no data on how many licensed therapists practice conversion therapy, but the available evidence suggests that the number is small in comparison to religious groups. Before closing in 2013, Exodus International had over 260 member ministries with numerous volunteer counselors associated with each group, several of which organized residential treatment programs that housed dozens of participants.\(^{97}\)

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90. Id. at 31–32.
92. Sandley, supra note 19, at 252–53.
94. Id.
By contrast, NARTH, the only group that promotes conversion therapy among mental health professionals, has only ever had 150 members in its referral directory. This is a miniscule fraction of the hundreds of thousands of licensed mental health professionals in the United States. Additionally, most therapists listed in the NARTH directory do not center their practice on conversion therapy, but rather offer this treatment to a small number of patients. In 2012, the Southern Poverty Law Center counted only seventy licensed mental health professionals offering conversion therapy across the United States, which constituted 0.02% of all licensed psychiatrists, psychologists, mental health counselors, and marriage and family therapists in America. This data is also supported by empirical studies of conversion therapy, which have documented that the majority of participants received assistance from pastors, Christian counselors, or religious groups, rather than licensed professionals.

This is not to say that licensed mental health professionals never provide conversion therapy treatments. Some very well-known licensed psychologists practice conversion therapy, such as Joseph Nicolosi and David Pickup, which lends scientific credibility to religious and lay ministers. The licensed professionals who offer conversion therapy have a decidedly religious approach to counseling, providing “counseling from a ‘Biblical perspective’ and . . . integrating Biblical teachings

98. Telephone Interview with David Pruden (Oct. 7, 2015). In a 2012 article, NBC reported that NARTH had 350 therapists in its directory, citing David Pruden as its source for that number. According to Pruden, NARTH has never had this many therapists and denies making this statement to NBC. Id.; Isolde Raftery, Therapists Defend Gay Conversion Counseling: “You Can't Say Gay Once, Gay Always,” NBC News (Dec. 5, 2012), https://usnews.newsvine.com/_news/2012/12/05/15658164-therapists-defend-gay-conversion-counseling-you-cant-say-gay-once-gay-always.


100. Nicolosi et al., supra note 79, at 693–94; Interview with Pruden, supra note 98.


103. Ritter & Terndrup, supra note 91, at 279; McCormick, supra note 19, at 179; Sacks, supra note 86, at 74.
into their sessions” on the basis that clients’ religious beliefs are crucial to change. Additionally, other licensed professionals serve as referral sources to religious ministries that provide conversion therapy. These licensed practitioners have received disproportionate attention in debates over conversion therapy at least in part because NARTH therapists are prominent voices in political debates over LGBT rights, with members testifying as experts before judicial and legislative hearings.

Conversion therapy participants have overwhelmingly identified their “religious beliefs” as the primary reason for seeking conversion therapy. Participants in conversion therapy tend to be members of evangelical Christian, LDS, or Orthodox Jewish communities, which view homosexuality as undesirable or morally objectionable. For these individuals, religion is a central part of their identity, such that they prioritize their religious beliefs over their sexual desires, which they view as incompatible. At the same time, many turn to conversion therapy because their religious teachings frame homosexuality as not only sinful but emotionally void, having heard from their families, peers, and community leaders that the “gay lifestyle” is promiscuous, diseased, addictive, and unnatural. Conversion therapy groups target their message to feed into

104. King v. Governor of N.J., 767 F.3d 216, 221 (2014); Nicolosi et al., supra note 79, at 697–98.
106. Flentje et al., supra note 102, at 1253; Elan Y. Karten & Jay C. Wade, Sexual Orientation Change Efforts in Men: A Client Perspective, 18 J. MEN’S STUD. 84, 94 (2010); Stanton L. Jones & Mark A. Yarhouse, A Longitudinal Study of Attempted Religiously Mediated Sexual Orientation Change, 37 J. SEX & MARITAL THERAPY 404, 409 (2011). This is also true for minors, whose religious beliefs play a significant role in the decision to seek conversion therapy. These teenagers are typically either religious and distressed by the conflict between their religious values and sexual attractions, or their parents seek conversion therapy for their children because of the family’s religious beliefs. Am. PSYCHOLOGICAL ASS’N, supra note 17, at 72–73; Ritter & Terndrup, supra note 91, at 280; SAMHSA, supra note 10, at 2, 18; Geoffrey L. Ream & Ritch C. Savin-Williams, Reconciling Christianity and Positive Non-Heterosexual Identity in Adolescence, with Implications for Psychological Well-Being, 3 J. GAY & LESBIAN ISSUES IN EDUC. 19, 19, 21–22 (2005); Raftery, supra note 98.
107. Jones & Yarhouse, supra note 106, at 409; SAMHSA, supra note 10, at 21; Am. PSYCHOLOGICAL ASS’N, supra note 17, at 3.
108. Am. PSYCHOLOGICAL ASS’N, supra note 17, at 25; Michael Benoit, Conflict between Religious Commitment and Same-Sex Attraction: Possibilities for a Virtuous Response, 15 ETHICS & BEHAV. 309, 309, 311 (2005); Flentje et al., supra note 102, at 1253.
109. Beckstead & Morrow, supra note 95, at 662; Karten & Wade, supra note 106, at 98. Another reason individuals seek conversion therapy is that some are married to
these fears, providing literature that incorporates negative depictions of homosexuality with religious doctrine, psychotherapeutic language, and the promise of community support.\textsuperscript{110} Thus, it is not just that individuals are responding to exhortations from scripture, but also from the deliberate spread of misinformation.

In addition to wanting to live according to their religious faith, conversion therapy participants value their place in their religious community and fear losing their familiar and reassuring church environment.\textsuperscript{111} The potential loss of their belief system, family, community, and core identity are such that it “is more realistic to consider changing sexual orientation than abandoning one’s religion of origin.”\textsuperscript{112} There are no data on the number of people seeking conversion therapy or how many minors receive conversion therapy services.\textsuperscript{113} However, Caitlin Ryan, a researcher at San Francisco State University, found that 34\% of LGBT young adults she surveyed reported having been sent to a religious leader or therapist to “cure, treat, or change [their] sexual orientation” as a teenager.\textsuperscript{114}

Conversion therapy is as deeply rooted in religious conversion as it is sexual transformation. This is why, in addition to theological proscriptions on homosexuality, conversion therapy is so connected to religious organizations. Among evangelical groups, participants become born-again Christians, reconstituting themselves sexually as they develop their religious identity.\textsuperscript{115} As Worthen, the founder of the first ex-gay ministry, explained, “we do not attempt to make heterosexuals out of homosexuals. Rather, we attempt to change a person’s identity” such that the person becomes “a Christian who has a homosexual problem, rather than a homosexual who believes in Christ Jesus. It is our hope that a person struggling with homosexuality will come to a place of wholeness in Christ.”\textsuperscript{116} According to ethnographer Tanya Erzen, for conversion therapy participants, “[s]exual identity is malleable and changeable members of the opposite sex, and therefore may lose their life partner and family if they cannot control or stop their same-sex attractions. \textit{Id.} at 86.

\begin{itemize}
  \item \textsuperscript{110} \textit{Am. Psychological Ass’n}, \textit{supra} note 17, at 25.
  \item \textsuperscript{111} \textit{Ritter & Terndrup}, \textit{supra} note 91, at 280; \textit{Am. Psychological Ass’n}, \textit{supra} note 17, at 47.
  \item \textsuperscript{112} Douglas C. Haldeman, \textit{When Sexual and Religious Orientation Collide: Considerations in Working with Conflicted Same-Sex Attracted Male Clients}, 32 \textit{Counseling Psychol.} 691, 694 (2004).
  \item \textsuperscript{113} In a 2005 report, the National Gay and Lesbian Task Force identified several conversion therapy programs that targeted adolescents, but none of them are in operation today. \textit{Cianciotto & Cahill}, \textit{supra} note 60, at 1, 11, 14–18.
  \item \textsuperscript{115} \textit{Erzen}, \textit{supra} note 50, at 3.
  \item \textsuperscript{116} Frank Worthen, \textit{Ex-Gay: Fact, Fraud, or Fantasy?}, \textit{Free ministry}, \texttt{www.freeministry.org/h/articles/worthen3.htm} (last visited Dec. 5, 2015).
\end{itemize}
because it is completely entwined with religious conversion. A person becomes ex-gay as he accepts Jesus into his life and commits to him.117 These individuals understand that they will continue to experience same-sex attractions and may even yield to their temptations, but root their identities in resisting temptation and reaffirming their commitment to Jesus, who forgives those who lapse so long as they repent.118 Participants in these religious ministries often refer to themselves as “ex-gay,” a label that represents the ongoing conversion process and a sense of identity that is in flux.119 In their testimonials, ex-gays focus on achieving an “identity in Christ.”120 Success is not only measured in changes to sexual attitudes, but also in submission to Jesus and Biblical teachings.121

Conversion therapy groups often provide a loving and accepting community that can be liberating and comforting for those who are struggling to reconcile their sexual and religious identities.122 As one psychologist who went through conversion therapy explained, “[t]he excitement of finding other like-minded people offering hope and acceptance is intoxicating. It can surely be described as ‘coming home.’”123 However, he also noted, the newness and excitement begin to fade after a honeymoon period, and the group’s tolerance for perceived failures lessened after an individual had been involved with the group for an extended period of time.124 One of the benefits that conversion therapy organizations may offer is a solution to spiritual struggles that have serious mental health consequences, including anxiety, depression, and suicidality.125 Conversion therapy thus provides a way of coping with a very real and harmful problem, offering relief to participants who are grateful to learn about the possibility of changing their same-sex desires.126

Recent changes in religious authorities’ stances on homosexuality have made conversion therapy more prominent and appealing. A number of religious groups have adopted a view of homosexuality that differentiates between the morally neutral issue of same-sex attraction and the sinful problem of same-sex sexual behavior. This creates a space for same-sex attracted religious individuals for whom chastity becomes a moral imperative.127 Early LDS authorities identified homosexuality as

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117. ERZEN, supra note 50, at 13.
118. Id. at 3–4.
119. Id. at 3.
120. Creek & Dunn, supra note 97, at 315.
121. ERZEN, supra note 50, at 3.
123. Id. at 73.
124. Id.
125. AM. PSYCHOLOGICAL ASS’N, supra note 17, 47.
an abomination and a “sin next to murder,” but have now distinguished between same-sex attractions and same-sex activities; like other religious groups, the LDS church has tempered its condemnation for homosexuality with compassion for homosexual individuals, adopting the stance of loving the sinner but hating the sin.128 These religious groups thus do not necessarily expel or shun those with same-sex sexual attractions, but rather embrace co-religionists who renounce their homosexuality, reaffirm their commitment to religious principles, and seek change.129 Thus, “[r]eparative therapy offers the fundamentalist homosexual a way to acknowledge his sexual and affectional feelings without fear of rejection. Seeking reparative therapy is seen as evidence of obedience and willingness to submit to God and Scripture.”130 This outlook helps explain why conversion therapy programs are directed towards devout individuals and are run by religious ministries. Not only do individuals participate in conversion therapy in hopes of having their sexual attractions conform to their religious beliefs, but these programs also provide a recognized avenue for integration with and acceptance by religious communities.

The theological shift permitted conversion therapy organizations to alter their definition of change, which became increasingly contested as scientists scrutinized the effectiveness of conversion therapy.131 As a result, some practitioners reframed their treatment, shifting from the promise to change sexual orientation to the more modest claim that individuals could alter their behavior. These groups explain that participants will always have to manage their attractions and consider celibacy a successful outcome.132 By acknowledging that physical attractions would linger and that the aim was to control behavior, religious ministries could diffuse the effect of the rising ex-ex-gay movement and media scandals revealing ex-gay ministry leaders’ sexual escapades with same-sex partners—including the founders and leaders of Exodus International, National Coming Out of Homosexuality Day, and Homosexuals

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128. Beckstead & Morrow, supra note 95, at 653; see also Drescher, supra note 86, at 78–79.
129. Erzen, supra note 50, at 3–4; Am. Psychological Ass’n, supra note 17, at 25.
130. Ford, supra note 122, at 71.
131. Waidzunas, supra note 74, at 115–16.
132. Drescher, supra note 86, at 80–81; Fjelstrom, supra note 102, at 815, 822; Roger L. Worthington, Heterosexual Identities, Sexual Reorientation Therapies, and Science, 32 Archives Sexual Behav. 460, 461 (2003). Nicolosi continues to maintain that it is possible to change sexual orientation, although he states that only a third of his patients develop heterosexual attractions. Robert L. Spitzer, Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation, 32 Archives Sexual Behav. 403, 404 (2003); Raftery, supra note 98.
Anonymous.\textsuperscript{133} This revised model characterizes behavior and identity as malleable but sexual orientation as a physiological fact.\textsuperscript{134}

However, not all conversion therapy providers differentiate between sexual orientation, behavior, and identity. Some counselors continue to claim that individuals can change both their behaviors and attractions, advertising that it is possible to become heterosexual.\textsuperscript{135} This perspective, which identifies sexual orientation as a chosen characteristic that an individual can elect to change, undergirds much of the political opposition to gay rights.\textsuperscript{136} These gay rights opponents claim that homosexuality’s mutability renders sexual orientation unlike race or sex and thus underserving of constitutional protections that extend to identity characteristics.\textsuperscript{137} While there are two distinct ideas around conversion, one focusing on orientation and the other on behavior, discourse around the bans does not differentiate between them and presents conversion therapy as a monolithic practice that seeks to alter sexual orientation rather than behavior.

2. \textit{Treatment Methods}

In treating participants, conversion therapy ministries combine psychoanalytic theory with religious belief, creating a hybrid practice that deploys scientific concepts to bolster theological perspectives. The ideas, practices, and goals of conversion therapy ministries, which connect sexual to religious conversion, make clear just how removed conversion therapy is from medical practice.

Conversion therapy ministries primarily adopt a reparative therapy approach, which relies upon psychoanalytic theories of arrested development to explain the causes of homosexuality.\textsuperscript{138} According to this model, homosexual men “suffer from a syndrome of male gender-identity deficit,” which results from a father’s failure to meet his son’s emotional needs and a mother’s domineering personality.\textsuperscript{139} Men are attracted to other men to satisfy their unmet love needs from childhood; they are seeking “to fill emotional and physical deficiencies in the relationship with the parent.

\begin{itemize}
\item[134.] Waidzunas, \textit{supra} note 74, at 4, 115–16.
\item[135.] Erzen, \textit{supra} note 50, at 4.
\item[136.] Id. at 6–7.
\item[137.] See infra Part II.B.
\item[139.] Nicolosi, \textit{Healing Homosexuality}, \textit{supra} note 54, at 211–12. See generally Nicolosi, \textit{Reparative Therapy of Male Homosexuality, supra} note 54, at 34–35, 77; Erzen, \textit{supra} note 50, at 145–46, 156.
\end{itemize}
of the same sex.\textsuperscript{140} Reparative therapists believe that by demystifying maleness and helping homosexual men develop stronger gender identifications, their patients’ erotic attractions to other men will diminish and they will gradually develop opposite-sex attractions.\textsuperscript{141} While reparative therapy has a developmental theory for men, its explanation for women’s homosexuality is almost non-existent. A small literature exists that blames mothers for creating masculine daughters, but the primary explanation for lesbianism is sexual abuse in childhood.\textsuperscript{142} Reparative therapists also view homosexual behavior as an addiction, such that conversion therapy helps clients feel “more in control and less consumed by homosexual preoccupations.”\textsuperscript{143} The theoretical framework for reparative therapy thus recycles many of the once-prominent ideas of homosexuality, which the medical mainstream slowly disavowed following the declassification.\textsuperscript{144} Nicolosi re-popularized these ideas among dissenters with his 1991 book, \textit{Reparative Therapy of Male Homosexuality}, which fuses psychoanalytic and spiritual thought, becoming a standard text for reparative therapists.\textsuperscript{145} The theory behind reparative therapy is particularly appealing for those seeking sexual conversion, because it identifies homosexual needs as normal, even if their sexual expression is not, and defines homosexuality as a condition rather than an immutable orientation.\textsuperscript{146} It also supports religious conservatives’ arguments about homosexuality as a choice and childhood as a potentially perilous time, as minors’ psychosexual development is shaped by their experiences with adults.\textsuperscript{147}

Conversion therapy treatments bridge reparative theories with religious doctrine, emphasizing the need to both repair gender deficits and submit to the word of God.\textsuperscript{148} Participants perform masculinity and femi-
ninity to cultivate gendered traits, which for men includes spending more time at the gym, wearing stereotypically male attire, and refraining from engaging in “feminine” pursuits, like playing the flute. Women, on the other hand, are given lessons in applying makeup and hairstyling, told to wear skirts, and discouraged from “masculine” activities, such as playing baseball. Participants are also encouraged to develop non-sexual friendships with members of the same-sex; these relationships are then monitored to ensure they do not cross any sexual boundaries. In addition to developing the gender roles that reparative theories posit are lacking, participants also engage in private and group talk therapy, which integrate religious doctrine and emphasize the need to live by Biblical proscriptions.

Ex-gay ministries have appropriated many of the concepts of twelve-step and recovery programs, particularly those of Alcoholics Anonymous, creating group settings in which participants confess their misdeeds and testify to their relationship with God. Participants also join one another in Bible study, where the group leader and other members reinforce and share religious teachings, and may be required to set aside time for personal prayer. This focus on living according to God’s will is further reinforced with cognitive behavioral modification techniques, which aim to change thought patterns by redirecting thoughts and reframing desires.

Some conversion ministries take more extreme measures, which include having participants reenact scenes of sexual abuse, beat an effigy of a parent, and snap a rubber band worn around the wrist whenever they feel sexual attraction for members of the same sex. By contrast, the

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**Homosexuality, supra note 54.**

149. Complaint and Jury Demand, supra note 96, at ¶ 54; Erzen, supra note 50, at 149; Fjelstrom, supra note 102, at 809; This Is What Love in Action Looks Like (Sawed-Off Collaboratory Productions 2011); Refuge Program Rules, Box Turtle Bull., http://www.boxturtleneck.com/Articles/000,022.htm (last visited Jan. 27, 2016).

150. Erzen, supra note 50, at 149; Fjelstrom, supra note 102, at 809.

151. Complaint and Jury Demand, supra note 96, at ¶¶ 7–8; Erzen, supra note 50, at 147; Fjelstrom, supra note 102, at 808.

152. Erzen, supra note 50, at 163, 181; Drescher, supra note 86, at 80–81; Raftery, supra note 98.


154. Dehlin, supra note 102, at 99; Drescher, supra note 86, at 80–81; Fjelstrom, supra note 102, at 808, 810; Ford, supra note 122, at 81.


156. Complaint and Jury Demand, supra note 96, at ¶¶ 8, 14.
identity exploration the American Psychological Association endorses emphasizes the need for compassion and respect for both sexuality and religion, and to explore the issues that the client raises without criticism or disapproval.\footnote{157. Am. Psychological Ass’n, supra note 17 at 55.} This includes helping patients reframe their desires, either by separating out personal feelings and social stigma or by recasting the problem as one of spiritual challenge rather than divine condemnation.\footnote{158. Id. at 58–59.} The American Psychological Association emphasizes that therapists should be clear on the difference between sexual orientation, behavior, and identity, and that while licensed practitioners might empathize with clients’ desire to change their sexual orientation, they need to manage patients’ expectations and emphasize that this change is unlikely.\footnote{159. Id. at 55.}

Regardless of the program’s goal—whether it seeks to “cure” individuals of homosexuality or help participants suppress their same-sex desires—the vast majority of participants do not attain the promised outcome, although there are no empirical studies that conclusively establish conversion therapy’s (in)effectiveness. More problematic is that researchers have found that many individuals suffer harm when they fail to achieve their desired ends, including depression, anxiety, shame, guilt, self-hatred, impaired relationships, and a loss of faith.\footnote{160. Am. Psychological Ass’n, supra note 17, at 28, 50; Erzen, supra note 50, at 131–32; Flentje et al., supra note 102, at 1247, 1257; Shidlo & Schroeder, supra note 155, at 257.} However, others—even those who found conversion therapy ineffectual—reported clear benefits, including an increased sense of belonging, social support, reduced distress, increased self-esteem, and strategies for living consistently with religious beliefs.\footnote{161. Am. Psychological Ass’n, supra note 17, at 28; Beckstead & Morrow, supra note 95, at 670; Flentje et al., supra note 102, at 1254; Shildo & Schroeder, supra note 155, at 257.} As a result, some conversion therapy participants who ultimately rejected the reparative therapy paradigm stated that conversion therapy options should nevertheless exist.\footnote{162. Beckstead & Morrow, supra note 95, at 673.} For some, the gains actually came from the programs’ ineffectiveness, as “reorientation therapy was very much part of the process by which they came to accept their own sexual orientation and to feel freed to identify as gay or lesbian.”\footnote{163. Id.; Shildo & Schroeder, supra note 155, at 257.} Through conversion therapy, participants did not change their sexual attractions, but rather came to terms with the immutability of their sexual orientation and were able to to reconcile their sexual and religious identities.\footnote{164. Flentje et al., supra note 102, at 1261.}

Conversion therapy’s treatment methods, which meld psychoanalysis and theology, reflect the religious nature of the practice. Indeed,
individuals typically seek conversion therapy because they want help reconciling their religious and sexual identities. Religious groups are the predominant providers of conversion therapy, given that the medical establishment has denounced it as unethical. Conversion therapy bans thus characterize a religious practice as a medical one, and proscribe a treatment that mental health professionals agree they should not offer.

II. EXPRESSIVE ENDS

Since the religious dimension of conversion therapy is far removed from the medical practice that the laws address, why have LGBT rights groups made the bans such a central part of their legislative agenda and why have commentators ignored the religious aspect of conversion therapy? It is true that the laws are prospectively useful, in that they likely have some effect in curtailing the behavior of the remaining dissenters and also create a barrier to regression. However, this answer seems insufficient and unsatisfying, given the extent and expense of the campaign. The better explanation is the laws’ substantial expressive power, which serve two extremely valuable purposes for the LGBT movement.

First, the bans identify conversion therapy writ large as ineffective and potentially harmful, a characterization that LGBT rights groups hope will create a broad social norm against conversion therapy. This furthers their desire to eliminate all forms of conversion therapy, no matter the practitioner. The bans’ criticisms of conversion therapy apply to all practitioners, not just licensed mental health professionals, and thus help serve as an oblique assault on all forms of conversion therapy.

Second, and as importantly, the bans undermine two interrelated arguments that religious conservatives have used to oppose gay rights claims. The laws help ratify the idea that sexual orientation is either a characteristic that no one should be forced to change, or is immutable and thus cannot be altered. LGBT rights groups have seized on the latter in their discussions of the laws, as pressing forward a claim about sexual orientation’s immutability has been central to both establishing gay rights and refuting opposition arguments. Additionally, the laws indicate that the state needs to take an active role in protecting LGBT youth, a radical reformulation of typical child protection arguments, which have focused on defending minors from the dangers of LGBT adults. The normative shifts that the laws introduce are extremely consequential for contemporary LGBT rights battles, with implications for debates over antidiscrimination laws, protections for sexual minority youth, and LGBT adoption and foster care rights.

165. See Telephone Interview with Samantha Ames, supra note 18.
A. Attacking Conversion Therapy of All Kinds

On their face, the laws only apply to licensed mental health practitioners and conversion therapy offered to minors. However, because of the expressive function of the lawmaking process, their reach is actually far more extensive: they indirectly affect all forms of conversion therapy, including when offered by religious and lay counselors, and when the patients are adults.

1. Disarming the Opposition

Before turning to the laws’ expressive elements, it is important to recognize the practical issues that have resulted in the laws’ specific framing. There are legal and political considerations that have led the campaign to limit its legislative efforts to bills that address licensed mental health professionals and the treatment of minors. Given these realities, the laws could not have been drawn in a way to regulate the conduct of religious and lay ministers.

The laws’ limited applicability—that they do not reach religious practitioners—has reduced the controversy around them and made it possible for legislatures to enact the statutes. In recent years, the clash between Christian beliefs and gay rights have taken center stage in American politics, with the Constitution’s First Amendment protection of religion pitted directly against the Fourteenth Amendment’s guarantee of equality. Religious exemptions to gay rights laws have been the centerpiece of current controversies, with faith and non-discrimination vying for supremacy in American political consciousness. However, debates over conversion therapy bans have avoided discussions of the religious dimension of the practice.

This is in large part because the bans on their face do not apply to religious groups, such that the laws’ advocates have been able to foreclose discussions regarding the laws’ impact on religion. In Washington D.C., the Gay and Lesbian Activists Alliance ended this line of questioning by stating: “Let us be clear: we do not seek to restrict freedom of speech or religion. We seek to regulate licensed therapy.” In Oregon, a coalition of faith leaders submitted a letter of support for the conversion

166. See, e.g., Tony Cook, Gov. Mike Pence Signs “Religious Freedom” Bill in Private, INDY STAR, Mar. 25, 2015; George Rede, Sweet Cakes Final Order: Gresham Bakery Must Pay $135,000 for Denying Service to Same-Sex Couple, OREGONIAN, July 2, 2015; Sheryl Gay Stolberg, Kentucky Clerk Defies Court on Marriage Licenses for Gay Couples, N.Y. TIMES, Aug. 13, 2015.


therapy law, stating it did not infringe on religious freedom because the statute “does not apply to clergy or to individuals who provide religious instruction.”169 The strategy of limiting the bans to licensed mental health professionals is also the product of the legal environment. The state has clear authority to regulate individuals it licenses, while laws that directly affect religious practices are subject to strict scrutiny.170 The bans’ limited scope therefore makes it more likely that courts will uphold the laws.

The laws’ opponents also have strategic reasons for not wanting to draw attention to the religious dimension of conversion therapy, as religious conservatives have benefited politically from associating conversion therapy with medicine. In the 1990s, the Religious Right began drawing upon scientific literature to provide secular justifications for its antigay politics, which allowed conservative groups to reach voters who distrusted religious extremism.171 By emphasizing the mutability of homosexuality and using the testimony of ex-gays to personalize the scientific studies it cited, the Religious Right provided a modernized argument for why gays and lesbians were undeserving of civil rights protections.172 It did so as part of a larger strategy it adopted in the 1980s, when the Religious Right turned to scientific authority to buttress its religious claims. As historian Emily Johnson has argued, conservative Christians “actively courted the mantle of scientific authority,” using scientific theories to produce secular explanations that promoted the Religious Right’s worldview.173 These efforts included the production of “Intelligent Design” curricula and “Creation Science” museums as an alternative to the theory of evolution.174 This tactical innovation allowed the Religious Right to break its connection to biblical literalism and claim “a certain degree of


scientific legitimacy,” crucial in a society that values both religious convictions and the scientific method.\textsuperscript{175}

The success of this secular approach has rendered claims to scientific authority central to religious conservatives’ political strategy, making it difficult for conservative groups to argue that conversion therapy is a nonscientific, religious practice. As a result, in legislative committee debates opponents have mostly refrained from discussing the religious nature of conversion therapy, except when describing their own, positive experiences.\textsuperscript{176} Instead, their arguments have been rooted in First Amendment free speech principles, the rights of parents to raise their children without undue government interference, and studies showing that conversion therapy can be effective.\textsuperscript{177} Perhaps part of the reason why the conversion therapy bans are so threatening to the conservative movement is not because they limit access to practitioners, but because the laws withdraw scientific credibility from the religious endeavor.

The second factor that limits the bans’ scope— their application to minors— has also made the laws easier to enact by preempting objections that the bans interfere with individuals’ autonomy. While LGBT rights advocates argue that adults are harmed by conversion therapy in much the same way as children, it is the coercion that adolescents face from their parents and community members that has convinced legislators to act.\textsuperscript{178} Interestingly, the first law LGBT rights groups proposed also

\begin{footnotesize}
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\item \textsuperscript{175} Lienesch, supra note 174, at 221; see also Gallagher & Bull, supra note 171, at 28.
\item \textsuperscript{177} No on HB2307-A Engrossed: Hearing on HB 2307 Before the S. Comm. on Human Servs. & Early Childhood, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Rebecca Roth); Therapy Ban Hearing, supra note 176 (testimony of Gordon B. Morrison, Marion County Precinct Committee Person); Testimony Opposing House Bill 2307: Hearing on HB 2307 Before the S. Comm. on Human Servs. & Early Childhood, 2015 Leg., 78th Sess. (Or. 2015) [hereinafter Testimony Opposing House Bill 2307] (written testimony of Lori Porter, Director of Parents’ Rights in Education); Conversion Therapy for Minors Prohibition Act Hearing, supra note 176, at 9 (testimony of Christopher Doyle, Director, International Healing Foundation); Conversion Therapy for Minors Prohibition Act Hearing, supra note 176, at 32 (testimony of David Pickup); Conversion Therapy for Minors Prohibition Act Hearing, supra note 176, at 51 (testimony of Peter Sprigg, Senior Fellow for Policy Studies, Family Research Council); Testimony Opposing House Bill 2307, supra, (email testimony of Linda Eskridge); EQUAL AND JUSTICE FOR ALL, Heterosexual-Affirming Therapy Fact Sheet, www.massresistance.org/docs/gen2/14b/ban-therapy-bill/docs/Heterosexual-Affirming-Facts-2014.pdf (last visited Feb. 6, 2017).
\item \textsuperscript{178} Interview with Samantha Ames, supra note 18.
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encompassed adults; the initial version of the California bill provided a private right of action against therapists who conducted conversion therapy without informed consent, thereby protecting adults as well as minors. That bill required therapists to warn clients of all ages that “[s]exual orientation change efforts have not been shown to be safe or effective and can, in fact, be harmful. The risks include, but are not limited to, depression, anxiety, self-destructive behavior, and suicide.” However, a Senate floor amendment removed this provision, limiting the ban’s reach to minors. The laws’ limited application has also helped them survive judicial scrutiny, with courts noting that children are especially vulnerable and therefore may require more protection from the state than adults.

2. Expressive Function

LGBT rights groups have strategic reasons for promoting the limited laws insofar as their scope has made the bans easier to enact and more likely to withstand judicial scrutiny. At the same time, the laws still further the movement’s broader agenda: they shape social norms through their expressive function. LGBT rights groups have harnessed the expressive power of the bans to undermine conversion therapy as a whole and thus have attained many of the benefits that would attach to more sweeping laws without risking legislative pushback or judicial losses.

As a number of legal scholars have argued, law has both material and expressive consequences, such that “law matters for what it says in addition to what it does.” The law expresses messages through its authorization, regulation, and proscription of conduct. Law shapes individuals’ behavior not only because of the legal penalties that are associated with violating a regulation, but also because of the reputational

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182. King v. Governor of N.J., 767 F.3d 216, 240 (3d Cir. 2014); Pickup v. Brown, 740 F.3d 1208, 1232 n.8 (9th Cir. 2013). For a discussion of cases testing the line between the parental and state authority over child welfare, see generally SHAWN FRANCIS PETERS, WHEN PRAYER FAILS: FAITH HEALING, CHILDREN, AND THE LAW (2008).
consequences of contravening the social norm.\textsuperscript{185} That is, law can change the social meaning of an action.\textsuperscript{186} It may also alter a person’s beliefs, but individuals do not need to agree with a value for the law to initiate social change.\textsuperscript{187} Even if individuals object to a policy choice, by conforming to the law, they create a cultural environment that supports the law’s normative commitment.\textsuperscript{188} As social movement scholars have noted, this has a feedback effect, creating a culture that shapes how laws are then understood.\textsuperscript{189} Thus, even if a law does not affect a specific individual’s conduct, it still may have an expressive impact on that person. It is precisely because laws express values and shape social norms that ideological interest groups have pursued symbolic statutes on a range of topics, including legislation that repeals unenforceable prohibitions on miscegenation, prohibits flag-burning, and opposes the theory of evolution.\textsuperscript{190} The LGBT movement has long recognized the importance of law’s expressive function, as the recent fight for marriage equality demonstrates. For advocates, securing the right to \textit{marry}—not just enjoy the benefits of marriage through civil unions—was essential because of the expressive function of the marriage label.\textsuperscript{191}

However, even before a law is enacted, the lawmaking process has an expressive effect. Legislators send a message when they first consider a bill; by demonstrating their commitment to and prioritization of an issue, legislators are signaling their approval of the values that the bill contains.\textsuperscript{192} The fact that a statute passes the two legislative chambers and

\textsuperscript{185} McAdams, supra note 184, at 340; Wittlin, supra note 183, at 424.
\textsuperscript{190} McAdams, supra note 184, at 379–80.
is approved by the executive signals a wider acceptance of the norms the law promotes and ratifies the messages of the lawmakers. Both before and after enactment, supporters and opponents disseminate information about the law and what it means, creating a discourse that shapes the law’s ultimate message. Some laws’ expressive intentions are clear while others are ambiguous, and lawmakers, advocates, and commentators can influence how citizens understand what the law signifies. The law is thus imbued with an expressive message from its inception that is completely separate from its regulation of conduct, but this message can be contested. At the period of inception, debate, and enactment, it is what those involved convey to the public that determines what citizens understand the law to mean, as well as its normative commitment.

That the lawmaking process has an expressive effect is clear from conversion therapy bans, as this is what is allowing LGBT rights groups to expand the laws’ reach. To create a broad social norm against all types of conversion therapy, LGBT rights groups and their allies have used the lawmaking process and its attendant legislative hearings, political debates, and media accounts to educate the public about the practice’s dangers. The laws have produced an outpouring of information about conversion therapy, making it more widely available, but it is important to distinguish information from education, as education is deeply normative. The sponsor of the California bill explained that his purpose was not only “to limit deceptive therapies that are harmful to minors,” but also to make “adults aware of the potential harms associated with sexual orientation change therapies.” This normative educative purpose is also evident in the statements individuals have made to legislative committees. In testifying about their personal experiences, supporters have asserted they would not have sought conversion therapy had information on its harms been available and urged lawmakers to enact the bans so others would not be similarly deceived. When presenting their arguments to legislative committees, supporters of the bans have repeatedly emphasized that conversion therapy is dangerous and can result in anxiety, depression, shame, hopelessness, and suicide, offering statistical evidence to support their arguments. Legislatures have also heard evidence that conversion

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193. Interview with Samantha Ames, supra note 18.
194. Third Reading, supra note 181.
195. See Therapy Ban Hearing, supra note 176 (testimony of Jason Zenobia); Conversion Therapy for Minors Prohibition Act Hearing, supra note 176 (testimony of Melanie Shurka); Conversion Therapy for Minors Prohibition Act Hearing, supra note 176 (testimony of Matthew Shurka).
196. See Therapy Ban Hearing, supra note 176 (testimony of Samantha Ames, National Center for Lesbian Rights); Therapy Ban Hearing, supra note 176 (testimony of Alison Gill, Human Rights Campaign); Therapy Ban Hearing, supra note 176 (testimony of Kate Kaufman, TransActive Gender Center); Therapy Ban Hearing, supra note 176 (testimony of Buster Ross); Therapy Ban Hearing, supra note 176 (testimony of Paul Southwick); Therapy Ban Hearing, supra note 176 (testimony of Jason Zenobia);
therapy is often ineffectual and have included statements to this effect in their legislative findings.197 While the legislative debates have focused on how conversion therapy impacts youth, the same arguments apply to adults. As a result, the evidence the legislative hearings has adduced, which the media has circulated into popular discourse, provides information so that the public can educate itself about conversion therapy in broad terms, not just as applied to minors or when practiced by licensed professionals.

California and other states’ bans have garnered a great deal of media attention, disseminating information about the limits and dangers of conversion therapy. Indeed, news reports on conversion therapy increased by almost 800% after California first introduced a ban.198 While there is no way to know whether these laws are effective in raising adults’ awareness of the dangers and limits of conversion therapy, social science literature has shown that “the mere publicity of disapproval affects behavior.”199 At the very least, the fact that conversion therapy is being discussed indicates that those interested in learning about the practice have more information available to them.200 It does appear that more people are seeking information on the topic, as Google searches for “conversion therapy” and related terms increased dramatically between 2012 and 2016.201

Conversion Therapy for Minors Prohibition Act Hearing, supra note 176 (testimony of Andrew Barnett); Conversion Therapy for Minors Prohibition Act Hearing, supra note 176 (testimony of Alison Gill, Human Rights Campaign); Conversion Therapy for Minors Prohibition Act Hearing, supra note 176 (testimony of Gregory Jones); Conversion Therapy for Minors Prohibition Act Hearing, supra note 176 (testimony of Apryl Prentiss); Conversion Therapy for Minors Prohibition Act Hearing, supra note 176 (testimony of Matthew Shurka); Therapy Ban Hearing, supra note 176 (memorandum of Nico Quintana, Basic Rights Oregon); Therapy Ban Hearing, supra note 176 (letter from American Counseling Association); Therapy Ban Hearing, supra note 176 (memorandum of Oregon Psychological Association).


198. A Westlaw search for news articles with the phrases “conversion therapy,” “reparative therapy,” or “sexual orientation change efforts” published between February 21, 2012 (the date California introduced its ban) and January 17, 2016, produced 4,321 results. A Westlaw news search for articles with the same terms published between February 20, 2008 and February 20, 2012, the four year span before California introduced its ban, produced 486 results. This constitutes a 789% increase.

199. McAdams, supra note 184, at 368–69.


Notably, however, the debates have not included information about alternatives to conversion therapy for individuals who want help reconciling their religious and sexual identities. Thus, while these individuals will learn that conversion therapy is harmful, the laws will not help them identify useful options—such as sexual identity therapy. This is perhaps unsurprising, since LGBT rights advocates consider conversion therapy to be harmful not just in its effects on individuals, but because it promotes the idea of homosexuality as something that is undesirable, such that someone would want it changed. As a result, their goal is to undermine conversion therapy as a practice, not help religious individuals find a replacement. This underscores the normative commitment of the groups supporting the bans and how it is deploying the expressive effects of law and the lawmaking process. What is striking is that the laws appear to include an exception for sexual identity exploration, but this goes unmentioned in the discourse around the statutes. That message in the text is thus silenced, demonstrating how important rhetoric is to the law’s expressive effects.

The anti-conversion therapy campaign has raised the profile of this issue, garnering the attention of national political leaders and making Americans more aware of conversion therapy. In April 2015, the White House issued a statement supporting conversion therapy bans for minors. It also endorsed public information campaigns, including the It Gets Better Project, that build support for LGBT youth. Under the Obama Administration, the Substance Abuse and Mental Health Services Administration (SAMHSA) issued a report on conversion therapy, concluding the practice was inappropriate and should be ended. As noted in the introduction, 2016 Democratic presidential candidate and former Secretary of State Hillary Clinton tweeted, “It is time to put an end to conversion therapy for minors. We should be supporting LGBT kids—not trying to change them.” Of course, the attention from politicians has not been entirely supportive of the LGBT movement’s campaign. In 2014, the Texas Republican Party platform stated that “homosexuality is a choice” and endorsed “therapy aimed at ‘curing’ people of being gay.”

(search terms “conversion therapy,” “reparative therapy,” and “sexual orientation change efforts”).

202. Interview with Samantha Ames, supra note 18.
205. SAMHSA, supra note 10, at 37.
206. Id.
Former Texas Governor Rick Perry has told supporters that “homo-
sexuality [is] like alcoholism: whether or not you feel compelled to do
something, you have the ability not to act on your urges.”

In 2016, the national Republican Party controversially included its opposition to con-
version therapy bans in its national platform, although it is unclear what
position the Trump Administration will take on the subject.

The bans have made conversion therapy part of a national con-
versation, garnering widespread attention. By helping to disseminate
information about the practice’s potential harms, advocates hope to
create a social norm against the practice. Thus, even though the laws only
apply to licensed mental health professionals who treat minors, their
reach is much broader. They are much more than the four corners of their
pages, which explains why the LGBT movement is pursuing these laws.

B. Attacking Antigay Legal Rhetoric

The bans’ expressive effects have a significant influence on the
LGBT movement beyond the question of conversion therapy, as they
implicate broader questions relevant to LGBT rights. Through these
laws, LGBT rights groups are able to emphasize that homosexuality is
an immutable characteristic, an issue that has been central to establish-
ing rights claims. Additionally, by reframing child protection to focus on
LGBT youth, the laws reverse a longstanding historical narrative that
has undermined gay rights. Conservative religious groups have opposed
gay rights for decades on the basis of child protection, claiming that the
state must take a disapproving stance on homosexuality lest children be
seduced into the “homosexual lifestyle.” The child protection claims gain
strength from conservatives’ belief in homosexuality’s mutability, with
the two ideas serving as mutually reinforcing arguments. These claims
continue to shape LGBT rights debates, making these bans, through their
expressive effects, especially important for LGBT advocates.

1. Historical Arguments

Conservative religious groups have used arguments of mutability
and child protection to oppose a range of gay rights, including sexual ori-
entation antidiscrimination laws, gay and lesbian teachers, multicultural
school curricula, and marriage equality. While these arguments initially
appeared in the discourse of the Religious Right, which coalesced in the
1970s, and reached their zenith in the 1990s, they persist today.

The related ideas about homosexuality’s mutability and the need to
protect children have infused debates over gay rights since the Religious

209. Id.

210. REPUBLICAN NAT’L COMM., supra note 13, at 37; Samantha Allen, Why Presi-
dent Trump Isn’t Anti-Gay Enough for the Religious Right, DAILY BEAST (Feb. 17, 2017,
12:00 PM), http://www.thedailybeast.com/articles/2017/02/17/why-president-trump-isn-
t-anti-gay-enough-for-the-religious-right.html.
Right’s early antigay crusades. One of the first was Anita Bryant’s 1977 voter referendum campaign to overturn Miami’s antidiscrimination law, which had been amended to include protections for gays and lesbians.\textsuperscript{211} Bryant, a well-known singer, prolific author, and spokeswoman for Coca-Cola and Florida Citrus, argued the state should not protect the rights of homosexuals by contending that homosexuals posed a danger to children.\textsuperscript{212} Calling her organization “Save Our Children,” Bryant’s campaign emphasized: “Homosexuals cannot reproduce—so they must recruit. And to freshen their ranks, they must recruit the youth of America.”\textsuperscript{213} The fear of homosexual role models was a central part of Bryant’s campaign, as Mike Thompson, the chair of the Florida Conservative Union, explained. According to Thompson, the referendum was necessary to counter “role modeling homosexuals, the ones who aren’t openly recruiting, but who don’t stay in the closet,” identifying the problem as “the homosexual who is blatant in his profession of his preferences and who gives the impression to young people that this lifestyle is not odd or to be avoided, but just an alternative.”\textsuperscript{214}

The campaign’s focus on indoctrination introduced a rhetoric that would characterize later antigay campaigns. While reporters discounted Save Our Children’s “homosexual recruitment” claims, they resonated with the general public as well as political leaders.\textsuperscript{215} Florida’s Democratic governor, Reuben Askew, spoke out in support of Bryant’s campaign, explaining, “If I were in Miami . . . I would have no difficulty in voting to repeal that ordinance. I would not want a known homosexual teaching my children.”\textsuperscript{216} Miami residents overwhelmingly voted to repeal the amendment, with 70% of voters approving the measure.\textsuperscript{217} The Dade referendum received widespread media attention and became a matter of national debate, with \textit{Newsweek} characterizing the vote as “a crucial test of whether the country [was] willing to extend civil-rights legislation to homosexuals.”\textsuperscript{218}

The next year, California senator John Briggs launched a statewide referendum to bar gays and lesbians from teaching in public

\textsuperscript{212.} \textsc{Anita Bryant, The Anita Bryant Story} 89 (1977).
\textsuperscript{213.} \textit{Id.} at 62.
\textsuperscript{215.} Fred Fejes, \textsc{Gay Rights and Moral Panic: The Origins of America’s Debate on Homosexuality} 140 (2008); Frank, \textit{supra} note 211, at 146.
\textsuperscript{217.} \textit{Id.} at 299, 303–04, 308; Fejes, \textit{supra} note 215, at 96, 121, 123, 131.
\textsuperscript{218.} Tom Mathews et al., \textit{Battle Over Gay Rights}, \textit{Newsweek}, June 6, 1977, at 16.
schools, calling his organization “California Save Our Children.”

Briggs explained the law was necessary because homosexuality was a learned behavior: “What I am after is to remove those homosexual teachers who through word, thought or deed want to be a public homosexual, to entice young impressionable children into their lifestyle.”

Briggs’s Proposition 6 also applied to heterosexuals who advocated, encouraged, or promoted homosexual activity, such that a teacher who merely spoke to friends in favor of gay rights could lose his or her job. This expansive scope led to Proposition 6’s failure, with voters criticizing the measure as creating “more government and a Big Brother atmosphere.”

While California voters rejected Proposition 6, the campaign reflected a national discomfort with the idea of gays and lesbians in the classroom, as their presence could influence children’s psychosexual development. Consequently, even when laws did not explicitly prohibit homosexual teachers, educators throughout the country lost their jobs when their sexuality became known, as parents and school districts complained that gay faculty would influence their students to become homosexual. In 1983, the West Virginia Attorney General issued an opinion that a state law allowing school districts to fire teachers for “immorality” applied by definition to gay and lesbian teachers. Many homosexual educators therefore stayed in the closet, afraid that revealing their sexuality would mean losing their careers and livelihoods.

Evangelical leaders contributed to this national conversation by emphasizing the danger that homosexual teachers posed to children. These arguments incorporated claims about homosexuality as a mutable characteristic, as they were based on the idea that the presence of gay teachers would result in youth choosing homosexuality. Jerry Falwell, the founder of the Moral Majority, explained that allowing gays and lesbians to teach “might be an open invitation for [homosexuals] to subvert our young and impressionable children into their lifestyle.” Likewise, Beverly LaHaye, who founded Concerned Women for America, warned that “[e]very homosexual is potentially an evangelist of homosexuality, capable of perverting many young people to his sinful way of life.”

220. Id.
221. Id.
222. Id. at 209.
223. Id. at 211.
226. Irvine, supra note 171, at 173.
response to these fears, in 1978, Oklahoma amended its law to permit
the dismissal of any teachers who “advocate[ed], solicit[ed], impos[ed],
encourag[ed] or promot[ed] public or private homosexual activity.”228

The Religious Right also waged battles to protect children from
homosexuality through debates over the content of instructional mate-
rials in schools.229 These curricular debates became heated in the early
1990s, after New York City introduced the multicultural “Children of the
Rainbow” curriculum for first graders in its public schools.230 The Rain-
bow guide urged teachers to discuss the value of every type of family
household, “including two-parent or single-parent households, gay or les-
bian parents, divorced parents, adoptive parents, and guardians or foster
parents.”231 While only two of the curriculum’s 443 pages mentioned gay
and lesbian families, and did not include any lessons that explained homo-
sexuality to the children, it included in its list of recommended readings
three books that became a focal point of the controversy—Heather Has
Two Mommies, Daddy’s Roommate, and Gloria Goes to Gay Pride—for
their depiction of loving gay parents.232 Upon learning of the Rainbow
curriculum, national and local conservative groups became involved in
efforts to prevent its introduction, creating a vitriolic debate that cen-
tered on the language of recruitment and depicted education reformers
as allowing sexual deviants to prey on youth. As one New York activist
explained, “It was the first time that someone was probably trying to woo
our children into a [gay] lifestyle . . . . The curriculum for the first time
was systematically going to recruit them and going to make them accept-
ing of that lifestyle.”233 While polls showed that 70% of New York City
parents initially supported the Rainbow curriculum, the controversy led
almost every school district to eliminate the multicultural guide by the
end of 1992.234

The Religious Right’s protests in New York City had a nation-
wide effect, with communities all over the country expressing concern
that children were being indoctrinated into homosexuality in schools.235
In the wake of the Rainbow controversy, several states prohibited their
schools from using instructional materials that portrayed homosexuality
as “an acceptable lifestyle.”236 School districts around the country became

229. Rosky, supra note 20, at 608.
231. Id.; Steven Lee Myers, How a “Rainbow Curriculum” Turned into Fighting
232. Gallagher & Bull, supra note 171, at 219–20; Myers, supra note 231.
234. Id. at 154–55; see also Myers, supra note 231.
235. Stuart Biegel, The Right to be Out: Sexual Orientation and Gender
Identity in America’s Public Schools 82–84 (2010).
embroiled in debates over how to address sexual orientation in schools; the Sexuality Information and Education Council of the United States documented more than 500 battles in all fifty states between 1992 and 1997.\textsuperscript{237} Opposition to gay and lesbian teachers remained pervasive in the 1990s and 2000s. Indeed, Justice Scalia remarked in his 2003 dissent to \textit{Lawrence v. Texas} that “[m]any Americans do not want persons who openly engage in homosexual conduct as . . . teachers in their children’s schools.”\textsuperscript{238} As this demonstrates, the notion that gays and lesbians are dangerous role models has had incredible staying power, rendering the expressive effects of the conversion therapy bans extremely important.

Parents were not the only ones who expressed concerns about homosexuality, with voters taking up gay rights issues throughout the 1990s and 2000s. Bryant’s success in 1977 led others to sponsor referenda around the country; religious conservative organizations proposed more than 245 referenda and initiatives by 2009.\textsuperscript{239} In 1992, one of these initiatives garnered nationwide attention: Colorado’s Amendment 2, which prohibited the state from protecting gays, lesbians, and bisexuals from discrimination on the basis of their sexual orientation.\textsuperscript{240} During the Amendment 2 campaign, the initiative’s sponsor, Colorado for Family Values (CFV), made child protection a critical message. Like Bryant’s 1977 campaign, which claimed children would become homosexual through indoctrination, CFV cast the danger as children being taught that homosexual “lifestyle” was “health[y] and normal.”\textsuperscript{241} According to this theory, children might be tempted into homosexuality once it was no longer a stigmatized behavior.\textsuperscript{242} In its printed campaign materials, CFV
proclaimed that children were already being taught that homosexuality was desirable, making the danger more immediate and conveying the urgency of the initiative. One pamphlet loudly announced: “Homosexual indoctrination in the schools? IT’S HAPPENING IN COLORADO!”

Connected to the rhetoric of child protection was the idea that homosexuality was a mutable characteristic that individuals could choose. CFV repeatedly emphasized that it respected and sought to protect the rights of what it called “legitimate minorities,” which were characterized by immutable characteristics like race or sex, but was opposed to “special rights” for gays and lesbians, who had chosen their sexuality. To buttress this claim, CFV pointed to social scientific evidence that homosexuality was a learned behavior, not a biological trait with genetic origins. It also emphasized the effectiveness of conversion therapy, which demonstrated that homosexuality could be overcome. Through “compassionate therapy” and religious counseling, the group maintained, gays and lesbians could change their behavioral patterns, demonstrating that homosexuality was not an immutable, biological characteristic. CFV described its “deep[est] purpose” as “bring[ing] a message of hope” to homosexuals. In taking this approach, the group provided an important counter to the gay rights movement, which had stressed the immutability of sexual orientation to argue for heightened judicial scrutiny of discriminatory laws. The measure passed by 53% of the vote, with CFV’s victory emboldening a number of other organizations to sponsor initiatives that mirrored Amendment 2. Between 1992 and 1996, groups around the

243. Letter from Danni Lederman, Fund Raising Coordinator of Colo. Legal Initiatives Project, to Colo. Legal Initiatives Project supporters on CFV Statements (Jan. 15, 1992) (on file with GLBT Historical Soc’y, Phyllis Lyon/Del Martin Papers, Collection No. 1993-13, Box 98, Folder 1) [hereinafter Lyon/Martin Papers]; see also ACLU, supra note 240, Appendix of CFV Advertising.

244. ACLU, supra note 240, Appendix of CFV Advertising; CFV, How Voting “Yes!” on Amendment 2 Protects Colorado’s True Minorities (on file with Equality Colo. Records, Box 15, Folder 2); CFV, Civil Right Should be Based on Real Need – Not How People Have Sex! (on file with Equality Colo. Records, Box 15, Folder 2).


247. Information About the Colorado for Family Values Petition, supra note 246; Pamphlet of No Special Rights Committee, supra note 246.


250. Id. at 27.
country made forty-six different attempts to enact initiatives modeled on Amendment 2, relying upon the twin claims of child protection and homosexuality's mutability to justify the laws.\textsuperscript{251} Most were preempted through state legislative action, did not obtain enough signatures to be placed on the ballot, or were ruled invalid by courts.\textsuperscript{252} However, Idaho and Oregon both came close to enacting versions of Amendment 2 in 1994, with the initiatives failing by only 1\% of the vote in both states.\textsuperscript{253} After the Supreme Court's 1996 ruling in \textit{Romer v. Evans}, which held that such measures were unconstitutional,\textsuperscript{254} the Religious Right turned its ballot initiative efforts to same-sex marriage bans.\textsuperscript{255}

Same-sex marriage became a matter of national debate in 1996, after a Hawaii court ruled that the state constitution protected same-sex couples' right to marry.\textsuperscript{256} In the years that followed, legislatures and voters enacted laws prohibiting same-sex marriage, with child protection and immutability a common refrain in the debates.\textsuperscript{257} In 1998, citizens in Hawaii and Alaska became the first to ban gay marriage by popular vote following ballot campaigns that emphasized the danger same-sex marriage posed to schoolchildren.\textsuperscript{258} In both states, the laws' sponsors argued that grade school children would be taught "that homosexual marriage was normal."\textsuperscript{259} Other anti-marriage initiative campaigns repeated this claim, which proved effective at swaying voters. In 2004, the Oregon Defense of Marriage Coalition created an advertisement featuring Clark Brody, the former Deputy Superintendent of Public Education. Brody claimed schools would have to promote same-sex relationships as equal to heterosexual ones, which would be "confusing for our students."\textsuperscript{260} As Michael Klarman has argued, "This ad capitalized on the fear of many parents who might have been willing to accept their children as gay if

\begin{itemize}
  \item \textsuperscript{252} Keen, supra note 251.
  \item \textsuperscript{254} 517 U.S. 620, 632–36 (1996).
  \item \textsuperscript{255} \textit{Stone, supra} note 239, at 11–12.
  \item \textsuperscript{257} Carlos A. Ball, \textit{Same-Sex Marriage and Children: A Tale of History, Social Science, and Law} 76 (2014).
  \item \textsuperscript{258} Michael. J. Klarman, \textit{From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage} 66–67 (2013); \textit{Stone, supra} note 239, at 33.
  \item \textsuperscript{259} Klarman, \textit{supra} note 258, at 67; see \textit{Stone, supra} note 239, at 33.
\end{itemize}
they turned out to be so but nonetheless preferred that they be straight and thus opposed schools’ possibly influencing the children’s choice by treating homosexuality as acceptable.”\textsuperscript{261} The advertisement, which preyed upon parents’ heterosexism, demonstrated the limits of the tolerance gays and lesbians had attained. Oregon was one of thirteen states in which voters elected to ban same-sex marriage in 2004.\textsuperscript{262}

The voter initiative campaign that best exemplifies how arguments about child protection had become the pillar of anti-marriage advocacy took place in California in 2008. After the state supreme court overturned a restrictive marriage law enacted through a voter initiative in 2000, Protect Marriage sponsored a state constitutional amendment to limit marriage to opposite-sex couples.\textsuperscript{263} The group emphasized child protection in the official ballot pamphlet, which explained that Proposition 8 “protects our children from being taught in public schools that ‘same-sex marriage’ is the same as traditional marriage,” and warned that, without the ban, “TEACHERS COULD BE REQUIRED to teach young children there is no difference between gay marriage and traditional marriage.”\textsuperscript{264} One of the group’s most effective commercials, entitled \textit{It’s Already Happened}, featured a pigtailed girl breathlessly telling her mother: “Guess what I learned in school today? . . . [A] prince [can marry] a prince, and I can marry a princess!”\textsuperscript{265} The commercial explicitly connected the lessons children would learn in school about same-sex marriage to its effect on their future sexual orientations. A post-election report concluded this ad was especially effective in persuading parents with school-age children to vote in favor of Proposition 8.\textsuperscript{266}

The Ninth Circuit characterized the child protection rhetoric of Proposition 8 as a repetition of decades-old antigay messaging, which ballot measure sponsors had “presented to voters in terms designed to appeal to stereotypes of gays and lesbians as predators, threats to children, and practitioners of a deviant ‘lifestyle’” since Anita Bryant’s Miami referendum in 1977.\textsuperscript{267} However, Protect Marriage’s messaging was slightly

\begin{itemize}
\item \textsuperscript{261} Klarman, supra note 258, at 108.
\item \textsuperscript{262} Daniel R. Pinello, America’s Struggle for Same-Sex Marriage 175 (2006).
\item \textsuperscript{263} In re Marriage Cases, 183 P.3d 384 (Cal. 2008), superseded by constitutional amendment Cal. Const. art I, § 7.5.
\item \textsuperscript{264} Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 930 (N.D. Cal. 2010) (emphasis omitted).
\item \textsuperscript{265} VoteYesonProp8, Yes on 8 TV Ad: It’s Already Happened, YouTube (Oct. 7, 2008), https://www.youtube.com/watch?v=0PjgcqFY4.
\item \textsuperscript{266} Ball, supra note 257, at 112; David Fleischer, The Prop 8 Report: What Defeat in California Can Teach Us About Winning Future Ballot Measures on Same-Sex Marriage 32–35 (2010). California voters with children under the age of eighteen voted for the ban by a margin of almost two to one. Klarman, supra note 258, at 121.
\item \textsuperscript{267} Perry v. Brown, 671 F.3d 1052, 1094–95 (9th Cir. 2012), vacated and remanded sub nom. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
\end{itemize}
different, insofar as it was rooted more deeply in heterosexism rather than strict homophobia: Proposition 8’s sponsors encouraged Californians to claim affection for their LGBT family members, friends, and neighbors, while legitimating voters’ reservations about having gay or lesbian children. 268 Although child protection arguments succeeded in convincing courts ultimately rejected them and struck down the bans. 269

These historical examples are just some of the instances in which religious conservatives used child protection, and its related question of immutability, to oppose gay rights. From the Religious Right’s first efforts to repeal a gay rights ordinance in the late 1970s to recent opposition to marriage equality, the fear that children would be indoctrinated into homosexuality unless the state took a disapproving stance against gays and lesbians was a central theme of antigay rights campaigns. Conversion therapy bans, by identifying homosexuality as an immutable characteristic, presenting the LGBT movement as the protectors of children, and emphasizing the state’s responsibility to sexual minority youth, reverse this more than forty-year opposition narrative.

2. Contemporary Battles

The idea that homosexuality is a choice that children will elect if not taught that being gay or lesbian is socially unacceptable continues to be pervasive in arguments against LGBT rights. The ubiquity and success of these arguments demonstrates why gay rights proponents have such a significant stake in the expressive effects of conversion therapy bans and the normative commitments they foster. LGBT rights groups, in deploying the laws for these expressive ends, they counter not only a historical narrative, but also a contemporary rhetoric that continues to shape battles over LGBT rights.

Child protection and immutability are central to arguments against the federal Employment Non-Discrimination Act (ENDA), which has been introduced in every Congress but one since 1994. 270 The law would

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268. Stone, supra note 239, at 146.
Understand Conversion Therapy Bans

protect individuals from discrimination in employment based on sexual orientation and gender identity. The Traditional Values Coalition (TVC), a prominent Christian lobbying organization, has launched a campaign against the bill entitled “ENDA Hurts Kids.”271 The campaign website asks parents: “Do you want men dressed as women teaching your kids?” before explaining that ENDA’s enactment would result in “she-male activists and cross-dressing teachers” holding children “hostage in the classroom.”272 There, “every homosexual, bisexual, and transgender teacher will have free reign to indoctrinate our children into accepting these ‘alternative lifestyles’ as normal and good.”273 TVC’s campaign is ongoing, with the organization regularly issuing statements claiming that ENDA “experiments dangerously with the well-being of millions of children.”274

This focus on protecting children in schools implicates other LGBT rights issues, including sexual orientation- and gender identity-based anti-bullying policies. Religious conservatives posit that anti-bullying policies that specifically prohibit bullying based on sexual orientation or gender identity are a means of furthering the “gay agenda” in public education.275 These regulations have typically been enacted in response to reports of LGBT youth suicides, which are often directly linked to the torment these adolescents experienced at the hands of their peers.276 According to the Gay, Lesbian, & Straight Education Network (GLSEN), nearly three-quarters of LGBT youth report being verbally harassed at school, and more than one-third report being physically assaulted by their schoolmates.277 Bullied LGBT students are more likely to miss school, have lower GPAs, and experience higher levels of depression than their non-bullied peers.278 Other research has likewise found that LGBT youth are “170% more likely to be assaulted at school and 240% more likely to miss school due to fear that they would be unsafe” than their heterosex-ual counterparts.279 Since LGBT students experience safer environments

271. Rosky, supra note 20, at 663.
272. Id.
273. Id.
278. Id. at 47–49; see also LGBT Youth, Ctrs. for Disease Control and Prevention (Nov. 12, 2014), http://www.cdc.gov/lgbthealth/youth.htm.
279. Letter from Mark S. Friedman to U.S. Comm’n on Civil Rights (May 26,
in schools with anti-bullying policies that specifically protect sexual orientation and gender identity expression, as compared to schools with generic anti-bullying rules, GLSEN and other LGBT rights groups have lobbied for states to enact comprehensive and enumerated regulations. In doing so, they have focused on redefining child protection to include LGBT adolescents. Anti-bullying policies that specifically protect LGBT students also identify the perpetrators of the harm as those who are prejudiced against sexual minority youth. This is a significant shift from religious conservatives’ discourse of child protection, which identifies the danger as coming from gays and lesbians.

However, it is these comprehensive policies that have drawn the ire of the Religious Right, rendering it even more important for advocates to address the issues of child protection and immutability. According to the American Family Association, anti-bullying legislation that specifies protections based on sexual orientation is “just another thinly veiled attempt to promote the homosexual agenda. No one is in favor of anyone getting bullied for any reason, but these anti-bullying policies become a mechanism for punishing Christian students who believe that homosexual behavior is not something that should be normalized.” Focus on the Family has criticized anti-bullying laws for the same reasons, protesting that these initiatives “cross[] the line in a lot of ways beyond bullying into indoctrination, just promoting homosexuality and transgenderism.” In response to nationwide protests from conservative organizations, state legislatures have increasingly enacted general anti-bullying laws that do not identify any prohibited characteristics or have attempted to include exemptions for religious beliefs or moral convictions. In the name of protecting Christian youth from the homosexual agenda, religious conservatives have successfully countered the anti-bullying efforts of LGBT rights groups, indicating the extent to which child protection and immutability continue to serve as central axes in the battles over LGBT rights. Additionally, although the Supreme Court has resolved the question of marriage equality, the fear of gay adults’ effect on children still shapes same-sex couples’ abilities to create families, with child welfare agencies continuing to discriminate against gay and lesbian parents. In

280. GLSEN, supra note 277, at 76.
2015, Senator Mike Enzi and Congressman Mike Kelly sponsored the Child Welfare Provider Inclusion Act, which would create religious exemptions to antidiscrimination laws for adoption and foster care agencies. In response, the Human Rights Campaign worked with supporters to introduce the Every Child Deserves a Family Act in May 2015. The bill would withhold federal funding from public child welfare agencies that discriminate on the basis of sexual orientation, gender identity, or marital status. In November 2015, Utah judge Scott Johansen demonstrated the need for the law when he removed a foster child from the home of a lesbian couple, explaining it was “not in the best interest of children to be raised by same-sex couples.” Thus, despite the Supreme Court’s recent ruling guaranteeing marital rights, LGBT individuals continue to face discrimination in family law, with child protection and immutability arguments playing central roles in these rights battles.

Given this legal background, the bans provide an important means of stressing homosexuality’s immutability and the need to protect the rights of LGBT youth. Notably, the laws do not on their face take a clear stance on whether homosexuality is an immutable characteristic. Since the laws only prohibit conversion therapy for minors, their message could be equally understood to mean that minors should not attempt to change their sexual orientation, but that it is an appropriate endeavor for adults. The bans do present homosexuality as a benign variation in human development, rather than an aberration that requires fixing. LGBT rights groups, however, have identified the laws as also taking a stance on homosexuality’s immutability, shifting the laws’ message to create a strategically useful expressive effect. Through this discourse, advocacy groups are bolstering a social and legal norm that identifies homosexuality as an immutable characteristic.

Perhaps as importantly, the laws identify LGBT youth as a population the state needs to protect and one that is vulnerable to harm. The extent to which the state should protect this group, and from whom they need to be defended, is a matter that is deeply debated. The question is whether LGBT rights groups can extend the state’s normative commitment to a marginalized population, so as to reshape how communities approach sexually non-conforming youth. The bans on conversion therapy signal that the state has a duty to the bullied students, which could influence governmental and social responses. These laws demonstrate an emerging legal response to LGBT youth welfare claims, which may yet translate into a corresponding social norm. At the same time, LGBT rights groups are identifying themselves as the protectors of youth, rather than religious conservatives.

This expressive end is more attenuated than the social norm against conversion therapy, but is nevertheless extremely important. Beginning in the 1970s and continuing today, religious conservatives have used arguments about immutability and child protection to stymie gay rights advocates. Conversion therapy bans provide an opportunity for LGBT rights groups to send a message about homosexuality’s immutability and reframe the child protection narrative to focus on the needs of LGBT youth. These expressive effects, as well as the social norm that advocates are building against conversion therapy, highlight the important expressive power not just of laws, but the lawmaking process. This underscores that it is how laws are discussed and the ways in which their messages are mediated that has an effect on social norms.

III. MOVEMENT IMPLICATIONS

The ongoing debates about gay and lesbian foster and adoptive parenting, anti-bullying initiatives, and ENDA are being waged over the welfare of children, with gay rights opponents repeating the same arguments about child indoctrination that have proved successful for decades. Through the expressive effects of conversion therapy bans, LGBT rights advocates are changing the discourse about which children need protecting and who poses the danger to those children. They have also used conversion therapy laws to emphasize that homosexuality is an immutable characteristic. However, this approach is in some respects problematic, as it reinforces an identity model that many scholars have criticized as ill-advised and exclusionary. This Part explains how the anti-conversion therapy campaign can reframe its discourse to support a more expansive vision of LGBT rights and increase the scope of legal protections for LGBT individuals.

289. Some scholars have criticized this approach as problematic because of its paternalism. Andrew Gilden, Cyberbullying and the Innocence Narrative, 48 Harv. C.R.-C.L. L. Rev. 357, 362–63 (2013).
A. The Identity Paradigm

Conversion therapy bans promote a specific vision of sexual identity, one in which sexual orientation is immutable, stable, and embodied through sexual behavior. This tripartite identity paradigm is one that has become prevalent in LGBT rights litigation, in which “individuals who engage in same-sex sexual conduct can be legally classified by a fixed and clearly demarcable gay, lesbian, or bisexual sexual identity.” This is true even though sexual identity can be and often is fluid for individuals, and sexual conduct is not necessarily central to everyone’s identity formation. The model does not necessarily claim that homosexuality is ingrained at birth, but rather that sexual orientation is deeply rooted and that it forms a constitutive part of gay and lesbian identity. Sexual orientation is immutable not because of its cause, but because it is both extremely difficult to alter and so central to a person’s identity that no one should be asked to change that part of themselves. In short, whether sexual orientation is in fact immutable, many individuals experience it as such and it forms a constitutive part of their identity. Gays and lesbians consequently form a “quasi-ethnicity” based on a shared “fixed, natural essence, a self with same-sex desires,” which provides the basis for claims of status-based discrimination. This model highlights parallels between race-, sex-, and sexual orientation-based discrimination, emphasizing how all are based on irrational prejudices, unfounded stereotypes, and unjust assumptions. The claim as to immutability tends to obfuscate the two other parts of the identity paradigm, that sexual orientation is fixed and expressed through conduct.

Immutability arguments, in addition to countering opposition rhetoric, support heightened scrutiny under the Equal Protection Clause. The characterization of homosexuality as an immutable trait, or at least one that is so integral to identity that it cannot be changed without incredible hardship and suffering, renders sexual orientation akin to race or sex,

291. Id. at 101, 114–15; Steven Seidman, Introduction to Queer Theory/Sociology 11–12, 19 (Steven Seidman ed., 1996).
292. Levit, supra note 25, at 57; Samuel A. Marcosson, Constructive Immutability, 3 U. PA. J. CONST. L. 646, 700–01 (2001); see also Jessica A. Clarke, Against Immutability, 125 YALE L.J. 2, 27 (2015) (arguing that this revised version of immutability is limited in protecting individuals from discrimination and calling for employment discrimination law to extend its protection beyond immutable characteristics).
294. Marcosson, supra note 292, at 700–01.
which the Supreme Court has described as “an immutable characteristic
determined solely by the accident of birth.” Courts have been divided
as to whether homosexuality constitutes an immutable characteristic and
thus have applied different standards of scrutiny. In overturning same-sex
marriage bans, several jurisdictions applied heightened scrutiny after find-
ing that homosexuality was immutable. Other courts, applying rational
basis review after determining homosexuality was not immutable, upheld
the laws. With the Supreme Court recently characterizing homosexuality
as immutable in dicta, remarking that the petitioners’ “immutable nature
dictates that same-sex marriage is their only real path to this profound
commitment,” LGBT rights groups received important support for their
argument about heightened scrutiny. Being able to identify sexual orien-
tation as a fundamental and immutable characteristic is important under
Equal Protection to secure protections against discrimination.

While this immutable identity paradigm existed long before the
modern LGBT movement, it became the focal point for gay rights lit-
igation in the wake of the Supreme Court’s 1986 decision in Bowers v.
Hardwick. That opinion, which upheld Georgia’s criminalization of con-
sensual sodomy, addressed homosexuality as the performance of a type
of sexual conduct rather than an expression of identity. To constrain
the impact of the decision, litigators changed their approach—instead
of focusing their arguments on protecting privacy and sexual conduct,
they emphasized that unfavorable treatment against gays and lesbians
constituted discrimination based on their identity. The move in argu-
mentation required litigators to present a universal model of gay and
lesbian personhood, one that cast the engagement in same-sex sexual
conduct as an indicator of a person’s essence.

While the framing shift from sexual conduct to sexual identity may
seem to be a distinction without a difference, it had a significant legal
effect. The identity paradigm proved extremely effective in securing

300. Conaway v. Deane, 932 A.2d 571, 614 (Md. 2007); Andersen v. King Cty., 138 P.3d 963, 974 (Wash. 2006).
301. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015); see also Kerrigan, 957 A.2d at 432; Varnum, 763 N.W.2d at 893; Griego, 316 P.3d at 884.
302. Clarke, supra note 292, at 8.
303. 478 U.S. 186 (1986); Katyal, supra note 290, at 108.
rights, with the legal status of gays and lesbians undergoing a dramatic change when courts shifted from characterizing homosexuality as sexual conduct to understanding same-sex sexuality as a fundamental element of identity.\textsuperscript{308} Indeed, Supreme Court decisions protecting gay rights have turned on the dignitary harm that gays and lesbians suffer as a result of discrimination, framing the legal violation in terms of group-based subordination.\textsuperscript{309} Likewise, popular support for gay rights has tended to depend on questions of mutability, with those who believe that homosexuality is innate more likely to endorse sexual orientation-based legal protections.\textsuperscript{310}

The legal arguments about immutability and a fixed gay identity have become central to the wider LGBT movement, demonstrating the broad impact of the legal strategy. Within the LGBT community, immutability arguments are so pervasive “that dissent from the idea that LGB people’s sexual orientations are innate and immutable is, in many contexts, treated as tantamount to opposing LGB rights.”\textsuperscript{311} In 2012, when Cynthia Nixon described being gay as a personal choice in an interview with the \textit{New York Times}, the gay community reacted with outrage.\textsuperscript{312} One activist described her comments as “irresponsible and flippant,” suggesting they would justify parents’ abuse of their gay children, while others expressed concern that similar views would prevent gays and lesbians from attaining legal rights.\textsuperscript{313} Nixon quickly issued a statement clarifying that she did not mean her bisexuality was a choice, only that she had chosen to be in a gay relationship, a decision most members of the LGBT community could not make because of their innate attraction to members of the same sex.\textsuperscript{314} This episode highlights the primacy of the immutable-gay-identity argument, which has crowded out dissent within both the social movement and its legal counterpart.\textsuperscript{315}


\textsuperscript{310} Waidzunas, supra note 74, at 6.

\textsuperscript{311} Stein, supra note 293, at 598; see also Tia Powell \\& Edward Stein, \textit{Legal and Ethical Concerns about Sexual Orientation Change Efforts}, 4 \textit{Hastings Ctr. Rep.} S32 (Sept.–Oct. 2014).


\textsuperscript{315} Popular culture reflects this shift, with the Macklemore song “Same Love” featuring Mary Lambert singing “I can’t change, even if I tried, even if I wanted to” and Lady Gaga asserting “I was born this way” in one of the best-selling singles of all
Despite its ubiquity and success in securing rights, many scholars have criticized the legal strategy as unduly confining, exclusionary, and legally fraught. Requiring individuals’ sexual identities to be immutable implies that being LGBT would otherwise be invalid, with civil rights depending on an empirical premise that scientists may later prove incorrect.316 Scholars have also claimed that pursuing immutability may have subverted the movement’s interests, which should have challenged gendered and sexual categories rather than essentializing them.317 These objections are part of a larger set of queer critiques of LGBT legal strategies, which have included emphasizing conformity, stressing domesticity, and identifying how gays and lesbians were like their heterosexual counterparts in all but sexual object choice.318

Connected to this is criticism that the movement’s approach has had limited strategic payoffs, such that its reification of gender and sexual norms has facilitated tolerance and not acceptance.319 In this view, the movement’s strategy has made transgender rights advocacy more difficult, with some claiming that the recent spate of anti-trans legislation sweeping American states is a product of the movement’s failure to reframe sexual and gender norms.320 Opponents of transgender rights emphasize that human beings exist along the binary of male and female, with no possible variation.321 Peter Sprigg, a Senior Fellow at the Family Research Council,
has derided transgender rights for its emphasis on fluidity, stating “the current transgender ideology . . . tell[s] us you can be both genders, you can be no gender, you can be a gender that you make up for yourself.” That opponents of transgender rights view sexual and gender fluidity as absurd indicates the extent to which the LGBT movement needs to shift the dialogue around sexual orientation to focus on autonomy, flexibility, behavior, and choice. Indeed, fluidity is particularly important for transgender rights, as advocates are not just seeking protections for men and women who have transitioned, but also those who are in the process of transitioning or who are genderqueer, meaning they identify as neither or both genders. Arguments about immutability do not require sexual orientation to be stable, nor do they necessitate sexual orientation to be expressed in specific forms. Immutability is only one part of the identity paradigm and can be separated from the tripartite structure that identity currently embodies, with legal benefits to disaggregating innate orientation and fixed desire.

As these criticisms make clear, the identity paradigm has been problematic. However, immutability is extremely important in countering longstanding opposition rhetoric and in making affirmative claims under Equal Protection jurisprudence. The anti-conversion therapy campaign, by using the bans to emphasize immutability and discounting sexual identity therapy, reinforces the contours of the mainstream LGBT rights movement. In this way, it is part of the iterative process shaping the direction of the movement itself, which thus far has ignored the criticisms of the immutability and identity paradigms.

B. Reframing the Anti-Conversion Therapy Campaign

Although the anti-conversion therapy campaign emphasizes immutable identity at the expense of the fluidity and choice advocates, it does not have to do so. In fact, the campaign can be reformulated so as to identify sexual orientation as immutable and yet still promote the law’s need to respect and protect consensual sexual expressions and behaviors. Many of the criticisms around movement strategy assume that LGBT rights groups must elect one approach or another. However, the conversion therapy bans provide the opportunity to do both.

The anti-conversion therapy campaign can begin this effort by nuancing its definition of conversion therapy and the harm the practice perpetuates. This is particularly important since, although the laws only address minors, the campaign focuses on all forms of conversion therapy. By distinguishing between efforts to change sexual orientation and behavior, the campaign can contribute to a more complicated


understanding of sexual identity. The campaign should oppose efforts to change sexual orientation. However, it must also recognize that sexual expression is a choice, and one deserving of respect. This also means the campaign must distinguish between the sexual identity therapy that licensed mental health professionals offer in supportive and nonjudgmental environments and behavioral modification rooted in moralistic and stigmatizing assumptions about homosexuality, rather than simply dismiss sexual identity therapy by licensed mental health professionals.

This recommendation is particularly fraught, as the LGBT rights movement has a complicated history with the medical profession.\textsuperscript{323} For much of the twentieth century, gays and lesbians worked to reduce medical professionals’ authority over their lives. However, since the declassification of homosexuality as a mental illness in 1973, mental health professionals have lobbied to promote gay and lesbian rights. With the help of psychiatrists, psychologists, and social workers, gays and lesbians were able to secure custody rights, adoption and foster care rights, and marriage equality.\textsuperscript{324} Given that mental health professionals have been essential allies in the gay and lesbian rights movement for more than four decades, it may be appropriate to trust mental health professionals to recognize and respect the difference between sexual identity and conversion therapy.\textsuperscript{325} As part of this, the campaign will need to change the expressive message of the laws to differentiate between the types of therapies. It is, of course, much more difficult to communicate a nuanced message and may reduce the expressive momentum of the campaign, but this new approach would have significant benefits for the wider LGBT movement.

LGBT rights advocates and their allies will also need to change the language of the legislation they sponsor, which identifies behaviors and sexual expression as identical to sexual orientation.\textsuperscript{326} The laws state that “sexual orientation identity exploration” does not constitute a prohibited practice, but do not define what this phrase means and often qualify this provision by stating that the therapy cannot seek to change orientation

\textsuperscript{323. George, supra note 245, at 488. See generally Marie-Amélie George, AGENCY NULLIFICATION: DEFYING BANS ON GAY AND LESBIAN FOSTER AND ADOPTIVE PARENTS, 51 HARV. C.R.-C.L. L. REV. 363 (2016). For transgender individuals, the relationship with the medical profession continues to be extremely problematic, as doctors serve as gatekeepers for required services. See Dean Spade, RESISTING MEDICINE, RE/MODELING GENDER, 18 BERKELEY WOMEN’S L.J. 15, 30–32 (2003) (discussing the ethical quandary of representing transgender clients, whose legal claims depend on a strategic use of the “medical model of transsexuality” when transgender rights more broadly would benefit from a disaggregation of rights and medical procedures).}

\textsuperscript{324. Marie-Amélie George, BUREAUCRATIC AGENCY: ADMINISTERING THE TRANSFORMATION OF LGBT RIGHTS, 36 YALE L. & POL’Y REV. (forthcoming 2017) (on file with author).}

\textsuperscript{325. To the extent licensed professionals fail to follow supportive procedures and instead offer behavioral modification therapy rooted in stigma and shame, they would be subject to malpractice liability. See Claudia E. Haupt, UNPROFESSIONAL ADVICE, 19 U. PA. J. CONST. L. (forthcoming 2017) (on file with author).}

\textsuperscript{326. See supra sources cited in note 8.}
or identity. Additionally, sexual orientation and gender identity are not defined, so it is unclear whether therapy can seek to change behavior or attractions without running afoul of the law. Licensed therapists need to be confident about what therapeutic practices they can provide. The reasonable reading of the law is that it excludes sexual identity therapy, but the language is ambiguous.

Another way to remedy this problem would be to include a model informed consent provision, which would clarify for practitioners what the law permits and prohibits. This consent provision should inform individuals that: 1) being lesbian, gay, bisexual, or transgender is not a disease or developmental disorder, but rather is part of the natural spectrum of sexual identity; 2) all leading mental health organizations agree that sexual orientation likely cannot be changed; 3) data shows that attempts to change sexual orientation have resulted in serious psychological harm for many individuals; 4) patients should not expect to eliminate or reduce their same-sex sexual desires; 5) therapists will not help individuals change their sexual orientation, nor will they endeavor to reduce or eliminate same-sex sexual attractions; 6) therapists will work with their clients in managing sexual behaviors; and 7) counseling will adopt a non-judgmental and non-stigmatizing approach to same-sex sexuality.

The informed consent provision needs to identify what results a client can reasonably expect from the counseling and the potential psychological risks involved in sexual identity therapy.

This informed consent provision would not only help set limits on what services therapists offer, but would also help frame the therapy for clients in the supportive, non-homophobic approach that the medical professions recommend. How information is presented shapes individuals’ later choices and behaviors with their counselors, which is why it is important to set patients’ expectations at the beginning.

Additionally, by making clear the legality of sexual identity therapy, the laws help return the practice to the realm of licensed mental health professionals.

327. See supra sources cited in note 8.

328. While some mental health professionals challenging the California ban provided conversion therapy, others may have been offering sexual identity therapy. Compare First Amended Complaint for Declaratory Judgment & Preliminary and Permanent Injunctive Relief at ¶ 35, Pickup v. Brown, 42 F. Supp. 3d 1347 (E.D. Cal. 2012) (No. 12-02497), 2015 WL 6592939 (characterizing therapeutic efforts as aiming to change, reduce, and eliminate “unwanted same-sex sexual attractions, behaviors, or identity”), with Complaint for Injunctive and Declaratory Relief at ¶ 54, Welch v. Brown, 58 F. Supp. 3d 1079 (E.D. Cal. 1079) (No. 2:12-2484), 2012 WL 4762008 (describing Dr. Duk as helping minors bring their “sexual conduct and desires into conformity with [their] religious traditions, cultural norms, and moral standards,” but without discussion of his approach or methods).

329. See Am. Psychological Ass’n, supra note 17, at 63.

and may steer individuals away from ministries providing conversion therapy. This has the particular benefit of helping the individuals who are currently harmed when they enter into religious ministries that stress sexual orientation change.331

The debates over whether conversion therapy is effective turn on the question of whether sexual identity can be flexible, as otherwise change would not be possible. For many members of the LGBT community, sexual flexibility is both real and good—but only if individuals embrace their queer identity.332 Indeed, this is one of the sources of frustration for many bisexuals, who are often excluded from LGBT discourse.333 Conversion therapy and the ex-gay movement create a paradox for the left, which values both autonomy and anti-subordination principles. In the same way, sexual identity therapy directly challenges the movement’s politics. There is room to both oppose the stigma and homophobia that makes people unwilling to accept their same-sex attractions and respect individuals’ choices about their sexual identities. However, the movement’s current formulation, which has focused almost exclusively on immutability, makes it difficult to incorporate these conceptions of identity. It is important to create a space for people who have fluid, rather than static, identities and who have been left out of Equal Protection jurisprudence.

Many within the LGBT community are skeptical of individuals who say they feel same-sex desires but want help sublimating them, identifying them as victims of their homophobic social environments or deriding their self-deception.334 Likewise, individuals who seek conversion therapy because their same-sex attractions conflict with their religious beliefs do not want to associate with the LGBT movement. It is nevertheless troubling that there is no place for them in a movement that ostensibly embraces sexual variation and values inclusivity. These individuals feel they must identify as either homosexual or heterosexual, but the LGBT movement could make space to accommodate a spectrum of self-identities, including those who understand themselves as heterosexual with same-sex attractions, have no sexual orientation identity, or adopt a unique self-identity.335 Providing an environment that encompasses all of

331. See generally Benoit, supra note 108.
335. See AM. PSYCHOLOGICAL ASS’N, supra note 17, at 50; Haldeman, supra note
these possibilities not only realizes the potential of queer theory, but may also make conversion therapy less of an imperative for these religious individuals, who are often seeking a community.336

The LGBT rights movement has enjoyed considerable success recently, creating the opportunity to expand its reach and to reincorporate the queer critiques that became marginalized during the struggle to establish basic civil rights protections and attain marriage equality. This does not mean abandoning conversion therapy bans, which play an important role in supporting LGBT rights advocacy, but rather shifting the discourse around conversion therapy itself. Ex-gays identify their underlying sexual orientation as immutable but claim that it is their sexual choices that matter. This characterization, which identifies sexual decision-making as more important than sexual orientation, is a view of sexuality that ironically helps promote the LGBT movement’s goals.337 Instead of identifying ex-gays as individuals whose disassociation of same-sex attraction and sexual identity constitutes a false consciousness, the laws’ proponents can use debates around conversion therapy as an opportunity to recognize how the LGBT movement can create a space for more sexual identities and incorporate queer theorists’ arguments about sexual choice, fluidity, and privacy. Conversion therapy bans do not need to propound a binary view of sexual orientation, but rather can use the laws as an opportunity to reposition the LGBT movement as one that supports all types of sexual variations and consensual sexual decisions.

Opening the legal door to recognizing the need to respect consensual sexual choices, rather than basing rights on identity categories, would benefit many within the LGBT movement. Beyond establishing legal protections for those who have fluid gender identities, it may also sever the link between rights and middle-class respectability, thereby eliminating the imperative to cover.338 Although the LGBT movement has been focused on immutable identity, the shift to a paradigm of choice is not much of a logical leap. As Ed Stein has argued:

[M]uch of what is ethically relevant about being an LGBT person is not innate and not immutable. Actually engaging in sexual acts with a person of the same sex, publicly or privately, identifying as an LGBT person, marrying or otherwise establishing a household with a person of the same sex, and raising children as an openly LGBT person are choices—choices that one might not make.339

Reorienting the movement and legal strategies towards choice would create a more inclusive and protective framework.

112, at 695, 706.

337. WAIDZUNAS, supra note 74, at 9.
The struggle to recognize sexual orientation as an immutable characteristic has been essential to legal advocacy, but it now needs to become the floor, not the ceiling, for the rights movement. A shift in the legal movement’s focus to protecting sexual choice will likely have a destabilizing effect, and the immutability claim that the bans reinforce will serve as a bulwark against backlash and a barrier to regression. The anti-conversion therapy laws, by emphasizing both immutability and expression, will serve the important role of consolidating movement gains, while also making room for the movement’s future.

IV. Conclusion

Changing the approach to conversion therapy bans so as to emphasize that mental health professionals should work with conflicted same-sex attracted individuals to reconcile their religious and sexual identities seems at odds with the LGBT movement’s goals. However, by emphasizing the distinction between sexual orientation, behavior, and identity, LGBT rights groups have the opportunity to not only help these devout individuals, but also reshape the direction of the LGBT movement.

The campaign as it is currently formulated reflects a broader legal strategy that has reaped significant rewards, securing the decriminalization of consensual sodomy and marriage equality rights. Indeed, the very fact that legislatures are considering and enacting conversion therapy bans and making the welfare of LGBT youth a subject of national conversation is a testament to how successful that strategy has been. Perhaps the laws’ most potent expression is of how far into mainstream political discourse LGBT individuals have come. At the same time, the bans present an opportunity to reconsider the contours of the LGBT movement and ask whether it is time to reincorporate the vision of social change that litigators eschewed in favor of concrete legal victories. Conversion therapy programs have been extremely harmful, and the powerful testimony as to their danger has helped forge a broader consensus against efforts to change individuals’ sexual orientation. This moment of political unity provides an opening to press for more profound legal change.

The expressive elements of conversion therapy bans operate on multiple levels, from reflecting and reinforcing movement strategy to creating a new rhetoric to counter a historical opposition narrative and a social norm against conversion therapy. The laws thus establish that the expressive elements of the lawmaking process can be extremely valuable for rights advocates, with the potential to transform social norms and support a wide-reaching agenda. Their very potency is what makes it essential for advocates to refine their goals, reframing their approach to conversion therapy so as to create room for the LGBT rights movement strategy to grow.

340. Importantly, the focus on sexual expression does not mean abandoning the claim to immutability, which provides an essential rebuttal to religious liberty claims.
LGBT Identity and Crime*

JOROUGH WOODS**

ABSTRACT

Recent studies report that LGBT adults and youth disproportionately face hardships that are risk factors for criminal offending and victimization. Some of these factors include higher rates of poverty, overrepresentation in the youth homeless population, and overrepresentation in the foster care system. Despite these risk factors, there is a lack of study and available data on LGBT people who come into contact with the criminal justice system as offenders or as victims.

Through an original intellectual history of the treatment of LGBT identity and crime, this Article provides insight into how this problem in LGBT criminal justice developed and examines directions to move beyond it. The history shows that until the mid-1970s, the criminalization of homosexuality left little room to think of LGBT people in the criminal justice system as anything other than deviant sexual offenders. The trend to decriminalize sodomy in the mid-1970s opened a narrow space for scholars, advocates, and policymakers to use antidiscrimination principles to redefine LGBT people in the criminal justice system as innocent and non-deviant hate crime victims, as opposed to deviant sexual offenders.

Although this paradigm shift has contributed to some important gains for LGBT people, this Article argues that it cannot be celebrated as

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an unequivocal triumph. This shift has left us with flat understandings of LGBT offenders as sexual offenders and flat understandings of LGBT victims as hate crime victims. These one-dimensional narratives miss many criminal justice problems that especially fall on LGBT people who bear the brunt of inequality in the criminal justice system—including LGBT people of color, transgender people, undocumented LGBT people, LGBT people living with HIV, and low-income and homeless LGBT people. This Article concludes by showing how ideas and methods in criminology offer promise to enhance accounts of LGBT offending and LGBT victimization. In turn, these enhanced accounts can inform law, policy, and the design of criminal justice institutions to better respond to the needs and experiences of LGBT offenders and LGBT victims.

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INTRODUCTION

After decades of mobilization and litigation, the U.S. Supreme Court held in Obergefell v. Hodges that the U.S. Constitution guarantees same-sex couples the right to marry. Now that marriage equality is here, there are looming questions about the next battlegrounds in the fight for formal equality for LGBT people. Possibilities include “religious freedom laws”; discrimination against LGBT people in the workplace, housing, and public accommodations; and discrimination against LGBT families living inside and outside of marriage.

The post-marriage era has also opened space to move beyond formal equality concerns to address the substantive inequalities that LGBT people commonly face. Scholars have criticized race-, gender-, and class-based substantive inequalities in the U.S. criminal justice system. Addressing LGBT-based substantive inequality, however, is difficult because we know very little about LGBT people who come into contact with the criminal justice system as either offenders or as victims.

With respect to criminal offending, there are currently little study and available data on LGBT offenders at several points of the criminal process, including arrest and detention, charging, conviction, sentencing, and probation and parole. This makes it difficult to identify LGBT inequalities at these different points and to develop legal and policy interventions to address those inequalities. With respect to victimization, most studies and available data on LGBT victims involve hate crimes, an undoubtedly important area of LGBT victimization. There is should not be the end of innovation and experimentation around the issue of relationship recognition


7. This point is discussed in more detail in infra Part III.A.1.

8. See infra Parts II.B, III.B. There are two recent exceptions. The first is data involving the sexual victimization of LGBT inmates under the PREA. See infra notes 291–301. The second is sexual orientation data on intimate partner violence from the National Intimate Partner and Sexual Violence Survey, which the Centers for Disease Control and Prevention (CDC)’s National Center for Injury Prevention and Control conducted in 2010. As discussed further in infra Part III.B, the data revealed that
little study and available data, however, on the potentially broader set of non-hate-motivated circumstances under which LGBT people become victims of crime. Accordingly, left in the shadows are the more nuanced ways in which LGBT discrimination in the domains of family, society, economy, and politics can leave LGBT people vulnerable to a host of harmful personal and property crimes.

These gaps in knowledge are troubling in light of recent discoveries indicating that LGBT individuals disproportionately face hardships that scholars have found increase the risk of criminal offending and victimization. Consider three recent developments.

First, recent studies report that as many as 20 to 40 percent of homeless youth identify as LGBT. Many of these youth wind up on the streets after suffering family rejection and abuse for being LGBT. To date, the connection between LGBT youth homelessness and crime (both during adolescence and later during adulthood) remains underexplored. Existing studies, however, support the notion that homeless bisexual women had significantly higher lifetime prevalence of rape, physical assault, and stalking by an intimate partner when compared to both lesbian and heterosexual women. Moreover, lesbian women and gay men reported levels of intimate partner violence and sexual violence equal to or higher than those of heterosexuals.


9. See infra Part III.B.


12. In a future article titled Unaccompanied Youth and Private-Public Order Failures, 103 Iowa L. Rev. (forthcoming 2018) (draft on file with author), I analyze the connections between LGBT youth homelessness and involvement in the juvenile justice system in greater detail. The limited available data, however, lends support to the connection between LGBT youth homelessness and involvement in the juvenile justice system. For instance, Angela Irvine conducted a survey of 2,100 youths in six juvenile justice institutions across the country. The study found that 15 percent of the youths were LGB, either questioning their sexual orientation or transgender, or expressing their gender in nonconforming ways. Moreover, LGB and gender non-conforming youths were more likely than heterosexual youths to enter the juvenile justice
youth are at greater risk than nonhomeless youth for committing a range of crimes from petty theft to violence in order to survive on the streets.\textsuperscript{13} Homeless youth are also at greater risk for sexual, physical, and verbal victimization.\textsuperscript{14}

Second, in the first study of its kind, researchers in 2014 discovered that 19 percent of Los Angeles County foster youth identified as LGBT—double the estimated percentage of LGBT youth in Los Angeles.\textsuperscript{15} Notably, almost 86 percent of those LGBT foster youth also identified as Latino, Black, or Asian Pacific Islander.\textsuperscript{16} The relationship between being in foster care as an LGBT youth and crime (both during adolescence and later during adulthood) is an underexplored topic. However, existing studies do indicate that foster youth are overrepresented in the juvenile justice system.\textsuperscript{17} Foster youth are also at greater risk for being arrested and incarcerated as adults after aging out of the foster care system.\textsuperscript{18}

Third, contrary to stereotypes that gay men and lesbians are affluent with high disposable income,\textsuperscript{19} recent studies report that LGBT people system because they ran away from home or an out-of-home child welfare placement. Angela Irvine, “We’ve Had Three of Them”: Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System, 19 COLUM. J. GENDER & L. 675, 676–77 (2010).

\textsuperscript{13} See, e.g., Stephen W. Baron, General Strain, Street Youth and Crime: A Test of Agnew’s Revised Theory, 42 CRIMINOLOGY 457, 459 (2004); Kristin M. Ferguson, Kimberly Bender & Sanna J. Thompson, Predicting Illegal Income Generation Among Homeless Male and Female Young Adults: Understanding Strains and Responses to Strains, 63 CHILDREN & YOUTH SERVS. REV. 101, 101 (2016) (“Homeless youth are reportedly more likely than their housed peers to be involved in illegal activities to generate income, such as theft, prostitution, and drug possession, use, and sales.”).

\textsuperscript{14} See generally, e.g., Jennifer P. Edidin, et al., The Mental and Physical Health of Homeless Youth: A Literature Review, 43 CHILD PSYCHIATRY & HUM. DEV. 354, 359–60 (2012) (discussing research indicating that homeless youth are at greater risk for victimization).


\textsuperscript{16} Id. at 8 tbl.2.

\textsuperscript{17} Joseph J. Doyle Jr., Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care, 116 J. POL. ECON. 746, 747 (2008) (summarizing studies involving higher rates of juvenile delinquency among foster youth); Rosemary C. Sarri, Elizabeth Stoffregen & Joseph P. Ryan, Running Away from Child Welfare Placements: Justice System Entry Risk, 67 CHILD. YOUTH SERVS. REV. 191, 191 (2016) (concluding that running away from foster care is a high-risk factor for entry into both the juvenile and adult justice systems).

\textsuperscript{18} Mark E. Courtney et al., Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care, 80 CHILD WELFARE 685, 708–09 (2001) (reporting high rates of adult criminal involvement and run-ins with law enforcement based on a study of former foster youth in Wisconsin).

\textsuperscript{19} For instance, in his dissent in Romer v. Evans, Justice Antonin Scalia described that “those who engage in homosexual conduct tend to . . . have high disposable income.” 517 U.S. 620, 645 (1996) (Scalia, J., dissenting); see also Luke A. Boso,
experience higher rates of poverty than non-LGBT people, and that lesbians, bisexual women, transgender people, LGBT people of color, and LGBT youth are especially vulnerable. In 2016, 27 percent of LGBT adults experienced a time in the past year when they did not have enough money to feed themselves or their families—1.6 times higher than non-LGBT adults. Scholars have yet to explore the connections between LGBT poverty and LGBT offending or victimization. A long line of research, however, shows that poverty is a risk factor for a range of criminal offending and victimization.

Thus, on one hand, there is a dearth of information about LGBT offenders and LGBT victims. On the other hand, several indicators suggest that LGBT people are at greater risk than non-LGBT people for a range of offending and victimization. Drawing on ideas in criminology,

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23. In examining what insight ideas (and more specifically theories) in criminology have to offer about LGBT identity and crime, this Article primarily takes a critical historical approach. John Tosh and Seán Lang claimed that “[h]istory reminds us that there is usually more than one way of interpreting a predicament or responding to a situation.” John Tosh & Seán Lang, The Pursuit of History 32 (4th ed. 2006). Thus, a historical approach has promise to offer alternative explanations for how the disjoint mentioned above emerged, beyond the surface explanation that it is an inadvertent oversight. At the same time, Tosh and Lang underscored that “[h]ow the past is known and how it is applied to the present need are open to widely varying approaches.” Id. at 2. Given this diversity, this Article is primarily guided by the principle of “process” in historicism. Simply put, through fresh evaluations of criminological texts, this Article situates this disjoint in a broader trajectory that “is still unfolding” to “give[] us some
this Article provides an original intellectual history of LGBT identity and crime to explain how this disjoint in LGBT criminal justice emerged. It then uses the intellectual history as a springboard to examine directions to move beyond these knowledge gaps.

Some scholars and advocates have criticized the mainstream LGBT social movement for neglecting criminal justice issues beyond sodomy criminalization and hate crime victimization. They have also used litigation to address some of these neglected problems, including the police profiling of LGBT people and the selective enforcement of criminal laws against LGBT communities. This Article broadens existing conversations about LGBT identity and crime beyond social mobilization and litigation to consider ideas and methods in criminology. Specifically, it argues that historical ideas in criminology help to diagnose the current problem of why there is so little understanding of LGBT offenders and LGBT victims. Moreover, criminology offers unique conceptual and empirical tools to enhance accounts of LGBT offending and LGBT victimization, which can in turn help law, policy, and the design of criminal justice institutions (for example, police agencies, prosecutor’s offices, and courts) to better respond to the needs and experiences of LGBT offenders and LGBT victims.

My central claims are twofold. First, I show that until the mid-1970s—before which almost every U.S. state criminalized same-sex sodomy—there was little space to view LGBT people in the criminal justice system other than as deviant sexual offenders. A wave of sodomy decriminalization in the mid-1970s, however, opened a narrow space for scholars, advocates, and policymakers in the 1980s and 1990s to use antidiscrimination principles to move discussions about LGBT identity and crime away from viewing LGBT people as deviant sexual offenders toward viewing them as innocent and nondeviant hate crime victims.

Although this paradigm shift is often celebrated and has contributed to some important gains for LGBT people, I argue that it has fallen purchase on the future and allow[] a measure of forward planning.” Id. at 40.


27. See infra Part IV.


29. See infra Part II.A.

30. See infra Part II.B.
short on both the offending and the victimization sides of LGBT criminal justice. Specifically, the limited deployment of antidiscrimination principles during this shift has resulted in flat narratives of LGBT offenders as deviant sexual offenders and of LGBT victims as hate crime victims. This shift has also overlooked many criminal justice problems that LGBT people have faced—and continue to face—that do not involve sodomy criminalization or hate crime victimization. These problems especially affect marginalized segments of the LGBT population that bear the brunt of LGBT inequality in the criminal justice system, including low-income and homeless LGBT people, LGBT people of color, transgender people, undocumented LGBT people, and LGBT people living with HIV.

My second claim is that with the exception of hate crime, most of the scholarly attention to LGBT identity and crime has focused on whether homosexuality should be considered a form of criminal sexual deviance in and of itself. Scholars, however, have treated other demographic differences (for example, race, ethnicity, gender, class, and age) as nondeviant differences, and then examined how hardships (for example, family instability, poverty, and societal discrimination) shape offending and victimization within and across those differences. Because LGBT people disproportionately face many of these hardships, I argue that conceptualizing LGBT identity in similar terms would (1) prompt new questions about LGBT identity and crime; (2) open doors to identify connections and trends between LGBT identity and other identity differences with respect to both offending and victimization; and (3) inform law, policy, and the design of criminal justice institutions, thus enabling them to better understand and respond to LGBT offenders and LGBT victims.

Because so little information exists on LGBT offenders and victims, it is impossible to conclude what we will find once LGBT identity is conceptualized in this way. However, we can speculate that discoveries might roughly fall into two camps. First, hardships attached to LGBT identity might be the primary driver of certain forms of LGBT offending

31. See infra Part III.
32. To be clear, I am not arguing that antidiscrimination principles should have no role in addressing LGBT criminal justice issues. Rather, my point is that the limited ways in which antidiscrimination principles have been used during this trend overlooks a wide range of LGBT criminal justice hardships and inequality.
33. Although we have little aggregate data, advocates and LGBT organizations have dug beneath the surface to identify key drivers of LGBT incarceration, which include drug policy, collateral consequences of criminalization and immigration, criminalization of poverty and homelessness, lack of access to identification and social services for transgender people, and criminalization of sex work and responses to trafficking in persons. CATHERINE HANSSENS ET AL., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV 54–65 (2014), http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf [https://perma.cc/T7YL-U5H2].
34. See infra Part IV.
and victimization. For instance, the high proportion of LGBT homeless youth suggests that family conflict over LGBT identity is a distinct pathway to youth homelessness, which then puts LGBT youth at greater risk for offending and victimization.\textsuperscript{35} Findings in this camp could highlight LGBT-specific criminal justice problems that law, policy, and criminal justice institutions should be aware of and address.

Second, non-LGBT differences (including race, ethnicity, gender, and age) might be stronger drivers than LGBT identity—or coequal drivers with LGBT identity—of certain hardships that put segments of the LGBT population at greater risk for offending and victimization. For instance, people of color face poverty at higher rates than white people,\textsuperscript{36} white LGBT people face poverty at higher rates than white non-LGBT people,\textsuperscript{37} and LGBT people of color experience poverty at higher rates than both white non-LGBT and white LGBT people.\textsuperscript{38} Although findings in this camp might show that LGBT identity is not a unique source of vulnerability for certain hardships, these findings are still meaningful because they illustrate how considering LGBT identity can offer more nuanced intersectional accounts of the different ways that poverty is connected to offending and victimization. In addition, common experiences of inequality across both non-LGBT and LGBT differences could open opportunities for coalition-building between LGBT social movements and other social movements to address criminal justice problems. As an example, one major critique of the mainstream LGBT social movement has been that it is centered on the problems of middle- to upper-class white gay men.\textsuperscript{39}

Before developing both of my claims, three caveats are in order. First, the intellectual history looks to the treatment of LGBT identity and crime in three main sources: criminological literature, criminal laws, and LGBT social movements.\textsuperscript{40} Its purpose is to show how ideas about LGBT identity and crime have traveled together over time in each of these sources. Its purpose is not to make causal arguments about the connections between these sources (for instance, whether ideas in criminology influenced LGBT social movements), and I do not view these causal

\textsuperscript{35} See supra notes 10–14.


\textsuperscript{37} See supra note 20.

\textsuperscript{38} Id.

\textsuperscript{39} Russell K. Robinson, Marriage Equality and Postracialism, 61 UCLA L. Rev. 1010, 1038 (2014) (“Wealthy white males dominate the gay rights agenda, which prioritizes rights that are most meaningful for people who are middle or upper class and neglects the discrimination faced by poorer LGBT people . . . .”).

\textsuperscript{40} To be more precise, I sometimes use the term “lesbian and gay” when discussing prior social movements that centered on the concerns of lesbians and gay men.
arguments as necessary to establish my claims. It is difficult to create a directional story about how ideas involving LGBT identity and crime came about, and all three sources have had important roles in shaping those ideas over time.

Although I look to all three sources, my primary focus is on the criminological literature. This literature is an untapped wealth of knowledge that offers unique insight into the past, present, and future states of LGBT criminal justice. Criminological theories and research reflect historical, political, and cultural assumptions about crime and criminal justice populations. Criminology is also a multidisciplinary field, and criminologists have advanced diverse conceptual and empirical models to study crime. Accordingly, tracking the treatment of LGBT identity in this literature over time exposes the types of questions that have been asked about LGBT identity and crime, and prompts the questions that remain to be studied. Further, criminologists are professional experts and their theories and research have influenced—and continue to influence—criminal laws and criminal justice policies.

As a second caveat, although intellectual histories are useful to track the development of an idea over time, no single intellectual history can offer a fully comprehensive account. There are inevitable gaps.

42. David Garland, Of Crimes and Criminals: The Development of Criminology in Britain, in The Oxford Handbook of Criminology 11, 19 (M. Maguire et al. eds., 1997). It is important to note that the interdisciplinary nature of criminology as a field has invited some criticism that the field lacks a disciplinary “core.” See Joachim J. Savelsberg & Robert J. Sampson, Introduction: Mutual Engagement: Criminology and Sociology?, 37 CRIME L. & SOC. CHANGE 99, 99 (2002).
45. For this reason, it is important to provide a brief explanatory note about methodology. The critical historical analysis that shaped the intellectual history focused on “mainstream” criminological theories—those that arguably had the greatest potential to set a tone for the treatment of LGBT populations in criminology and beyond the discipline by inspiring new paradigms to conceptualize crime and rigorous empirical testing. I divided the research into two phases. The aim of the first phase was to develop an organized scheme of the criminological literature to form the basis of the intellectual history. Specifically, I conducted research to identify the major schools of criminological thought, the major subfields in those schools, and the major authors and works in each of those subfields. I categorized theories as “mainstream” if they were discussed in criminological treatises, handbooks, popular collections of essays, or prior systematic critiques of criminological theory. In total, I analyzed over a hundred
in coverage, different ways to divide the literature, and alternative explanations for the development of an idea. Recognizing these limitations, I designed the intellectual history to offer as systematic an account as possible.\textsuperscript{46} The intellectual history is expansive in time. It tracks the treatment of LGBT identity and crime from the 1860s—when criminologists developed the first scientific theories of crime\textsuperscript{47}—to today. It is also expansive in terms of the evaluated criminological perspectives. It examines a range of theories and research in several major schools of criminology, including biology, psychology, and sociology.

Third, in this Article I often use the term “LGBT,” which is a contemporary term commonly used to describe lesbian, gay, bisexual, and transgender sexual orientations and gender identities.\textsuperscript{48} In using this term, sources to identify how the criminological literature was divided, and analyzed the most popular works of authors in subfields.

The second phase of research involved the collection and analysis of individual primary texts. As a starting point, I collected the major works of each author identified in the first phase. I then read each of those works completely. I paid special attention to three themes. First, I documented the major scientific and theoretical assumptions driving the author’s perspective. Second, I documented where and how the author discussed sexual orientation and gender identity in the text. I also documented when the author omitted sexual orientation and gender identity from a work entirely. Oftentimes, homosexuality (which was often the focus of discussions of LGBT identity when they appeared) was only mentioned briefly. Third, I documented whether the author discussed any other authors or texts that were not captured during the first phase of the research. I then collected and documented when and how those texts discussed sexual orientation and gender identity. In addition, it is important to note that this Article focuses entirely on theories of crime from North America and Europe (especially from the United States and the United Kingdom). The reality that criminology is a “weak” discipline in many areas of the world mostly motivated this focus. See What Is Criminology? 1 (Mary Bosworth & Carolyn Hoyle eds., 2011). At the same time, it is important to underscore that the intellectual history would look very different if it were not limited to Western perspectives or philosophies given the continuing enforcement of sodomy laws against LGBT people in many non-Western countries. See Map: Countries Where Homosexuality Is a Crime, CBC News (Feb. 25, 2014), http://www.cbc.ca/news2/interactives/map-same-sex-criminalization [https://perma.cc/3F4U-4D22].

\textsuperscript{46} Beyond the methodology discussed supra note 45, the data analysis process made this systematic account possible. I divided data analysis into multiple levels. In the first level of analysis, I identified major themes in the treatment (or lack thereof) of sexual orientation and gender identity in the individual texts. In the second level, I compared those themes to identify broader themes involving the treatment of sexual orientation and gender identity over time within a criminological subfield. In the third level, I conducted a similar analysis comparing themes across subfields to identify broader themes involving the treatment of sexual orientation or gender identity over time in a specific school of criminology. In the last level of analysis, I compared those themes across major schools of criminology to identify organized concepts or principles to explain the treatment of sexual orientation and gender identity across schools of criminology over time. Through this process, the major themes from the intellectual history took form.

\textsuperscript{47} See infra Part I.A.

\textsuperscript{48} Douglas NeJaime, Before Marriage: The Unexplored History of Nonmarital
I want to clarify that most discussions of LGBT identity in criminology (and criminal justice contexts more broadly) primarily apply to male homosexuality. In the criminological literature, there is little attention to lesbians, bisexuals, and transgender people, and even less attention to intersectional issues involving LGBT identity and race, ethnicity, class, and gender.

For this reason, one might raise questions about my use of the term “LGBT” to evaluate these prior discourses. My primary motivation for using this term is to indict prior and current reductionist accounts of LGBT identity and crime. In using this term, I intend to push the idea that it is essential to bring the criminal justice hardships and experiences of people along the entire LGBT spectrum out of the shadows, and that intersectional approaches are necessary to achieve this goal.

This Article proceeds as follows. Part I presents the first of two sections of the intellectual history, which focuses on ideas about LGBT identity and crime from the 1860s to the mid-1970s. I call this period the “former criminal status quo” because sodomy laws existed in almost every U.S. state and were widely enforced against LGBT people (especially gay men). I show that during this period, there was little discursive space to think of LGBT people in the criminal justice system other than as deviant sexual offenders.

Part II presents the second section of the intellectual history, which focuses on ideas about LGBT identity and crime after the decline of sodomy laws in the mid-1970s. It explains how this decline opened a narrow space for scholars, advocates, and policymakers in the 1980s and 1990s to draw on antidiscrimination principles to move ideas about LGBT identity and crime away from treating LGBT people as deviant sexual offenders toward treating them as innocent and nondeviant hate.
crime victims. I label this growing attention to anti-LGBT hate crime victimization as “the new visibility.”

Part III discusses three problems with the rush to portray LGBT people as innocent and nondeviant hate crime victims under the new visibility. First, this rush has obscured the relationship between criminal offending and LGBT identity, leaving little space to understand LGBT offenders. 53 Second, it has left little space to understand the non-hate-motivated circumstances under which LGBT people become victims of crime, despite signals that LGBT people are at greater risk than non-LGBT people for a wide range of victimization beyond hate crimes. 54 Third, it has neglected the multiple dimensions of LGBT victimization and ignored their interactions with LGBT offending. 55 Understanding these interactions is essential to improving the state of LGBT criminal justice given that many LGBT offenders have likely been victimized at several points of their lives—whether from family rejection or abuse, peer violence, or social discrimination. 56

Finally, Part IV discusses what these shortcomings tell us about the types of questions that we should be asking about LGBT offending and LGBT victimization. It also explains how ideas in criminology are useful to engage with those questions. These enhanced accounts can then inform law, policy, and the design of criminal justice institutions to better address the needs and experiences of LGBT offenders and LGBT victims.


This Part presents the first portion of the intellectual history, which focuses on ideas about LGBT identity and crime from the 1860s—when scholars began to advance the earliest criminological theories—to the mid-1970s—when states began to repeal sodomy laws that applied to same-sex sexual activity. I evaluate three major areas of literature during this period: (1) Cesare Lombroso’s early biological theory of crime, (2) psychological theories of crime, and (3) sociological theories of crime. Across all three areas, the discourse on LGBT identity and crime was limited to whether homosexuality should be viewed as a form of sexual deviance in and of itself. The limited parameters of this discourse reflect that there was little room under the former criminal status quo to conceive of LGBT people who came into contact with the criminal justice system as other than deviant sexual offenders.

53. See infra Part III.A.
54. See infra Part III.B.
55. See infra Part III.C.
56. See infra Part III.C.
A. Lombroso’s Early Biological Theory of Crime: The Emerging Class of Biologically Inferior Homosexual Offenders

Sexual deviance concepts were so deeply entrenched in discussions of LGBT criminal justice that they shaped the earliest conceptual and empirical understandings of LGBT identity and crime. The birth of criminology is often traced to a group of Italian physicians who first applied the scientific method to study the causes of crime in the 1860s. Cesare Lombroso’s early biological theory of crime was the most influential of these perspectives, and shaped theories and research on crime for decades after its development.

This group consisted of Cesare Lombroso, Raffaele Garofalo, and Enrico Ferri. Reece Walters, Deviant Knowledge: Criminology, Politics and Policy 15 (2003). Some scholars disagree that modern criminology began in the late nineteenth century with the Italian physicians. See generally, e.g., Alfred Lindesmith & Yale Levin, The Lombrosian Myth in Criminology, 42 Am. J. Soc. 653 (1937). These scholars date its birth to the mid-eighteenth century, when Cesare Beccaria released his influential treatise on penal reform. See generally Cesare Beccaria, An Essay on Crimes and Punishments (1764). Although legal thinkers of the eighteenth and early nineteenth centuries, including Beccaria, made influential contributions to penal reform, they were not concerned with applying the scientific method to study the causes of crime. Walters, supra, at 16. Since criminology is typically defined as the scientific study of crime, most criminologists do not date the birth of modern criminology to the late eighteenth and early nineteenth centuries. Id.

Here it is important to discuss a caveat concerning the available English translations of Lombroso’s scholarship. In 1876, Lombroso released the first edition of Criminal Man, which he revised in four subsequent editions. Despite Criminal Man being considered a foundational text, no complete English translation of any edition of Criminal Man has been published. Mary Gibson & Nicole Hahn Rafter, Editors’ Foreword, in Cesare Lombroso, Criminal Man 3 (Mary Gibson & Nicole Hahn Rafter trans., 2006) (1876). Two incomplete and distorted English translations of the text, both released in 1911, shaped twentieth-century interpretations of Lombroso’s positions. Lombroso’s daughter produced the first translation shortly after Lombroso’s death, the content of which scholars now interpret as being mostly written by Lombroso’s daughter and not Lombroso himself. Horton released the second translation, which was only based on the third volume of the fifth edition of the text. Id. In 2006, historians Gibson and Rafter released the first abridged English translation of all five editions. This Article draws on excerpts from Gibson and Rafter’s translation because it is the most accurate and comprehensive translation to date.

Mark M. Lanier, Stuart Henry & Desire J.M. Anastasia, Essential Criminology 75 (4th ed. 2015). Focusing on Lombroso’s work warrants explanation given that he was not the only Italian physician of the late nineteenth century to apply principles of biological determinism to explain crime. See supra note 57. I focus on Lombroso’s theory for three reasons. First, Lombroso’s theory of crime became influential in the field and inspired the development of future criminological theories in Europe and the United States. Id. Second, the evolving treatment of sexuality and gender nonconformity in Lombroso’s writings offers insight into the broader intellectual currents of his time. See Nicole Hahn Rafter & Mary Gibson, Editors’ Introduction, in Cesare Lombroso & Guglielmo Ferrero, Criminal Woman, the Prostitute & the Normal Woman 3, 21 (Nicole Hahn Rafter & Mary Gibson trans., 2004) (“Lombroso should be recognized as a transitional figure between Victorian prudery and the celebrations of sexual freedom characterizing sexology from its foundation in the early twentieth century on.”). Third,
For context, it is useful to explain a few developments that predated Lombroso’s theory of how homosexuality was conceptualized in Western societies. Until the mid-nineteenth century, homosexuality was viewed as a series of abominable acts, as opposed to a feature of individual identity.\textsuperscript{60} As historian Jonathan Katz has explained, the words “heterosexual” and “homosexual” did not even exist in the United States until 1892.\textsuperscript{61}

The view that homosexuality was a feature of individual identity gained force during the second half of the nineteenth century.\textsuperscript{62} As Michel Foucault described, the homosexual “became a personage, a past, a case history, and a childhood.”\textsuperscript{63} During this period, many Western societies (including the United States) became increasingly mobile as a result of rapid industrialization and urbanization.\textsuperscript{64} Historians have explained that the growth of a capitalist consumer economy promoted a new social ethos that motivated people to view the human body as a source of sexual gratification, not merely a source of reproduction.\textsuperscript{65} In this environment, a greater diversity of sexual preferences and behaviors, including homosexuality, became more publicly visible.\textsuperscript{66}

Sodomy laws were rarely enforced in the United States before 1880.\textsuperscript{67} Scholars have interpreted this lack of enforcement as a product of the State’s limited role in regulating the private sphere at the time.\textsuperscript{68}

Lombroso’s name appears in the titles of works that made the first calls to “queer” criminology. See Nic Groombridge, \textit{Perverse Criminologies: The Closet of Doctor Lombroso}, 8 SOC. & LEGAL STUD. 531 (1999); Stephen Tomsen, \textit{Was Lombroso a Queer? Criminology, Criminal Justice, and the Heterosexual Imaginary, in HOMOPHobic VIOlence 33} (Steven Tomsen & Gail Mason eds., 1997). These scholars viewed Lombroso as a major figure in part because his early theories included discussions of sexuality.

\textsuperscript{60} Jeffrey Weeks, \textit{Sexuality} 33 (1986).
\textsuperscript{62} Weeks, \textit{supra} note 60, at 33 (“From the mid-nineteenth century . . . ’the homosexual’ . . . was increasingly seen as belonging to a particular species of being, characterized by feelings, latency and a psychosexual condition.”).
\textsuperscript{65} \textit{Id.}
\textsuperscript{68} Ronald Hamowy, \textit{Medicine and the Criminalization of Sin: “Self-Abuse” in 19th Century America}, 1 J. LIBERTARIAN STUD. 229, 231 (1977) (describing that the State’s role in regulating sexuality focused on protecting the sanctity of the public realm from “the public flaunting of sexual activities,” not on regulating socially
instance, rules of evidence shielded adults who engaged in private consensual sodomy from prosecution by excluding the testimony of a willing sexual partner. Because the State had this limited role, middle-class society turned to medical professionals to regulate private sexual morality in this time of great change.

In this environment, a science of sexology emerged and homosexuality became the subject of medical inquiry. In 1869, Carl Westphal—a professor of psychiatry in Berlin—became the first medical practitioner to study homosexuality from a clinical perspective. Following Westphal, several renowned physicians advanced the idea that homosexuality was a natural form of human sexuality. Other prominent physicians, however, relied on new scientific theories—especially degeneracy theory—to define homosexuality as an unnatural sexual inversion. This reliance reflected social responsibility for sexual vices, including homosexuality, by rooting their causes in individual pathology.

In 1886, German Austrian psychiatrist Richard von Krafft-Ebing advanced the most influential of these positions in his work *Psycho-pathia Sexualis*. Krafft-Ebing described homosexuality as a feature of individual personality, consistent with newly emerging conceptions of homosexual identity. He defined heterosexuality as the biological norm and classified sexual behaviors that did not further procreation, including homosexuality, as manifestations of pathological disorders. Importantly,
based on his view that homosexuality was a biological abnormality, Krafft-Ebing argued that punishment was neither an effective nor an appropriate response. Rather, he recommended several nonpunitive interventions to address homosexuality, including masturbation, the promotion of good sexual mores and hygiene, and hypnosis.

Krafft-Ebing’s view that homosexuality was a pathological disorder directly shaped the treatment of homosexuality in Lombroso’s early biological theory of crime. Lombroso’s theory argued that external physical features reflected a person’s internal morality, and that therefore the causes of crime were connected to a person’s physical features. Using methods of phrenology and anthropometry, he distinguished different types of offenders from law-abiding citizens based on measurements of skulls, brains, facial features, and other body parts. Influenced by Darwin’s theory of evolution, Lombroso contended that most criminal offenders were “born criminals” (delinquente nato) and that they possessed certain physical anomalies that made them resemble more “primitive” humans.

Critically, Lombroso’s theory shifted the discourse on crime away from philosophical debates about proportional punishments for specific sadism, masochism, assorted fetishisms, and “antipathic sexual instinct”—his term for homosexuality—as pathological. Id.

81. Krafft-Ebing, supra note 78, at 383; see also Leslie J. Moran, The Homosexual(ity) of Law 7 (1996) (elaborating that Krafft-Ebing did not consider the “homosexual” as an appropriate subject for legal regulation, but viewed “homosexual” as “a term by means of which this male genital body might become a new object within a different field of regulation”).


83. Scholars have explained that Lombroso’s adoption of Krafft-Ebing’s theories of sexual psychopathy was by no means inevitable, and that its causes are not entirely clear. See, e.g., Mariana Valverde, Lombroso’s Criminal Woman and the Uneven Development of the Modern Lesbian Identity, in The Cesare Lombroso Handbook 201, 203 (Paul Knepper & P.J. Ystehede eds., 2013) (noting that there “is no real answer to this question”). This is especially noteworthy given that alternative and less stigmatizing conceptions of homosexuality were circulating among medical professionals at the time. See supra note 74 and accompanying text.

84. Gibson & Rafter, supra note 58, at 9.


86. Gibson & Rafter, supra note 58, at 9.

87. Id. at 1.
acts toward the scientific investigation of criminal offenders. Emerging conceptions of homosexual identity fit neatly into this paradigm shift. Lombroso initially described homosexual men ("pederasts") as feminine in appearance based on hair, clothing, and mannerisms; promiscuous; having an affinity for the arts; and likely to associate with one another. As he developed and honed his theory, he came to describe homosexual men as a distinct class of insane offenders whose psychology was defined by biological inferiority and perversion. He explicitly relied on Krafft-Ebing’s pathological view of homosexuality to create this classification. This conceptual move illustrates how at the time when criminologists advanced our earliest scientific and empirical theories of crime, homosexuality was not simply viewed as a series of deviant acts; rather, homosexuals were a distinct class of offenders defined by their perceived deviant sexual pathology.

At the same time, it is important to underscore that the use of biological positivism in Lombroso’s theory to rationalize the denigration of specific groups was by no means specific to sexual and gender minorities at the time. Rather, this use of biological positivism emerged against the backdrop of growing awareness of racial, cultural, economic, political, and social differences between the North and South of Italy after the unification of Italy in 1861. Italian Southerners mostly consisted of villagers from isolated agricultural areas, who had visible racial differences from Italian Northerners because of South Italy’s closer proximity to Africa and the Middle East than to Northern Europe.

88. Walters supra note 57, at 16.
89. Gibson & Rafter, supra note 58, at 8. Lombroso used Darwin’s concept of “atavism” to describe criminals as biological throwbacks to a lesser-evolved, more primitive human. Id. at 1. He used the term “atavism” to refer to human “regression to an earlier stage of evolution.” Id. at 39.
90. Lombroso, supra note 58, at 73.
92. Lombroso stated:
   The crimes of rape and pederasty may be caused by sexual inversion (Conträre Sexualempfindung, to use Krafft-Ebing’s term). When the erotic impulses of an individual do not correspond to his physical constitution, he seeks sexual satisfaction among his own kind. Sexual inversion leads not only to perverted lust (pederasty and lesbianism) but also to a morbid propensity for platonic love and idealization of individuals of the same sex. This strange anomaly often shapes the person’s entire psychology.
Lombroso, supra note 58, at 273.
93. See Foucault, supra note 63, at 43.
95. See Lucy Riall, Sicily and the Unification of Italy: Liberal Policy and
Historians have documented that economic and demographic changes due to migration and industrialization fueled concerns about the stability of the new unified state. In this fragile context, biological positivism emerged as an instrument of nationalism to identify, control, and “civilize” certain groups that were perceived as dangerous and threatening to social order, including racial and ethnic (as well as sexual and gender) minorities. For instance, Lombroso’s writings described whites as “civilized” and nonwhite groups as “primitive” or “savage.” Therefore, the denigration of sexual and gender minorities in early biological theories of crime was part of a broader pattern of using biological principles to rationalize the subordination and control of minority groups.

B. Psychological Theories of Crime: Homosexuality as Criminal Sexual Deviance Caused by Psychological Dysfunction

During the first half of the twentieth century, criminologists began to favor theories and methods of psychology over those of phrenology and anthropometry. This Section evaluates the treatment of LGBT identity in two major strands of psychological theories of crime that gained popularity after this shift: (1) psychoanalytic theories and (2) psychopathological theories. Both strands include disagreements over whether homosexuality should be criminalized, viewed as a mental illness, or both. Regardless of which side criminologists fell on, the scope of the debates was limited to whether homosexuality should be viewed as a form of sexual deviance in and of itself. There was little to no consideration of how psychological hardships that LGBT people experienced could have shaped LGBT offending or LGBT victimization in situations that did not involve sodomy.

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98. Id. at 8.
1. **Psychoanalytic Theories of Crime: Homosexuality as a Natural Variant of Human Sexuality and Contestations Over Criminalization**

Psychoanalytic theories of crime were especially popular between the 1920s and the 1940s. In this literature, criminologists relied on Sigmund Freud’s theory of psychoanalysis to explain crime in terms of unconscious motives. Freudian theory had significant implications for how criminologists addressed culpability and punishment. Specifically, psychoanalysis drew attention to the unconscious desires that motivated behavior over which people had no control. Many psychoanalysts believed that criminal punishment was ineffective to reform individual actors because their offenses were not products of choice or free will.

These ideas about culpability and punishment contributed to significant changes in how criminologists discussed homosexuality in this area of literature. For context, however, it is useful first to summarize Freud’s views on homosexuality, which also shaped these changes. Freud viewed homosexuality as a harmless aberration of sexual development that could not be changed during adulthood. He argued that all children were innately bisexual and experienced a homosexual phase during early psychosexual development, but that most children grew out of this phase before adulthood. In his view, homosexual desires remained as

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101. The arguments in this Section are based on my close readings of five cornerstone texts on psychoanalysis and crime during this period: AUGUST AICHHORN, WAYWARD YOUTH (Viking Press 1935) (1925); FRANZ ALEXANDER & WILLIAM HEALY, ROOTS OF CRIME: PSYCHOANALYTIC STUDIES (1935); FRANZ ALEXANDER & HUGO STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC: A PSYCHOLOGICAL ANALYSIS (Gregory Zilboorg trans., 1931) (1929); KATE FRIEDLANDER, A PSYCHO-ANALYTICAL APPROACH TO JUVENILE DELINQUENCY (1947); WILLIAM HEALY & AUGUSTA F. BRONNER, NEW LIGHT ON DELINQUENCY AND ITS TREATMENT (1936).


105. Id.


107. Bayer, supra note 72, at 22 (observing that “[a]ll children experienced a homosexual phase in their psychosexual development, passing through it on their route to heterosexuality”).

108. Id.
unconscious drives during psychosexual development and were deflected to serve other ends in overt behavior.\textsuperscript{109}

Several criminologists who relied on Freudian theory adopted the position that homosexuality was a harmless aberration of sexual development that could not be changed during adulthood.\textsuperscript{110} In advancing this less stigmatizing view, these thinkers criticized the criminalization of adult homosexuality. Some even went so far as to characterize criminal laws against homosexuality as illegitimate intrusions into private life,\textsuperscript{111} foreshadowing the reasoning in \textit{Lawrence v. Texas}\textsuperscript{112} decades ahead of its time.

This tolerance, however, extended only so far. Many of these criminologists also adopted Freud’s position on the malleability of child sexual development to recommend using psychotherapy to “correct” homosexuality in children.\textsuperscript{113} Therefore, although these criminologists disagreed with criminalizing adult homosexuality, they viewed homosexuality during adulthood as worthy of avoiding.\textsuperscript{114} This lends further support to

\textsuperscript{109} Id.

\textsuperscript{110} See, e.g., ALEXANDER & STAUB, \textit{supra} note 101, at 138–39 (describing that “as a matter of fact, every living being, is \textit{bisexual} in its biological development” and stressing Freud’s writings on homosexuality as “of particular importance”); FRIEDLANDER, \textit{supra} note 101, at 132 (arguing, based on Freud’s views, that homosexual tendencies are part of everyone’s biology and that it is so common for boys and girls to go through homosexual phases after puberty that it should be considered a “normal phase of sexual development”).

\textsuperscript{111} See, e.g., ALEXANDER & STAUB, \textit{supra} note 101, at 134 (describing punishments for homosexual sodomy as “unwarranted intrusions into the private life of citizens” that are “devoid of any far-reaching, imperative, sociological foundation, and are nothing more than a meaningless and superfluous offense to the general sense of justice”).

\textsuperscript{112} 539 U.S. 558 (2003). In \textit{Lawrence v. Texas}, the U.S. Supreme Court invalidated a Texas law that made it a crime for two persons of the same sex to engage in certain sexual conduct. \textit{Id.} at 578. \textit{Lawrence} will be discussed in more detail in \textit{infra} Part II.B.

\textsuperscript{113} See, e.g., AICHHORN, \textit{supra} note 101, at 156–57 (describing the case of a seventeen-year-old gay teenager who was put to work in a tailor shop to sublimate his homosexual tendencies); ALEXANDER & STAUB, \textit{supra} note 101, at 143, 144 (describing homosexuality as a problem of child education and stressing that society “must attempt to institute preventive measures by means of rational, psychologically correct education of children” to prevent homosexuality). These interventions often harmed children psychologically. Terry S. Stein, \textit{Theoretical Considerations in Psychotherapy with Gay Men and Lesbians}, 15 J. HOMOSEXUALITY 75, 80 (1988) (stressing that the effects of psychotherapeutic interventions directed to change homosexuality were “frequently extremely negative, serving to reinforce a sense of low self-esteem and rarely affecting any significant change in sexual identity”).

\textsuperscript{114} These recommendations were consistent with wider social currents that stressed improving the conditions of childhood development to promote nondeviant behavior during adulthood. With the growth of the mental hygiene movement in the late nineteenth century, scholars and advocates increasingly explained mental illness in terms of childhood maladjustment that could be addressed through improving family and social conditions. AMANDA BARUSCHE: FONATIONS OF SOCIAL POLICY: SOCIAL JUSTICE IN HUMAN PERSPECTIVE 241 (2009). In focusing on childhood development, psychoanalysis provided scientific justifications for interventions that stressed supervised
my claim that a stigma of sexual deviance attached to LGBT identity under the former criminal status quo—in this case, even when criminologists advanced more tolerant views of homosexuality.

2. **Psychopathological Theories of Crime: Homosexuality as Mental Disease and Contestations Over Criminalization**

In 1941, Hervey Cleckley released groundbreaking research that offered the first clinical profile of the “psychopath.” Criminologists applied and honed this profile to study the connection between psychopathy and crime. Three points about sexual deviance and LGBT identity emerge from this literature. First, criminologists who studied psychopathy and crime disagreed over whether homosexuality should be criminalized, but unlike the psychotherapists discussed above, they viewed homosexuality in adults as a mental disease that was “curable” and warranted psychiatric intervention. Second, stereotypes of homosexuals as sexual psychopaths and pedophiles are common in this literature. Third, criminologists in this literature provided professional expertise on government-organized committees that were created to address sex crimes, many of which proposed new “sexual psychopath” laws. As explained below, these laws worked in conjunction with exist-

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117. See, e.g., J. Paul de River, *Crime and the Sexual Psychopath* 83 (1956) (describing a homosexual who refused psychiatric treatment as a “criminal in the true sense”); cf. Edwin H. Sutherland, *The Sexual Psychopath Laws*, 40 J. Crim. L. & Criminology 543, 554 (1950) (“Certain psychiatrists have stated that they are interested in the sexual psychopath laws principally as a precedent; they believe that all or practically all criminals are psychopathic . . . ”). But see Benjamin Karpman, *The Sexual Psychopath*, 42 J. Crim. L. Criminology & Police Sci. 184, 197 (1951) (“The proper treatment of the sexual psychopath is not confinement but psychotherapy, or, better yet, proper sexual education in childhood.”).

118. The stigma attached to this stereotype is demonstrated through the statement from Eugene D. Williams, former chief deputy district attorney of Los Angeles County, in his introduction to the book *The Sexual Criminal*, written by prominent forensic psychiatrist Dr. J. Paul De River. Williams described the “homosexual” as an “inveterate seducer of young children of both sexes.” J. Paul De River, supra note 117, at xii.

ing criminal laws against sodomy to coerce LGBT people to undergo psychiatric treatment.\textsuperscript{120}

To provide greater context for the treatment of LGBT identity in this literature, it is helpful to discuss a few developments in psychiatry and criminal law that occurred from the 1940s to the early 1970s. Emerging ideas about psychopathy coincided with a growing consensus in the U.S. psychiatric profession that homosexuality was a mental disease.\textsuperscript{121} The writings of Sandor Rado, Edmund Bergler, Irving Bieber, and Charles Socarides\textsuperscript{122} were especially influential in motivating this consensus.\textsuperscript{123} Reflecting this influence, homosexuality was listed as a mental disorder in the 1952 edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM).\textsuperscript{124}

Emerging ideas about psychopathy and the growing psychiatric consensus that homosexuality was a mental disease contributed to important changes in how LGBT people were treated under the law. The most vivid example was a wave of sexual psychopath legislation that swept across the United States from the late 1930s to the early 1970s.\textsuperscript{125} Between 1946 and 1959 specifically, twenty-nine states enacted sexual psychopath laws.\textsuperscript{126}

A wave of moral panic about sexual predators targeting children during and immediately after World War II contributed to these new laws.\textsuperscript{127} The war not only displaced millions of men from their homes, but also drove the proportion of women in the workforce to an all-time high.\textsuperscript{128} Images of the “sex criminal” in popular culture started to include...
storylines about women being alone during wartime. Once the war concluded, Americans faced the challenge of returning to normalcy both inside and outside of the home. Strengthening traditional family values was one means by which people attempted to return to normalcy. The prioritization of traditional family values fed anxieties about populations that were perceived to threaten those values, including gay men.

Sexual psychopath laws emerged in this environment of moral panic, and primarily took two forms. The first was directly connected to the criminal domain. Any person who was charged with a crime and found by a jury to be a sexual psychopath could be handed over to the state’s department of public health, perhaps indefinitely, until that person was fully “cured.” The second was a variation of civil insanity laws that provided for the psychiatric commitment of sexual psychopaths, perhaps indefinitely, regardless of whether they were charged with a crime. As written, sexual psychopath laws applied to a variety of crimes (for example, rape, prostitution, child molestation, and sodomy) and noncriminal sexual disorders. These laws were enforced so heavily against gay men, however, that the term “sexual psychopath” became culturally synonymous with “homosexual.”

This convergence between the psychiatric sphere and the criminal justice system put LGBT people in a bind: either accept the label of being mentally ill or accept the label of being a criminal. For instance, prominent forensic psychiatrist J. Paul De River argued that “any homosexual act” could be “eradicated through psychotherapy and education, providing the individual involved desires to really do something about it.” He further stressed that any homosexual who refused psychiatric treatment was “a criminal in the true sense as he has no regard or respect for existing laws, made and enforced by the majority of our society.” To avoid criminal prosecution, many LGBT people reluctantly chose the mentally ill label and underwent psychiatric treatment directed to change their sexual orientations and gender identities. The use of psychopathy con-

129. Id. at 72.
131. Id.
132. See, e.g., Freedman, supra note 120, at 132.
133. Id.
134. Id.
135. Id.
136. Id.; Margot Canaday, Heterosexuality as a Legal Regime, in 3 The Cambridge History of Law in America 442, 460 (Michael Grossberg & Christopher Tomlins eds., 2008).
137. Bayer, supra note 72, at 28.
138. de River, supra note 117, at 83.
139. Id.
140. Id. at 28.
cepts to construct homosexuality as a mental disease offered scientific justification for this bind that LGBT people faced.

Having illustrated how sexual deviance concepts shaped discussions of LGBT identity in these two major strains of psychological theories of crime, my analysis now turns to evaluate the treatment of LGBT identity under the sociological theories of crime that gained popularity during the same period.

C. Sociological Theories of Crime: Homosexuality as Criminal Sexual Deviance Caused by Environmental Factors

As these ideas about the relationship between LGBT identity and crime emerged in psychoanalytic and psychopathological theories of crime, a different set of ideas appeared in sociological theories of crime. These sociologically based ideas were important because they framed the discourse on how social and environmental factors, as opposed to individual psychology, shape the relationship between LGBT identity and crime.141

Generally, sociological theories of crime can be divided into two camps, each of which I will discuss in turn.142 First, social structure theories study the macrolevel causes of crime (for instance, poverty, unemployment, racism, and poor education).143 Discussions of LGBT identity in this literature are scarce,144 showing that the former criminal status quo left little room to consider how LGBT-related social hardships (for instance, losing a job or family rejection for being LGBT) influence LGBT offending or LGBT victimization. Second, social process theories explain crime through microlevel interactions between

142. To be clear, here I am not arguing that this is the only way to divide the sociological literature. Paul Rock, Sociological Theories of Crime, in THE OXFORD HANDBOOK OF CRIMINOLOGY, supra note 42, at 233, 234 (noting that “[t]here is no one, royal way to lay out the sociology of crime”).
144. This conclusion is based on my reading of the major works in this area, including Robert E. Park & Ernest Burgess, Introduction to the Science of Sociology (2d ed. 1924); Robert E. Park, Ernest W. Burgess & Roderick D. McKenzie, The City (1925); Clifford Shaw & Henry D. McKay, Juvenile Delinquency and Urban Areas (1942). My discussion of social structure theories in this Section is limited to social disorganization theories of crime. For space consideration, I omit discussions of Merton’s anomie theory that became popular during the former criminal status quo. However, I conducted close readings of Merton’s major works, which also do not consider LGBT identity in a meaningful way. E.g. Robert K. Merton, Social Theory and Social Structure (1949); Robert Merton, Social Structure and Anomie, 3 Am. Soc. Rev. 672 (1938). Although I do not discuss Merton’s strain theory here, I discuss how anomie and strain theories prompt new questions about LGBT identity and crime infra Part IV.C.
individuals and peer groups, families, schools, social institutions, and society. Discussions of LGBT identity in this literature are more common, but characterize homosexuality as a form of sexual deviance rooted in environmental causes—namely, improper socialization.

1. **Social Structure Theories: Neglect of LGBT Identity as a Demographic Difference and Anti-LGBT Discrimination as a Social-Structural Determinant of Crime**

At the turn of the twentieth century, Chicago experienced a rapid increase in industrialization and urbanization as millions of migrant workers settled into poor neighborhoods with widespread crime to find work. These dramatic changes in the city influenced sociologists at the University of Chicago (collectively known as the “Chicago School”) to examine connections between neighborhood conditions and crime.

Two points about the treatment of identity emerged from the Chicago School. First, the Chicago sociologists conceptualized racial or ethnic heterogeneity and poverty as structural determinants of crime. Accordingly, their theories reflect the idea that certain social conditions influence crime (for example, weakened family ties or weakened community bonds), and that it is impossible to understand those connections without considering demographic differences—namely, race, ethnicity, and class. Second, these theories offered empirical models to measure the uneven distribution of crime in neighborhoods with different racial, ethnic, and class compositions without labeling people as deviants or criminals strictly on the basis of race, ethnicity, or class. In fact, Robert Ezra Park used his early theory of social disorganization to challenge the stigmatizing idea that the uneven racial distribution of crime was caused by purportedly inherent biological differences between individuals of different races.

148. See, e.g., Shaw & McKay, supra note 144, 44, 435–41. Robert Ezra Park and Ernest Burgess, who led Chicago’s Department of Sociology, were the first in the Chicago School to apply principles of biological ecology to study crime. They argued that the city grew from the inside out through a process of invasion, dominance, and succession. They asserted that this process was characterized by a cultural or a racial or ethnic group moving into a territory that was occupied by another group, and battling the occupying group until the invading group dominated the area, after which another group invaded and the cycle repeated itself. See Park & Burgess, supra note 144, 47–62.
149. I will return to this point infra Part IV.B, which discusses how more recent social disorganization theories prompt questions about LGBT identity, neighborhood conditions, and crime.
Importantly, there is little to no consideration of LGBT identity in this literature.\textsuperscript{151} Though it is impossible to reach definite conclusions, there are at least two possible explanations for this omission, both of which lend support to my claim that there was little room under the former criminal status quo to view LGBT people in ways other than as deviant sexual offenders. One possible formalist explanation is that the Chicago sociologists did not consider LGBT hardships as nondeviant structural determinants of crime because—unlike race, ethnicity, or class—they viewed LGBT identity as an inherent manifestation of crime given existing sodomy laws.

An alternative and more sound possibility is that the Chicago sociologists were open to viewing LGBT identity along the same terms as other demographic differences in their research, but existing political pressures motivated them to avoid doing so. Recently, historians have called attention to an underground research agenda of the Chicago sociologists that documented a diversity of sexual practices in urban spaces, including homosexuality, prostitution, and interracial sexual relationships.\textsuperscript{152} This research was largely unpublished and never reached the public.\textsuperscript{153} Historians have argued that the Chicago sociologists likely hid their research on homosexuality from the public because it was too controversial for its time and might have compromised support for their other areas of research.\textsuperscript{154}

Although it is impossible to know for sure why LGBT identity was not considered, the focus on demographic differences in this literature reflects a missed opportunity to examine macrolevel connections between LGBT identity, neighborhood conditions, and crime beyond sodomy. Later in this Article, I will return to this point and discuss in more detail the types of questions that social structure theories prompt for LGBT offending and LGBT victimization.\textsuperscript{155}

2. \textit{Social Process Theories: Homosexuality as Sexual Deviance Caused and Sustained by an Individual’s Interactions With the Environment}

Discussions of LGBT identity (and homosexuality in particular) are more common in social process theories, which explain crime in terms of microlevel interactions between individuals and peer groups, families,
schools, and social institutions. These theories became especially popular during the 1950s, when “symbolic interactionism” emerged as a dominant sociological framework to study deviance. At four different levels, social process theories described homosexuality as a form of sexual deviance rooted in environmental causes: (1) society, (2) families, (3) peer groups, and (4) social movements.

At the first level—society—some social process theorists described homosexuals as sexual deviants merely because society labeled them that way via the criminal law. Generally, these scholars were concerned with the process by which societies come to define certain acts and people as deviant. Although they did not embrace laws criminalizing homosexuality, their analysis centered on the validity of those laws and the social problems that those laws created for LGBT people. Their discussions did not go the additional step to examine the social hardships that contributed to LGBT offending and LGBT victimization beyond sodomy criminalization.

156. In this Section, I am drawing from literature in three areas of social process theory: (1) labeling and societal reaction theories, (2) social control theories, and (3) social learning theories. Labeling and societal reaction theories view crime as a social construction and examine the process by which societies come to define certain acts and people as deviant. Frank P. Williams III & Marilyn D. McShane, Criminological Theory: Selected Classic Readings 181–82 (2d ed. 1998). Social control theories examine why people refrain from committing crime. Matt DeLisi, Self-Control Pathology: The Elephant in the Living Room, in Control Theories of Crime and Delinquency 21, 30 (Chester L. Britt & Michael R. Gottfredson eds., 2003). Social learning theories view crime as a learned behavior. Vito & Maahs, supra note 102, at 177.


159. To be clear, some social process theorists focused on more than one level of environmental causes. As will be explained, Howard Becker is an example of a social process theorist who focused on society and peer groups in his analysis of homosexuality and deviance.

160. With respect to this first level, I am primarily drawing on labeling and societal reaction theories.

161. See, e.g., Howard S. Becker, Outsiders 30 (1963) (describing that the homosexual “makes of deviance [his] way of life” and “organizes his identity around a pattern of deviant behavior”).

162. Williams & McShane, supra note 156, at 181–82 (explaining that “labelling theorists developed a perspective that emphasized the importance of society’s role in defining a person as a criminal or delinquent”).

163. For example, Howard Becker stressed that being “known as a homosexual in an office may make it impossible to continue working there.” Becker, supra note 161, at 34. He further stressed that in “such cases, the individual finds it difficult to conform to other rules which he had no intention or desire to break, and perforce finds himself deviant in these other areas as well.” Id.

164. This conclusion is based on my close readings of the major texts from this area of criminological literature.
At the second level—families—some social process theorists\textsuperscript{165} viewed homosexuality as a form of sexual deviance that “improper” socialization within families caused and sustained. These arguments appeared after scholars started to draw on B.F. Skinner’s “operant conditioning theory”\textsuperscript{166} in the 1960s to explain the mental processes—including sexual deviance—through which individuals learned how to commit crime. For instance, in early iterations of his social learning theory of crime, Ronald Akers\textsuperscript{167} hypothesized that a person’s sex drive had biological origins, but that its strength and direction were guided by social regulations and institutions, including gender roles, marriage, and family.\textsuperscript{168} From this point of view, he argued that parents and others who socialize children might encourage homosexuality.\textsuperscript{169}

At the third level—peer groups—some social process theorists described homosexuality as a form of sexual deviance that peer groups encouraged and sustained. For instance, in articulating his influential labeling theory, Howard Becker argued that norms within peer groups could facilitate deviancy. Using homosexuality as an example, he explained that membership in a deviant subculture “solidifie[d] a deviant identity” and encouraged “a set of perspectives and understandings about what the world is like and how to deal with it, and a set of routine activities based on those perspectives.”\textsuperscript{170}

At the fourth and final level—social movements—some social process theorists described homosexuality as a form of sexual deviance and discussed the role of early lesbian and gay social movements in justifying homosexual “deviance” for people who engaged in same-sex sex. For context, it is helpful to explain that the rise of lesbian and gay mobilization is commonly traced to the birth of the “homophile” movement in

\textsuperscript{165} With respect to this second level, I am primarily drawing on social learning theories.

\textsuperscript{166} Operant conditioning theory argues that learning is shaped by the consequences that flow from behavior (for instance, punishment or reinforcement). B.F. Skinner, \textit{Science and Human Behavior} 62–66 (3d ed. 1957).

\textsuperscript{167} In the following discussion, I am drawing on sources that are based on Akers’s early articulation of his social learning theory in the 1970s. Akers dedicated an entire chapter in the first and second editions of \textit{Deviant Behavior: A Social Learning Approach}, a key work in which he explicated and applied his social learning theory, to the topic of homosexuality. \textit{Ronald L. Akers, Deviant Behavior: A Social Learning Approach} (1973). In later articulations of his theory after sodomy laws lost force, he no longer included this chapter on homosexuality. \textit{See, e.g., Ronald L. Akers, Social Learning and Social Structure: A General Theory of Crime and Deviance} (2009).

\textsuperscript{168} \textit{Id.} at 147.

\textsuperscript{169} \textit{Id.} at 150. Akers identified two ways that this could occur. First, parents might socialize children in ways that provide direct reinforcement for homosexuality. Second, parents might socialize children in ways that render them “unprepared” to engage in heterosexual conduct. \textit{Id}.

\textsuperscript{170} \textit{Becker, supra} note 161, at 38.
the 1950s. Groups affiliated with this movement advocated for the full inclusion of lesbians and gay men in society, and for homosexuals to be afforded the same rights and protections as heterosexuals.

To understand the influence of early lesbian and gay mobilization on discussions in the criminological literature, revisit Becker’s labeling theory discussed above. Becker argued that the homosexual community developed its own historical, legal, and psychological justifications for their members’ deviant activities, and described the emerging body of literature from the homophile movement as providing a working philosophy for the homosexual. This working philosophy purportedly functioned to justify homosexual behaviors from the perspective of people who engaged in them.

Social process theorists who discussed homosexuality at one or more of these levels did not necessarily embrace criminalizing homosexuality, and some even held opposite intentions: to humanize and normalize specific groups of “deviants” by showing that they were no different than the rest of the population. At the same time, their discussions assumed the legitimacy of the status quo under which sodomy laws existed and were enforced against LGBT people. Consistent with my claim, this literature paid little attention to how social hardships that stemmed from microlevel interactions between LGBT people and their environment (such as family rejection for being LGBT) contributed to LGBT offending or LGBT victimization beyond sodomy.

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To recap, this first section of the intellectual history illustrated that ideas about LGBT identity and crime under the former criminal status quo (which lasted from the 1860s through the early 1970s) centered on whether homosexuality should be viewed as a form of criminal sexual deviance in and of itself. These ideas were largely shaped by thinkers engaging with LGBT identity and crime through the lens of sodomy laws. They paid little attention to how the psychological and social hardships that LGBT people faced might shape LGBT offending and LGBT victimization beyond sodomy. This illustrates the lack of space under the

171. In the 1950s, the “homophile” movement emerged with the creation of the Mattachine Society, which was comprised of gay men and is viewed today as the first modern gay rights organization. Soon after in 1955, a parallel society for lesbians called the Daughters of Bilitis formed. D’EMILIO, supra note 125, at 2.
172. Id.
173. Id.
175. Id. at 38–39.
former criminal status quo to think of LGBT people in the criminal justice system other than as deviant sexual offenders.

II. THE NEW VISIBILITY (MID-1970S–TODAY): LGBT PEOPLE AS INNOCENT AND NONDEVIAN'T HATE CRIME VICTIMS

This Part presents the second section of the intellectual history, which focuses on the paradigm shift between the mid-1970s and 1990s to redefine LGBT people in the criminal justice system as innocent and nondeviant hate crime victims, as opposed to deviant sexual offenders. I label this heightened focus on anti-LGBT hate crime victimization as “the new visibility.” For context, Part II.A discusses some important changes in substantive criminal law and in lesbian and gay social movements that preceded this shift. Part II.B then examines the move to redefine LGBT people in the criminal justice system as innocent and nondeviant hate crime victims. I explain that the new visibility embodied a broad trend among scholars, advocates, and policymakers to reframe LGBT identity as a source of unjust victimization as opposed to a source of sexual offending.

A. The Decline of the Former Criminal Status Quo

The decline of the former criminal status quo did not occur in one complete sweep. Rather, at least two phenomena contributed to its decline. First, state legislatures began to decriminalize private consensual sodomy in the 1970s, which was largely a consequence of states incorporating the Model Penal Code. Second, challenges from professional experts and lesbian and gay social movements encouraged the psychiatric profession to shift away from its dominant view that homosexuality was a mental disease. Each of these phenomena did different work to diminish the stigma of sexual deviance attached to homosexuality. The former phenomenon diminished the criminal stigma, whereas the latter phenomenon diminished the mental illness stigma. As explained later, these changes opened space to conceive of LGBT people in the criminal justice system in ways other than as deviant sexual offenders.

1. The Model Penal Code and Sodomy Decriminalization

Every state criminalized private consensual sodomy between adults until Illinois repealed its sodomy law in 1961. This repeal occurred after Illinois adopted the American Law Institute (ALI)’s Model Penal Code (MPC), which did not criminalize private consensual sodomy between adults. During the 1970s, a number of states decriminalized private con-

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177. See infra Part II.A.1.
178. See infra Part II.A.2.
179. Eskridge, supra note 28, at 662.
sensual sodomy, mostly as a consequence of twenty-two states adopting the MPC between 1971 and 1983.\textsuperscript{181}

One might argue that this decriminalization trend was the inadvertent outcome of states incorporating the MPC, as opposed to mobilization on the issue. But as scholars have documented, the omission of private consensual sodomy from the MPC was part of a broader historical moment involving the right to privacy.\textsuperscript{182} In this moment, professional experts, legislators, courts, and advocates questioned the role of the criminal law in regulating morality, and private intimate life in particular.\textsuperscript{183}

One could trace the beginning of this moment to the late 1940s, when Alfred Kinsey released groundbreaking research showing that it was not uncommon for men and women to engage in illegal sex acts at some point of their lives, including adultery, fornication, sodomy, and homosexuality.\textsuperscript{184} Kinsey’s specific revelation that it was not uncommon for people to engage in homosexual acts within their lifetime challenged the growing psychiatric consensus that framed homosexuality as a mental disease.\textsuperscript{185} Based on his findings, Kinsey called for legislators to lift criminal laws against homosexual acts (as well as other sexual acts) that, contrary to popular belief, were quite common behind closed doors.\textsuperscript{186}

\begin{itemize}
\item \textsuperscript{181} Id. at 63.
\item \textsuperscript{182} See Melissa Murray, Griswold’s Criminal Law, 47 Conn. L. Rev. 1045, 1047 (2015) (noting that Griswold v. Connecticut was part of a historical moment that “sought to reimagine the state’s authority in the intimate lives of citizens and limit the use of criminal law as a means of enforcing moral conformity”); Reva B. Siegel, How Conflict Entrenched the Constitutional Right to Privacy, Yale L.J. F. 316, 317–18 (2015) (placing the debate over whether it was appropriate to criminalize sex into broader contestations over the meaning of a constitutional right to privacy).
\item \textsuperscript{183} See Siegel, supra note 182, at 317–18.
\item \textsuperscript{184} Alfred C. Kinsey, Wardell B. Pomeroy & Clyde E. Martin, Sexual Behavior in the Human Female (1953) [hereinafter Human Female]; Alfred C. Kinsey, Wardell B. Pomeroy & Clyde E. Martin, Sexual Behavior in the Human Male (1948) [hereinafter Human Male].
\item \textsuperscript{185} Bayer, supra note 72, at 42. Kinsey began his comprehensive study on sexual behavior in 1938, and over the course of a decade he and his staff interviewed over 5,300 white men and 5,940 white women about their sexual histories. Human Female, supra note 184, at 3, 4. Although the sample was racially homogenous, it was intended to represent a cross section of Americans based on geographic location, education, occupation, socioeconomic level, age, and religion. Id. at 31–37. Kinsey placed sexuality on a 7-point scale from 0 (exclusively heterosexual) to 6 (exclusively homosexual). Id. at 471–72. He found that about 37 percent of the male subjects and 13 percent of the female subjects had engaged in at least one homosexual act to the point of orgasm between adolescence and late adulthood. Id. at 474–75. Moreover, only 10 percent of the male subjects were more or less exclusively homosexual (a rating of 5 or 6) for at least three years between the ages of sixteen and fifty-five. Human Male, supra note 184, at 650. Only 2 to 6 percent of unmarried women between the ages of sixteen and fifty-five, and 1 percent of married women in the same age range, identified as more or less exclusively homosexual. Human Female, supra note 184, at 473.
\item \textsuperscript{186} Murray, supra note 182, at 1050 (noting that “Kinsey began advocating for legal reform”).
\end{itemize}
In 1951, the ALI began its project of creating a model uniform code to simplify the inconsistent web of common law and statutes that comprised different states’ criminal laws. The drafters were especially concerned about criminal law intruding into private life. Referencing Kinsey’s research, a commission consisting of prominent legal experts released an early draft of the MPC in 1955 that omitted private consensual sodomy from its list of crimes—a landmark reform given that every state criminalized private consensual sodomy at the time. This omission remained in the final version of the MPC that the ALI adopted in 1962. To morally and philosophically justify this reform, the drafters drew on J.S. Mill’s harm principle to conclude that “no harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners.”

While the MPC drafters discussed and formulated these reforms, similar debates about privacy and the criminal regulation of sexual morality emerged in England and Wales. In 1957, the Department Committee on Homosexual Offenses and Prostitution released a report (the “Wolfenden Report”) concluding that criminalization was an inappropriate response to private consensual homosexual conduct and prostitution. Using arguments similar to the privacy justifications of the MPC reforms, the Wolfenden Report stressed a domain of private morality that the criminal law may not encroach upon.

Soon after the Wolfenden Report’s release, Lord Patrick Devlin and H.L.A. Hart engaged in extensive written debates about the moral and philosophical underpinnings of its recommendations. Hart argued in favor of protecting a sphere of privacy from criminal intervention, whereas Devlin defended the use of the criminal law to enforce public morality. The opposing ideas represented in the Hart-Devlin debates

187. Id. at 1051.
188. Id.
190. Eskridge, supra note 28, at 662.
191. Cain, supra note 189, at 137.
194. The Wolfenden Report stressed that “[u]nless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.” Id. ¶ 61.
196. Siegel, supra note 182, at 318.
would later shape the U.S. Supreme Court’s 1965 decision in *Griswold v. Connecticut*,\(^{197}\) which established a federal constitutional right to privacy and initiated privacy jurisprudence in areas involving reproductive rights, sex, and marriage.\(^{198}\)

Before moving on, I want to be clear: I am not arguing that this sodomy decriminalization trend resulted in sodomy laws having no relevance to the criminal justice problems that LGBT people faced after the 1970s. For instance, the Court’s 1986 decision in *Bowers v. Hardwick* provided a federal constitutional justification for the twenty-five states that had sodomy laws on the books at that time.\(^{199}\) Even after the Court overturned *Bowers* in its 2003 decision in *Lawrence v. Texas*,\(^{200}\) some states continued to have criminal laws on the books prohibiting private consensual sodomy,\(^{201}\) and police officers have recently applied these laws against LGBT people in constitutionally suspect ways.\(^{202}\) Rather, this discussion is intended to set the stage for my argument to follow that this sodomy decriminalization trend was associated with a drastic shift in scholarly and popular conceptions of LGBT people in the criminal justice system after the mid-1970s.

2. **Challenges to the Psychiatric Profession and the Repeal of Sexual Psychopath Laws**

As criminal sodomy laws lost popularity, so did the prevailing view in the psychiatric profession that homosexuality was a mental illness. Homosexuality was removed from the DSM in 1973.\(^{203}\) Many states also began to repeal their sexual psychopath laws in the early 1970s.\(^{204}\) The declining popularity of the orthodox view in the psychiatric field that homosexuality was a mental illness was a key precursor to the decline of the dominant image of the deviant LGBT sexual offender under the former status quo.

Two interconnected factors help to explain these changes. First, a growing body of empirical research provided a scientific basis to reject the...

\(^{197}\) 381 U.S. 479 (1965).

\(^{198}\) Siegel, *supra* note 182, at 318–19.

\(^{199}\) 478 U.S. 186, 196 (1986) (upholding against constitutional challenge Georgia’s sodomy law insofar as it criminalized acts between people of the same sex).

\(^{200}\) 539 U.S. 558, 573 (2003) (invalidating on substantive due process grounds Texas’s “deviate sexual intercourse” law that criminalized same-sex oral and anal sex).

\(^{201}\) Ian Millhiser, *10 Years After They Were Declared Unconstitutional, 14 States Still Have ‘Sodomy’ Laws*, THINKPROGRESS (Apr. 9, 2013), http://thinkprogress.org/justice/2013/04/09/1835221/10-years-after-they-were-declared-unconstitutional-14-states-still-have-sodomy-laws [https://perma.cc/AAS7-DG2M].


\(^{203}\) Bayer, *supra* note 72, at 40.

\(^{204}\) *Id.*; Nathan James, Kenneth R. Thomas & Cassandra Foley, *Civil Commitment of Sexually Dangerous Persons* 6 (2008).
view that homosexuality was a mental disease.\textsuperscript{205} Alfred Kinsey and Evelyn Hooker’s research was especially influential in discounting this prevailing view. In one study, Hooker recruited gay subjects with the help of the Mattachine Society, illustrating the connection between these experts and early lesbian and gay social movements.\textsuperscript{206} Based on her findings, Hooker advocated for changing societal conditions that denigrated homosexuality, and against subjecting homosexuals to psychiatric treatment.\textsuperscript{207}

Second, lesbian and gay social movements prioritized eliminating the stigma of disease attached to homosexuality.\textsuperscript{208} During the homophile movement,\textsuperscript{209} organizations provided public forums for professional experts to present research challenging this stigmatizing view.\textsuperscript{210} For instance, in 1955, the Mattachine Society released the first issue of its magazine, \textit{Mattachine Review}.\textsuperscript{211} The issue featured a summary of Hooker’s research,\textsuperscript{212} which, as noted above, refuted the idea that homosexuality was a mental disease.

Challenges to the psychiatric profession continued with the birth of more radical lesbian and gay mobilization during the 1960s. The growth of lesbian and gay neighborhoods and establishments in major cities,\textsuperscript{213} as well as the increased public presence of lesbian and gay social movements, was associated with heightened police crackdowns on lesbian and gay communities and social spaces during the 1960s.\textsuperscript{214} Energized by radical counterculture movements of the 1960s, many LGBT people pursued a more radical agenda of protest against LGBT oppression.\textsuperscript{215} The Stone-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{205} Bayer, supra note 72, at 41–66 (summarizing major research challenging the prevailing view that homosexuality was a mental illness).
\item \textsuperscript{206} Evelyn Hooker, \textit{The Adjustment of the Male Overt Homosexual}, 21 J. PROFESSIONAL TECH. 18, 19 (1957).
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Bayer, supra note 72, at 67–100 (discussing challenges to the psychiatric profession in lesbian and gay social movements from the 1950s to the 1970s).
\item \textsuperscript{209} See supra note 171 (briefly describing the homophile movement).
\item \textsuperscript{210} Id. at 73–75 (describing that the \textit{Mattachine Review} and the \textit{Ladder}—the two official publications of the Mattachine Society and the Daughters of Bilitis—including psychiatric research contesting the idea that homosexuality was a mental illness).
\item \textsuperscript{211} Id. at 73.
\item \textsuperscript{212} Id.
\item \textsuperscript{213} Bérubé, supra note 130, at 245.
\item \textsuperscript{215} D’Emilio, supra note 125, at 224; Gwendolyn M. Leachman, \textit{From Protest to Perry: How Litigation Shaped the LGBT Movement’s Agenda}, 47 U.C. Davis L. Rev. 1667, 1678 (2014) (discussing the emergence of lesbian and gay “liberationist” organizations in the 1970s that were influenced “by the larger progressive political climate of the 1970s”). The Gay Liberation Front described itself as “a militant coalition of
wall Riots of 1969 and the development of the Gay Liberation Front symbolized the growth of this more radical turn within lesbian and gay social movements.216

Members of these more radical groups joined feminists to protest at the American Psychiatric Association (APA)’s annual conventions in 1970 and 1971.217 Demonstrators disrupted presentations and grabbed microphones to denounce psychiatrists who advocated using aversion therapy to treat homosexuality.218 In part to avoid disruption at future conventions, the APA allowed “homosexuals” to present at the 1971 convention—something homosexuals had been consistently denied in the past.219 Protest organizers and prominent gay activists also discussed their demands to remove homosexuality from the DSM with APA officials.220 This mobilization triggered more critical conversations at the 1972 APA convention about the psychiatric discipline’s stance toward homosexuality.221 In 1973, the APA’s board of trustees voted to remove homosexuality from the DSM.222

* * *

In sum, two related but separate movements contributed to the decline of the image of the deviant LGBT sexual offender. The first was the decriminalization of private consensual sodomy in the 1970s, which was largely a consequence of states incorporating the MPC. The second was the declining popularity of the view in the psychiatric profession that radical and revolutionary homosexual men and women ‘exist[ed] to fight the oppression of the homosexual as a minority group, and to demand the right to the self-determination of [their] own bodies.’” Michael Boucai, Glorious Precedents: When Gay Marriage Was Radical, 27 YALE J.L. & HUMAN. 1, 11 (2015) (quoting 10 GLF NEWS (Gay Liberation Front, N.Y.) (Feb. 1970)).


217. BAYER, supra note 72, at 102, 105.

218. Id. at 103, 105.

219. Id. at 104.

220. Id. at 107.

221. Id. at 112.

homosexuality was a mental disease. My analysis now shifts gears to discuss how the decline of the former criminal status quo opened space for new narratives about the relationship between LGBT identity and crime.

B. Anti-LGBT Hate Crime Victimization: The Move to Antidiscrimination Principles to Reframe LGBT Identity and Crime

The decline of both sodomy laws and the dominant view that homosexuality was a mental illness paved the way for a new scholarly and policy agenda that reframed LGBT identity as a source of unjust hate-motivated victimization. Importantly, this emerging agenda on anti-LGBT hate crime victimization was part of a wider movement consisting of different racial, ethnic, religious, and sexual minority groups that pushed “hate crime” to the fore of public discussion starting in the 1980s. Many scholars view the social movements of the 1960s and 1970s—including the Civil Rights Movement, the women’s movement, the lesbian and gay rights movement, and the crime victim’s movement—as having provided the structural and discursive foundations necessary to redefine violence against minorities as “hate crimes” in the 1980s. During the 1980s and 1990s, civil rights organizations and other advocacy groups increasingly monitored and called attention to the problem of hate-motivated violence. In addition, legislatures and municipalities enacted hate crime laws and ordinances at the local, state, and federal levels.

Greater attention to hate-motivated violence against lesbians and gays specifically was a key aspect of this growing hate crime movement.
In 1989, Gregory Herek—a psychologist and prominent LGBT hate crime scholar—published an article that criticized the lack of scientific attention paid to anti-lesbian and gay hate crime, especially among psychologists.\textsuperscript{228} Herek advanced several arguments why psychologists should be concerned about anti-lesbian and gay hate crime, illustrating a lack of awareness in the field at that time that this topic was worthy of study.\textsuperscript{229}

Answering this call for greater research, in 1989 the National Institute of Mental Health convened a two-day workshop that brought together clinicians, community workers, and researchers from a variety of disciplines to develop a research agenda for anti-lesbian and gay hate crime.\textsuperscript{230} The workshop provided the impetus for the first special collection of published essays on anti-lesbian and gay hate crime.\textsuperscript{231} The essays touched on three key areas: (1) existing data and methodological issues involving the study of anti-lesbian and gay hate crime; (2) the circumstances under which this violence occurred; and (3) the psychological harms of this violence and the available services to assist victims with those harms.\textsuperscript{232}

In the 1990s and 2000s, studies of anti-lesbian and gay hate crime victimization surged, which enhanced knowledge in each of these three areas.\textsuperscript{233} As the literature grew, it paid greater attention to anti-transgender hate crime.\textsuperscript{234} In addition, there was greater discussion of the underreporting of anti-LGBT hate crime to the police.\textsuperscript{235} Reporting obstacles included fear of secondary victimization by the police, fear of retaliation by the perpetrator(s), general distrust of the police, and feelings of shame.

\textit{Processes: The Gay/Lesbian Movement and Violence Against Gays and Lesbians as a Social Problem}, 42 Soc. Probs. 145, 149 (1995) (describing that “[h]ate-motivated violence against gays and lesbians has attracted considerable attention from a variety of constituencies and numerous forums, including editorials in many prestigious newspapers, official hearings before both houses of Congress, and sustained educational efforts on many university campuses”).


\textsuperscript{229}. Id. at 948.


\textsuperscript{231}. The essays were published in a 1990 issue of the \textit{Journal of Interpersonal Violence}. See 5 J. Interpersonal Violence 267–427 (1990).

\textsuperscript{232}. These areas are set out in the table of contents of the special issue.


from being criminally targeted for being LGBT. These studies substantiated the idea that crimes motivated by anti-LGBT prejudice were a special case—whether because they were more frequent or caused more serious harm to both immediate LGBT victims and LGBT communities than nonhate crimes did. Critically, this idea rested on antidiscrimination principles—namely, that a perpetrator’s discriminatory selection of a victim on the basis of the victim’s LGBT identity resulted in unique problems that warranted special scholarly, policy, and legal attention.

Antidiscrimination concerns not only shaped this body of literature, but also influenced wider developments in social movements, criminal law, and constitutional doctrine. Beginning with social movements, during the 1980s and 1990s there was an unprecedented level of mobilization against violence within lesbian and gay communities, in part due to perceptions that this violence was increasing. Many lesbian and gay advocacy groups coordinated with lesbian and gay community centers to establish antiviolence projects to address the problem. Antiviolence projects served many functions, including documenting anti-lesbian and gay violence within communities; distributing reports of this violence to law enforcement agencies, government officials, and lesbian and gay communities; and offering victim assistance to lesbian and gay victims of hate crime. Over time, antiviolence projects paid more attention to hate crime affecting a broader spectrum of the LGBT population, including bisexual and transgender people.

With regard to criminal law reforms, many state legislatures adopted hate crime laws that included sexual orientation, which imprinted the image of the innocent and nondeviant LGBT hate crime victim into legislation. For instance, sixteen states and the District of Columbia adopted hate crime laws that included sexual orientation between 1978

236. Id.
237. Gregory M. Herek, J. Roy Gillis & Jeanine C. Cogan, Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults, 67 J. Consulting Clinical Psychol. 945, 945–46 (1999) (noting that much of the “heightened concern” about hate crimes during the 1990s “reflected an assumption that whereas all crimes have negative consequences for the victim, hate crimes represent a special case because of their more serious impact on both the crime victim and the larger group to which she or he belongs”).

238. Although here I am focusing on anti-LGBT hate crime, the analysis to follow illustrates that reliance on anti-discrimination principles applied to other categories of hate crime as well.

239. Jenness, supra note 227, at 150. For a critical perspective on this wave of hate-crime activism in mainstream gay mobilization see generally Spade & Willse, supra note 24.

240. Jenness, supra note 227, at 150.
241. Id. at 154–62 (discussing the multiple functions of antiviolence projects).

and 1995. Within this same period, only Minnesota and the District of Columbia included gender identity in their hate crime laws, illustrating that there was much less attention paid to anti-transgender violence during these reforms.

Generally, hate crime laws (both in the LGBT and non-LGBT context) fell into two camps. First, some laws provided for the enhanced punishment of anti-LGBT hate crime (as well as other forms of hate crime). These laws rested on antidiscrimination principles because they embodied the idea that the criminal law should not tolerate violence directly motivated by anti-LGBT prejudice (or other forms of prejudice), especially when the prejudicial nature of this violence resulted in greater harm to targeted victims and communities than non-hate-motivated crimes did. Second, some laws shaped the gathering of hate crime statistics. It is also possible to view these laws as resting on antidiscrimination principles because they reflected the idea that crimes motivated by anti-LGBT prejudice warranted special government monitoring in light of their distinct harms to immediate LGBT victims and wider LGBT communities. That LGBT identity was and still is largely omitted from official crime statistics involving other crimes—a point I will discuss further—lends support to this idea.

Constitutional doctrine also reflects the paradigm shift away from the deviant LGBT sexual offender to the innocent LGBT hate crime victim. Two U.S. Supreme Court cases are instructive on this point. The first is the Court’s 1993 decision in *Wisconsin v. Mitchell*, which upheld the constitutionality of Wisconsin’s hate crime penalty-enhancement law.


248. On this point involving antidiscrimination principles, there are important parallels with the government collection of racial data under the 1964 Civil Rights Act. Although organizations in the Civil Rights Movement were initially skeptical that this data would further entrench segregation, attitudes within these organizations shifted to view racial data collection as an integral part of the enforcement of civil rights legislation. *See* Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. Pa. L. Rev. 927, 928, 938 (2006).

249. I discuss this point in more detail *infra* Part III.A.1.
statute. Although the facts of the case involved a racially motivated crime, the Wisconsin statute more broadly applied to crimes in which a perpetrator “intentionally select[ed]” a victim because of bias toward a victim’s sexual orientation, race, religion, color, disability, national origin, or ancestry. The State’s petition for certiorari specifically discussed the problem of gay bashing and its reply brief in support of its petition included a study indicating that anti-gay hate crime was on the rise.

Before the Court, the defendant argued that the Wisconsin statute violated the First Amendment because it impermissibly punished offensive thought. In response, the State argued that the statute punished conduct—namely, the perpetrator’s intentional selection of a victim because of that victim’s personal characteristic. In upholding the law, the Court relied on antidiscrimination principles, stressing that “motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge.” The Court further stressed that the Wisconsin statute targeted hate-motivated conduct that the State and its amici curiae perceived to inflict greater individual and societal harm, and concluded that the State’s desire to redress those harms was adequate justification for the law.

The second case is the Court’s 2003 decision in Lawrence v. Texas, which overruled Bowers v. Hardwick and invalidated remaining sodomy laws as they applied to private consensual sodomy between two adults. On one hand, the differences between Justice Anthony Kennedy’s majority and Justice Antonin Scalia’s dissenting opinions reflect the opposing ideas about privacy and the criminal regulation of morality surrounding the MPC, the Wolfenden Report, and the

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251. In Wisconsin v. Mitchell, the respondent, Mitchell, was part of a young group of black men that brutally beat a white man. Id. at 479–80. Immediately before the assault, the group watched and discussed a scene from the movie Mississippi Burning, in which a white man beats a young black boy while he is praying. Id. at 480. After the scene ended, the group asked Mitchell, “[D]o you all feel hyped up to move on some white people?” Id. The group then moved outside and assaulted the white victim. Id. The jury concluded that Mitchell selected his victim because he was white, and enhanced his maximum sentence from two to seven years of imprisonment. Id.
252. Id. at 480.
255. Id. at 484.
256. Id. at 487.
257. Id.
Hart-Devlin debates discussed previously. In fact, Kennedy’s opinion discusses the decriminalization reforms that the MPC and the Wolfenden Report inspired.

On the other hand, a closer reading of the decision reveals that antidiscrimination principles played an important role in the case. Psychological experts who served as amici for Lawrence characterized the Texas homosexual sodomy statute as a source of reinforcement for anti-lesbian and gay prejudice and hate-motivated violence. Legal experts who served as amici further stressed that sodomy laws resulted in states excluding lesbians and gays from hate crime laws and antidiscrimination protections in the civil realm. This positioning of hate crime laws in the Lawrence litigation illustrates how the case played an important role in discrediting images of the LGBT deviant sexual offender.

Antidiscrimination principles also appear to have factored into Justice Kennedy’s opinion deciding the case on due process, as opposed to equal protection, grounds. He stressed that “[w]hen homosexual conduct is made criminal by the law of the States, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” He further stressed the stigma that the Texas law placed on its targets, including the indignity of the charge itself, the risk of being forced to register as a sex offender for the same crime in other states, and the collateral consequences following a conviction (for example, notations on job application forms).

Justice Sandra Day O’Connor’s concurrence invalidating the Texas law on equal protection grounds also rested on antidiscrimination principles. She explained that the “Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction.” She emphasized the consequences of being convicted under the Texas statute, including disqualification from working in a variety of professions (for instance, medicine, athletic training, and interior design). Similar to Justice Kennedy’s majority opinion, her concurrence stressed the risk of being forced to register as a sex offender for the same crime in other states. Notably, Justice O’Con-

261. Lawrence, 539 U.S. at 572–74.
264. Lawrence, 539 U.S. at 575.
265. Id. at 576.
266. Id. at 581 (O’Connor, J., concurring).
267. Id.
268. Id.
nor also stressed the collateral consequences of the Texas law in the civil domain, including “employment, family issues, and housing.”

Accordingly, both Justice Kennedy’s majority and Justice O’Connor’s concurrence in Lawrence stressed the collateral consequences of criminal sodomy laws. Their discussions reflect how the move away from images of the deviant LGBT sexual offender has contributed to the substantive criminal law being framed as primarily harmful to LGBT people in the civil, as opposed to the criminal, domain. Underlying this framing is the misguided idea that eliminating sodomy laws corrects the main injustice that LGBT people experience in the criminal realm. As I will argue in the next Part, this narrow framing overlooks a range of criminal justice problems that LGBT people have faced—and continue to face.

III. PROBLEMATIZING THE NEW VISIBILITY

Scrubminating the limited ways in which scholars, advocates, and policymakers have relied on antidiscrimination principles under the new visibility brings to the surface the LGBT criminal justice problems that have been overlooked. This Part discusses three ways in which the rush to view LGBT people as innocent and nondeviant hate crime victims has fallen short. First, it has obscured the relationship between LGBT identity and criminal offending. Second, it has fostered incomplete accounts of LGBT victimization. Third, it has neglected the dynamic interactions between LGBT victimization and LGBT offending. These problems illustrate a need to broaden existing accounts of the relationship between LGBT identity and crime.

A. Obscured Relationships Between LGBT Identity and Offending

The rush to view LGBT people (and in particular, lesbians and gays) in the criminal justice system as innocent and nondeviant hate crime victims has left little space to understand LGBT people as offenders. There are at least three overlapping layers to how we have lost sight of LGBT criminal offenders under the new visibility, which I will discuss in turn: (1) a scarcity of data on how many LGBT offenders there are and the types of personal or property crimes for which they are arrested or have committed, (2) a lack of theoretical insight into how LGBT identity might relate to the causes of offending for both personal and property crimes, and (3) a lack of LGBT-offender narratives to replace the antiquated deviant sexual-offender narrative.

269. Id. at 582. For a more detailed discussion of the collateral consequences of sodomy laws for lesbians and gays, see Christopher R. Leslie, Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws, 35 Harv. C.R.-C.L. L. Rev. 103 (2000).
1. **Scarcity of Data on LGBT Offenders**

Recently available data suggests that the incarceration rate for self-identified lesbian, gay, and bisexual adults is three times that of the U.S. adult population. Nonetheless, there is a scarcity of publicly available data involving LGBT offenders at several points of the criminal process including detention and arrest, charging, conviction, sentencing, and probation and parole. These statistical gaps make it difficult to identify and to address LGBT-based inequality at these different points of the criminal process.

The connection between the move to embrace images of the innocent and nondeviant hate crime victim and the lack of available data on LGBT offenders is apparent in official government crime statistics. Consider the Federal Bureau of Investigation (FBI)’s Uniform Crime Reporting (UCR) Program, which began in 1930 and is the most popular source of official crime data in the United States. Published annually, the UCR today is based on data from over 18,400 law enforcement agencies across the United States. The UCR report contains data on four categories of violent crime (murder, forcible rape, robbery, and aggravated assault) and four categories of property crime (burglary, larceny-theft, motor vehicle theft, and arson) that are reported to the police. In expanded data, the UCR breaks down some of these reported offenses and arrests based on the race, sex, and age of the victims and the offenders.

Scholars have used this data to study how crime is distributed within and across these demographic differences and have built theoretical models to explain those distributions. Sexual orientation and gender identity, however, are omitted from this data. Rather, the only

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270. Meyer et al., supra note 6, at 267.
271. As explained infra pp. 146–47, there is some data involving the sexual victimization of LGBT inmates from data collection efforts under the Prison Reform and Elimination Act (PREA).
276. See, for example, Michael Gottfredson and Travis Hirschi’s “self-control theory” discussed infra Part IV.D.
point at which sexual orientation and gender identity appear in the UCR data is in a separate report on hate crime statistics that breaks down the number of hate crime incidents, offenses, victims, and known offenders based on sexual orientation and gender identity bias.277

Undoubtedly, there are several potential explanations for why LGBT identity is excluded from more general offending data in official crime sources. For instance, these statistics may be more difficult to collect in cases that do not involve anti-LGBT hate crime victimization. There are also other demographic characteristics, such as religion, that these data sources exclude. Moreover, calling for greater inclusion of, and attention to, sexual orientation and gender identity in official and unofficial crime data raises challenging and controversial concerns about the monitoring and classification of LGBT people.278 Scholars have also warned that the inclusion of rigid definitional categories of sexual orientation and gender identity in official crime statistics perpetuates narrow and oversimplified ideas of what it means to be LGBT.279

At the same time, scholars have argued that the availability of LGBT-inclusive statistics assists in allocating resources and developing policies in the interest of equality.280 With regard to crime data specifically, there are persuasive reasons why there should be greater attention paid to LGBT identity in aggregate offending data at different points of the criminal process. To begin with, the lack of data on the number


278. Scholars have raised these points about LGBT identity and statistics in general. See, e.g., Kath Browne, Queer Quantification or Queer(ly)ing Quantification: Creating Lesbian, Gay, Bisexual, or Heterosexual Citizens Through Government Social Research, in Queer Methods and Methodologies: Intersecting Queer Theories and Social Science Research 231 (Kath Browne & Catherine J. Nash eds., 2010). In the specific context of crime statistics and LGBT identity, Matthew Ball has stressed that “it remains important to consider the ways in which such knowledge is produced, the ends to which that knowledge is put, and the assumptions made about the potential of such knowledge to transform the experiences of queer communities in the context of criminal justice.” Matthew Ball, Criminology and Queer Theory: Dangerous Bedfellows? 85 (2016).

279. For an insightful analysis on the connection between identity categories, essentialism, and LGBT identity in criminology, see Matthew Ball, Queer Criminology, Critique, and the “Art of Not Being Governed,” 22 CRITICAL CRIMINOLOGY 21 (2014).

of LGBT people who are arrested and for what crimes makes it difficult to quantify how many LGBT people are affected by police profiling. This lack of data also makes it difficult to determine whether particular segments of the LGBT population (for instance, LGBT people of color, transgender people, or homeless LGBT people) are especially vulnerable to police profiling.

Illustrating the promise of such data—especially along the lines of intersectionality—recent studies on homeless LGBT youth have reported that homeless LGBT youth (and in particular, homeless LGBT youth of color) commonly experience illegitimate practices of police profiling, indiscriminate stops and searches, and arrests for “quality of life” offenses. History tells us that these statistics can make a difference in raising social awareness and designing laws and doctrine to combat police profiling. For instance, data showing racial disparities in stops, searches, and arrests has been vital to recent pushbacks in both courts and legislatures against racial profiling involving stop-and-frisks and the aggressive enforcement of quality of life offenses.

Moreover, LGBT statistics involving the pretrial phase of a criminal case would help to answer several questions, including whether LGBT suspects are more likely to be detained before trial, whether prosecutors are more likely to dismiss or reduce charges in cases involving

281. LGBT organizations have engaged in their own data collecting efforts in attempts to quantify the extent of the problem. See, e.g., Am
desy Int’l, Stonewalled: Police Abuse and Mis
r511222005en.pdf [https://perma.cc/CWF2-G8GB].

282. Shannan Wilber, Juv. Detention Alternatives Initiative, Lesbian, Gay, Bisexual, and Transgender Youth in the Juvenile Justice System 11 (2015); Mer

283. See, e.g., Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (relying on racial disparities in obtained data to hold that the NYPD’s stop-question-
and-frisk policy is unconstitutional under both the Fourth and Fourteenth Amend-
ments). To provide another example, shortly before legalizing marijuana for personal use, the District of Columbia decriminalized simple marijuana possession in 2014. See Jordan Blair Woods, Decriminalization, Police Authority, and Routine Traffic Stops, 62 UCLA L. Rev. 672, 695 (2015). The sponsor of the bill stressed evidence of racial disparity in arrest data for simple marijuana possession. Id.
non-LGBT suspects, and whether non-LGBT suspects are more likely to be offered plea bargains that reduce charges or do not include prison sentences. These questions touch on several possible LGBT-based injustices and disparities that occur pretrial. For instance, in 2014, researchers released a report finding that each of these questions implicated significant racial disparities. The report relied on a dataset of diverse cases from the New York County District Attorney’s Office that included demographic information about the race and ethnicity of suspects, and tracked outcomes at these different points of the prosecution. Because this dataset omitted sexual orientation and gender identity information, it is impossible to identify parallel LGBT-based disparities.

In addition, LGBT-inclusive statistics involving sentencing would assist in identifying LGBT-based sentencing inequalities. Available statistics have made it possible to identify sentencing disparities based on race, gender, education, and socioeconomic status. One study, for instance, reported that black offenders, male offenders, offenders with low levels of education, and low-income offenders receive substantially longer sentences. It is difficult to explore how LGBT identity fits into these patterns of sentencing disparities. This knowledge gap is especially troubling given that scholars have stressed different ways that anti-LGBT biases permeate courts and shape the perception of LGBT litigants and witnesses, jury selection, and judicial outcomes.

Finally, the lack of data on how many LGBT people are on parole, how many LGBT people complete parole, and how many (and the circumstances under which) LGBT people violate parole, makes it difficult to identify LGBT recidivism rates and trends. These statistics can inform policies that serve to assist ex-offenders’ successful reentry into society.

285. Id. at 75.
286. It is important to note, however, that the dataset provided some data on the gender of prosecutors and defendants. See id. at 26, 62.
For instance, with the goal of reducing recidivism, the California Department of Corrections and Rehabilitation releases an annual report that includes recidivism rates based on gender, age at time of release, race or ethnicity, and county of parole. This report omits sexual orientation and gender identity information, which hinders the evaluation of the extent to which LGBT offenders are being successfully reintegrated into society after their release from jail or prison.

Although there are knowledge gaps involving LGBT offending at many points of the criminal process, in the past several years there have been significant advances in data involving LGBT inmates under the Prison Rape Elimination Act (PREA). Enacted in 2003, PREA requires the Bureau of Justice Statistics (BJS) to gather data on the prevalence and incidence of sexual assault in prisons and jails, as reported by inmates. This data has provided a useful snapshot of the proportion of adult and juvenile inmates who self-identify as LGBT and their higher rates of sexual victimization.

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292. BUREAU OF JUSTICE STATISTICS (BJS), PRISON RAPE ELIMINATION ACT (SEXUAL VICTIMIZATION IN CORRECTIONAL FACILITIES), http://www.bjs.gov/index.cfm?ty=t-p&tid=20 [https://perma.cc/HC35-LDDX] (last visited Mar. 11, 2017). The BJS created the National Prison Rape Statistics Program (NPRS), which includes four separate data collection efforts to measure the prevalence of sexual violence in different correctional facilities. Id.

293. PREA only requires a 10 percent random sample of all federal, state, and county prisons; a representative sample of municipal prisons; and that at least one prison from each state be included. Id.

294. For instance, 2011–2012 data from the National Inmate Survey (NIS) included 111,500 “non-heterosexual” prisoners (compared to 1,298,000 heterosexual inmates), and reported that nonheterosexual prisoners were over ten times more likely to suffer inmate-on-inmate sexual victimization (12.2 percent versus 1.2 percent) and staff sexual misconduct (5.4 percent versus 2.1 percent) than heterosexual prisoners. See ALLEN J. BECK, MARCUS BERZOFSKY & CHRISTOPHER KREBS, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 18 (2013), http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf [https://perma.cc/AD9F-GWKH]. Nonheterosexual prisoners also reported higher rates of staff sexual misconduct (5.4 percent versus 2.1 percent). In jails, the NIS reported 50,100 nonheterosexual inmates compared to 654,500 heterosexual inmates. “Non-heterosexual” included gay, lesbian, bisexual, and other sexual orientations. Id. The NIS is part of the NPRSP. BJS, supra note 292. 2012 data from the National Survey of Youth in Custody included 2,200 nonheterosexual youth in juvenile facilities (compared to 15,900 heterosexual youth), and reported that nonheterosexual youth were more likely to suffer sexual assault by another youth (10.3 percent versus 1.5 percent) than heterosexual youth. ALLEN J. BECK & DAVID CANTOR, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH 20 (2012), http://www.bjs.gov/content/pub/pdf/svjfry12.pdf [https://perma.cc/H2ZF-3ATP]. Nonheterosexual youth reported nearly similar rates of sexual
Moreover, this data has contributed to significant policy changes that address LGBT sexual victimization behind bars, illustrating the key point that paying greater attention to LGBT identity in crime data can inform changes in how criminal justice institutions respond to and treat LGBT populations. For instance, PREA created the National Prison Rape Elimination Commission (NPREC) to study prison rape and recommend national standards to the DOJ to address the problem. In May 2012, after nine years of investigation, the DOJ promulgated a set of regulations implementing PREA. The DOJ’s summary of the final regulations stressed that LGBT inmates were particularly vulnerable to sexual abuse in prisons. The regulations included protections against the assault, harassment, and prolonged isolation that many LGBT inmates suffered while incarcerated. After the DOJ promulgated these regulations, the federal government was immediately required to implement PREA in federal prisons. States had until August 2013 to certify compliance with PREA regulations or lose federal funds. Since the DOJ’s promulgation, several states have passed their own PREA laws.

Of course, it is possible that LGBT-inclusive data might not reveal LGBT inequality at one or more points of the criminal process. But to the extent that this data could, this absence frustrates efforts to identify and to address those inequalities, which likely fall on segments of the LGBT community most vulnerable to inequality within the criminal justice system (for instance, low-income and homeless LGBT people, LGBT people of color, transgender people, LGBT people living with HIV, and undocumented LGBT people). Either way, the shift under the new visibility toward images of the innocent and nondeviant LGBT hate crime victim completely misses these issues involving LGBT offenders.
2.  **Lack of Theoretical Attention to LGBT Identity and Offending**

The rush to redefine LGBT people in the criminal justice system as innocent and nondeviant hate crime victims has hindered the advancement of theorizing about criminal offending, both in the LGBT context and more generally.

In the LGBT context, the obscured relationship between LGBT identity and offending has driven underground the diverse ways that hardships attached to LGBT identity (for instance, family rejection for being LGBT or LGBT-based social discrimination) can contribute to offending, particularly in contexts that do not involve sodomy. As the next Section will explain in more detail, scholars have recognized that hardships within and across demographic groups defined by race, ethnicity, class, gender, and age can shape experiences of criminal offending. LGBT identity, however, has yet to be comprehensively viewed in these same terms.

It is unclear what we will find when LGBT identity is considered in these broader terms. This expanded approach, however, might bring pathways to crime involving specific LGBT hardships out of the shadows. It might also strengthen our knowledge of issues surrounding intersectionality by uncovering how hardships associated with non-LGBT differences (for instance, race, ethnicity, class, and age) work in tandem with sexual orientation or gender identity to shape experiences and uneven distributions of offending in different segments of the LGBT population.

Thinking beyond the LGBT context, greater attention to LGBT identity holds promise to challenge heterosexist assumptions that shape more generally applicable theories of offending that apply to both non-LGBT and LGBT populations. This attention might also offer more sophisticated qualitative and quantitative models of criminal offending. On these points, there are important parallels with the contributions of feminist criminologists.

Before the 1960s, women’s involvement in crime was not a major focus of the criminological discipline. Most existing perspectives on the issue advanced depictions of women as inherently passive and docile based on gender-role stereotypes. Inspired by the emergence of second-wave feminism, feminist criminologists in the 1960s began to criticize the historical neglect and mistreatment of women in crime theories and research. Liberal feminists advocated for the full inclusion of women in

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existing theories of crime to fill knowledge gaps about female offending and victimization.\(^{305}\) In the 1970s, radical feminist criminologists critiqued the move to include women in existing theories of crime without interrogating how those theories reinforced patriarchy.\(^{306}\) Radical feminists depicted the historical evolution of social relations in terms of masculine power and privilege, and developed new theories to conceptualize crime in terms of patriarchy.\(^{307}\)

Although LGBT people’s specific experiences of crime have not been a strong focus of feminist criminology,\(^{308}\) what we learn from these perspectives is that theoretical understandings of crime can improve when they take different identities into account.

This logic extends to LGBT identity. Consider D. Kelly Weisberg’s 1985 ethnographic study of seventy-nine male youth sex workers in New York and San Francisco.\(^{309}\) Less than 20 percent of the youth identified as heterosexual and most left home before the age of seventeen.\(^{310}\) Twenty-two percent of the youth (all of whom identified as homosexual or bisexual) cited family conflict over their sexuality as a reason for leaving home.\(^{311}\) The stigma attached to homosexuality and the lack of opportunities for same-sex intimacy without the threat of rejection motivated many of them to use sex work as a means to explore and define their sexual identities.\(^{312}\) Thus, in considering LGBT identity, the study problematized oversimplified models and theories of crime that assumed that financial gain was the sole motive driving youth to engage in sex work.\(^{313}\)

Another example of how paying greater attention to LGBT identity can enhance general understandings of crime involves studies examining the connection between marriage and offending. Many studies of crime emphasize marriage as a critical life event that dissuades prior

\(\text{supra}\) note 42, at 381, 383.
306. \textit{Id.} at 537–38.
307. \textit{Id.}
309. \textsc{D. Kelly Weisberg}, \textsc{Children of the Night: A Study of Adolescent Prostitution} 70 (1985). 85 percent of the youth were age twelve to eighteen, and the rest were over eighteen. \textit{Id.} at xii.
310. \textit{Id.} at xiii, 70.
311. \textit{Id.} at 71.
312. \textit{Id.} at 22 (stressing that “prostitution became a vehicle for the enjoyment of their sexuality, for sociability with other gay men, and for a declaration of their own homosexuality”).
313. \textit{See id.} at 56. Subjects reported many reasons for engaging in prostitution, including financial gain (87 percent), sexual gratification (27 percent), fun and adventure (19 percent) and sociability (11 percent). \textit{Id.} at 56.
offenders from committing crimes in the future.\textsuperscript{314} Given that same-sex couples have only recently gained access to the institution of marriage, it is unclear how this presumption has applied to prior offenders in committed same-sex relationships.

On one hand, considering same-sex relationships might problematize the presumption that marriage itself, as opposed to forming similar long-term commitments, motivates desistance from crime. Given their historical exclusion from marriage, same-sex couples are an interesting case to examine whether love, companionship, and a sense of obligation to one’s partner or children, are underlying forces that motivate desistance from crime independent of marriage. On the other hand, in the fight for marriage equality, advocates emphasized that marriage provides unique social, cultural, financial, and legal benefits.\textsuperscript{315} Although the unique benefits of marriage over other forms of state-recognized relationships have varied across jurisdictions and time, marriage could have fostered distinct mechanisms of security that same-sex couples were denied and that motivated desistance from crime. For instance, a study that was published prior to \textit{Obergefell} reported that married lesbians, gays, and bisexuals were significantly less psychologically distressed than lesbians, gays, and bisexuals who were not in a legally recognized relationship.\textsuperscript{316}

Although which point of view is correct remains an open question, the key point is that both possibilities show how considerations of LGBT identity can problematize and enhance prevailing models and understandings of criminal offending.

3. \textit{Flat Narratives and Stereotypes of LGBT Offenders}

Obscuring the relationship between LGBT identity and offending has also left us with a one-dimensional image of LGBT offenders as deviant sexual offenders. Studies reporting the overrepresentation of LGBT youth in the youth homeless and foster youth populations\textsuperscript{317} suggest that this image is far underinclusive.


\textsuperscript{317} See supra notes 10–18.
In fairness, there are reasons to be cautious about expanding crime studies to generate new narratives about LGBT offending. Under the former criminal status quo, LGBT people were commonly stereotyped as “predators,” “criminals,” “sinners,” and “psychopaths.” Crime research that calls attention to the overrepresentation of LGBT people in the criminal justice system could fuel existing LGBT stereotypes or create new ones. The troublesome history between the 1940s and 1960s of using crime research to support the enactment of sexual psychopath laws substantiates these risks. These dangers show a need to be cautious and careful when considering LGBT identity in future research on offending.

At the same time, broadening how we think about LGBT identity and criminal offending can provide a greater diversity of narratives that more accurately capture the experiences of LGBT offenders today. Those narratives can do important work to defeat stereotypes of LGBT people. Vanessa Panfil’s recent ethnographic study of gay gang members—the first study of its kind—exemplifies this point.

Panfil’s study included fifty-three gay gang- and crime-involved men who were mostly men of color in their late teens or early twenties and were involved in either majority gay-identified or majority heterosexual-identified gangs. The very act of calling attention to the fact that there are openly gay gang members, and that gay-majority gangs exist, shatters certain stereotypes of both LGBT people and gang members. A consistent finding of Panfil’s study was that participants both responded to, and actively resisted, societal stereotypes about gay men through violence, gang membership, and crime. One stereotype that they often wanted to dispel was the notion that gay men were weak, passive, and would not defend themselves if threatened or harassed. Another stereotype they actively resisted was that gay men were.


319. See supra Part I.B.2.


322. As Panfil explained, “Being regarded as passive, effeminate, middle-class, and white essentially removes gay men from consideration as violent offenders and gang members.” Id. at 103.

323. Id. at 104–05.

324. Id. at 105.
“deadbeats”—a term used to describe gay male cocaine users, escorts, or “crafters” (people who commit various forms of economic fraud).\(^{325}\)

The knowledge gap involving LGBT offending enables these stereotypes to persist. This is especially the case when violating the criminal law is part of a broader effort of LGBT offenders to challenge demeaning stereotypes of LGBT people that rest on homophobia, transphobia, and sexism.\(^{326}\)

B. **Incomplete Accounts of LGBT Victimization**

The rush to move away from the deviant LGBT sexual offender to the innocent and nondeviant LGBT hate crime victim has also resulted in an incomplete picture of LGBT victimization. With the exception of recent data involving intimate partner violence and the sexual victimization of LGBT inmates,\(^{327}\) hate crime continues to dominate the available data on LGBT victimization. Accordingly, there is very little information about the non-hate-motivated circumstances under which LGBT people become victims of crime.

Consider the National Crime Victimization Survey (NCVS). Conducted by the U.S. Census Bureau for the BJS, the NCVS is the largest ongoing victim survey in the United States.\(^{328}\) The NCVS was created to capture crimes that victims did not report to the police.\(^{329}\) For the reasons discussed previously, underreporting is a particular concern in the context of anti-LGBT hate crime victimization.\(^{330}\)

The NCVS asks participants about several demographic characteristics, including age, marital status, sex, race, and income.\(^{331}\) These questions help to assess the distribution of victimization within and across these characteristics. Critically, these demographic questions omit sexual orientation and gender identity information; this information only

\(^{325}\) Id.

\(^{326}\) Id.

\(^{327}\) See supra notes 8 and 294.

\(^{328}\) The NCVS is based on a nationally representative sample of about 90,000 households (approximately 160,000 people). The households are included in the sample for three years, and the participants are interviewed twice a year about their victimization experiences of violent and property crimes. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DATA COLLECTION: NATIONAL CRIME VICTIMIZATION SURVEY (NCVS): METHODOLOGY, http://www.bjs.gov/index.cfm?ty=dcdetail&iid=245#Methodology [https://perma.cc/KN53-C7D2] (last visited Mar. 11, 2017).


\(^{330}\) Rubenstein, supra note 235, at 1220.

appears in a series of questions involving hate crime. In those questions, participants can answer whether they believed that they were victims of a hate crime, whether they perceived the crime to be motivated by their gender or sexual orientation, and whether the incident took place near a gay bar or at a Gay Pride March.  

Recent studies, however, suggest that LGBT people disproportionately face hardships (for instance, poverty and homelessness) that likely put them at greater risk for a much wider range of victimization than hate crime. These signals suggest that the available data on LGBT victimization is far underinclusive. In addition, the limited attention to LGBT identity in the data inhibits intersectional explorations of whether different segments of the LGBT population experience dissimilar rates of victimization for particular crimes.

To illustrate the significance of these intersectional explorations, consider recently released victimization data involving sexual and intimate partner violence. Until 2010, national survey data on sexual and intimate partner violence omitted sexual orientation. In 2013, the first snapshot of LGB-inclusive data revealed that bisexual women had an especially high lifetime prevalence of both sexual and intimate partner violence. Specifically, bisexual women had a much higher lifetime prevalence of rape by any perpetrator (46.1 percent) when compared to both lesbians (13.1 percent) and heterosexual women (17.4 percent). Bisexual women also had a much higher lifetime prevalence of sexual violence other than rape by any perpetrator (74.9 percent) compared to both lesbians (46.4 percent) and heterosexual women (43.3 percent)—as well as gay (40.2 percent), bisexual (47.4 percent), and heterosexual men (20.8 percent). Moreover, bisexual women experienced a much higher lifetime prevalence of rape, physical violence, and stalking by an intimate partner (61.1 percent) compared to both lesbians (43.8 percent) and heterosexual women (35.0 percent)—as well as gay (26.0 percent), bisexual (37.3 percent), and heterosexual (29.0 percent) men. Although future research and theorization is necessary to explore why bisexual women appear to have such high lifetime prevalence of sexual and intimate partner violence, the key point is that the need for such examination at the
intersection of gender and sexual orientation would not be apparent without this LGB-inclusive data. These intersectional explorations are especially meaningful in the bisexual context given the historical erasure of bisexual identity from the legal and political domains.  

Victimization data from the National Transgender Discrimination Survey (NTDS) offers another example of the multifaceted victimization narratives that emerge from intersectional and LGBT-inclusive crime data. In 2011, the National Center for Transgender Equality and the National Gay and Lesbian Task Force released the NTDS, which is the most comprehensive survey to date on transgender discrimination in the United States. The NTDS revealed that race had a large impact on transgender respondents’ interactions with the police. Specifically, white transgender respondents experienced respectful treatment from the police at much higher levels than transgender respondents of color. Overall, 22 percent of all transgender respondents who interacted with the police experienced harassment by officers, which was much lower than the 38 percent of black, 36 percent of multiracial, and 29 percent of Asian transgender respondents who experienced harassment during interactions with the police. Moreover, black transgender respondents who interacted with the police reported being physically assaulted by officers at much higher levels than transgender respondents overall (15 percent versus 6 percent) as well as being sexually assaulted by officers (7 percent versus 2 percent). These intersectional connections involving gender identity and race that emerged from the NTDS data lend support to the idea that although victimization by police officers is a problem for transgender people in general, such victimization is especially acute for transgender people of color.

Shedding new light on criminal victimization disparities within the LGBT population could influence LGBT organizations and social service providers to think differently about how they allocate resources and offer services to LGBT crime victims. Further, a more complete picture

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340. Id. at 2. The NTDS included 6,450 transgender respondents across the United States. Id.

341. Id. at 159.

342. Id.

343. Id.

344. Id. at 160.
of LGBT victimization might assist criminal justice institutions (for instance, law enforcement agencies, prosecutor’s offices, and courts) to think more broadly about who LGBT victims are and how to interact with them sensitively. Consider the following example involving LGBT homeless youth who are trafficked into the sex trade.

Currently, there is a growing movement across states to treat youth who are trafficked into the sex trade as victims, as opposed to offenders.\textsuperscript{345} Over a dozen states have enacted safe harbor exceptions to laws criminalizing prostitution for minors who are trafficked into the sex trade.\textsuperscript{346} Despite these legislative changes, scholars and commentators have documented that there are inadequate systems in place to offer these youth victims the institutional support that they need to escape the trade.\textsuperscript{347} Homeless youth are particularly vulnerable to sex trafficking.\textsuperscript{348} Not having a place to sleep is a key factor that contributes to homeless youth entering the sex trade.\textsuperscript{349} Many sex traffickers pressure homeless youth into the industry by alerting them to the fact that shelters are at full capacity, and then offering them a place to sleep for the night.\textsuperscript{350} Given that empirical data on LGBT victimization centers on hate crime (and to a lesser extent, intimate partner violence), it is unknown whether LGBT youth are more vulnerable to sex trafficking in light of their overrepresentation in the youth homeless population. In terms of the design of criminal justice institutions, such a discovery would suggest that prosecutors and police should have the cultural competency to interact with LGBT victims beyond hate crime.

The key point is that the rush to construct LGBT crime victims as hate crime victims has overlooked the wider range of circumstances under which LGBT people become victims of crime.

C. Obscured Interactions Between LGBT Victimization and Offending

Scholars have stressed that victimization patterns cannot be understood separately from offending patterns,\textsuperscript{351} and that victimization is a

\textsuperscript{345.} Covenant House, Homelessness, Survival Sex and Human Trafficking: As Experienced by the Youth of Covenant House New York 19 (2013); Michelle Madden Dempsey, Decriminalizing Victims of Sex Trafficking, 52 Am. Crim. L. Rev. 207, 209 (2015) (“While this situation is beginning to change in some states and localities in the United States, the vast majority of jurisdictions continue to criminalize victims of sex trafficking.”).

\textsuperscript{346.} Chelsea Parsons et al., Ctr. for Am. Progress, 3 Key Challenges in Combating the Sex Trafficking of Minors in the United States 5 (2014).

\textsuperscript{347.} Id.; Covenant House, supra note 345, at 19 (discussing how youth ages eighteen and older are shut out of government and private funding allocated for sex trafficking victims).

\textsuperscript{348.} Covenant House, supra note 345, at 19.

\textsuperscript{349.} Id.

\textsuperscript{350.} Id.

\textsuperscript{351.} See, e.g., Janet L. Lauritsen, Robert J. Sampson & John H. Laub, The Link
key risk factor for offending. For instance, studies have reported that youth who are victims of violent crime are more likely to be perpetrators of violence as adults. At the same time, youth offenders are more likely to be victims of a range of crimes, including assault, robbery, larceny, and vandalism.

Under the new visibility, the paradigm shift away from the deviant LGBT sexual offender to the innocent and nondeviant LGBT hate crime victim has neglected and obscured these possible interactions between LGBT victimization and offending. Nonetheless, one might surmise that many LGBT offenders have been victims at multiple points of their lives. Victimization could stem from harassment, social discrimination, violence, or family rejection and abuse—common hardships that LGBT adults and youth experience, whether they offend or not.

To understand how these interactions could unfold in the LGBT context, revisit the high representation of LGBT homeless youth. Many LGBT youth wind up on the streets after suffering family rejection and abuse. Although the relationship between LGBT youth homelessness and crime is underexplored, existing studies on homeless youth more generally have reported that homeless youth are at greater risk for being physically and sexually victimized on the streets. With respect to offending, the crimes that homeless youth commit to survive can range


354. See, e.g., Lauritsen, Sampson & Laub, *supra* note 351, at 286.

355. To explain this point in more detail, the discussion to follow will draw on studies involving LGBT homeless youth and LGBT adults who are incarcerated.

356. Durso & Gates, *supra* note 10, at 4 (discussing family rejection, being kicked out of the home, and physical, emotional, or sexual abuse at home as the top three reasons why LGBT youth are homeless or at risk of becoming homeless); Joseph G. Kosciw et al., Gay, Lesbian & Straight Educ. Network, The 2013 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation’s Schools (2014) (documenting anti-LGBT harassment and bullying in schools); Pizer et al., *supra* note 3 (discussing workplace discrimination against LGBT people); Stotzer, *supra* note 234 (reviewing U.S. data on violence against transgender people).

357. See Quintana et al., *supra* note 10.

358. *Id.* at 9.

from minor crimes (for example, petty theft and shoplifting) to serious crimes (for example, violence as a means of self-protection). As John Hagan and Bill McCarthy described, “[H]unger causes theft of food; problems of hunger and shelter lead to serious theft; and problems of shelter and unemployment produce prostitution.”

LGBT homeless youth might face problems that non-LGBT homeless youth experience to a lesser degree or not at all. For instance, anti-LGBT discrimination might make it more difficult for LGBT youth to find support networks or support services to get off the streets. In many localities, lack of public funding causes private community organizations and religious institutions to provide the bulk of services to unaccompanied youth. LGBTQ youth may feel unwelcome, be turned away, or face discrimination when the missions of those entities are hostile toward LGBTQ people. Another possibility is that family rejection for being LGBT might make it less likely that LGBT homeless youth will go back, or be welcomed back, to their families. With these youth having nowhere to go, their rejection might in turn shape future criminal involvement.

Consider the story of Brian Dixon, a gay youth who found himself homeless at the age of eighteen. After enduring years of mental and physical abuse from his family, Brian left home at the age of fourteen to live with his grandparents in Georgia. Within a year, his grandparents placed him into Georgia’s foster care system. From there, Brian bounced from group home to group home. One of those group homes, touted as a “Christian group home,” made him sign a form agreeing to never disclose his sexual orientation. Brian tried to hide that he was gay, but he was unsuccessful and the group home kicked him out.

Eventually, Brian quit high school and earned a GED before officially “aging out” of the foster care system. He asked for an extension


362. In a future article *Unaccompanied Youth and Private-Public Order Failures*, 103 Iowa L. Rev. (forthcoming 2018) (draft on file with author), I analyze this point and the examples to follow in this paragraph in further detail.

363. Quintana et al., supra note 10, at 27.

to stay in foster care so that he could work on his nursing degree. His new caseworker, whom Brian described as a “devout Christian,” did not support him and convinced her superiors that Brian was not a “good candidate” for an extension. Brian was dropped off with his belongings at a homeless shelter. The strict rules and curfew at the facility did not mesh with his school and work schedule. Eventually, Brian wound up living on the streets in Atlanta, which capitulated into a year-long streak of illegal drug use and prostitution to make ends meet.

These dynamic interactions between LGBT offending and victimization also unfold in the adult context. On this point, Sharon Dolovich’s ethnographic study of the K6G unit in the Los Angeles County Men’s Central Jail is instructive.365 The K6G unit is a small unit in the jail that holds approximately 350–400 residents who are gay men or transgender women.366 Although Dolovich’s study focused primarily on the experiences and conditions in K6G compared to the general population units, the findings raise important questions about the connection between LGBT victimization and LGBT offending.

In particular, several K6G residents in Dolovich’s study reported that they felt safer being incarcerated in K6G than they felt “on the outside.”367 These findings raise questions about what is happening to these LGBT offenders on the outside that they feel safer in a jail—especially a jail known for being incredibly dangerous368—than wherever they live when they are not incarcerated. The study revealed multiple adverse living conditions for many K6G residents on the outside. Many residents were homeless, poor, hungry, or unemployed; lacked access to health care and medication; engaged in sex work for money; and lacked family support.369 As these findings highlight, in constructing LGBT crime victims primarily as hate crime victims, we have neglected the multiple dimensions of LGBT victimization and their relation to LGBT offending.

IV. RECLAIMING LGBT IDENTITY AND CRIME: LOOKING BACK TO MOVE FORWARD

In the previous Part, I identified the shortcomings of the new visibility; this Part now discusses the types of questions that we should be

365. Dolovich, Two Models of the Prison, supra note 6, at 965.
366. Id. at 969, 980.
367. Id. at 985, 1048–49 & n.340. Here, it is important to recognize that legal scholars have offered alternative evaluations of the K6G unit. As discussed above, Professor Sharon Dolovich has offered a relatively positive account of the K6G unit as a protective measure for gay and transgender inmates. Professor Russell Robinson, however, has offered a more critical take that challenges the view that gay and transgender inmates feel safer in segregated housing. He argues that such segregation relies on and perpetuates stereotypes of gay men that are inconsistent with the experiences of gay men of color. See generally Robinson, supra note 6.
368. Dolovich, Two Models of the Prison, supra note 6, at 967.
369. Id. at 1094–99.
asking about LGBT offending and LGBT victimization. It also shows how ideas in criminology offer promising first steps to engage with those questions. Specifically, it examines four areas of criminological theory that focus on a much broader set of crimes than hate crime.\textsuperscript{370}

Critically, scholars have yet to apply these theories to LGBT identity in a meaningful way. Scholars have applied these theories, however, outside of the LGBT context to examine how psychological and social hardships shape distributions and experiences of crime within and across demographic groups defined by race, ethnicity, gender, class, and age. Accordingly, bridging the gap between these theories and LGBT identity can open possibilities to engage in intersectional research and develop more sophisticated accounts of LGBT offending and victimization.\textsuperscript{371}

A. Life Course and Crime

The first area of criminological theory that holds promise to enhance understandings of LGBT identity and crime is life course theories. In the family law domain, longitudinal studies have played a critical role in dispelling the notion that children in families with same-sex parents are worse off than children in families with heterosexual parents. For instance, since the 1980s, the National Longitudinal Lesbian Family Study (NLLFS) has followed a cohort of families headed by lesbian parents to examine the social, psychological, and emotional development of children, and the dynamics within those families.\textsuperscript{372} The findings revealed that children of lesbian parents score similarly to children of heterosexual parents on many development and social measures, and even score higher on some psychological measures, including self-esteem, academic performance, and desistance from rule breaking and aggression.\textsuperscript{373}

\textsuperscript{370} It is important to note that these theories focus more on offending than on victimization. This treatment is a product of victimology only being included in mainstream criminology in the 1970s. \textit{Lanier et al.}, supra note 59, at 10. Therefore, these theories are merely a sample and not the complete universe of options to engage with LGBT identity in ways that capture a broader range of criminal justice problems than sodomy and hate crime.

\textsuperscript{371} The lack of attention to LGBT identity in these theories lends further support to my central claim that there is little to no criminological theory or research that conceptualizes LGBT identity as a nondeviant difference. In fact, more recent criminological theories often use homosexuality, when discussed, as an example to show how the definition of crime can change over time—a point that still places LGBT identity in relation to sexual offending and sexual deviance concepts, even after the decline of criminal sodomy laws. \textit{See, e.g.}, Peter B. Ainsworth, \textit{Psychology and Crime} 4 (2000) (using homosexuality as an example to show “what are and what are not criminal acts, changes constantly”).


Demonstrating the NLLFS’s influence, several amicus briefs and expert reports discussed or cited the NLLFS in the marriage equality litigation. In criminology, Developmental and Life Course (DLC) theories became a major approach to studying crime in the 1990s, when several longitudinal studies on criminal offending were published. DLC theories focus on the development of criminal and antisocial behavior during an individual’s life span from childhood to adulthood. These theories attempt to identify the risk factors, protective factors, and life events that make people more or less likely to behave in criminal or antisocial ways during their lifetimes.

Eight major DLC theories have emerged from the longitudinal studies published in the 1990s. Broadly speaking, these theories have identified several categories of factors that put people at greater risk for criminal offending before the age of twenty: (1) individual factors (for example, low school achievement, low intelligence, hyperactivity-impulsiveness, and aggression); (2) family factors (for example, parental neglect, harsh discipline and child abuse, broken families, criminal parents, and delinquent siblings); (3) socioeconomic factors (for example, low family income and large family size); (4) peer factors (for example, delinquent peers, low popularity, and peer rejection); (5) school factors (for example, a high delinquency rate at an attended school); and (6) neighborhood factors (for example, a high crime neighborhood). DLC theories have also provided insight into the life events during adulthood that influence people to desist from crime, including getting married, getting a satisfying job, and joining the military.

Longitudinal crime studies might hold special promise to fill knowledge gaps involving LGBT offending and victimization in light of research suggesting that LGBT youth are coming out in greater numbers.


375. David P. Farrington, Life-Course and Developmental Theories in Criminology, in The Sage Handbook of Criminological Theory 249, 250 (Eugene McLaughlin & Tim Newburn eds., 2010).

376. Id. at 249.

377. Id.

378. For a summary of these eight theories, see David P. Farrington, Conclusions About Developmental and Life-Course Theories, in Integrated Developmental & Life-Course Theories of Offending 247 (David P. Farrington ed., 2005).

379. David P. Farrington, Developmental and Life-Course Criminology: Theories and Policy Implications, in Criminological Theory: A Life-Course Approach 167, 170 (Matt DeLisi & Kevin M. Beaver eds., 2011); David P. Farrington, Introduction to Integrated Developmental & Life-Course Theories of Offending, supra note 378, at 6.

380. Farrington, supra note 375, at 251.
and at earlier ages. Moreover, at least two categories of risk factors that DLC theories focus on (family factors and peer factors) directly touch on hardships that many LGBT youth face today. Studies indicate that LGBT youth are vulnerable to experiencing family rejection and bullying at school for being LGBT. In addition, many of the adult life events that DLC researchers have found are associated with desistance from crime involve social institutions that have historically excluded LGBT people (for instance, marriage and the military) or involve domains where LGBT people are vulnerable to discrimination (for instance, the workplace).

Part of the problem is that several of the longitudinal studies that DLC researchers relied on began decades ago when consensual same-sex sex was either criminalized or when there was still a heavy societal stigma attached to LGBT identity. Consider the Cambridge Study in Delinquent Development (CSDD), which is a globally influential longitudinal survey involving 411 boys who reported low socioeconomic status in South London. The CSDD began in 1961, when same-sex sex between adults was still criminalized in England. Some of the study

381. See, e.g., Christian Grov et al., Race, Ethnicity, Gender, and Generational Factors Associated with the Coming-Out Process Among Gay, Lesbian, and Bisexual Individuals, 43 J. SEX RES. 115 (2006) (studying younger cohorts of subjects who reported significantly earlier ages for sexual debut with same-gendered partners as compared to older cohorts).

382. See generally, e.g., Roberto Baiocco et al., Negative Parental Responses to Coming Out and Family Functioning in a Sample of Lesbian and Gay Young Adults, 24 J. CHILD. FAM. STUD. 1490, 1491 (2015) (describing how stress over coming out can include family rejection).


384. See Pizer et al., supra note 3 (discussing workplace discrimination and patterns of discrimination against LGBT people in court decisions, including marriage and military).

385. This is not to suggest that there is not a large social stigma that still attaches to being LGBT in many regions of the United States today.


387. Id.

388. These laws were not lifted until 1967, when the British Parliament decriminalized private consensual sexual conduct between men over the age of twenty-one. Jeffrey Weeks, Coming Out: Homosexual Politics in Britain, From the Nineteenth Century to the Present 176 (1977).
variables addressed the sexuality of the subjects, but only captured the boys’ attraction to girls. These variables included the boys’ interests in girls; parental attitudes toward the boys going out with girls; how the boys felt about bringing girls home; and the frequency of the boys’ sexual activity in terms of the number of girls with whom they had had intercourse.\textsuperscript{389}

Because same-sex sex was criminalized when the CSDD began, it is arguably unreasonable to expect that CSDD researchers at the time would have viewed sexual orientation and gender identity as nondeviant, demographic differences. This point, however, raises a problem that applies not only to the CSDD, but also to other longitudinal studies that have shaped DLC theories since then: the stigma of outdated sexual deviance concepts continues to thrive in hidden ways today when scholars rely on longitudinal studies that implicitly accept those stigmatizing concepts. This problem shows a potential need to develop new longitudinal studies involving crime that more accurately and sensitively capture LGBT identity.

Putting this need aside, the key point is that DLC theories prompt underexplored questions about the risk factors and life events that shape LGBT people’s involvement and desistance from crime over the course of their lives.

B. \textit{Neighborhood Conditions and Crime}

The second area of criminological theory that holds promise to enhance understandings of LGBT identity and crime is social disorganization theories. The social disorganization theories of the Chicago sociologists\textsuperscript{390} lost popularity in the 1950s,\textsuperscript{391} until Robert Sampson and Byron Groves offered their strongest empirical support in the late 1980s.\textsuperscript{392} Using data from over two hundred neighborhoods in the 1982 British Crime Survey, Sampson and Groves discovered a connection between community structural variables and social disorganization.\textsuperscript{393} Specifically, they discovered that crime rates were highest in neighborhoods characterized by low friendship networks, low organizational participation, and high frequency of unsupervised teenage groups.\textsuperscript{394} Importantly, Sampson and Groves’s social disorganization model included racial or ethnic heterogeneity and socioeconomic status as variables to explain

\textsuperscript{389} For a complete list of the variables in the CSDD, see David P. Farrington, \textit{Cambridge Study in Delinquent Development (Great Britain), 1961–1981} (1999), http://halley.sju.edu/8488/8488cb.pdf [https://perma.cc/GC8C-B6HJ].

\textsuperscript{390} These theories were evaluated in supra Part I.C.1.


\textsuperscript{393} \textit{Id.} at 777,782.

\textsuperscript{394} \textit{Id.} at 786–94 (presenting the study findings).
the distribution of crime.\textsuperscript{395} Therefore, their model illustrates that considerations of demographic differences can enhance knowledge about distributions of crime, and that it is possible to study those distributions without stigmatizing people as deviants or criminals on the basis of those differences alone.

Although criminologists have yet to apply social disorganization concepts to study LGBT offending or victimization in a systematic way, some public health scholars have examined the connection between neighborhood-level factors and two public health issues affecting gay men. First, public health scholars have studied whether social networking patterns in neighborhoods with very high representations of gay people\textsuperscript{396} facilitate illicit drug use among gay men.\textsuperscript{397} Second, public health scholars have examined whether social networking patterns in primarily gay neighborhoods increases the likelihood of gay men engaging in risky sexual behaviors.\textsuperscript{398} These examples illustrate the ways in which neighborhood- and community-level factors offer insight into problems that affect LGBT communities.

In the criminal justice context, social disorganization theories prompt meaningful questions about LGBT identity and crime. For instance, scholars might explore associations between sexual orientation or gender identity heterogeneity in a neighborhood and LGBT offending and victimization. Scholars might also explore the relationship between different neighborhood conditions (such as networking patterns or levels of social isolation) in neighborhoods with very high representations of LGBT people and crime beyond illicit drug use. Perhaps the strength of local friendship networks in those neighborhoods is associated with lesser or higher rates of specific types of crime and crime in the aggregate.

\textsuperscript{395} Id. at 788.

\textsuperscript{396} Some scholars have used the term “gay ghettos” to describe these neighborhoods. See Martin P. Levine \textit{Gay Ghetto, in 3 Sexualities: Critical Concepts in Sociology, Difference and the Diversity of Sexualities} 166 (Kenneth Plummer ed., 2002) (describing “gay ghettos” as “neighborhoods housing large numbers of gays as well as homosexual gathering places, and in which homosexual behavior is generally accepted, designated as such in [some metropolitan communities]”).


\textsuperscript{398} See, e.g., Brian C. Kelly et al., \textit{Sex and the Community: The Implications of Neighborhoods and Social Networks for Sexual Risk Behaviours Among Urban Gay Men}, 34 \textit{Soc. Health & Illness} 1085 (2012). Researchers have also looked at these issues in the context of men who have sex with men. See, e.g., Gregory Phillips II et al., \textit{Neighborhood-Level Associations with HIV Infection Among Young Men Who Have Sex with Men in Chicago}, 44 \textit{Archives Sex Behav.} 1773 (2015).
C. Individual Strain and Crime

The third area of criminological theory that holds promise to enhance understandings of LGBT identity and crime is individual strain theories. Strain theories of crime examine how sociostructural pressures motivate people to commit crime. For instance, Robert Agnew’s “general strain theory” (GST) argues that people commonly experience negative emotions when they encounter “strain,” which refers “to negative or adverse relations with others.” Strains can have economic, social, or cultural origins and take many forms (for example, poverty, parental rejection, erratic supervision or discipline, child abuse and neglect, negative secondary school experiences, marital problems, failure to achieve selected goals, criminal victimization, residing in poor communities, homelessness, and discrimination based on race or ethnicity, gender, and religion).

The core policy recommendations of GST are to reduce exposure, and to help people respond to strain in noncriminal ways.

One of the major advantages of GST is that it can be applied to study group differences in crime. For instance, criminologists have applied GST to examine differences in crime rates within and across groups based on age, sex, and race or ethnicity. To date, there are no published studies that apply GST to explore connections between LGBT identity and crime.

399. Strain theories of crime have their origins in the work of Robert Merton, who in 1938 applied Durkheim’s concept of “anomie” to study crime. See Merton, supra note 144, at 3.

400. For a summary of Agnew’s GST, see Robert Agnew, Foundation for a General Strain Theory of Crime and Delinquency, 30 CRIMINOLOGY 47, 61 (1992). Anger is the focus of GST, but other negative emotions are also important. Id. at 49.


402. Id. at 25.


407. See generally Deeanna M. Button, Understanding the Effects of Victimization: Applying General Strain Theory to the Experiences of LGBQ Youth, 37 DEViant BEHAV. 537 (2016) (applying GST to explore connections between LGBQ youths’
In the public health literature, however, the concept of strain has had a key role in explaining connections between anti-LGBT discrimination and adverse mental health outcomes for LGBT individuals. Generally, studies have reported that LGBT people suffer higher occurrences of mental health problems—including substance abuse, affective disorders, and suicide—than non-LGBT people.\(^408\) Ilan Meyer’s “minority stress” theory has explained these negative outcomes as consequences of the strain that stems from sexual orientation discrimination, and researchers have expanded the theory to include gender identity discrimination.\(^409\)

Critically, minority stress theory illuminated that the strain from anti-LGBT discrimination is multifaceted, and occurs along a continuum from distal processes (objective events and conditions) to proximal personal processes (subjective perceptions and appraisals).\(^410\) In addition, the theory identified different levels of coping with minority stress, including the individual level (for example, personality factors) and the group level (for example, services by LGBT-affiliated or friendly social institutions or organizations).\(^411\)

These discussions of minority stress in the public health literature are useful to consider how criminologists might apply GST to explore connections between LGBT identity, strain, and crime. For instance, GST identified discrimination based on race or ethnicity, gender, and religion as crime-facilitating strains. Homophobia and transphobia fit into this list. In addition, GST identified parental rejection, negative school experiences, criminal victimization, and homelessness as crime-facilitating strains. Given that LGBT youth and adults commonly experience these strains, GST may offer insight into how these strains relate to when and why LGBT people offend or desist from crime.

experiences with victimization and negative life outcomes); Susan M. Snyder, et al., *Homeless Youth, Strain, and Juvenile Justice Involvement: An Application of General Strain Theory*, 62 CHILD. & YOUTH SERVS. REV. 90, 92–93 (2016) (applying GST to explore connections between experiences of discrimination and violent victimization that result from LGBT identity and involvement in the juvenile justice system).


\(^{410}\) Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674, 676 (2003). Meyer identified four processes of minority stress: (1) external objective stressful events and conditions (chronic and acute), (2) expectations of such events and the vigilance this expectation requires, (3) concealment of one’s sexual orientation, and (4) the internalization of negative social attitudes. *Id.*

\(^{411}\) *Id.* at 677.
D. Social Controls and Crime

The fourth area of criminological theory that holds promise to enhance understandings of LGBT identity and crime is social control theories. Social control theories examine the factors that motivate people not to commit crime, and view socialization as the key process through which social controls prevent individuals from committing crime. Two popular social control theories prompt different questions about family dynamics and crime. These theories have yet to be applied to LGBT identity, but they may provide insight into whether and why LGBT youth and children in same-sex headed families desist from crime.

The first theory is Michael Gottfredson and Travis Hirschi’s “self-control theory.” Self-control theory views individual self-control as the primary mechanism of criminal restraint. It argues that people develop their sense of self-control during early childhood, and that once acquired, self-control remains relatively stable throughout life. The theory identifies ineffective socialization during early childhood as the primary source of low self-control. Schools and other social institutions contribute to socialization, but the theory views parents as most important in the socialization process. Accordingly, the theory argues that children from households with ineffective and neglectful parents “tend to be impulsive, insensitive, physical (as opposed to mental), risk-taking, short-sighted, and nonverbal,” and therefore, more likely to engage in crime.

Self-control theory attempts to explain group differences in crime rates based on age, sex, and race. Gottfredson and Hirschi discovered that these characteristics were not strong correlates of criminal offending, and thus argued that differences in self-control provided a better explanation. It is unclear whether this proposition applies to LGBT identity. The omission of sexual orientation and gender identity from popular crime surveys that are used to calculate crime rates inhibits these applications.

There are some clues, however, from the findings of the NLLFS. Those findings revealed that children who reported experiences of homophobia showed higher levels of rule-breaking and aggressive behavior. Children who reported experiencing homophobia and attended

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412. See supra Part I.C.2.
413. See supra Part I.C.2.
415. Id. at 91.
416. Id. at 97, 144.
417. Id. at 97.
418. Id. at 106.
419. Id. at 90.
420. Id. at 123–53 (applying self-control theory to race, sex, and age).
schools with LGBT curricula showed lower levels of aggressive problems than children who had experienced homophobia and did not attend such schools.\textsuperscript{422} Moreover, compared to a heterosexual family comparison group, children of lesbian parents reported lower levels of aggression and rule-breaking behavior.\textsuperscript{423}

The second theory is John Hagan’s “power-control” theory.\textsuperscript{424} This theory raises different questions about the relationship between juvenile delinquency and family dynamics. In its current form, the theory largely assumes a traditional family model headed by one man and one woman. The key question for power-control theory is cast in these traditional terms—namely, “[W]hat differences do the relative positions of husbands and wives in the workplace make for gender variations in the parental control, risk preferences, and delinquent behaviour [sic] of adolescents?”\textsuperscript{425} To date, the theory has not been applied to households that are headed by LGBT parents or by a single LGBT parent.

But given its emphasis on families, power-control theory provides a platform to explore the relationship between the distribution of power within LGBT-headed families, child socialization, and juvenile delinquency. For instance, perhaps inequitable power divisions based on gender roles are less common in LGBT-headed households.\textsuperscript{426} Higher egalitarianism between LGBT couples might then shape child socialization in ways that discourage juvenile delinquency. Although more research is necessary, this is one potential hypothesis for why children of lesbian parents in the NLLFS reported lower levels of aggression and rule-breaking behavior.\textsuperscript{427}

\textbf{Conclusion}

In providing an intellectual history of LGBT identity and crime, this Article has shown that the rush to portray LGBT people who come into contact with the criminal justice system as innocent and nondeviant hate crime victims has resulted in flat understandings of LGBT offenders as sexual offenders and flat understandings of LGBT victims as hate crime victims. These one-dimensional narratives overlook a range of problems that especially fall on LGBT people who bear the brunt of inequality in the criminal justice system—including LGBT people of

\begin{footnotes}
  \item[422] Id. at 464.
  \item[425] Id. at 166.
  \item[426] Some researchers have found that same-sex parents divide family responsibilities more equitably than opposite-sex parents. See, e.g., Abbie E. Goldberg, “\textit{Doing}” and “\textit{Undoing}” Gender: The Meaning and Division of Housework in Same-Sex Couples, 5 \textit{J. Fam. Theory & Rev.} 85, 95 (2013).
  \item[427] See, e.g., Gartrell & Bos, supra note 423, at 32.
\end{footnotes}
color, transgender people, undocumented LGBT people, LGBT people living with HIV, and low-income and homeless LGBT people. Addressing LGBT inequality in the criminal justice system requires more engagement with the hardships that likely put LGBT people at greater risk for both offending and victimization, including poverty, homelessness, and family rejection. This Article has illustrated how ideas and methods in criminology offer new directions to engage with these issues, and to identify meaningful connections and trends about LGBT identity and crime. These enhanced accounts can then inform law, policy, and the design of criminal justice institutions to better respond to the needs and experiences of LGBT offenders and LGBT victims.
There is a fundamental revolution under way regarding the relationship between gender and the state, both domestically and internationally. Across the world, the rise and visibility of transgender rights movements have forced a persistent rethinking of the cornerstone legal presumptions associated with science, sex, and gender. As many people, along with multiple courts, colleges, and workplaces, now recognize, the binary presumptions of male and female identity are largely outdated and often fail to capture the complexity of identity and expression. The question for legal scholars and legislatures is how the law can and should respond to this complexity.

Taking this observation as an invitation, this Article provides a different way to conceive of the relationship between sex and gender that might provide another vantage point in demonstrating the limits of our jurisprudence. Drawing on Professor Cheryl Harris’s groundbreaking article exploring whiteness as property published in the Harvard Law Review over twenty years ago, this Article argues that, in order to understand the relationship between sex and gender, it might be helpful to explore a parallel type of affiliation between identity, property, and intellectual property. My thesis is that sex is to gender as property is to intellectual property. Unpacking this further, this Article argues that, instead of thinking of sex as

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a construct of biology alone, it might be helpful for us to reconceptualize state-assigned sex along the lines of tangible property—bordered, seemingly fixed, rivalrous, and premised on a juridical presumption of scarcity in terms of its rigid polarities of male and female. In contrast, regarding gender, I argue that thinking through gender as a performance, if taken seriously, also suggests that gender is more akin to intellectual property—permeable, malleable, unfixed, nonrivalrous—and ultimately deeply nonexclusive. Normatively, I argue that a model of gender pluralism is an important framework with which to examine the importance of gender diversity and fluidity.

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INTRODUCTION

There is a fundamental revolution under way regarding the relationship between gender and the state, both domestically and internationally. Across the world, the rise and visibility of transgender rights movements have forced a persistent rethinking of the legal presumptions associated with science, sex, and gender. For years, the law has largely maintained a steadfast commitment to the idea that one’s assigned sex—referring to
the binary polarities of male and female—operated as a relatively stable fixture, capable of being mapped onto one’s gender identity and self-perception. This expectation of stability translated into a basic presumption within law and policy that gender identity and assigned sex almost always align with one another—that the binary formation of sex operated as a basic organizing principle to formalize and reify gender expression, sexuality, and so forth. In turn, antidiscrimination jurisprudence reflects these principles and, with the exception of a minority of cases, has historically labored under the perception that gender identity and assigned sex rarely conflict with one another. The myriad of legal regulations that deploy sex classifications rest on this presumption; everything from the procurement of passports to access to social services to the gathering of data relies on the presumption of the binary, fixed nature of assigned sex.

Today, these perceptions are increasingly confronted with the reality that the relationship between gender and sex is far more complicated than the law currently recognizes. Our global culture and legal landscape are replete with examples that continually demonstrate the discontinuity of the relationship between gender and sex, calling for a more complex representation of reality.¹ In 2014, Facebook decided to offer its users more than fifty terms for gender self-identification, recognizing that many people use a multiplicity of terms other than male or female to describe themselves.² As of 2017, at least three people in the United States have been able to obtain “nonbinary” or “intersex” as their legally designated gender.³ Indeed, the transgender rights movement is—and has always been—global in scope; many courts, countries, and

1. In the introduction to their pathbreaking volume published in 2006, Transgender Rights, the authors observed that more than sixty colleges and universities now include gender identity as part of their nondiscrimination policies. Paisley Currah, Richard M. Juang, and Shannon Price Minter, Introduction, in Paisley Currah, Richard M. Juang, and Shannon Price Minter, eds, Transgender Rights xiii, xiii (Minnesota 2006). Today, eleven years later, that number has grown to over 999 colleges and universities that have nondiscrimination policies that include gender identity or gender expression, including those that forbid gender discrimination. See Colleges and Universities with Nondiscrimination Policies That Include Gender Identity/Expression (Campus Pride), archived at http://perma.cc/BP99-2NHN.


municipalities throughout the world have faced similar pushes toward pluralism, leading some nations to offer a third category for those who identify as something other than male or female.\(^4\)

Popular culture, too, has begun to reflect these identities.\(^5\) Even before Caitlyn Jenner and Laverne Cox captured the mainstream’s attention with a particular representation of transgender identity, there were rapidly increasing numbers of people who identified as neither male nor female, in addition to agender, bigender, nonbinary, or genderqueer individuals, and those relying upon other categories of gender nonconformity.\(^6\) Many view gender as fluid, as transitory, or as something that does not necessarily need to be assigned at all.\(^7\)

At the same time, in the United States and elsewhere, despite these cultural strides toward greater inclusivity, judges and political leaders continue to display a pervasive confusion regarding transgender equality, at times using the language and history of sex discrimination law and other areas to unwittingly craft one of the most protracted—and ironic—exclusions of transgender individuals from equality-based protections. In New Jersey, Governor Chris Christie vetoed a bill that would have removed a surgical requirement for changing one’s gender assignment.

\(^4\) Examples of such nations include India, Nepal, Australia, New Zealand, and Germany, and also Argentina, which guarantees fair access to transitional health care. See Valentine Pasquesoone, *7 Countries Giving Transgender People Fundamental Rights the U.S. Still Won’t* (Identities.Mic, Apr 9, 2014), archived at http://perma.cc/SF34-MDT3; *English Translation of Argentina’s Gender Identity Law* (Global Action for Trans Equality), archived at http://perma.cc/GZU9-CAAK. Note, however, Professor Susan Stryker’s trenchant observation that “[t]ransgender is, without a doubt, a category of First World origin that is currently being exported for Third World consumption.” Susan Stryker, *De*)Subjugated Knowledges: An Introduction to Transgender Studies*, in Susan Stryker and Stephen Whittle, eds, *The Transgender Studies Reader* 1, 14 (Routledge 2006). See also Sonia Katyal, *Exporting Identity*, 14 Yale J L & Feminism 97, 133–48 (2002).


on a birth certificate, arguing that it could lead to fraud and abuse. At one point, Arizona’s House Appropriations Committee approved an amended bill that would make it illegal for local governments to pass laws or regulations that would have ensured access to public “privacy areas,” that is, restrooms, based on “gender identity or expression.” The original bill actually would have made it a crime for transgender individuals to use a bathroom other than one specified for use by people of the sex they were assigned at birth. As of early 2017, a total of fourteen states—Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Mississippi, Missouri, New York, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming—had considered actions that essentially sought to ban transgender individuals from using bathrooms consistent with their gender identity. In Kentucky, a proposed bill would permit students to file lawsuits if they see transgender students using school restroom and locker facilities that do not conform to their “biological sex”; another bill in Texas would authorize payments to students who prove “mental anguish” upon finding someone not of the same “biological sex” in a school restroom facility. And in North Carolina, the Public Facilities Privacy & Security Act, otherwise known as HB2, essentially requires individuals to use restrooms that are consistent with the sex on their birth certificates, thereby deleteriously affecting transgender individuals whose self-identities might conflict with the sex they are assigned at birth.

These battles are being played out in the Supreme Court as well as the White House. In July 2016, a coalition of thirteen states, led by Texas, asked a federal judge to block the enforcement of a set of guidelines issued by the Department of Education and the Department of Justice that would have prevented schools from discriminating against transgender and other gender nonconforming students. Despite the guidelines’
definition of “sex” under Title IX, which includes a more capacious view of gender identity, a district court concluded that “[i]t cannot be disputed that the plain meaning of the term sex . . . meant the biological and anatomical differences between male and female students as determined at their birth.” The Supreme Court also, in another related case, initially granted certiorari in a Fourth Circuit ruling that required a school district to accommodate a transgender student’s request to use a particular bathroom. Just before the case was argued, however, the new presidential administration, despite the objections of the new secretary of education, decided to rescind the prior administration’s interpretation of Title IX, leaving transgender students unprotected by the federal interpretation.

Part of the reason for this trend, I would argue, is attributable to the dearth of empirical and policy research on gender pluralism, including the multiplicity of issues and identities within the transgender community and the impact of our legal system on gender self-determination. But part of it is also due to a deeper issue regarding the law’s inability to critically reimagine the regulation of gender in a more capacious manner.

Consider an example. In 2006, in a flurry of media attention, New York City’s Board of Health decided to validate what the transgender community had argued for years: that individuals can and should have the right to change the sex on their birth certificates without being required to undergo a particular type of gender reassignment surgery. Under the


16. See, for example, Catherine E. Lhamon and Vanita Gupta, Dear Colleague Letter on Transgender Students *2 (Department of Justice and Department of Education, May 13, 2016), archived at http://perma.cc/WH7D-R37P (“The Departments treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.”). See also Texas v United States, 2016 WL 4426495, *1 n 4 (ND Tex).


rule change initially explored by the board, individuals would have been able to change the sex on their birth certificates, so long as they provided affidavits from a doctor and a mental health professional outlining the reasons for the change and documenting their intention to live permanently as members of the opposite sex.\footnote{21}

At the time of the announcement, the decision was met with enormous praise from transgender rights advocates, who felt that the proposed rule confirmed the need to correct a disjunction between one’s assigned sex and one’s gender identity without the need for prohibitively expensive (and, at times, medically unsafe) surgery.\footnote{22} For those who face similar struggles, this right—a right to represent oneself by gender self-determination, rather than by legal prescription—is a right that is at the heart of notions of gender equality.\footnote{23} Yet, just as public health advocates were nearing victory, the board abruptly abandoned its decision, citing “broader societal implications” and concerns about fraud and abuse.\footnote{24} It took another eight years (and more than one lawsuit) for New York City to finally adjust its approach to a more inclusive one that did not require proof of surgical treatment.\footnote{25}

As this example illustrates, the laws that regulate gender assignation continually have a disparate impact on the transgender community. But there is a deeper irony: at the same time that the law reflects lingering confusion over gender categories, the literature outside the law—and public

culture, more generally—has never before reflected such a momentous dismantling of the codes of both sex and gender altogether.²⁶ Drawing from Professor Judith Butler’s seminal work, *Gender Trouble*, today’s scholarly thought critiques both sex and gender as seemingly “necessary” fictions—social constructs that operate to divide, classify, and polarize society into standard, but not always universal, categories.²⁷ In turn, by exploring the external markers of identity, this body of work has also helped to deconstruct the internal aspects of identity. Even within public culture, there has been a huge shift in gender’s terrain. The same week that the Department of Justice reversed the guidelines on Title IX, for example, French *Vogue* featured a transgender model on its cover.²⁸

Interestingly, despite these accounts, law—one of the principal devices of social change—has only just begun to grapple with these insights regarding the construction of identity.²⁹ The end result is the development of two relatively vast stand-alone regimes in silent conflict with one another, one that recognizes the constructed dimensions of identity, and another that largely requires the existence of these identities—both virtual and real—for its regulatory functions to function successfully.

The result of this confluence of moments inscribes the gender studies movement with a degree of irony: at the very moment at which it has


The Numerus Clausus of Sex

revolutionized academic thought on gender and sexuality, it has never before faced such yawning obstacles within the law’s superlative commitment to categorization. Yet as the transgender rights movement takes firm hold, it exposes a variety of limitations to antidiscrimination jurisprudence, particularly the limits of the legal categories that animate sex and gender. For this reason, any account of gender identity must embrace the importance of not viewing transgender individuals as merely a “means to an end or an intellectual curiosity,” as Professor Paisley Currah, Professor Richard Juang, and Shannon Minter have noted; it must focus on the importance of ensuring gender self-determination as a matter of well-being in the law, rather than as an intellectual exercise.30

Toward that end, this Article attempts both to provide a theoretical starting point to reanalyze the relationship between sex and gender, and to offer another vantage point in demonstrating the limits of our jurisprudence. In this Article, I seek to introduce a new layer to the dynamic between gender and sex by suggesting the need for a reconceptualization of gender, both descriptively and normatively, through the lens of property and intellectual property theory. My thesis is that sex is to gender as property is to intellectual property. Unpacking this further, instead of thinking of sex as a construct of biology or medicalization alone, this Article argues that it might be helpful for us to reconceptualize the assignation of sex as it functions in the law along the lines of tangible property—something that is bordered, seemingly fixed, rivalrous, and premised on a juridical presumption of scarcity in terms of its rigid polarities of male and female. In this way, the Article draws on Professor Cheryl Harris’s important work on race and property31 as well as other scholarship on antiessentialism and antidiscrimination. But it also draws parallels to the numerus clausus principle that has foregrounded property law’s commitment to established categories of entitlement; this analogy, I argue, is particularly salient because it demonstrates how the

30. Currah, Juang, and Minter, Introduction at xxii (cited in note 1). This admonition is especially pertinent to cisgender authors, like myself, writing on transgender issues. See Julia Serrano, Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity 209–12 (Seal 2007); Jacob Hale, Suggested Rules for Non-transsexuals Writing about Transsexuals, Transsexuality, Transsexualism, or Trans____, (Nov 18, 2009), archived at http://perma.cc/9T6W-8ERX (observing the importance of interrogating one’s subject position and goals in writing about the trans community); M. Dru Levasseur, Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights, 39 Vt L Rev 943, 947 (2015) (“For transgender people to be recognized as full human beings under the law, the legal system must make room for the existence of transgender people—not as boundary-crossers but as people claiming their birthright as part of a natural variation of human sexual development.”).

law’s commitment to standardization has essentially foreclosed alternative modes of identification.\textsuperscript{32}

In contrast, regarding gender, I argue that thinking through gender as a performance, if taken seriously, also suggests that gender functions in the law more akin to intellectual property—a creation which is by its nature intangible, permeable, malleable, nonrivalrous, and, ultimately, deeply nonexclusive. An account of gender performance suggests that gender is not something tangible, or fixed, but constitutes a sort of expression that is intangible, borderless, and suffused through cultural regulation and social norms rather than “biological” imperative. As I argue, this account moves gender away from a set of social constructions—and instead recharacterizes its function in the law as a series of intangible possibilities of expression, an essence that is not natural or fixed, but instead resembles the mutable, highly expressive, and transitory qualities of intellectual property.

If we reconceptualize the relationship between gender and sex and the law, I argue, we map an entirely new host of normative possibilities for gender relations to operate outside the boundaries of law’s fixedness on identity. This leads us to a broader set of possibilities regarding the regulation and policy of gender altogether.

This Article is constructed in three parts. Part I explores the parallels between the function of property and state-assigned sex, arguing that the regulation of sex can be analogized to a number of property law–like formations, paralleling the \textit{numerus clausus} principle. I also explore early transgender jurisprudence, showing how the polarities of male and female operated to seriously disadvantage broader approaches to gender regulation. In Part II, drawing on Butler, I argue that gender, like intellectual property, carries an expressive nature that is also entirely nonrivalrous in the sense that one can occupy the spheres of both male and female, masculine and feminine, or neither. I also show how the law has slowly shifted, in some ways, to embrace this vision through its jurisprudence on gender nonconforming behavior in the workplace. However, despite these changes, there are a number of areas of transgender equality that are deeply in need of a shift—particularly the case law regarding bathroom facilities, grooming codes, and sex-segregated facilities. In each of these areas, I argue that the law’s approach to gender discrimination has severely limited the possibilities for transgender equality.

Part III offers a normative framework that focuses on gender pluralism in order to reexamine the regulation of gender and state-assigned sex. Returning to the parallels between property and identity, this Part offers a metaphorical and doctrinal reconceptualization of gender


I. **Sex as Scarcity**

Typically, the *numerus clausus* principle represents a maxim that the law will allow the creation of only a certain number of property formations. It is the most powerful organizing principle in property law to date, and I would argue that it also illuminates both the limits and the possibilities behind identity categories. In the law of tangible property, the *numerus clausus* principle dictates that there are only four different categories of estates, and those estates must serve as the basic building blocks for future transactions.\footnote{34}{The categories described by Professors Thomas Merrill and Henry Smith are the following: fees simple, leases, defeasible fees, and life estates. Merrill and Smith, 110 Yale L J at 3 (cited in note 32).} It serves as one of the most foundational and basic propositions in property law because it forms the very basis for classifying legal entitlements—and disallowing any deviations. As one court put it, ‘“incidents of a novel kind,’ cannot ‘be devised and attached to property at the fancy or caprice of an[ ] owner.’”\footnote{35}{Id, quoting *Keppell v Bailey*, 39 Eng Rep 1042, 1049 (Ch 1834).}


While it is possible for skillful lawyers to design transactions to accomplish their client’s goals, the *numerus clausus* principle militates against challenging or changing the basic categories of property entitlements.\footnote{37}{For an alternative view of the rigidity of property entitlements, see Davidson, 61 Vand L Rev at 1610–16 (cited in note 36) (arguing that there is more dynamism in the *numerus clausus* system than property scholarship recognizes).}

The same observation might also be made of gender regulation, which assigns individuals to either male or female categories but rarely
explores the levels of privilege inherent in either categorization. Back in 1993, Professor Harris punctured the worlds of property theory and anti-discrimination when she published an article in the Harvard Law Review titled Whiteness as Property.\(^\text{38}\) In that article, Harris argued powerfully that the system of slavery facilitated the merging of white identity and property, investing whiteness with a kind of proprietary value. “Whiteness has functioned as self-identity in the domain of the intrinsic, personal, and psychological,” she wrote, “as reputation in the interstices between internal and external identity; and, as property[,] . . . moving whiteness from privileged identity to a vested interest.”\(^\text{39}\) She argued that not only has the law accorded white individuals the same privileges that are extended to other holders of property, but whiteness has operated historically as a form of “status property,” a type of reputational property that is based on racial hierarchy, vesting some with rights and others without.\(^\text{40}\)

Drawing on foundational cases like *Plessy v Ferguson*,\(^\text{41}\) *Brown v Board of Education of Topeka*,\(^\text{42}\) and others, Harris also notably argued that whiteness has operated instrumentally as property by excluding all others from certain privileges, like the right to vote, travel, attain an education, obtain work, and occupy a higher social status.\(^\text{43}\) In the modern era, Harris applied her theories to affirmative action and showed that, even after the civil rights movement, the metric of constitutional injury is still measured by the injury to whites’ settled expectations of admission (rather than its effect on minority admissions), further amplifying the privileged, proprietary status of whiteness.\(^\text{44}\)

At the time of Harris’s publication, it was the first of its kind to link conceptions of property theory—and its concomitant rights of exclusion, alienation, use, and enjoyment—to human identity. “As whiteness is simultaneously an aspect of identity and a property interest, it is something that can both be experienced and deployed as a resource,” Harris wrote.\(^\text{45}\) “Whiteness can move from being a passive characteristic as an aspect of identity to an active entity that—like other types of property—is used to . . . exercise power.”\(^\text{46}\)

\(^{38}\) See generally Harris, 106 Harv L Rev 1707 (cited in note 31). Others have also noted a similar parallel between gender and property. See generally, for example, Davina Cooper and Flora Renz, If the State Decertified Gender, What Might Happen to Its Meaning and Value?, 43 J L & Society 483 (2016).

\(^{39}\) Harris, 106 Harv L Rev at 1725 (cited in note 31).

\(^{40}\) Id at 1734–36.

\(^{41}\) 163 US 537 (1896).

\(^{42}\) 347 US 483 (1954).

\(^{43}\) Harris, 106 Harv L Rev at 1745–57 (cited in note 31).

\(^{44}\) Id at 1757–91.

\(^{45}\) Id at 1734.

\(^{46}\) Id.
In this Part, I draw on a similar analogy operating within the confines of the sex/gender system. A basic system of property rights has three main components. The first component is the creation of a basic legal status, one that usually provides that an asset or entitlement “belongs” to an owner. The second component involves the legal system’s definition of the status in question—that is, its design of a constellation of powers and privileges associated with the performance of that status. And the third aspect of a system of property is that it attaches consequences to those who violate property rules, like the punishment of trespassers.

The same might also be true of our system of sex and gender classifications. The law “sexes” individuals upon birth, according them a certain social status and offering each a set of privileges and entitlements that vests upon the classification. As many scholars have already shown in antidiscrimination jurisprudence, society often reflects a hierarchical distinction between males and females, underscoring a kind of “male privilege” that closely parallels the proprietary white privilege that Harris wrote about. But there is also another kind of privilege as well, a “cis privilege” that extends to those whose gender identities or performances match the sex they are assigned at birth. The law assigns sex so that it functions within the law as a type of property, offering a particular sex classification to individuals whose features correlate to a constellation of characteristics (gonadal, anatomical, chromosomal) that people generally identify as male or female. Normally, this approach to sex (what I call the “morphological model of sex”) is rarely questioned or challenged within the law, and as a result it has taken on significance as a central organizing principle.

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47. See generally Cooper and Renz, 43 J L & Society 483 (cited in note 38) (describing a similar system).
49. Id.
50. Id.
51. See generally Harris, 106 Harv L Rev 1707 (cited in note 31); Cooper and Renz, 43 J L & Society 483 (cited in note 38).
52. See Kristen Schilt and Laurel Westbrook, Doing Gender, Doing Heteronormativity: “Gender Normals,” Transgender People, and the Social Maintenance of Heterosexuality, 23 Gender & Society 440, 443–44 (2009). I use the term “cis” and “cisgender,” following the Merriam-Webster dictionary, to refer to “a person whose gender identity corresponds with the sex the person had or was identified as having at birth.” Cisgender (Merriam-Webster), online at http://www.merriam-webster.com/dictionary/cisgender (visited Mar 4, 2017) (Perma archive unavailable).
54. See Abrams, 21.2 Colum J Gender & L at 78 (cited in note 29) (“In most legal discourse (indeed probably in most social or cultural conceptions) gender is something you can easily have by yourself: it comes with your biological sex.”).
But the morphological model, I argue, also suffers from severe limitations. Although most individuals presume that this model relies on an objective set of criteria, many scholars and scientists have shown that a determination of sex can be far more complicated than the law readily suggests. Not only do countless individuals possess characteristics associated with both sexes, but also many individuals transition from one sex to another, and still other individuals challenge the binary system altogether. The morphological model, however, tends to traditionally overlook these narratives, rendering them invisible under the law unless individuals undertake certain affirmative acts—surgery, hormone injections, and the like—in order to receive recognition. Under this construct, the binary system is never questioned or challenged. Moreover, the morphological model of assigned sex—with its focus on fixity, stability, and objectivity—tends to foreclose the possibility of interrogating these categories altogether or imagining an alternative.55

This is the point at which the parallel between property and the morphological model becomes so instructive. Like Harris, I do not argue that gender or sex functions formally or technically as property in the sense that these entitlements can be purchased or alienated, but instead I argue that our gender and sex classification system functions as a regulatory network of entitlements that illuminates the functions of property and identity.56 Taking the analogy between the morphological approach and property even further, we see a clear parallel between the definition of tangible property—fixed, immutable, and informed by the notion of scarcity—and the way that the law has historically treated the categories of male and female. Even more than the comparison of entitlements between males and females, Harris’s observations, when applied to the concept of assigned sex itself, tend to suggest that the very ascription of sex as male or female—and nothing else—operates as itself a kind of status-based property that excludes those who fall outside of its system.57

In making this suggestion, I make two specific arguments. First, I argue that the ascription of sex58 resembles the *numerus clausus* principle. Just as the *numerus clausus* principle operates in property to classify entitlements into a fixed, stable, and rigid set of categories, leaving no room for deviant entitlements, the same is true for the categories of sex and gender. Like tangible property’s focus on fixedness, the law regarding

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56. See Cooper and Renz, 43 J L & Society at 490 (cited in note 38) (reaching similar conclusions).

57. See id at 493 (noting that gender’s organizing principles determine “where we belong and who we belong with”) (citation omitted).

sex assignation has historically tended to operate from a presumption of scarcity, meaning that there are only two poles of sex—male and female—and that there are no other choices of identification.

Second, I argue that the morphological model, like property itself, functions in an **allocative** fashion. Like Harris argued concerning whiteness, I argue that the “sexed” nature of identity operates to offer privilege and status to some and not others. Those who operate outside the polarities of male and female, or who view themselves as crossing between these polarities, are in a situation similar to the one that Harris argued was facing nonwhite individuals; they can face a troubling sort of exclusion from legal recognition. Individuals who do not fit in either category can be left legally unrecognized, partially erased from legal personhood, unless and until they undergo surgical treatment. At times, even when they do undertake such treatments, they can still be barred from changing their birth certificates, parenting, or being legally recognized in other ways as well.

### A. The Ascriptive Function of Assigned Sex

In the **numerus clausus** of sex, the law dictates that there are only two possibilities—male or female. Sex is constructed as both a function of scarcity (in the sense that one’s choices are limited between male and female) and a rivalrous one (in the sense that one can be either male or female, but not both or neither). As one author points out, “Courts and administrative agencies make two demands of bodies—that they be **legible** as male or female, and that they be so designated and classified.”

The state’s system of sex classification is often elaborate—from birth certificates, to drivers’ licenses, passports, and other identity-related documents, to the federal collection of data—and has been used to enforce bans on same-sex marriage, to exclude women from military combat positions, and to administer institutional systems of sex segregation, among other actions.

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60. See Know Your Rights: Transgender People and the Law (ACLU), archived at http://perma.cc/6AMW-DU8X (describing how state requirements for changing the gender designated on a birth certificate vary widely and are often vague).


64. Id at 160–61 (enumerating these and other means of sex classifications).
Just as the *numerus clausus* principle in property law operates to erase the possibilities of alternative formations, the availability of only two categories of gender identity—male and female—tends to erase the possibility of anything that does not fit into either one.65 Yet, in many cases, the presumption of polarities between male and female is deeply fraught with empirically unwarranted presumptions.66 Every year, for example, thousands of individuals are born intersex, meaning that their chromosomes, hormones, gonads, genitals, internal sex organs, and secondary sex characteristics are not all associated with either the male or female sex.67 The moment a child is born, the child is automatically

65. See, for example, Michael Boulette, *That Kind of Sex: Which Doth Prevaile: Shifting Legal Paradigms on the Ontology and Mutability of Sex*, 50 Jurimetrics 329, 336–39 (2010) (listing eight determinants of individual sex: “[g]enetic or chromosomal sex (XX or XY),” “[g]onadal (testes or ovaries),” “[i]nternal morphologic sex (seminal vesicles-prostate or vagina-uterus-fallopian tubes),” “[e]xternal morphologic (penis-scrotum or clitoris-labia),” “[h]ormonal sex (androgens or estrogen),” “[p]henotypic sex (extensive body hair or breasts),” “[a]ssigned sex and gender of rearing,” and finally “[s]exual identity,” and discussing how legal sex distinctions become unclear when these determinants do not align).


assigned an identity that is congruent with the physician’s determination of the sex of the child as male or female.

Despite the fact that most believe that sex is determined by chromosomes—XX for females, XY for males—sex tends to be assigned at birth by a simple visual inspection of the baby’s genitals. Anyone who fails to fit within these visual parameters—for example, individuals with large clitorises or small penises—can be subjected to corrective surgery to ensure that their bodies conform to an expectation of what is male and what is female, often according to the physician’s overwhelming power of determination. For this reason, intersex children are almost uniformly habilitated into one gender, even though there is mounting evidence that suggests that nonconsensual genital “normalization” surgery may cause more psychological harm than good. In addition, growing evidence of healthy psychosocial development among intersex children who have not had surgery suggests that the procedures can be successfully delayed or may even be unnecessary.

Even aside from the intersex population, the numerus clausus of sex also operates to shoehorn other types of gender identities into male or female, irrespective of the complexity of human identity formation and expression. In some cases, the standardization of male and female categories acts to impose regulatory categories on something as complex as private self-identity. Like the critiques leveled at numerus clausus in property, which suggest that the principle restrains individual autonomy and leads to imposed standardization and conformity, the same is

L & Gender 51 (2006).

68. Ezie, 20.1 Colum J Gender & L at 146–47 (cited in note 63). If a child is born with a “normal” clitoris (defined as less than three-eighths of an inch), she is designated as a girl; if a child is born with a penis length of one inch or longer and appears to be potentially capable of penetrative sex, he is designated a boy. Id at 147. This is so even though the chromosomal identity of the child may differ from their external organs. Id at 147–48. Chromosomal identity is also quite complex, based on research into the molecular genetics of sex determination. See generally, for example, Vernon A. Rosario, The Biology of Gender and the Construction of Sex?, 10 GLQ: J Lesbian & Gay Stud 280 (2004).

69. Pediatric genital surgery is also not always successful. Some infants require three to five surgeries, and others have had many more during the course of a lifetime—twenty-two in one case. Ezie, 20.1 Colum J Gender & L at 150 (cited in note 63). In addition, these surgeries are often performed without the consent of the patient, and parents are not always made fully aware of the range of choices and alternatives to medical surgery. Id at 150–51. Equally troubling is the fact that many intersex patients are not even made aware of their condition, a factor that has caused many intersex patients significant challenges, both physical and psychological. See id at 152 n 34 (detailing the case of David Reimer, who committed suicide due, in part, to issues surrounding his involuntary gender-related treatments).

70. Id at 151–54.

71. Id at 153 & n 38.

72. See Davidson, 61 Vand L Rev at 1623, 1643–44 (cited in note 36) (noting how the standardizing function of numerus clausus engrafts public regulatory goals onto
also true of our systems of sex classification and discrimination law. Here, the law—and many others—overwhelmingly categorize transgender persons as people in the process of becoming something else, as uniformly “transitioning” from one sex to another, even though that is not always an accurate description of many people’s self-identities or expressive preferences.\(^73\)

Today, more and more evidence suggests that there is a myriad of transgender identities that do not always track the crossing of male to female, or the reverse, that the law demands or envisions.\(^74\) For example, in a recent, powerful article, Professors Dean Spade and Rori Rohlfs critiqued the project of compiling statistics on the LGBT community for the purposes of rights-based advocacy, pointing out that some survey questions tend to overemphasize transition at the cost of people who do not engage in certain body modification practices.\(^75\) These practices, they argue, reinscribe the same problematic assumptions that transgender advocates critique and also overlook the role of race and class in identity formation.\(^76\) Many individuals undergo no medical treatment but private legal relations and, thus, “instantiates a variety of normative and pragmatic priorities”).

73. See Elizabeth M. Glazer and Zachary A. Kramer, Transitional Discrimination, 18 Temple Poli & CR L Rev 651, 663–67 (2009) (describing the reductionist approach courts and antidiscrimination laws have taken to identity); Sue Landsittel, Comment, Strange Bedfellows? Sex, Religion, and Transgender Identity under Title VII, 104 Nw U L Rev 1147, 1174–76 (2010) (recommending a “consistency” test to protect transgender plaintiffs on the grounds that “most people—both transgender and cisgender—seem to experience their gender identity, whether or not it corresponds with their birth-assigned sex, as something fairly fixed”).

74. In this Article, I use the term transgender to broadly include individuals who, for one reason or another, do not conform their gender identity or expression to the social expectations that generally accompany the sex assigned at their birth. See Currah, Juang, and Minter, Introduction at xiv (cited in note 1). The term transgender, as Judge Phyllis Frye has noted, is a “political term created to fill the need for self-definition by the transgender community.” Paisley Currah, Gender Pluralisms under the Transgender Umbrella, in Currah, Juang, and Minter, eds, Transgender Rights 3, 4 (cited in note 1). At the same time, however, it is also important to note the proliferation of multiple categories within this umbrella term. As Professor Susan Stryker has noted, the term refers to “all identities or practices that cross over, cut across, move between, or otherwise queer socially constructed sex/gender boundaries,” and is often used to denote a pluralistic variety of differing identities. Susan Stryker, My Words to Victor Frankenstein above the Village of Chamounix: Performing Transgender Rage, in Stryker and Whittle, eds, Transgender Studies Reader 244, 245 n 2 (cited in note 4). For a very eloquent account of transgender identity construction and its varying forms, see Currah, Gender Pluralisms at 4 (cited in note 74). See also Jennifer L. Levi and Bennett H. Klein, Pursuing Protection for Transgender People through Disability Laws, in Currah, Juang, and Minter, eds, Transgender Rights 74, 80 (cited in note 1).


76. Id.
do take other steps to conform to their gender identity. Some reject their birth-assigned sex in favor of another, whereas others may reject the binary system of sex classification entirely. As Professor Currah, Professor Juang, and Minter have noted, “As new generations of body modifiers and new social formations of gender resisters emerge, multiple usages coexist, sometimes easily, sometimes with much generational or philosophical tension.” Of course, even the term transgender can be limiting; while it is often a useful term in many contexts, at other times, it can be too imprecise.

However, despite the proliferation of identities that transgress the polarities of male and female, the law often forecloses the possibility of legal recognition of these categories, due again to the numerus clausus of sex. As Professor Judith Lorber has wisely observed, “Every social institution has a material base, but culture and social practices transform that base into something with qualitatively different patterns and constraints.” In order to fit into the assigned categories of male and female, the law has historically recognized transgender persons’ identity only when they undertake gender confirmation surgery considered “permanent and irreversible.” Because of the tremendous cost associated with genital surgery, advocates have utilized the categories of disability in order to seek coverage, as Section C describes. As Spade writes, “In

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77. Levi and Klein, Pursuing Protection at 80 (cited in note 74).
78. See Dylan Vade, Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People, 11 Mich J Gender & L 253, 273–78 (2005) (identifying and describing a plethora of diverse gender identities). There are also significant racialized dimensions to the terms that individuals adopt. See, for example, Julia C. Oparah, Feminism and the (Trans) Gender Entrapment of Gender Nonconforming Prisoners, 18 UCLA Women’s L J 239, 245 (2012) (noting a proliferation of other terms promulgated by people of color who may not identify as transgender).
80. Currah, Juang, and Minter, Introduction at xvi (cited in note 1).
81. See Meerkamper, Note, 12 Dukeminier Awards J at *17–23 (cited in note 6).
83. In the Matter of Heilig, 816 A2d 68, 86–87 (Md 2003) (discussing how the courts and agencies have approached “sexing” a transgender individual).
84. Ezie, 20.1 Colum J Gender & L at 158–60 (cited in note 63). In the past, private insurers and Medicaid agencies have also denied coverage under broad exclusion policies or because the applicant has failed to demonstrate “medical necessity.” Id. These denials have particular impact on youth, people of color, and individuals who
order to get authorization for body alteration, the scripted transsexual childhood narrative must be performed, and the GID [now known as gender dysphoria] diagnosis accepted, maintaining an idea of two discrete gender categories that normally contain everyone but occasionally are wrongly assigned, requiring correction to reestablish the norm."

B. *The Allocative Function of Assigned Sex*

On a deeper level, the very act of classifying human identity, like the *numerus clausus* principle, operates to reinforce the centrality of the state as the sole source of legal personhood, particularly in matters of sex classification. Consider Merrill and Smith on the *numerus clausus* point:

> [I]f the code recognizes certain forms of property, but not others, it follows logically that the forms enumerated in the code are the only types of property that the judiciary may enforce. The parties may not create a new type of property by contract, nor may the judiciary on its own authority invent new property rights, because this would contradict the code’s status as the exclusive source of legal obligation."

The same can also be said for the legal regulation of sex, which cumulatively and completely establishes the determinative power of the state—and its codes—in determining, recognizing, and ultimately administering identity. Through its design of legal entitlements, the state gains a monopoly power in assigning one’s sex, obviating the power of alternative interpretations. This entitlement is deeply and intimately connected to political recognition and personhood. Even if the goals of our regulatory system lie in (seemingly) efficient standardization, it creates a hierarchy of privilege for those who fall outside of its parameters. In this sense the “property” of being sexed operates allocatively and instrumentally, in the sense that the law accords a certain type of privilege and entitlement to those who are cisgender, conforming to either male or female identities assigned at birth, or those who undergo a particularized type of gender transition. These privileges determine tangible and intangible entitlements—including access to education, employment, and public accommodations, among others.

In addition to the scientific difficulties associated with the very classification of assigned sex under the morphological model, there is the added difficulty posed by the presumption of fixedness and immutability that informs this model. The classification of assigned sex, therefore, translates to a differentiation of privilege. Just as Harris suggested that the status of whiteness operates as a type of property, here I suggest

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86. Merrill and Smith, 110 Yale L J at 10 (cited in note 32) (citation omitted).

that the status of “sexedness”—that is, being “sexed” or classified by the state—performs the same function, conferring the benefits of recognition on individuals who fit the morphological model and denying certain entitlements, particularly recognition, to those who transgress or who do not fulfill the regulatory requirements for transition.

Gender classification is a primary power of the state, but as scholars have shown, it is an inordinately messy, shifting, complex, and contradictory set of rules, demonstrating a near total absence of coherence. For example, the formal rule of the Social Security Administration used to be that individuals could apply to have their gender reclassified upon a showing of proof that they had undergone gender confirmation surgery. Yet reports suggested that these rules were enforced inconsistently, and that some transgender individuals were able to get their gender changed by showing a court decree of a name change and a doctor’s letter simply stating that the transition is “complete,” without specifying further. Passports, which are provided by the Department of State, also required proof of confirmation surgery in the past (that has now changed). However, in the past, some individuals had been able to receive new passports simply by convincing the State Department employee that the gender assignation is a “mistake.”

Birth certificates, for example, are regulated by the states, not the federal government, and, despite the difficulties or ambivalence many associate with gender confirmation surgery, over a quarter of states specifically require evidence of surgery in order to change the designated gender. Here, too, there is significant variation, among both the statutes themselves and their application, leading to marked levels of inconsistency. Some states do not require surgery but instead require other forms

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89. See id at 762. This rule has now changed. For the new policy, see How Do I Change My Gender on Social Security’s Records? (Social Security Administration), archived at http://perma.cc/WM67-TNDZ.
91. See Kerry Eleveld, Passport Rules Eased for Transgender People (Advocate, June 10, 2010), archived at http://perma.cc/X7LW-6RCT. For a description of the current policy, see Gender Transition Applicants (Department of State, Bureau of Consular Affairs), archived at http://perma.cc/QLL3-499K.
92. Spade, 59 Hastings L J at 775 (cited in note 88). Federal regulations since September 11, 2001, have made this much more difficult. Id at 746, 775. See also Nan D. Hunter, “Public-Private” Health Law: Multiple Directions in Public Health, 10 J Health Care L & Pol 89, 93–99 (2007) (discussing the increase in federal security regulations regarding health).
94. See Spade, 59 Hastings L J at 736 (cited in note 88). Forty-six states plus a handful of other jurisdictions allow people to correct their gender marker, and a handful of states do not have clear policies. See Lisa Mottet, Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates:
of medical evidence. Others require a court order confirming gender change. Some states ban transgender individuals from changing their assigned sex altogether. Still others require a new birth certificate to change assigned sex on other state documents. Indeed, the policies—and the way they are interpreted and applied—can lead to such marked variation that some transgender persons have, again, reported success in simply visiting the DMV and then complaining that the sex listed on their drivers’ licenses is an error.

Even aside from the state and federal matrices that govern the assignation of sex, researchers report a similar pattern of inconsistency in sex-segregated facilities, for which there is often no formal policy to determine gender classification in cases of transgender clients. The absence of formal policies can have dramatic effects on the lives and well-being of transgender persons, who can be especially vulnerable when placed in facilities that are inappropriate to their gender identities. Like the issues surrounding documentation of identity, the law tends to avoid recognizing other forms of gender nonconforming behavior without evidence of gender confirmation surgery or a gender dysphoria diagnosis. Moreover, the state’s centrality in sex classification—and its concomitant reliance on the polarities of male and female—is rarely critiqued or questioned. The state’s purpose in official sex designations is for information gathering and juridical enforcement of sex-specific laws and policies; these government interests effectively override individual gender self-determination.

Admittedly, just like property’s _numerus clausus_ system, our systems of gender and sex regulation do offer important benefits. One key interest, which Merrill and Smith point out in the real property context, is to economize on information costs—allowing third parties and future
transaction participants to decrease information-processing costs.\textsuperscript{103} Although Merrill and Smith recognize the value of the fluidity of language for generative or expressive purposes—in other words, to derive new possibilities of entitlement formation—they clearly note that the \textit{numerus clausus} principle strongly cuts against building any flexibility within the basic categories themselves.\textsuperscript{104} The result, it seems, maintains standardization at the cost of individual autonomy.

The same observation may also be made for the regulation of sex. Very often the presumption of the fixed, binary, stable formation of male and female categories enables people to make quick assumptions about individual preferences and entitlements. At times, these assumptions can be largely benign or rebuttable based on future interaction.\textsuperscript{105} Yet when these ascriptive elements translate into assumptions about the intellectual, emotional, or physical capacities of an individual based on assigned sex, the constructs can be deeply problematic and a cause for concern under antidiscrimination laws.\textsuperscript{106}

Yet the absence of legal possibilities for deviation—while certainly economizing on standardization—also creates marked costs that are borne by individuals who fall outside of these categories. So the benefits of standardization might actually create measurable costs that are internalized by gender nonconforming populations. Here, the \textit{numerus clausus} principle of sex operates to disadvantage members of both the transgender and intersex communities, first, by foreclosing the possibility of alternative identity formations and, second, by forcing individuals who may not fit into either category to change themselves—sometimes physically and sometimes psychologically—in order to avail themselves of legal recognition. For intersex persons, they may be involuntarily subjected to medical intervention, sometimes irrespective of their potential preferences and without their informed consent. In contrast, transgender individuals may desire treatment, including hormones or surgery, but might be prevented from getting treatment, due to the insurance or regulatory issues surrounding gender transition. Or, as the data suggests, many others may not desire medical intervention at all, and thus may

\textsuperscript{103} See Thomas W. Merrill and Henry E. Smith, \textit{What Happened to Property in Law and Economics?}, 111 Yale L J 357, 387 (2001) (“If in rem rights were freely customizable—in the way in personam contract rights are—then the information-cost burden would quickly become intolerable.”).

\textsuperscript{104} Merrill and Smith, 110 Yale L J at 37–38 (cited in note 32).

\textsuperscript{105} See Rich, 79 NYU L Rev at 1148 (cited in note 53) (making similar observations with respect to race).

\textsuperscript{106} See, for example, \textit{United States v Virginia}, 518 US 515, 542–45 (1996) (applying intermediate scrutiny to the sex-based prohibitions at bar and drawing parallels between the prohibitions and archaic assumptions about the sexes); \textit{City of Los Angeles Department of Water and Power v Manhart}, 435 US 702, 704–09 (1978) (“Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.”).
face legal invisibility.\textsuperscript{107} Yet in either case, the individuals’ preferences and ability to determine, for themselves, their own gender are foreclosed by the dominance of the polarities of male and female, erasing other possibilities of legal self-identification.

C. \textit{The Evolution of the “Properties” of Gender}

The allocative function of the morphological model of sex, as I suggest above, necessarily leads to a degree of state surveillance and regulation of the entitlements associated with assigned sex. Most of these classifications and entitlements are rarely questioned, even though they do function, in some ways, similarly to racial classifications and thus as status-based properties, as Harris has suggested. Those who are classified “successfully” by the state are able to exercise the privileges and entitlements associated with their birth-assigned sex as a vested interest. Yet those who experience a disjunction between their assigned sex and their own self-identity may face a myriad of legal challenges stemming primarily from the state’s inordinately powerful role in their identity classification.\textsuperscript{108}

Of course, there are obvious advantages offered by the centrality of the state. Ideally, state-sponsored regulations offer some degree of uniformity to sex classifications, and they also provide notice to the public, thereby reducing information costs. Yet, under this model, the state alone carries a rarely challenged monopoly power over sex classifications and also, relatedly, over gender reassignment. Particularly in these realms, in which public health considerations are so intimately tied to the range of possibilities for identity management, it is notable that many classificatory decisions have been made without significant deference to transgender individuals themselves.

In these ways, transgender communities offer an important critique of the law’s regulation of sex and gender from both a minoritizing and universalizing perspective.\textsuperscript{109} For members of the transgender community...
nity, this project is largely self-constitutive, because it demonstrates the need to rethink some of the classifications that disenfranchise them from access to medical services, equal treatment, and full-fledged citizenship. At the same time, because they engage with the deepest presumptions that the law holds regarding the classifications of sex and gender, and the cultural expectations that underlie each, transgender communities offer a universalizing critique of the role of gender in our everyday lives and also underscore the need for a reimagining of the relationship between sex and gender altogether.

While studies of transgender-related theories have existed since the mid-nineteenth century in academia, many scholars, particularly Professor Sigmund Freud, tended to conflate transgender identity with repressed homosexuality, leading to a focus on psychoanalytic therapy that persisted well into the 1970s. At the same time, however, medical advances in endocrinology and surgical techniques began to slowly decouple the conflation of transsexuality with transvestism (cross-dressing) and homosexuality, leading to the emergence of new models of transgender identity.

Eventually, experts also began using the term gender dysphoria, which slowly began to replace the previous category of transsexuality. Many of the key issues that transgender people face—both historically and even today—center around the role of medical treatment and the advantages and disadvantages of a diagnosis of Gender Identity Disorder (GID), now referred to as gender dysphoria. In 1980, the American Psychiatric Association (APA) added a category of gender identity disorders, including transsexualism, to the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III). By 1994, the

110. For excellent writing on transgender identity and related issues involving race, class, and other categories, see the work of Spade. See generally, for example, Spade, 59 Hastings L J 731 (cited in note 88); Dean Spade, Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy, in Currah, Juang, and Minter, eds, Transgender Rights 217 (cited in note 1); Dean Spade, Mutilating Gender, in Stryker and Whittle, eds, Transgender Studies Reader 315 (cited in note 4); Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law (Duke rev ed 2015).

111. See Knauer, 6 Pierce L Rev at 44–50 (cited in note 109).


113. Id at 26.

114. Id at 30–31.

115. For a very helpful summary of these developments in the past few years, see Kevin M. Barry, et al, A Bare Desire to Harm: Transgender People and the Equal Protection Clause, 57 BC L Rev 507,516–26 (2016).

116. See Jonathan L. Koenig, Note, Distributive Consequences of the Medical
criteria for a GID diagnosis included the following: “(A) strong and persistent cross-gender identification, (B) persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex, (C) lack of a physical intersex condition, and (D) clinically significant distress or impairment in social, occupational, or other important areas of functioning.” In 2013, the fifth edition (DSM-5) removed GID entirely and replaced it with a new diagnosis of gender dysphoria.118

Gender dysphoria has had a long and tumultuous history, leading to the birth of what has been called the “medical model” of transgender identity.119 Following the much-publicized transition of Christine Jorgensen, an ex-GI formerly named George Jorgensen who in 1953 returned to the United States as a woman, many more individuals began to seek out medical treatment.120 This culminated in the 1966 founding of a program at Johns Hopkins University for those with gender identity issues, along with a specialized protocol developed by an endocrinologist, Dr. Harry Benjamin, who sympathized with his patients and prescribed hormones, among other options.121 Within just ten years of the opening of Hopkins’s inaugural clinic, forty others opened.122

Yet, many of these clinics relied on a model that was so narrow that it risked excluding a wide variety of gender variant individuals. As one scholar reports:

To qualify for treatment, it was important that applicants report that their gender dysphorias manifested at an early age; that they have a history of playing with dolls as a child, if born male, or trucks and guns, if born female; that their sexual attractions were exclusively to the same biological sex; that they have a history of failure at endeavors undertaken while in the original gender role; and that they pass or had potential to pass successfully as a member of the desired sex.123

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120. Dallas Denny, Transgender Communities of the United States in the Late Twentieth Century, in Currah, Juang, and Minter, eds, Transgender Rights 171, 174–75 (cited in note 1).
121. Id at 175–76.
122. Id at 176.
123. Id at 177, citing generally Dallas Denny, The Politics of Diagnosis and a
As a result of this pathologizing tendency, many individuals were turned away for spurious reasons:

because they were “too successful” in their natal gender roles, because they were married, because they had read too much about transsexualism, because they had the “wrong” sexual orientation, because clinic staff didn’t consider them sexually attractive in the cross-gender role, or because they wouldn’t comply with lifestyle requirements imposed on them by the clinics.124

Those accepted for treatment were pressured to avoid socializing with other transgender individuals on the grounds that they were “now normal men and women.”125

Today, the World Professional Association for Transgender Health, which provides guidance to the medical community for the treatment and management of gender dysphoria, requires that individuals receive the diagnosis and live full-time as their self-identified gender prior to receiving certain forms of medical treatment, such as hormones and surgery.126 Until the early 1990s, the medical model was the dominant approach to transgender care.127 Like the numerus clausus principle’s disallowance of deviation, this model has operated under the presumption that all transgender individuals were literally “in transition” from male to female, or the reverse, largely disallowing any forms of deviation.

Of course, one significant advantage of using the language of dysphoria involves the simple fact that a gender dysphoria diagnosis has enabled individuals to receive access to medical care for the purposes of surgery or hormone treatments.128 Similarly, it has allowed courts and medical professionals to view transgender individuals as facing a conflict over their gender identity, one that is successfully treatable and resolvable with the right combination of medical interventions.129

At the same time, however, an overreliance on this medical model tends to suggest that “trans-identified individuals suffer from a psychological condition” requiring medical intervention.130 Further, the medical

Diagnosis of Politics: The University-Affiliated Gender Clinics, and How They Failed to Meet the Needs of Transgender People, 98 Transgender Tapestry 3 (Summer 2002).

124. Denny, Transgender Communities of the United States at 177 (cited in note 120).

125. Id.


127. Denny, Transgender Communities of the United States at 178–79 (cited in note 120).


129. To date, “[c]ourts or administrative agencies in at least seven states have found that transgender people are protected under state civil rights statutes that prohibit discrimination on the basis of disability.” Levi and Klein, Pursuing Protection at 74 (cited in note 74). The seven states are: Florida, Illinois, Massachusetts, New Hampshire, New Jersey, New York, and Washington. Id at 74 n 1.

model tends to reify, rather than challenge, pervasive stereotypes about sex and gender. One scholar observed:

The medical model of transsexualism supposed that there were but two sexes, and that the only alternative to remaining unhappily in the original gender role was to work hard to conform to the only available alternative. That is, one “changed sex,” going from male to female or from female to male. The model didn’t question the society that created such restrictive gender roles or examine the possibility of living somewhere outside those binary roles. . . . Transsexualism itself was considered a liminal state, a transitory phase, to be negotiated as rapidly as possible on one’s way to becoming a “normal” man or “normal” woman.131

Another significant disadvantage involves the disparate implications of the diagnosis requirement. By carving out a class of transgender individuals who have been diagnosed with gender dysphoria and are receiving treatment or surgical intervention, the medical model tends to risk unwittingly excluding those who are not receiving treatment from legal recognition.132 Individuals who do not believe that they have a medical condition, who identify as genderqueer or with some other gender nonconforming category, who opt for nonmedical modes of transformation, like binding breasts or using cosmetics or wigs, or who otherwise choose not to physically transform, risk exclusion from these models.133 By implicitly suggesting that individuals need to first receive a diagnosis in order to receive particular forms of treatment, gender dysphoria has had the effect of actually limiting access to treatment because those who cannot afford medical treatment (or who lack health insurance coverage) can be left unable to address their situation through any other form of managed care if they lack a gender dysphoria diagnosis.134 As a result, many individuals seek hormones and other treatments extralegally, outside of the medical system, posing risks to their well-being and safety.135

131. Denny, Transgender Communities of the United States at 179 (cited in note 120).
132. See Oparah, 18 UCLA Women’s L J at 247 (cited in note 78).
133. Id.
134. This is particularly an issue given the low rate of insurance coverage for transgender individuals. One 2003 study found that 43 percent of the transgender-identified individuals interviewed lacked health insurance, a rate that was double the proportion in the general population. Id at 247 n 38. For a discussion of steps that can be taken to ensure greater coverage, see Ilona M. Turner, Pioneering Strategies to Win Trans Rights in California, 34 U La Verne L Rev 5, 14–18 (2012).
Another result of the emphasis on gender dysphoria is slightly more ephemeral. Focusing on gender dysphoria as a variant of a disability lends itself to the suggestion that gender nonconformity is something experienced by only a small minority of individuals, cast as in need of treatment and therapy. Yet this myth could not be further from the truth. To be sure, gender nonconformity is different from gender dysphoria, but the law tends to recognize only a particular subset of the latter category and may fail to protect the former category as a result.\textsuperscript{136}

Of course, the observation above is not meant to suggest that the desire to obtain gender confirmation surgery or hormone treatments is not a real, deeply felt need by some transgender-identified individuals. Professor Jennifer Levi and Ben Klein, for example, have argued that the purpose of seeking disability protection is not to pathologize individuals but rather to obligate institutions to ensure that transgender individuals are able to participate fully in society by providing them with medical options for transition when appropriate.\textsuperscript{137} Many individuals focus on the materiality of the body in seeking a congruence between their self-identity and gender presentation, and much of the surrounding discourse often uses, either directly or indirectly, the language of property in articulating claims for medical intervention on this basis. Consider, for example, Dr. Jay Prosser on this point:

I do not recognize as proper, as my property, this material surround; therefore I must be trapped in the wrong body. Since inappropriateness is located in the material body, the entire configuration explains why the subject seeks surgical intervention to alter the flesh rather than psychological intervention to transform body image. If the body is not owned, it is in this experience of body—not my body—that surgery intervenes.\textsuperscript{138}

For some, as Prosser suggests, surgical intervention might be a desirable goal. Yet there are dangers in presuming that all people who identify as transgender seek the same thing, a presumption that is categorically

\textsuperscript{136} See \textit{Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People} *4 (World Professional Association for Transgender Health 2011), archived at http://perma.cc/VA6E-8YLN (discussing the difference between the two classifications).


flawed and yet often imposed by the law and the state itself. My point here is simply to suggest that the minoritizing language of a gender dysphoria diagnosis lends itself to obscuring the significant need for a deeper and more structural critique of gender itself—highlighting its political role in creating and consecrating the categories of male and female, and exposing the presumption that there is something deeply wrong with gender nonconforming behavior that needs to be “fixed.”

D. The Path of Transgender Jurisprudence

While these medical advances were unfolding in the 1950s and afterward, the law had only just begun to face the question of how to address sex changes in a variety of different contexts, ranging from the validity of marriages between trans- and cisgender-identified individuals, to the question of “gender fraud,” to birth certificate questions, to cases involving employment. Similar cases were also unfolding on a global scale, and each of these trajectories initially effectively cemented the centrality of one’s assigned sex at birth, rejecting the possibility that the law recognized transitions from male to female and vice versa.

Here, the morphological model of sex characterizes early jurisprudence on transgender issues. Again, the two polarities of male and female are all that is offered, at times limiting the chance of a successful transition between them, let alone the possibility of identifying outside of these polar categories. Sex operates here like a type of tangible property under the law—fixed, immutable, and rivalrous. Because the law treats sex through a lens of scarcity, it functions like a kind of nontransferable property, limiting the possibility of more malleable approaches. Here, the idea of sex operating as a kind of nontransferable property gives rise to two main approaches in the law: (1) early cases that rejected the possibility of a change in assigned sex, and (2) later cases that recognized the possibility of a change in sex assignation but relied on a mode of analysis that employed stereotypical views of male and female, thus reifying a binary system that failed to take into account the malleability of changed roles regarding gender. Both of these trends had negative effects on transgender equality, though for very different reasons.

Consider the first line of cases, which rely heavily on policing the boundaries between male and female, allowing for little crossover between them. In 1957, a Scottish court rejected a transgender woman’s application to alter her birth certificate by stating that “skin and blood tests still show X’s basic sex to be male and that the changes have not yet reached the deepest level of sex determination.” This observation that

139. This discussion of transgender legal history is only a fraction of a much richer and more complex chronology. For an excellent book on the topic, see generally Susan Stryker, Transgender History (Seal 2008).

140. Sharpe, Transgender Jurisprudence at 40 (cited in note 112), quoting X—Petitioner, 1957 Scots L Times 61, 62 (Sheriff Ct 1957). The court also noted that, even if a
biology was essentially immutable pervades early transgender jurisprudence, and it also operated to suggest a deep-seated similarity between conceptions of sex and conceptions of property—both were cast as fixed, stable, and largely immutable under the law. Gender fraud, too, played a key thematic role.

By the 1970s, the first cluster of legal cases involving transgender individuals began to make their way to the courts, both in the United States and elsewhere. Prior to the 1970s, in the United Kingdom, transgender persons were able to legally marry members of the opposite gender. However, in 1970, an English court handed down Corbett v Corbett, a case that held that sex was determined at birth. The case involved a challenge to the validity of a marriage between a cisgender male petitioner, Arthur Corbett, and a postoperative transgender woman, April Ashley. Although the husband was aware of Ashley’s history, in order to avoid paying her alimony, he sought an annulment on the grounds that Ashley was actually a “person of the male sex” and therefore the marriage was invalid.

Although her status as a “transsexual” had not been challenged by the defense, Ashley was examined multiple times by medical experts—her vagina was examined to determine whether it could accommodate a male penis, for example. In their recommendations, one expert classified her as “a male homosexual transsexualist,” and yet another concluded that “the pastiche of femininity was convincing.” A third expert classified Ashley as intersex, and said she should be assigned to the female sex. In the end, however, the judge concluded that sex is determined at birth by a congruence of chromosomal, gonadal, and genital factors. After reviewing all of these factors, the judge, himself a medical doctor, concluded, “It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the change of sex had taken place, the relevant statute would not have permitted a change to the birth certificate, which was “a record of fact at a fixed time” and “not . . . a narrative of events.” X, 1957 Scots L Times at 62.

141. See Corbett v Corbett, 2 All ER 33, 47 (High Probate Divorce and Admiralty 1970).
142. 2 All ER 33 (High Probate Divorce and Admiralty 1970).
143. Sharpe, Transgender Jurisprudence at 40–41 (cited in note 112), citing Corbett, 2 All ER at 48–49.
144. Sharpe, Transgender Jurisprudence at 40 (cited in note 112), citing Corbett, 2 All ER at 34.
145. Corbett, 2 All ER at 34, 37, 40. A related issue in the case involved allegations that the marriage had never been consummated. See id at 34.
146. Id at 41–42.
147. Id at 43, 47.
148. Id at 43.
149. Sharpe, Transgender Jurisprudence at 41–42 (cited in note 112). See also Corbett, 2 All ER at 40–47.
150. Ladrach, 513 NE2d at 832.
latest), and cannot be changed. . . . [Ashley’s] operation, therefore, cannot affect her true sex.”

The court further concluded that “[m]arriage is a relationship which depends on sex and not on gender.”

Corbett, by nearly all accounts, had a profound and lasting effect on transgender equality around the globe. Corbett was followed in other countries as well, specifically Canada, Singapore, and Australia. The central proposition of the case—that sex is determined at birth—became the conclusion that foreclosed transgender equality claims in multiple areas, specifically regarding birth certificates, social security, sex discrimination, unfair dismissal, equal pay, criminal law, and marriage, throughout England—and elsewhere—for many years.

Moreover, the presumption that sex was inevitably fixed at birth continued to inform the development of early transgender jurisprudence in the United States. The *numerus clausus* of sex functioned here to deny alternative classifications or transitions between the sexes. Consider the observations by a Texas appellate court that refused to recognize the marriage between Christie Lee Littleton, a transgender woman, and Jonathan Mark Littleton, a cisgender man:

The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person’s gender immutably fixed by our Creator at birth?

There are some things we cannot will into being. They just are.

. . .

We hold, as a matter of law, that Christie Lee Littleton is a male. As a male, Christie cannot be married to another male.

After Littleton and Corbett, appellate courts in Kansas, Ohio, and Florida ruled that marriages involving transgender individuals were null and void.

Although many courts still cling to the presumption that sex cannot be changed, a growing body of jurisprudence has come to conclude otherwise. For example, after Corbett, courts in the United States, Australia, and New Zealand began to respond to calls for reform, and so began to carve out legal recognition for individuals who transitioned into another identity by focusing on the importance of “psychological and anatomical harmony.” For example, in a 1968 New York

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151. *Corbett*, 2 All ER at 47.
152. Id at 49.
156. Id at 231.
158. Sharpe, *Transgender Jurisprudence* at 3 & n 5 (cited in note 112) (emphasis
case, *In re Anonymous*, a judge permitted a transgender woman to change her birth certificate, on the grounds that, postoperation, her anatomy (originally assigned male) had been successfully conformed to her self-identity (female). The judge rejected any concern over fraud, noting “the probability of so-called fraud, if any, exists to a much greater extent when the birth certificate is permitted . . . to classify this individual as a ‘male.’”

Despite the growing importance accorded to psychological self-identification, however, the law still tended to reflect a preoccupation with the tangible manifestations of genital anatomy. This preoccupation, unusually, also manifested itself through a growing focus on the applicant’s postoperative capacity to engage in heterosexual intercourse. The issue came up in *Corbett* and also, inexplicably, in *Anonymous*, although it is extremely difficult to understand why such an observation would even be necessary on a change of birth certificate. The focus on postoperative “genital performance” turned out to be a central factor in a case from New Jersey, *M.T. v J.T.*, which held a postoperative transgender woman to be female, at least for the purposes of marriage. Here, the court noted the medical expert’s testimony that the woman’s vagina and labia were “adequate for sexual intercourse.” The reasoning suggested that it was because she could no longer perform sexually as a male in sexual intercourse, and because the surgery provided her with the capacity to perform sexually as a woman, that the court validated the change.

Admittedly, the recognition of sex changes within the law was a tremendous benefit to transgender individuals seeking legal recognition. At the same time, however, these decisions, by limiting the recognition of (omitted) (listing cases). An Australian court, for example, held that one’s psychological gender identity played a considerably more powerful role than one’s anatomical sex at birth. See Taylor Flynn, *The Ties That (Don’t) Bind: Transgender Family Law and the Unmaking of Families*, in Currah, Juang, and Minter, eds, *Transgender Rights* 32, 35 (cited in note 1), citing generally *Re Kevin: Validity of Marriage of Transsexual*, 28 Fam L 158 (Fam Australia 2001).

159. 57 Misc 2d 813 (NY City Civ 1968).
160. Id at 816–17.
161. Id at 817.
163. *Anonymous*, 57 Misc 2d at 815.
165. Sharpe, *Transgender Jurisprudence* at 60 (cited in note 112), citing *M.T.*, 355 A2d at 211. The sex/gender distinction has intersected with the question of mixed-sex requirements for marriage, which were common before *Obergefell v Hodges*, 135 S Ct 2584 (2015), at times leading to a variety of approaches that failed to question the justification behind these requirements. See David B. Cruz, *Getting Sex “Right”: Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship*, 18 Duke J Gender L & Pol 203, 210–15 (2010).
166. *M.T.*, 355 A2d at 206.
transgender bodies to those who had undergone surgery, began to explicitly and implicitly suggest that surgical confirmation was an imperative to a successful transition.\textsuperscript{168} Again, like in the context of physical property, these cases tended to ground themselves in an overwhelming focus on the tangible manifestations of one’s anatomical genitalia, by always remaining fixed to a polarity of male or female. After all, these courts reasoned, without genital surgery, how could there be a change of sex?\textsuperscript{169} Adding to this view, one scholar explained, referring to surgery, that “it is hard to see an earlier point at which legal sex reassignment could take place,” due to “the need for ‘objective’ evidence of a subjective state of mind, and the need for a clear-cut point at which the legal sex-change takes place.”\textsuperscript{170}

Again, as these scholars suggest, the tangible fixedness of ascriptive sex—coupled with a presumption of polarity—can operate to disadvantage transgender parties even further. During this period, and even today, judges engaged in a kind of scientific scrutiny of genitalia that was unparalleled compared to many other areas of law.\textsuperscript{171} In many cases, often those resulting in positive outcomes for transgender individuals, courts engage in a detailed, and often problematic, examination of what counts as “normal” versus “abnormal” physiological characteristics, overlooking the dangers of definitional over- and underinclusivity. In performing these analyses, courts reduce the transgender plaintiff and his or her marriage to a specific set of behaviors and anatomical differences, allowing little room for fluidity, variability, or negotiation of the categories themselves, just as the \textit{numerus clausus} doctrine dictates.\textsuperscript{172}

An overly rigid dichotomy between preoperative and postoperative status has disparate effects based on social status, gender, and race, further obscuring the more complicated medical choices faced by transgender individuals, particularly transgender men who face a lower probability of surgical success in metoidioplasty or phalloplasty.\textsuperscript{173} Given this instability,

\begin{enumerate}
  \item Sharpe, \textit{Transgender Jurisprudence} at 3 (cited in note 112).
  \item Echoing this view, one scholar, for example, wrote that anatomical sex had to play a determinative role, noting that “[s]ociety would consider a fully anatomical male to be male regardless of a convincing feminine appearance or the individual’s inner beliefs.” Id at 60, quoting Douglas K. Smith, Comment, \textit{Transsexualism, Sex Reassignment Surgery, and the Law}, 56 Cornell L Rev 963, 969 (1971).
  \item See, for example, Gardiner, 42 P3d at 133–34; \textit{Richards v United States Tennis Association}, 400 NYS2d 267, 269 (NY Sup 1977).
  \item See Flynn, \textit{The Ties That (Don’t) Bind} at 35–37 (cited in note 158).
  \item For example, Michael Kantaras, a transgender man who faced a custody battle regarding his children (who were biologically fathered by his brother), faced a three-week trial in which the main object of discussion concerned whether Kantaras had a penis that was sufficient for the purposes of penetration. Id at 38–39. The court failed to recognize that Kantaras’s choice not to undergo surgical construction of a penis is like the choice made by many—indeed, most—trans men. Id at 39. The surgery,
courts’ focus on body parts often has the unintended result of conferring far more legal recognition on trans women than on trans men.\textsuperscript{174} As Professor David Cruz points out, “Medicalization encourages a delegation of authority over gender not to individuals, but to medical professionals, a class that has largely maintained itself as gatekeepers over, hence deniers of, access to various gender confirming treatments.”\textsuperscript{175}

There are, of course, larger difficulties with this approach. On this point, Professor Alex Sharpe has commented:

In this way sex, albeit in refashioned form, continues to provide a foundation for, and to make sense of, the social system of gender. In other words, only one body per gendered subject is “right” . . . and the “rightness” of that body is to be understood in relation to heterosexual function. In this regard, the view that anatomy determines destiny is taken to somatic limits.\textsuperscript{176}

Thus, it is not just enough for the court to know that certain transgender individuals have a “functional” vagina or penis; courts also need to be further implicitly reassured of the heterosexuality of each in order to recognize them.

E. \textit{The Legal Presumption of Polarity}

The dominant theme of the cases above is their focus on a kind of polarity between male and female: one can be one or the other, or perhaps cross over successfully with gender confirmation surgery, but never rest between the two or challenge the poles altogether. Just as the \textit{numerus clausus} doctrine dictates, other forms of gender nonconformity are simply not protected by applicable law.

Consider, for example, cross-dressing. In the mid-1800s, a variety of American cities began to adopt ordinances that prohibited cross-dressing. St. Louis, for example, adopted a law in 1864 that declared that whoever appeared in a public place “in dress not belonging to his sex” would be guilty of a misdemeanor.\textsuperscript{177} Similar statutes were adopted in Columbus, Cincinnati, Miami, Detroit, Los Angeles, Dallas, and Houston.\textsuperscript{178} State laws, too, were employed to prevent cross-dressing under the use of statutes to prevent “disguise.”\textsuperscript{179}

\begin{flushleft}
\begin{thebibliography}{99}
\item 174. Id at 39.
\item 175. Cruz, 18 Duke J Gender L & Pol at 222 (cited in note 165).
\item 176. Sharpe, \textit{Transgender Jurisprudence} at 62 (cited in note 112).
\item 178. Id.
\item 179. Id at 1425–28, citing generally \textit{People v Archibald}, 296 NYS2d 834 (NY App 1968).
\end{thebibliography}
\end{flushleft}
These statutes were employed to target both men and women who cross-dressed, and often remained on the books until well into the 1980s. In several cases, transgender individuals were targeted even though they were actually required to wear clothing of the opposite gender in preparation for their reassignment surgery. Later, several courts overturned these statutes on the grounds that they were overly vague or that they interfered with the liberty interests of the individuals; one court observed that “the aesthetic preference of society must be balanced against the individual’s well-being,” noting that it would be inconsistent for the law to permit gender confirmation surgery and then impede the therapy necessary in preparation.

While these cross-dressing statutes remained on the books, more and more individuals began to turn to other areas of the law for recognition and protection. As more cases involving transgender individuals made their way through the courts, a number of judges were asked to consider whether Title VII’s prohibition against discrimination on the basis of sex applied to the individuals’ situations. Early cases, again, followed the “sex as scarcity” model, leaving transgender persons unprotected due to a preoccupation with the fixedness associated with state-assigned sex. According to one commentator, these early decisions, around the 1970s and 1980s, generally offered the following observations: (1) that “sex discrimination laws were not intended to protect transgender individuals,” and (2) that the term “sex” referred only to one’s assigned sex, “not to change of sex.”

These two conclusions led to a variety of presumptions that further grounded sex in property-like formations. First, they reified the dominant model of sex discrimination as a system of polarity between male and female, again underscoring the presumption of scarcity between gender choices. Second, they engaged in a type of “sex scripting,” by forcibly assigning a particular sex to someone who may have self-identified with another (often opposite) identity. Third, they foreclosed the possibility of mutability, leaving assigned sex a tangible, unchangeable manifestation, not of a person’s self-identity, but of the state’s inability to accept change and transition. Finally, the cases ascribed identities to members of the transgender population that were no longer congruent with their self-identification.

For example, in 1975, two federal courts—one in California and another in New Jersey—held that Title VII did not protect transsexual

181. See, for example, City of Chicago v Wilson, 389 NE2d 522, 522–23 (Ill 1978).
182. Id at 525.
employees. In one of those cases, *Voyles v Ralph K. Davies Medical Center*, an employee was fired after she announced that she wished to transition; the court held that Congress enacted Title VII to protect women, not “transsexuals,” and that nothing in the legislative history of Title VII suggested any desire to protect transgender individuals. Similar reasoning was employed in the case of *Grossman v Bernards Township Board of Education*, in which a teacher was fired after undergoing gender confirmation surgery “not because of her status as female, but rather because of her change in sex from the male to the female gender.”

Here, the court suggests that what lacks protection is the volitional nature of gender choice. Under these cases, any changes or crossovers between the two polarities of male and female did not have to do with sex, per se; they were merely the result of a personal choice. Sex, here, becomes scripted as a kind of unchangeable reality, an entrenched, tangible property that informs an immutable identity. The result of these decisions is a form of “sex scripting”—the idea both that sex is biologically assigned from birth and that the state’s protection simply flows from a presumption of polarity and immutability. Consider, for example, the famous 1984 case of *Ulane v Eastern Airlines, Inc*, in which a federal court of appeals found that the plaintiff, a transgender woman, did not suffer discrimination on the basis of sex, because (according to the court):

Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot’s certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case. . . . It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is a female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.

Other courts also concluded that discrimination against transgender persons did not constitute discrimination based on sex. Again, in

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184. 403 F Supp 456 (ND Cal 1975).
185. Id at 456–57 & n 1. See also Broadus, *The Evolution of Employment Discrimination Protections for Transgender People* at 95 (cited in note 183) (discussing this case).
186. 1975 WL 302 (D NJ).
187. Id at *4. See also Broadus, *The Evolution of Employment Discrimination Protections for Transgender People* at 95 (cited in note 183).
188. 742 F2d 1081 (7th Cir 1984).
189. Id at 1087 (citation omitted).
190. See, for example, *Holloway v Arthur Andersen and Co*, 566 F2d 659, 663–64 (9th Cir 1977) (holding that transgender people are not a suspect class and that
these cases, the implicit presumption of scarcity—that one can be assigned male or female but cannot transition into something else—suggests that sex, like property, is fixed, unchangeable, unalterable, and tangible. To suggest otherwise invites charges of fraud.¹⁹¹ Even in cases that do recognize a change in assigned sex, the judicial focus on the tangibility of the change (for example, the focus on genitalia) further forecloses the possibility of recognizing sex changes outside of genital surgery.

These cases represent a particularly strident point of view that persists, even today. Many of the assumptions explored above—the idea that sex is biologically determined at birth, for example—have continued to circulate in contemporary discussions of transgender protection and identity. Consider, for example, a full-page newspaper ad taken out by the Campaign for California Families to oppose the redefinition of the term “gender” to include transgender individuals in California’s employment discrimination statute:

The State should not promote the transsexual agenda upon society. Little girls should not be influenced in any way to think they are boys, nor little boys influenced to think they are girls. This bill makes the State approve of transsexuality and sets up an unnatural standard for adults and children. . . . [It] is an attack on nature. People are born with 46 chromosomes, XX for females, XY for males. You are either born male or female, and there are no in-betweens.¹⁹²

Similarly, a columnist for a conservative magazine put forth the observation that “expectations and notions of gender may evolve, but gender itself is permanent. Sorry.”¹⁹³

II. EXPLORING THE INTELLECTUAL PROPERTIES OF GENDER

Whereas the morphological model functions in the law under a numerus clausus model that presumes the fixedness, immutability, and tangibility of assigned sex, gender, which is typically defined as the cultural expectations and social roles that accompany sex,¹⁹⁴ offers an opposite set of possibilities. In this Part, I turn to a second, alternative model of gender: a performative model. In contrast to the morphological discrimination on the basis of transgender identity is not actionable under Title VII, the Fifth Amendment, or the Fourteenth Amendment); Sommers v Budget Marketing, Inc, 667 F2d 748, 750 (8th Cir 1982) (per curiam) (noting that the plain meaning, legislative history, and subsequent debates surrounding Title VII all support the conclusion that Congress did not envision Title VII’s protections extending to transgender individuals).

¹⁹¹. See Sharpe, Transgender Jurisprudence at 64 (cited in note 112).
¹⁹². Currah, Gender Pluralisms at 15 (cited in note 74) (brackets in original).
¹⁹³. Id at 16.
¹⁹⁴. See, for example, Definitions Related to Sexual Orientation and Gender Diversity in APA Guidelines and Policy Documents *1, archived at http://perma.cc/QRR6-T2E4.
model’s presumption of polarity, a performative model of gender focuses on subjectivity, malleability, and fluidity in offering a set of possibilities for identity formation and expression. Further, a performative model, I argue, demonstrates an intimate and overlooked connection to intellectual property, because it highlights the intangible, nonexclusive, nonrivalrous, and malleable elements of gender, in contrast to assigned sex. Put another way, as they function in the law, the relationship between property and intellectual property tracks a similar connection between sex and gender. If assigned sex operates as a tangible marker of identity within the law, then gender operates as an intangible overlay, a fluid performance over the seemingly tangible “property” of assigned sex.

In constructing this argument, I rely heavily on Professor Butler’s theory of gender performativity, which argues that gender is constituted by a series of external, ritualized performances that, over time, help to construct an image of gender as something that is intrinsically tied to sex. For Butler, there is no cognizable gender identity behind its external expressions, social constructions, and expectations; rather, “identity,” she argues, “is performatively constituted by the very ‘expressions’ that are said to be its results.” In this Part, following Butler, I introduce two ways of thinking about gender and performance through the lens of intellectual property, one descriptive, and the other normative.

In Section A, I show how gender performance, following Butler’s theory, demonstrates an intrinsic connection to intellectual property through its focus on expression. Like intellectual property, gender, according to Butler’s account, is not something natural, tangible, or fixed, but constitutes a sort of expression that is deeply intangible and suffused through with cultural regulation and social norms rather than biological imperative. Unlike other forms of tangible property, gender lacks a sovereign border—instead, it constitutes an intangible expression, an ongoing performance—in much the same way as traditional formulations of intellectual property display these attributes. Indeed, the performative dimensions of gender suggest that, instead of thinking of gender as a type of fixed identity, one should view it as more akin to intellectual property—permeable, unfixed, malleable, and ultimately expressive.

In Section B, I argue that a performative model—if taken seriously—allows us to reimagine the relationship among law, gender nonconforming behavior, and sex discrimination. When gender becomes viewed as an intangible set of expressions, rather than a set of expectations scripted onto a state-assigned identity, as we see in the morphological model, we see an entirely new host of possibilities for gender relations to operate outside the boundaries of law’s fixedness on tangibility.

196. Id.
I argue that, with the advent of *Price Waterhouse v Hopkins*[^198] and its progeny, which banned employment decisions based on gender stereotyping,[^199] the law of sex discrimination has moved, appreciably so, toward a focus on gender performance. Such accounts of gender performativity move gender from a set of cultural expectations to an intangible form of expression, a performance that is not natural or fixed but mutable, highly expressive, and transitory.

In Section C, I analyze the performative model and its possibilities in the law and policy regarding gender discrimination. Following *Price Waterhouse* and a constellation of new cases embracing transgender equality in the workplace, I argue that the main contribution of a performative model lies in its ability to transgress the fixed, stable, property-like formations of state-assigned sex and to instead embrace the broader, malleable, and expressive dimension to gender.

### A. Performative Model of Gender

When we think of a “performance,” we tend to conjure up an image of a scripted set of statements, actions, and activities that are fully anticipated, planned, and enacted down to every last detail—stage, costume, antics, language—with an audience in rapt attention. We imagine a performance to be something separate from everyday life and behavior: we tend to think of actors stepping outside their everyday roles as individual beings and adopting particular identities that are assertively divorced from their own.

Performance theory at once both supplements and fractures this understanding in multiple ways. At its most basic level, performance theory actively distances itself from the idea of a clear delineation between the performances of life and the performances of art, and argues instead that everyday life and activities both capture and enable elements that bear a stark resemblance to theatrical rendition and expression. The terms “performance” and “performativity,” here, are thought to apply to an admittedly wide range of behavior—from the most sophisticated and stylized of rituals to the most mundane of cultural behavior.[^200]

Butler’s theories of gender performativity comprise the most powerful rethinking of gender and social norms in the past several decades. Her work has ruptured current, identity-based theories of gender and sexuality, forcing theorists to ask whether the act of categorization replicates the very structures feminists hope to challenge. Here, Butler’s contribution has not only lent itself to a new and fuller understanding

[^199]: Id at 258 (Brennan) (plurality).
of the modes of social construction in gender expression, but also helped theorists to recognize the powerful role of performance in everyday life, lending itself to a host of possibilities for civil rights activism both inside and outside the world of gender norms.

For Butler, traditional feminism both presumes and relies upon a kind of distinction between sex and gender that is deeply problematic. Thus, in her first work, *Gender Trouble*, Butler punctured the traditional formulations of sex and gender by instead emphasizing the need to question binary categories of being. She argued that gender is produced and performatively constituted by a series of repetitive acts, which, if taken seriously, would show “that there was no natural core or essential nature of gender categories, that ‘gender’ instead constituted a series of performative acts that, taken together, created the appearance of an authentic ‘core’ of gender identity.” Antidiscrimination advocates, she argued, subverted many of the interests of their movement by relying on clearly demarcated categories of gender, sex, or sexuality. Thus, instead of normalizing or essentializing same-sex sexual desires or conduct into categories that suggest that they are fundamental, immutable aspects of human identity, which is the traditional strategy of lesbian and gay rights activists, Butler argued that gay rights advocates should seek to challenge, rather than replicate, the concept of gender altogether.

She argued that individuals are driven to perform certain behaviors associated with gender norms, and thus are always yearning for, but not quite representing, an ideal vision of masculinity or femininity. Over time and repetition, however, these performances give the impression that gender is a foundational aspect of personhood: “[G]ender is always a doing... There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very ‘expressions’ that are said to be its results.” In other words, she wrote, these acts and gestures help to create an illusion of an interior “gender core” that is maintained for the purpose of regulating sexuality.

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202. Id at 10–47.
205. Id at 7–8. See also Katyal, 14 Yale J L & Feminism at 118 (cited in note 4) (discussing Butler’s performatory theory and subsequent divisions between civil rights activists and queer theorists); Katyal, 14 J Gender, Soc Pol & L at 489–92 (cited in note 203).
209. Id at 185–86.
A cornerstone of her theory, then, lies in a complete refusal to disassociate the biology of sex and the social construction of gender.\textsuperscript{210} Traditional feminism actively distinguishes between sex and gender; it suggests that sex is biologically intractable but gender is culturally constructed.\textsuperscript{211} Butler takes issue with this distinction and argues instead that biological sex, the very materiality of the body, is totally inseparable from the cultural and regulatory norms that govern gender.\textsuperscript{212} In other words, sex is not a function of the body and a construct upon which to impose gender assumptions but actually a cultural norm that itself governs the body.\textsuperscript{213}

This altogether brief explication of performativity and gender leads to two normative observations: First, Butler’s approach suggests a need to revisit and examine the complex codes and norms (legal, technological, cultural) that help us contextualize meaning through a focus on the material body and its performing potential. The success of the gender performativity model necessarily requires an audience to actively embrace gender codes and norms and also to eventually mobilize these codes to ensure that others read the performances in the same manner.\textsuperscript{214} However, gender performance itself can be a site for either resistance or conformity; much depends on the intention of the speaker, the reception of the audience, and the context in which the performance is offered.\textsuperscript{215}

Second, performance theory suggests that all language becomes a series of activities, a set of “doings” and performances, a process of action and reaction that embodies behavior and expression. As Butler suggests, following the codes of gender often requires significant effort in managing one’s aesthetic appearance, particularly regarding hair, clothing, and other forms of expression.\textsuperscript{216} Gender’s deeply expressive, transitory nature thus suggests that it is nonrivalrous, akin to a kind of intellectual property. As Professor Kath Weston has commented on Butler’s work, “the reification of ‘woman’ and ‘man,’ ‘masculine’ and ‘feminine,’ implies essence where none exists. . . . A person ‘is’ not feminine, apart from the play of eyeliner and fingernails that points to an interior essence and

\textsuperscript{210} Other prominent legal scholars have taken similar approaches. See, for example, Franke, 144 U Pa L Rev at 39 (cited in note 82); Russell K. Robinson, Masculinity as Prison: Sexual Identity, Race, and Incarceration, 99 Cal L Rev 1309, 1331–35 (2011).

\textsuperscript{211} Butler, Gender Trouble at 8–9 (cited in note 27).

\textsuperscript{212} Judith Butler, Bodies That Matter: On the Discursive Limits of “Sex” 1–4 (Routledge 1993).

\textsuperscript{213} Id.

\textsuperscript{214} See Rich, 79 NYU L Rev at 1178 (cited in note 53).

\textsuperscript{215} See Butler, Gender Trouble at 186–90 (cited in note 27).

\textsuperscript{216} See id at 191–92.
makes it seem so.”217 In later work, Butler goes so far as to argue that the very materiality of the body is actually the effect of power.218

B. Gender Resistance and Parodic Properties

This model is deeply and implicitly reflective of intellectual property in three significant ways. First, Butler’s explication of the nature of gender mirrors, in major ways, the definition of intellectual property. Unlike real property, which is fixed, rivalrous, and tangible, intellectual property, like other types of expression, is intangible, expressive, and non-rivalrous,219 meaning that one person’s use of a resource does not deprive another of the same resource. As such, it has none of the dangers of scarcity that are associated with tangible resources. Also, because it is expressive, it allows for a multiplicity of different types of performances and recodings and is essentially unlimited in its expressive possibilities.

Many of the same things are also true of gender. Butler’s theory of performativity is deeply and intimately entwined with the notion of gender as a sort of intangible property or expression that can be created, expressed, and even subverted, according to the audience’s expectation. The performative model’s divergence from the tangibility and scarcity associated with property suggests that gender functions in an unlimited declarative capacity, opening up manifold possibilities of articulation and transference. As scholars have argued with respect to gender and property, both are performed, and both function as signals to others, communicating a set of expectations about how others must behave.220

Second, like intellectual property, Butler’s treatment of gender also suggests that its expressive nature is entirely nonrivalrous in the sense that one can occupy the spheres of both male and female, masculine and feminine, at the same or different times.221 But she also argues, implicitly, that gender identity can be transferred between the sexes—not only can a person occupy the spheres of masculine and feminine at the same time, but a person can perform femininity and be classified as a male, and vice versa. In other words, the process of regulating gender, and its concomitant performance, produces slippages, or openings, between expectation and behavior, between the ideal of masculinity or femininity and the assigned sex of the subject. These slippages, she argues, are seeds

217. Weston, Gender in Real Time at 40 (cited in note 207).
221. Butler, Gender Trouble at 184–86 (cited in note 27).
that enable an unconventional set of performances that demonstrate the transferable nature of gender expression.\textsuperscript{222}

A third major point of complementarity between the performative model of gender and intellectual property is the subject’s own agency in performing gender parody, which demonstrates gender’s expressive qualities. Here, law can act in powerful ways to constrain, silence, or enable the performative model. Because gender comprises neither the causal result of sex nor a seemingly fixed aspect of sex,\textsuperscript{223} Butler argues that we must also extend recognition to those individuals who fall somewhere in the interstices of male and female binary systems, to recognize those “bodies that have been regarded as false, unreal, and unintelligible.”\textsuperscript{224} As she argues, “The cultural matrix through which gender identity has become intelligible requires that certain kinds of ‘identities’ cannot ‘exist’—that is, those in which gender does not follow from sex and those in which the practices of desire do not ‘follow’ from either sex or gender.”\textsuperscript{225}

To resignify gender, Butler argued strenuously for individuals to use their agency and autonomy to engage in a series of “subversive repetition[s]” of gender, in order to decouple and recode the fictive unity of sex and gender.\textsuperscript{226} In many cases, these expressions take the form of parody or pastiche—all of which aim to offer subversive readings of the same script.\textsuperscript{227} These repetitions, for Butler and others, lie in the range of activities, identities, and expressions that transgress, rather than follow, the cultural expectations associated with assigned sex and gender.\textsuperscript{228} For example, Butler suggested that drag performance reveals the true nature of gender: that there is no realness associated with gender; it comprises a seductive illusion that can be reframed and rearticulated to suggest the need for its subversion. Taking her argument to its logical conclusion implies that if gender is a performance, then “gender cannot be said to follow from a sex in any one way,” suggesting a separation between gender and sex that is full of radical possibilities of expression.\textsuperscript{229}

Butler’s exploration of drag and other forms of gender parody suggests that the performative dimensions of gender comprise a sort of expressive property—one that can be mimicked, reframed, and recast as a different text, all depending on the performer’s position. Drag allows

\textsuperscript{222} Id at 186–88.
\textsuperscript{223} Id at 9–10. She writes: “If gender consists of the social meanings that sex assumes, then . . . sex is relinquished[,] . . . and gender emerges, not as a term in a continued relationship of opposition to sex, but as the term which absorbs and displaces ‘sex.’” Butler, Bodies That Matter at 5 (cited in note 212).
\textsuperscript{224} Butler, Gender Trouble at xxv (cited in note 27).
\textsuperscript{225} Id at 24.
\textsuperscript{226} Id at 201.
\textsuperscript{227} Id at 188–89, 200.
\textsuperscript{228} See Butler, Gender Trouble at 200 (cited in note 27); Gail L. Hawkes, Dressing-Up—Cross-Dressing and Sexual Dissonance, 4 J Gender Stud 261, 266–70 (1995).
\textsuperscript{229} Butler, Gender Trouble at 9–10 (cited in note 27).
for assigned sex to become literally transformed from an item of tangible property (exclusive, fixed, bordered, and sovereign) into *performance*, an item akin to intellectual property (intangible, expressive, nonexclusive, nonsovereign, and deeply prone to commentary and critique). In this process, gender becomes reframed as a particular kind of speech act that can be transferred, performed, acquired, and commented upon: in short, it comprises the marriage of an idea and an expression. “When the constructed status of gender is theorized as radically independent of sex, gender itself becomes a free-floating artifice,” she writes, “with the consequence that man and masculine might just as easily signify a female body as a male one, and woman and feminine a male body as easily as a female one.”

Like the nature of intellectual property, gender acts as a set of qualities that take shape through ideas and intangible qualities but that can be changed and altered, revealing a world of infinite possibilities of expression. And, through these performances, the codes of gender become delegitimized as illusory, confining, and deeply in need of parodic subversion.

C. *Unscripting Gender*

At first glance, when one considers the wide range of outcomes on transgender issues, it may seem that Butler’s performative model, admittedly abstract and theoretical, has not directly influenced the outcome of case law or policy. However, to reach such a conclusion might be unwarranted. Specifically, her work has forced legal scholars to reckon with the expressive, transitory nature of gender performance, forcing us to reformulate, for example, current approaches to transgender equality to recognize some pragmatic limitations of the antidiscrimination model based on sex.

In addition, I argue that the notion of gender performance has a deep and lasting significance in the law due to the Supreme Court’s *Price Waterhouse* decision, which implicitly analyzed the performance-related

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230. Id at 9 (emphasis omitted).

231. Note that I am suggesting, as Butler has, that “[t]he critical promise of drag does not have to do with the proliferation of genders, as if a sheer increase in numbers would do the job, but rather with the exposure of the failure of heterosexual regimes ever fully to legislate or contain their own ideals.” Judith Butler, *Critically Queer*, 1 GLQ: J Lesbian & Gay Stud 17, 26 (1993). See also Sheila “Dragon Fly” Koenig, *Walk like a Man: Enactments and Embodiments of Masculinity and the Potential for Multiple Genders*, in Donna Troka, Kathleen LéBesco, and Jean Bobby Noble, eds, *The Drag King Anthology* 145, 152 (Harrington Park 2002) (“Butler’s discussion of drag focuses only on the enactment of heterosexual gender categories, ignoring the ways that drag can expose ‘Gender’ to consist of many genders.”).

232. Indeed, Butler’s influence on legal scholarship has been substantial. A recent Westlaw search (conducted on February 15, 2016) revealed that her work has been cited well over a thousand times in the law review literature.

aspects of gender in demanding that employers refrain from basing employment decisions on gender scripting or stereotyping under Title VII.\(^\text{234}\) As I show in this Section, *Price Waterhouse* and its progeny suggest an implicit prohibition on employers engaging in “gender scripting” in making employment decisions, thus implicitly embracing a performative model of gender. In addition, by protecting gender nonconforming behavior, the performative model, quite unlike the morphological one, also enables a greater diversity of gender expression in the workplace. As I suggest, the performative model dictates that employers not only refrain from imposing identity-related scripts, but also embrace rethinking the concept of discrimination “because of sex.”\(^\text{235}\)

In this Section, I argue that *Price Waterhouse* has given rise to two distinct approaches in protecting transgender employees, each of which emphasizes the intangible expressions of gender, rather than solely focusing on state-assigned sex. The first approach, which I call the “extrinsic” approach, essentially prohibits gender stereotyping and identity scripting in the workplace, thus leading to a greater degree of expressive diversity in the workplace. In the second approach, which I call the “intrinsic” approach, transgender individuals receive protection from sex discrimination not because they have been the victim of gender stereotyping, but because their decision to transition—and an employer’s reaction—implies concerns about the essence of discrimination based on sex. Each of these strategies has significant implications for our understanding of antidiscrimination approaches to sex and gender in the law, but for very different reasons.

1. **An Extrinsic Approach: Prohibiting Identity Scripting**

   “Identity scripting” is the term that I use to refer to the expectations that surround individuals based on their perceived identities.\(^\text{236}\) For example, Part I suggested that the *numerus clausus* of assigned sex often implicitly demands congruence between a male-assigned sex and masculinity and a female-assigned sex and femininity. As Professor Holning

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\(^{235}\) 42 USC § 2000e(k) (“The terms ‘because of sex’ . . . include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons.”).

\(^{236}\) See Holning Lau, *Identity Scripts & Democratic Deliberation*, 94 Minn L Rev 897, 902–10 (2010) (describing “identity scripts” as the aggregation of distinct stereotypes, which collectively form a script to which individuals are expected to conform).
Lau has explained, ascribed scripts are very difficult to reject because psychologists have found that individuals tend to register only those instances in which individuals conform to stereotypes, overlooking situations in which individuals resist the ascribed stereotype. Due to these cognitive biases, identity scripts are extremely difficult to alter or change, and convincing others that individuals do not (or should not have to) follow a certain script takes enormous dedication and work.

In the past, courts were extremely reluctant to interpret “sex” in a way that would protect transgender individuals, leaving them with very little chance of success in stating a claim. However, *Price Waterhouse* changed the landscape of gender-related jurisprudence. In that case, the Court considered a broader meaning of “gender” than it had in the past, implicitly revealing a view of gender as a particular kind of performance. The defendant-employer had failed to recommend a heterosexual female plaintiff for a partnership at the accounting firm because some partners thought that she was too masculine, observing her “aggressiveness” and lack of “interpersonal skills.” Others, along similar lines, described her as “macho” and stated that she “overcompensated for being a woman.” One partner indicated that the plaintiff could have improved her chances of making partner if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

The Court took these suggestions to demonstrate that the employer clearly violated Title VII’s prohibition against sex discrimination. In response, the Court stated that it did not “require expertise in psychology to know that, if an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.” The Court found that Title VII reaches claims of discrimination based on “sex stereotyping,” noting “we are beyond the day when

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237. Id at 904.
238. For example, Professors Devon W. Carbado and Mitu Gulati have suggested that, due to scripts that associate African American males with laziness, some African American males work longer hours than necessary. Id at 905 & n 29, citing Devon W. Carbado and Mitu Gulati, Working Identity, 85 Cornell L Rev 1259, 1292–93 (2000).
240. See *Price Waterhouse*, 490 US at 239–42 (Brennan) (plurality).
241. Id at 234–36 (Brennan) (plurality).
242. Id at 235 (Brennan) (plurality).
243. Id (Brennan) (plurality).
244. *Price Waterhouse*, 490 US at 256 (Brennan) (plurality).
an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”

Looking to congressional intent, the Court stated that “in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

The impact of *Price Waterhouse* for the LGBT community cannot be overstated. By expanding the definition of sex discrimination to embrace claims of gender stereotyping, the Court opened up the possibility that individuals could sue under a theory that discrimination on the basis of sexual orientation or gender identity could be considered similar types of gender-related stereotyping, because many LGBT-identified individuals in the workplace are often targeted because their behavior or identity fails to conform to expectations regarding gender. Thus, a man who is targeted for appearing more feminine is often also perceived to be gay, and *Price Waterhouse* opened up the possibility of Title VII’s protection for him, despite the fact that sexual orientation (as a category) is not covered.

At the same time that this decision opened up a host of possibilities to protect gender nonconforming individuals in the workplace, however, there were still serious obstacles within Title VII’s jurisprudence. Most federal courts have clearly held that discrimination on the basis of sexual orientation or transgender identity is not protected under Title VII. As a result, LGBT plaintiffs had to craft claims of gender stereotyping without relying on evidence that they were targeted due to their sexual orientation, real or perceived. The results were mixed. In one case, for example, the Second Circuit held that a gender-stereotyping claim could not be used to “bootstrap protection for sexual orientation into Title VII.”

Despite these challenges, however, equally significant to the doctrinal shift in *Price Waterhouse* was its implicit embrace of gender

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245. Id at 251 (Brennan) (plurality).
246. Id (Brennan) (plurality) (brackets omitted).
250. Id at 882, quoting *Dawson v Bumble & Bumble*, 398 F3d 211, 218 (2d Cir 2005). Another court went so far as to observe that recognizing such claims “would have the effect of de facto amending Title VII” to include sexual orientation, fearing that “any discrimination based on sexual orientation would be actionable under a sex stereotyping theory . . . as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.” Palmer, Note, 37 Hofstra L Rev at 882 (cited in note 239) (ellipsis in original), quoting *Vickers v Fairfield Medical Center*, 453 F3d 757, 764 (6th Cir 2006).
nonconformity in the workplace. When an employer suggests that a
woman behave more “femininely,” and the Court finds that to be prohib-
ited behavior under Title VII, the Court is implicitly protecting gender
nonconforming plaintiffs—masculine women, effeminate men, and
potentially a host of transgender plaintiffs—from discrimination based
on sex. Here, the gender-stereotyping model implicitly tracks many of the
differences between property and intellectual property because it places a
primary value on the intangible, expressive value of gender performance,
instead of assigned sex. It also, in some ways, “frees” individuals from
the scripted or stereotypical requirement that state-assigned sex dictate
one’s gender performance (that is, that males behave in a masculine fash-
on and the corollary for women), enabling individuals to challenge the
expectations of gender, in true Butlerian fashion.

Not surprisingly, after Price Waterhouse, a slow shift occurred in the
transgender rights case law from the 1980s to the 1990s. In at least a few
eyary early cases, courts began to switch their choice of pronoun—from the
state-assigned sex of the plaintiff to his or her gender self-identity. Yet
despite this discursive adoption of the plaintiff’s own representation in
court documents, courts still continued to deny claims under Title VII.
These early cases, it seems, failed to recognize the primary value of the
intangible, psychological, and expressive aspects of gender expression
and performance, contrary to Price Waterhouse. Instead, these cases con-
tinued to emphasize the tangible, anatomical aspects of an individual’s
identity, according them an immutable, fixed status.

In one case, an Amtrak employee who began to transition from a
male to a female through hormone injections faced a number of sex-re-
lated employment decisions: she was required to dress as a male, was
addressed by her male name, had her office moved out of public view, and
was not permitted to use the women’s restroom. Yet the court rejected
her sex discrimination charge on the grounds that it was not discrimina-
tion against her sex, but rather “because she was perceived as a male who
wanted to become a female.”

Yet several years after Price Waterhouse, plaintiffs were better able
to employ gender-stereotyping theories to their advantage. By the year
2000, at least two circuits had embraced a gender-stereotyping claim in
cases of transgender plaintiffs. In Rosa v Park West Bank & Trust Co, 255

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251. See, for example, Dobre v National Railroad Passenger Corp (“Amtrak”), 850
252. See, for example, id at 286–87.
253. Id at 286.
254. Id at 287. See also Grossman, 1975 WL 302 at *4 (rejecting a Title VII claim
     because the termination was based on the plaintiff’s identity as a transgender individ-
     ual and not on sex).
255. 214 F3d 213 (1st Cir 2000).
a case brought under the Equal Credit Opportunity Act, the First Circuit allowed the claim to proceed against a bank that had allegedly discriminated against a birth-assigned male when it refused to provide her with a loan on the grounds that her “attire did not accord with his male gender.” In that case, the court characterized the plaintiff as a cross-dressing male, rather than a transgender female. The plaintiff was told that she would not receive a loan until she “went home and changed.” In defense of its decision, the bank argued that the laws against discrimination on the basis of sex did not apply to cross-dressers, and that it genuinely could not identify the plaintiff without a change of clothing. The district court adopted this argument, concluding, in the plaintiff’s words, that there was “no relationship . . . between telling a bank customer what to wear and sex discrimination.”

Note the contrast between the Supreme Court’s Price Waterhouse approach and the district court’s approach in Rosa. In Price Waterhouse, the plaintiff was expressly told what to wear and how to dress. Even though the plaintiff in Rosa was subjected to the same treatment, she faced a dramatically different outcome at the lower court. One could surmise that the district court, here, was drawing a line between cross-dressing and other types of gender nonconformity in the workplace, allowing the latter to receive protection but not the former. Nevertheless, the First Circuit reversed on this point, concluding that, although the prohibited bases of discrimination do not include “style of dress or sexual orientation,” it was possible that the plaintiff could still state a claim based on the possibility of disparate treatment, that is, that the bank treated “a woman who dresses like a man differently than a man who dresses like a woman.”

That same year, the Ninth Circuit in Schwenk v Hartford took a different approach by explicitly embracing a gender-stereotyping approach in the case of Crystal Schwenk, a transgender female. In that case, Schwenk sued under the Gender-Motivated Violence Act on the grounds that a state prison guard in an all-male penitentiary had targeted and attacked her after he realized that she identified as a female and had adopted a feminine appearance. The Ninth Circuit explicitly

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258. I do not adopt the court’s use of pronouns and instead conform with the plaintiff’s self-identification.
259. Rosa, 214 F3d at 214.
260. Id at 214–15.
261. Id at 214.
262. Id at 215–16.
263. 204 F3d 1187 (9th Cir 2000).
264. See generally id.
266. Schwenk, 204 F3d at 1193–94.
adopted the reasoning of *Price Waterhouse*, concluding that the evidence showed that “[the guard]’s actions were motivated, at least in part, by Schwenk’s gender—in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor.” The Ninth Circuit concluded that discrimination against transgender females “as anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity” could constitute actionable sex discrimination. (Note, here, that Schwenk received protection as an assigned male, rather than a transgender female.)

These cases raise a foundational question that continues even today: whether, under Title VII, it is preferable for the plaintiff to claim that the discrimination is based on his or her assigned birth sex or that the discrimination is based on his or her own gender identity. In other words, can a plaintiff successfully employ both the morphological and performative models in a single case? For example, if a state-assigned male transitions to a transgender female and faces discrimination during that transition, is it preferable for her to claim discrimination based on her identity as an effeminate male, or as a gender nonconforming female? In many cases, it seems as though the former approach has a greater potential for success, despite the unfairness of the imposed classifications altogether under the *numerus clausus* of sex. As Stevie Tran and Professor Elizabeth Glazer have pointed out, the result of these cases essentially requires a kind of “perfect” gender nonconformity—that is, individuals must “behave like women . . . [while] ‘really’ [being] . . . men.”

Further, there remains some uncertainty over whether *Price Waterhouse* has overruled the prior reasoning of cases like *Ulane*, which distinguished discrimination based on transgender identity from other types of sex discrimination. It also took some time for the reasoning of *Schwenk* and *Rosa* to be adopted in the Title VII context. However, case law eventually began to turn toward employing a gender-stereotyping rationale to protect transgender plaintiffs. For example, in *Smith v City of Salem, Ohio*, a transitioning female firefighter was subjected to a number of psychological evaluations and ultimately suspended. Although the lower court dismissed the plaintiff’s claim on the grounds that she was discriminated against based on her transgender status, not

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267. Id at 1202.
268. Id at 1201, 1205.
269. See Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U Pa L Rev 757, 785 (2013) (“When, however, is a male-to-female transsexual expressing a feminine gender identity in the same way as a biological woman, and when is she occupying some third gender category?”). See also generally Kimberly A. Yuracko, *Gender Nonconformity and the Law* (Yale 2016).
271. 378 F3d 566 (6th Cir 2004).
272. Id at 568–69.
her sex, the Sixth Circuit reversed the decision, noting that \textit{Ulane}'s reasoning had been “eviscerated” by \textit{Price Waterhouse}.\footnote{273. Id at 569–70, 573.} The court stated that “a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”\footnote{274. Id at 575.} The Sixth Circuit defined “transsexuality” as someone who “fails to act and/or identify with his or her gender” and found that discrimination on these grounds “is no different from the discrimination” in \textit{Price Waterhouse}, the case in which the Supreme Court held that a valid Title VII claim existed for a plaintiff “who, in sex-stereotypical terms, did not act like a woman.”\footnote{275. Smith, 378 F3d at 575.} The court reasoned that Smith was discriminated against based on “his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.”\footnote{276. Id at 572. See also \textit{Barnes v City of Cincinnati}, 401 F3d 729, 733–38 (6th Cir 2005) (upholding a jury award in favor of a transgender plaintiff’s sex discrimination claim under Title VII).}

While \textit{Smith} represented perhaps the most sweeping critique of the earlier Title VII reasoning on transgender discrimination, it does, however, offer a few causes for concern. First, by defining transgender identity as something intrinsically gender nonconforming, the case raises the question of how the law should respond when a transgender person does not engage in gender nonconforming behavior (such as, for example, a transgender woman who is fired due to animus against her transgender status, as opposed to her appearance in the workplace).\footnote{277. See Jason Lee, Note, \textit{Lost in Transition: The Challenges of Remediying Transgender Employment Discrimination under Title VII}, 35 Harv J L & Gender 423, 444–46 (2012).} In such a situation, there is the risk—always present—that her case would be characterized as falling within the case law that holds that discrimination on the basis of one’s transgender status is not discrimination based on sex.\footnote{278. Id at 439–41.} Because of these holdings, transgender individuals face an added degree of vulnerability in stating a claim for discrimination, because an employer could argue that the person was victimized based solely on her transgender status, rather than her gender nonconforming behavior. For example, at least one district court has maintained that \textit{Ulane} is still good law and granted the defendant’s motion for summary judgment in a case in which the plaintiff failed to make a gender stereotyping claim but instead argued that she was terminated because of her intent to change her sex.\footnote{279. See \textit{Sweet v Mulberry Lutheran Home}, 2003 WL 21525058, *2–3 (SD Ind).}
There is a further issue that is significant, however. The gender-stereotyping approach, in both theory and practice, actually reifies and entrenches the very stereotypes regarding gender that Title VII is supposed to resist. As one scholar has explained, this approach forces courts to employ antiquated notions of sex and gender roles in order to determine gender “nonconforming” behavior. Moreover, to win under Title VII, the plaintiff has to construct her identity as no different than any other gender nonconforming person—thus ignoring or erasing her transgender status altogether. A transgender woman, for example, has to construct a case that represents her as a gender nonconforming male, instead. Consider Smith as an example—the plaintiff, a transgender woman, made the decision with her lawyer to refer to herself as a male and use male pronouns throughout the litigation, even though it is likely that Smith saw herself completely differently.

2. An Intrinsic Approach: Scripting “Based on Sex”

A second approach takes a more literal view of transgender discrimination by viewing it as per se violative of Title VII. I call this approach “intrinsic” because it defines discrimination against transgender individuals as inherently related to their sex (as opposed to their gender expression). In Schroer v Billington, the employer, the Library of Congress, rescinded a job offer to a highly qualified transgender applicant after she informed the Library of her intention to transition from a male to a female when the job began. After she met with a Library representative in order to explain her transition and assure the Library that her transition would not interfere with any of the aspects of her job, the Library rescinded her offer the following day.

The district court concluded that it did not matter whether the decision was made because the employer perceived Diane Schroer as an “insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.” Rather, the main issue

the pronoun to accord with the plaintiff’s apparent self-identity in my discussion.

280. See Lee, Note, 35 Harv J L & Gender at 444–45 (cited in note 277). See also Flynn, 18 Temple Polít & CR L Rev at 472–73 (cited in note 69) (noting that, for transgender plaintiffs whose identities fall outside binary categories, “making a claim as only ‘male’ or ‘female’ could require a plaintiff to undergo an injury similar to the one she is attempting to redress”).


283. For a longer discussion of this approach, see Lee, Note, 35 Harv J L & Gender at 447–55 (cited in note 277).

284. 577 F Supp 2d 293 (DDC 2008).

285. Id at 296–99.

286. Id.

287. Id at 305.
for the court was that discrimination on the basis of transitioning from one sex to another is literally discrimination on the basis of sex. Consider the court on this point:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a change of religion.

An Equal Employment Opportunity Commission (EEOC) opinion established a similar approach. In that opinion, the EEOC clearly stated that, when an employer discriminates against a person because of his or her transgender status, that employer has engaged in discrimination “related to the sex of the victim.” For these purposes, the EEOC expressly stated, it does not matter whether it is because the individual has expressed his or her gender in a nonstereotypical fashion, or because the employer is uncomfortable with the process of gender transition, or because of some discomfort with an individual’s transgender identity. Each of those narratives, for the EEOC, is enough to establish discrimination based on sex.

The Eleventh Circuit, too, reached similar conclusions regarding a transgender woman who had been diagnosed with “Gender Identity Disorder” and was taking steps to transition to a female under the advice and supervision of her health-care providers. She was terminated based on “the sheer fact of the transition,” which the supervisor described as “inappropriate,” “disruptive,” “unsettling,” and “unnatural,” referring to her as a “man dressed as a woman and made up as a woman.” When the head of her office learned of her transition, he called her into his office to ask whether she had “formed a fixed intention to become a woman.” When she answered in the affirmative, she was terminated.

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289. Schroer, 577 F Supp 2d at 306.
291. Id at *7, quoting Schwenk, 204 F3d at 1202.
293. Glenn v Brumby, 663 F3d 1312, 1314 (11th Cir 2011).
294. Id at 1321.
295. Id at 1314.
297. See Lee, Note, 35 Harv J L & Gender at 449–50 (cited in note 277), citing Glenn, 724 F Supp 2d at 1292.
The Eleventh Circuit reasoned that “[a] person is defined as trans-
gender precisely because of the perception that his or her behavior 
transgresses gender stereotypes,” noting the “congruence between dis-
criminating against transgender . . . individuals and discrimination on the 
basis of gender-based behavioral norms.”

Significantly, the court also 
concluded that there is essentially no difference between discrimination 
against gender nonconforming behavior experienced by a nontransgen-
der person and discrimination experienced by a transgender person, 
concluding that they “differ in degree but not in kind.”

In each of these opinions, we see a consistent theme: the idea that 
gender transition, and discrimination on that basis, constitutes literal 
discrimination based on sex. Yet, commentators have noted that this con-
clusion directly conflicts with prior law such as Ulane, which expressly 
concludes that individuals who are undergoing gender confirmation sur-
gery are not protected under Title VII on that basis. At this date, it is 
not clear whether a plaintiff must allege a gender-stereotyping theory 
in addition to alleging simple sex discrimination, because courts tend to 
look for evidence of both kinds in order to state a claim.

But this approach, too, has flaws. One commentator, Jason Lee, has 
suggested that this approach, while helpful in addressing “first genera-
tion” discrimination, which involves overt acts of exclusion—comments, 
segregation, actions clearly based on animus—is not helpful in address-
ing “second generation” discrimination, which takes the form of “us[ing] 
unprotected traits as proxies for discrimination” (such as using grooming 
codes instead of discriminating against a group directly).

In such cases, it is difficult to prove that the rule was motivated by transgender animus, 
a point that I discuss further in the next Part. Courts have, for example, 
upheld grooming standards even though they affect transgender employ-
ees in a specific way.

Perhaps the largest problem with the intrinsic approach, however, 
volumes its inordinate emphasis on a surgical imperative of gender tran-
sition in fashioning a claim under Title VII. Of course, it is true that 
most of the case law involves individuals who wish to transition from 
one sex to another. However, this misses the myriad other ways in

298. Glenn, 663 F3d at 1316.
299. See Lee, Note, 35 Harv J L & Gender at 449–50 (cited in note 277), quoting Glenn, 663 F3d at 1319. Interestingly, the Smith court initially reached the same conclusion but then retreated from this approach in an amended decision, eventually 
adopting a narrower, gender-stereotyping approach. Lee, Note, 35 Harv J L & Gender at 450 (cited in note 277) (quoting the original opinion as stating, “Even if Smith had alleged discrimination based only on her self-identification as a transsexual her claim is actionable pursuant to Title VII”) (brackets and ellipsis omitted).
300. See Ulane, 742 F2d at 1086–87.
302. See, for example, Creed v Family Express Corp, 2009 WL 35237, *8–10 (ND Ind).
which transgender individuals relate to their own identity and presentation. Empirical evidence shows that a significant portion of people who identify as transgender do not want to identify, full-time, in the sex opposite that which they were assigned at birth.\textsuperscript{303} In fact, large numbers of transgender-identified individuals do not plan or desire to have gender confirmation surgery.\textsuperscript{304} Again, however, the \textit{numerus clausus} of sex rears its head, due again to the law’s insistence on a polarity between male and female identities. In each of these examples, the fluidity of their identities can be unprotected by the law, leaving plaintiffs still vulnerable to discrimination.

In sum, while \textit{Price Waterhouse}’s legacy has mostly offered significant change with respect to employment discrimination, it has not been extended to other areas that represent equally or more pressing needs for transgender individuals. Some of these more prominent issues include challenging placements in sex-specific facilities, enabling individuals to gain legal recognition of a change in gender, and acquiring coverage for gender-related medical care.\textsuperscript{305} Again and again, the term “biological sex” is used in ways that facilitate discrimination against transgender individuals. In 2001, for example, the Minnesota Supreme Court held in \textit{Goins v West Group}\textsuperscript{306} that an employer who refused to allow a transgender woman to use the women’s restroom did not violate a Minnesota human rights statute that included protections based on gender identity.\textsuperscript{307} In that case, tellingly, the court found nothing objectionable about the employer’s delineation of restrooms based on “biological gender,” ruling that, unless a transgender woman could prove that she was “biologically” a female, the employer could deny her access to female restroom facilities.\textsuperscript{308} The reasoning in \textit{Goins} was also adopted in a New York case involving a landlord who attempted to ban transgender people from using the building’s restrooms on the grounds that restricting such access based on whether a person is a “biological male” or a “biological female” did not violate the city’s human rights law.\textsuperscript{309} Other states have prohibited Medicaid funding

\begin{thebibliography}{99}
\bibitem{303} See Lee, Note, 35 Harv J L & Gender at 454 (cited in note 277) (citing a discrimination survey that showed 18 percent of transgender individuals “do not wish to live full time in a gender other than the one assigned at birth”).\textsuperscript{304} Id at 455 (reporting that 72 percent of transgender men report no interest in phalloplasty, and 14 percent of transgender women express no desire for vaginoplasty).\textsuperscript{305} Romeo, Note, 36 Colum Hum Rts L Rev at 742–43 (cited in note 66).\textsuperscript{306} 635 NW2d 717 (Minn 2001).\textsuperscript{307} Romeo, Note, 36 Colum Hum Rts L Rev at 743 n 109 (cited in note 66), citing generally \textit{Goins}, 635 NW2d 717.\textsuperscript{308} \textit{Goins}, 635 NW2d at 723. See also id at 726 (Page concurring specially).\textsuperscript{309} See Harper Jean Tobin and Jennifer Levi, \textit{Securing Equal Access to Sex-Segregated Facilities for Transgender Students}, 28 Wis J L, Gender & Society 301, 319 (2013), citing \textit{Hispanic AIDS Forum v Estate of Bruno}, 792 NYS2d 43, 46–48 (NY App 2005).
\end{thebibliography}
from being used toward gender-related medical care. These limitations suggest that *Price Waterhouse*’s legacy is, at best, mixed.

III. **Rescripting Gender(s)**

Both models that I have discussed—the morphological model and the performative model—have serious shortcomings. While the morphological model focuses to an extreme extent on the presumption of fixedness and objectivity associated with assigned sex, the performative model, with its emphasis on the intangibility of gender performance, might overlook some of the material ways in which transgender individuals might approach the question of transition. Further, the case law that surrounds gender nonconforming behavior, while offering some cause for optimism, still risks reifying, rather than challenging, basic gender stereotypes based on the continuing vitality of the *numerus clausus* of sex. As I argue, this is the case in three areas in which law interfaces with gender nonconformity: in some kinds of gender nonconforming behavior (for example, cross-dressing), in sex-segregated institutions, and in bathroom facilities.

A. **Implications of the Morphological and Performative Models**

On a very basic level, as I have suggested, the morphological model generally allows for sex reclassification as long as the person successfully “passes” in their chosen sex (through either surgery or a reliance on hormones), leaving the rigid gender binary essentially intact and unchallenged. By implicitly requiring transgender plaintiffs to seek a gender dysphoria diagnosis and to undergo gender confirmation surgery, the morphological model fails to engage with the shortcomings of our system of gender classification and instead depicts transgender persons as deviants in need of medical care and intervention, rather than as the victims of gender prejudice. As Professor Andrew Gilden has eloquently observed, “If sex is the construction of gender norms, and sex remains unquestioned in transgender legal discourse, then this discourse similarly fails to question the ways in which restrictive gender norms construct the category of sex.”

The morphological model, in some ways, relocates the blame for “deviance” onto the transgender body, as opposed to society’s adherence to the binary model, which is the underlying cause of harm. Consider Professor Katherine Franke’s insightful treatment of the *Rosa*...
case, in which she links the treatment of transgender persons in the workplace to all gender stereotypes:

Rather than understand Rosa’s experience as lying well beyond the bounds of laws relating to sex-stereotyping, she is better understood as a sort of canary in the sartorial coal mine: She was simply the most visible victim of systemic gender norms that regulate all of us in the ways in which we coherently present ourselves to the world as “men” or “women.”

In another very powerful piece, lawyer Sharon McGowan recalls her experiences representing Schroer, who told her, “I haven’t gone through all this only to have a court vindicate my rights as a gender non-conforming man.”

Because the earlier case law tended to protect transgender women as gender nonconforming men, McGowan explained that lawyers framed their cases in the way most likely to fit Price Waterhouse’s theory. Yet this strategy, understandably, makes transgender advocates deeply uncomfortable; as McGowan explained, “It felt as though we would be disavowing Ms. Schroer’s identity as a woman, and accepting society’s discriminatory conception that transgender women are just men who want to dress as women.”

Schroer’s lawyers instead utilized another strategy: they argued that Schroer had a female gender identity, but was likely to be perceived as a male at the time of her hiring based on her appearance and name. Yet, tellingly, even this framing demonstrates the limitations of antidiscrimination law.

1. Materiality and Morphology

Consider, for example, a legal essay entitled Transitional Discrimination. In that essay, the authors, Professors Glazer and Zachary Kramer, employ what they call a “transitional identity” model in describing transgender individuals. They argue that “[a] transgender person has a transitional identity because the person’s identity has aspects of the gender or sex from which the person is transitioning as well as the gender or sex to which the person will transition.” They describe transgender identity as an identity that is “inchoate, in that the identity does not express fully any of those extant identities.”

315. Id at 212.
316. Id.
317. Id at 218.
319. Id at 663–66.
320. Id at 664.
321. Id.
While I agree with Glazer and Kramer that some transgender plaintiffs view their identities as “in transition” in terms of crossing over to another gender or sex,322 I think it may be inaccurate to categorize all transgender plaintiffs in this manner. Indeed, for some transgender individuals, as I have suggested, their choices to cross-dress or evoke gender nonconforming behavior might not rise to the level of a “transitioning” practice; it might be an intermittent choice or perhaps some other form of individualized gender expression. But under the binary system, these individuals might not receive recognition, because the model suggests that transgender persons must, in some fashion, be in the process of crossing over, somewhere along the spectrum from male to female, for their claims to be intelligible.

These outcomes suggest that gender expression can almost never be a matter of volitional choice—although sex can be reversed, gender identity must remain stable. As Professor Currah has pointed out, within this discourse, “[t]he relation between sex and gender is reversed: biological sex characteristics are cast as aspects of genders, and largely mutable ones at that. It is gender identity and often even expressions of gender identity, however, that are described as unchangeable, set from an early age.”323 Missing from this description is the reality that many individuals lead gender nonconforming lives deserving of legal protection from discrimination and yet do not necessarily wish to transition into the opposite sex.

Consider, for example, the data produced by the landmark National Transgender Discrimination Survey, performed in 2008 and then again in 2015.324 In 2008, four categories of identity were presented in response to the question of the survey respondent’s primary gender identity: “male/man”; “female/woman”; “part time as one gender, part time as another”; 322. Glazer and Kramer, 18 Temple Polit & CR L Rev at 664 (cited in note 73).

323. Currah, Gender Pluralisms at 18 (cited in note 74). For further proof, consider the treatment employed by transgender advocates in a recent case: “While individuals can alter the way they dress and can change their appearance to some degree through the use of make-up and other accessories, there is a core aspect of gender identity and gender expression that is deeply rooted and that cannot be changed.” Jennifer L. Levi, Clothes Don’t Make the Man (or Woman), but Gender Identity Might, 15 Colum J Gender & L 90, 111 (2006), quoting Brief of Amici Curiae the National Center for Lesbian Rights and Transgender Law Center in Support of Plaintiff-Apellant, Jespersen v Harrah’s Operating Co, Case No 03-15045, *5 (9th Cir filed June 8, 2005) (available on Westlaw at 2005 WL 1501598) (“NCLR-TLC Brief”) (emphasis omitted). See also Levi, 15 Colum J Gender & L at 111 n 104 (cited in note 323), citing NCLR-TLC Brief at *5 n 13 (cited in note 323).

and “a gender not listed here.”\textsuperscript{325} Among the respondents, 20 percent listed themselves as occupying the third category, and 13 percent listed themselves as falling into the last category, describing themselves as “‘genderqueer,’ ‘queer’, . . . ’neither,’ ‘both,’ ‘non-binary,’ ‘androgy nous,’ ‘gender does not exist,’ and ‘gender is a performance’ (a specific reference to Judith Butler’s work).”\textsuperscript{326} By 2015, although 88 percent of respondents described themselves as transgender, 12 percent described themselves in some other fashion.\textsuperscript{327} In addition to terms like “transgender,” 20 percent to 30 percent described themselves as nonbinary, genderqueer, or gender nonconforming or gender variant.\textsuperscript{328} But even noting the role of these terms, it is still important to recognize how different communities within the transgender umbrella can strive for alternate forms of legal recognition and also face disproportionate effects from the \textit{numerus clausus} of sex.

In contrast, one might offer a similarly situated criticism of the performative model, though in reverse. While the performative model does appear to take issue with the foundational import of the binary systems of sex and gender, one might argue that the performative model, in its attempt to normalize all forms of gender nonconformity—drag, cross-dressing, gender transition, and the like—tends to overlook some of the key differences between these experiences. As Professor Weston points out, “Performatively gendered bodies are like onions whose layers peel back to reveal no core truths, no seeds of authenticity, no deeply buried masculinity, femininity, or for that matter, hermaphroditic sensibility. . . . There is no ‘there’ there; the layering, like the performance, is the thing.”\textsuperscript{329}

Consider, for example, the contrast between Professor Butler’s work and the work of Professor Henry Rubin, who argues that identity is Janus-faced: it is both socially constructed and absolutely real at the

\textsuperscript{325} Harrison, Grant, and Herman, 2 LGBTQ Pol J at 13–14 (cited in note 324).

\textsuperscript{326} Meerkamper, Note, 12 Dukeminier Awards J at *7 (cited in note 6), citing Harrison, Grant, and Herman, 2 LGBTQ Pol J at 20 (cited in note 324) (noting these observations). Genderqueer respondents, despite the fact that they had completed college or obtained graduate degrees at rates that were higher than other survey respondents, were much more likely to live on less income. See Meerkamper, Note, 12 Dukeminier Awards J at *8 (cited in note 6), citing Harrison, Grant, and Herman, 2 LGBTQ Pol J at 19–20 (cited in note 324) (noting these observations).


\textsuperscript{328} Id (noting also that, in addition to a list of twenty-six terms, respondents wrote in more than five hundred other unique gender terms to describe themselves). For particular discussions of identity variance among trans-identified people of color, see generally Z Nicolazzo, ‘It’s a Hard Line to Walk’: Black Non-binary Trans* Collegians’ Perspectives on Passing, Realness, and Trans* Normativity, 29 Intl J Qualitative Stud Educ 1173 (2016); Hugh Ryan, Ballroom Culture’s Rich Alternative to the Trans/Cis Model of Gender (Slate, Aug 12, 2016), archived at http://perma.cc/K8T4-W8BW.

\textsuperscript{329} Weston, \textit{Gender in Real Time} at 82 (cited in note 207).
same time. In this sense, as Rubin explains, it matters not how constructed an identity actually is, because it always feels real to the person who claims it. According to Rubin, some transgender men describe their bodies as the products of an “expressive error” (“ranging from the belief that God had made a mistake, to genetic mutations, to chemical imbalances, to underdeveloped or hidden male anatomy”), in which their innermost core conflicts with their bodily attributes. Commenting on the absence of transgender male visibility and an increasing politicization within transgender scholarship, Rubin observes, “[M]y fear is that in the name of politics, those transsexuals who do favour surgery or who are not homosexual or who claim an essential identity (apart from what they tell their physicians) will be considered illegitimate transgenderists.”

In making this observation, Rubin notes the risk of replicating hierarchies within a diverse community.


331. Id. For Rubin, as well as Rubin’s subjects of analysis, “[b]odies are far more important to (gender) identity than are other factors, such as behaviors, personal styles, and sexual preferences.” Id at 11. He continues:

Bodies matter for subjects who are routinely misrecognized by others and whose bodies cause them great emotional and physical discomfort. One would do well to remember this when theorizing about the body. To get our heads around “the body,” we must come to terms with the experiences that subjects have of their bodies. Simply stated, subjectivity matters.

332. Id.

333. Id at 150–51.


334. Rubin’s focus on the invisibility of transgender men is echoed by other scholars working in the field. See generally, for example, Jason Cromwell, Transmen and FTMs: Identities, Bodies, Genders, and Sexualities (Illinois 1999). See also Jamison Green, Look! No, Don’t!: The Visibility Dilemma for Transsexual Men, in Stryker and Whittle, eds, Transgender Studies Reader 499, 505–06 (cited in note 4):

Now I feel as if I’m being told by Gender Studies theorists that biology is not destiny unless you are transsexual. I cannot say that I was a man trapped in a female body. I can only say that I was a male spirit alive in a female body, and I chose to bring that body in line with my spirit, and to live the rest of my life as a man. Socially and legally I am a man. And still,
In later works, such as *Bodies That Matter*, Butler notes the materiality of the body, but maintains that gender is socially constructed and rife with the possibility for recoding and resistance.335 Yet one of the most powerful critiques of the performative model, offered by both transgender advocates and scholars outside the law, echoes Rubin’s concern: the gender-stereotyping theory may overlook or devalue the importance of gender identity and the importance of changing the material body. Professor Levi, for example, criticizes Butler and others for “the post-modern perspective that all gender is socially constructed and that there is nothing essential about gender identity.”336 Taken to its logical conclusion, she argues, a postmodern view of gender suggests that “transsexualism” does not exist because masculinity could be redrawn to include female parts, and the reverse.337 Others note that Butler’s later works often fail to include dissenting perspectives, and still others argue that “in queer and feminist discourses on ‘transgender’ a history is being written of and for trans people, one that privileges an abstracted rubric of identity and with it the experiences and concerns of middle-class and largely white, university-based and queer-identified trans people.”338

2. *Rescripting Gender Expression*

Perhaps the most demonstrative area of underinclusivity stems from the case law regarding cross-dressing. Consider *Oiler v Winn–Dixie Louisiana, Inc*:339 in 1979, Peter Oiler was hired by Winn-Dixie as a loader and later promoted to be a truck driver.340 Oiler was a heterosexual man, married since 1977, who identified as a male cross-dresser, and who had no intention to take feminizing hormones or to transition, but who instead demonstrated a motivation to cross-dress in order to express “a

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337. Levi, 15 Colum J Gender & L at 108 (cited in note 323):

[T]his perspective implies that if people could fully embrace their masculinity (from the female-to-male (“FTM”) perspective) or femininity (from the male-to-female perspective), despite the social construction of biologically female traits as feminine or biologically male traits as masculine, no one would ever need to take hormones or have surgery to fully express their gender identity.

Instead, Levi favors a disability approach, although she notes some of its dominant criticisms, namely, that it stigmatizes transgender plaintiffs, that it is underinclusive and overly medicalized, and finally that it essentializes gender. Id at 104–08.


340. Id at *1.
feminine side” and for other, erotically motivated reasons. Oiler wore female clothing, wore makeup, and adopted a female persona in public one to three times per month, but never at work. However, after he told a supervisor that he cross-dressed, his supervisor and the president of the company decided to terminate him after consulting the company’s lawyer and asking Oiler to resign.

In the case, the court granted summary judgment to Winn-Dixie, rejecting Oiler’s claims. It noted, after a thorough review of the prior case law, including Ulane, that Title VII was not “meant to embrace ‘transsexual’ discrimination, or any permutation or combination thereof.” The court stated that it did not believe that the plaintiff was discharged “because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee.” Rather, the court explained that he was terminated due to his “disguise” as a woman:

The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women’s clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named “Donna.”

The court underscored that, in its view, the plaintiff was not discriminated against because he was perceived as being insufficiently masculine or because he appeared to be effeminate. “The plaintiff in [Price Waterhouse] may not have behaved as the partners thought a woman should have, but she never pretended to be a man or adopted a masculine persona,” the court observed, thus distinguishing the two cases.

Cases like Oiler suggest that, when an employer can offer a seemingly nondiscriminatory reason for its decision (even one that draws a facile distinction between “disguising” oneself as the opposite sex and resisting gender stereotyping), courts will defer to the employer’s determination. The effect simply rescripts the plaintiff into a binary system of sex identification, the numeros clausus principle. Such deference to the employer is particularly striking in cases that involve grooming and

341. See id at *1 & nn 11–12.
342. Id at *1.
343. 2002 WL 31098541 at *2. They explained that they were concerned that, if their clients recognized Oiler in his female attire as a Winn-Dixie employee, “they would shop elsewhere and Winn–Dixie would lose business.” Id.
344. Id at *5–6, 8.
345. Id at *4 n 51, quoting Voyles v Ralph K. Davis Medical Center, 402 F Supp 456, 457 (ND Cal 1975). The court further bolstered its conclusions based on the fact that, despite many attempts to amend, Congress had failed to include protections for gender or sexual identity in Title VII. Oiler, 2002 WL 31098541 at *4–5.
347. Id.
348. Id at *6.
dress codes, which have been used to uphold terminations of female employees, transgender employees, and employees of color. Such cases, in many ways, personify the darker side of gender performance regulation, because they overwhelmingly tend to defend an employer’s right to control the expression and performance of employees, even when the guidelines are sex and gender specific.

In one example, a transgender female plaintiff with gender dysphoria began to change her appearance at work to appear more feminine by wearing clear nail polish and mascara, growing out her hair, and trimming her eyebrows. She also began to use the name Amber Creed. The defendant maintained that it had received over fifty complaints about Creed’s appearance, and eventually told her that she was not in compliance with the dress code and grooming policy of Family Express. When Creed explained that she was transgender and was going through her transition, the employer allegedly replied by asking “whether it would kill her” to appear masculine for eight hours a day; she was eventually told that she had twenty-four hours to decide whether she would report to work in a more masculine manner. When she allegedly replied that she could not, she was terminated.

Interestingly, the employer argued that it did not demand that Creed present herself in a less feminine manner; it reported that the only demands that it made of Creed were that she cut her hair and stop wearing makeup and nail polish. The court, in turn, granted summary judgment to the employer, finding that the employer did not discriminate against Creed based on her sex, but instead fired her because she had failed to comply with its sex-specific grooming and dress codes. “While [the human resources director’s] comments, in particular, were insensitive of Ms. Creed being in the process of coming to terms with her gender identity, these comments in and of themselves don’t establish that

349. See, for example, Jespersen v Harrah’s Operating Co, 392 F3d 1076, 1077–78, 1083 (9th Cir 2004). See also Rich, 79 NYU L Rev at 1140–41 (cited in note 53) (arguing that employers are able “to discriminate against workers by proxy [by] disproportionately screening out or penalizing workers from disfavored racial/ethnic groups based on aesthetics”).


352. Id.

353. Id at *2–3. The codes were sex specific, requiring males to maintain neat and conservative hair and not to wear any jewelry. Id at *2.

354. Id at *4.


356. Id at *4.

357. Id at *9. Other cases have reached similar determinations in nontransgender contexts. See, for example, Jespersen, 392 F3d at 1082–83; Harper v Blockbuster Entertainment Corp, 139 F3d 1385, 1387 (11th Cir 1998); Tavora v New York Mercantile Exchange, 101 F3d 907, 908–09 (2d Cir 1996) (per curiam).
Family Express fired Ms. Creed because she wasn’t ‘male’ enough. By drawing a line between prohibited gender stereotyping and permitted dress and grooming code regulation, the court enabled the protection of the codes to take precedence over prohibiting gender discrimination under Title VII.

Similar reasoning has been adopted in other cases, as well. In 2005, a case emerged involving a transgender bus operator, Krystal Etsitty, who was diagnosed with what was then known as GID and was transitioning from male to female through the use of hormones. The employer subsequently asked her about her transition process and expressed concern about potential liability resulting from her using a female restroom facility.

The court granted summary judgment to the defendants on the ground that “transsexuals” are not a protected class under Title VII, and explicitly disagreed with the reasoning offered by the Sixth Circuit in Smith:

There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes.

It rejected a gender stereotyping theory, noting that the only concern involved one of restroom use, which it distinguished from requiring the plaintiff’s appearance to conform to a particular gender stereotype. Still other cases have come out in the same manner.

360. Id at *1–2.
361. Id at *4–6.
362. Id at *5. The court then went on to cite “[a]n authoritative treatise” on GID that asserted the following:

Gender Identity Disorder can be distinguished from simple nonconformity to stereotypical sex role behavior by the extent and pervasiveness of the cross-gender wishes, interests and activities. This disorder is not meant to describe a child’s nonconformity to stereotypic sex-role behavior. . . . Rather, it represents a profound disturbance of the individual’s sense of identity with regard to maleness or femaleness.

Id (reflecting the APA diagnostic criteria from DSM-IV).

363. Etsitty, 2005 WL 1505610 at *6. On appeal, the Tenth Circuit affirmed the lower court, holding that Ulane was still good law and finding that the employer had provided a nondiscriminatory reason for its actions: that it feared liability from allowing someone with anatomically male genitalia to use a female restroom. Etsitty v Utah Transit Authority, 502 F3d 1215, 1221–27 (10th Cir 2007).

364. See Kastl v Maricopa County Community College District, 325 Fed Appx 492, 494 (9th Cir 2009) (finding, like the Etsitty court, that banning the plaintiff from the women’s restroom was motivated by safety reasons and not by her gender).
3. Transgender Equality and Sex-Segregated Spaces

As Professor Tobias Wolff persuasively argues, and as the case law demonstrates, opponents of transgender equality have also focused their resistance to antidiscrimination efforts around a single issue: the bathroom.\textsuperscript{365} When the Employment Non-discrimination Act (ENDA) (a bill that would have prohibited employment discrimination on the basis of both sexual orientation and gender identity) failed in Congress a few years ago, proponents of the bill explained that the protections for gender identity, and in particular the anxiety over bathroom use by transgender persons, were the reason for its failure.\textsuperscript{366} As Wolff explains, the image of bathroom use illustrates an underlying anxiety over the body that has played a powerful role in forming opposition to civil rights reforms. Within this bathroom-obsessed strategy, Wolff writes, “this aggressive form of erasure takes shape around anxiety over the body, for it is the transgender body itself that the antagonist wishes to erase.”\textsuperscript{367} Wolff points out that, like the anxieties expressed by white individuals about including persons of color in swimming pools, or the fears expressed by heterosexuals about showering with gay people when the Don't Ask Don't Tell Act\textsuperscript{368} faced repeal, anxieties about the body have remained a central theme in opposition to civil rights reforms.\textsuperscript{369}

Again, the materiality of the body remains a central concern. Even the proposed ENDA bill contains an exception for grooming standards despite its transgender-inclusive language.\textsuperscript{370} The bill essentially requires

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\textsuperscript{365} Tobias Barrington Wolff, \textit{Civil Rights Reform and the Body}, 6 Harv L & Pol Rev 201, 201–02 (2012). There are a number of excellent articles on restroom access, noting, of course, that bathroom issues also disproportionately affect particular groups based on class, age, and race, among other characteristics. See generally, for example, Jennifer Levi and Daniel Redman, \textit{The Cross-Dressing Case for Bathroom Equality,} 34 Seattle U L Rev 133 (2010); \textit{Transgender Youth and Access to Gendered Spaces in Education,} 127 Harv L Rev 1722 (2014).

\textsuperscript{366} Wolff, 6 Harv L & Pol Rev at 202 (cited in note 365).

\textsuperscript{367} Id.


\textsuperscript{369} Wolff, 6 Harv L & Pol Rev at 203 (cited in note 365).

\textsuperscript{370} Employment Non-discrimination Act of 2013 § 8(a), S 815, 113th Cong, 1st Sess (Apr 25, 2013), in 159 Cong Rec S7907, S7908 (daily ed Nov 7, 2013): Nothing in this Act shall prohibit an employer from requiring an employee, during the employee’s hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition . . . to adhere to the same dress or grooming standards as apply for the gender to which the employee has transitioned or is transitioning.

See also Gilden, 23 Berkeley J Gender, L & Just at 108 (cited in note 66) (discuss-}
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that the individual has already undergone gender transition or plans to transition, and then enables employers to impose rigorous grooming standards on those individuals. Those standards, again, would likely have the perverse effect of reimposing the very same standards of masculinity and femininity that *Price Waterhouse* dictated against.

As Wolff eloquently recounts, protections on the basis of gender identity have been labeled as “bathroom bills” by astute opponents who have realized that honing in on gender panic can breed powerful opposition. In Connecticut, opponents of a bill protecting gender identity claimed that the bill “would permit ANY man who claims female ‘gender identity’ even if he just wears a dress cannot [sic] be excluded from any job statewide, and MUST be given access to women’s facilities, including public and private women’s restrooms, locker rooms and showers.”

As Wolff explains, these campaigns play into the fear that women and children are at risk for rape or sexual assault; others suggest a risk of “peeping Tom” behavior. Yet both fears are unsubstantiated; there is absolutely no evidence to suggest that gender identity protections have led to any predatory behavior.

Nevertheless, these unsubstantiated fears informed the passage of HB2 in North Carolina and the lawsuit filed by eleven states against the Obama administration’s interpretation of Title IX to require access to bathrooms.

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371. Wolff, 6 Harv L & Pol Rev at 201–02 (cited in note 365). See also the commentary of Andrew Beckwith, president of the Massachusetts Family Institute, who observed, in reference to proposed legislation protecting transgender access to restrooms:

[T]hat’s why you see individuals who claim to be transfemale—if that’s the proper terminology— but they’re biological men going into women’s dressing rooms and exploiting these laws whether they’re just doing it as folks with gender identity issues or abusing them. It’s unclear because it’s hard to nail down what exactly someone’s gender identity is because it all boils down to what their internal feelings are. But what’s black and white is if you take a guy like Bruce Jenner—I know he calls himself Caitlyn now but as far as I understand he is still an intact male. If he walks into a locker room at the local Y where my wife and her daughter are changing, they’re going to be exposed to his male genitalia. Regardless of what he looks like on the cover of Vanity Fair or what he calls himself on his TV show, he is still an intact biological male with an XY chromosome.


374. Id at 207–08.
to restrooms that were consistent with a person’s gender identity, alleging that the guidelines “conspired to turn workplaces and educational settings across the country into laboratories for a massive social experiment, flouting the democratic process, and running roughshod over common-sense policies protecting children and basic privacy rights.”375

HB2 essentially requires individuals to use restrooms that are consistent with their “biological sex,” defined as “[t]he physical condition of being male or female, which is stated on a person’s birth certificate.”376 The bill has the effect of treating transgender employees whose gender identities do not match their assigned sexes differently than cisgender employees, who are able to access restrooms that are consistent with their gender identities.377 It also has the effect of putting transgender individuals in an “impossible” catch-22: a separate state law requires individuals to undergo gender confirmation surgery in order to change their birth certificates; but they are required by medical recommendations to live for at least twelve months in the gender roles that conform with their identities, including using the restrooms consistent with those identities, prior to receiving such surgery.378

Yet despite recent jurisprudence that has found gender identity protections not to be foreclosed by a previous focus on the original definition of assigned sex,379 some courts have come out differently. Most recently, a district court in Texas that addressed the DOJ guidelines interpreting Title IX drew a clear line between gender identity and state-assigned sex, finding that “the plain meaning of the term sex . . . meant the biological and anatomical differences between male and female students as determined at their birth,” emphasizing the historical focus on the physiological and reproductive differences between males and females.380 It noted, for example, that the text and regulations surrounding the construction of restroom and locker facilities focused on recognizing the need for “separation from members of the opposite sex, those whose bodies possessed a different anatomical structure,” due to concerns about personal privacy.381 In reaching these conclusions, it seemed that the court

376. HB2 § 1.2, codified at NC Gen Stat § 115C-521.2.
379. See, for example, Schroer, 577 F Supp 2d at 306–08.
381. Id at *15.
drew a clear line between gender identity and assigned sex, finding a more inclusive interpretation to be wholly outside “traditional biological considerations,” as well as “illogical and unworkable.”

Finally, the need to protect the self-determination of transgender employees is particularly acute beyond the workplace, particularly in cases involving institutionalized settings (prisons, youth facilities, and the like), for a host of distributive reasons. Many sex-segregated facilities (shelters, foster care, group homes, psychiatric facilities, prisons, etc.) have particular racial dimensions due to the comparably higher concentration of persons of color. In such facilities, individuals are subjected to an astonishing array of surveillance and regulations on dress, behavior, and access to entitlements. As Professor Russell Robinson has pointed out, sex segregation in such facilities also raises intrinsic questions of paternalism and misidentification.

382. Id at *6.
387. Robinson, 99 Cal L Rev at 1356–61 (cited in note 210). Robinson has explored the significance of the K6G unit of the Los Angeles County Jail, which is ostensibly designed to protect individuals who might face abuse or harassment based on their self-identified gay sexual orientation or gender nonconforming appearance. Id at 1311. Yet as Robinson points out, the standards for determining who belongs in K6G are not only stereotypically constructed, but are also significantly underinclusive of other individuals who may be just as deserving of protection (as they exclude, for example, some men who have had sex with men, or gay-identified men who lead private lives), and also overlook the racialized dimensions of identity. Id at 1345–49. See also Rosenblum, 6 Mich J Gender & L at 522–36 (cited in note 66) (describing the problems faced by transgender prisoners, who are often placed in facilities according to the sex assigned to them at birth); Oparah, 18 UCLA Women's L J at 242 (cited in note 78) (“By assuming, erroneously, that all people incarcerated in women's prisons are women, and that all imprisoned women are in women's prisons, we have overlooked and misrepresented the gender fluidity and multiplicity that exists in men's and women's prisons, jails and detention centers.”); Elizabeth F. Emens, Inside Out, 2 Cal L Rev Cir 95, 96–99 (2011) (commenting on Robinson's discussion of K6G); Gabriel Arkles, Safety and Solidarity across Gender Lines: Rethinking Segregation of Transgender People in Detention, 18 Temple Polit & CR L Rev 515, 537–60 (2009) (questioning the utility of segregated facilities for transgender inmates and making alternative suggestions for preventing violence). For a different, more positive view of K6G, see generally Sharon Dolovich, Two Models of the Prison: Accidental Humanity
Prisons, perhaps more than any other sex-segregated facility, routinely struggle with the management of gender identity and expression. Court cases have long tended to diverge on the question whether these facilities are required to provide forms of accommodation for individuals diagnosed with gender dysphoria. In one recent case, the Fourth Circuit reversed a district court’s dismissal of an Eighth Amendment claim brought by a transgender woman.\textsuperscript{388} In that case, the plaintiff had a GID diagnosis and overwhelming urges of “self-castration,” even though she had been allowed to dress in feminine attire and was provided with psychological counseling and hormone therapy.\textsuperscript{389} Yet her request for gender confirmation surgery was characterized by the district court as a “choice of treatment,” rather than as a necessary part of her treatment protocol.\textsuperscript{390} The Fourth Circuit reversed, noting that the plaintiff had stated a claim under the Eighth Amendment based on the prison officials’ “deliberate indifference” to her serious medical needs.\textsuperscript{391}

Today, more courts have adopted this view.\textsuperscript{392} Seven US Courts of Appeals and the Supreme Court recognize that gender dysphoria is a serious medical need.\textsuperscript{393} However, while Federal Bureau of Prisons policy now authorizes the use of hormones, officials may fail to consider other

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\textsuperscript{388} See De’Lonta v Johnson, 708 F3d 520, 526–27 (4th Cir 2013).

\textsuperscript{389} Id at 522.

\textsuperscript{390} Id at 523–24. At the time of litigation, the standards of care adopted by the World Professional Association for Transgender Health advised a “triadic treatment sequence comprising [ ] (1) hormone therapy; (2) a real-life experience of living as a member of the opposite sex; and (3) sex reassignment surgery.” Id at 522–23 (quotation marks omitted). According to these recommendations, “after at least one year of hormone therapy and living in the patient’s identified gender role, sex reassignment surgery may be necessary” for those who have persistent symptoms of GID. Id at 523.

\textsuperscript{391} Id at 525–26.

\textsuperscript{392} In 2010, for example, the US Tax Court decided that expenses related to medical treatments for transgender individuals were tax deductible. See O’Donnabhain v Commissioner of Internal Revenue, 134 Tax Ct 34, 74–77 (2010). See also Travis Wright Colopy, Note, Setting Gender Identity Free: Expanding Treatment for Transsexual Inmates, 22 Health Matrix 227, 239–44 (2012).

\textsuperscript{393} Colopy, Note, 22 Health Matrix at 250 & n 170 (cited in note 392) (listing cases).
modes of treatment. In addition, inmates who are not diagnosed with gender dysphoria may not receive the benefit of an Eighth Amendment imperative to receive medical care. Gender confirmation surgery is not required, and hormone treatments are available only to those who receive a diagnosis.

The only recourse, then, for inmates in such situations is to depict their condition as an extreme condition. Yet even when inmates are able to do so, and to attain hormone treatments, legislatures have presented obstacles. In Wisconsin, for example, even though the Department of Corrections had a previous practice of providing hormone treatment to inmates diagnosed with GID, the practice was abruptly terminated after the legislature passed the Inmate Sex Change Prevention Act, which forced the department to cease providing such treatment. The Act was later found to be unconstitutional under the Eighth and Fourteenth Amendments after a series of transgender plaintiffs decided to file a legal challenge. However, the evidence submitted, like much of the evidence surrounding gender dysphoria, further underscored a rigid gender binary that depicted the plaintiffs, rather than the system of classification itself, as impaired.

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394. Id at 251. Note that in 2014, the Federal Bureau of Prisons provided that “inmates in the custody of the Bureau with a possible diagnosis of GID will receive a current individualized assessment and evaluation” and that “[t]reatment options will not be precluded solely due to level of services received, or lack of services, prior to incarceration.” See Charles E. Samuels Jr, Patient Care *42 (Department of Justice, Federal Bureau of Prisons, June 3, 2014), archived at http://perma.cc/WN77-E938.


397. 2005 Wis Laws 105.

398. Wis Stat § 302.386(5m), held unconstitutional by Fields v Smith, 653 F3d 550, 559 (7th Cir 2011). The legislation was designed to prevent [t]he department [from] authoriz[ing] the payment of any funds or the use of any resources of this state or the payment of any federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy . . . for a resident or patient . . . [who would use the] hormones to stimulate the development or alteration of [his or her] sexual characteristics in order to alter [his or her] physical appearance so that [he or she] appears more like the opposite gender.

Ryan, Note, 34 U La Verne L Rev at 125–26 (cited in note 312) (brackets and ellipses in original).

399. Fields v Smith, 712 F Supp 2d 830, 855–69 (ED Wis 2010), affd, 653 F3d 550 (7th Cir 2011).

B. Toward a Model of Gender Pluralism

Both the performative and morphological approaches, taken together, underscore the need for a more capacious approach to gender regulation. At best, the law treats state-assigned sex as a spectrum, a crossing from male to female or the reverse, placing transgender individuals somewhere along the transition in between. Yet, as I and others have suggested, the pluralism represented by the transgender community—some who see themselves as entirely male or female, others who see themselves as combining aspects of both, some who see themselves as falling completely outside the gender binary, others who identify as genderqueer, and still others who reject these terms entirely—is at times left unrecognized by the *numerus clausus* of sex.

Years ago, Professor Mary Dunlap noted, “If the individual’s authority to define sex identity were to replace the authority of law to impose sex identity, many of the most difficult problems currently associated with the power of government to probe, penalize, and restrict basic freedoms of sexual minorities would be resolved.” As Currah has brilliantly noted, Dunlap’s transformative project has become obscured, largely due to the deployment of legal arguments that serve to reify, rather than challenge, the dominance of gender norms. The result of this approach risks what Currah describes as a “pyrrhic” victory, one that disadvantages not just gender nonconforming and transgender individuals, but many others who fall outside those categories as well.

Throughout this Article, I have argued that the *numerus clausus* of assigned sex leads to a polarity between male and female classification, one that forecloses alternative identity formations under the law. Is it possible, however, to reform the *numerus clausus* principle so that it can take into account the potential for alternatives? The answer, I would argue, is that this is definitively possible by adopting a model of gender pluralism.

In the property context, a pluralist framework, as described by Professor Nestor Davidson, recognizes the varied, sometimes conflicting crosscurrents that animate the potential dynamism in property law,
recognizing a diverse array of interests, communities, and institutions. Others, too, take the view that, while the *numerus clausus* principle represents a set of shared understandings of the basic forms of property, those forms can expand and change through legislative intervention or common-law reformation. Consider, for example, a critique of the *numerus clausus* principle put forth by Professors Henry Hansmann and Reinier Kraakman, who suggested that a lower level of verification, rather than standardization, should be the goal of property regulation. Here, at least in the realm of gender and sexuality, there are strong possibilities for reform through legislation or private contractual solutions that dilute the overwhelming monopoly power of the state in defending the gender binary. As Professors Davina Cooper and Flora Renz note, “civil society organizations may not only recognize genders unrecognized by state law; they may also recognize, and so give, gender a classed, racialized, sexual, and religious specificity in contexts where state law claims only to notice broad abstract categories.”

As scholars have noted in the *numerus clausus* system, the state frequently invokes and relies upon preexisting categories; as Davidson writes, “The state limits the forms of property self-consciously at times by explicitly pruning the extant forms . . . [and at other times] refuses to recognize new forms passively.” Here, the immutability of standardization can be inappropriate for the formation of identity, expression and community. Yet others, like Professor Hanoch Dagan, argue that contract law, rather than property, should enable citizens to opt out of the rules of property. Whereas property principles relate to a wide variety of social and nonmarket interactions, thus necessitating a set of shared understandings and standard formations, contract law is built upon principles of freedom in crafting “one-shot” market transactions “in an ad hoc fashion.” Private law, here, can be pluralist in nature, Dagan explains, participating “in the state’s obligation to empower people to make real choices among viable alternatives, and thus be the authors of their own lives.”

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408. Id at 1637–44.
415. Id.
416. Id.
The preceding principles, while admittedly abstract, also have legal purchase, because they provide us with a solid foundation from which to explore the potential of gender pluralism as a replacement for the binary system that we have grown accustomed to. More recently, scholars have embraced the possibility of offering menus of options for antidiscrimination in the workplace, while “setting altering rules that make it easier for private parties to contract toward more preferred alternatives.”

Consider, for example, the possibility of contractual alternatives for self-identification, like the Facebook example in the Introduction, which offer some divergent possibilities to the *numerus clausus* of the gender binary system. A notion of gender pluralism would normatively embrace gender nonconforming behavior, not just individuals who wanted to transition from one sex to another. It would also demonopolize the classificatory power of the state in determining sex or gender identity. Taking this concept seriously also requires broad and creative thinking about how other jurisdictions have dealt with similar issues and about how to dilute the state’s power in determining sex classifications altogether.

As I have noted, data suggest that the gender binary might be wholly inapposite to large numbers of individuals who face discrimination. The concept of gender pluralism, I would argue, embodies a conceptual model that echoes the basic presumptions present in intellectual property law: the nonrivalry and nonexclusivity between male and female. Here, I do not want to suggest a perfect complementarity between the notion of property and intellectual property and the regulation of sex and gender. Instead, I want to suggest that there are key areas of resonance between the regulation of resources and the regulation of identity, and that some of the insights offered by the former can influence the way that we think about the latter. The language of property embraces tangibility and the material body, leaving room for a strict set of norms regarding gender transition. However, the language of intellectual property embraces the expressive potential of human behavior and identity formation, leaving room for other forms of gender nonconforming behavior to be protected by the laws that govern gender discrimination.

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419. See Currah, *Gender Pluralisms* at 18 (cited in note 74) (proposing a similar conclusion based on the language of the International Bill of Gender Rights, which declares that “all human beings have the right to define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role”).

420. See text accompanying notes 324–26. Note, of course, that there are also broader issues with empirical data collection as well. See Spade, 59 Hastings L J at 749–50 (cited in note 88).
1. **Sex Without Scarcity**

The idea of a more plural approach to gender regulation has long been a part of the transgender advocacy community—the law has simply failed to recognize its potential. More than thirty years ago, for example, a variety of groups—including cross-dressers and other transgender individuals—had begun to question the appropriateness of the diagnostic categories under which they were described.\(^{421}\) In the transgender world, the “medical” model of transgender identity persisted as the dominant model until Professor Sandy Stone published an essay titled *The Empire Strikes Back: A Posttranssexual Manifesto*.\(^{422}\) The piece was an eloquent and expansive essay that largely argued that the narrow, medicalized requirements for gender reassignment actually forced individuals to essentially lie to their doctors in order to satisfy these requirements and to fit the common medical constructions associated with gender dysphoria and the binary model.\(^{423}\) In part due to Stone’s prominent critique, the model shifted from a medicalized view of transgenderism to a gradual trend toward building a greater community for transgender individuals (who had been previously pressured to assimilate).\(^{424}\)

With this paradigm shift, a new model, a transgender model, was born, one that embraced the need for gender differentiation and pluralism and that also empowered trans individuals to view themselves as healthy, whole individuals. As Dallas Denny observes:

Gender-variant people were no longer forced to choose restrictive transsexual or cross-dresser or drag queen/king roles, each with its own behavioral script. Suddenly it was possible to transition gender roles without a goal of genital surgery, to acknowledge one’s gender dysphoria and yet remain in one’s original gender role, to take hormones for a while and then stop, to be a woman with breasts and a penis or a man with a vagina, to blend genders as if from a palette.\(^{425}\)

In line with these observations, empirical research has shown an accompanying diversity of body modification choices within the transgender community—some individuals desire surgery, others take hormones, and others choose to alter their hairstyle or makeup choices, bind their chests, or do nothing at all.\(^ {426}\) Just as there is not a single age for coming out, transgender people discover their self-identity at different points along

\(^{421}\) See Denny, *Transgender Communities of the United States* at 180 (cited in note 120).


\(^{423}\) Id at *12–13. See also Denny, *Transgender Communities of the United States* at 178–79 (cited in note 120).

\(^{424}\) Denny, *Transgender Communities of the United States* at 178–81 (cited in note 120).

\(^{425}\) Id at 182.

\(^{426}\) Vade, 11 Mich J Gender & L at 268–70 (cited in note 78).
their lives—some know very early in age, while others know their gender only years later.\textsuperscript{427}

Perhaps looking to recent scholarly work on pluralist rulemaking might lead to some insights into what a better model might look like. In one example, Professor William Eskridge describes how family law has increasingly moved from a set of mandatory rules governing marriage to a system that includes a broader focus on “guided choice,” leaning more heavily toward default rules with override options instead.\textsuperscript{428} While I am clearly oversimplifying for the purposes of this Article, my primary normative suggestion, here, would be to adopt a similar framework for the state’s gender assignment system: Why not also allow for default rules that can be overridden or altered in cases that are necessary or justified? In other words, just like the concept of increased pluralism in family law, which now provides individuals with a menu of options to define a family,\textsuperscript{429} the law should act to embrace the same concept here.\textsuperscript{430}

Legally, the first place to start in building a gender pluralism model is to explore deregulation.\textsuperscript{431} Here, much of my normative analysis echoes part of Professor Cruz’s groundbreaking article, \textit{Disestablishing Sex and Gender}.\textsuperscript{432} As Cruz writes elsewhere, “The Constitution could be understood to protect individuals’ free exercise of gender, as well as to require the disestablishment of sex and gender.”\textsuperscript{433} Cruz’s proposition, which parallels the constitutional treatment of religion, has both affirmative and negative aspects to the approach of regulating gender. On the one hand, he proposes not only “disestablishing” gender, but also enabling

\textsuperscript{427} Id at 267–68.

\textsuperscript{428} William N. Eskridge Jr, \textit{Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules}, 100 Georgetown L J 1881, 1892–1901 (2012). Note Eskridge’s definition: “[m]andatory rules” are “rules or directives that parties . . . must accept as binding”; “[d]efault rules” are directives that can be changed “by contracting around the default”; and “[o]VERRIDE rules” are “the legal steps or requirements that . . . must [be] follow[ed] . . . to contract around” the default rule regime. Id at 1902. Note that override rules are also called “altering rules” by Professor Ian Ayres. See Ian Ayres, \textit{Regulating Opt-Out: An Economic Theory of Altering Rules}, 121 Yale L J 2032, 2036 (2012); Ayres, 73 U Chi L Rev at 6 (cited in note 418).

\textsuperscript{429} See Eskridge, 100 Georgetown L J at 1889–91 (cited in note 428).

\textsuperscript{430} See Cooper and Renz, 43 J L & Society at 503 (cited in note 38) (reaching similar observations).

\textsuperscript{431} See id at 496 (noting the utility of an “official” gender status, but observing that “just because states withdraw from determining and assigning gender does not mean they cannot recognize gender determinations by others”) (emphasis omitted).


\textsuperscript{433} Cruz, 18 Duke J Gender L & Pol at 215 (cited in note 165).
an affirmative right to the free exercise of gender at the same time. Cruz advocates, for example, precluding the government from forcing a transgender person to identify with an assigned sex that does not represent how they see themselves. Here, Cruz advocates for a principle of “inclusive neutrality,” which would create, essentially, a public realm in which gender divisions are not reinforced (or enforced), enabling all individuals, including intersex and transgender persons, to self-identify and reducing the power of the state to use its own criteria to determine sex. Cruz also argues for an approach he calls “separationism,” which aims to restrain government regulation in a certain area. Here, Cruz argues that questions of how many sexes there are, or how to distinguish between the sexes, would be matters left to the private realm instead of state regulation. A final area of Cruz’s approach is “accommodation”; here, Cruz advocates enabling government to protect the flourishing of gender in the private sphere. One application of this principle involves supporting employers who create inclusive restrooms, for example.

Cruz's disestablishment model does a brilliant job of clarifying how the state can refrain from overregulating sex and gender classifications. Admittedly, there are legitimate reasons for the state to record one's assigned sex at birth, but there are equally legitimate reasons for enabling the state to broadly deregulate the way in which individuals can identify themselves. Moreover, in a gender pluralism model, the state essentially refrains from heavily regulating gender classifications unless there is a sound justification for doing so. But there are also affirmative actions that the government may take in order to avoid imposing gender scripting or sex classifications. Here, under the overarching aegis of individual autonomy, the law may take certain actions and interpretations that actualize the principle of gender self-determination.

Aside from the realm of government regulation, there are three other avenues of change that also are worthy of analysis: common law, legislative intervention, and private contractual alternatives. Consider, for example, the common-law solutions offered by the case law discussed in this Article. Price Waterhouse and its progeny protected gender non-conforming behavior in the workplace, and Macy v Holder and other cases recognized discrimination against transgender individuals as intrin-

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435. Id at 1056.
436. Id at 1042.
437. Id at 1048–50.
438. Cruz, 90 Cal L Rev at 1050 (cited in note 432).
439. Id at 1050–54.
440. Id at 1052.
442. For more on the concept of gender autonomy, see generally Weiss, 5 J Race, Gender & Ethnicity 2 (cited in note 33).
sically violative of Title VII. Both lines of cases clearly suggest that gender nonconforming individuals—not just individuals who are transitioning to members of the opposite sex—are automatically protected from workplace discrimination under Title VII.

Just as these cases can offer ways to move beyond the binary formations of the *numerus clausus* of sex, they also present new ways to reimagine gender pluralism through enabling individuals to create their own complex formation of identities. One option, therefore, could be to simply liberalize the existing standards for gender reassignment, thereby moving toward a default model with override potential. Significantly, in 2010, the State Department issued guidelines that permit trans citizens to obtain passports in their lived gender without having to submit a revised birth certificate, and without having to prove that genital confirmation surgery had been performed. This change enables applicants to bypass onerous state procedures or state laws that forbid gender reassignment. But the law can even go further than that, perhaps by allowing people to opt out of gender recognition altogether in specific instances, under the rubric of privacy protection, thus dismantling the binary system of classification.

A related concept is the idea of a third classification for transgender individuals. The International Civil Aviation Organization (ICAO), which adopts international standards for customs and immigration, has established a separate category beyond male or female, called

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444. See Part II.C.
446. See note 91 and accompanying text. The Veterans Health Administration has also implemented a similar policy, as did the Social Security Administration. See *Veterans Administration Makes Important Clarification on Records Policy* (National Center for Transgender Equality), archived at http://perma.cc/Z6CX-X49X; *Transgender People and the Social Security Administration* (National Center for Transgender Equality, June 2013), archived at http://perma.cc/3PGC-6BEZ.
447. See notes 94–99 and accompanying text.
“unspecified.”450 In Australia, for example, gender confirmation surgery is not necessary in order to obtain a passport in the preferred gender: the individual must procure a letter from a medical practitioner that confirms either intersex status or some form of clinical treatment.451 Or, if they cannot acquire a letter from a doctor, they can apply for a Document of Identity with the gender left blank—one can get a passport with either M, F, or X (unspecified).452 Similarly, in New Zealand, gender confirmation surgery is not necessary—the applicant must provide documentation to the New Zealand Family Court demonstrating that the gender change “will be maintained.”453 In order to receive an “X” designation, citizens must declare how long they have been living in their current gender status and promise that, if the gender identity changes in the future, they will file for a new application.454

In many writings about transgender individuals, the notion of a “third gender” was traditionally employed as a sort of “exotica, with little relevance to our ‘modern’ societies.”455 Today, however, more and more transgender writers are employing the term to denote those who live outside the gender binary; ironically, the term has become more popular at the same time as anthropologists have found great fault with its use, because of the historical and cultural specificity associated with the term and because it tends to depict an overly rigid dichotomy between the West and the “primordial” East.456

Yet at its most useful, it illuminates what Professor Marjorie Garber calls a “space of possibility,” highlighting the point that some phenomena, like cross-dressing, should be understood on their own terms rather

452. Id.
453. Id at 28–29. See also Information about Changing Sex/Gender Identity (New Zealand Department of Internal Affairs), archived at http://perma.cc/HG67-QLQC.
455. See Evan B. Towle and Lynn M. Morgan, Romancing the Transgender Native: Rethinking the Use of the “Third Gender” Concept, in Stryker and Whittle, eds, Transgender Studies Reader 666, 666–67, 676 (cited in note 4) (noting that the concept of a third gender is itself “flawed because it subsumes all non-Western, nonbinary identities, practices, terminologies, and histories” into a single term, a “junk drawer into which a great non-Western gender miscellany is carelessly dumped”).
456. Id at 667, 674–76 (noting Kate Bornstein and Leslie Feinberg as examples of popular writers who have referred to third genders in their work).
than through the lens of a binary system. As others argue, a third category can be empowering in its diversity:

Third sex/gender does not imply a single expression or an androgynous mixing. . . . The third gender category is a space for society to articulate and make sense of all its various gendered identities, as more people refuse to continue to hide them or remain silent on the margins. . . . If more transsexual people were able to identify as transgendered and express their third gender category status, instead of feeling forced to slot into the binary because of the threats of punishment and loss of social legitimacy, that third category would be far more populated than one might imagine. People could be given legitimacy by this third category, if society recognized gender diversity alongside ethnic or religious diversity.

Others, like Professor Terry Kogan, argue that the classification of a category like “other” should be dependent on personal choice, rather than biology, desire, or gender presentation. “Identifying oneself as ‘Other’ is a conscious choice by an individual to oppose the male/female, masculine/feminine dichotomies, and the oppressions that result from those dichotomies.”

A third category, however, has costs. One of them is that it may be situated hierarchically underneath the categories of male and female; in other words, the “other” category could be treated just as such, as “other,” and given less weight and meaning. Even the use of a third gender, Evan Towle and Professor Lynn Morgan write, can be problematic because it suggests the relative inviolability of the first and second categories. As they argue, “The term third gender does not disrupt gender binarism; it simply adds another category (albeit a segregated, ghettoized category) to the existing two.” There is also the danger that even three forms will require an increasing level of standardization, just as the numerus clausus

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457. Id at 671, citing Marjorie Garber, Vested Interests: Cross-Dressing and Cultural Anxiety 11 (HarperPerennial 1993).


460. Id at 1247.

461. Some intersex activists question whether a third gender would be helpful. See, for example, Alice D. Dreger and April M. Herndon, Progress and Politics in the Intersex Rights Movement, 15 GLQ: J Lesbian & Gay Stud 199, 217 (2009) (noting that some intersex activists argue that, because intersex is not a discrete category, “someone would always be deciding who to raise as male, female, or intersex: three categories don’t solve the problem any more than two or five or ten do”).

462. Towle and Morgan, Romancing the Transgender Native at 677 (cited in note 455).

463. Id.
dictates. “The greater the number of genders,” cautions one scholar, “the greater their oppressive potential as each may demand the conformity of the individual within increasingly narrower confines.”

One scholar has also advocated for the use of the term “trans*” with an asterisk to demonstrate an intrinsic critique of the notion of gender and sex categorization and emphasize those categories’ open-endedness. As explained, “The asterisk allows for the inclusion of many identities. Rather than enumerating a single subset of identities, the term trans* recognizes our incredibly diverse community and widely varying self-identification.” As one scholar has argued, if the law were more understanding that there are more than two possibilities beyond male and female, then the law might be more accommodating of that third choice.

For these reasons, a pragmatic first step would be to liberalize rules regarding gender reassignment. Argentina has one of the most liberal rules, enabling people to change their gender on official documentation without first having to receive a psychiatric diagnosis of gender dysphoria, hormone therapy, surgery, or any other psychological or medical treatment or diagnosis. It also requires public and private practitioners to provide free hormone therapy or gender confirmation surgery for those who desire it, even if they have not reached the age of eighteen. Similarly, Mexico City’s civil code was amended in 2004 to enable transgender individuals to change the sex on their birth certificates upon request and without requirement of gender confirmation surgery. In Austria, a court invalidated the requirement of gender confirmation surgery for legal recognition, and in Sweden, a recent law allows individuals who have felt “for some time” that they were a different gender to change their birth marker. These changes are not limited to just a few countries; indeed, they provide the backdrop for many of the changes that are taking place in agencies and localities throughout the United States.

466. Id (brackets and ellipsis omitted).
468. See Argentina Gender Identity Law (Transgender Europe, Sept 12, 2013), archived at http://perma.cc/LN9G-FWPG.
472. For example, California is considering a law that would allow individuals
A final example of constructive gender pluralist modeling comes from private industry: as mentioned earlier, Facebook added a customizable option with over fifty different terms that people can use to identify their gender (such as androgynous, trans woman, bigender, intersex, gender fluid, transsexual, and others), including three different choices of pronouns: him, her, or them.473 “There’s going to be a lot of people for whom this is going to mean nothing, but for the few it does impact, it means the world,” stated a transgender software engineer at Facebook who worked on the program and who changed her gender from female to trans woman the day it launched.474 Indeed, a central factor in motivating the change was the recognition that a binary system of gender failed to represent many individuals, including many who worked at Facebook.475

2. Protecting Gender Expression

The previous Section outlined ways in which the law could liberalize the “transition” part of gender transition and thus deemphasize the importance of gender confirmation surgery and other tangible markers of transition. Yet, as this Article has suggested, simply lowering the requirements for state-recognized transition is not enough. The law needs to actively embrace those who are gender nonconforming—in short, it has to embrace the concept of gender as a nonrivalrous form of expression, rather than a static formation. What this means, more literally, is that the law must begin to embrace the concept of protection beyond the binary of male and female—and begin protecting those who transgress these boundaries. One simple, doctrinal tool to accomplish this goal is for legislatures to choose to enact protections on the basis of gender expression,


474. Id.

475. Id. At the same time that the decision was hailed by the trans community and its allies, however, it was disparaged by others. Consider this statement from an analyst for Focus on the Family, a religious organization:

Of course Facebook is entitled to manage its wildly popular site as it sees fit, but . . . it’s impossible to deny the biological reality that humanity is divided into two halves–male and female. . . .

Those petitioning for the change insist that there are an infinite number of genders, but just saying it doesn’t make it so.

Id.
rather than focusing on gender identity alone, in order to enable and protect a broader variety of gender nonconforming behavior.

Consider the difference between the two. Scholars describe “gender identity” as referring to “an individual’s emotional and psychological sense of being male or female,” noting that this is not always “the same as an individual’s biological identity,” whereas they define “gender expression” as “how a person represents or expresses one’s gender identity to others, often through behavior, clothing, hairstyles, voice or body characteristics,” something that can more easily change over time. Gender identity might be more internal, whereas gender expression is typically considered to be more external and, as I have suggested, does not always follow a binary formation.

The difference between the two terms can often result in significant differences in legal treatment, because existing law tends to emphasize protection on the basis of gender identity, instead of the comparably broader category of gender expression. As Dr. Matthew Waites has observed, “‘Gender identity’ tends to privilege notions of a clear, coherent and unitary identity over conceptions of blurred identifications.” Again, the focus on a stable, fixed binary can act to exclude those whose self-presentation is less fixed toward the polarities of male and female. Accordingly, because gender expression tends to be a more capacious category than identity, it can offer a more capacious form of protection for gender pluralism. The Yogyakarta Principles on Sexual Orientation and Gender Identity, for example, recognize that “the right to freedom of opinion and expression . . . includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means.”

Notably, these values—supporting a diversity of expression, avoiding enforced conformity—are very much at work in the regulation of intellectual property, particularly copyright law, which has long protected fair use rights of commentary, critique, and scholarship with the goal of protecting expressive diversity. Copyright law also places a great deal of emphasis on protecting the sanctity of authorship as an equally expressive

476. Palmer, Note, 37 Hofstra L Rev at 898–99 (cited in note 239) (brackets omitted) (providing definitions of the terms as used by other scholars). See also Diagram of Sex and Gender (Center for Gender Sanity), archived at http://perma.cc/59UW-TH4R (using similar definitions of gender expression and gender identity).

477. See Stryker, (De)Subjugated Knowledges at 9 (cited in note 4) (making this distinction).


part of the author’s personality. The law carves out a protective space to ensure that intellectual property retains a nonexclusive, nonsovereign character that comports with basic First Amendment values by enabling the flourishing of many different kinds of expressive freedom.

By focusing on expression, as opposed to a traditional antidiscrimination model, we can begin to reform—and reimagine—our approach to gender regulation. Antidiscrimination models are caught within a tension between equality doctrine, which presupposes sameness, and the law’s treatment of sex, which is premised on differentiating between men and women. In traditional gender discrimination cases, the law is well established that government classifications based on sex are held to a standard of intermediate scrutiny, that is, that they must be substantially related to an important government purpose. As a result of this standard, which tends to implicitly presuppose the benign necessity for sex discrimination in certain circumstances, challenges to sex segregation have led to mixed results, sometimes upheld, and sometimes not.

Although the Court has struck down sex segregation in state-run educational institutions because it was based on overbroad stereotypes about men and women, it has also, at other times, permitted segregation when it is tied to physical differences between men and women. In either case, however, the law starts from a presumption that sex classifications are sometimes necessary, particularly when the Court perceives an “actual” difference to exist between men and women, whether legislatively, biologically, or socially. Even in the absence of facially sex-based classifications, the law requires clear evidence of conscious discriminatory intent when there is some evidence of discriminatory impact, suggesting that gender discrimination is an anomaly.


482. Others have made similar arguments. See, for example, Jeffrey Kosbie, (No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech, 19 Wm & Mary J Women & L 187, 203–21 (2013).

483. See id at 123 n 323, quoting Catharine A. MacKinnon, Sex Equality 5 (Foundation Press 2d ed 2007) (“[I]f one is the same, one is to be treated the same; if one is different, one is to be treated differently.”).


487. See Cohen, 20.1 Colum J Gender & L at 106 (cited in note 384).

488. Flynn, 18 Temple Polit & CR L Rev at 474–75 (cited in note 66) (criticizing
As others have observed, transgender activists are caught almost perfectly at the cross section between wanting to protect volitional choices regarding gender and being imprisoned by the unsatisfactory choices that law offers in protecting against discrimination. The dominant strategy, thus far, has been to add another category onto the variety of types of gender discrimination: “[T]o ask legislatures to define sex, gender, or even sexual orientation within nondiscrimination laws so as to explicitly include trans people, or to add a new category, usually gender identity.” Even in the most inclusive formulation of Title IX, in a case recently pending before the Supreme Court, earlier regulations promulgated by the previous Department of Education initially specified that an individual’s sex should be determined by reference to gender identity.

Here, gender identity becomes the focus of interpretation, even though gender expression would be a much more inclusive category precisely for its ability to transgress simple categories of identity classification. As I have argued in this Article, some courts might interpret gender identity narrowly, keeping a rigid binary system in place. This categorization may risk excluding those who demonstrate gender nonconforming behavior or expression, but who do not fall within a binary, identity-based structure. Put more directly, a focus on identity, while understandable, comes at the expense of honoring volitional choices regarding expression and also risks overemphasizing the binary nature of the sexes without paying due regard to those who fail to meet the heightened standards for gender reassignment.

Moreover, taken to its logical conclusion, one could plausibly argue that the standards of what qualifies as a gender identity are set so fundamentally high that they may unwittingly construct a picture of gender that overemphasizes, rather than diminishes, the importance of a binary system—thereby reinscribing the codes of gender, rather than challenging them altogether. The result, again, is an assimilationist bias that almost completely transforms the goals of the antidiscrimination movement altogether, reifying and replicating gender classification with every decision that works in its favor. As Jeffrey Kosbie has pointed out, an antidiscrimination model can (does not always, but can) run the risk of reinforcing the cultural binary. But it also, more importantly, overlooks the reality of gender expression altogether: that it can be fundamentally different, and broader, than gender identity alone, and that it encompasses a panoply of behaviors that are—in fact—far more pluralistic regarding expression than identity itself.

490. Id at xvii.
492. See Kosbie, 19 Wm & Mary J Women & L at 218 (cited in note 482).
Here, a focus on expression starts from a wholly different vantage point. Rather than addressing the state as a benign protector, the state might be viewed through a comparably more suspicious lens.\textsuperscript{493} The concern about state regulation stems from a desire to protect expression and avoid the coercion of conformity, which is closely linked to traditional First Amendment jurisprudence.\textsuperscript{494} A more pluralist model would include the term “gender identity \textit{and} expression,” which broadens its protections beyond gender dysphoric individuals alone.\textsuperscript{495} For example, “gender identity or expression” has been defined by one municipality as the following:

\begin{quote}
[A] person’s actual or perceived gender, as well as a person’s gender identity, gender-related self-image, gender-related appearance, or gender-related expression whether or not that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with a person’s sex at birth.\textsuperscript{496}
\end{quote}

Such statutes are drafted so broadly that they effectively eliminate any required relationship between assigned sex, gender identity, and gender expression.\textsuperscript{497} The result is a conscious delinking of sex from gender, and a conscious effort to integrate autonomy, self-determination, and authorship within both constructs by situating the protection of transgender individuals “as part of a strategy of gradually expanding the courts’ interpretation of gender as a legal category.”\textsuperscript{498}

Of course, a related possibility is to simply interpret gender identity to include gender expression, instead of describing it as a separate category. For example, gender identity, at least in an earlier version of the ENDA federal bill, is defined as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”\textsuperscript{499} Unfortunately, the provisions regarding gender identity garnered the most opposition regarding ENDA’s passage; supporters were told to either drop the transgender-inclusive language or risk losing the passage of the legislation altogether. They opted for the latter, but the law has still not been passed.\textsuperscript{500}

Despite the outcome of ENDA, this language appears extremely significant, because it extends a much fuller set of protections to

\begin{itemize}
\item \textsuperscript{493} Flynn, 18 Temple Polit & CR L Rev at 475 (cited in note 66).
\item \textsuperscript{494} Id.
\item \textsuperscript{495} Currah, \textit{Gender Pluralisms} at 22 (cited in note 74).
\item \textsuperscript{496} Id at 23 (quoting a 2003 Boston nondiscrimination law).
\item \textsuperscript{497} Id.
\item \textsuperscript{498} Id.
\item \textsuperscript{499} Palmer, Note, 37 Hofstra L Rev at 889 (cited in note 239) (quoting from a 2007 version of ENDA). Although the bill would have required employers to provide adequate shower or dressing facilities to transitioning employees, it did not prohibit them from enacting reasonable dress or grooming standards. Id.
\item \textsuperscript{500} Id at 890–91.
\end{itemize}
transgender individuals, as well as everyone else, suggesting a kind of embrace of the pluralities of gender expression and identity.\textsuperscript{501} At the same time, however, as Professor Mary Anne Case has insightfully noted, ENDA’s inclusion of allowances for dress and grooming codes serves to reify the existing binary at the cost of those who may have the greatest need for inclusive protection.\textsuperscript{502}

Again, the conflict between gender inclusivity and grooming codes may seem insurmountable. Yet Case, drawing on California state law, offers a solution by creating an allowance that enables “an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee’s gender identity or gender expression.”\textsuperscript{503} By reaching a compromise that enables an employer to regulate dress, but only insofar as it is consistent with gender identity and expression, it becomes possible to reach a fruitful, inclusive conclusion. “If the gender identity being accommodated is indeed, as suggested by the text of the California statute, nonbinary,” she writes, then it becomes “subject to an almost infinite range of possibly required accommodations.”\textsuperscript{504}

\textbf{Conclusion}

The goal of this Article is to offer a theory of the relationship between sex and gender, not as a social construct, biological reality, or expression alone, but as a theory that focuses on its descriptive similarities to property and intellectual property. As I have suggested, just as the \textit{numerus clausus} principle has operated to foreclose productive alternative interpretations in property, the same theory holds true in the law’s steadfast commitment to a static, binary system premised on male and female categories. Accordingly, an account of gender as a set of intangible properties can further suggest the need to rethink categories of discrimination and the law as tools for governing and protecting the plurality of gender expression, rather than gender identity. In making these comparisons among property, intellectual property, and gender, I do not expect them to be perfectly seamless or complete, but I do hope that the examination reveals important sets of similarities between the two theoretical constructs and sheds light on the relationship between gender and sex—where it has been and where it can go in the future.

\begin{footnotes}
\footnotetext{501. Currah, \textit{Gender Pluralisms} at 6 (cited in note 74) (observing that legislation tends “to place gender nonconforming identities and practices on a continuum of gender, rather than create a new category of a protected class”).}
\footnotetext{502. See Case, 66 Stan L Rev at 1368 (cited in note 234) (noting that ENDA carries these risks).}
\footnotetext{503. Id (emphasis added), quoting Cal Gov Code § 12949.}
\footnotetext{504. Case, 66 Stan L Rev at 1368 (cited in note 234).}
\end{footnotes}
The Nature of Parenthood*

DOUGLAS NEJAIME**

In the wake of Obergefell v. Hodges, courts and legislatures claim in principle to have repudiated the privileging of different-sex over same-sex couples and men over women in the legal regulation of the family. But as struggles over assisted reproductive technologies (ART) demonstrate, in the law of parental recognition such privileging remains. Those who break from traditional norms of gender and sexuality—women who separate motherhood from biological ties (for instance, through surrogacy), and women and men who form families with a same-sex partner—often find their parent-child relationships discounted.

This Article explores what it means to fully vindicate gender and sexual-orientation equality in the law of parental recognition. It does so by situating the treatment of families formed through ART within a longer history of parentage. Inequalities that persist in contemporary law are traceable to earlier eras. In initially defining parentage through marriage,

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the common law embedded parenthood within a gender-hierarchical, heterosexual order. Eventually, courts and legislatures repudiated the common-law regime and protected biological parent-child relationships formed outside marriage. While this effort to derive parental recognition from biological connection was animated by egalitarian impulses, it too operated within a gender-differentiated, heterosexual paradigm.

Today, the law increasingly accommodates families formed through ART, and, in doing so, recognizes parents on not only biological but also social grounds. Yet, as courts and legislatures approach the parental claims of women and same-sex couples within existing frameworks organized around marital and biological relationships, they reproduce some of the very gender- and sexuality-based asymmetries embedded in those frameworks. With biological connection continuing to anchor nonmarital parenthood, unmarried gays and lesbians face barriers to parental recognition. With the gender-differentiated, heterosexual family continuing to structure marital parenthood, the law organizes the legal family around a biological mother. Against this backdrop, nonbiological mothers in different-sex couples, as well as nonbiological fathers in same-sex couples, struggle for parental recognition.

To protect the parental interests of women and of gays and lesbians, this Article urges greater emphasis on parenthood’s social dimensions. Of course, as our common law origins demonstrate, the law has long recognized parental relationships on social and not simply biological grounds. But today, commitments to equality require reorienting family law in ways that ground parental recognition more fully and evenhandedly in social contributions. While this Article focuses primarily on reform of family law at the state level, it also contemplates eventual constitutional oversight.

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INTRODUCTION

Those who form families through assisted reproductive technologies (ART)—donor insemination, in vitro fertilization, and gestational surrogacy—frequently establish parental relationships in the absence of gestational or genetic connections to their children. In seeking legal parental recognition, they do not deny the importance of biological ties, but simply urge courts and legislatures to credit social contributions as well. In other words, they ask for recognition that turns on factors such as intent to parent, parental conduct, and family formation. Yet law fails to value parenthood’s social dimensions adequately and consistently. This failure has significant and painful consequences in the lives of parents and children. Those who have been parenting their children for many years may find they are not legal parents. Some become legal parents only by engaging in the time-consuming, costly, and invasive process of adopting their children. Others, for whom adoption is impossible, remain legal strangers to their children. Indeed, some parents may not realize adoption is necessary until it is too late, perhaps when their relationship to the legally-recognized parent dissolves.

Consider just a few examples. In Connecticut, a married different-sex couple had a child through surrogacy and raised the child together...
for fourteen years. When they divorced, the court deemed the mother, who had neither a gestational nor genetic connection to the child, a legal stranger to her child. In Florida, an unmarried same-sex couple used the same donor sperm to have four children, with each woman giving birth to two children. They raised the children together until their relationship ended several years later, at which point the court left each woman with parental rights only to her two biological children. In New Jersey, a male same-sex couple used a donor egg to have a child through a gestational surrogate. The court recognized the gestational surrogate, rather than the biological father’s husband (and the child’s primary caretaker), as the second parent.

Today, many courts and legislatures seek to promote gender and sexual-orientation equality in the family. Judges and lawmakers have repudiated gender-based distinctions in both spousal and parental regulation, including gendered presumptions in child custody. More recently, courts and legislatures have acknowledged same-sex couples’ interest in family recognition. In extending marriage to same-sex couples in

5. See Doe v. Doe, 710 A.2d 1297 (Conn. 1998).
7. While some statutes regulating gestational surrogacy use the term “gestational carrier,” this Article uses the term “gestational surrogate.”
12. Scholars have examined distinct aspects of ART, including donor insemination and surrogacy, but have rarely attended to the interlocking regulation of various forms of ART, particularly along lines of parental recognition. For an important account of families with “donor-conceived children,” see Naomi Cahn, The New Kinship: Constructing Donor-Conceived Families (2013). For the leading treatment of changes in approaches to surrogacy, primarily in the context of heterosexual family formation, see Elizabeth S. Scott, Surrogacy and the Politics of Commodification, 72
what it means, in the world of marriage equality, to build a system of parental recognition that fully integrates families headed by same-sex couples in the ways that *Obergefell* contemplates. And it connects questions of sexual orientation to questions of gender, aspiring to parental recognition that allows women, in not only same-sex but also different-sex couples, to assume nontraditional parenting roles. It does so by situating the contemporary legal treatment of family formation through ART within a longer history of parental recognition.  

Biological and social factors have long shaped the law of parental recognition. The common law tied parenthood to marriage and thus made parentage a legal, rather than biological, determination. Pursuant to the marital presumption (also known as the presumption of legitimacy), when a married woman gave birth to a child, the law recognized her husband as the child’s father. This presumption channeled intuitions about biological paternity, but it could also conceal deviations from biological facts—allowing men to avoid questions of paternity and ensuring the child’s legitimacy. In contrast to the marital child, the “illegitimate” child traditionally existed outside a legal family.  

The common law’s organization of parentage through marriage reflected and enforced a gender-hierarchical, heterosexual order—giving men authority over women and children inside marriage and insulating men’s property from claims to inheritance by children born outside marriage.

Slowly, American law departed from the harshest aspects of its common-law origins. Legislatures and courts began to recognize a legal relationship between a mother and her “illegitimate” child—granting the mother custody and bestowing on the child rights to support and eventually inheritance. In contrast, fathers of “illegitimate” children had financial obligations imposed on them less as a consequence of a legal family relationship and more as an effort to privatize support. Even as American law came to mitigate some of the effects of “illegitimacy,” the government continued to place substantial legal impediments on nonmarital parents and children well into the twentieth century.

By the late 1960s and early 1970s, in the wake of increasing efforts to hold unmarried fathers financially accountable and to protect the rights of nonmarital children, the Court intervened by recognizing nonmarital parent-child relationships on constitutional grounds. Biological connection served as an explicit basis for constitutional protection, for

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14. See *infra* Section I.A.
both mother-child and father-child relationships.\textsuperscript{15} Yet even as the Court renounced “illegitimacy” and dismantled legally enforced gender hierarchy within marriage, it produced a new form of gender differentiation in parenthood—which it justified by resort to reproductive biology. At the moment of birth, the nonmarital child—unlike the marital child—had one legal parent: the mother. Gestation and birth evidenced the biological fact of maternity and furnished a relationship to the child that justified legal recognition. An unmarried man, in contrast, needed to demonstrate commitment to the parent-child relationship, in addition to his genetic connection. Of course, gestation provides a unique relationship to the child that is not only biological but functional. But in a series of cases, the logic of reproductive biology authorized more far-reaching social and legal differences between mothers and fathers—situating women, but not men, as naturally responsible for nonmarital children. Judges and lawmakers liberalized a parentage regime that had been deliberately organized around the gender-hierarchical, heterosexual status of marriage, yet continued to approach parentage within a gender-differentiated, heterosexual paradigm.

Against this legal backdrop, courts and legislatures in the late twentieth and early twenty-first centuries began to address parent-child relationships formed through a range of reproductive technologies.\textsuperscript{16} They determined parentage in ways that turned increasingly on social, and not simply biological, grounds—not only for men but for women, and not only for different-sex but for same-sex couples. Concepts of intentional and functional parenthood gained traction in both judicial and statutory reasoning addressing a range of family configurations.\textsuperscript{17}

Yet even as courts and legislatures have acted to conform parentage law to more recent egalitarian commitments, their attempts have been partial and incomplete. By tracing the evolution of modern parentage law, this Article shows how judges and lawmakers reason about parenthood in ways that carry forward legacies of exclusion embedded in frameworks of parental recognition forged in earlier eras. The account presented here tracks parental recognition across jurisdictions, bodies of law, family configurations, and forms of ART, showing how courts and legislatures draw distinctions between motherhood and fatherhood, different-sex and same-sex couples, biological and nonbiological parents, and marital and nonmarital families. Mapping regulation in this way reveals how the recognition of some parents but not others on social grounds reflects and perpetuates inequality based on gender and sexual

\textsuperscript{15} See infra Section I.B.
\textsuperscript{17} See id.
With biological connection continuing to anchor non-marital parenthood, unmarried gays and lesbians struggle for parental recognition. With the gender-differentiated, heterosexual family continuing to structure marital parenthood, the law assumes the presence of a biological mother in ways that burden nonbiological mothers in different-sex couples, as well as nonbiological fathers in same-sex couples.

To vindicate the parental interests of women and of gays and lesbians, this Article urges greater emphasis on parenthood’s social dimensions. Same-sex family formation features a parent without a genetic or gestational connection to the child; therefore, treating same-sex parents as equals demands recognition on social grounds. An approach that simply provides for equal treatment based on biological criteria would continue to marginalize those who parent with a same-sex partner, as well as women who defy conventional gender norms by separating the biological fact of maternity from the social role of motherhood. The law has traditionally connected women to motherhood as biological destiny, and thus crediting the social aspects of motherhood is necessary to value the parenting work of women who break from conventional roles.

This Article’s analysis suggests the desirability of social grounds for parental recognition from the perspective of not only parents but children. Nonetheless, it does not aim to articulate an ideal model of parental recognition, nor does it defend social grounds for parental recognition based on a best-interests-of-the-child standard. Of course, courts and legis-


19. For the leading account of the equal treatment position, see Garrison, supra note 1. Garrison’s interpretive approach would apply “the law governing sexual conception and the implicit assumptions about parentage and family on which that law is based” to ART. Id. at 842. This approach, she argues, “treats all would-be parents equally, without regard to their choice of a method for becoming a parent. It does not depend on any particular vision of family life or parental prerogatives, except insofar as that vision has been accepted elsewhere within family law and policy.” Id. at 920.

20. Moreover, this Article does not make an affirmative case for ART over other forms of family formation. Nonetheless, in seeking to reform family law so that parental recognition emerging out of existing practices of ART aligns with equality principles, this Article identifies a distinctive relationship between ART—specifically, the creation of nonbiological parent-child bonds—and the equal standing of women and of same-sex couples. While the emphasis on nonbiological bonds finds common ground with arguments for greater access to adoption, it is important to note that some scholars view liberal ART policies as undermining adoption. See Elizabeth Bartholet,
tures would rarely protect parental interests in ways they see as harmful to children. Yet unlike a custody determination, which turns on a child’s best interests, parentage is generally guided by the parental interest.\(^{21}\) There are compelling reasons to keep parentage from devolving purely into a question of best interests. Indeed, views about gender and sexuality have historically influenced custody determinations in ways that have frustrated not only children’s interests in ongoing relationships with their parents, but also parents’ expectations of nondiscriminatory treatment.\(^{22}\)

After elaborating the meaning of equality in the context of parental recognition, this Article seeks to reorient family law in ways that protect the parent-child relationships of women and same-sex couples by grounding recognition more fully and evenhandedly in social contributions to parenting. Reform efforts will occur primarily at the state level. State legislatures can restructure parentage law in ways that credit parenthood’s social dimensions, and state courts can apply parentage principles to recognize as legal parents those who have committed to the work of parenting.

Nonetheless, reform will likely require constitutional oversight. While scholars have addressed constitutional limitations on government regulation of family formation through ART,\(^{23}\) the issues of parental recognition uncovered in this Article gesture toward a set of constitutional questions in both equal protection and due process that will take years to fully emerge and develop. Although constitutional claims will likely first arise in state courts under state law, federal courts may eventually revisit constitutional commitments to parental equality and liberty articulated in earlier eras.\(^{24}\) This Article closes by considering the constitutional paths


\(^{24}\) See infra Section IV.C. In fact, the path toward same-sex marriage suggests
that might lead courts to recognize parents in ways that align with emergent equality principles and accordingly protect parental relationships on social, and not merely biological, grounds.

This Article proceeds in four Parts. While its focus is on developments beginning in the late twentieth century, Part I begins at a much earlier point to show parenthood’s foundation in the institution of marriage. It then turns to the repudiation of “illegitimacy,” focusing on the recognition of unmarried biological fathers who demonstrated a commitment to the parental relationship. Both approaches reflected and enforced gender differentiation and heterosexuality in parenthood.

Part II turns to the more recent—and ongoing—epoch of liberalization provoked by ART. It provides the first comprehensive account of contemporary regulation of parental recognition in the context of ART. It brings together multiple forms of ART, demonstrating how law treats parent-child relationships formed through donor insemination, IVF, and gestational surrogacy. This Part covers a range of family configurations, including both different-sex and same-sex couples, marital and nonmarital families, and biological and nonbiological parents. And it surveys the law across jurisdictions, identifying positions that represent majority views or clear modern trends, rather than focusing on less common statutory and judicial approaches. Part II occasionally references Appendices to this Article that catalog the current state of the law with respect to parental recognition in the context of ART. Ultimately, Part II’s detailed analysis of the contemporary law of parentage makes clear the unappreciated status-based effects of the current regime.

Part III uncovers the practical and expressive harms inflicted within this regime and shows that these harms are not evenly distributed. Instead, they recur in ways that exclude those who break from traditional norms of gender and sexuality that govern reproduction, parenting, and the family. Part IV considers ways to ameliorate these harms and promote equality based on gender and sexual orientation. It shows how emergent equality commitments lead law to value the social dimensions of parenthood more transparently, extensively, and consistently. It offers ways to reconstruct parentage, through both legislation and adjudication, primarily as a family law matter but also as a constitutional matter. Finally, the Conclusion shows how the reforms envisioned here may lead toward yet another shift in the law of parental recognition—a system of multiple-parent recognition.

I. MARRIAGE, BIOLOGY, AND PARENTHOOD

As this Part shows, the common law organized parenthood around marriage and, in doing so, enforced a gender-hierarchical, heterosexual order. Inside marriage, the marital presumption purported to channel biological paternity but could hide biological facts to maintain the husband’s parental status and the child’s legitimacy. Outside marriage, even as local authorities sought to extract support from parents of “illegitimate” children, parent-child relationships lacked legal recognition. Only slowly did the law come to regard the “illegitimate” child as part of a legal family. Reform efforts in the mid-twentieth century, aimed at both the rights of nonmarital children and the financial responsibilities of unmarried fathers, precipitated a wave of constitutional liberalization beginning in the late 1960s. The Court repudiated key elements of the common-law regime and protected the parental relationships of unmarried biological parents. Nonetheless, the Court preserved a gender-differentiated, heterosexual approach to parentage, justifying differences in the legal treatment of mothers and fathers by resort to sex-based differences in reproductive biology.

A. Parenthood, Marriage, and “Illegitimacy”

The Anglo-American legal system initially understood parentage as a relationship defined through marriage. The marital presumption, or presumption of legitimacy, recognized the mother’s husband as the child’s legal father. At English common law, overcoming the presumption required showing that “the husband be out of the kingdom of England . . . for above nine months, so that no access to his wife can be presumed.” As this factual showing suggests, the presumption purported to reflect biological parenthood.

Nonetheless, the law assumed, but did not in fact require, blood ties. Instead, the marital presumption both facilitated parental recognition that departed from biological facts and cut off claims to parental recognition based on biological facts. If the child was conceived through an extramarital relationship with another man, the marital presumption allowed the husband to pretend he was the biological and thus legal father. Indeed, traditionally neither the husband nor wife were permitted to testify to the husband’s “nonaccess,” meaning that the couple themselves could not penetrate the presumption with inconsistent biological facts. A jury

25. See 1 William Blackstone, Commentaries *457.
26. Id.
28. See In re Findlay, 170 N.E. 471, 473 (N.Y. 1930) (“At times the cases seemed to say that any possibility of access, no matter how violently improbable, would leave the presumption active as against neutralizing proof.”).
“could not legally find against . . . legitimacy, except on facts which prove, beyond all reasonable doubt, that the husband could not have been the father.”\textsuperscript{30} As a Massachusetts court observed more recently, “The effect of the common law presumption of legitimacy was, in many instances, to prevent the fact finder from reaching the true issue in the case.”\textsuperscript{31}

By allowing the marital presumption to hide situations in which the husband was not in fact the biological father, the law ensured the child’s “legitimacy.”\textsuperscript{32} At common law, a child born outside a marital relationship was deemed the child and heir of no one (\textit{filius nullius}).\textsuperscript{33} Traditionally, the “illegitimate” child, as historian Michael Grossberg explains, “had no recognized legal relations with his or her parents, particularly not those of inheritance, maintenance, and custody.”\textsuperscript{34} Nonetheless, support for “illegitimate” children became a feature of the common-law system in both England and America, as poor laws empowered local government to force parents to financially support their “illegitimate” children.\textsuperscript{35} Still, financial support and legal parentage remained distinct concepts, with officials able to “compel support but not family membership.”\textsuperscript{36}

The common-law system reflected and enforced a gender-hierarchical order.\textsuperscript{37} Given the legal doctrine of coverture, marriage subordinated women to men in both the spousal and parenting relationship. The husband assumed authority over his wife,\textsuperscript{38} and possessed “an almost

\begin{itemize}
\item \textsuperscript{30} Phillips v. Allen, 84 Mass. (2 Allen) 453, 454 (1861).
\item \textsuperscript{31} C.C. v. A.B., 550 N.E.2d 365, 371 (Mass. 1990).
\item \textsuperscript{32} See Michael Grossberg, \textit{Governing the Hearth: Law and the Family in Nineteenth-Century America} 201–02 (1985).
\item \textsuperscript{33} See Michael Grossberg, \textit{Governing the Hearth: Law and the Family in Nineteenth-Century America} 201–02 (1985).
\item \textsuperscript{36} Grossberg, \textit{supra} note 32, at 198.
\item \textsuperscript{37} See Hendrik Hartog, \textit{Man & Wife in America: A History} 90 (2000) (“[A] father gained ‘the unquestioned right to [children’s] custody, control and obedience.’ Meanwhile, the mother, as nothing but a wife, was left without any rights at all.” (quoting Graham v. Bennet, 2 Cal. 503, 506–07 (1852))); see also Grossberg, \textit{supra} note 32, at 196 (explaining how the law of legitimacy “had been constructed to protect family lineage and resources, and to promote marriage”).
\item \textsuperscript{38} See Nancy F. Cott, \textit{Public Vows: A History of Marriage and the Nation} 11–12 (2000).
\end{itemize}
unlimited right to the custody of their minor legitimate children.” The father’s rights were rooted in a property-based understanding of parenthood. As Grossberg explains, children’s “services, earnings, and the like became the property of their paternal masters in exchange for life and maintenance.” And the system of marital parentage ensured transmission of wealth across generations of men.

Outside marriage, women routinely cared for their “illegitimate” children, even as the parental relationship traditionally lacked legal status. While the American system reflected its English roots, early in the nation’s history legislatures and courts began to extend limited legal protections to “illegitimate” children. As Grossberg documents, law “turn[ed] the customary bonds between the bastard and its mother into a web of reciprocal legal rights and duties.” Mothers possessed legal custody of their “illegitimate” children, and “illegitimate” children gained legal rights to support—and eventually inheritance—from their mothers. This nineteenth-century American innovation reflected not recognition of women’s autonomy but rather the “cult of domesticity” that valued women’s “maternal instinct.”

Fathers of “illegitimate” children occupied a different position. Whereas reforms relating to the mother-child relationship focused on legal rights and family recognition, paternity hearings endeavored to

39. Grossberg, supra note 32, at 235; see also State v. Paine, 23 Tenn. (4 Hum.) 523, 536 (1843) (“The wife, by the common law, has no right to the children against the husband.”).

40. Grossberg, supra note 32, at 235.


43. Grossberg, supra note 32, at 197–98.

44. See id. at 201. American law also departed from strict English common law rules—and adopted rules with civil-law and ecclesiastical origins—in ways that expanded the space of legitimacy. Examples include recognition of common law marriage, legitimation by subsequent marriage, and preservation of legitimacy in cases of annulment. See id. at 201–04.

45. See id. at 207.

46. See id. at 207–12.

47. Id. at 209.
enforce financial obligations for the sake of protecting public funds. With financial support seen as “a male obligation,” local authorities sought to hold men liable for their nonmarital children. Notably, in an age before reliable biological evidence, paternity often turned simply on the parties’ testimony.

Even with significant reform in favor of “illegitimate” children over the course of the nineteenth century, the importance of legitimacy remained. While many states provided mechanisms by which men could confer rights on their nonmarital children, parity with marital children proved elusive. Paternal inheritance in particular remained out of reach. Well into the mid-twentieth century, some states required unmarried fathers to engage in elaborate proceedings simply to have legally protected relationships with their nonmarital children. As a leading reformer of “illegitimacy” commented, the law remained “an uncertain mixture of old English common law tempered with occasional flashes of modern thought—limited, narrow statutes which are directed at only selected aspects of illegitimacy.”

B. Parenthood’s Liberalization: The Rise of Biological Authority

In the second half of the twentieth century, reformers endeavored with greater success to protect the rights of nonmarital children to both care and support and, relatedly, to hold unmarried fathers financially responsible for their children. With these efforts gaining traction in the 1960s, the Court intervened to remedy some of the wrongs perpetrated by a common-law regime rooted in marital privilege. It made biological connection an explicit basis for paternal rights in ways that did not merely supplement, but in some circumstances rivaled, marriage. Yet even as the Court eradicated longstanding inequalities, it preserved gender differentiation in parentage, appealing to differences in reproductive biology to justify legal differences between mothers and fathers.

48. See id. at 215–18.
49. See id. at 215.
50. See id. at 216.
52. Grossberg, supra note 32, at 228–33.
53. Id. at 221.
1. **Unmarried Fathers, Biological Connection, and Social Performance**

By the late 1960s, the Court assumed an important role in further dismantling the common-law system of “illegitimacy.”57 As the Court began to recognize the constitutional rights of unmarried fathers in the 1970s, the biological relationship provided its starting point.58 The biological father was uniquely situated to claim the constitutional right to be a legal parent. Yet the Court emphasized social contribution as the means to achieve a protected liberty interest.59 Only the unmarried biological father who “demonstrates a full commitment to the responsibilities of parenthood” gained constitutional protection.60

The Court’s decisions bolstered legislative advocacy that sought to recognize, with greater consistency across states, both rights and obligations flowing from nonmarital parent-child relationships.61 Pushed by these constitutional decisions, states reformed their family law systems. The 1973 Uniform Parentage Act (UPA), which many states adopted, endeavored to extend legal protection “equally to every child and to every parent, regardless of the marital status of the parents.”62 The UPA, and the state statutes that followed suit, provided a number of “presumption[s] of paternity” through which to recognize father-child relationships.63 Marriage continued to provide a path to parentage.64 Other presumptions applied to unmarried men, recognizing a man as a father if “he acknowledges his paternity of the child in a writing filed with the [government]” or if “he receives the child into his home and openly holds out the child as his natural child.”65 Based on the assumption that biological paternity generally produced legal fatherhood, these various paternity presumptions were rebuttable through blood test evidence.66 Of course, biological evidence did not simply allow men to refute parental status; it also allowed the government to impose financial obligations on resistant fathers. While the law ordinarily required an unmarried man seeking to establish his parental status to take affirmative steps,67 bio-

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58. See *Stanley*, 405 U.S. 645.
60. *Lehr*, 463 U.S. at 261.
61. Harry Krause, the leading figure in favor of national legislative efforts, proposed a uniform act in a 1966 publication. See Krause, *supra* note 55, at 832–41.
63. *Id.* § 4.
64. *Id.* § 4(a)(1)-(3).
65. *Id.* § 4(a)(4)-(5).
66. *Id.* §§ 4(b), 12.
67. See Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 Ind. L. Rev. 611, 624–26 (2009). Some states require strong showings of parental conduct when biological fathers challenge the child’s
logical connection could provide the sole basis for imposing duties.68
Referencing Congress’s plans to establish “a national system of federally assisted child support enforcement,” the UPA drafters expressed their expectation that “blood test evidence will go far toward stimulating voluntary settlements of actions to determine paternity.”69

Biological claims to fatherhood eventually conflicted with marital claims. The unmarried father, armed with his biological connection, attempted to displace the mother’s husband, who, even without a biological connection, claimed parenthood based on the marital presumption. When asked to intervene in ways that would disturb marriage’s ability to hide biological facts, the Court resisted. In its 1989 decision in Michael H. v. Gerald D., a fractured Court upheld application of California’s conclusive marital presumption, thus preventing an unmarried biological father, with whom the mother had an extramarital relationship, from asserting parentage against the wishes of the mother and her husband.70 After explaining that “California law, like nature itself, makes no provision for dual fatherhood,”71 Justice Scalia’s plurality opinion protected the nonbiological parent-child relationship formed by the husband.72 By limiting the constitutional rights of unmarried biological fathers—including those, like Michael H., who had formed relationships with their biological children—the Court preserved the marital presumption’s ability to conceal biological facts. Thus, the Court protected purely social forms of parenthood inside marriage.73

Nonetheless, the emphasis on biological paternity crept into marital parenthood. In contrast to California’s conclusive marital presumption affirmed in Michael H., many states, as well as the UPA, made the marital presumption rebuttable.74 Eventually, across a number of states, husbands could disestablish paternity through biological evidence, wives could

68. See Dolgin, supra note 1, at 110 (distinguishing “cases in which unwed biological fathers have been held responsible for supporting their biological offspring despite the absence of any social relationship between the father and his biological child”).
70. 491 U.S. 110 (1989).
71. Id. at 118 (emphasis added).
72. Id. at 119 (“California declares it to be . . . irrelevant for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband and had a prior relationship with him.”).
73. Earlier decisions had also protected social bonds within marriage, as rejection of unmarried fathers’ claims cleared the way for adoption by stepfathers. See Lehr v. Robertson, 463 U.S. 248 (1983); Quillioin v. Walcott, 434 U.S. 246 (1978).
challenge their husband’s parental status, and unmarried men could seek to rebut the marital presumption.\textsuperscript{75} In many states, the reliability of biological evidence and the recognition of unmarried fathers rendered the marital presumption more explicitly biological in ways that departed from its common-law origins.\textsuperscript{76}

By the late twentieth century, a range of demographic, scientific, and political developments had led family law to focus even more intently on ascertaining biological fatherhood.\textsuperscript{77} With the rapid rise of nonmarital childbirth and the increased sophistication of paternity testing, the federal government engaged in far-reaching efforts to identify fathers of nonmarital children and impose financial obligations on them.\textsuperscript{78} To comply with federal legislation aimed at increasing child support collection, states adopted a procedure to encourage unmarried fathers to identify themselves immediately upon the child’s birth to not only attain rights but also undertake obligations. With voluntary acknowledgments of paternity (VAPs), a man (and the child’s biological mother) attested to his status as the biological father.\textsuperscript{79}

The revised UPA, promulgated in 2000 and amended in 2002, responded to “federal mandates” by building out a more elaborate system of paternity identification.\textsuperscript{80} It maintained a number of paternity presumptions resembling those in the 1973 version,\textsuperscript{81} but did even more than its predecessor to prioritize biological facts in paternity adjudication. As the drafters explained, “[n]owadays, genetic testing makes it possible in most cases to resolve competing claims to paternity.”\textsuperscript{82} The revised UPA dedicated an entire article to “genetic testing”\textsuperscript{83} and sought to “establish[] the controlling supremacy of admissible genetic test results in the adjudication of paternity.”\textsuperscript{84}

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\item \textsuperscript{76} See June Carbone & Naomi Cahn, Marriage, Parentage, and Child Support, 45 Fam. L.Q. 219, 221–22 (2011).
\item \textsuperscript{78} See Jane C. Murphy, Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children, 81 Notre Dame L. Rev. 325, 344–50 (2005); see also Nancy E. Dowd, Redefining Fatherhood 114–21 (2000).
\item \textsuperscript{79} See, e.g., Ga. Dep’t Pub. Health, Paternity Acknowledgment–Form 3940, 2 (June 2016), http://dph.georgia.gov/sites/dph.georgia.gov/files/Paternity%20Acknowledgement%20/Form%203940.pdf [http://perma.cc/VD8J-24JT] (“The father should not sign . . . unless he is confident that he is the biological father of this child.”).
\item \textsuperscript{80} Unif. Parentage Act prefatory n. at 2 (Unif. Law Comm’n 2002).
\item \textsuperscript{81} Id. § 204.
\item \textsuperscript{82} Id. § 204 cmt.
\item \textsuperscript{83} Id. art. 5.
\item \textsuperscript{84} Id. § 631 cmt. Earlier, the Court had held that indigent defendants in paternity actions were constitutionally entitled to blood tests at the expense of the
The revised UPA also integrated the VAP procedure through an extensive set of provisions.85 Going beyond federal regulations, which did not expressly “require that a man acknowledging paternity must assert genetic paternity of the child,” the revised UPA sought “to prevent circumvention of adoption laws by requiring a sworn assertion of genetic parentage of the child.”86 Under the revised UPA’s mechanism, “[t]he mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man’s paternity.”87 VAPs are now the most common way that legal fatherhood is established for nonmarital children.88

2. Gender Differentiation in Parenthood

The developments charted up to this point revolved around men’s parental status and disputes over fatherhood. At common law, married mothers were legal mothers to their children. Courts and legislatures eventually recognized legal bonds between mothers and their “illegitimate” children,89 but continued to treat nonmarital mother-child relationships less favorably than their marital counterparts. In fact, the Court initiated its repudiation of “illegitimacy” in 1968 with two cases involving mother-child relationships.90

Still, the parental status of women was rarely in dispute. The mother-child relationship was established by proof of giving birth.91 Maternity was understood as a conclusive fact92—not a disputed status that could
be rebutted. Generally, a mother’s status could be divested only by her own relinquishment or an adjudication of unfitness.

As Serena Mayeri’s important historical work shows, as the Court forged constitutional sex-equality doctrine in the 1970s and 1980s, it generally resisted claims that the differential treatment of unmarried mothers and fathers constituted impermissible sex discrimination. The Court repudiated the purposive forms of gender subordination embodied in the law of coverture and “illegitimacy,” but turned to reproductive biology to authorize gender differentiation in parenthood. While the Court demanded social performance of parenthood from unmarried fathers claiming constitutional protection, for women the social aspects of parenthood were assumed to flow inevitably from the biological. Because gestation established not merely a biological but also a social connection to the child, the mother, unlike the father, had a relationship with the child at the moment of birth. The requirement that unmarried fathers “grasp[] [the] opportunity” to form a parent-child relationship to have a constitutionally protected interest appeared justified by men’s lack of pre-birth connection to the child. As the Court stated in *Lehr v. Robertson*: “The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father’s parental claims must be gauged by other measures.”

Nonetheless, the Court resorted to reproductive differences between women and men to authorize more far-reaching social and legal differences between mothers and fathers. Women became mothers automatically—and thus had child-rearing responsibilities imposed on them—while men often escaped parental obligations. And for those men who desired parental rights, the Court relied on biological

93. See *In re C.K.G.*, 173 S.W.3d 714, 723 (Tenn. 2005) (observing that “the parentage statutes generally fail to contemplate dispute over maternity” and that “the statute providing for an order of parentage is concerned solely with the establishment of paternity”); *In re M.M.M.*, 428 S.W.3d 389; cf. Unif. Parentage Act § 4(b) (providing that a presumption of paternity may be rebutted).

94. See, e.g., *In re Baby*, 447 S.W.3d 807, 829–30 (Tenn. 2014) (discussing how a mother’s parental rights can only be terminated based on abuse and neglect, consent to adoption, or relinquishment); see also Unif. Parentage Act § 25 (addressing the procedure for termination of parental rights if a mother relinquishes her child).


98. *Id.* at 260 n.16 (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979)).

99. See Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 Rutgers L. Rev. 73, 80–82 (2003). Marriage was imagined to tie fathers to their children, but no similar arrangement assured commitments from unmarried fathers. See Mayeri, supra note 95, at 2381.
differences in ways that discounted their parental contributions after the child’s birth. As Sylvia Law argues, “[T]he facts of the cases reveal the inaccuracy of the stereotypes asserted by the various Justices as ‘biological fact.’”

Consider Parham v. Hughes, in which the Court upheld a Georgia statute that allowed the mother, but not the father, of an “illegitimate” child to sue for wrongful death of the child. The father had not undertaken the procedures required to formally legitimate the child, but he had signed the child’s birth certificate, contributed to the child’s support, and regularly visited with the child. The Court rejected the father’s equal protection claim because “mothers and fathers of illegitimate children are not similarly situated. . . . Unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown.” For the Court, biological differences between women and men—differences that may be relevant to knowing the biological parent’s identity—justified legal distinctions between mothers and fathers, even where the father’s identity was clear and he had formed a parental relationship with the child.

The gendered distinctions countenanced in the 1970s and 1980s reemerged with greater force in the immigration context in subsequent decades. By the start of the twenty-first century, the Court turned to reproductive biology to justify a gendered order of parentage with respect to citizenship status—specifically for nonmarital parent-child relationships. While marital children enjoyed rights to citizenship based on mother-child and father-child ties, nonmarital children’s rights were restricted based on the sex of their citizen parent. This system reflected and enforced views about both the legitimacy of nonmarital family formation and the roles of women and men with respect to their nonmarital children.

First in Miller v. Albright and then in Nguyen v. INS, the Court considered the constitutionality of a statutory scheme making it more difficult for a nonmarital child born abroad to claim citizenship when

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100. See Albertina Antognini, From Citizenship to Custody: Unwed Fathers Abroad and at Home, 36 Harv. J.L. & Gender 405, 410 (2013) (explaining that the Court’s “decisions consistently reflect an assumption that the unwed father is absent and the unwed mother is present—not just at birth but in the child’s life thereafter”).
102. 441 U.S. 347, 348–49, 359 (1979) (plurality opinion).
103. Id. at 349.
104. Id. at 355.
105. Id. at 353–57. The Court rejected the father’s due process claim because the case involved a right to damages after a child’s death, rather than “the freedom of a father to raise his own children.” Id. at 358–59.
the citizen parent is the father. Where the citizen parent is the mother, the child acquires the mother’s nationality status at birth. But the citizen father, in addition to proving a biological connection, must take additional, post-birth steps—legitimation of the child, a written acknowledgement of paternity, or an adjudication of paternity—to evidence the social bonds of parenthood.

In *Miller*, a deeply fractured Court refused to hold the statutory provisions unconstitutional. Justice Stevens announced the Court’s judgment but delivered an opinion joined only by Chief Justice Rehnquist. The opinion reasoned that the anti-stereotyping principle implicated in the Court’s leading sex-equality precedents, many of which involved family-based rights and responsibilities, was “only indirectly involved in this case.” Instead, Justice Stevens relied on *Lehr*, which upheld the differential treatment of unmarried mothers and fathers, and concluded that “biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands.”

Resolving the constitutional issues left open in *Miller*, a sharply divided Court in *Nguyen* found no equal protection violation, largely because “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood.” The Court explained: “Given the proof of motherhood that is inherent in birth itself, it is unremarkable that Congress did not require the same affirmative steps of mothers.” But the Court translated differences in the biological dimensions of parenthood into differences in the social dimensions: “The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship.” But for the father, “[t]he same opportunity does not result from the event of birth, as a matter of biological

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109. 8 U.S.C. § 1409(c) (2012). Section 1409(c) additionally requires that “the mother ha[s] previously been present in the United States or one of its outlying possessions for a continuous period of one year.” *Id.*

110. *Id.* § 1409(a).

111. 523 U.S. at 424.

112. *Id.* at 423.

113. *Id.* at 442.

114. *Id.* at 441.


117. *Id.* at 64.

118. *Id.* at 65.
inevitability . . . .”119 In the earlier cases on unmarried fathers, a sex-based reproductive difference—gestation—could be understood to create a different parent-child relationship at birth. Now, that difference justified far-reaching distinctions in the post-birth relationships of unmarried mothers and fathers.

While the Court had warned that physiological differences cannot justify policies that reflect or perpetuate generalizations about the distinct capacities of women and men,120 the Nguyen Court rejected the argument that the differential treatment of mothers and fathers reflected “a stereotype that women are more likely than men to actually establish a relationship with their children.”121 Over a strong dissent, the Court viewed the immigration regulations as simply reflecting biological facts.122 Just as in earlier cases, the Court’s gender-differentiated treatment of parent-child relationships discounted the social performance of biological fathers.123 The father in Nguyen, after all, had parented his child for most of the child’s life.124 The decision relied on an approach to parenthood forged in previous decades,125 but subjected unmarried biological fathers to even more demanding standards in the immigration context.126

Conflict over sex-based distinctions in immigration continues. This term, the Court is considering a challenge to a law that placed more onerous residency requirements on unmarried fathers.127 Under the law at issue

119. Id.
121. 533 U.S. at 69.
122. As Reva Siegel has shown, because the Court reasons about reproductive regulation “as a form of state action that concerns physical facts of sex rather than social questions of gender,” it often neglects “the possibility that such regulation may be animated by constitutionally illicit judgments about women.” Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 264 (1992).
124. 533 U.S. at 57 (explaining how the child came to the United States before he turned six and was raised by his father).
126. See Abrams & Piacenti, supra note 123, at 634 (finding that “as a descriptive matter . . . immigration and citizenship law generally use more stringent standards for determining parentage than state family law”).
127. See Morales-Santana v. Lynch, 804 F.3d 520, 524, 532–33 (2d Cir. 2015), cert. granted, 136 S. Ct. 2545 (2016) (No. 15-1191). But see Flores-Villar v. United States, 564 U.S. 210 (2011) (per curiam) (affirming, by an equally divided Court, the Ninth Circuit’s determination that the differing residency requirements do not violate Equal Protection because the requirements are rationally related to the government’s interest in establishing a link between the citizen father, illegitimate child, and the United
in *Morales-Santana v. Lynch*, a nonmarital child born abroad to a citizen mother enjoyed citizenship at birth if the mother resided in the United States (or U.S. possession) for at least one year at some point prior to the child’s birth.\(^{128}\) But if the citizen parent is the father, a child attained citizenship at birth only if the father resided in the United States (or U.S. possession) for a total of ten years, at least five of which must occur after age fourteen.\(^{129}\) While the statute has been amended, a similar distinction persists in modern immigration law, though with a shorter physical-presence requirement for fathers.\(^{130}\) The government has defended the law challenged in *Morales-Santana* based in part on a contention about parentage law: that, for a nonmarital child, the mother and not the father is “typically” the only legal parent at the moment of birth.\(^{131}\) But that says nothing of the actual parent-child relationships that develop after birth. Here, the father legitimated the child by marrying the mother when the child was eight.\(^{132}\) Yet that legitimation is insufficient to confer citizenship in light of the pre-birth residency requirements.

Of course, these immigration cases involve only unmarried parents, reflecting the law’s continued division between marital and nonmarital parenthood.\(^{133}\) The immigration system has perpetuated views not only about the gender-based roles of women and men with respect to their nonmarital children, but also about the place of nonmarital parents and children. Both the gender- and marriage-based forms of differentiation in the immigration cases reflect understandings that structured the Court’s earlier cases with respect to family law. Yet the immigration cases have relied more extensively on gender differentiation in parenthood and have done so in ways that are more punitive to nonmarital parents and children.

II. **Assisted Reproduction and Parenthood’s Modern Liberalization**

For centuries, individuals who aspired to parenthood as a meaningful life project had their desires frustrated. Women who could not become pregnant or carry a pregnancy to term, as well as men who

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\(^{129}\) Id. § 301(a)(7), 66 Stat. 163, 236 (codified at 8 U.S.C. § 1401(a)(7) (1952)); see also id. § 309(a), 66 Stat. 163, 238–39 (codified at 8 U.S.C. § 1409(a)).

\(^{130}\) Compare 8 U.S.C. § 1409(a) (2012), with id. § 1409(c).


\(^{132}\) See Morales-Santana, 804 F.3d at 524.

suffered from infertility, would live without the families they imagined. Adoption became widespread over the course of the twentieth century and offered a path to parenthood for some, but many either had their attempts rejected by restrictive adoption regimes or simply decided to forego parenting without the possibility of biological children.

In the late twentieth century, assisted reproductive technologies (ART) offered new hope to these individuals and, in the process, transformed practices of family formation. Married heterosexual couples who in previous generations would have gone without children found opportunities for parenthood through ART. Use of donor sperm had for decades allowed women with infertile husbands to have children—often without anyone but the doctor knowing that the child was not biologically related to the husband. Now, women who themselves struggled with infertility found hope in a variety of new techniques. In vitro fertilization (IVF), in which fertilization occurs outside the woman’s body, allowed many women to carry and bear their own genetic children. By separating gestation from genetics, IVF also facilitated new practices of egg donation and gestational surrogacy.


137. See John A. Robertson, Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction, 59 S. CAL. L. REV. 939, 942–43 (1986). The first IVF child was born in 1978, but it took years before the procedure became more successful and accessible.

138. See Sarah Franklin, Biological Relatives: IVF, Stem Cells, and the Future of Kinship (2013); Charis Thompson, Making Parents: The Ontological Choreography of Reproductive Technologies (2005). With the assistance of an egg donor, infertile women could become mothers to children they carried and birthed. And women who could not carry a pregnancy but desired a child with a genetic link to themselves or their husbands found hope in gestational surrogacy. Unlike a traditional surrogate, a gestational surrogate carries a child genetically related to another woman—either the intended mother or an egg donor.

a fifty percent jump over the previous decade.\textsuperscript{140} The number of children born with donor gametes grew,\textsuperscript{141} as did the number born to gestational surrogates.\textsuperscript{142} While married different-sex couples were the first to use ART, others eventually turned to ART to form less traditional families. Single women used donor insemination to become mothers, while gays and lesbians engaged in donor insemination, IVF, and surrogacy to have children.\textsuperscript{143} As the social meaning and practical import of ART shifted,


\textsuperscript{142} Reliable data on gestational surrogacy are not available, but the rise in the number of children born through the process is clear. See S. A. Grover et al., Analysis of a Cohort of Gay Men Seeking Help with Third-Party Reproduction, 98 Fertility \& Sterility (Supplement) S48, S48 (2012). Limited data from the Centers for Disease Control and the Society for Assisted Reproductive Technology indicate “an exploding market, one that nearly doubled from 2004 to 2008, producing a total of 5,238 babies over just four years.” See Magdalina Gugucheva, Surrogacy in America, COUNCIL FOR RESPONSIBLE GENETICS 7 (2010), http://www.councilforresponsiblegenetics.org/pagedocuments/KAeVeJ0A1M.pdf [http://perma.cc/H537-QF9T].

questions of parental recognition began to implicate emergent commitments to gender and sexual-orientation equality.  

This Part examines the law’s response to parent-child relationships formed through ART, bringing together developments across jurisdictions and involving a range of family arrangements made possible by donor insemination, IVF, and gestational surrogacy. In some states, family law has aggressively attempted to adapt to developments in parenthood by broadly facilitating family formation through ART and legally recognizing a range of nonbiological parents. But the focus here is on a wider swath of jurisdictions, where law has rendered some individuals legal parents to their children while leaving others legal strangers. Accordingly, (July 2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/htag-parent-families-july-2014.pdf [http://perma.cc/23Y7-2H44]

144. Whereas different-sex couples often use ART to form biological parent-child relationships, same-sex couples often use ART to form less traditional family bonds, defying the heterosexual, gendered, and biological norms of parenting. In the 1980s and 1990s, powerful critiques of ART raised equality concerns with respect to sex, race, and class. See, e.g., Gena Corea, The Mother Machine 2–3 (1985); Janice G. Raymond, Women as Wombs 30–31 (1993); Barbara Katz Rothman, Recreating Motherhood 22–23 (1989); Dorothy Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209, 210 (1995). Those critiques focused largely on heterosexual family formation and the prioritization of what Dorothy Roberts called “the genetic tie.” See id. at 213 (exploring “how race, along with gender, continues to determine the meaning of the genetic tie”). Even as practices of ART emphasize biological connections, they also destabilize the importance of biological contributions—and do so most powerfully with single and same-sex parenting. Accordingly, an understanding of how ART has facilitated family formation that challenges traditional norms may suggest the need to qualify equality-inflected critiques of ART. Indeed, this Article’s relatively affirmative treatment of ART finds common ground with Roberts’s critique of ART specifically with respect to the call to “reconceive the genetic tie as a nonexclusive bond that forms the basis for a more important social relationship between parents and children.” Id. at 214. Importantly, the point here is not to suggest that equality concerns no longer support critiques of ART, but rather to show how equality concerns also came to animate pro-ART efforts. For other work in this vein, see Cahill, supra note 13, at 683–85; Martha M. Ertman, What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification, 82 N.C. L. Rev. 1, 37 (2003) (“One important effect of new family forms is that they increase agency for women and gay people generally by undermining patriarchal understandings of family.”).


146. In the vast majority of situations involving ART, the various parties agree on who should parent the child. Courts need not decide on conflicting claims between those with biological and social claims to recognition. Instead, an individual who seeks parentage on social grounds does so in circumstances in which another individual with a biological connection does not seek parentage. In other words, the intended parent understands herself as a parent, and the gestational surrogate or gamete donor does not. Yet law may assign parentage in ways that diverge from these shared understandings.

In a relatively small number of cases, the parties disagree, or disagreement emerges over time. Law may then assign parentage in ways that match some of the parties’ wishes but not others. Given that this Part focuses substantially on litigated cases, it
having surveyed the law across all jurisdictions, this Part attempts to capture approaches that are representative, focusing on majority positions and clear modern trends, rather than attending to less common statutory regimes and judicial decisions.\textsuperscript{147}

The account presented here is structured around a set of related distinctions that shape legal recognition: marital and nonmarital parent-child relationships, biological and nonbiological parent-child relationships, motherhood and fatherhood, and different-sex and same-sex couples.\textsuperscript{148} It shows how, even as principles of gender and sexual-orientation equality have animated shifts in parental recognition, parentage law continues to draw distinctions that carry forward legacies of inequality embedded in frameworks forged in earlier eras.

As Part I explained, the common law organized parentage around the gender-hierarchical relationship of marriage. The marital presumption historically facilitated the parental recognition of men who were not in fact biological fathers. When, in the second half of the twentieth century, the Court intervened to protect nonmarital parent-child relationships on constitutional grounds, it made biological connection necessary for legal recognition. Yet biological connection operated differently for mothers and fathers. For the Court, gestation and birth inevitably produced legal motherhood. Unmarried biological fathers, in contrast, were required to demonstrate the social bonds of parenthood to have legally protected rights. Inside marriage, men could achieve legal parenthood without biological parenthood. Outside marriage, men could assert biological parenthood but still lack legal parenthood. For women, in contrast, biological and legal parental ties traveled together, both inside and outside marriage.\textsuperscript{149}

As this Part shows, the gender-differentiated logic of both the common-law approach and its constitutional repudiation have structured law’s response to ART. When the law accommodated the use of donor insemination by married different-sex couples, it openly acknowledged includes some cases involving disagreement; but these cases represent only a sliver of families formed through ART.

147. The legal landscape includes both legislation and adjudication. While statutes demonstrate developments in the law, cases provide a fuller picture of the reasoning that shapes the law of parental recognition. In addition, given that legislatures in most states have been slow to respond to ART, judicial decisions have been critical drivers of legal change in this area. Nonetheless, this Part does not include the kinds of parentage judgments that some trial courts have been willing to issue without explicit statutory or judicial authority.

148. To deliberately form legally recognized dual-parent families, same-sex couples engage in ART or adoption (either jointly or through adoption by one parent of the other parent’s child). Accordingly, for same-sex couples, attention to ART encompasses the mode of family formation—nonadoptive parentage—that is the focus of this Article.

149. See Dolgin, supra note 1, at 108 (“Biology, in short, gives men options . . . . Mothers, wed or unwed, do not have the same choices.”).
and expanded marriage’s capacity to derive legal fatherhood purely from social arrangements. Courts and legislatures treated the man married to the biological mother as the child’s father.

While legal fatherhood’s nonbiological capacity inside marriage expanded, legal motherhood largely remained a biological status—even as ART complicated motherhood’s biological basis. A woman who gives birth to a child conceived with a donor egg is a legal parent; the biological facts of gestation and birth, along with her intention to be the child’s mother, render her the legal mother. Similarly, a woman who uses her own egg but engages a gestational surrogate to carry the child is a legal parent; the genetic contribution and her intention to be the child’s mother render her the legal mother. Social aspects of parenthood now shape determinations of motherhood, but, unlike fatherhood, not in ways that dislodge parental recognition from biological connection. When a woman both engages a gestational surrogate and uses a donor egg, the law often fails to treat her as a legal mother. As this Part makes clear, men without biological ties attain parenthood by virtue of marriage to the biological mother, but women without biological ties do not attain parenthood by virtue of marriage to the biological father.

The common law organized parenthood around a legal relationship—marriage—that was not only gender-hierarchical but also exclusively heterosexual. As Part I explained, when courts and legislatures endeavored to protect nonmarital parent-child relationships, they turned explicitly to biological connection as a basis for parental recognition. But tethering parenthood to biological ties perpetuates the exclusion of same-sex couples, who necessarily include a parent without a gestational or genetic connection to the child.

Marriage has intervened in ways imagined to remedy the struggles of same-sex couples. Indeed, the Court in Obergefell focused on parenthood, specifically listing “birth . . . certificates; . . . and child custody, support, and visitation” as “aspects of marital status” that would now be open to same-sex couples. Yet, as this Part shows, the law has accommodated same-sex parenting within a framework shaped by the gender-differentiated, heterosexual family—recognizing nonbiological parents in married same-sex couples to the extent they satisfy criteria used to identify legal fathers. Women, not men, in same-sex couples gain access to parenthood through marriage. The woman married to the biological mother can be recognized as the legal parent by virtue of her marriage. Men in same-sex couples find themselves in the same position

150. See, e.g., Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 504 (N.Y. 2016) (Pigott, J., concurring) (claiming that with marriage equality, “[s]ame-sex couples are now afforded the same legal rights as heterosexual couples and are no longer barred from establishing the types of legal parent-child relationships that the law had previously disallowed”).

as women in different-sex couples. Neither can attain parentage by virtue of marriage to the biological father, and both struggle for parental recognition in the absence of a biological connection to the child.

Ultimately, this Part’s treatment of parental recognition and ART reveals a critical dynamic: courts and legislatures continue to structure the legal family around a biological mother. Biological fathers can be replaced—by either women or men who make purely social claims to parental recognition—yet biological mothers remain necessary. Within this regime, women who separate motherhood from biological ties and men who parent with a same-sex partner often go without legal recognition. To uncover this dynamic, this Part begins with donor insemination and then moves through family formation made possible by IVF, concluding with egg-donor gestational surrogacy.

A. Donor Insemination

The first and most basic form of assisted reproduction, donor insemination, forced law to confront situations in which the biological and social dimensions of parenthood point in different directions. While the identity of the biological and legal mother was clear, law struggled with determinations of who, if anyone, would be the child’s second parent. Ultimately, courts and legislatures expanded the marital presumption’s capacity to obscure biological facts in favor of social arrangements that privileged marriage. With donor insemination, law treated the man married to the biological mother as the child’s father.

As this Section shows, same-sex family formation eventually injected contemporary questions of equality into the regulation of donor insemination, as women in same-sex couples sought legal recognition for the nonbiological mother. In the absence of adoption by the nonbiological mother, parental recognition largely emerged from presumptions of parentage applicable only to married couples; the birth mother’s legal spouse could be recognized as a legal parent regardless of sex or sexual orientation. But outside marriage, same-sex couples continued to struggle for parental recognition; the nonbiological mother would rarely be recognized as the child’s legal parent at the time of the child’s birth. For those outside marriage, biological connections continued to structure parental recognition—rendering same-sex couples, who are not similarly situated to different-sex couples with respect to biological parenthood, especially vulnerable.

1. Different-Sex Couples, Marriage, and Nonbiological Fathers

Donor insemination, which law first confronted within the marital family, exposed the confused state of the marital presumption, which assumed biological paternity but could recognize relationships that deviated from biological facts. Donor insemination made such deviations deliberate, even if not plainly visible.
Courts and lawmakers initially responded by condemning donor insemination as a threat to the “natural” family and rejecting application of the marital presumption. Because the woman conceived with semen from another man, she was thought to have committed adultery, and the resulting child was considered “illegitimate.”

This logic remained rooted in men’s entitlements, and specifically concerns with “the possibility of introducing into the family of the husband a false strain of blood.”

Despite this hostile legal backdrop, the practice of donor insemination became more widespread. Beyond the couple and their doctor, few knew that a child was conceived with donor sperm. Judges and lawmakers eventually responded and, by the mid-1960s and early 1970s, began to expressly treat the husband of a woman who conceived with donor sperm as the child’s “lawful” father.

Following the 1973 UPA, most states adopted statutory provisions providing that marriage to the mother and consent to assisted reproduction yielded parental recognition for the husband. The husband’s consent demonstrated his willingness to introduce another man’s “blood” into his family line. At the same time, his recognition allowed the state to assure the child’s support from private sources.

Since most states, as well as the original UPA, limited donor-insemination provisions to married couples, those provisions merely replicated the marital presumption’s logic. In fact, in the many states that failed to enact donor-insemination statutes, the husband of a woman giving birth to a child conceived with donor sperm is presumed the child’s legal father simply by virtue of the marital presumption. Marriage had always served as an imperfect proxy for biological paternity. But by explicitly accepting donor insemination, law embraced social fatherhood in ways that rendered marriage not a proxy but a substitute for biological paternity.

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156. See Sorensen, 437 P.2d 495 (finding criminal nonsupport).


158. See NeJaime, supra note 16, at 1245 n.354.
2. Same-Sex Couples, Marriage, and Nonbiological Mothers

By the 1980s and 1990s, donor insemination furnished lesbian couples a relatively accessible path to child-rearing. Excluded from marriage, same-sex couples inhabited a nonmarital parentage regime that mostly turned on biological connections. Since only one of the women would have a biological connection to the child, the other found herself a legal stranger upon the child’s birth. For many years, courts in most states refused to provide comprehensive legal recognition to the nonbiological mother. Over time, in an effort to provide some protections to same-sex parents, some states furnished legal recognition to nonbiological mothers even in the absence of second-parent adoption. Yet even in these states, legal recognition did not arise at the child’s birth and instead required some period of parenting.

By the 2000s, access to marriage became the chief test of equality for same-sex couples, and was understood to protect not only their romantic bonds but also their parent-child relationships. As same-sex couples gained entry to marriage—first on a state-by-state basis, and then nationwide with Obergefell—they began to press claims to parental recognition by virtue of their marital relationships. Marriage, of course, had shown the capacity to allow individuals to achieve parentage on social rather than biological grounds. While only men, not women, had received parental recognition without a biological connection, judges and lawmakers soon accommodated married women.

Courts and legislatures adapted donor-insemination regulations governing married different-sex couples to married same-sex couples. Provisions recognizing the mother’s husband as the legal father can similarly treat the mother’s wife as the “natural,” and thus legal, parent. While Appendix A shows that only about a third of states with donor-insemination statutes currently maintain gender-neutral provisions, courts that have considered the issue in other states have, almost without exception, applied these statutes to married same-sex couples.


160. See supra note 24.


163. See infra Appendix A (listing twelve gender-neutral donor insemination statutes); Appendix B (listing thirty-eight state donor-insemination statutes).

164. See infra Appendix A. But see Smith v. Pavan, 505 S.W.3d 169 (Ark. 2016) (declining to recognize same-sex spouses of women on Arkansas birth certificates).
In many states, such application has been aided by explicit gender-neutrality directives modeled on the UPA. The original UPA provides that in actions “to determine the existence or nonexistence of a mother and child relationship[.] [i]nsofar as practicable, the provisions . . . applicable to the father and child relationship apply.”  

The revised UPA includes a similar directive, stating that the provisions “relating to determination of paternity apply to determinations of maternity.” While the UPA drafters viewed “cases involving disputed maternity [as] extraordinarily rare,” same-sex couples tested the reach of these gender-neutrality directives. With marriage equality, courts began to treat the nonbiological mother like a legal “father.” Gender neutrality furthered principles of not only sex but also sexual-orientation equality.

Strikingly, specific donor-insemination statutes have become in some ways ancillary, as states have simply applied the marital presumption to lesbian couples. A New York court, for instance, determined that common-law and statutory presumptions of parentage must be interpreted in a “gender-neutral” manner in light of the onset of marriage equality, and so concluded that “the child of either partner in a married same-sex couple will be presumed to be the child of both, even though the child is not genetically linked to both parents.” As Appendix A shows, some state legislatures have revised not only their donor-insemination provisions but also their marital presumptions to recognize that the person married to the “woman giving birth” or the “natural mother” is presumed to be the child’s legal parent. In these states, the marital presumption, long capable of hiding contrary biological facts, expressly embraces purely social aspects of parenthood. If law is not pretending that the individual presumed to be the parent is the biological parent, it no longer seems necessary that that individual be a man.

167. Id. § 106 cmt.; see also Unif. Parentage Act § 21 cmt. (Unif. Law Comm’n 1973) (declaring that “it is not believed that cases of this nature will arise frequently”).
168. See infra Appendix A; see also NeJaime, supra note 16, at 1242–48 (describing states’ different levels of receptivity to applying the marital presumption to same-sex spouses).
169. Wendy G-M v. Erin G-M, 985 N.Y.S.2d 845, 860–61 (Sup. Ct. 2014). Other New York courts have provided less clear guidance on the presumption’s application. See, e.g., Q.M. v. B.C., 995 N.Y.S.2d 470, 474 (Fam. Ct. 2014) (“It is this court’s view that the Marriage Equality Act does not require the court to ignore the obvious biological differences between husbands and wives . . . . Thus [the law] . . . does not preclude differentiation based on essential biology.”).
170. Fewer than ten states have legislated explicitly in this way as a means of addressing same-sex couples. See infra Appendix A. While a few additional states maintain a statutory marital presumption that does not include gender-specific language, these provisions predate marriage for same-sex couples and were not enacted to address same-sex family formation.
171. See NeJaime, supra note 16, at 1240–49.
parenthood for both men and women can derive from marriage to the biological mother.

While many of these developments emerged solely as a matter of family law, constitutional equality commitments also drove judicial decisions applying the marital presumption to same-sex couples. After Obergefell, courts have held that donor-insemination provisions must allow the biological mother’s wife to be treated as the child’s natural parent, just like a husband would be.\textsuperscript{172} Several courts have also held that equal protection requires the general marital presumption to apply to lesbian couples.\textsuperscript{173}

Nonetheless, the reach of the marital presumption is far from settled.\textsuperscript{174} Even though courts considering the issue have largely required application of the marital presumption to lesbian couples, some state governments continue to defend parenthood as a biological fact and assert that the marital presumption serves as a proxy for biological parenthood. Yet these states have allowed married men in different-sex couples to use the presumption to derive legal fatherhood of children conceived through donor insemination.\textsuperscript{175} Now, when confronted with same-sex couples who make deviations from biology obvious, these states have struggled to frame this nonbiological application to different-sex couples as an exception to be minimized, rather than extended.

Courts generally have responded skeptically to these resistant states. For example, a federal district court in Indiana recently considered a number of cases in which state officials expressly told married same-sex couples they could not both be listed on the birth certificate and that the nonbiological mother would have to adopt her child.\textsuperscript{176} Repudiating the state’s actions, the court ruled that Indiana cannot offer mothers with different-sex spouses the “legal fiction” facilitated by the marital presumption but withhold that “legal fiction” from mothers with same-sex spouses.\textsuperscript{177} The marital presumption had become a critical site for the promotion of sex and sexual-orientation equality.


\textsuperscript{174} See NeJaime, supra note 16, at 1245–46.

\textsuperscript{175} See, e.g., Henderson, 2016 WL 3548645 at *9.

\textsuperscript{176} Id. at *4.

\textsuperscript{177} Id. at *13.
3. **Donor Insemination Outside Marriage**

For married couples using donor insemination, the law has increasingly recognized their claims to parentage. Both nonbiological fathers in different-sex couples and nonbiological mothers in same-sex couples attain parentage by virtue of marriage to the biological mother. While parentage inside marriage has tracked individuals’ expectations about their parent-child bonds, parentage outside marriage in the context of donor insemination often has not.

As Appendix B shows, most states draw marital-status distinctions in their treatment of donor insemination. Spouses, not unmarried partners, are recognized as legal parents of children conceived with donor sperm.\(^{178}\) Further, under the original UPA and the laws of many states, sperm donors are divested of rights and responsibilities only if they donate sperm for use by a married woman.\(^{179}\) The nonrecognition of unmarried nonbiological coparents and the legal recognition of sperm donors both complicate ART for unmarried individuals and threaten the stability of nonmarital families.

The nonrecognition of nonbiological unmarried parents is particularly problematic for same-sex couples, who are not similarly situated to different-sex couples as a matter of biological parenthood. Same-sex couples necessarily include a parent without a gestational or genetic tie to the child,\(^{180}\) and thus are especially vulnerable in a parentage regime where recognition turns on biological connection. Yet courts have generally held that laws meet equality commitments as long as a nonbiological lesbian coparent in an unmarried same-sex couple is treated the same as a nonbiological father in an unmarried different-sex couple.\(^{181}\)

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178. Whether through explicit legislation or a lack of legislation, this is the case in more than forty states. See infra Appendix B. Fewer than ten states have explicit provisions allowing for the unmarried partner’s recognition. (These are the states in Appendix B with a statute regulating donor insemination and no mark in the first column. See infra Appendix B.).

179. This remains the case in more than half the states, with only about fifteen states explicitly providing that a man who donates sperm to a woman who is not his wife is not the child’s legal father. See infra Appendix B.

180. To be clear, that parent may have a biological relationship because of a relative’s gamete donation or gestational role, but does not have a legally cognizable gestational or genetic connection.

181. See In re Madrone, 350 P.3d 495, 501 (Or. Ct. App. 2015) (reasoning that because the donor-insemination statute “would not apply to an opposite-sex couple that made that choice [not to marry], it follows that the statute also should not apply to same-sex couples that make the same choice”); State ex rel. D.R.M., 34 P.3d 887, 892–93 (Wash. Ct. App. 2001) (reasoning that the nonbiological lesbian mother “is not being treated differently than an unmarried man under similar facts” and is therefore not being denied equal protection “based on . . . gender or sexual orientation”); see also Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 504 (N.Y. 2016) (Pigott, J., concurring) (asserting that “an unmarried individual who lacks a biological or adoptive connection to a child [born outside marriage] does not have standing . . . regardless of gender or
jurisdictions, neither of these individuals ordinarily enjoys parentage without adoption. 182

Lacking statutory or equitable paths to recognition, the unmarried coparent, even after years of parenting, generally finds no relief in constitutional doctrine. 183 For instance, in *Russell v. Pasik*, a lesbian couple had four children with the same donor sperm, with each woman giving birth to two children. 184 They raised the children together for years, but after the couple’s relationship dissolved, only the biological parent-child relationships enjoyed legal recognition. The Florida appellate court rejected the argument that each woman had constitutionally protected rights with respect to each child. 185 The court acknowledged the significance of the social performance of parenthood, explaining that “the act of assuming parental responsibilities and actively caring for a child is sufficient to develop constitutional rights in favor of the parent.” 186 But, recalling the earlier cases on unmarried fathers, it then explained that this path to parental rights springs only from biology: “[I]t is the *biological connection between parent and child* that ‘gives rise to an inchoate right to be a parent that may develop into a protected fundamental constitutional right based on the actions of the parent.’” 187 Each woman enjoyed a legally protected relationship only with the children to whom she gave birth.

Equality for same-sex couples had been channeled through marriage and its ability to legally recognize nonbiological fathers. Most states grafted the two legal regimes that had formed to regulate parenthood—marriage and biology—onto donor insemination and thus sharply differentiated between marital and nonmarital families. A man, and now a woman, can be a legal parent of a child conceived with donor sperm if that man or woman is married to the biological mother. In an effort to protect *nonmarital* parent-child relationships that had been excluded by the common law’s marital order, courts and legislatures had turned

182. More than half of the states have mechanisms—equitable or statutory—that allow an unmarried nonbiological parent to obtain custody or visitation. See infra Appendix C. At times, these paths provide only some parental rights, or fail to treat the unmarried nonbiological parent as standing in parity with the legal parent. These state mechanisms also usually require an extensive period of parenting, thus leaving the unmarried nonbiological parent a stranger at the time of the child’s birth and for some significant period afterwards. Further, they ordinarily require a judicial determination, leading unmarried nonbiological parents to rely on courts to obtain custody or visitation.

183. Once a nonbiological parent qualifies as a legal parent as a family law matter, she has constitutional parental rights, S.Y. v. S.B., 134 Cal. Rptr. 3d 1 (App. Dep’t Super. Ct. 2011), but this is distinct from the idea that the nonbiological parent has a constitutional interest in being recognized as a parent.


185. See id. at 60.

186. *Id.* (quoting D.M.T. v. T.M.H., 129 So. 3d 320, 338 (Fla. 2013)).

187. *Id.*
explicitly to biological connection as a basis for parental recognition. But tethering parenthood to biological ties perpetuates same-sex couples’ exclusion. The unmarried mother’s partner, with neither a biological nor marital basis for parental recognition, will ordinarily be a legal stranger upon the child’s birth, even if she intends to parent the child and does in fact parent the child.

B. *In Vitro Fertilization, Egg Donation, and Gestational Surrogacy*

While donor insemination challenged the relationship between the biological fact of paternity and the social role of fatherhood, IVF, in which the egg is fertilized outside the woman’s body, challenged the relationship between the biological facts of maternity—gestation and genetics—and the social role of motherhood. By separating gestation from genetics, IVF made biological connection itself a more complex marker of parenthood. The biological fact of motherhood had always followed seamlessly from birth, but now a woman could give birth to a child genetically related to another woman. Of course, many women used IVF in ways that allowed them to give birth to their own genetic children. But the technology also facilitated important new practices—egg (and embryo) donation, gestational surrogacy, and “co-maternity”—that divided biological maternity across two women.

Courts and legislatures, this Section shows, navigated these new situations in ways animated by commitments to gender and sexual-orientation equality. Women, they recognized, could attain legal motherhood based on birth or genetics, and, correspondingly, could separate the physical facts of pregnancy and birth from the social role of motherhood. The legal status of motherhood followed not simply from the biological fact of maternity but from the social performance of parenthood. Not only could women in different-sex couples achieve parental recognition based on birth or genetics, but women in same-sex couples could each achieve parental recognition by having one woman be the genetic mother and the other be the gestational mother. Nevertheless, even as social markers of parenthood became critical to legal determinations of motherhood, a biological connection—whether gestation or genetics—remained critical to legal motherhood. Law continued to ground motherhood, unlike fatherhood, in a biological tie.

1. *Donor Eggs and Birth Mothers*

The use of donor eggs or embryos did not ordinarily provoke controversy. Since the woman giving birth was the intended mother, others would rarely know she was not genetically related to the child. When disputes arose, they often occurred upon dissolution of a relationship, when

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188. See Dolgin, *supra* note 1, at 3 (arguing that “it is no longer possible to judge questions about the social dimensions of motherhood against the unchanging parameters of biological maternity”).
the birth mother’s husband or partner (and the child’s biological father) attempted to use the mother’s lack of genetic connection to deny her parental status.

As courts and legislatures approached these conflicts, social factors that had begun to shape legal fatherhood in the regulation of donor insemination provided guidance. Consider a representative case from Tennessee. Cindy and Charles, an unmarried couple in their mid-forties, decided to have children together. Cindy, who already had children, was concerned about the viability of her eggs and thus turned to donor eggs and IVF. After Cindy gave birth to triplets, she and Charles raised the children together. When the couple later broke up, Charles attempted to use Cindy’s lack of genetic connection to deprive her of parental rights.

The Tennessee Supreme Court rejected his argument. In recognizing Cindy as the legal mother, the court focused on the fact that both she and Charles intended that she be the children’s legal mother. The court looked to the state’s donor-insemination statute to support its consideration of intent, explaining how that statute “confers parental status on a husband even though the child conceived in his wife via artificial insemination is not necessarily genetically related to him.” So too could Cindy, not genetically related to the children, be their legal mother. Other courts analogized egg (and embryo) donation to sperm donation, and, as Appendix D shows, many states codified this result—divesting egg and embryo donors of parental rights and rendering the intended (birth) mother the legal mother.

Nonetheless, there was an important difference between Cindy and a man whose wife conceives with donor sperm. The birth mother who uses donor eggs still claims a biological, even if not genetic, connection to the child. As the Tennessee court noted, Cindy claimed maternity based on the biological marker relied upon in the common law—birth. And that fact was critical to the court’s judgment. Indeed, parenthood laws across the country continue to provide that maternity may be established by giving birth. Unlike men whose wives use donor insemination, women

190. *Id.*
191. *Id.*
192. *Id.* at 718.
193. *Id.* at 718–19.
194. *Id.* at 728.
196. See infra Appendix D.
197. *In re C.K.G.*, 173 S.W.3d at 729 (concluding that “gestation is an important factor for establishing legal maternity”).
198. See, e.g., *Ohio Rev. Code Ann.* § 3111.02 (LexisNexis 2015) (“The parent and child relationship between a child and the child’s natural mother may be established by proof of her having given birth to the child . . . .”).
using donor eggs turn to intent as a supplement to, rather than substitute for, biological markers of parenthood. For these women, gestation and birth constitute biological maternity, and thus form the basis of a claim to parentage. Intention—a social criterion—supports parental recognition that follows from this biological connection.

2. **Gestational Surrogacy and Genetic Mothers**

In contrast to the relatively few disputes involving donor eggs, the use of IVF in surrogacy provoked greater controversy by disturbing the foundational assumption that the woman giving birth is the child’s mother. When surrogacy first attracted national attention with New Jersey’s infamous *Baby M* case in the 1980s, the focus was on traditional surrogacy, in which the surrogate is both the child’s gestational and genetic mother. Courts and commentators attended to the rights of the surrogate, not the nonbiological intended mother. The intended mother was simply a legal stranger who, even if surrogacy were accepted, would have to adopt the child.

After the New Jersey Supreme Court repudiated surrogacy in *Baby M*, many state legislatures considered—and some passed—bans on the practice. At that time, sex-equality arguments animated the rejection of surrogacy. Judges and lawmakers, as well as scholars and activists, worried about the exploitation of women, the commodification of women’s reproductive capacity, and the deprivation of biological mothers’ rights. As Elizabeth Scott has shown, views on surrogacy shifted over time for several reasons. Some women’s rights advocates pulled back after seeing arguments against surrogacy invoked to restrict women’s reproductive rights more generally. Empirical work presented a more

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199. See McDonald v. McDonald, 608 N.Y.S.2d 477, 480–81 (App. Div. 1994) (holding that when genetics and gestation do not coincide in one woman, the intended mother should be the legal parent).


202. See, e.g., *In re Baby M*, 537 A.2d at 1241–46 (focusing on the status of the surrogate mother and the biological father, and assuming that even if the surrogacy agreement were accepted, the intended mother would have to adopt the child).


206. See Scott, *supra* note 12, at 144 (“[I]t became clear that support for restrictions on surrogacy undermined pro-choice advocacy.”).
complicated picture of surrogacy in the United States, one that bore little resemblance to predictions of coercion and exploitation.\textsuperscript{207} And, most critically, the introduction of \textit{gestational} surrogacy, in which the woman giving birth is not genetically related to the child, dramatically reshaped the regulatory framework and social norms governing surrogacy.\textsuperscript{208} Not only did the surrogate have no genetic connection to the child, but the intended mother could be the genetic mother. In response, courts soon drew distinctions between traditional and gestational surrogacy in ways that suggested that sex-equality commitments required \textit{acceptance} of the practice.

In its landmark 1993 decision in \textit{Johnson v. Calvert},\textsuperscript{209} the California Supreme Court recognized a child’s genetic intended mother as the legal mother, over the objection of the gestational surrogate. The court articulated a doctrine of intentional parenthood that would reverberate across the country.\textsuperscript{210} After concluding that “both genetic consanguinity and giving birth [are] means of establishing a mother and child relationship,” the court reasoned that “when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.”\textsuperscript{211} An intent-based rule, the court concluded, would “best promote certainty and stability for the child.”\textsuperscript{212}

In the years that followed, other states recognized intended mothers as legal mothers if they were also genetic mothers.\textsuperscript{213} Consider a case from Massachusetts. Marla Culliton was “incapable of bearing and giving birth to a child without unreasonable risk to her health.”\textsuperscript{214} She and her husband, Steven, entered into an arrangement with Melissa Carroll, a single woman who agreed to serve as a gestational surrogate. The embryos gestated by Melissa were created from Steven’s sperm and Marla’s ova, thus allowing the Cullitons to have their own biological children.\textsuperscript{215} All


\textsuperscript{208} See Scott, \textit{ supra} note 12, at 139–42.
\textsuperscript{209} 851 P.2d 776, 782 (Cal. 1993).
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id. at 783.
\textsuperscript{214} See \textit{Culliton}, 756 N.E.2d at 1135 (quoting the gestational surrogacy contract in this case).
\textsuperscript{215} See id.
three parties sought the same relief in court, asking that Marla, and not Melissa, be recognized as the legal mother.\textsuperscript{216}

In an earlier case, the Massachusetts Supreme Judicial Court had required adoption by an intended mother in circumstances involving traditional surrogacy.\textsuperscript{217} Yet with the new scenario presented by the Cullitons, the court ruled that adoption would not be required in circumstances of gestational surrogacy where the intended mother is the genetic mother.\textsuperscript{218} Marla would be the legal mother, and Melissa would not.

Ordinarily, the child born to an unmarried woman—here, Melissa—would not be a child of a marriage. But Marla’s genetic connection changed that calculus. “While the twins technically were born out of wedlock,” the court explained, they “were conceived by a married couple [and] [i]n these circumstances the children should be presumed to be the children of marriage.”\textsuperscript{219} Marla did not attain parenthood by virtue of her marriage to Steven, the biological father. Rather, Marla’s genetic connection allowed her to claim legal motherhood, and thus to claim the children as children of the marriage. With gestational surrogacy, a child could qualify as a “child of the marriage” based on the mother’s genetic connection, even if she did not give birth to the child.

Taken together, the emerging legal regulation of gestational surrogacy and egg donation made motherhood a contested biological, social, and legal status. Either gestation or genetics can be the basis of motherhood, and neither gestation nor genetics is itself necessary to motherhood. A woman can be a legal mother when she gives birth to a child genetically related to another woman (an egg donor), and a woman can be a legal mother when she is genetically related to a child carried by another woman (a gestational surrogate).\textsuperscript{220}

With the expansion of women’s reproductive and parental options, motherhood became contingent on social factors. Faced with two women who could claim a biological tie to the child—one gestational, the other genetic—courts turned to intent to determine which biological mother was the legal mother. While the role of intent in some ways mirrored determinations of legal fatherhood in the donor-insemination context, the legal mother still enacted parenthood biologically—either as a genetic progenitor or through pregnancy and birth.\textsuperscript{221} Law could preserve motherhood as a biological status, even as it resorted to social factors to

\textsuperscript{216} Id. at 1136.
\textsuperscript{218} See Culliton, 756 N.E.2d at 1137–38.
\textsuperscript{219} Id. at 1137.
\textsuperscript{220} Express statutory or appellate authority for the genetic intended mother’s parental status exists in a majority of states. See infra Appendix E. In other states, trial-court decisions (not considered here) may also provide this result.
determine its legal status. While social factors supplanted biological ties in the donor-insemination context, here they merely *supplemented* biological factors.

The shifts charted above occurred as a matter of state parentage law. But in those states that resisted shifts in maternity provoked by ART, courts turned to state and federal constitutional law to credit the claims of genetic intended mothers who had engaged a gestational surrogate. Sex equality, courts reasoned, required recognition of women who are genetic, but not gestational, mothers. In particular, parentage for *married genetic mothers* followed from the earlier recognition of *unmarried biological fathers*. In 1994, in *Soos v. Superior Court*, a woman “unable to have children because of a partial hysterectomy” had her eggs removed and fertilized with her husband’s sperm and then engaged a gestational surrogate to carry the pregnancy.\(^\text{222}\) The Arizona court accepted her challenge to the state’s commercial-surrogacy prohibition, explaining that, unlike a man, “[a] woman who may be genetically related to a child has no opportunity to prove her maternity and is thereby denied the opportunity to develop the parent-child relationship.”\(^\text{223}\)

A similar result emerged in Utah in 2002. In *J.R. v. Utah*, a federal district court found that giving conclusive effect to the maternity presumption based on birth violated equal protection by treating “the genetic/biological father” differently than “the genetic/biological mother.”\(^\text{224}\) For the court, the genetic intended mother was analogous to the unmarried father protected constitutionally in the 1970s.\(^\text{225}\) By denying her the opportunity to establish parentage based on her genetic tie and instead deeming the gestational surrogate the legal mother, Utah’s surrogacy regulation violated the woman’s fundamental parental rights.\(^\text{226}\)

For some, not only recognition of the intended genetic mother, but also *nonrecognition* of the gestational surrogate, promoted sex equality. As a concurring opinion in *Soos* observed:

> [The gestational surrogate’s] contract is to carry the child, not to nurture or raise it. The [anti-surrogacy] statute thrusts these burdens on her as a duty well beyond her contract . . . [B]y automatically giving custody of the child to the surrogate, the statute ignores the very real possibility . . . that the gestational mother has probably no interest whatsoever in raising the child . . . .\(^\text{227}\)

Resonating with equality concerns audible in abortion rights jurisprudence, the concurrence impugned the state’s surrogacy ban for compelling


\(^{223}\) *Id.* at 1360.

\(^{224}\) 261 F. Supp. 2d 1268, 1272 (D. Utah 2002).

\(^{225}\) *Id.* at 1285 (citing cases on unmarried fathers).

\(^{226}\) *Id.* at 1289.

\(^{227}\) 897 P.2d at 1361 (Gerber, J., concurring).
a woman to assume the social role of motherhood based on the physical fact of pregnancy.\textsuperscript{228}

Strikingly, the recognition of genetic mothers as legal mothers—and the corresponding nonrecognition of gestational surrogates—made reproductive biology less central to legal parenthood, and thus reduced the salience of a key justification for gender-differentiated parental recognition. As Part I showed, when the Court repudiated the common law of “illegitimacy,” it placed a premium on biological connection \textit{and} differentiated between mothers and fathers by resort to reproductive biology. Now, in the age of ART, the premium on biological connection aided the genetic intended mother, who claimed a constitutional interest in parenthood that sprung from her genetic connection to the child. Like the biological father from the 1970s, the genetic intended mother grasped the opportunity to be a parent that her biological connection afforded.

Yet, by focusing on the rights of genetic intended mothers, courts cleaved the biological process of reproduction from the legal status of motherhood, thus weakening the justification for differences between motherhood and fatherhood. The genetic intended mother was like the unmarried biological father. At the same time, the woman who gave birth—who had always been the legal mother—no longer necessarily attained that status. The law’s accommodation of ART pulled back on the gender-differentiated understanding of parenthood that the constitutional repudiation of “illegitimacy” had authorized in the name of reproductive biology.

Developments in New York illustrate this point. In 1992, a court had rejected the idea that maternity could be adjudicated in the context of gestational surrogacy where the intended mother was the genetic mother; motherhood was a biological fact grounded in birth.\textsuperscript{229} But courts in the state eventually allowed for maternity determinations for genetic intended mothers. They moved in this direction by applying sex-equality principles to questions of parental recognition.\textsuperscript{230} In 2011, a court explained: “The issue here is not . . . whether there is a distinction between males and females in the birth process, as there most assuredly is one. Rather, the issue . . . is whether there is an impermissible gender-based classification between parents \textit{after} the birth of the child.”\textsuperscript{231} Gestational surrogacy’s separation of gestation and genetics exposed


\textsuperscript{230} See Doe v. N.Y.C. Bd. of Health, 782 N.Y.S.2d 180 (Sup. Ct. 2004) (allowing postbirth relief without adoption, provided the intended mother demonstrates that she is the genetic mother).

the ways in which biological differences in reproduction had naturalized legal differences in parenthood. Now, sex-equality principles animated the rejection of reproductive biology as a justification for gender-differentiated parental recognition.

3. Co-Maternity and Same-Sex Couples

The parental recognition of women who separated gestation from genetics furthered commitments to equality based not only on sex but also on sexual orientation. Some lesbian couples used IVF to produce “co-maternity,” in which one partner carries a child conceived with the other partner’s egg. While co-maternity cases arose only in a handful of states, the courts that addressed the question found that the birth mother and genetic mother each qualified as legal parents, even if on different facts they would be surrogates or egg donors.

Each woman could make a statutory claim to motherhood based on a biological criterion, and each could point to social factors—such as intent, family formation, and parental conduct—to translate the biological fact of maternity into the legal status of parentage.\textsuperscript{232} Even when courts ruled on statutory rather than constitutional grounds, they understood their decisions to promote the equal status of same-sex couples and their children.\textsuperscript{233} Recognition of two mothers aligned both with gender-neutrality principles in state parentage codes and with commitments to sexual-orientation equality expressed in legislation recognizing the rights of same-sex couples.\textsuperscript{234}

Constitutional principles also protected the genetic mother’s parental interests. Courts found that preventing her from proving maternity constituted impermissible sex or sexual-orientation discrimination,\textsuperscript{235} and deprived her of a protected liberty interest generated by her

\begin{itemize}
\item \textsuperscript{232} See, e.g., K.M. v. E.G., 117 P.3d 673, 681 (Cal. 2005) (reasoning that though Johnson declared that a child can have “only one natural mother,” a child can have two natural mothers in the context of same-sex couples); St. Mary v. Damon, 309 P.3d 1027, 1029, 1035 (Nev. 2013) (reversing the district court’s ruling that the birth mother was a surrogate and instructing the district court to “consider the parentage statutes with respect to [women’s] testimonies regarding their intent in creating the child and the nature of their relationship to one another”).
\item \textsuperscript{233} See St. Mary, 309 P.3d at 1033.
\item \textsuperscript{234} See id. at 1032–33 (noting that “the Legislature has recognized that the children of same-sex domestic partners bear no lesser rights to the enjoyment and support of two parents than children born to married heterosexual parents”).
\item \textsuperscript{235} See D.M.T. v. T.M.H., 129 So. 3d 320, 343 (Fla. 2013) (holding that a statute defining “commissioning couple” as the intended “mother and father” impermissibly discriminated against same-sex couples based on sexual orientation); In re Adoption of Sebastian, 879 N.Y.S.2d 677, 688 (Sur. Ct. 2009) (finding that the court lacked jurisdiction to invalidate the law as unconstitutional but nonetheless explaining that “provisions permitting the biological (‘putative’) father of a child born out of wedlock to establish parental status while excluding the genetic mother from the same opportunity is a constitutionally prohibited gender-based classification”).
\end{itemize}
biological connection. The genetic mother was like the unmarried biological father recognized by the Court in the 1970s. By virtue of her biological tie, she was uniquely situated “to grasp the opportunity” to be a parent.

C. Egg-Donor Gestational Surrogacy

This Part has shown how courts and legislatures responded to ART in ways animated by emergent commitments to sex and sexual-orientation equality, yet did so by reasoning within frameworks of parental recognition organized around marital and biological relationships. With donor insemination, judges and lawmakers elaborated the capacity of legal fatherhood inside marriage to capture social parent-child relationships. Men, and eventually women, derived parentage by virtue of marriage to the biological mother. But outside marriage, intended parents found themselves excluded. Nonbiological coparents—a regular feature of same-sex-couple-headed families—struggled to gain parental rights.

With IVF, courts and legislatures again responded in ways that furthered equality principles. Women, in both different-sex and same-sex couples, could achieve parenthood without giving birth or in the absence of a genetic connection to the child. Yet even as judges and lawmakers muddied understandings of maternity in both marital and nonmarital families—looking to social factors to make legal determinations of parentage—they preserved biological understandings of motherhood. Intended mothers pointed to their own biological connection to the child, whether gestational or genetic, to claim maternity.

From this perspective, surrogacy’s normalization had not resulted from a new perspective on the nonbiological intended mother, but rather from her disappearance. The intended mother from Baby M had been replaced by the genetic intended mother from Johnson—a woman who could combine parenthood’s biological and social dimensions. As this Section shows, intended parents who engaged two women—an egg donor and a gestational surrogate—struggled to capitalize on the law’s acceptance of gestational surrogacy. Accordingly, the remainder of this Part focuses on failed claims to parental recognition.

This Section first shows how, in situations involving different-sex couples, courts and legislatures failed to see the nonbiological intended mother, who lacked a genetic or gestational connection to the child, as a legal mother. The intended mother who could claim a genetic, but not gestational, tie to the child had successfully analogized herself to a genetic father. Now, the intended mother with neither a genetic nor gestational tie to the child attempted to analogize herself to the man whose wife gives birth to a child conceived with donor sperm. Within the gendered

236. D.M.T., 129 So. 3d at 336–37.
237. Id. at 337–38 (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983)).
logic of the marital presumption, however, judges and lawmakers refused to allow her to derive parentage by virtue of marriage to the biological father or on the basis of her consent to assisted reproduction. And while reproductive biology no longer justified gender-differentiated parentage when courts and legislatures confronted genetic intended mothers who had engaged gestational surrogates, it reemerged as a basis on which to reject the sex-equality claims of nonbiological intended mothers denied parental recognition.

After addressing egg-donor gestational surrogacy involving different-sex couples, this Section turns to male same-sex couples, who increasingly relied on gestational surrogacy to have children. Nonbiological fathers in same-sex couples found themselves in a similar position to nonbiological mothers in different-sex couples. Female same-sex couples had seized on marriage as a pathway to recognition for the nonbiological mother, but male same-sex couples found little help in the rules of marital parentage. While the nonbiological mother in a same-sex couple derives parentage by virtue of marriage to the biological mother, the nonbiological father in a same-sex couple does not derive parentage by virtue of marriage to the biological father. In most states, nonbiological fathers in same-sex couples cannot establish parentage without adoption, even when they are married.

Observing the treatment of both nonbiological mothers in different-sex couples and nonbiological fathers in same-sex couples brings to the surface a key feature of the modern parentage regime: the law continues to organize the family around a biological mother. This aspect of parentage law has troubling implications in terms of both gender and sexual orientation.

1. **Different-Sex Couples and Nonbiological Mothers**

As Appendix E shows, in a minority of states, surrogacy statutes and appellate decisions expressly recognize nonbiological mothers engaging in egg-donor gestational surrogacy as parents without requiring them to adopt their children. The intended parents can be the legal parents at birth, and neither the surrogate nor the donor has parental rights. But family law regimes in most states have not developed in this way. Instead, while genetic mothers can attain parentage without adoption, women without a biological or genetic connection ordinarily cannot.

238. Fifteen states have explicit statutory or appellate authority recognizing a nonbiological intended parent using egg-donor gestational surrogacy. See infra Appendix E. Some state statutes remain limited to different-sex couples. See infra Appendix E.

239. In at least eleven states, it is clear that the nonbiological intended parent must adopt the child, either because of a legislative directive, see, e.g., IOWA ADMIN. CODE r. 641-99.15(144) (2016); LA. STAT. ANN. § 9:2718 (2016); NEB. STAT. ANN. § 25-21,200 (West 2016), or because of case law, see, e.g., In re Paternity & Maternity of Infant T., 991 N.E.2d 596 (Ind. Ct. App. 2013); In re Parentage of a Child by T.J.S. &
tational surrogate, who is not the legal mother when the intended mother is the genetic mother, is the legal mother when the intended mother uses a donor egg.

Compare two decisions from Indiana. In In re Infant R., the court allowed the gestational surrogate to disestablish maternity when the intended mother was also the genetic mother.\(^{240}\) Whereas the trial court had denied the request because “the birth mother is the legal . . . mother,” the appellate court reversed in light of the state’s “interest in correctly identifying a child’s biological mother.”\(^{241}\) In a subsequent case, In re Infant T., the court refused to disestablish a gestational surrogate’s maternity when the biological father’s wife—the intended mother—was not genetically related to the child and instead had used an egg donor.\(^{242}\) The court concluded: “It would not be in the best interests of the child, and would be contrary to public policy, to allow the birth mother to have the child declared a child without a mother.”\(^{243}\) Of course, there was a mother to raise the child—but one without a gestational or genetic connection to the child.\(^{244}\)

While the Indiana cases focused on the status of gestational surrogates, nonbiological intended mothers have joined surrogates to challenge this regime. Consider developments in New Jersey in the decades since Baby M. In the context of gestational surrogacy, New Jersey allows adjudication of parentage for genetic intended mothers but continues to require adoption by nonbiological intended mothers.\(^{245}\) In In re Parentage of a Child by T.J.S. & A.L.S., a married woman, “unable to carry a child to term[,] . . . turned to the process of in vitro fertilization,” in which her husband’s sperm fertilized the ova of an anonymous donor, and the resulting embryos were carried by a gestational surrogate.\(^{246}\) The intended parents sought a declaration of parentage from the court, and were joined by the gestational surrogate. Neither the intended mother nor the surrogate

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\(^{240}\) In re Paternity & Maternity of Infant R., 922 N.E.2d 59 (Ind. Ct. App. 2010).

\(^{241}\) Id. at 60–61.

\(^{242}\) In re Paternity & Maternity of Infant T., 991 N.E.2d at 600.

\(^{243}\) Id.

\(^{244}\) Id. at 601; see also In re Adoption of Male Child A.F.C., 491 S.W.3d 316, 317 (Tenn. Ct. App. 2014) (holding that the mother entered on the birth certificate is the woman who delivers the child).


wished to resort to adoption, and instead desired a timely assignment of rights and responsibilities in ways that reflected their expectations.\(^{247}\)

In 2011, the New Jersey appellate court held in *T.J.S.* that the intended mother could not establish parentage because state law provides for a declaration of maternity only for a woman who is “biologically” or “gestationally” related to the child.\(^{248}\) Unlike fathers, who would be presumed legal parents based on their marriage to the biological mother, mothers could not derive parenthood from marriage to the biological father. Accordingly, the parentage law “requires adoption to render [the intended mother] the mother of [the child].”\(^{249}\)

The *T.J.S.* appellate court rejected the nonbiological intended mother’s constitutional challenge to her treatment based on reasoning that reflects the biological, gender-differentiated framework erected in the constitutional repudiation of “illegitimacy.” The court turned down the nonbiological mother’s due process claim, explaining that she “does not have parental rights to the child . . . because of the absence of any biological or gestational connection to the child.”\(^{250}\) Rejecting her equal protection claim—which depended on her comparison to nonbiological fathers in the donor-insemination context—the court simply declared that “the complained of disparate treatment is not grounded in gendered constructions of parenthood but in actual reproductive and biological differences.”\(^{251}\) By collapsing the biological aspects of reproduction with the social aspects of parenting, the court situated the state’s regulation of parenthood as an innocuous and natural response to the biological processes of reproduction.

The New Jersey Supreme Court affirmed the decision in a 2012 per curiam order.\(^{252}\) A concurring opinion justified the denial of parental recognition by emphasizing the necessary relationship between motherhood and biology, reasoning that “the status of maternity is grounded on either a biological or genetic connection to the child, failing which the Legislature has decreed that the status can only be achieved through adoption.”\(^{253}\) This regime did not offend constitutional equality principles in the eyes of the concurring justice, who declared, without elaborating, that the distinction between nonbiological fathers (recognized by law)

\(^{247}\) *Id.* at 270–71.


\(^{249}\) *Id.*

\(^{250}\) *Id.* at 392.

\(^{251}\) *Id.* at 398.


\(^{253}\) *Id.* at 264 (Hoens, J., concurring) (citations omitted) (citing N.J. STAT. ANN. § 9:17-41(a)-41(c) (West 2012)).
and nongenetic, nongestational mothers was justified by “actual physiological differences between men and women.”

While legal fatherhood’s nonbiological capacity inside marriage had expanded, legal motherhood largely remained a biological status—albeit a more complicated one. When a woman engages a gestational surrogate and uses a donor egg, the law often fails to treat her as a legal mother. Unlike a married father of a child conceived with donor sperm, she does not derive parentage by virtue of consent to assisted reproduction or marriage to the biological father. At the same time, the gestational surrogate, who avoids legal motherhood when the intended mother is the genetic mother, now has legal motherhood imposed on her.

2. Same-Sex Couples and Nonbiological Fathers

Nonbiological mothers in different-sex couples are not the only ones who struggle to achieve parentage when they engage in egg-donor gestational surrogacy. Nonbiological fathers in same-sex couples do as well. Gay male couples engaging in gestational surrogacy necessarily include a nonbiological intended parent. Of course, the nonmarital parentage regime organized around biological connection disadvantages same-sex couples relative to different-sex couples. But, as this Part has shown, marriage offered relief to lesbian couples. Given the family-based equality that marriage equality is assumed to furnish—and given judicial statements that “the child of either partner in a married same-sex couple will be presumed to be the child of both”—one might expect male same-sex couples to also gain dual parentage by virtue of marriage. Much follows simply from the determination that a child is “a child of the marriage.” Parties to the marriage, even if not biologically related to the child, have standing to assert parental rights, including rights to custody.

Yet, without a biological mother in the marriage, male same-sex couples do not technically have marital children. Parentage presumptions applicable to same-sex couples replicate the gender-differentiated rules applicable to different-sex couples. Presumptions of parentage for the second parent, even when they apply to both women and men, relate to that person’s marriage to “the woman giving birth” or the “natural mother.” Accordingly, a woman can derive parentage by virtue of her marriage to the biological mother, as parental regulation in lesbian couples makes clear. But a man can only derive parentage by virtue of marriage to the biological mother, not the biological father. Without

254. Id. (citing In re Parentage of a Child by T.J.S. & A.L.S., 16 A.3d at 393).
biological ties, men in same-sex couples and women in different-sex couples find themselves in the same position: neither can establish parentage without adoption.

The scant case law on the status of nonbiological fathers in same-sex couples affirms the gestational surrogate’s legal parentage and authorizes the nonbiological father’s nonrecognition. Around the same time that the New Jersey courts denied recognition to the nonbiological mother in *T.J.S.*, they also denied recognition to a nonbiological father in a same-sex couple who had engaged in egg-donor gestational surrogacy. In *A.G.R. v. D.R.H.*, a same-sex couple who were married under California law and registered domestic partners under New Jersey law sought to have biologically related children. One man’s sperm was used to fertilize donor eggs, and the other man’s sister served as the gestational surrogate. The surrogate sought parental rights after conflict developed with her brother and his partner. By the time the court was set to determine whether the gestational surrogate was a legal parent, the two men were parenting the children. In fact, the nonbiological father was the primary caretaker. Yet the court treated the nonbiological intended father as a nonparent and instead credited the gestational surrogate’s claim to parental recognition. Strikingly, the court found immaterial the distinction between traditional and gestational surrogacy—the very distinction that had reshaped the law in cases involving a genetic intended mother. After quoting the rejection of surrogacy in *Baby M*, a traditional surrogacy case, the court asked, “Would it really make any difference if the word ‘gestational’ was substituted for the word ‘surrogacy’ in the above quotation?” It quickly answered, “I think not.”

In the contemporary regulatory landscape, it would be exceedingly difficult to maintain this position where the genetic mother is the intended mother. In that context, in most jurisdictions (including New Jersey), the difference between gestational and traditional surrogacy marks the difference between parent and nonparent status. Yet, for the nonbiological gay father, the surrogate’s gestation—increasingly immaterial where the intended mother is the genetic mother—produces legal motherhood and justifies the denial of his parental status. Like nonbiological intended mothers in different-sex couples, nonbiological intended fathers in same-sex couples cannot claim parentage by virtue of a relationship to the biological father. They must, if possible, adopt the child.

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259. *Id.* at *1–2.
262. *Id.*
263. *See supra* text accompanying note 245.
As Appendix E suggests, the treatment of male same-sex couples in New Jersey is consistent with the approach of most other states.264

As with intended mothers in different-sex couples engaging in egg-donor gestational surrogacy, intended fathers in same-sex couples have not launched successful constitutional challenges to their treatment. The nonbiological father is not understood to possess a constitutionally protected liberty interest in parenthood. And, since women and different-sex couples face similar hurdles, the nonbiological father’s treatment is not deemed to offend sex or sexual-orientation equality principles.265

Ultimately, male same-sex couples are excluded by a parentage regime that grounds parenthood in biological connection outside marriage and derives nonbiological parenthood inside marriage only from marriage to a biological mother. Ordinary parentage rules simply do not permit dual parentage for male same-sex couples absent adoption.266 The few states that have allowed this result have done so through a separate set of rules regulating gestational surrogacy.267

3. Biological Mothers and the Legal Family

This Part’s exhaustive examination of the law’s regulation of parental relationships formed through ART reveals a critical dynamic: even in an age of sex and sexual-orientation equality, courts and legislatures continue to treat biological mothers as the parents from whom the legal family necessarily springs. This treatment is rooted in the marital presumption and is carried forward by the presumption’s adaptation to ART. Traditionally, the woman giving birth is the legal mother, and, if she is married, her husband is the legal father. Law has adapted this reasoning to different-sex and same-sex couples using donor insemination. And this reasoning has reached different-sex and same-sex couples using donor eggs and embryos when the intended mother is the birth mother.

The gendered, heterosexual legacy of marital parentage—parentage by virtue of marriage to the woman giving birth—is justified by resort to the gendered, heterosexual logic of reproductive biology. But law’s accommodation of ART reveals the instability of that very logic. Courts are willing to deviate from the gendered logic of reproductive biology to recognize the genetic mother who engages a gestational surrogate to

264. See infra Appendix E; see also supra note 238 and accompanying text.
265. See, e.g., Oleski v. Hynes, No. KNLFA084008415, 2008 Conn. Super. LEXIS 1752, at *48 (Super. Ct. July 10, 2008) (“Since the gender . . . of the parent and the partner are immaterial, this is not a case raising issues of equal protection or invidious discrimination.”).
carry her child. Within a regime that prioritizes biological ties, contemporary courts view the genetic mother like the biological father protected by the Court in the 1970s. The differential treatment of genetic mothers and fathers poses an equality problem. Yet, in considering the claim of a nonbiological mother who engages in egg-donor gestational surrogacy, reproductive biology persists as a justification to reject her claim to parental recognition. Courts do not see an equality problem when law recognizes a nonbiological father as a legal parent but withholds recognition from a nonbiological mother.

In either of these cases, one could imagine courts invoking reproductive biology to justify the differential treatment of mothers and fathers. In fact, in some of the earliest gestational surrogacy cases, courts rejected the claims of genetic intended mothers based precisely on grounds of reproductive biology: motherhood resulted from the specific act of birth. But today, courts disclaim reproductive biology as a basis to withhold recognition from a genetic mother. Indeed, recall that in accepting gestational surrogacy, the Massachusetts Supreme Judicial Court deemed the children of the genetic intended mother “children of [the] marriage.” The mother’s genetic—not gestational—connection produced marital children. Yet a father’s genetic connection does not produce marital children, and therefore does not offer a route to parenthood to a nonbiological mother. Reproductive biology continues to justify treating the claims of nonbiological mothers differently than the claims of nonbiological fathers.

Same-sex couples, who are not similarly situated to different-sex couples with respect to biological parenthood, remain particularly vulnerable in a nonmarital parentage regime organized around biological connection. Marriage furnishes space for the legal recognition of nonbiological parents, but, with its gender-differentiated legacy, offers relief to only some same-sex parents. Nonbiological parents in female same-sex couples attain parenthood by virtue of marriage to the biological parent, but this is not true in male same-sex couples. For a man or woman married to a biological mother, biological connection is not necessary for legal parenthood; that man or woman is deemed a legal parent by virtue of marriage. But for a man or woman married to a biological father, the lack of a biological connection excludes that individual from legal parenthood.

From this perspective, it becomes clear that the shift toward nonbiological parenthood has occurred along only one axis: legal “fatherhood” can capture nonbiological parenthood, but legal “motherhood” cannot. And the collapse of gendered parental statuses has occurred in only one

direction: women can be legal “fathers,” but men cannot be legal “mothers.” On this view, biological mothers are indispensable—essential to the legal family. In contrast, biological fathers are replaceable—by men or women who have no biological connection to the child.  

* * *

As this Part has shown, the law has traveled a great distance from the common-law regime that defined parentage through the gender-hierarchical and heterosexual institution of marriage. Yet even after waves of liberalization, troubling asymmetries persist. The law continues to anchor parental recognition in biological connection and to organize the legal family around a biological mother. This leads courts and legislatures to treat men’s and women’s claims to parental recognition differently and to privilege different-sex over same-sex couples. The next Part focuses on the profound harms that this parentage regime inflicts on those who break from traditional norms of gender and sexuality.

III. SELECTIVE HARMs

Within the contemporary parentage regime, those who believe they are parents on social grounds, including those who have been parenting their children for many years, may be denied parental status. Of course, it is difficult to imagine a system that satisfies all those who make claims to parental recognition. But it is especially troubling that the law rejects claims in ways that preserve longstanding forms of inequality. This Part turns to the concrete burdens imposed by the current regime and shows how the uneven distribution of those burdens reflects traditional judgments about gender, sexuality, and parenthood.

A. The Practical and Expressive Harms of Nonrecognition

As a practical matter, lack of parental recognition shifts individuals out of the ordinary parentage regime and into the adoption scheme. While for some the adoption process may be relatively straightforward,

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270. Cf. Hollandsworth, supra note 18, at 214 (“[T]he legal system has created a paradigm for reproduction that statutorily excludes a significant number of children born through donor insemination from having a father. Yet, the same legal system will not allow the child to be born without a mother.”).

271. The results seem inadvertent in many jurisdictions, as courts and legislatures aspire to inclusion and yet do so within frameworks that carry forward legacies of inequality. In other jurisdictions, the results appear more deliberate. This dynamic resonates with Reva Siegel’s account of preservation through transformation. See Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111 (1997); see also J.M. Balkin, The Constitution of Status, 106 Yale L.J. 2313, 2326 (1997) (“[S]tatus hierarchies can gain the support of legal norms either directly or indirectly. Legal categories can map status distinctions and even help constitute them . . . [or] status hierarchies can manipulate or work around other kinds of legal distinctions to reproduce themselves in ever new forms.”).

272. See generally Polikoff, supra note 18.
for others it brings risk and uncertainty. The process can be “lengthy and costly”\textsuperscript{273} and may be prohibitively expensive for some parents.\textsuperscript{274} For those who can afford it, they may, as one court observed, “have to wait as long as six months” to gain custody of their child.\textsuperscript{275} The process itself can be intrusive, subjecting those who have coparented for many years to invasive home studies.\textsuperscript{276} As a federal court in Indiana observed in the context of same-sex parents, the nonbiological parent “is required to undergo fingerprinting and a criminal background check in addition to submitting her driving record [and] her financial profile.”\textsuperscript{277} The home study examining the couple’s relationship “requires them to write an autobiography and to discuss their parenting philosophy, and requires them to open their home for inspection.”\textsuperscript{278} The costs in Indiana can exceed $4,000.\textsuperscript{279}

Resort to adoption harms not only parents but children. Given the timing of adoption, those who believe they are parents lack parental rights at a particularly critical point—the beginning of the child’s life. As one nonbiological mother who had engaged in gestational surrogacy reported in legislative testimony in Washington State: “I had no parental rights for the first five months of [my daughter’s] life.”\textsuperscript{280} As the Massachusetts Supreme Judicial Court observed, “[I]n the event of medical complications arising during or shortly after birth,” the intended parent would not have legal authority over the child’s treatment.\textsuperscript{281} “The duties and responsibilities of parenthood (for example, support and custody) would lie with the gestational carrier,” who “could be free to surrender the [child] for adoption.”\textsuperscript{282} Young children may struggle when their

\textsuperscript{275} See Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133, 1138 (Mass. 2001). Of course, if they are coparenting with the biological parent, they would presumably reside with the child.
\textsuperscript{276} See In re Adoption of Doe, 326 P.3d 347, 349 (Idaho 2014) (noting that the nonbiological mother in a same-sex couple had to undergo a home study as she sought to adopt children she had been coparenting for more than ten years). This resonates with Bruce Ackerman’s focus on humiliation. See 3 Bruce Ackerman, We the People: The Civil Rights Revolution 137–41 (2014).
\textsuperscript{277} Henderson, 2016 WL 3548645, at *2.
\textsuperscript{278} Id.
\textsuperscript{279} Id.
\textsuperscript{282} Id. at 1138.
parents’ bonds are uncertain and insecure. As intended parents and a gestational surrogate in New Jersey explained, adoption does not provide an adequate substitute for parentage by operation of law “because the extended legal process would place the legal status of the child in limbo.” Children may be harmed later in life as well. Older children whose parents must adopt them may question the status and stability of their family.

Many of those who believe they are parents on social grounds but are denied legal recognition will successfully navigate the adoption process and emerge, eventually, with legal rights to their children. The harms of the adoption process, though, are not only material but also dignitary. Requiring adoption in this setting communicates to the parent and child that they are not family and, in this sense, “fails to account for the parent-child relationship that already exists in fact.” Those parents with biological ties are seen as real parents. Those without biological ties—even those engaging in the same forms of ART—are cast as parental substitutes who must formally replace the biological parents through adoption. As a California court explained: “Parents are not screened for the procreation of their own children; they are screened for the adoption of other people’s children.” Resort to adoption is based on the notion that “a child who is born as the result of artificial reproduction is somebody else’s child from the beginning.”

Of course, it is not only those who believe they are parents on social grounds that are harmed. The law may recognize a gestational surrogate as a legal mother, even though she neither desires such recognition nor


285. Cf. United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (stating that the Defense of Marriage Act, which in part defined marriage—for the purposes of federal law—as being only between different-sex couples, “makes it even more difficult for the children [of same-sex couples] to understand the integrity and closeness of their own family”).


288. Id.
actually forms a parental relationship. Law may also impose parental responsibilities on a sperm donor if he donates sperm for the insemination of an unmarried woman, even if he and the mother agreed that he would not be a parent and even if he is not acting as a parent. Just as the decision to form a parent-child relationship is enormously meaningful and consequential, so is the decision not to form a parent-child relationship.

Adoption requirements thus intervene in ways that reproduce normative distinctions between biological and nonbiological parents. As Elizabeth Bartholet has persuasively shown, the regulation of adoption expresses suspicion of nonbiological parents in ways that support traditional views about the biological family. While Bartholet is skeptical of commercial surrogacy, her insights on adoption shed light on contemporary approaches to gestational surrogacy. In surrogacy cases featuring nonbiological intended parents, courts express concerns about “strangers” raising children unrelated to them. They invoke adoption as a check on nonbiological parents’ fitness—even though fitness is not employed as a check on biological parents using ART. The point here is not that the government lacks an interest in children’s welfare that justifies attention to parental fitness; instead, it is that the government deploys this interest selectively. The check on parental fitness does not apply whenever gestational surrogacy is involved—that is, whenever the woman giving birth surrenders the child—but rather only when the intended parent is not the genetic parent.

While adoption will ultimately yield legal parentage for some, it may be impossible for others, meaning that legal recognition remains out


290. See supra note 179 and accompanying text; see also Appendix B.


292. See Dov Fox, Reproductive Negligence, 117 Colum. L. Rev. 149, 185–89 (2017).

293. Traditional adoption models have even shaped the emergence of “embryo adoption” programs. See I. Glenn Cohen, Religion and Reproductive Technology, in LAW, RELIGION, AND HEALTH IN THE UNITED STATES (Holly Fernandez Lynch et al. eds., forthcoming 2017) (on file with author).


295. See Bartholet, supra note 20, at 111.

296. See Oleski v. Hynes, No. KNLF4084008415, 2008 Conn. Super. LEXIS 1752, at *42 (Super. Ct. July 10, 2008) (“If the children here were one day old, and [the gestational surrogate] then [was] turning them over to a stranger, no court in the world would approve that transfer solely on the basis of her contract with that third party, and without any evidence as to whether such a transfer accommodated the children’s interests.”).

297. See id. at *41–42.
of reach. Terminating the rights of the individual presumed by law to be the parent may not be feasible. Or, the relationship to the legal parent may end, leaving the nonbiological parent at the mercy of her former partner. Or, the parents may not be married and may live in a state that allows only stepparent, and not second-parent, adoption.

Some parents, ignorant of the need to adopt their own child, may not even pursue adoption. This is especially likely when both parents, whether married or not, are listed on the child’s birth certificate, and thus mistakenly believe they have been definitively identified as legal parents. It is also likely when the nonbiological parent is married to the biological parent and believes she attains parentage by virtue of the marriage.

For instance, a woman may believe that if her husband is the biological father, she would be the legal parent. Consider a traditional surrogacy case from Connecticut. In Doe v. Doe, when the couple divorced, the biological father claimed that his wife was not the child’s legal mother because she never adopted the child, even though she raised the child for fourteen years and the surrogate’s rights had long been terminated. The Connecticut Supreme Court—constrained by a biologically grounded, gender-specific marital presumption—held that even though the child was conceived and born during the marriage, she was not a “child of the marriage” because the wife was not the biological mother. Lack of a biological tie would not have prevented the husband from making parental claims upon divorce if his wife were the biological mother, but the wife’s lack of a biological tie—even when accompanied by years of parental conduct—placed her outside the bounds of the parentage regime.

Without legal recognition, parent-child relationships may be destroyed. Again, consider Russell v. Pasik, in which an unmarried lesbian couple used the same donor sperm to have four children, with each woman giving birth to two children. Even though, as the court explained, “[t]he four children were raised by both women jointly as a family unit,” Russell was able to unilaterally end the relationship between Pasik and the two children to whom Pasik did not have a

301. As Nancy Polikoff explains in her work on parental recognition in same-sex couples, while a birth certificate “is only evidence of parentage, not definitive proof, it is the one piece of commonly accepted evidence.” Polikoff, supra note 18, at 238–39.
302. 710 A.2d 1297, 1300 (Conn. 1998).
303. Id. at 1315–16.
304. 178 So. 3d at 57.
305. Id.
biological connection. The parent-child relationships were legally severed, left to the whims of Russell, the biological mother.

This approach undermines children’s wellbeing. In Russell, the children themselves were harmed by the loss of their parent and their siblings, since each woman would leave the relationship with rights to only her biological children. Law generally seeks to protect and promote stable and continuing parental relationships for children. Yet here the law threatens such relationships.

Courts themselves appear to recognize the gravity of the problems encountered within the current regime and attempt to avoid the most immediate and severe consequences. The court in Doe, for instance, interpreted state statutes to allow the nonbiological mother to assert a third-party claim to custody based on the child’s welfare. The parental relationship could continue even as the mother was denied parental status.

In cases where the family remains intact, courts have resorted to custody determinations that in practice protect the nonbiological parent’s bond. For example, after recognizing the biological father and the gestational surrogate as the legal parents in A.G.R., the New Jersey court vested primary custody in the biological father—and, therefore, his same-sex partner as well. The nonbiological father, the court observed, “is essentially a stay at home dad.” The custody determination, rather than

306. Id. at 60–61.
307. As Anne Alstott’s work emphasizes, law generally makes “parental exit” difficult so as to protect the interests of children. See Anne L. Alstott, No Exit 45 (2004). Yet here law knowingly severs existing bonds of willing parents.
308. Scholars have long recognized the importance of psychological parent-child bonds. Law has been heavily influenced by the foundational work on children’s best interests and psychological parenthood elaborated by Joseph Goldstein, Albert Solnit, Anna Freud, and Sonja Goldstein. See Joseph Goldstein et al., The Best Interests of the Child 11–12, 16, 19 (1996) (emphasizing the importance of the psychological parent regardless of biological connections and elaborating the concept of “common-law adoptive parent-child relationship[s]”). Psychological parent theory influenced Robert Mnookin’s seminal work on custody. See generally Robert H. Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Probs. 226 (1975). While some scholars focused on a single parent-child relationship, others allowed for multiple bonds. See Davis, supra note 283, at 362.
312. See id.
the parentage determination, allowed this arrangement to persist. The man who formed a parent-child relationship on social but not biological grounds lived in the house with the legal parent granted primary custody, but he received no legal recognition himself. His relationship was less secure, dependent on continued cohabitation with the biological father. Even then, his lack of recognition could, as other nonlegal parents report, pose ongoing practical problems, for instance when he had “to sign something for the kids from school or at the doctor’s office.”

The harms of nonrecognition are not only practical but expressive. Courts routinely term those who serve as parents but lack biological ties “nonparents”—casting them as third parties who are otherwise strangers to the family. As one gay father put it, “People always ask, ‘Who are you? Are you his dad?’ Legally, we are not family, but in reality we are.” Legal treatment may shape parental experiences. In qualitative studies of gay men parenting, those parents lacking legal status not only experienced “less validation and support from the outside world,” but also reported feeling “insecure about [their] role in the family.” They found nonrecognition “demeaning” and reported frustration with “being the invisible dad.”

B. Sexuality- and Gender-Based Judgments

As Russell, Doe, and A.G.R. suggest, the burdens imposed on social parent-child bonds are not distributed evenly. Those who break from traditional norms governing gender, sexuality, and family—by not marrying, by separating motherhood from biological ties, or by forming a family with a same-sex partner—are channeled into adoption or denied parental status in ways that others are not. Often, courts and legislatures engage in genuine but failed attempts to protect the rights of women and of same-sex couples. At times, though, the regulation of ART and the law of parental recognition serve as sites for active resistance to gender and sexual-orientation equality.


315. Mallon, supra note 313, at 78.

316. Id. at 77; see also Abbie E. Goldberg, Gay Dads 83 (2012).

317. Goldberg, supra note 316, at 83 (quoting an anonymous father).

1. **Biology, Marriage, and Sexual Orientation**

As Part I explained, courts and legislatures expressly protected biological relationships to repair the wrongs perpetrated by a system of marital privilege. Unmarried parents could derive parental rights from their biological connection. But parenthood’s liberalization protected parent-child relationships that came out of heterosexual family formation. While nonbiological parent-child relationships are legally vulnerable as a general matter, some families are more likely than others to experience this vulnerability. As New York’s highest court recently acknowledged, “Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing [to seek custody], as only one can be biologically related to the child.”

For same-sex couples, the focus on biological connection works in conjunction with marital privilege to marginalize their nonmarital families. Even as marriage has offered space for some same-sex couples’ nonbiological ties, biological ties retain importance within the gender-differentiated framework of marital parentage. And some seek to expand and entrench biological norms in ways that threaten same-sex parents both inside and outside marriage. Biological connection can present itself as a natural and innocuous parenting norm, but appeals to biological parenthood can both incorporate and mask judgments about same-sex family formation.

Consider advocacy against ART by the Institute for American Values (IAV), the organization headed by leading social conservative advocate David Blankenhorn. Elizabeth Marquardt, the director of IAV’s Center for Marriage and Families, argues that because “two persons in a same-sex couple cannot both be the biological parents,” research demonstrating the benefits of children being raised by a “biological mother and father” is relevant to debates over “same-sex marriage and parenting.” For Marquardt, the biological and social dimensions of parenthood should be united. She opposes “family forms that even before conception intentionally deny children a relationship with their biological father or mother.” Importantly, Marquardt accepts ART to create families in which a mother and father raise a child biologically related

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322. *Id.* at 6.
to each of them—for instance, gestational surrogacy where the genetic mother is the intended mother. She carefully preserves ART deployed in service of the traditional family with a biological mother and father, while rejecting ART that disturbs that paradigm by facilitating families headed by same-sex couples. 323

This view finds expression in the law. After Obergefell, for example, Louisiana authorized gestational surrogacy but only in limited circumstances—when “the parties who engage the gestational surrogate not only are married to each other, but also create the child using only their own gametes.” 324 As the law expressly states, only those “intended parents can bypass the current need to go through extended proceedings to adopt their own child.” 325 The law authorizes gestational surrogacy—and its separation of pregnancy from motherhood—in ways that necessarily exclude same-sex couples, even when they are married. In this regime, it is not sex-based reproductive differences that matter but biological ties that allow for the maintenance of the gender-differentiated, heterosexual family. 326

As the Louisiana legislation suggests, arguments from biological parenting can entail both a rejection of same-sex family formation and an appeal to dual-gender parenting. 327 Families headed by same-sex couples fail as “motherless” and “fatherless.” 328 These views, 329 which were expressed but repudiated in the conflict over same-sex marriage, retain


325. Id.

326. The continued exclusion of same-sex couples resonates with Ackerman’s account of “institutionalized humiliation.” See Ackerman, *supra* note 276, at 140.


purchase in conflicts over parenting. In fact, they have become a potent way to resist the implications of marriage equality.

2. **Marriage, Biology, and Gender**

Approaches to ART—and specifically gestational surrogacy—suggest that, even as courts and legislatures liberalized motherhood and recognized same-sex parenting, they sustained biologically grounded, gender-differentiated views of parenthood. Nonbiological mothers in different-sex couples and nonbiological fathers in same-sex couples struggle for parental recognition, even when they are married to the biological parent. If these parents fail to adopt their children, they may be deemed legal strangers even after raising the children. These dynamics may reflect judgments about women who separate motherhood from biological connection, as well as men who fill roles traditionally demanded of women.

Those who are invested in gender-based family roles and their biological basis often oppose surrogacy regardless of its form. Both traditional and gestational surrogacy challenge the connection between the physical fact of pregnancy and the social role of motherhood. Through this lens, surrendering the child, even when the woman is not genetically related, “is contrary to the natural instincts of motherhood.” But most states have departed from this view and instead have increasingly accommodated gestational surrogacy where the intended mother is the genetic mother. That woman is the legal mother, and the gestational surrogate is not.

Gestation and birth—the sex-based reproductive features that licensed legal distinctions between motherhood and fatherhood—no longer inevitably produce the social role of motherhood. Genetics—itself

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332. See, e.g., Complaint ¶ 96, Cook v. Harding, No. 2:16-CV-00742 (C.D. Cal. Feb. 2, 2016), 2016 WL 424998 (“The bonding process between the pregnant mother and the children she carries during the nine months of pregnancy is the same physical process and experience, whether or not the mother is genetically related to the children.”); Jennifer Lahl, *Commercial Surrogacy: Stop It or Just Regulate It?*, PUB. DISCOURSE (Oct. 14, 2015), http://www.thepublicdiscourse.com/2015/10/15801/ [http://perma.cc/7HM4-XR7P] (arguing for prohibitions on all forms of surrogacy based in part on the claim that “[s]urrogacy demands that mother and child not bond, a very important part of human reproduction that safeguards the physical and psychological well-being of both mother and child”).

333. Complaint, supra note 332, ¶ 105.
not a sex-based reproductive difference—can ground legal motherhood. Yet in most states, the surrogate’s nonrecognition occurs only when the intended mother is the genetic mother. With egg-donor gestational surrogacy, birth reemerges as necessarily producing legal motherhood—with no change in the surrogate’s role or in the intentions of the parties.

Consider Soos, where the court required Arizona to recognize the genetic mother as the legal mother and ordered nonrecognition of the gestational surrogate. Indeed, the concurring opinion pointed out how the surrogacy ban foisted motherhood on the gestational surrogate based solely on the physical fact of pregnancy. Yet Arizona law continues to distinguish egg-donor gestational surrogacy. The absence of a genetic intended mother blocks the gestational surrogate’s attempt to avoid legal motherhood, and the intended mother must adopt the child.

Even in the face of legislation that appeared to authorize egg-donor gestational surrogacy, the state of Connecticut sought to require termination of a gestational surrogate’s parental rights and subsequent adoption by the nonbiological intended parent. In unsuccessfully defending its position at the Connecticut Supreme Court, the state made the uncontroversial observation that “a mother contributes to the development of the child in her womb.” But it then linked the physical contribution of the surrogate to an inevitable legal status of motherhood—because the gestational surrogate “form[s] a bond with [the child in her womb],” her “role in bringing the child into the world is sufficiently consequential to require her registration.” Connecticut defended its refusal to recognize nonbiological intended parents by appealing to the connection between pregnancy and motherhood. Yet, in that very litigation, the state admitted that it did not oppose parentage judgments when the intended parent was the genetic mother.

If the biology of reproduction can be detached from the social role of motherhood, it is difficult to maintain distinctions between the two forms of gestational surrogacy. The law’s differential treatment of genetic intended mothers and nonbiological intended mothers suggests that biological connection generally—whether gestation or genetics—creates maternal attachments. At stake is the maintenance of motherhood

335. See id. at 1361 (Gerber, J., concurring).
338. Id. at 14.
339. Id.
340. See id. at 3–4. The State’s position was rejected in Raftopol, 12 A.3d at 804, in which the Connecticut Supreme Court recognized a biological father’s same-sex partner, and not the gestational surrogate, as a legal parent.
as a biological status—not the specific relationship between pregnancy and motherhood.

The act of surrogacy challenges the “maternal instinct,” and instead suggests that a mother’s attachment is constructed. The genetic intended mother, whom law recognizes, can maintain a connection between the biological and social aspects of motherhood, even if not through pregnancy. The nonbiological intended mother, in contrast, renders maternal attachment the product of social arrangements, rather than biology.341 The surrogate and the nonbiological intended mother reveal the mother-child bond to be in important ways like the father-child bond—volitional and constructed.342

Through this lens, the law of parental recognition may reflect stereotypes that view the social role of motherhood as flowing naturally from biological ties.343 A mother’s biological tie to her child—established most often through gestation but also through genetics—both defines and limits her parental status.344 While the legal status of motherhood derives solely from biological connections, biological connections may, but need not, determine the legal status of fatherhood.345 One can be a

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341. The nonbiological intended mother also defies gender-based roles by separating motherhood from biological reproduction. Attorneys in Baby M portrayed the intended mother, despite her multiple sclerosis, as an ambitious, career-driven woman who delayed and avoided childbearing and thus produced her own dilemma. See Trial Brief on Behalf of Defendants Mary Beth and Richard Whitehead at 4, In re Baby M, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987) (No. FM25314-86E) (“The Sterns by agreement did not even attempt to conceive a child until Mrs. Stern finished college, medical school and her residency. By the time she finished her residency in the year 1981, she was 36 years old. Thereafter, Mr. and Mrs. Stern have never attempted to conceive a child.”). Such characterizations also appear in contemporary arguments against surrogacy. See, e.g., Sharon Greenthal, Social Surrogacy: A Scary Trend in Pregnancy, HUFFINGTON POST (Apr. 21, 2014, 11:53 AM), http://www.huffingtonpost.com/sharon-greenthal/social-surrogacy-a-scary-_b_5179121.html [http://perma.cc/KUC4-RTGE] (expressing shock at “women who don’t want pregnancy to interfere with their career trajectory” and wondering “what kind of mothers they’ll be once they’ve been handed their surrogate-grown children” and whether they will “take a day off from their precious careers to tend to a baby that needs them”).

342. See Katharine T. Bartlett, Re-Expressing Parenthood, 98 YALE L.J. 293, 334 (1988) (“[S]urrogacy arrangements may help to dilute the stereotype of the woman in the nuclear family whose role is confined to that of mother and homemaker . . . .”).


345. As Karen Czapanskiy argues, men volunteer for parenthood, while women are drafted into it. See Karen Czapanskiy, Volunteers and Draftees: The Struggle for Parental Equality, 38 UCLA L. REV. 1415, 1415–16 (1991). Of course, when the
father purely on social grounds if, for instance, he forms a family with the mother and the child. On this view, the mother remains the parental figure who establishes the family, while the father is a secondary, optional parent, potentially supplementing but certainly not replacing the mother.

The law’s construction of parenthood situates women as biologically connected not only to reproduction but also to child-rearing—itself a form of uncompensated labor that drastically shapes a woman’s life opportunities. While biological fathers can be displaced by men and women who lack biological ties, the law attempts to ensure the biological mother’s presence. From this perspective, women—naturally, inevitably—bear the burdens of child-rearing.

Views that tie motherhood to biology not only negatively affect women; they also harm men by viewing fatherhood as derivative of motherhood and secondary as a parental role. While these stereotypes retain purchase within various domains of family law, as well as outside of family law, they have specific effects on parentage in same-sex government attempts to establish paternity, it may impose fatherhood on men based on their biological connection. But even then, the government seeks to impose support obligations, rather than child-rearing responsibilities. See id. at 1418. This, too, may reflect stereotypes that situate women as caretakers and men as breadwinners. Moreover, the government does not in practice make paternity compulsory. See Cahill, supra note 13, at 687–88. See, e.g., In re Sabrina H. v. Bright, 266 Cal. Rptr. 274, 276 (Ct. App. 1990) (emphasizing the importance of identifying “fathers who have entered into some familial relationship with the mother and child”).

See Appleton, supra note 18, at 282 (explaining that “fatherhood remains, in significant part, a ‘secondary’ or derivative relationship that requires an initial determination of the child’s first or ‘primary’ parent, the mother”); Dalton, supra note 159, at 289 (“[T]he mother-child relationship is always seen as primary. The father-child relationships (whether based in biology or not) are always secondary.”).


See Hollandsworth, supra note 18, at 217–18.

See also Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parents’ Rights, 14 Cardozo L. Rev. 1747, 1749 (1993) (using the term “generism” to reimagine the legal norms of family and fathering as centered around nurturing).
couples. Female same-sex couples may reaffirm gender stereotypes that see women as mothers and caretakers even as they challenge heterosexual norms, but male same-sex couples disrupt norms of both heterosexuality and gender that have structured family relationships. By forming a family that excludes a mother, these men position fathers as primary parents—assuming the social role traditionally demanded of women as a matter of biology.

Gay men engaging in surrogacy challenge the centrality of the mother-child relationship in ways that different-sex couples engaging in surrogacy do not. Their parental recognition, and the corresponding production of “motherless” families, threatens gender differentiation—not merely biological sex differentiation. Consider A.G.R., the New Jersey decision recognizing the gestational surrogate, and not the nonbiological father, as a legal parent. The court quoted Baby M to support the unique importance of the mother-child relationship, objecting that “[t]he surrogacy contract . . . guarantees the separation of a child from its mother.” A mother, on this view, is a necessary part of a family. There was no other mother to fill the role left open by the surrogate. Genetic intended mothers had emerged since Baby M’s rejection of traditional surrogacy as viable candidates to supplant the surrogate. But fathers engaging in egg-donor gestational surrogacy simply could not replace the mother.

Similar concerns emerge in cases involving single fatherhood. While donor insemination and IVF have facilitated the creation of legally recognized single-parent families for women, men struggle to form single-parent families through ART. Like gay male couples, single fathers engaging in egg-donor gestational surrogacy seek to displace mothers. Texas, for instance, allows gestational surrogacy (including egg-donor

357. See Mallon, supra note 313, at 99 (“The one subject that all the [gay] dads discussed at length was the multitude of questions from people in the community about their child’s mother or lack thereof.”).
359. Id. at *11–12.
gestational surrogacy) for married (different-sex) couples, but closes paths to single fatherhood through gestational surrogacy. A Texas appellate court refused to declare that the gestational surrogate with no genetic connection to the children is not a legal parent, even though Texas law readily allows this result when a married different-sex couple commissions a surrogate. The court noted that the biological father “seeks a declaration that he is the sole parent and the children have no mother.” Given that the egg donor was not seeking motherhood, the court expressed concern that “[t]here is no other woman claiming to be the mother.” Indeed, some courts have refused to allow women to relinquish parental rights if no other woman is seeking to adopt the child.

These results are troubling. They make paths to parenthood more difficult and fraught for those who break from norms that have traditionally structured family life, and they reiterate views about motherhood and fatherhood that harm both women and men. To remedy these harms, the next Part considers how to forge a parentage regime that vindicates gender and sexual-orientation equality and thus more fully and consistently values the social bonds of parenthood.

IV. RECONSTRUCTING PARENTHOOD

Even as the law has grown to accommodate an increasingly diverse range of parental configurations, many who believe themselves to be parents on social grounds—because they are the intended parent, function as a parent, or are married to the biological parent at the time of the child’s birth—discover that in the eyes of the law they are in fact strangers to their children. These problems cannot be wholly eliminated; courts and legislatures will continue to face difficult questions about when to recognize individuals as parents. Nonetheless, in working through questions of parental recognition, solutions can be devised so that the burdens do not fall systematically on those historically subject to exclusion. This Part suggests how the law might better realize egalitarian commitments in parentage, not only with respect to families formed through ART but across the wider swath of families in contemporary society.

First, this Part sets out the principles to guide reform. Then, it illustrates how such principles can shape family law reform, primarily through

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361. At the time of enactment, same-sex couples could not marry. It is unclear how Texas will handle same-sex couples, though its provisions requiring that the “intended mother is unable to carry a pregnancy to term” may be read to exclude male same-sex couples even when they are married. Tex. Fam. Code Ann. § 160.756(b)(2) (West 2016).


363. Id. at 392.

364. Id. at 392 n.1. But cf. In re Roberto d.B., 923 A.2d 115, 126 (Md. 2007) (holding that it is “within a trial court’s power to order the [Maryland Division of Vital Records] to issue a birth certificate that contains only the father’s name”).

365. See Hollandsworth, supra note 18, at 235–38.
state legislative action but also through judicial decisions. Finally, this Part contemplates a future in which the parentage questions at the heart of this Article enter federal courts, and considers how courts might reason about those questions from a constitutional perspective.

Of course, the role of federal courts in the law of parental recognition is far from clear. Recent shifts in family law have featured federal courts playing a dialogic role. In the conflict over same-sex marriage, federal courts were critical but were not the primary actors for many years. Instead, change occurred at the state level, as legislatures reformed family law regimes and courts applied state constitutional principles to strike down laws restricting same-sex family formation. Those developments shaped the constitutional stakes in conflicts that would enter federal courts. So too in the domain of parentage may developments at the state level eventually produce and structure federal constitutional conflict.

A. Equality Commitments and Recognition of Parenthood’s Social Dimensions

There is broad consensus that the law of parental recognition should conform with principles of equality, but critical differences over the meaning of equality in this setting persist. As this Article demonstrates, merely providing equal treatment under existing rules does not furnish equality based on gender and sexual orientation. Instead, equality requires treating those traditionally excluded from the parentage regime as full participants. What does it mean in the law of parental recognition to treat those who break from conventional norms of gender and sexuality as belonging from the outset? In practical terms, equality requires law to value social as well as biological contributions in recognizing parents—and to do so in more transparent and evenhanded ways. Proceeding in this way is necessary to ensure that women engaged in nontraditional acts of parenting and gays and lesbians forming families with children—both of whom ground parental claims in social contributions—have their parent-child relationships recognized and respected.

366. See Eskridge, supra note 24, at 281–82.
367. See NeJaime, supra note 24, at 91–92.
368. For an illustration of an equal-treatment approach, see Garrison, supra note 1.
369. See Siegel, supra note 122, at 368–70.
370. Cf. Martha Minow, All in the Family & in All Families: Membership, Loving, and Owing, 95 W. Va. L. Rev. 275, 304 (1992) (challenging “state standardization and social stigma directed towards groups of people who depart from the state-sanctioned model of the family” and arguing that “stability, nurturance and care should be promoted wherever possible, and people committed to taking on these tasks should be encouraged to do so”).
Same-sex family formation ordinarily features nonbiological parent-child relationships. Accordingly, a parentage regime anchored in biological connection does not ensure equality for same-sex couples’ families, even if it withholds legal recognition from nonbiological parents in both different-sex and same-sex couples. Instead, a parentage regime that treats lesbian and gay parents as full participants opens social paths to recognition to both women and men, in both different-sex and same-sex couples, both inside and outside marriage.

A parentage regime rooted in the gender-differentiated frameworks of marriage and biology also makes outsiders of women who parent children to whom they are not biologically connected. Courts and legislatures often invoke reproductive biology to justify the differential treatment of nonbiological mothers and fathers—recognizing fathers, but not mothers, on social grounds. But this approach reflects and reiterates traditional understandings of motherhood as women’s natural destiny, and it excludes women who break from conventional roles by separating the biological aspects of reproduction from the social aspects of parenting. An approach to parentage driven by gender equality acknowledges that women and men are not similarly situated with respect to reproductive biology, yet recognizes both women and men who parent children to whom they are not biologically connected.

Such an approach protects not only parents but also children. The determination of legal parentage is generally driven by the parental interest, and is not a determination based on the best interests of the child.

371. This resonates with Martha Minow’s argument for “disentangling equality from its attachment to a norm that has the effect of unthinking exclusion.” Martha Minow, Making All the Difference 16 (1990).


373. See Bartholet, supra note 21, at 335–39 (connecting protection of social parent-child bonds to children’s welfare).

374. As Glenn Cohen persuasively argues, best-interest arguments for the regulation of reproduction can mask troubling justifications, but for the regulation of
family law and clearly animates approaches to parentage. Of course, difficult questions about children’s interests arise when the law allows individuals to make agreements about parental status, as it increasingly does in the context of ART. Nonetheless, vindicating equality commitments in the ways suggested here—and specifically through recognition of parenthood’s social dimensions—significantly promotes the interests of children. In fact, courts that have made parentage determinations that conform to principles of gender and sexual-orientation equality have recognized how their decisions further “the state’s interest in the welfare of the child and the integrity of the family.” Recognition of parents on social grounds allows courts to protect, rather than sever, “strongly formed bonds between children and adults with whom they have parental relationships.” Constitutional precedents on family recognition, parenthood, children’s interests remain critical. Compare I. Glenn Cohen, Beyond Best Interests, 96 MINN. L. REV. 1187, 1189 (2012) (arguing that best-interest justifications are “a way of talking about the regulation of reproduction that avoids confrontation with justificatory idioms that are disturbing, controversial, and illiberal”), with I. Glenn Cohen, Regulating Reproduction: The Problem with Best Interests, 96 MINN. L. REV. 423, 426 (2011) (“[I]n countless . . . areas of family law, the protection of the best interests of existing children serves as a powerful organizing principle that justifies state intervention.”).

375. While this Article’s approach to parentage primarily involves determinations of adult recognition, it reorients that recognition in ways that align with children’s well-being. On the ways in which American law continues to reason in terms of parental rights instead of children’s interests, see Anne L. Alstott, Is the Family at Odds with Equality? The Legal Implications of Equality for Children, 82 S. CAL. L. REV. 1, 5 (2008), which describes the tendency in “constitutional law and state family law . . . [to] privilege parental rights and disclaim any affirmative state obligation to secure children’s well-being.”

376. In re Guardianship of Madelyn B., 98 A.3d 494, 500 (N.H. 2014); see also, e.g., Elisa B. v. Superior Court, 117 P.3d 660, 669 (Cal. 2005) (recognizing the nonbiological mother as a parent so as not to “deprive [the children] of the support of their second parent”); In re Parental Responsibilities of A.R.L., 318 P.3d 581, 587 (Colo. App. 2013) (recognizing the nonbiological mother based on “the compelling interest children have in the love, care, and support of two parents, rather than one, whenever possible”); Chatterjee v. King, 280 P.3d 283, 293 (N.M. 2012) (“[T]he child’s best interests are served when intending parents physically, emotionally, and financially support the child . . . .”). Of course, the state may also recognize parents on social grounds in order to privatize dependency. This policy decision could further an agenda that relieves the government of obligations to support its citizens. See Melissa Murray, Family Law’s Doctrines, 163 U. PA. L. REV. 1985, 1990 (2015) (noting that a “traditional function of the marital family [is] the privatization of support and care of children”).

377. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 498 (N.Y. 2016) (quoting Debra H. v. Janice R., 930 N.E.2d 184, 201 (N.Y. 2010) (Ciparick, J., concurring)). Equitable parent doctrines, which have been critical to parental recognition on social grounds, often focus on the child’s interest. See, e.g., Me. REV. STAT. ANN. tit. 19-A, § 1891(3) (2015) (allowing a court to “adjudicate a person to be a de facto parent if the court finds . . . that the person has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child’s life”); V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000) (“[C]hildren have a strong interest in maintaining the ties...
including recent decisions on marriage equality, also emphasize children’s interests in nonbiological parent-child relationships.\textsuperscript{378}

In crediting parenthood’s social dimensions, this approach does not suggest that the law jettison biological connection as a basis for parentage. The aim here is not to articulate an ideal model of parental recognition but rather to reform the law in ways that align with principles of equality. Moreover, this approach respects existing expectations about parental connections.\textsuperscript{379} Given that both genetic contribution and birth play powerful roles in common understandings of parenthood, law may continue to reflect the salience of biological ties. Indeed, longing for biological parenthood leads many to engage in ART in the first place.\textsuperscript{380} Even those who create nonbiological relationships often seek their own physical traits in sperm and egg donors.\textsuperscript{381} The law need not deny the salience of biological bonds to incorporate other indicia of parenthood. Further, biological connections often lead individuals to form parent-child relationships. In this sense, biological ties—including not only gestation but genetics—may provoke commitments of care and support that align with the vindication of social factors.

This approach suggests a continued role for marriage as well.\textsuperscript{382} Individuals commonly understand parental relationships to coincide with marital bonds, and marriage has long captured social, and not simply biological, parent-child relationships.\textsuperscript{383} Marriage historically recognized social parent-child relationships in service of a gender-hierarchical, heterosexual order, but today, marriage may channel social parental ties in service of a more egalitarian society. Much of the shift toward marriage equality was driven by the relationship between marriage and parenting advanced by same-sex couples themselves. Now, same-sex couples assert compelling demands to parental recognition linked to marriage.\textsuperscript{384} Still, even as marriage persists as a pathway to parentage, law must ensure that connect them to adults who love and provide for them.”).


\textsuperscript{379} See Garrison, supra note 1, at 842.

\textsuperscript{380} See Michael Boucai, Is Assisted Procreation an LGBT Right?, 2016 Wis. L. Rev. 1065; Roberts, supra note 144.

\textsuperscript{381} See Laura Mamo, Queering Reproduction 191–92 (2007); Dean A. Murphy, Gay Men Pursuing Parenthood Through Surrogacy 152–53 (2015); Petra Nordqvist, Out of Sight, Out of Mind: Family Resemblances in Lesbian Donor Conception, 44 Sociology 1128, 1133 (2010).


\textsuperscript{384} See NeJaime, supra note 16, at 1242–46.
equality for nonmarital parents and children. This requires social paths to parental recognition for unmarried parents.

Significant authority from family law and constitutional law supports the equality principle articulated here. For example, lawmakers in states such as California and Maine recently revised their parentage codes to ensure equality for lesbian and gay parents and their children and to implement explicit and consistent gender-neutral constructions. These reforms required more than merely applying existing parentage rules on a facially neutral basis; they required reorienting parentage rules in ways that reflect the realities of same-sex family formation and that value contributions of women who assume nontraditional parental roles. In these states, lawmakers added paths to parentage that turned on social factors and opened those paths to women and men, in different-sex and same-sex couples, in marital and nonmarital families.

Constitutional precedents also support this approach to equality. The Court’s injunction against gender stereotyping in United States v. Virginia, as well as its protection of same-sex couples’ marriage and parenting relationships in United States v. Windsor and Obergefell, require treating women and gays and lesbians as equally valued participants. Nonetheless, these precedents do not definitively establish the implications of an equality principle in the parenting context. In fact, it is not clear that courts would require the types of reforms envisioned here under constitutional doctrine in its current form. Yet, as the trajectory toward marriage equality illustrates, courts may work out the meaning of equality over the course of many years and in dialogue with developments at the state level.

Accordingly, the next Section explores state-based family law reform, suggesting how law might concretely address parentage when

385. The purpose of the parentage statute, as the Massachusetts high court recently recognized in allowing an unmarried, nonbiological mother to establish parentage, “is to provide all ‘[c]hildren born to parents who are not married to each other . . . the same rights and protections of the law as all other children.’” Partanen v. Gallagher, 59 N.E.3d 1133, 1138 (Mass. 2016) (quoting Mass. Gen. Laws ch. 209C, § 1 (2016)).
guided by commitments to equality that require greater recognition of parenthood’s social dimensions. These reforms are meant to be illustrative and not exhaustive. The last Section then points toward constitutional developments that may follow from family law reform. The constitutional discussion draws on the case of marriage equality to consider how courts might come to understand the requirements of equal protection and due process so as to protect the social contributions of parents, including women and same-sex couples.

B. Reorienting Parentage in Family Law

Statutory parentage regimes in most states remain rooted, to varying degrees, in distinct approaches to motherhood and fatherhood. While law has increasingly allowed both men and women—with and without biological connections—to satisfy traditional presumptions of paternity, maternity remains limited to women with a biological connection to the child. Accordingly, law facilitates families without biological fathers but restricts families without biological mothers. Parentage law could move away from separate regulations of maternity and paternity and instead work toward general regulation of parentage.\(^\text{392}\) This would permit a fuller recognition of the social bonds of parenthood, for both men and women, in both different-sex and same-sex couples, both inside and outside marriage.\(^\text{393}\)

Biological connections—birth and genetics—would continue to demonstrate parentage, but social factors would as well. Some obvious candidates include intent (especially relevant before conception and birth),\(^\text{394}\) function (relevant in post-birth and longer-term scenarios), and family formation (including, but not limited to, marriage).\(^\text{395}\) Any

\(^{392}\) As the following discussion suggests, some states provide models for this shift. For a thoughtful perspective rejecting thoroughly gender-neutral parentage rules, see Appleton, supra note 18, at 237–40.

\(^{393}\) While this Article does not explore changes to the adoption regime as a potential avenue of reform, one could imagine making adoption less burdensome, at least in the circumstances addressed here. Cf. Bartholet, supra note 294, at 187. One could also imagine making adoption a more general requirement for all parents. The latter approach would challenge the notion that some individuals, but not others, have natural rights to parent particular children. Cf. Bruce A. Ackerman, Social Justice in the Liberal State 126 (1980) (“Infertile citizens . . . are no less entitled to fulfill their good than others who are differently endowed by the genetic lottery.”).

\(^{394}\) In cases involving ART, even those decisions reached on grounds other than intent often align with an intent-based rule. See Mary Patricia Byrn & Lisa Giddings, An Empirical Analysis of the Use of the Intent Test To Determine Parentage in Assisted Reproductive Technology Cases, 50 Hous. L. Rev. 1295, 1316–17 (2013). While devised first in the context of ART, intent-based principles, perhaps surprisingly, might aid more vulnerable families. See Jacobs, supra note 1, at 467.

\(^{395}\) Ideally, law would reward the work of parenting and thus prioritize functional criteria; such criteria would align with this Article’s focus on parenthood as a performative concept. But parents and children have interests in establishing legal relationships at birth, and thus social factors must vary based on timing. Moreover,
approach to parental recognition will credit the claims of some while rejecting the claims of others. When biological and social factors point in different directions, the approach elaborated here would recognize the social claim in some cases in which under current law it would fail and would reject the biological claim in some cases in which under current law it would prevail.

Some might object that the move toward social parenthood pushes law away from administrable rules and toward individualized and contested determinations. Yet there are relatively clear and predictable ways of protecting social parenthood, ordinarily without delay or judicial involvement. This Part suggests reforms that aim for relative certainty and predictability. Nonetheless, to the extent that crediting parenthood’s social dimensions leads law toward more fine-grained, fact-specific assessments, this is not new. Courts have long looked at social attachments and functional criteria in determining de facto parental status.

1. The Marital Presumption

Presently all but one state maintain a marital presumption that derives a spouse’s parentage from marriage to “the woman giving birth” or “the natural mother.” While most states continue to refer to the man married to the mother, a handful of states have revised their statutory marital presumptions to recognize the person married to the requiring parental conduct in the absence of biological ties disadvantages same-sex couples, who have critical interests in establishing the nonbiological parent’s status at birth. See Nancy D. Polikoff, And Baby Makes . . . How Many? Using In re M.C. To Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple, 100 GEO. L.J. 2015, 2033 (2012). At that point, intent—evidenced through consent to ART, written acknowledgment of parentage, or marriage to the biological parent—may provide the best indication of a commitment to the work of parenting.

396. Intentional and functional parenthood principles have been used by courts for many years and have been extensively elaborated by scholars. For foundational contributions, see Hill, supra note 91; Martha Minow, Redefining Families: Who’s In and Who’s Out, 62 U. COLO. L. REV. 269 (1991); Polikoff, supra note 1; and Shultz, supra note 1. For synthesis of intentional and functional principles, see Storrow, supra note 221.


mother. In these states, the marital presumption expressly applies to men in different-sex couples and women in same-sex couples. Yet, only one state—Washington—has a marital presumption that would also apply to women in different-sex couples and men in same-sex couples. Washington’s presumption provides that “a person is presumed to be the parent of a child if . . . [t]he person and the mother or father of the child are married to each other . . . and the child is born during the marriage . . . .” Guided by principles of equality, states could reform the marital presumption to apply in a fully gender-neutral manner. Washington’s statutory language provides a model—though one that could be altered in some ways.

Historically, the marital presumption could furnish parental recognition in the absence of a biological relationship and deny recognition to those with biological ties. Law exploited and elaborated this feature of the marital presumption as it accommodated ART. In an age of marriage equality and ART, the marital presumption is not based on gendered, heterosexual, and biological assumptions about reproduction and parenthood, but instead on social grounds for parental recognition. On this understanding, it is not clear why male same-sex couples cannot benefit from the presumption. Nor is it clear why women without biological ties cannot attain parentage by virtue of marriage to the biological father, just as men can attain parentage by virtue of marriage to the biological mother.

Animated by equality principles that lead law to value the social bonds of parenthood, the marital presumption could provide that the person married to the biological parent at the time of the child’s birth is the child’s presumed parent. While this type of provision would be relatively straightforward, it may insufficiently protect the rights of women who give birth. That is, by automatically furnishing a presumption to the wife of a biological father, it calls into question the parental rights of the birth mother. Accordingly, lawmakers might account for the interests of birth mothers by implementing a two-tiered system of marital presumptions: first, the person married to the woman giving birth at the time of the child’s birth would be presumed the child’s legal parent; second, the person married to the genetic parent at the time of the child’s birth would have significance for nonbiological mothers in different-sex couples and nonbiological fathers in same-sex couples only when the birth mother has already relinquished her rights or had them terminated.

400. See infra Appendix A.
403. Washington’s presumption appears to be limited by the state’s unchanged regulation of maternity. Washington law provides that the woman who gives birth is a legal parent. Wash. Rev. Code Ann. § 26.26.101 (West 2016). In contrast, many other states provide merely that the mother-child relationship may be established by proof of giving birth. Accordingly, in Washington, the gender-neutral marital presumption might have significance for nonbiological mothers in different-sex couples and nonbiological fathers in same-sex couples only when the birth mother has already relinquished her rights or had them terminated.
be presumed to be the child's legal parent, if that person accepts the child into his or her home and openly holds the child out as his or her child. This approach would respect the gestational bonds of women, but at the same time account for the parental bonds of women who separate motherhood from biological connection. And male same-sex couples who have children together would enjoy a nonadoptive path to dual parentage through marriage. Importantly, such an approach would not necessarily render a nonbiological mother in a different-sex couple or a nonbiological father in a same-sex couple a legal parent, but would merely make that result possible by virtue of a system of rebuttable presumptions. For the vast majority of parents, these changes would be irrelevant.

Revisiting *Doe*, the Connecticut decision discussed in Part III, illustrates the paradigmatic case in which this gender-neutral application of the marital presumption would matter. The mother there had parented her child for fourteen years before the dissolution of her marriage. While the surrogate’s rights had long been terminated, the biological father—the mother’s husband—pointed to Connecticut’s regulation of marital parentage to preclude his wife’s legal status. If she were the biological mother—whether gestational or genetic—she could have claimed the child as a child of the marriage; her husband would have been able to claim parental status even without a biological connection. But since she was a nonbiological mother, the child was not a child of the marriage. A gender-neutral marital presumption could resolve this problem and provide a way to recognize the mother’s status on social, rather than biological, grounds.

A gender-neutral marital presumption would promote not only sex but also sexual-orientation equality. Notably, when Washington became the only state to alter its marital presumption in this way, it did so as part of a broader effort to protect the families formed by same-sex couples. The bill to amend the parentage statutes followed from legal

404. The circumstances in which biological evidence would rebut parentage presumptions must be limited. See Polikoff, *supra* note 395, at 2027. For instance, where the parent is recognized on nonbiological grounds, the court may decide that it is not appropriate to allow biological evidence as grounds for rebuttal. See *Partanen v. Gallagher*, 59 N.E.3d 1133, 1140 (Mass. 2016). Some provisions already allow courts to exclude biological evidence based on the child’s best interests. See D.C. CODE § 16-909(b) (2012); UNIF. PARENTAGE ACT § 608(b) (UNIF. LAW COMM’N 2002).

405. A Connecticut court suggested the connection between marriage equality and dual parentage for male same-sex couples engaging in gestational surrogacy. See *Cunningham v. Tardiff*, No. FA08-4009629, 2008 WL 4779641, at *5 (Conn. Super. Ct. Oct. 14, 2008) (“[A]ny children born as a result of these procedures acquire in all respects the status of a legitimate child; which means that the plaintiffs do not have to terminate the parental rights of the surrogate and her husband, nor do they have to adopt their own children.” (citation omitted)); cf. *Partanen*, 59 N.E.3d at 1138 n.12 (suggesting that a nonbiological reading of the “holding out” presumption “may apply not only to a child born to two women, but also to a child born to two men through a surrogacy arrangement”).
recognition of same-sex relationships and sought to conform parentage law to such recognition.406 The bill was sponsored by a legislator who had engaged in gestational surrogacy in California to have children with his same-sex partner.407 As part of the same bill, he had attempted to repeal the state’s ban on compensated surrogacy and instead to facilitate gestational surrogacy.408 Despite support from both LGBT and women’s rights organizations in the state, the surrogacy provisions were dropped.409 Yet with the revised marital presumption, women in different-sex couples and men in same-sex couples may in some circumstances be able to engage in egg-donor gestational surrogacy and turn to the marital presumption to claim parentage.

Ideally, legislators would accept primary responsibility for reforming parentage law, as they did in Washington. But lawmakers in many states have been slow to respond to shifts in family formation made possible by ART—even when urged to do so by judges.410 Consequently, courts are routinely asked to apply existing parentage principles to new and unforeseen situations. In many states, courts can rely on existing family law principles to apply the marital presumption in ways that promote equality and recognize parents on social grounds.

Following the UPA, parentage codes in many jurisdictions expressly provide that, where possible, provisions governing the father-child relationship apply to the mother-child relationship.411 Courts have appealed to this gender-neutrality principle to recognize women in same-sex couples, in both marital and nonmarital families, on purely social grounds. Going forward, courts could apply this principle in more far-reaching ways, so as to recognize women in different-sex couples and men in same-sex couples on social grounds.412

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412. More general rules of statutory construction may also aid this move, but they vary in critical ways across jurisdictions. While some states have absolute gender-neutral rules of construction, others limit gender-neutrality such that the masculine
Consider *S.N.V.*, a case from Colorado in which a husband and wife had been raising a child from the husband’s extramarital relationship.\(^{413}\) When, two years after the child’s birth, the birth mother sought custody, the husband and wife claimed to be the child’s legal parents to the birth mother’s exclusion. Colorado’s statutory marital presumption provided that “[a] man is presumed to be the natural father of a child if . . . [h]e and the child’s natural mother are . . . married to each other and the child is born during the marriage.”\(^{414}\) Relying on the parentage code’s gender-neutrality principle, the court found that even though “on its face, [the provision] applies only to paternity determinations,” it “extended to maternity determinations.”\(^{415}\) The biological father’s wife, the court determined, could “bring an action to establish her legal maternity, even though she [was] not the biological mother.”\(^{416}\) The court recognized a social path to parentage by virtue of “[a] woman’s proof of marriage to the child’s father.”\(^{417}\) This is not to say that the nonbiological mother prevails over the birth mother, but rather that she simply has standing to assert parentage. Within a legal regime that limits parentage to two individuals, the decision authorizes a result that would prioritize the social bonds of the biological father’s wife over the claims of the birth mother.

*S.N.V.*’s application of the marital presumption is an outlier. If its logic were accepted more widely, parentage could be derived in the first instance from the biological father—a transformative shift in the law of parenthood. Critically, though, this shift would be consistent with equality commitments that already have reshaped other aspects of family law, and it would eradicate some of the asymmetries that continue to pervade parentage law.

2. **Voluntary Acknowledgments of Parentage**

While the marital presumption addresses children born inside marriage, states maintain statutory frameworks to recognize the parents of nonmarital children. Every state uses a procedure, commonly termed a

\(^{413}\) *In re S.N.V.*, 284 P.3d 147, 148 (Colo. App. 2011). They contended, against the allegation of the birth mother, that they had arranged for the birth mother to act as a surrogate. *Id.*


\(^{415}\) *In re S.N.V.*, 284 P.3d at 151.

\(^{416}\) *Id.* at 148.

\(^{417}\) *Id.* at 151. The parentage code provides that the mother-child relationship may be established “by proof of her having given birth to the child or by any other proof specified in [the code].” *Colo. Rev. Stat. Ann.* § 19-4-104. The same result could be reached through a gender-neutral and nonbiological “holding out” presumption. *See In re S.N.V.*, 284 P.3d at 151.
Voluntary Acknowledgment of Paternity (VAP), to identify a nonmarital child’s father.\textsuperscript{418} VAPs purport to identify the child’s \textit{biological} father. The identification of a second legal parent alleviates some of the burdens experienced by nonmarital children. But because same-sex couples ordinarily include a nonbiological parent, the biological foundation of VAPs does not repair—but instead exacerbates—burdens experienced by the nonmarital children of same-sex couples. The equality principles guiding reform would lead states to open VAPs to same-sex couples in ways that render VAPs explicitly capable of capturing social, and not only biological, grounds for parenthood.

As the revised UPA sets out the VAP mechanism, “The mother of a child and a man \textit{claiming to be the genetic father} of the child may sign an acknowledgment of paternity with intent to establish the man’s paternity.”\textsuperscript{419} After sixty days, VAPs have the force of an adjudication.\textsuperscript{420} VAPs assume biological paternity but do not formally require paternity testing.\textsuperscript{421} Accordingly, they effectively facilitate parental recognition on purely social grounds. In fact, courts in many states have rejected subsequent challenges to VAPs based on the father’s lack of genetic connection to the child.\textsuperscript{422}

Yet VAPs emphasize biological paternity in ways that obscure their nonbiological capacity. This means that VAPs capture nonbiological parenthood only for different-sex couples who, unlike their same-sex counterparts, can \textit{pretend} they are the child’s biological parents. So long as the signatories are an unmarried man and woman, the VAP can have the force of an adjudication of paternity regardless of biological facts. An unmarried lesbian couple, in contrast, cannot sign a VAP. Accordingly, in most states, the nonbiological mother cannot establish parentage upon the child’s birth. Nonbiological fathers can deploy their heterosexual relationship to achieve parentage, while nonbiological mothers are excluded.

A more egalitarian system would expressly allow VAPs to recognize parents not only on biological but also on social grounds.\textsuperscript{423} Voluntary acknowledgments of \textit{paternity} could become voluntary acknowledgments of \textit{parentage} and apply to both biological and nonbiological parents, including both men and women.\textsuperscript{424} Drafters of revisions to the UPA have

\textsuperscript{418} See Harris, \textit{supra} note 88, at 469.
\textsuperscript{419} \textit{Unif. Parentage Act} § 301 (Unif. Law Comm’n 2002) (emphasis added). “[T]he man and the mother acknowledge his paternity, under penalty of perjury,” but are not required to prove paternity. \textit{Id.} § 301 cmt.
\textsuperscript{421} See \textit{Unif. Parentage Act} § 302.
\textsuperscript{423} Cf. Harris, \textit{supra} note 88, at 478–88; Jacobs, \textit{supra} note 1, at 497–98.
\textsuperscript{424} As the Massachusetts high court recently suggested in dictum, if “a father
proposed this type of reform. The January 2017 discussion draft included a VAP procedure in which “[t]he woman who gave birth to a child and an individual claiming to be the alleged genetic father, intended parent, or presumed parent of the child may sign an acknowledgment of parentage with intent to establish the child’s parentage.”

3. **The Regulation of ART**

The marital presumption and VAP procedure envisioned above would accommodate some forms of ART through generally applicable regulations of parental recognition. Same-sex couples who engaged in donor insemination, for example, could sign a VAP to establish parentage for the nonbiological mother. Still, legislatures have compelling reasons to regulate ART through specific statutory provisions. In fact, states with the most extensive recognition of parentage through ART have enacted elaborate regulations aimed solely at assisted reproduction.

Lawmakers in these states have used the concept of consent to build statutory frameworks that open paths to nonadoptive parentage based on social, and not simply biological, grounds. The concept of consent already structures approaches to at least some forms of ART in practically every state. A more comprehensive and evenhanded use of consent in the regulation of ART can promote equality, based on gender, sexual orientation, and marital status. Approaches to both donor insemination and gestational surrogacy illustrate this point.

In every state, the man married to a woman who conceives with donor sperm is treated as the legal father. Under relevant statutes, his consent to assisted reproduction authorizes his recognition. In most states, though, his consent would be legally unavailing if he were not married to the child’s mother. While this presents obstacles to different-sex couples, its greatest impact has been on same-sex couples, who rely more heavily on donor insemination to have children and historically were excluded from marriage. In a regime animated by equality commitments, an unmarried partner, like a mother’s spouse, would derive parentage validly may execute [a VAP] absent a genetic relationship,” a VAP also “may be executed by a same-sex couple, even if one member of the couple is not biologically related to the children.” Partanen v. Gallagher, 59 N.E.3d 1133, 1139 (Mass. 2016).


426. *See Joslin, supra note 1, at 1222 (“[T]he most appropriate solution is to extend the consent = legal parent rule to all children born through assisted reproduction, regardless of the marital status, gender, or sexual orientation of the intended parents.” (citation omitted)); see also Polikoff, supra note 18, at 233 (addressing donor insemination). The current draft version of the UPA takes an approach that applies the concept of consent broadly to ART. See Unif. Parentage Act, supra note 425, § 704.*

427. *See Polikoff, supra note 18, at 234.*

428. *See infra Appendix B.*
from intention—operationalized through written consent to the mother’s use of ART with the intent to be a parent. For example, as Maine’s newly enacted parentage code provides, “a person who consents to assisted reproduction by a woman . . . with the intent to be the parent of a resulting child is a parent of the resulting child.”\textsuperscript{429} Not only would this remedy some of the inequalities that the biological framework governing non-marital parenthood imposes specifically on same-sex couples, it would also help unmarried different-sex couples who engage in ART.

Even as states open various forms of assisted reproduction on equal terms, they might still devise specific regulations for particular practices. Because surrogacy raises concerns with the exploitation of low-income women and the commodification of children and women’s reproductive labor, lawmakers may continue to treat surrogacy with special caution. Those states that have authorized gestational surrogacy for both different-sex and same-sex couples have done so through specific regulatory frameworks that seek to protect intended parents, surrogates, and children. Regulating in ways that attend to the interests of surrogates does not mean that surrogates possess parental rights. Instead, these states cut off claims to parental recognition and recognize the intended parents at the child’s birth.

Maine’s recent reform exemplifies this pattern. The state’s parentage code separately regulates gestational surrogacy by providing that, if certain conditions relating to protection of the surrogate’s interests are met,\textsuperscript{430} intended parents “are by operation of law the . . . parents of the resulting child immediately upon the birth of the child.”\textsuperscript{431} This regime allows both biological and nonbiological intended parents, in both different-sex and same-sex couples, both inside and outside of marriage, to obtain parental rights immediately upon the child’s birth.\textsuperscript{432} In doing so, it recognizes the importance of social contributions for those engaging in ART, and it applies mechanisms that capture those social contributions in ways that promote equality along lines of gender, sexuality, and marital status.

C. Reorienting Constitutional Law on Parenthood

Attention to family law’s treatment of parent-child relationships makes visible emergent constitutional questions. These questions may first arise in state courts under state law but will likely confront federal courts eventually. Constitutional precedents on the rights of women and gays and lesbians, including with respect to family and parenting relationships, demonstrate a strong commitment to including as full participants those who have been traditionally excluded. Nonetheless, courts have not

\textsuperscript{430} See id. § 1931.
\textsuperscript{431} See id. § 1933.
\textsuperscript{432} The current version of the UPA now being drafted and considered also takes this approach. See \textit{Unif. Parentage Act}, \textit{supra} note 425, § 809.
determined what these precedents mean for purposes of the specific relationships addressed in this Article. This Section explores how, in response to significant state-level reform, shifting patterns of family formation, and evolving norms of gender and sexuality, federal constitutional law may develop in ways that expand the space of parental recognition.

1. Equal Protection and Parental Recognition

Today, parental recognition implicates questions of equality—including on grounds of gender, sexuality, and marital status. But equal protection doctrine, as currently constituted, may struggle to adequately address issues arising in parenthood. The following discussion considers doctrinal features that present obstacles to effective constitutional oversight in the law of parental recognition, looks to marriage equality as a site in which these features did not prevent meaningful constitutional review, and then considers how law might develop on questions of parental recognition.

a. Contested Sites of Equality Law

Some features of current equal protection doctrine may constrain developments that promote gender and sexual-orientation equality in the law of parental recognition. As Part I showed, the Court has permitted gender differentiation in the legal regulation of parenthood, justifying such differentiation by resort to reproductive biology. Reasoning first articulated at the dawn of modern sex-equality doctrine continues to supply authority for the differential treatment of mothers and fathers. The failure to see gender differentiation in parenthood as a sex-equality problem led law to devalue the social contributions of unmarried biological fathers. In the contemporary regulation of parentage, this failure also leads law to discount the social contributions of women who separate parenthood from biological ties.

Other features of equal protection doctrine also pose obstacles. The Court has focused on questions of classification and discriminatory purpose in ways that mask inequality. For example, the Court has resisted an approach to sex equality that understands “legislative classification[s] concerning pregnancy [as] . . . sex-based classification[s].”\textsuperscript{433} And it has required a particularly demanding showing of “discriminatory purpose”\textsuperscript{434} in challenges to laws “neutral on [their] face”\textsuperscript{435}—that state actors


\textsuperscript{435} \textit{Id.} at 241.
took “a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”\textsuperscript{436}

In the law of parental recognition, courts might fail to see how a legal regime that privileges biological over social connections discriminates against lesbian and gay parents. Courts might conclude that so long as the government treats nonbiological unmarried parents the same (closing paths to their parental recognition), it acts in accordance with principles of equal protection. Compounding the problem, courts might view access to marriage as curing discrimination against same-sex couples and thus may give the government wide latitude in drawing distinctions that harm same-sex couples’ nonmarital families.\textsuperscript{437}

Certainly, these doctrinal features complicate effective constitutional oversight in the law of parental recognition. Yet, critically, these features did not prove dispositive in judicial approaches to marriage equality. Instead, courts considered social meaning in ways that led them to repudiate forms of exclusion that had long been taken for granted.\textsuperscript{438} The \textit{Windsor} Court did not appear to view the question of whether DOMA classified on the basis of sexual orientation as central, and thus neither addressed nor resolved it.\textsuperscript{439} Instead, the Court focused on DOMA’s purpose and effect. “The avowed purpose and practical effect of the law,” the Court explained, “are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”\textsuperscript{440} The harm the Court sought to remedy was not merely that the law differentiated but that it excluded and disrespected same-sex couples’ family relationships—“tell[ing] [same-sex] couples, and all the world, that their . . . marriages are unworthy of federal recognition.”\textsuperscript{441} Without legal


\textsuperscript{438.} See \textit{Obergefell v. Hodges}, 135 S. Ct. 2584, 2603 (2015) (“[N]ew insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”).


\textsuperscript{440.} United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

\textsuperscript{441.} \textit{Id.} at 2694; see also Reva B. Siegel, \textit{The Supreme Court 2012 Term, Foreword: Equality Divided}, 127 HARV. L. REV. 1, 90 (2013) (“[T]he Court emphasizes the message the law’s enforcement communicates to people, what it ‘tells’ them . . . . This is an
recognition, “same-sex . . . couples ha[d] their lives burdened . . . in visible and public ways.”

In striking down state marriage bans in *Obergefell*, the Court concluded that “the marriage laws . . . are in essence unequal.” While the Court reasoned primarily in terms of due process, its equality analysis focused not on questions of discriminatory purpose but instead on the impact of marriage bans on same-sex couples. The Court condemned the laws because they “serve[d] to disrespect and subordinate” gays and lesbians. “Especially against a long history of disapproval of their relationships,” the exclusion of same-sex couples “work[ed] a grave and continuing harm.” The Court required the government to make insiders of same-sex couples, declaring that “[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”

b. *Sexual-Orientation Equality and Parental Recognition*

The approach to equality that guided resolution of the marriage question could shape approaches to questions of parental recognition. Disputes emerging in state courts under state constitutional law are illustrative. In ordering the state to apply its marital presumption to lesbian couples, the Iowa Supreme Court relied on its earlier decision holding the state’s marriage law unconstitutional. Even though the law referred to “mothers” and “fathers”—just as the marriage law referred to women and men—the court rejected the argument that it classified only on the basis of sex, and not sexual orientation. Instead, the court concluded that “the refusal to list the nonbirthing lesbian spouse on the child’s birth certificate ‘differentiates implicitly on the basis of sexual orientation.’”

As in its earlier marriage decision, the court addressed the issue as one of discrimination against gays and lesbians. For the court, the effect of the law on same-sex couples appeared more important than a formal approach to questions of classification.

The concern with social meaning in marriage equality jurisprudence extends to parent-child relationships. In fact, *Windsor* and *Obergefell* each focused on the impact on children. The exclusion of same-sex couples, the *Windsor* Court explained, not only “demeans the couple,” but also “humiliates tens of thousands of children now being raised by account of how people understand and experience the law.”

442. *Windsor*, 133 S. Ct. at 2694. As Ackerman argues, the reasoning in *Windsor* focused on “social meaning,” “moving beyond the law world to the lifeworld.” Ackerman, *supra* note 276, at 308.
443. *Obergefell*, 135 S. Ct. at 2604.
444. *Id.*
445. *Id.*
446. *Id.* at 2602.
448. *Id.* at 352 (quoting Varnum v. Brien, 763 N.W.2d 862, 885 (Iowa 2009)).
same-sex couples.” The Court emphasized the difficulty that children would experience in “understand[ing] the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” Again, in *Obergefell*, the Court declared that for those “gays and lesbians [who] . . . create loving, supportive families,” the legal exclusion “harm[s] and humiliate[s] [their] children.” The Court observed that “[w]ithout the recognition, stability, and predictability marriage offers, children [of same-sex couples] suffer the stigma of knowing their families are somehow lesser.”

In this sense, marriage equality precedents push courts to reevaluate whether existing parentage regimes furnish equality to gays and lesbians and their children. As New York’s highest court recently acknowledged in repudiating a twenty-five-year precedent that excluded unmarried nonbiological parents from parentage, the “foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage . . . and the . . . holding in *Obergefell v. Hodges*, which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples.” *Obergefell* may reshape legal regulation even in traditionally resistant jurisdictions. Indeed, a Louisiana appellate court recently reevaluated the state’s treatment of unmarried nonbiological parents based on *Obergefell*, which the court read to protect not only marriage but also “the decision to start a family.”

Guided by marriage equality precedents, courts would focus on the meaning and impact of the law, rather than simply on whether the law classifies based on sexual orientation. Unlike different-sex family

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450. *Id.*
452. *Id.* at 2600. Even the Court’s earlier cases on unmarried fathers were driven by concern for children’s welfare. See *Caban v. Mohammed*, 441 U.S. 380, 391 (1979).
455. The marriage decisions’ approach to equality loosely maps onto antisubordination reasoning. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHILO. & PUB. AFF. 107, 157 (1976) (arguing that under the “group-disadvantaging principle,” “what is critical . . . is that the . . . law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group”); see also Balkin, *supra* note 271, at 2343 (“The Constitution has an egalitarian demand, . . . which . . . is a demand for equality of social status . . . .”); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9,
formation, same-sex family formation ordinarily—almost necessarily—features nonbiological parental ties. Accordingly, treating same-sex couples like different-sex couples is an empty promise so long as biological connection remains parenthood’s animating logic.

The harms documented in Part III would become relevant to an examination of the constitutionality of the state’s regulation of parentage. Nonrecognition and resort to adoption are concrete harms inflicted on same-sex parents and their children. The regime that imposes these burdens treats same-sex couples’ families as less deserving of respect and recognition. As the New York court reasoned, an approach to parenthood that does not turn on biological connection is necessary to “ensure[] equality for same-sex parents and provide[] the opportunity for their children to have the love and support of two committed parents.” Social paths to parental recognition, courts might conclude, are necessary to treat gays and lesbians as fully belonging in the institution of parenthood.

c. **Sex Equality and Parental Recognition**

While the constitutional treatment of gays and lesbians has evolved dramatically in recent years, the law of sex equality has received less attention. Yet issues of gender differentiation in parenthood continue to arise in both family law and immigration law. While cases in both settings illustrate how law has insufficiently credited the social contributions of biological fathers, the contemporary treatment of ART shows that law also insufficiently credits the social contributions of nonbiological mothers.

Constitutional precedents have permitted this system by citing biological differences between women and men to authorize the differential treatment of mothers and fathers. In rejecting the claims of unmarried fathers in the 1970s and 1980s, the Court justified the state’s treatment in terms of reproductive differences—even in the face of facts that evidenced actual father-child relationships. This dynamic arose even more powerfully in immigration cases. In *Nguyen*, the Court upheld regulations making it more difficult for fathers to confer citizenship on nonmarital children. The Court connected a woman’s biological role in reproduction to the “opportunity for mother and child to develop a real, meaningful relationship.” Yet it dismissed the claim of the father, who had in fact

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developed a “real, meaningful relationship,” because “[t]he same opportunity does not result from the event of birth, as a matter of biological inevitability.”

Other sex-equality precedents, however, take a different approach to sex-based classifications that implicate physiological differences between women and men. In holding the exclusion of women from the Virginia Military Institute (VMI) unconstitutional, the Court in *United States v. Virginia* recognized the persistence of “inherent differences” between women and men, but explained that such differences cannot form the basis “for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” Sex-based classifications, the Court declared, “may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.” The Court rested its decision on an equality principle premised on inclusion and participation, impugning laws that deny to women “full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”

*Virginia* and *Nguyen* share some common themes. They treat sex-based classifications as presumptively unconstitutional and subject such classifications to heightened scrutiny regardless of whether they implicate physiological differences between women and men. They recognize that in some circumstances, sex-based classifications can be justified in light of physiological differences. But they diverge in their approach to those circumstances. The tension between *Virginia* and *Nguyen* manifests itself most clearly in the law of parental recognition. If courts were to reason about parenthood from *Virginia*, rather than *Nguyen*, they would likely exhibit less tolerance for gender differentiation.

459. *Id.*


461. *Virginia*, 518 U.S. at 534 (internal citation omitted). As Cary Franklin argues, the Court’s reasoning suggests that “equal protection law should be particularly alert to the possibility of sex stereotyping in contexts where ‘real’ differences are involved, because these are the contexts in which sex classifications have most often been used to perpetuate sex-based inequality.” Franklin, *supra* note 343, at 146.

462. *Virginia*, 518 U.S. at 532. This resonates with Akhil Amar’s discussion of how to address, as a constitutional matter, the historical exclusion of women from the country’s decision-making community. See AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION 279 (2012) (asking how, after the Nineteenth Amendment’s adoption, “should faithful constitutional interpretation make amends for the retrospective-ly problematic exclusions that defined the American constitutional order prior to 1920?”).


This term, the Court has before it another case challenging the differential treatment of unmarried mothers and fathers in the immigration context. The law imposed longer residency requirements on unmarried fathers who wished to transmit citizenship to their children. In 2011, an equally divided Court affirmed per curiam a Ninth Circuit decision upholding these regulations. The Ninth Circuit had relied heavily on *Nguyen*, which involved a different set of sex-based regulations.

In rejecting the regulations now before the Court, the Second Circuit refused to extend *Nguyen*. Instead, *Virginia* guided the court’s analysis. The court found that, despite differences between women and men with respect to reproduction, the sex-differentiated residence requirements were “not substantially related to the goal of ensuring a sufficient connection between citizen children and the United States.” The Second Circuit explained that the sex-based distinction in the immigration regulations “arguably reflect[s] gender-based generalizations concerning who would care for and be associated with a child born out of wedlock.” By imposing more onerous requirements on biological fathers, the regulations not only enforced views that inevitably imposed child rearing on women but also failed to adequately credit the father-child relationship at stake. Indeed, the father had legitimated the child by marrying the mother when the child was eight.

Decisions on questions of parenthood in immigration may shape decisions in family law, just as earlier decisions relating to family law underwrote subsequent decisions regarding citizenship status. If the Court affirms the Second Circuit’s decision regarding parenthood in immigration law, it may also begin to question the wisdom of relying on biological justifications to distinguish between motherhood and fatherhood for purposes of family law. State court reasoning that relies on *Nguyen* to justify the nonrecognition of nonbiological mothers for purposes of parentage law could become suspect.

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467. See Flores-Villar v. United States, 536 F.3d 990, 996 (9th Cir. 2008), aff’d, 564 U.S. 210.
469. Id. at 531.
470. Id. at 533–34.
471. Id. at 524.
472. See Siegel, supra note 122, at 264–65 (discussing how questions of gender equality are obscured by physiological reasoning about reproduction in the legal regulation of abortion). On the confused treatment of parentage through ART in citizenship law, see Abrams & Piacenti, supra note 123, at 699–700.
Consider *Amy G. v. M.W.*, a California case with facts reminiscent of *S.N.V.*, the Colorado marital presumption case discussed earlier. The biological father and his wife had been raising the child, who at the time of the decision was three, since he was one month old. The birth mother had surrendered the one-month-old child to the father and had signed an agreement consenting to adoption by the father’s wife, but months later filed a petition to establish a parental relationship. Unlike in Colorado, the California court held that the father’s wife did not have standing to establish parentage pursuant to the marital presumption. Rejecting her equal protection argument, the court explicitly resorted to the Court’s reasoning in *Nguyen*:

> While a biological father’s genetic contribution to his child may arise from nothing more than a fleeting encounter, the biological mother carries the child for the nine-month gestational period. Because of this inherent difference between men and women with respect to reproduction, the wife of a man who fathered a child with another woman is not similarly situated to a man whose wife was impregnated by another man.

Of course, men and women are not similarly situated with respect to reproductive biology. But, guided by *Nguyen*, the court translated biological differences between women and men into social and legal differences between mothers and fathers. The point here is not to suggest that the birth mother should not have prevailed. Rather, it is that the court relied on biological differences to justify a system that denies standing to assert parentage to a woman who had formed a parent-child relationship on social grounds.

In contrast, an approach guided by *Virginia* would have asked whether, notwithstanding biological differences between women and men, the gender-differentiated parentage law is substantially related to an important governmental objective. Parentage laws, as many courts have recognized, are driven by the state’s interests in identifying those individuals responsible for the support of the child, protecting the integrity of the family, and safeguarding the child’s interest in continuity of

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476. *Id.* at 5–6.
The differentiation between men and women who step forward to parent children—that is, the recognition of nonbiological fathers but not mothers—may not advance those interests but instead may undermine them. A sex-neutral alternative could promote the government’s interests as effectively. Again, such an approach would not mean that the biological father’s wife in a case like Amy G. would prevail but that she merely would have standing to assert parentage.

Here, again, the principles animating the Court’s recent marriage decisions provide guidance. If courts were to reason in the tradition of Windsor and Obergefell, they might focus the constitutional inquiry not simply on means-ends analysis but also on the law’s social meaning. A court might ask whether the parentage law devalues women’s social bonds in the absence of biological ties and thereby denigrates important relationships of care and support formed between parents and children. Again, the harms documented in Part III would be relevant to the constitutional inquiry. Courts would view with skepticism a legal regime that forces nonbiological mothers, but not nonbiological fathers, to adopt their children. A court might ask whether the parentage law reflects views that tie women to child rearing as a matter of biology. As Part III showed, the nonrecognition of nonbiological mothers—as seen specifically in approaches to surrogacy—perpetuates the notion that the social role of motherhood flows inevitably from the biological fact of maternity. Guided by an equality-inflected approach, the Amy G. court, for instance, might have repudiated the trial court’s reasoning, which suggested that the nonbiological mother was “[no] different from a live-in nanny”—presumably also a woman who cares for a child not biologically her own.

Rather than insulate gender differentiation in parenthood from scrutiny based on biological differences between women and men, courts might provide constitutional oversight in ways that detect gender stereotypes and require sex-neutral alternatives. This may furnish greater recognition of unmarried biological fathers—like those in Parham and Nguyen—who commit to the social work of parenting. It may also dislodge motherhood from biological ties in ways that recognize women—like

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480. See sources cited and accompanying text supra note 376; see also Alstott, supra note 307, at 5 (stating that “continuity of care helps define what a parent is”).

481. Cf. Gartner v. Iowa Dep’t of Pub. Health, 830 N.W.2d 335, 353 (Iowa 2013) (“When a lesbian couple is married, it is just as important to establish who is financially responsible for the child and the legal rights of the nonbirthing spouse.”).

482. See Morales-Santana v. Lynch, 804 F.3d 520, 529 (2d Cir. 2015) (“In assessing the validity of the gender-based classification, . . . we consider the existence of gender-neutral alternatives to the classification.”), cert. granted, 136 S. Ct. 2545 (2016) (No. 15-1191).

483. Cf. Amar, supra note 462, at 302 (noting that “social meaning becomes especially important with regard to certain issues of gender equality,” including those that implicate “biological differences between the sexes”).

those in Doe and S.N.V.—who parent children to whom they have neither a gestational nor genetic connection. Both of these developments would value parenthood’s social dimensions in ways that promote children’s interests in continuing and stable relationships.

2. Equality and Parental Liberty

Given that equality concerns have structured the protection of liberty in the realm of family relationships, the law of parental recognition might also evolve as a matter of due process, which this Section only briefly considers. As Part I showed, the Court’s efforts in the 1970s to protect the parental rights of unmarried fathers grew out of concerns with the inequalities experienced by nonmarital parents and children. At that time, the Court announced that unmarried fathers have a due process interest in parenthood that springs from their biological connection to the child. Even though the Court required social performance from biological fathers, biological connection continued to ground the claim to constitutional protection. Since then, challenges to the biological limitation on constitutional protection have largely failed.


487. See Lehr v. Robertson, 463 U.S. 248, 262 (1983) (“[T]he biological connection . . . offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.”). The biological basis of parental liberty trades on a negative-liberty understanding of constitutional rights, rather than a due process doctrine that confers affirmative recognition. For competing accounts of this negative-positive distinction in constitutional approaches to family law, compare Anne L. Alstott, Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State, 77 Law & Contemp. Probs. 25 (2014), with Susan Frelich Appleton, Obergefell’s Liberties: All in the Family, 77 Ohio St. L.J. 919 (2016). For an approach that grounds rights to parental recognition in due process, see NeJaime & Siegel, supra note 439.

488. See Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844–45 (1977) (rejecting the claims of foster parents and affirming the importance of “natural” parent-child bonds, but leaving unsettled when, if ever, foster parents might have constitutional liberty interests). But see Elwell v. Byers, 699 F.3d 1208, 1216 (10th Cir. 2012) (extending constitutional protection to “preadoptive parents [who] have a more significant relationship than foster care because of the possibility of developing a permanent adoptive relationship” (quotation marks omitted)). Notably, in Prince v. Massachusetts, the Court assumed the litigant, who was the legal guardian of her niece, could claim constitutional parental rights vis-à-vis her niece, even though it ultimately upheld the governmental intervention. 321 U.S. 158, 161 (1944).
But with new appreciation for the equal status of gay and lesbian parents, courts might eventually recognize the social bonds of parenthood as a matter of due process.489 Again, marriage equality jurisprudence provides support for this approach, suggesting how emergent understandings of equality can reshape understandings of liberty.490 In Obergefell, the Court observed that the exclusion of same-sex couples from marriage “may long have seemed natural and just . . . .”491 But, it reasoned, new understandings of the equal status of gays and lesbians made clear that the exclusion impermissibly “impose[s] stigma and injury . . . .”492 Echoing the emphasis in Windsor’s equal protection analysis, the Obergefell Court’s due process analysis focused on how the “exclusion [from marriage] has the effect of teaching that gays and lesbians are unequal in important respects.”493 Explaining how the lack of recognition “consigned [same-sex couples] to an instability many opposite-sex couples would deem intolerable in their own lives,”494 the Court, as a matter of due process, required the government to treat gays and lesbians as insiders.

If Obergefell were to guide approaches to parental recognition, courts might extend due process protection to social bonds in the absence of biological connection. Indeed, this development would build on and elaborate commitments that animated the Court’s earlier precedents. Decisions on unmarried fathers emphasized men’s social contributions, even as constitutional protection was rooted in the biological tie. And when the Court articulated the due process interest in parental recognition, it did so to promote equality for nonmarital parents and children. Since then, it has become clear that the biological lines drawn to vindicate unmarried parents and children have resulted in the exclusion of same-sex couples’ families. Now, due process protection for the social dimensions of parenthood would remedy harms imposed on the nonmarital families formed by gays and lesbians.

489. A federal district court recently recognized a nonbiological same-sex spouse’s “right to be a parent” as a matter of due process. Henderson v. Adams, No. 1:15-cv-00220-TWP-MJD, 2016 WL 3548645, at *15 (S.D. Ind. June 30, 2016). At least one court has suggested that an unmarried nonbiological mother may have a constitutional liberty interest to maintain the parental relationship. See In re Parentage of L.B., 122 P.3d 161, 177 n.27 (Wash. 2005) (noting that the nonbiological mother “persuasively argue[s] that [she and the child] . . . have constitutionally protected rights to maintain their parent-child relationship,” but concluding that “granting de facto parental standing to [nonbiological mother] renders these additional constitutional concerns moot”).


492. Id.

493. Id.

494. Id. at 2601.
Further, due process protections for social bonds of parenthood would more broadly protect nonbiological mothers.\textsuperscript{495} The woman who commits to the difficult task of parenting—even without biological connections—would have the importance of her parental work and the significance of her relationship with the child recognized as a matter of liberty. Due process protection of this kind would also affirm values that the Court has articulated in protecting women’s liberty interests in reproductive decision making. The Court has explained that women’s ability to separate pregnancy from motherhood and thereby break from traditional norms that tie them naturally to child rearing is critical to women’s equal standing.\textsuperscript{496} In the regulation of ART, this insight has implications for intended mothers and surrogates, both of whom separate the biological fact of maternity from the social role of motherhood. Law would not only protect the intended mother’s social contributions, but also the surrogate’s decision to carry and give birth to a child she does not wish to parent. Women who occupy unconventional gender roles—both those who seek to parent and those who do not—would have their decisions respected.

At this point, it is unclear what doctrinal form constitutional oversight of parental recognition might take. Both equal protection and due process might contribute to developments in the law of parental recognition. In either area, though, meaningful constitutional interventions are likely to arise only after a number of states have reckoned with the burdens placed on women and same-sex couples whose parent-child relationships the government fails to respect and recognize.

**Conclusion**

This Article uncovers the harms countenanced by a legal regime rooted in marital and biological frameworks of parental recognition. Because those frameworks were designed around the gender-differentiated, heterosexual family, gender- and sexuality-based asymmetries remain embedded in the law of parental recognition. Even as courts and legislatures seek to conform parentage law with more recent egalitarian commitments, their progress remains partial.

To repair the problems that exist in current approaches to parental recognition, this Article proposes reforms that continue to use marital and biological ties as markers of parentage. Perhaps this reform project holds more transformative potential than one might assume. The shifts in

\textsuperscript{495} While this discussion focuses on parental rights, there may be plausible arguments regarding a “child’s liberty interest in preserving established familial or family-like bonds.” Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting). Nonetheless, little constitutional authority currently supports this child-centered approach.

\textsuperscript{496} See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992); see also Siegel, supra note 122.
legal parenthood envisioned here may ultimately destabilize both marital and biological logics by transcending the two-parent limit on which both are premised.\textsuperscript{497} Indeed, a subsequent phase of liberalization focused on recognition of multiple parents may have just begun.\textsuperscript{498}

In \textit{Michael H.}, the seminal case on the conflict between unmarried biological fathers and married nonbiological fathers, Justice Scalia declared that “California law, \textit{like nature itself}, makes no provision for dual fatherhood.”\textsuperscript{499} Yet his plurality opinion protected the nonbiological father—the mother’s husband who claimed parenthood by virtue of the marital presumption—by rejecting the \textit{natural} father’s constitutional claim. Marriage, in that case, did not simply vindicate social understandings of parenthood; it also cabined reproduction and parenting within the two-parent unit.\textsuperscript{500} The child emerged with only one legal mother and father.

Since \textit{Michael H.}, California law has changed. The state allows biological fathers to challenge the parentage of husbands;\textsuperscript{501} recognizes unmarried nonbiological fathers,\textsuperscript{502} even over their biological counterparts;\textsuperscript{503} and protects the parental rights of same-sex couples.\textsuperscript{504} The state regulates ART, for both married and unmarried couples and different-sex and same-sex couples, in ways that furnish a range of paths to nonbiological parentage.\textsuperscript{505}

Eventually, when confronted with the many types of parental configurations that California law could produce,\textsuperscript{506} California legislators decided to allow recognition of more than two legal parents.\textsuperscript{507} Without marriage, biology, gender, and sexual orientation as constraints on parenthood, the two-parent rule seemed neither doctrinally sound nor normatively desirable. Now, marital and biological bonds need not define

\begin{footnotes}
\item [501] \textit{Cal. Fam. Code} \S 7541 (West 2016).
\item [502] \textit{In re} Nicholas H., 46 P.3d 932 (Cal. 2002).
\item [503] Steven W. v. Matthew S., 39 Cal. Rptr. 2d 535 (Ct. App. 1995).
\item [504] \textit{See}, \textit{e.g.}, \textit{Cal. Fam. Code} \S 7611.
\item [505] \textit{Id.} \S 7613.
\item [506] \textit{See}, \textit{e.g.}, \textit{In re} M.C., 123 Cal. Rptr. 3d 856, 861 (Ct. App. 2011) (describing a case involving a birth mother, her same-sex spouse, and the biological father who stepped forward to parent).
\item [507] 2013 \textit{Cal. Legis. Serv. ch.} 564 (West).
\end{footnotes}
nor limit parentage. Legal parental ties can spill out of both the biological and marital units, making each less meaningful to parentage. 508

Ironically, pushing beyond the two-parent limit might in some ways vindicate biological ties—but in ways that reflect the changes wrought by ART. 509 Recognition of more than two parents may accommodate situations in which parents seek to have gamete donors or surrogates maintain a relationship to the child, even if not as a primary parent. 510 Recognition of multiple parents may also address objections to a less biologically oriented parentage regime. 511 If the marital presumption were thoroughly gender-neutral, concerns about the rights of birth mothers could be addressed by recognizing a nonbiological parent’s interest in addition to, rather than in place of, the birth mother’s interest. In fact, recognition of multiple parents might address potential constitutional objections to a system that would otherwise allow the birth mother’s parental rights to be rebutted. 512 In the end, law might adapt to many kinds of families forming today, recognizing the continued attraction of biological parenthood while accommodating the growing number of nonbiological bonds that are possible.

Of course, this approach is not without costs. In facilitating additional claims, law might change the very meaning of parenthood—divesting the power to exclude that has historically been central to parental status. 513 Moreover, it is not clear when exactly recognition of multiple parents serves, and when it undermines, children’s interests. Further, as we have already seen, efforts at liberalization may fail to eradicate inequalities. Those with nonbiological bonds—including same-sex couples and women engaging in egg-donor gestational surrogacy—may have valid objections to a system of parentage that exposes their families to biological claims, even if the claimants seek to supplement rather than supplant the nonbiological parents.

508. This result is now also possible under parentage codes in other jurisdictions. See D.C. Code § 16-831.01 (2013); Me. Stat. tit. 19-A, § 1853(2) (2016).
511. For example, recognizing nonbiological fathers of nonmarital children would not prevent imposing obligations on biological fathers.
Within this regime, inequalities based on gender and sexuality may persist. These concerns do not counsel in favor of abandoning current efforts to reform parentage. Rather, they suggest the importance of learning from the past—moving forward with an appreciation for how inequalities may endure even as legal regimes are transformed. 514

APPENDIX A

Gender Neutrality in Donor-Insemination Regulation and Marital Presumptions

This Appendix documents jurisdictions in which donor-insemination statutes and marital presumptions apply to not only different-sex but also same-sex couples. With respect to the marital presumption, except in the case of Washington State, the gender-neutral presumption applies to female same-sex couples—recognizing the woman married to the birth mother as the legal parent—but not to male same-sex couples.

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514. See Siegel, supra note 271.
515. The statute refers to support obligations and not parental recognition.
516. After Obergefell, the Arkansas Supreme Court upheld the state’s refusal to issue birth certificates for children of married female couples listing the nonbiological mother as the second parent. See Smith v. Pavan, 505 S.W.3d 169 (Ark. 2016).
517. The case is an unreported trial-court decision.
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519. The reach of authority on the question of the marital presumption, as distinct from donor-insemination provisions, is unclear.

520. The statute’s gender-neutral language was not aimed at same-sex couples and thus its application is unclear.

521. Although statutes regulating marital parentage have not been updated, presumably civil union statutes treating same-sex partners like spouses for parentage would extend to same-sex spouses in the era of marriage equality.
<table>
<thead>
<tr>
<th>State</th>
<th>Gender-Neutral Donor-Insemination Regulation</th>
<th>Authority</th>
<th>Gender-Neutral Marital Presumption</th>
<th>Authority</th>
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<tr>
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<td>X</td>
<td></td>
<td>S.D. Codified Laws § 25-8-57 (2016)</td>
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<td>Wyoming</td>
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</table>

<sup>522</sup>. Case law in New York remains mixed over the extent to which marital presumptions of parentage apply to same-sex spouses.
APPENDIX B
Marital Status in Donor-Insemination Statutes

This Appendix lists statutes for those jurisdictions that maintain provisions specifically governing parentage in the context of donor insemination. It then addresses the role of marital status in these statutes—first, whether the statute recognizes only a woman’s spouse as a legal parent, and second, whether the statute divests sperm donors of parental rights only when the donee is a married woman.

<table>
<thead>
<tr>
<th>State</th>
<th>Relevant Authority</th>
<th>Donor-Insemination Statute</th>
<th>Statute Recognizes Only Spouse As Legal Parent</th>
<th>Statute Divests Sperm Donor Only With Married Donee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>X</td>
<td>ALA. CODE §§ 26-17-702 to -703 (LexisNexis 2009)</td>
<td>X</td>
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<td>ALASKA STAT. § 25.20.045 (2014)</td>
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<td>ARK. CODE ANN. § 9-10-201 (2015)</td>
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<td>CAL. FAM. CODE § 7613 (West 2016)</td>
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<td>COLO. REV. STAT. § 19-4-106 (2016)</td>
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<td>CONN. GEN. STAT. §§ 45a-775 to -775 (2015)</td>
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<td>GA. CODE ANN. § 19-7-21 (2015)</td>
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<td>IDAHO CODE § 39-5405 (2011)</td>
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<td>X</td>
<td>750 ILL. COMP. STAT. 46/702, 46/703 (2015)</td>
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<td>Indiana</td>
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<td>Kentucky</td>
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</table>

523. The statute refers to support obligations and not parental recognition.
<table>
<thead>
<tr>
<th>State</th>
<th>Relevant Authority</th>
<th>Donor-Insemination Statute</th>
<th>Statute Recognizes Only Spouse As Legal Parent</th>
<th>Statute Divests Sperm Donor Only With Married Donee</th>
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<td>Louisiana</td>
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<td>MD. CODE ANN., EST. &amp; TRUSTS § 1-206 (West 1974)</td>
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<td>X</td>
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<td>MASS. GEN. LAWS ANN. ch. 46, § 4B (West 1981)</td>
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<td>Minnesota</td>
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<td>MINN. STAT. § 257.56 (1987)</td>
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<td>MO. ANN. STAT. § 210.824 (West 1987)</td>
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<td>Nevada</td>
<td>X</td>
<td>NEV. REV. STAT. ANN. §§ 126.660, 126.670, 126.041 (West 2013)</td>
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<tr>
<td>New Mexico</td>
<td>X</td>
<td>N.M. STAT. ANN. §§ 40-11A-702, -703 (2009)</td>
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<td>North Dakota</td>
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<td>N.D. CENT. CODE §§ 14-20-60, -61 (2009)</td>
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<td>OHIO REV. CODE ANN. § 3111.95 (LexisNexis 2015)</td>
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<td>OKLA. STAT. ANN. tit. 10, § 552 (West 2009)</td>
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<td>Oregon</td>
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<td>OR. REV. STAT. ANN. §§ 109.239, .243 (West 2016)</td>
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</table>
### Appendix C

**Availability of Paths to Parental Recognition for Unmarried, Nonbiological Parents**

This Appendix documents jurisdictions in which unmarried, non-biological parents may attain some form of parental recognition without having adopted the child. It provides relevant authority both for jurisdictions in which parental recognition is available and for jurisdictions in which parental recognition is unavailable.

<table>
<thead>
<tr>
<th>State</th>
<th>Available Path</th>
<th>Authority</th>
</tr>
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<tbody>
<tr>
<td>Alabama</td>
<td></td>
<td><em>Ex parte</em> N.B., 66 So. 3d 249 (Ala. 2010)</td>
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<tr>
<td>Arkansas</td>
<td>X</td>
<td>Bethany v. Jones, 378 S.W.3d 731 (Ark. 2011), <em>But see</em> Foust v. Montez-Torres, 456 S.W.3d 736 (Ark. 2015) (finding no standing for a nonparent, who did not stand in loco parentis with the child at the time of filing her complaint)</td>
</tr>
<tr>
<td>California</td>
<td>X</td>
<td>Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005)</td>
</tr>
<tr>
<td>State</td>
<td>Available Path</td>
<td>Authority</td>
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<tr>
<td>Connecticut</td>
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<tr>
<td>Delaware</td>
<td>X</td>
<td>DEL. CODE ANN. tit. 13, § 8-201(c) (2014)</td>
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<td>District of Columbia</td>
<td>X</td>
<td>D.C. CODE §§ 16-831.01-.03 (2016)</td>
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<tr>
<td>Kentucky</td>
<td>X</td>
<td>Ky. REV. STAT. ANN. § 403.800 (West 2010), as interpreted by Mullins v. Picklesimer, 317 S.W.3d 569 (Ky.), as modified on denial of rehe’g (2010)</td>
</tr>
<tr>
<td>Louisiana</td>
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<tr>
<td>Maryland</td>
<td>X</td>
<td>Conover v. Conover, 141 A.3d 31 (Md. 2016)</td>
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<td>Michigan</td>
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<tr>
<td>Minnesota</td>
<td>X</td>
<td>MINN. STAT. ANN. § 257C.08 (West 2007), as interpreted by Soohoo v. Johnson, 731 N.W.2d 815 (Minn. 2007); see also LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000)</td>
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<tr>
<td>Mississippi</td>
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<tr>
<td>Montana</td>
<td>X</td>
<td>MONT. CODE ANN. § 40-4-228(2)(a)-(b) (2009), as interpreted by Kulstad v. Maniaci, 220 P.3d 595 (Mont. 2009)</td>
</tr>
<tr>
<td>Nebraska</td>
<td>X</td>
<td>Latham v. Schwerdtfeger, 802 N.W.2d 66 (Neb. 2011)</td>
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524. The Illinois court decision is limited to common-law contract and promissory estoppel claims arising from agreements to conceive a child through donor insemination.

525. The Indiana cases apply to visitation only and not full parental rights.
<table>
<thead>
<tr>
<th>State</th>
<th>Available</th>
<th>Authority</th>
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</thead>
<tbody>
<tr>
<td>New Hampshire</td>
<td>X</td>
<td>In re Guardianship of Madelyn B., 98 A.3d 494 (N.H. 2014)</td>
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<tr>
<td>New Mexico</td>
<td>X</td>
<td>Chatterjee v. King, 280 P.3d 283 (N.M. 2012)</td>
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<td>North Dakota</td>
<td>X</td>
<td>McAllister v. McAllister, 779 N.W.2d 652 (N.D. 2010)</td>
</tr>
<tr>
<td>Ohio</td>
<td>X</td>
<td>In re Bonfield, 780 N.E.2d 241 (Ohio 2002)</td>
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<tr>
<td>Oklahoma</td>
<td>X926</td>
<td>Ramey v. Sutton, 362 P.3d 217 (Okla. 2015)</td>
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<td>In re Parentage of L.B., 122 P.3d 161 (Wash. 2005)</td>
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<td>X</td>
<td>In re Clifford K., 619 S.E.2d 138 (W. Va. 2005)</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>X928</td>
<td>In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995)</td>
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<tr>
<td>Wyoming</td>
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<td>LP v. LF, 338 P.3d 908 (Wyo. 2014)</td>
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</table>

526. Parental recognition is afforded only upon showing that the couple was unable to legally marry, that they engaged in intentional family planning to have a child and to coparent, and that the biological parent consented.

527. Parental recognition is afforded only upon showing that the couple would have chosen to marry had the choice been available to them (rather than merely that they were unable to marry).

528. The Wisconsin case applies to visitation only and not full parental rights.
**APPENDIX D**

Statutes Expressly Regulating Donor Status and Intended-Parent Status in the Context of Egg and Embryo Donation

This Appendix lists statutes for those jurisdictions that maintain provisions specifically governing parentage in the context of egg and/or embryo donation. It then addresses two specific aspects of these statutes—first, whether the statute provides that egg or embryo donors are not legal parents, and second, whether the statute recognizes as legal parents those who use donor eggs or embryos with the intent to be a parent.

<table>
<thead>
<tr>
<th>State</th>
<th>Relevant Authority</th>
<th>Egg/Embryo Donor Statute</th>
<th>Statute Divests Egg/Embryo Donor of Parental Rights</th>
<th>Statute Recognizes Intended Parent as Legal Parent</th>
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</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>X</td>
<td>Ala. Code § 26-17-702 (LexisNexis 2015)</td>
<td>X</td>
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<td>Statute Recognizes Intended Parent as Legal Parent</td>
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<th>State</th>
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<th>Egg/Embryo Donor Statute</th>
<th>Statute Divests Egg/Embryo Donor of Parental Rights</th>
<th>Statute Recognizes Intended Parent as Legal Parent</th>
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**APPENDIX E**

Statutes and Appellate Cases Regarding Parentage in Gestational Surrogacy

This Appendix documents relevant statutory and judicial authority on gestational surrogacy. It first lists jurisdictions that explicitly restrict gestational surrogacy and then lists jurisdictions that explicitly permit gestational surrogacy. It then covers jurisdictions extending parental recognition to intended mothers who use their own egg but engage a gestational surrogate. Finally, it covers jurisdictions extending parental recognition to intended parents who engage a gestational surrogate and do not have a genetic connection to the child.

<table>
<thead>
<tr>
<th>State</th>
<th>Gestational Surrogacy Expressly Restricted by Statute</th>
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530. The statute is expressly limited to different-sex couples and single individuals.
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531. For a trial-court order recognizing a genetic mother as a legal mother, see *In re Babies S*, No. 06CV4323, 2006 WL 5502456 (Colo. Dist. Ct. 2006).

532. The statute is limited to different-sex couples and female same-sex couples by the requirement that there be a “commissioning mother.” *Fla. Stat. Ann.* § 742.15 (West 2016).

533. The statute is limited to different-sex couples by the requirement that the couple “create the child using only their own gametes.” *La. Stat. Ann.* § 9:2718 (2016).
### Nature of Parenthood

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³⁴ This case did not involve a genetic intended mother. Nevertheless, the Maryland court ordered disestablishment of the gestational surrogate’s maternity, such that the intended father became the sole legal parent.

³⁵ Applying Illinois law per the terms of the agreement, the court ordered disestablishment of the gestational surrogate’s maternity.

³⁶ The authority applies to noncompensated surrogacy and includes a waiting period.

³⁷ New Mexico prohibits compensated surrogacy.
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538. The authority applies to noncompensated surrogacy and includes a waiting period.

539. The statute is limited to different-sex couples by the requirement that “the embryo is conceived by using the egg and sperm of the intended parents.” N.D. Cent. Code § 14-18-01 (2009).

540. The Ohio case enforced a contract so as to preclude the gestational surrogate from being designated a legal parent.

541. The statute contemplates gestational surrogacy in which the embryo results from the “wife’s egg and husband’s sperm,” but nonetheless provides that nothing in the statute “shall be construed to expressly authorize the surrogate birth process.” Tenn. Code Ann. § 36-1-102(48) (2016).

542. The statute may be limited to different-sex couples and female same-sex couples given provisions that “the intended mother [show she] is unable to carry a pregnancy to term . . . .” Tex. Fam. Code § 160.756(b)(2) (West 2016).
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543. The application to same-sex couples is unclear.
544. The statute restricts compensated surrogacy.
545. The statute is limited to cases of noncompensated surrogacy.
546. The statute is limited to cases of noncompensated surrogacy.
Sexuality On Trial: Expanding Pena-Rodriguez To Combat Juror Queerphobia

Chan Tov McNamarah

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“There will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a homosexual or bisexual person offensive . . . . [O]ur criminal justice system must take the necessary precautions to assure that people are convicted based on evidence of guilt, and not on the basis of some inflammatory personal trait.”

“I was taken aback by Christian’s dialect. That when I heard it, I considered Christian a Homosexual. And from that point, accepted Commonwealth’s testimony as Gospel, while on the other hand, found defense testimony, no matter how helpful to Christian’s case, unsubstantial. And that my verdict was based on Christian’s Homosexuality.”

**INTRODUCTION**

On March 6, 2017, in *Pena-Rodriguez v. Colorado*, the U.S. Supreme Court recognized a constitutional exception to Federal Rule of Evidence 606(b), holding that a juror’s comments made during deliberation may be used to set aside a verdict if they suggest reliance “on racial stereotypes or animus.” Rule 606(b) serves as a “no impeachment rule”—generally preventing jurors from testifying about statements made during deliberations after a verdict has been rendered. In *Pena-Rodriguez*, the Supreme Court considered whether Rule 606(b) preempted juror testimony and impeachment of the verdict, where a juror made statements evoking disparaging stereotypes about “Mexican[s] and Mexican men” during deliberations. The five to three decision ultimately carved out a limited exception, covering only cases in which “one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict.” Writing for the majority, Justice Anthony M. Kennedy reasoned that such an exception was necessary “to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.”

The *Pena-Rodriguez* holding adds fuel to a larger discussion on the issue of juror bias. In recent years, a growing body of scholarship has focused on jurors’ implicit biases, most prominently White jurors’

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4. Fed. R. Evid. 606(b)(1) (“During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement or incident that occurred during the jury’s deliberations.”).
6. *Id.* at 869.
7. *Id.* at 868.
8. See, e.g., Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012) (discussing the existence of implicit biases in civil and criminal trials and
biases towards Black defendants, and male jurors’ biases against women. Fewer articles have comprehensively considered juror biases against queer parties or solutions to prevent queerphobia from improperly influencing outcomes in criminal proceedings. This Note seeks to fill that dearth by conducting a thorough consideration of queerphobia at trial. The Note is both descriptive and prescriptive. It argues that the effects of juror queerphobia are not uniform but dynamic, manifesting in a myriad of ways depending upon the type of trial and the queer party’s role therein. To combat this queerphobia, the Note then proposes an extension of Pena-Rodriguez to cases of blatant anti-queer bias. In so doing, the Note constitutes the first published call for an extension of the Pena-Rodriguez to queerfolk.

The Note proceeds in three parts. Part I uses social science research on societal queerphobia to document the pervasiveness and consequences of anti-queer bias. Existing scholarship overwhelmingly focuses on the effects of queerphobia in criminal, not civil, trials. Part I also builds

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9. See, e.g., Shamena Anwar et al., The Impact of Jury Race in Criminal Trials, 127 Q.J. ECON. 1017 (2011) (finding that all-White jury pools convicted Black defendants 16 percentage points more than White defendants); Samuel R. Sommers & Phoebe C. Ellsworth, White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom, 7 PSYCHOL. PUB. POLY & L. 201 (2001) (finding that white jurors were likely to demonstrate racial prejudice in cases without salient racial issues).

10. See e.g., Connie Lee, Gender Bias in the Courtroom: Combating Implicit Bias Against Women Trial Attorneys and Litigators, 22 CARDOZO J.L. & GENDER 229 (2016) (documenting biases against female attorneys).

11. In this paper, the term queer is used interchangeably to refer to gender and sexual minorities including those mentioned under the acronym “LGBTQ+” (Lesbian, Gay, Bisexual, Transgender, Queer, and Others). The term has been reclaimed by LGBTQ+ communities and is not intended as derogatory. This usage is consistent with recent scholarship on LGBTQ+ issues. See, e.g., Diane L. Zosky & Robert Alberts, What’s in a Name? Exploring Use of the Word Queer as a Term of Identification Within the College-aged LGBT Community, 26 J. HUM. BEHAV. SOC. ENV’T 597 (2016) (providing evidence that LGBTQ+ persons have reclaimed the term “queer”).

12. Others have peripherally noted juror queerphobia within larger studies of queerphobia in the judicial system. The majority of these studies have been limited to biases against Lesbian and Gay individuals. See, e.g., Todd Brower, Twelve Angry—and Sometimes Alienated—Men: The Experiences and Treatment of Lesbian and Gay Men During Jury Service, 59 DRAKE L. REV. 669, 672–95 (2011) (examining the experience of gay men and lesbians during jury service).

13. Per preemption check (4/22/18).
upon such work by considering how juror queerphobic bias may affect the outcomes of civil trials.¹⁴

Part II proposes expanding Pena-Rodriguez to combat blatant juror queerphobia at jury trials. Because voir dire has not facilitated the removal of jurors with queerphobic biases, the issue requires a more specific and intentional response, which an expansion of Pena-Rodriguez could bring.

Finally, Part III recounts the contours of the Pena-Rodriguez case and argues that because of the pervasive and invidious nature of queerphobic sentiment, the same Pena-Rodriguez rationale applies. Both the similarities between racial and queerphobic prejudices and the ineffectiveness of procedural tools designed to remove and reduce jury biases amplify the need for the Pena-Rodriguez’s safety net to be extended to queerphobic bias.

I. JUROR QUEERPHOBIA AND THE CONSEQUENCES FOR QUEER JUSTICE

A. The Existence & Prevalence of Anti-Queer Bias

Over the past decade polls have conveyed a narrative of rapidly decreasing bias against queer persons, and have touted gathering public support for queer persons and relationships. One public opinion poll on the morality of homosexual relations documented a twenty-three (23) percent increase in “moral acceptance” between 2014 and 2017.¹⁵ Other meta-reviews of public opinion polls indicate that support for lesbians and gays has doubled over the past thirty years,¹⁶ the belief that homosexuality is wrong has decreased dramatically over the past forty years,¹⁷ and between 2005 and 2011 support for transgender persons has increased by forty percent.¹⁸ In terms of support for same-sex marriage, one pre-Obergefell meta-review found that support for marriage equality increased nationwide by an average of 2.6 percent per year between 2004 and 2012 and by 6.2 percent per year between 2012 and 2015.¹⁹

¹⁴. Few others have briefly considered the role of sexual orientation discrimination in civil jury deliberations. See Peter Nicolas, “They Say He’s Gay”: The Admissibility of Evidence of Sexual Orientation, 37 GA. L. REV. 793, 835–842 (2003) (discussing case examples of civil trials where evidence of a litigant’s sexual orientation was raised). However, this Note is the first to comprehensively consider the effects jurors’ attitudes towards queerfolk in the calculation of economic and noneconomic damage awards.


¹⁶. ANDREW R. FLORES, WILLIAMS INST., NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES (2014) (analyzing the results of over 325 national surveys on LGBT rights).

¹⁷. Id. at 15.

¹⁸. Id.

¹⁹. ANDREW R. FLORES & SCOTT BARCLAY, WILLIAMS INST., TRENDS IN PUBLIC
In addition, Americans’ support for same-sex marriage increased seven percentage points between 2015 and 2017 (the years immediately following Obergefell v. Hodges) so that by the close of 2017 sixty-two percent of Americans favored allowing gays and lesbians to marry. With respect to transgender individuals, polls suggest that a large majority of “Americans agree that transgender people deserve the same rights and protections as other Americans.” Moreover, three-quarters of Americans support hate crime legislation and employment nondiscrimination laws to protect transgender people.

However, these national trends fail to show the full picture. Support for queer persons is not uniform nationally, instead queerfolk face a range of social realities depending on where they live. A 2014 Williams Institute Report documented extensive regional variances in LGBT acceptance and rights protections across the United States. The report noted an association between legal protection and social acceptance, meaning that queerfolk who live in legally unsupportive states are more likely to also experience a lack of social support and vice versa. This association suggests that jurors in less legally supportive states may be less accepting of queer litigants and likewise harbor higher levels of queerphobic sentiment.

Popular studies that indicate increasing acceptance of queerfolk are also inaccurate measurements of societal queerphobia. The findings are largely drawn from data gathered by way of opinion polls or surveys—types of self-reporting mechanisms. Such mechanisms fail to capture implicit biases, and are also subject to reporting and social-desirability biases. As a result, these statistics may not accurately represent societal acceptance for marriage for same-sex couples by state (2015) (analyzing the results of national surveys on same-sex marriage).

21. See Gallup News, supra note 16.
23. Id.
25. Id. at 6. The report measured legal support as the existence of laws protecting against anti-LGBT discrimination. Id. at 4.
26. Id. at 7. (“This is likely because LGB/T supportive laws are less likely to pass in areas where LGB/T social acceptance is lower and the lack of LGB/T supportive legal protections can contribute to less LGB/T supportive social climates.”).
27. See supra text accompanying notes 22–27.
28. See Roberts, supra note 9, at 834 (“Levels of implicit bias frequently conflict with self-reported attitudes, usually because explicit measures show no bias, while implicit measures show bias.”).
29. See Robert J. Fisher & James E. Katz, Social-Desirability Bias and the Validity of Self-Reported Values, 17 PSYCHOL. & MARKETING 105, 106 (2000) (reporting that self-interest may cause participants to give self-reported answers they believe are
sentiment, but may instead reflect an increasing reluctance to admit bias against queerfolk.

Indeed, notwithstanding polls suggesting societal queerphobia is on the decline, studies eliminating social desirability bias and those examining implicit attitudes, report continuing bias against queerfolk. One study comparing participants’ self-reported and implicit bias using the Implicit Association Test (IAT) found that participants faked positive explicit attitudes towards homosexuals. Another study found that explicit preferences for straight persons over gay persons declined approximately twice the amount as implicit preferences did during the investigated period—suggesting that self-reported attitudes were probably not the result of changing negative attitudes, but more likely because

socially desirable).

30. For example, a 2016 study found that when respondents were assured that their answers were anonymous and untraceable—thereby reducing or eliminating social desirability bias—self-reports of anti-gay sentiment increased substantially. See Katherine B. Coffman et al., The Size of the LGBT Population and the Magnitude of Antigay Sentiment Are Substantially Underestimated, 63 Mgmt. Sci. 3168, 3169–3170 (2017), HTTPS://DASH.HARVARD.EDU/HANDLE/1/34403526 (finding “[r]espondents were 67% more likely to express discomfort with an openly gay manager at work 71% more likely to say it should be legal to discriminate in hiring on the basis of sexual orientation . . . 22% less likely to support the legality of same-sex marriage, 46% less likely to support adoption by same-sex couples . . . and 32% less likely to state they believe homosexuality is a choice” under anonymous conditions.).

31. See, e.g., Melanie C. Steffens, Implicit and Explicit Attitudes Towards Lesbians and Gay Men, 49 J. Homosexuality 39, 39 (2005) (“Explicit attitudes [towards Lesbians and Gays] were very positive. However, implicit attitudes were relatively negative instead, except for female participants’ implicit attitudes towards lesbians which were repeatedly as positive as were their attitudes towards heterosexuals.”); Shankar Vendantam, See No Bias, Wash. Post Mag., Jan. 23, 2005, at W12 (“[N]early 83 percent of heterosexuals showed implicit biases for straight people over gays and lesbians.”); See also Pasquale Anselmi et al., Implicit Sexual Attitude of Heterosexual, Gay and Bisexual Individuals: Disentangling the Contribution of Specific Associations to the Overall Measure, 8 PLOS ONE, NOV. 2013, at 1, 1, http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0078990. (“A preference for heterosexuals relative to homosexuals is observed in heterosexual respondents, driven most by associating positive attributes with heterosexuals rather than negative attributes with homosexuals.”); Gregory M. Herek, Heterosexuals’ Attitudes Toward Lesbians and Gay Men: Correlates and Gender Differences, 25 J. Sex Res. 451, 451 (1988) (finding “a consistent tendency for heterosexual males to express more hostile attitudes than heterosexual females, especially toward gay men”); Melanie C. Steffens & Axel Buchner, Implicit Association Test: Separating Transsituationally Stable and Variable Components of Attitudes Toward Gay Men, 50 Experimental Psychol. 33, 33 (2003) (“Explicit attitudes towards gay men as assessed by way of questionnaire were positive and stable across situations. Implicit attitudes were relatively negative instead.”).

32. See Rainer Banse et al., Implicit Attitudes Towards Homosexuality: Reliability, Validity, and Controllability of the IAT, 48 Zeitschrift fur Experimentelle Psychologie 145 (2001) (describing IAT for anti-gay bias demonstrating, “participants were able to fake positive explicit but not implicit attitudes” toward homosexuals).
people have “become more reluctant to admit bias.”  

Both studies suggest that trends in self-reported attitudes are attributed to a growing reluctance to admit anti-queer sentiment due to apprehension of societal consequences, rather than due to true attitude shifts.

Federal Bureau of Investigation hate crime statistics may also cut against the narrative of declining queerphobia. For example, 2014 statistics indicate that lesbian, gay, bisexual and transgender people are “the most likely targets of hate crimes in America.”  

But whether these statistics truly indicate growing queerphobia is unclear. Mark Potok of the Southern Poverty Law Center suggests that hate crimes may have risen because “[a]s the majority of society becomes more tolerant of L.G.B.T. people, some of those who are opposed to them become more radical.”

Also contradicting the polls suggesting increasing public support for queerfolk, are studies documenting discrimination against transgender persons. In the first large-scale survey of transgender and gender nonconforming persons in the United States, the National Center for Transgender Equality documented alarming rates of discrimination. Specifically, thirteen percent of transgender and ten percent of gender nonconforming respondents reported being “denied equal treatment” or “harassed and disrespected” while interacting with “judges, courts and legal services clinics.”

A look to anti-queer legislation further refutes positive public opinion trends. More than 129 anti-queer bills were introduced across 30 states in 2017. This number included ten states that attempted to pass legislation banning transgender people from accessing the appropriate public facilities. Further, on February 25, 2018, the Georgia Senate passed legislation allowing adoption and foster care agencies to refuse placing children with same-sex couples based on religious convictions.

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35. Id.


37. Id. at 133.


39. Id.

Within the legal community, both courts and attorneys have recognized the continued presence of anti-queer bias amongst jurors and within the judicial system for years. In addition, studies examining queerpobia in the jury box consistently documented such biases. In one national study for instance, “seventeen percent of jurors surveyed admitted that they could not be fair if a party to a case was homosexual,” and “[t]hree-and-a-half times more people said that they could not be fair and impartial if a party to a case was gay than said that they could not be fair if a party was female, black, or Latino.” In another survey by the National Law Journal, twelve percent of jurors surveyed admitted that they could “not be fair to a gay defendant.” Surveys by state judicial commissions on LGBT equality have similarly confirmed queerpobia amongst jurors.

41. See, e.g., Michael B. Shortnacy, Guilty and Gay, a Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases, 51 Am. U.L. Rev. 309, 321–22 (2001) (“A handful of state judicial councils and local bar associations, however, have undertaken studies about bias against homosexuals within their own court systems. These studies overwhelmingly conclude that homosexuals (whether court employees, attorneys, jurors, court users, or criminal defendants) face widespread and rampant prejudice within the legal system.”). See State v. Lovely, 451 A.2d 900, 902 (Me. 1982) (recognizing, “[t]he stigmatization of homosexuals in our society and the possibility of anti-homosexual bias arising from the pervasive belief that homosexuals are deviants cannot be gainsaid.”); Abbe Smith, Defending the Innocent, 32 Conn. L. Rev. 485, 490 (2000) (describing an attorney’s concern over potential juror queerpobic bias in a murder trial: He worried that jurors might be more hostile to Kelly if they knew she was a lesbian. Instead, he advised Kelly to avoid any mention of her lesbianism, present herself as heterosexual, and agree that she had “dated” Billy Ronald [the alleged murderer]—but assert that it had not been a serious involvement.). In a more recent example of queerpobia within the judiciary, a murder conviction had to be reconsidered when Riverside County Superior Court Judge David B. Downing was caught on tape saying he did not read a defendant’s motions because the envelopes had been sealed by a gay defendant who was HIV positive. The judge was recorded saying, “[l]ord knows where his tongue has been.” Brett Kelman, Judge’s Secretly Recorded HIV Insult Could Undo Palm Springs Killers’ Convictions, Desert Sun, Nov. 1, 2017, https://www.desertsun.com/story/news/crime_courts/2017/11/01/judges-secretly-recorded-hiv-insult-could-undo-palm-springs-killers-convictions/797205001. See also People v. Garcia, No. E057519, 2016 Cal. App. Unpub. LEXIS 5726 (Cal. Ct. App. Aug. 3, 2016).

Therefore, though the results of self-reporting mechanisms indicate increasing support for, and acceptance of queerfolk, queerphobia still widely exists. Reports of discrimination against queerfolk, as well as hate crime statistics cut against narratives of increasing tolerance and decreasing queerphobia. Research on implicit biases against queer persons similarly suggests that public opinion trends are the result of a reluctance to admit queerphobic bias, rather than true attitude shifts. As a result, it is likely that a significant minority of potential jurors express queerphobic bias, and even more hold implicit biases against queer persons. The following Part will examine the consequences that occur when these biases enter the jury deliberation process.

B. The Consequences of Juror Queerphobia

During deliberation, jurors are as subject as anyone else to their human experiences, prejudices, and opinions. If jurors are queerphobic, their biases may ultimately impinge on a queer litigant’s right to be tried by an impartial jury. Jurors have admitted that queerphobic bias directly influenced their verdict decisions, some jurors have refused to convict defendants for anti-queer hate crimes due to their own biases against the victim, and in other cases prosecutors have used jurors anti-queer sentiment to force harsher sentences for queer defendants. This Part will explore examples of queerphobic biases and resulting injustice at trial.

Fairness 8 (1999)). At the time of this writing no similar studies have been published on discrimination against transgender persons amongst jurors; however, studies examining the wider judicial system provide anecdotal evidence of transphobia amongst judges and court staff. See, e.g., Protected and Served?, LAMBDA LEGAL (2014), https://www.lambdalegal.org/protected-and-served/courts (discussing the findings of a 2012 national Lambda Legal survey as demonstrating wide-spread discrimination including misgendering and misnaming of transpersons).


46. See, e.g., Chumbler v. Commonwealth, 905 S.W.2d 488, 494 (Ky. 1995) (reasoning the introduction of a defendant’s homosexual relationships and sexual habits, “had the effect of poisoning the atmosphere of the trial, rendering it impossible for the defendants to have had a fair trial”).

47. See infra notes 55–58 and accompanying text.

48. See infra notes 84–110 and accompanying text.

49. See infra notes 59–78 and accompanying text.
1. Queerfolk as Defendants in Criminal Trials

Courts have recognized that introducing evidence of a defendant’s sexual orientation can improperly influence the jury to convict defendants due to queerphobic animus rather than on the basis of trial evidence. In State v. Lovely, a Maine appellate court refused to affirm the arson conviction of a homosexual in a case where the trial judge refused to question the jury on queerphobic bias. Specifically, the court emphasized “the essential unfairness of allowing a homosexual or one who might well be perceived by the jury as homosexual to be tried by a jury whose prejudices concerning homosexuals have not been examined.” Because of this unfairness, the court vacated the trial court’s holding. The court’s decision suggests a concern that anti-queer bias may impair a jury’s ability to remain fair and impartial.

The Lovely court’s concerns have been realized in cases where queerphobia has played a role in a juror’s verdict. In Commonwealth v. Delp for instance, after a jury convicted a defendant of rape of a child and contributing to the delinquency of a minor, a juror admitted that his verdict was “based on” the defendant’s homosexuality. The juror disclosed that prior to realizing the defendant’s sexual orientation he believed the defendant was innocent, and the juror disclosed that he found the defendant “guilty solely on his apparent homosexuality.” Despite the juror’s own admission of partiality, the court held that the “personal consciousness of one juror” should not be allowed to disturb the “expressed conclusion of twelve,” and denied the defendant’s motion for a new trial.

Prosecutors have long been aware of the power of jury queerphobia, and in many cases have consciously highlighted a queer defendant’s
sexuality to “play off implicit or explicit juror prejudice.” As Sally Kohn has noted, “prosecutors often portray gay male capital defendants as predators—regardless of the facts of the alleged crime—in order to exploit the fears of heterosexual male jurors and the fallacious association of gay men with child molesters.” Further, other commentators have observed that prosecutors use juror queerphobia to sentence defendants to death rather than life in prison. In Burdine v. Johnson, the prosecutor explicitly urged the jury to sentence Calvin Burdine, convicted of capital murder, to death rather than to life imprisonment because he was a homosexual. The prosecutor reasoned that because Burdine was a homosexual, he “would enjoy a sentence of life in prison and therefore it would not be punishment.”

Similarly, in Neill v. Gibson, a prosecutor asked the jury to consider the defendant’s homosexuality as evidence of an undesirable character in deciding to sentence him to death:

I want you to think briefly about the man you’re setting in judgment on and determining what the appropriate punishment should be. . . . I’d like to go through some things that to me depict the true person, what kind of person he is. He is a homosexual. . . . You’re deciding life or death on a person that’s a vowed homosexual.

The jury recommended the death penalty, and Neill was sentenced to four death sentences and twenty years imprisonment. On appeal from the denial of habeas relief, the Tenth Circuit Court of Appeals concluded that the prosecutorial remarks were “improper” but reasoned that “not
every improper or unfair remark made by a prosecutor will amount to a federal constitutional deprivation.”67 Instead, the court held that the prosecutor’s remarks did not render the trial fundamentally unfair and affirmed the denial of habeas relief.68

Similar homophobic stereotypes have been used to sentence lesbians to death.69 In such cases, prosecutors use stereotypes about lesbians to de-feminize defendants, thereby stripping them of the protectionist notions accompanying femininity.70 Indeed, a common prosecutorial strategy is to imply that lesbian defendants are masculine.71 By invoking such stereotypes, “the labeling of a woman as a lesbian often falsely brands her as a man hater, aggressive, and deviant, and thus more capable of committing a crime than a heterosexual woman.”72 In People v. Mata, for example, a jury examined the case of Bernina Mata, accused of stabbing John Draheim to death the night the two met at a bar.73 In this case, the State consistently raised Mata’s sexual orientation, arguing that it provided motive to kill Draheim.74 It is clear that appealing to jurors’ queerphobic bias formed a key prosecutorial strategy: before

67. Id. at 1061 (citing Tillman v. Cook, 215 F.3d 1116, 1129 (10th Cir. 2000)).
68. Id. at 1061.
70. Id. at 482. See Joan W. Howarth, Executing White Masculinities: Learning From Karla Faye Tucker, 81 Or. L. Rev. 183, 211 (2002) (“Most of the women charged with capital murder are not sufficiently feminine—because of poverty, mental illness, race, or the violent agency of the crime of which they are accused, to earn the full protection of womanhood through informal immunity from being charged as capital defendants.”). See also Jenny E. Carroll, Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice, 75 Tex. L. Rev. 1413, 1436 (1997) (“[C]ourts consider[] . . . women’s ability to conform to gender expectations in either initially sentencing them or making decisions to commute or reverse their sentences. . . . [W]omen suffer or benefit from their ability to conform to anticipated gender roles.”). Cf. Steven F. Shatz & Naomi R. Shatz, Chivalry Is Not Dead: Murder, Gender, and the Death Penalty, 27 Berkeley J. Gender L. & Just. 64 (2012) (providing empirical evidence of chivalric norms in jury decisions to impose the death penalty against female defendants).
71. See, e.g., Wiley v. State, 427 So. 2d 283, 285 (Fla. Dist. Ct. App. 1983) (“[T]he State elicited the fact that she was a “bull dagger”—a lesbian who assumes the male role during intercourse.”); Adam Buckley Cohen, Who Was Wanda Jean?, ADVOCATE, Mar. 13, 2001 (describing the prosecution of Wanda Jean Allen, the first Black woman executed in the United States since 1954. At trial, prosecutors emphasized that Allen went by the masculine nick-name “Gene,” and was the “man” in her relationship); David Kirby, Was Justice Served?, ADVOCATE, Feb. 27, 2001 (describing the prosecution’s anti-gay rhetoric at Allen’s trial, including the statement that Allen “wore the pants” in the relationship).
72. Mogul, supra note 70, at 483.
73. Id. at 473.
74. Id. at 474.
the trial, the state rejected the defense’s offer to stipulate Mata was a lesbian, instead bombarding the jury with highly prejudicial evidence of her sexual orientation. In addition, at trial the prosecutor, Assistant State’s Attorney Troy C. Owen, explicitly stated: “[w]e are trying to show that [Bernina Mata] has a motive to commit this crime in that she is a hard core lesbian, and that is why she reacted to Mr. Draheim’s behavior in this way. A normal heterosexual woman would not be so offended by such conduct.” Mata was subsequently convicted of murder, and a jury sentenced her to death.

2. Queerfolk as Victims in Criminal Trials

Jurors’ queerphobic attitudes may also arise when the defendant is not queer but the victim is, a scenario often arising in the context of hate crimes. A common defense strategy in such cases involves using evidence of the victim’s sexual orientation or gender identity to elicit animus toward the victim and manufacture sympathy for the defendant. In *Brocksmith v. U.S.*, a jury sentenced defendant Russell Brocksmith to 15 years imprisonment for the assault and attempted robbery of Valerie Villalta, a transgender woman. At trial, Villalta’s transgender status became a central part of Brocksmith’s defense when he claimed that Villalta had falsely accused him of robbery to “get even” for his insults on her gender identity. During opening statements Broderick’s defense attorney claimed that “Ms. Villalta fabricated the assault after [Broderick] rebuffed her unwanted sexual overtures and insulted her as he walked past her on the street.” While the tactic of raising Ms. Villalta’s transgender status ultimately failed in *Broderick*, other cases suggest that defendants believe introducing a victim’s gender identity is a potentially viable legal strategy.

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75. At trial, the State offered ten witnesses to testify Mata was a lesbian. *Id.* at 485.
76. *Id.* at 473 (quoting unpublished Transcript of Record at 2133, 2135, People v. Mata (Cir. Ct. Boone County, Ill. Oct. 7, 1999) (No. 98-CF-110)).
77. *Id.* at 474.
78. See *infra* notes 94–97 and accompanying text.
79. 99 A.3d 690 (D.C. Cir. 2014).
80. *Id.* at 693.
81. *Id.* at 694. Specifically, the defense alleged that Ms. Villalta sought to get back at Broderick, because his transphobic comments “cut deep . . . to the core of who she was.” *Id.* at 693 n.4.
82. See *e.g.* Jordan v. State, NO. 01-14-00721-CR, 2015 Tex. App. LEXIS 11491 (Nov. 5, 2015), where a defendant suggested that introducing a victim’s transgender status would have made his conviction less likely. There, a jury sentenced defendant James Jordan to 30 years confinement after he forced entry into the home of Lupe Valdez, begun removing her clothes, and threatened sexual violence against her. On appeal, Jordan argued that the State’s failure to reveal that Valdez was transgender “denied him a fair trial,” *Id.* at 12. According to Jordan, “Valdez’s transgender status would have made a difference in his trial,” because “the prosecution’s painting of the
“Panic defenses” are also another avenue through which jurors’ queerphobic biases affect trials. The quintessential “gay panic” case is one wherein a heterosexual man is charged with murdering a gay man, and the “trans panic” defense is the analog in for murders of transwomen. In either case, the defendant (likely to be heterosexual and male) claims provocation—that he killed the gay man or transwoman as the result of an unwanted sexual advance. Underlying these defenses is the societal belief that a defendant can be partially excused if a different but still reasonable person would have become similarly inflamed by similar events. To prevail on such a defense the defendant must convince a jury that it is reasonable for a heterosexual man enact violence upon someone exhibiting unreturned sexual desire for the heterosexual. Such a belief is necessarily rooted in queerphobic bias. Estimates suggest such panic defenses have been used in around forty-five cases, but this figure may not account for cases where the defense is raised implicitly. Some complainant as a ‘damsel in distress’ may have been rebutted with testimony, medical records and cross-examination as well as other inquiry into the motives and mens rea of Appellant vis-à-vis the complainant . . . ” Id. at 15–17. Further, Jordan contended that he would have introduced Valdez’ transgender status, and would have argued “impossibility, mistake, or heat of passion.” Id. at 13.

83. See generally Cynthia Lee, The Gay Panic Defense, 42 U.C. DAVIS L. REV. 471, 475 (2008) (documenting the use of gay panic defenses—the excuse that the victim’s unwanted homosexual advance constituted provocation which sent he defendant into a violent emotional state or “heat of passion,” thereby mitigating a murder charge to the lesser offense of manslaughter.)

84. See generally Cynthia Lee & Peter Kwan, The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women, 66 HASTINGS L.J. 77 (2014) (documenting the use of “trans panic” defenses—the excuse that the revelation that the victim was transgender constituted provocation and sent the defendant into a violent emotional state).

85. Lee, supra note 84.


88. For example, Cynthia Lee argues gay panic defenses “seek to capitalize on unconscious bias in favor of heterosexuality that is prevalent in today’s heterocentric society.” Lee, supra note 84, at 476. Lee also makes the point, “[a] man who responds to a (homo)sexual advance with deadly violence claims he acted as the average heterosexual man would have acted. A woman who tries to make a similar claim would find it extremely difficult to succeed.” Id. at 510. Similarly, Kara Suffredini argues: “our legal system does not accept ‘race panic,’ ‘gender panic,’ or ‘heterosexual panic’ as culpability-reducing defenses to violence against people of color, women, and heterosexuals.” Kara S. Suffredini, Pride and Prejudice: The Homosexual Panic Defense, 21 B.C. THIRD WORLD L.J. 279, 310 (2001).

89. See David Alan Perkiss, A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons From the Lawrence King Case, 60 UCLA L. REV. 778, 780 (2013).

90. For instance, J. Kelly Strader et al., point out that introducing inflammatory
scholars have called panic defenses a “judicial institutionalization of homophobia” and believe that they resonate with juries because of the prevalence of negative stereotypes about queer persons as sexual predators. A recent study examining the gay panic defense further supports the belief that the success of these defenses are fueled in part by juror’s queerphobic biases.

Beyond relying on negative stereotypes that infuse the trial with queerphobic bias, queer panic defenses often lead to the admission of prejudicial and inflammatory evidence that courts allow as proof of the victim’s sexual orientation. Such evidence may distract the jury from its task of objectively evaluating the evidence, and, in some cases, the admission of such evidence has led to reduced sentences and acquittals of defendants who have committed crimes against queer victims.

The trial of fourteen-year-old Brandon McInerney for the murder of fellow E.O. Green Middle School student Lawrence “Larry” King is one such case. Larry King was a queer teenager, self-identified as gay. King reportedly dressed and behaved in a gender-nonconforming manner. After King and McInerney engaged in a verbal altercation, McInerney brought a hand gun to school, shot King twice in the back.

evidence of a victim’s sexual orientation or using dog-whistle rhetoric may have the same effect of eliciting juror animus towards the queer victim, though the panic defense is not explicitly raised. See Gay Shield Laws, supra note 88 at 1477–78.


93. The researchers asked participants to read vignettes depicting control and gay panic conditions. Participants were then asked to provide verdicts, and ratings of victim blame and responsibility. The research also measured participants’ levels of homonegativity and political orientation. See Jenna Tomei et al., The Gay Panic Defense: Legal Defense Strategy or Reinforcement of Homophobia in Court?, J. Interpersonal Violence 1, 17 (2017), http://journals.sagepub.com/doi/pdf/10.1177/0886260517713713 (finding that participants who registered higher degrees of homonegativity were more likely to assigned higher levels of victim blame, lower defendant responsibility, and assigned more lenient verdicts).

94. See, e.g., Russell v. State, 522 So. 2d 969 (Fla. Dist. Ct. App. 1988) (discussing the trial court’s decision to allow evidence that the murder victim had AIDS in order to corroborate his identity as a gay man, and support the defense’s gay panic defense). See generally Sexual Orientation and the Law 36–38 (Harvard Law Review Ass’n eds., 1990) (collecting examples of courts allowing evidence of a victim’s sexuality in gay panic defense cases).

95. Mison, supra note 92, at 169 (“The introduction of highly prejudicial and often irrelevant evidence in homosexual-advance cases also diverts the fact finders’ attention.”).

96. Sexual Orientation and the Law, supra note 95, at 36 (collecting cases).

97. See Gay Shield Laws, supra note 88, at 1475 n.7.

98. See id. at 1473 (reporting that King had feminine mannerisms and sometimes wore jewelry, makeup, and women’s clothes).

99. Id. at 1484.
of the head, put the gun down and ran out of the classroom.\textsuperscript{100} King died two days later.\textsuperscript{101}

At trial, the defense focused on King’s identity and behavior as a queer person.\textsuperscript{102} The defense argued that that King had sexually harassed McInerney, publicly humiliated him, and pushed him to his “emotional breaking point.”\textsuperscript{103} In rebuttal, prosecutor Maeve Fox asked the jury to set aside any queerphobic biases they may have.\textsuperscript{104} Ultimately, after seventeen hours of deliberations, the jury of three men and nine women could not come to a consensus on whether McInerney should be convicted of voluntary manslaughter or murder, and the judge declared a mistrial.\textsuperscript{105}

The jurors’ actions after the trial support the conclusion that the verdict was based, at least in part, upon queerphobic sentiments. In a post-trial interview, one juror appeared to admit that she was unable to set aside her biases during deliberations.\textsuperscript{106} Subsequently, another juror characterized the victim as a “deviant” in a letter to the district attorney.\textsuperscript{107} Finally, in a documentary about the trial, one female juror suggested that if Larry had suppressed his gender non-conforming behavior, he would not have been killed.\textsuperscript{108} Instead of being sympathetic to Larry, she asked, “where are the civil rights of the one who is being taunted by a person who is cross-dressing?”\textsuperscript{109}

3. \textit{Queerfolk as Third-Parties in Criminal Trials}

Juror queerphobia also affects queer witnesses, lawyers and jurors at trial in addition to queer defendants and victims. In some cases attorneys have used a witness’ queer identity as means of disputing their credibility. For example, in \textit{United States v. Santos} a defendant offered evidence of a witness’s lesbianism in order to impute bias, thereby discrediting her

\textsuperscript{100.} Id. at 1485.
\textsuperscript{101.} Id.
\textsuperscript{102.} Id. at 1488.
\textsuperscript{103.} Id. at 1488–1490. This argument evoked the previously discussed stereotypes of queerfolk as sexually aggressive. \textit{See} text accompanying \textit{supra} note 93.
\textsuperscript{104.} \textit{Gay Shield Laws}, supra note 88, at 1492.
\textsuperscript{105.} Id. at 1493.
\textsuperscript{106.} \textit{See} AmericanNetworkNews, \textit{Hung Jury in Murder Trial of Brandon McInerney Who Shot Gay Classmate Larry King in California}, \textit{YouTube} at 2:13 (Sept. 15, 2011), https://www.youtube.com/watch?v=9ucOuwe8ssY (Interviewer: “We are supposed to leave all our personal stuff outside that courtroom.” Juror: “It’s impossible—I mean for the most part we are supposed to decide based on the evidence provided you know as they instructed us but you can’t help but to notice this kid.” The jurors went on to call McInerney’s retrial a “tragedy.”) (last visited Nov. 1, 2017).
\textsuperscript{107.} \textit{Gay Shield Laws}, supra note 88, at 1477 (quoting Letter from Lisa S., Juror No. 11, to Gregory D. Totten, Dist. Attorney, Ventura Cty. (Sept. 28, 2011)).
\textsuperscript{108.} \textit{See} \textit{Valentine Road} at 1:12:45 (Bunim-Murray Prod.’s & Eddie Schmidt Prod.’s 2013).
\textsuperscript{109.} Id.
testimony. The fact that juror queerpheobia may discredit witnesses is also supported in a study of homophobia in the California Court system, which found anecdotal evidence of jurors using witnesses perceived queerness as grounds for discounting them.

In other cases queerpheobia has been used to discredit attorneys. For instance, in 2001 Marjorie Knoller was infamously tried for the death of Dianne Whipple, a lesbian, who was killed after being attacked by Knoller’s dogs. At trial the defense sought to undermine the prosecutor by insinuating that he was improperly interested in the case because he was gay. Knoller was ultimately convicted of second-degree murder.

Imputations of queer identity can even be used to discredit other jurors. Consider the case of Wing Shung Lam v. Chung-Ko Cheng. There, the First Department of the Supreme Court of New York set aside a jury verdict, in part, because of jury queerpheobia. During tumultuous deliberations, several jurors falsely accused the jury foreman of “having engaged in a ‘homosexual encounter’ with plaintiff’s counsel in a courthouse bathroom.”

110. See United States v. Santos, 201 F.3d 953, 964 (7th Cir. 2000) (where the defendant was a supporter of a major anti-queer political candidate, and introduced the witness’ lesbianism to imply her testimony was not impartial).

111. Survey responses noted a “jury member suggested that witness was gay and therefore his testimony could not be trusted,” and another stated “I was discredited as a witness because they said I was probably ‘out at a club or something’ before I witnessed the accident.” See Todd Brower, Homophobia in the Halls of Justice: Sexual Orientation Bias and its Implications Within the Legal System Obstacle Courts—Results of Two Studies on Sexual Orientation Fairness in the California Courts, 11 AM. U. J. GENDER SOC. POL’Y & L. 39, 46 (2003) (quoting Dominic J. Brewer & Maryann Jacobi Gray, Survey Data, Preliminary Report Draft 3/31/99, reported in 4/9/99 materials of the Subcommittee on Sexual Orientation Fairness 8 (1999)). But see Lisa Olson, Assessing Sexual Orientation Bias in Witness Credibility Evaluations in a Sample of Student Mock Jurors, 14 JUST. POL’Y J. 1, 17–20 (2017), http://www.cjcj.org/uploads/cjcj/documents/assessing_sexual_orientation_bias.pdf (finding no significant effect of witness sexual orientation on mock jurors’ assigned credibility, but finding that Lesbian witnesses were viewed as the least credible).


113. John Gallagher, Homophobia for the Defense, ADVOCATE, May 14, 2002, at 34, 34 (quoting defense attorney Nedra Ruiz: “What is the prosecution’s excuse for keeping this evidence from you? . . . Maybe he wants to curry favor with the homosexual and gay folks who were picketing 2398 Pacific [the apartment building in which Whipple lived with her partner, Sharon Smith] and demanding justice for Diane Whipple. Maybe that’s his motivation for hiding this from you.”). Id. at 36.

114. See Barbara Kate Repa, Dog Mauling Conviction Affirmed Again, NEW FILLMORE (Feb 6, 2016) http://newfillmore.com/2016/02/06/dog-mauling-conviction-again-affirmed.


116. Id. at 549.

117. Id. at 539.
4. Queerfolk as Litigants in Civil Trials

This Part considers the effects of juror queerphobia in civil trials, by focusing on damage awards in cases in which the litigant is queer. The reasons for focusing on damage awards are threefold. First, monetary awards provide an objective measure that is easily comparable across queer and non-queer cases. Second, the lack of detailed jury instructions for calculating noneconomic damages makes them ideal for measuring the existence and effects of juror queerphobia. Conditions of uncertainty and discretion facilitate discrimination, and therefore we can expect disparities in noneconomic damage awards to display any queerphobic biases jurors have. And, finally, by focusing on jury damage awards, this Part adds to the body of scholarship documenting disparities in damage awards to women and people of color.

At the time of this writing, no studies have examined the effects of queerphobic bias on civil trial damages awards, and little anecdotal evidence exists. Nonetheless, studies conducted on the effects of racial and gender biases in civil trials suggest that queerphobic bias may affect civil juries in addition to criminal ones. This Part will therefore begin by examining studies on racial and gender bias in civil trials to establish a baseline understanding of how biases affect civil trial juries generally. This Part then proceeds by extending the conclusions and principles, where appropriate, to the queer context in order to try and explain how anti-queer bias may affect civil trials.

While juries in civil trials serve many functions, undoubtedly one of the most common is the calculation of relief awards. Jurors in civil cases may award three kinds of relief: economic damages, noneconomic damages, and punitive damages. Economic damages compensate plaintiffs for harms that are effable in monetary terms, including the loss of past or future income, the incurrence of medical bills, and property loss. Non-economic damage awards compensate plaintiffs for injuries inexpressible in economic terms, including, but not limited to, pain and suffering, emotional distress, loss of consortium, loss of parental guidance, loss of society, disfigurement, and loss of enjoyment of life. Finally,
punitive damage awards seek to punish a defendant for her conduct and deter others from engaging in similar conduct.122

a. Economic Damages and Queerphobia

Juror bias can affect the amount of damages awarded for a number of reasons.123 For example, jury bias against racial and ethnic minorities, as well as to women results in lower jury damage awards.124 Some commentators have suggested that these disparities are attributable to the use of objective future expectancy data in the calculation of economic damages—that is the disparities in economic damage awards are the result of real-life gender and racial gaps in earnings.125 The theory is that because of the gender wage gap, and racial income inequality, any future income estimates calculated based on the average earnings of members of these groups replicates existing disparities.

Examining jury calculations of loss of future income, Professors Martha Chamallas and Jennifer Wriggins have documented that gender and race-based data tables are used to determine an individual’s work life expectancy and estimated yearly income.126 By using these generalized gender and race-based tables in the calculating loss of future earning capacity, they find that juries replicate “historical patterns of wage discrimination in the labor market.”127 The Professors give several illustrations of how the use of race and gender-based economic data results in significantly lower awards for minority and female plaintiffs, ultimately undervaluing injuries that primarily affect minority communities.128

122. Prosser, Wade and Schwartz’s Torts, supra note 120, at 519.
125. See, e.g., id.; Nicolas, supra note 14, at 839 (highlighting the routine use of race and gender based statistical tables, and discussing life expectancy tables displaying lower life expectancy for African Americans, and wage earning tables showing lower earnings for women).
127. Chamallas & Wriggins give the following example: historically, women have traditionally left the labor force to raise children. Id. Using gender-based work life tables would continue to assume that women work fewer years than men. Id.
128. Id. at 159–60 (discussing the use race-based economic data in calculating damages in lead paint litigation). See also Goodman, supra note 125, at 1354 (illustrating racial and gendered award disparities in lead paint poising trials).
Based upon these findings, there are many ways in which queer identity could result in similar discrepancies in jury economic damages awards. Recent studies have found that gay men and lesbians generally have higher incomes than their heterosexual counterparts. Nonetheless, any wage advantages that gays and lesbians experience will likely be lost in the use of objective future expectancy data. When a jury calculates economic damages for queer parties, the objective data tables selected will probably classify the litigants based on their racial or ethnic groups, and gender. The use of racial and gendered generalized statistics, rather than a queer litigant’s individualized circumstances could harm gay and lesbian litigants, since comparing a lesbian plaintiff to her generalized racial and gender cohorts would likely result in under-calculated damage awards. In contrast, using statistics based on generalized cohorts for cases involving transgender plaintiffs may lead to over-calculated damage awards, since studies suggest transpersons experience wage penalties when compared to their non-transgender counterparts.

129. See Christopher S. Carpenter & Samuel T. Eppink, Does It Get Better? Recent Estimates of Sexual Orientation and Earnings in the United States, 84 S. Econ. J. 426 (2017) (finding that self-identified lesbians earned significantly more, and gay men earned ten percent more than their heterosexual counterparts); Robin Fisher, Geof Gee & Adam Looney, Joint Filing by Same-Sex Couples After Windsor: Characteristics of Married Tax Filers in 2013 and 2014, at 11 (Office of Tax Analysis, Working Paper No. 108, 2016) (examining joint tax returns of LGB couples and finding that gay couples had an average adjusted gross income of $176,000, compared to lesbian couple’s average of $124,000, and heterosexual couple’s $113,000). See also Heather Antecol et al., The Sexual Orientation Wage Gap: The Role of Occupational Sorting and Human Capital, 61 Indus. & Lab. Rel. Rev. 518 (2008) (finding lesbians earn more than their heterosexual counterparts regardless of marital status, whereas homosexual men earned less than comparable married heterosexual men, but more than cohabiting heterosexual men); Mareika Klawitter, Meta-Analysis of the Effects of Sexual Orientation on Earnings, 54 Indus. Rel. 4, 13 (2015) (conducting a meta-analysis on homosexual wage differential studies and finding, “studies found, on average, that gay men earned 11 percent less than did heterosexual men although the estimates ranged from 30 percent less to no difference. Studies, on average, found that lesbians earned 9 percent more than heterosexual women and the range . . . from 25 percent to 43 percent more”). But see Sylvia A. Allegretto & Michelle M. Arthur, An Empirical Analysis of Homosexual/Heterosexual Male Earnings Differential: Unmarried and Unequal?, 54 Indus. & Lab. Rel. Rev. 631 (2001) (finding wage differentials for unmarried partnered homosexual men of 15.6 percent less than similar married heterosexual men, and 2.4 percent less than similar unmarried partnered heterosexual men); M.V. Lee Badgett, The Wage Effects of Sexual Orientation Discrimination, 48 Indus. & Lab. Rel. Rev. 726 (1995) (finding that behaviorally gay and bisexual men earned 11 to 27 percent less than their heterosexual counterparts, controlled for experience, marital status, geographical residence and education).

130. See Goodman, supra note 125, at 1361 (“[M]any commonly used life tables present [] data according to race, gender, and combinations of race and gender.”). Indeed life tables that are queer specific do not exist at this time.

In some economic damage calculations the jury may consider the plaintiff’s specific background—including individualized prior injuries and specific health defects—in addition to generalized statistics about identity groups to which the plaintiff belongs. But even if the court decides to incorporate plaintiff-specific information, this could also serve to decrease the queer litigant’s damage awards. Professor Peter Nicolas has made the point that statistics suggest a shorter life expectancies, lower employment participation, and less employment retention for queer persons, all of which could factor in the calculation and reduction of economic damages.132

Another complication involves intersectional and multidimensional identities.133 Queer persons may fall at the intersections of multiple minority statuses—including different racial and ethnic groups. Consequently, the identities considered in the calculation of economic damages may either harm or help the queer litigant.134 To illustrate, in calculating economic damages for a Black-gay litigant the jury could arguably compare him to similarly situated men, Black persons (both genders),
Black men, gay persons, or Black-gay men, producing a range of possible outcomes.  

b. **Noneconomic Damages and Queerphobia**

Noneconomic damages are calculated according to subjective assessments of non-pecuniary harms, such as pain and suffering. These damages may be at higher risk for having their determination or valuation influenced by jurors’ queerphobia. In determining the value of a victim’s pain and suffering, jurors are afforded great discretion, which is often accompanied by a certain degree of uncertainty. Social psychology research suggests that such uncertainty and discretion facilitate discrimination. The uncertainty, discretion, and the lack of detailed instructions, open the jury room to extraneous biases.

Discrepancies in the amounts awarded for pain and suffering between plaintiffs of different races and genders support the conclusion that extrajudicial juror biases affect noneconomic damage awards. For instance, bias against racial and ethnic minorities has been shown to impact noneconomic injury awards. In the first large-scale study analyzing the outcomes of more than 9,000 civil jury trials in Cook County, Illinois, researchers found that a litigants’ race had a “pervasive influence on the outcomes of civil jury trials.” The study found that Black plaintiffs won less often than White plaintiffs, and, when they did win, Black plaintiffs on average received seventy-four percent of the amount civil juries awarded White plaintiffs. In another study, researchers identified

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135. See sources cited, supra note 135. The outcomes are further complicated by studies suggesting that black-gay men face less discrimination than their individual black and gay counterparts—suggesting the effect of intersectionality. This would potentially lower the effect of systematic discrimination in comparison to their heterosexual counterparts. See David S. Pedulla, *The Positive Consequences of Negative Stereotypes: Race, Sexual Orientation, and the Job Application Process*, 77 Soc. Psychol. Q. 75, 89 (2014) (finding that stereotypes about gay men interacted with stereotypes about black men to produce positive results for black-gay men, in a study manipulating the race and sexual orientation of fictitious applicants).


139. See Joseph H. King Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 176 (2004) (describing pain and suffering awards as “subject to the influence of extrajudicial factors, such as race, gender, and social and physical attractiveness”).


141. *Id.*
plaintiff race by relying on probability estimates based on census data and examined the awards in 1,133 civil cases that included awards for pain and suffering. The authors found that jurors “tend to award black plaintiffs approximately 41 percent of the amount of pain and suffering damages as white plaintiffs” even when controlling for total economic damages. Both studies support the conclusion that jurors’ biases result in lower noneconomic damage awards in civil trials.

Damage awards may also be depressed because of the close relationship between economic and noneconomic damage calculations. Economic damages serve as a significant predictor of noneconomic damages. Therefore any bias that infects the calculation of economic damage awards will be replicated in the calculation of noneconomic damage awards. If queerphobic biases lower economic damages awards as previously discussed, then we can expect noneconomic damage awards for queerfolk to also be lower.

Queerphobic prejudice correlates with higher levels of victim-blame, which may bias jurors’ subjective decisions relating to non-economic damages. Previous studies of civil trials have found a general anti-plaintiff bias amongst jurors, and have found that jurors are often skeptical of civil plaintiffs’ motives. When jurors begin to blame plaintiffs, the amount of damages eventually awarded decreases. This may be particularly troubling in the case of queer litigants since studies examining queerphobia and victim-blame have consistently found that prejudice against queerfolk correlates with higher levels of blame attribution to queer victims. This suggests that jurors with queerphobic biases may

142. See Girvan & Marek, supra note 139, at 251. The research used U.S. Census Bureau Genealogy Project data that “includes each surname shared by at least 100 individuals, and the proportion of respondents with that surname who identified as a member of each of the racial categories. For example, 96.03 percent of individuals with the name Olson identified as White.” Id.
143. Id., at 251–53.
144. Valerie P. Hans & Valerie F. Reyna, To Dollars From Sense: Qualitative to Quantitative Translation in Jury Damage Awards, 8 J. EMPIRICAL LEGAL STUD. 120, 141–42 (2011) (“In both judge and jury trials, the economic damage award reached by the decision-maker is a significant predictor of the noneconomic damages,” but is “a slightly stronger determinant of the noneconomic damage award for juries as compared to judges”).
145. See supra text accompanying notes 131–136.
147. Bothwell, supra note 124, at 2135.
149. See, e.g., Christopher J. Lyons, Stigma or Sympathy? Attribution of Fault to Hate Crime Victims and Offenders, 69 SOC. PSYCHOL. Q. 39, 50 (2006) (presenting the findings from a vignette study indicating that more negative attitudes towards lesbians and gays were associated with increased victim blame attribution); Dexter M. Thomas
attribute more blame to queer litigants, thereby increasing their skepticism and in-turn lowering damage awards.

5. The Pervasive Effects of Queerphobia at Trial

The minority of potential jurors likely to express queerphobic biases is significant enough to warrant concern; and the number of individuals subject to implicit biases against queerfolk is infinitely greater. These biases operate dynamically; distorting justice in different ways depending on the queer party’s role in a variety of cases. These include criminal cases where the accused’s or victim’s sexual orientation or gender identity may become known to the jury, civil cases where the plaintiff’s queer identity may be discovered, and cases that involve queer witnesses or attorneys. It is therefore important to recognize, acknowledge, and actively combat juror queerphobia in a wide swath of cases. The following Part considers why the trial procedures expected to safeguard against juror biases may fail to inoculate against the queerphobic biases described.

II. Voir Dire’s Failure to Detect & Remove Queerphobic Jurors

Having discussed the existence and effects of juror queerphobia, this Part now begins to chart the Note’s sole prescriptive claim that the Pena-Rodriguez exception should extend to cases of blatant juror queerphobia.

The holding in Pena-Rodriguez was based, in part, upon the failure of key procedural safeguards to detect and remove a juror’s racial biases.150 There, the majority noted that defendants have several defenses against juror bias, including: “Voir dire at the outset of trial, observation of juror demeanor and conduct during the trial, juror reports before the verdict, and nonjuror evidence after trial.”151 The court also suggested that jury instructions might also serve to remind jurors of their duty to remain impartial and to reduce the potential for juror biases to affect deliberations.152 However, the court acknowledged that safeguarding mechanisms could be compromised or insufficient.153 For instance, generalized questions during voir dire may fail to expose “specific attitudes or

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151. Id. at 868.
152. Id. at 871.
153. Id. at 868.

et al., Anti-transgender Prejudice Mediates the Association of Just World Beliefs and Victim Blame Attribution, 17 INT’L J. TRANSGENDERISM 176, 180–81 (2016) (finding higher levels of genderism (the belief in two genders) and transphobia were associated with higher levels of transgender victim blaming). See also Karyn M. Plumm et al., Victim Blame in a Hate Crime Motivated by Sexual Orientation, 57 J. HOMOSEXUALITY 267, 276 (2010) (finding evidence that mock jurors with higher support for gay community members were less likely to blame LGB victims).
biases that can poison jury deliberations,” but overly specific questions might “exacerbate whatever prejudice might exist without substantially aiding in exposing it.” Similarly, expecting a juror to report another’s bias before the verdict was unlikely to work.

This Part will focus specifically on one safeguard—voir dire—because of its central role in uncovering juror bias, and because of the other procedural safeguards’ failure to detect and remove socially-unacceptable biases such as those against racial and sexual minorities. As other scholars have noted, “[i]t is often said that a trial is won or lost at the jury selection stage.” Indeed as the Court referenced in Pena-Rodriguez, voir dire is the earliest safeguard against juror bias, and serves the most prominent gate-keeping function to remove bias at the outset of trial. The capability of voir dire to remove juror bias is further evinced by Supreme Court precedent requiring “that defendants be permitted to ask questions about racial bias during voir dire.” In addition, other tools that may reduce juror bias at trial, including diverse juries or salience are outside the

154. Id. at 869.
155. Id. at 869 (quoting Rosales-Lopez v. United States, 451 U.S. 182, 195 (Rehnquist, J., concurring)).
156. Id. at 869. (“The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case. . . . It is quite another to call her a bigot.”).
157. See id. at 869 (reasoning that the stigma associated with racial bias renders safeguards like juror reports prior to the verdict “compromised . . . or insufficient.”). Indeed, as Justice Kennedy noted, reporting a fellow juror’s racist statements may be viewed as “call[ing] her a bigot.” Id.
158. See Cynthia Lee, Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society, 91 N.C.L. REV. 1555, 1590 (2013); Id. at 1590 n.223 (quoting Herald Price Fahringer, “Mirror, Mirror on the Wall . . . “: Body Language, Intuition, and the Art of Jury Selection, 17 AM. J. TRIAL. ADVOC. 197, 197 (1993) as “noting that “[a]cknowledged experts in the field believe that eighty-five percent of the cases litigated are won or lost when the jury is selected.”); Herald Price Fahringer, In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case, 43 LAW & CONTEMP. PROBLEMS 116, 116 (1980) (“Jury selection is the most important part of any criminal trial. If a lawyer has a difficult case, but succeeds in obtaining a jury sympathetic with his client’s cause, the chances of winning improve substantially.”); Cathy E. Bennett et al., How to Conduct a Meaningful & Effective Voir Dire in Criminal Cases, 46 SMU L. REV. 659, 659 (1993) (“Effective and skillfully conducted voir dire is the most important ingredient in willing a trial”).
159. Pena-Rodriguez, 137 S. Ct. at 866.
160. Id. at 868.
scope of this Note. A discussion of whether *voir dire*, as it is currently used, is a sufficient safeguard against juror queerphobia follows.

### A. When is Inquiry Into Jurors’ Attitudes Towards LGBTQ+ Issues Necessary?

As demonstrated, even when a case does not directly involve queer issues, queerphobic bias may infect jury deliberations and verdicts. Inquiry into jurors’ attitudes towards queer persons is therefore appropriate in a variety of cases, many of which will involve legal issues entirely unrelated to identity politics and querness. These include civil and criminal disputes, whether litigated, unresolved, or resolved by alternative means of resolution.

Whether there is a risk of queerphobic juror bias infecting jury deliberations and therefore a heightened need for an inquiry into queerphobic bias, will depend upon whether the jury becomes aware that or believes that a party is queer. Presumably, if throughout the case a juror cannot tell or does not believe that any party is queer, queerphobia will not affect the outcome. Ultimately such an awareness will depend on whether the party’s sexual orientation or gender identity is “outed” during trial—which is always a possibility, or if the party does not “pass” as straight. Others have suggested that there is little risk of a queer defendant’s sexual orientation or gender identity being discovered at trial, arguing that while gender and racial identity are associated

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163. Arguably, diverse jury selection will be less feasible since preemptive strikes against LGBTQ+ venire members have not been held unconstitutional. For a detailed discussion, see Kathryn Ann Barry, *Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation*, 16 Berkeley Women’s L.J. 157 (2001) (arguing for legislative protection against homophobic peremptory strikes); Julia C. Maddera, *Note, Batson in Transition: Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression*, 116 Colum. L. Rev. 195 (2016).

164. See discussion *supra* Part I(B)(1)–(5).


166. See State v. Edwards, 219 S.E.2d 249 (N.C. Ct. App. 1975) (upholding trial court inquiry into prospective jurors’ prejudices against homosexuality when the state’s witnesses were homosexuals or transvestites, to determine if they could impartially consider witness testimony).

167. The term “passing” is used to describe the “social process whereby the [queer individual] presents himself or herself to the world as heterosexual.” Raymond M. Berger, *Passing: Impact on the Quality of Same-Sex Couple Relationships*, 35 Soc. Work 328, 328 (1990).
with visible physical traits and generally easily discernable,\textsuperscript{168} queer identity is not.\textsuperscript{169}

Many disagree with the argument that there is little risk of a juror recognizing a party is queer. Whether jurors will be able to readily determine if a party is queer remains an open question. Scholarship on whether persons can easily visually distinguish between gay and straight persons have come to mixed conclusions.\textsuperscript{170} However, recent studies have uniformly found that persons can accurately perceive sexual orientation from observing as little as one second video clips,\textsuperscript{171} listening to voices,\textsuperscript{172} viewing full body photographs,\textsuperscript{173} viewing facial photographs,\textsuperscript{174} and even viewing isolated facial traits such as the eyes.\textsuperscript{175} Related scholarship examining transpersons’ ability to “pass” has also found reported widespread difficulties in transpersons passing in their new gender.\textsuperscript{176} These studies suggest that it is very likely that trial juries may become aware of a party’s queer identity during trial, bolstering the need for \textit{voir dire} on attitudes towards LGBTQ+ issues, wherever a party identifies as queer.\textsuperscript{177}

\begin{itemize}
\item \textsuperscript{168.} \textit{See generally Linda Martín Alcoff, Visible Identities: Race, Gender, and the Self} (2006).
\item \textsuperscript{169.} \textit{See Brower, supra} note 13, at 680 (arguing “most sexual minorities are not identifiable visually, by accent, or surname”).
\item \textsuperscript{170.} \textit{Compare} Gregory Berger et al., \textit{Detection of Sexual Orientation by Heterosexuals and Homosexuals}, 13 J. HOMOSEXUALITY 83 (1987) (finding little evidence to support accurate detection of sexuality based on observing short videotaped interviews), \textit{and Brower, supra} note 13 at 680 n.60 (stating “contrary to many people’s beliefs, heterosexuals often cannot identify lesbians or gay men who do not disclose their sexual orientation”), \textit{with infra} notes 172–177.
\item \textsuperscript{171.} \textit{See Nalina Ambady et al., Accuracy of Judgments of Sexual Orientation From Thin Slices of Behavior}, 77 J. PERSONALITY & SOC. PSYCHOL. 538, 545 (1999).
\item \textsuperscript{173.} \textit{Rieger et al., supra} note 173.
\item \textsuperscript{174.} \textit{See Nicholas O. Rule & Nalini Ambady, Brief Exposures: Male Sexual Orientation Is Accurately Perceived at 50ms}, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1100 (2008) (finding sexual orientation correctly characterized at above-chance levels when participants were shown faces for durations between 50ms and 10,000ms).
\item \textsuperscript{175.} \textit{See Nicholas O. Rule et al., Accuracy and Awareness in the Perception and Categorization of Male Sexual Orientation}, 95 J. PERSONALITY & SOC. PSYCHOL. 1019 (2008) (finding accurate judgements of sexual orientation based on photographs of hair, eyes, and mouth areas).
\item \textsuperscript{176.} \textit{See Schilt & Wiswall, supra} note 132, at 18 (“56 percent of FTM [female-to-male] respondents describe themselves as ‘always’ passing as men. In contrast, 17 percent of MTFs [male-to-female] describe themselves as ‘always’ passing as women.”).
\item \textsuperscript{177.} While beyond the scope of this Note, whether jurors know for certain that a litigant is queer does not necessarily insulate deliberations from queerphobic bias.
\end{itemize}
B. *The Modern Framework for Voir Dire on Juror Bias*

When deciding whether to conduct *voir dire* on specific biases, a court must first determine whether “juror prejudices are reasonably suspected.”\(^{178}\) That is, whether there is “a constitutionally significant likelihood that, absent questioning about [the potential] prejudice, the jurors would not be indifferent” to the potentially biasing trait.\(^{179}\) In addition, courts have recognized a “heightened need” for *voir dire* questioning where “either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact.”\(^{180}\)

Under this framework LGBTQ+ status meets all the threshold requirements for a “heightened need” for *voir dire* questioning. As discussed in Part I, anti-queer biases remain rife in American society, and, therefore, it is improbable that jurors will be “indifferent” toward queer identity.\(^{181}\) Rather, it is more likely that “[t]here will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a . . . [queer] person offensive.”\(^{182}\) As numerous other courts have reasoned, queerphobia is so pervasive that it should be the rare case with a queer party where a court should not consider conducting *voir dire* questioning on jury attitudes towards LGBTQ+ issues.\(^{183}\) Despite this, it is still the infrequent case in which *voir dire* on queerphobic attitudes is conducted. Moreover, when it has been allowed, *voir dire* may still be unsuccessful at removing jurors with anti-queer biases.

If jurors perceive litigants to be queer—whether or not they are—queerphobic bias may still infect jury deliberations and therefore affect the trial’s outcome. See, e.g., State v. Lovely, 451 A.2d 900, 902 (Me. 1982) (“[W]e vacate the conviction because of the essential unfairness of allowing a homosexual or one who may be perceived to be a homosexual to be tried by a jury whose prejudices concerning homosexuals have not yet been examined.”) (emphasis added); Matt Hamilton, *L.A. Sanitation Worker Taunted Over Perceived Homosexuality Wins $174-Million Verdict*, L.A. TIMES (June 15, 2017, 9:30 PM), http://www.latimes.com/local/lanow/la-me-ln-city-discrimination-verdict-20170615-story.html (detailing a case where a plaintiff was found to have been mistreated, and discriminated against for perceived homosexuality, despite being heterosexual).

\(^{178}\) See United States v. Bates, 590 F. App’x 882, 886 (11th Cir. 2014) (quoting United States v. Ochoa-Vasquez, 428 F.3d 1015, 1037 (11th Cir. 2005)).

\(^{179}\) See Bates, 590 F. App’x at 886 (citing Ristaino v. Ross, 424 U.S. 589, 596 (1976)).

\(^{180}\) Bates, 590 F. App’ at 886.

\(^{181}\) See supra notes 31–34.


\(^{183}\) See, e.g., United States v. Delgado-Marrero, 744 F.3d 167, 205 (1st Cir. 2014) (“As evinced in part by the government’s persistence in hammering the largely irrelevant point of Delgado’s same-sex relationship, evidence of homosexuality has the potential to unfairly prejudice a defendant.”); Tanner v. Oregon Health Sci.’s Univ., 971 P.2d 435, 447 (Or. Ct. App. 1998) (“[C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.”).
C. Why Voir Dire Fails to Detect & Remove Queerphobia

Voir dire on juror’s biases is not constitutionally mandated, despite the theoretical risk that denying inquiry may implicate constitutional Sixth Amendment and due process rights. Instead, inquiry into jurors’ prejudices and the scope of such an inquiry remains decisively within the discretion of the trial court. Consequently, seldom have appeals courts reversed decisions based upon the failure to conduct voir dire on jurors’ biases against queer persons. Undisputed trial court discretion, in tandem with appellate reluctance to reverse, creates an environment in which jurors with anti-queer reluctance to reverse, creates an environment in which jurors with anti-queer biases remain largely unquestioned within the justice system.

For instance, in Toney v. Zarynoff’s Inc. a Massachusetts Appellate court affirmed the trial judge’s refusal to conduct voir dire on possible bias against homosexuality where the plaintiffs, a homosexual couple, argued that the jury would realize the two were homosexuals. The trial judge denied the request, finding that the plaintiff’s sexuality was a “totally extraneous issue’ which he would ‘hate to inject’ into the case.” On appeal, the court admitted that “[t]here is no question that some people do harbor prejudice against homosexuals,” and advised lower courts to generously allow voir dire into homophobic bias when one of the parties is a homosexual. Despite this advice, the appellate court concluded that “the ultimate decision as to whether the question

184. Shay, supra note 166, at 415.
185. Id. at 415 n.47 (collecting cases).
186. Id. As an additional illustration, consider the following exchange between a prospective juror and defense counsel, in a case where homosexuality might become an issue:

“Prospective Juror S: I feel that the homosexual lifestyle is disgusting, but I don’t think I have any difficulty being objective hearing the evidence.
Defense Counsel: If you hear information about promiscuity, escort services, transgender individuals, are you going to have difficulty separating your feelings, your personal feelings about how that lifestyle is, from your ability to judge the evidence.
Prospective Juror S: No. I don’t think so.
Defense Counsel: Could you serve?
Prospective Juror S: Yes.
Defendant challenged prospective Juror S for cause. The trial court denied the challenge, stating, “He did say he could be fair. So based on his representations about his own abilities. I can’t excuse him for cause. And perhaps he might be someone you might consider on a peremptory.” People v. McAfee, No. 06CA0987, 2008 Colo. App. LEXIS 2355, at *14 (Colo. App. Aug. 14, 2008). The appellate court ultimately held that the court “did not abuse its discretion in denying the challenge for cause.” Id.
188. Id. at 556.
189. Id.
190. Id. at 560.
should be asked lies within the judge’s sound discretion.”\textsuperscript{191} The plaintiff’s motion for a new trial was denied.\textsuperscript{192} Likewise, in \textit{United States v. Click}, the Ninth Circuit Court of Appeals upheld a trial court judge’s decision to refuse \textit{voir dire} on homosexuality because “it would unnecessarily call attention to Click’s effeminate mannerisms.”\textsuperscript{193}

In the instances where \textit{voir dire} on attitudes towards LGBTQ+ issues is conducted, it is ineffective at detecting and removing jurors with implicit anti-queer biases.\textsuperscript{194} Jurors have no incentive to admit their prejudices against queer persons in open court.\textsuperscript{195} They may alternatively be unaware of their implicit anti-queer biases\textsuperscript{196} or lie about their attitudes towards LGBTQ+ persons.\textsuperscript{197} For example, briefly return to the Lawrence King case discussed in Part I.\textsuperscript{198} In jury selection, prospective jurors were questioned on their attitudes towards LGBT persons on two separate occasions—once in a juror questionnaire and again in \textit{voir dire} conducted in groups of twelve.\textsuperscript{199} The former included the question: “Do you have strong feelings or opinions about homosexuality or gender identity issues that would impact your ability to be a fair or impartial juror in a case involving these issues?”\textsuperscript{200} Clearly, the post-trial comments indicate that \textit{voir dire} was unsuccessful.\textsuperscript{201} Additionally, consider \textit{People v. Avila}, a case alleging child molestation by a gay defendant.\textsuperscript{202} During \textit{voir dire}, four jurors brought religious texts with them. Two brought bibles, one brought a Christian devotional, and another brought a Buddhism devotional.\textsuperscript{203} In \textit{voir dire}, each juror was asked whether there was anything about their “religious beliefs that would make it difficult or impossible to serve as a juror.”\textsuperscript{204} Each answered “No.”\textsuperscript{205} Nevertheless, post-ver-
dict testimony revealed that *voir dire* was insufficient to eliminate juror queerphobia. During jury deliberation, an older male juror made “statements to the effect that Avila [, the defendant,] was a homosexual, that homosexuality was a sin, and that homosexuals had to repent for their sin or else they would go to hell.”

The juror then opened and pointed to the bible. An elderly female juror then stated that she shared a similar view to the elder juror’s, based on her reading of the bible. Clearly, the jurors’ claims of impartiality during *voir dire* were false.

Professor Giovanna Shay has documented that even when *voir dire* identifies venire persons with queerphobic biases, they may not be removed from jury service. Instead they are likely rehabilitated. During the rehabilitation process, the court instructs biased venire persons on their duty to remain fair and impartial. The venire persons are then repeatedly asked if they can “set aside” their biases. If they answer affirmatively, the court considers the venire members “rehabilitated” and allows them to serve on the jury.

The rehabilitation process is both counterintuitive and ineffective. It is unlikely that jurors who have expressed strong anti-queer beliefs will be able to remain fair and impartial when evaluating the case, despite acquiescing to the judge’s questions. As the Court recognized in *Irvin v. Dowd*, “[w]here so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.” Rehabilitation’s effectiveness is also particularly dubious considering social science findings based upon self-reporting that jurors are not able to set aside

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206. *Id.* at *25.

207. *Id.* at *19.

208. See, e.g., *Owens v. Hanks*, No. 96-1124, 1996 U.S. App. LEXIS 15465, at *5 (7th Cir. Jun. 25, 1996) (finding jurors who expressed biases set them aside and rendered a fair verdict, where two jurors admitted “they would be less likely to believe a homosexual.”); *Shay*, *supra* note 166, at 428–434 (discussing the common practice of rehabilitating jurors who have expressed queerphobic bias).


211. *Id. See, e.g.*, *Sechrest v. Baker*, 816 F. Supp. 2d 1017 (D. Nev. 2011) (discussing the rehabilitation of a juror who admitted that she would have a problem with the issue of homosexuality because of her Christian beliefs).

212. See Wolin, *supra* note 210, at 288 (“[N]o amount of rehabilitation would make a person who candidly admits his bias impartial.”).

213. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). As early as 1807 the Supreme Court has expressed skepticism towards rehabilitation’s effectiveness. *See United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692g) (“He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him.”).
personal feelings and biases during the trial. Indeed as Professors Neil Vidmar and Valerie Hans have argued, “[h]uman psychology is such that people cannot avoid their biases simply by vowing that they won’t be affected by them.”

Overall, it is clear that the *voir dire* process is inadequate to prevent anti-queer bias from entering the jury room. Allowing inquiry into juror’s biases against queerfolk is discretionary, and appellate courts rarely overturn verdicts because of a denial of *voir dire*. Moreover, where *voir dire* on the issue is conducted, jurors may either be unaware of, or easily able to conceal their queerphobic biases. In the instances in which venire members admit to having prejudices against queer persons, judges are apt to rehabilitate them, ultimately failing to immunize against jurors’ queerphobic biases.

III. EXPANDING PENA-RODRIGUEZ’S CONSTITUTIONAL EXCEPTION

A. Pena-Rodriguez’s Exception to Federal Rule of Evidence (FRE) 606(b)

In *Pena-Rodriguez v. Colorado*, following the conviction of Miguel Angel Pena-Rodriguez for harassment and unlawful sexual conduct, two jurors approached the defense counsel and stated that that juror “H.C.” had expressed “anti-Hispanic” sentiment towards the defendant and the defendant’s alibi witness. According to the jurors, during jury deliberations H.C. told the others that, he “believed the defendant was guilty because, in [H.C.’s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.” He also opined that Mexican men were controlling of women, saying “I think he did it because he’s Mexican and Mexican men take whatever they want.” H.C. went on to explain that in his experience, “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.” Finally, the affidavits noted that H.C. also expressed bias against the defendant’s alibi witness by suggesting that the witness was not credible because he was “an illegal.”

Based on the juror’s statements the trial court acknowledged H. C.’s bias, but it denied Pena-Rodriguez’s motion for a new trial because “[t]he actual deliberations that occur among the jurors are protected

217. *Id.* at 862.
218. *Id.*
219. *Id.*
220. *Id.*
from inquiry under [Colorado Rule of Evidence] 606(b).”

A divided appellate court affirmed Pena-Rodriguez’ conviction, and the Colorado Supreme Court affirmed by a four to three vote. Thereafter, the Supreme Court granted certiorari to determine “whether there is a constitutional exception to the no-impeachment rule for instances of racial bias.”

Writing for the majority, Justice Kennedy began by reaffirming the importance of the jury to the justice system and wider democracy. Kennedy then recounted the development of the common law rule against juror verdict impeachment. That rule, later deemed the Mansfield rule, prevented jurors from testifying about their subjective thoughts or objective events that arose during jury deliberations after the verdict was entered.

The Mansfield rule, the majority acknowledged, served to give verdicts stability and prevent post-trial juror harassment. For these reasons, the Court had previously refused to overturn jury verdicts based on post-trial testimony on two occasions: First, in Warger v. Shauers, where the Court had considered whether a juror’s lying about pro-defendant bias could support a motion for a new trial; and next in Tanner v. United States, where the Court considered whether evidence that jurors were intoxicated during deliberations could support a motion for a new trial. Notwithstanding these verdicts, the Court had previously signaled possible exceptions to the no-impeachment rule by the time that Pena-Rodriguez was decided, particularly in the “gravest and most important cases.”

Returning to the present case, Justice Kennedy explained why the facts supported a constitutional exception to Federal Rule of Evidence 606(b). He emphasized the importance of “ris[ing] above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons.” Kennedy then distinguished the juror’s racial bias in Pena-Rodriguez from the juror misconduct in Tanner and Warger. Racial bias “if left unaddressed, would risk systemic injury to the

221. Id.
222. Pena-Rodriguez, 137 S. Ct. at 862.
223. Id.
224. Id. at 860.
225. Id. at 863.
226. See id.
227. Id. at 866.
228. 135 S. Ct. 521 (2014).
231. Pena-Rodriguez, 137 S. Ct. at 867
232. Id. at 868.
administration of justice.”

Therefore, allowing an exception to the no-impeachment rule was not an effort to perfect the jury, but one “to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.”

Considering the insufficiency of judicial safeguards, and the potentially detrimental effects of racial biases at trial Justice Kennedy declared:

“[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”

Finally, the Court finished by considering the practical application of the constitutional exception. Kennedy endorsed the lower courts’ authority, noting that determinations of what constituted a “clear statement” of bias or animus would be left to the individual courts. Finding that “blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases,” the Court held that blatant racist comments constituted a constitutional exception to Federal Rule of Evidence 606(b)’s no-impeachment rule.

B. An Argument for Expanding the Exception

Conceptually, the reasoning underlying the holding in *Pena-Rodriguez* could permit its applicability to other juror biases—a point Justice Alito adamantly pressed in his dissent. The majority’s bases for why racial bias justifies an exception to the no-impeachment rule are two-fold. First, racial bias “implicates unique historical, constitutional, and institutional concerns,” so leaving the “familiar and recurring evil” that is racial bias unaddressed “would risk systematic injury to the administration of justice.”

Second, judicial safeguards are substantially less successful at protecting against racial bias. Both arguments are equally applicable to queerphobic biases.

233. *Id.* at 867 (emphasis added).
234. *Id.* at 868.
235. *Id.* at 869.
237. *Id.*
238. *Id.* at 875 (Alito, J., dissenting) (“This is a startling development, and although the Court tries to limit the degree of intrusion, it is doubtful that there are principled grounds for preventing the expansion of today’s holding.”).
239. *Id.* at 868.
240. *Id.* (emphasis added).
241. *Id.*
Given the appalling history of state-sponsored discrimination against LGBTQ+ persons, a failure to confront blatant queerphobia within the jury room will undermine the queer community’s faith in the justice system, ultimately resulting in systematic injury to the administration of justice. Just as history of prejudice and animus against racial minorities affords “a sound basis to treat racial bias with added precaution,”242 so too does the historical marginalization of queerfolk.243

For much of American history, queer persons have been considered pathological. They have faced cruel conversion therapies, criminalization, imprisonment, and societal exclusion.244 The Supreme Court’s consistent emphasis of the widespread discrimination against queerfolk is a testament to its familiarity and recurrence; indeed, over the past half-century seldom has the Court failed to mention the state-sanctioned and societal prejudice against queerfolk in any case it has resolved related to LGBTQ+ issues.245

242. Id. at 869.

243. In no way should this be interpreted as a direct comparison between racial subordination and queerphobia. Instead, my argument is that the two factors considered in Pena-Rodriguez, (risk of systemic injury, and the failure of judicial safeguards) are applicable in the context of juror queerphobia. For detailed discussions of the problems arising from comparisons of race and queer subordination, see Darren Leonard Hutchinson, Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse, 29 Conn. L. Rev. 561 (1997); Russell K. Robinson, Marriage Equality and Postracialism, 61 UCLA L. Rev 1010, 1017 (2014) (“Arguments about what blacks and gays can and cannot do tend to overlook people who are black and gay.”) (emphasis in original).

244. See Kenji Yoshino, Covering, 111 Yale L.J. 769, 794–804 (2002) (detailing the development of homosexual conversion therapy); Jordan Blair Woods, LGBT Identity and Crime, 105 Cal. L. Rev. 667, 674 (2017) (“[U]ntil the mid-1970s—before which almost every U.S. state criminalized same-sex sodomy—there was little space to view LGBT people in the criminal justice system other than as deviant sexual offenders.”).

245. In the Court’s first consideration of prejudice against the LGBT community Rowland v. Mad River Local School District, Justice William Brennan noted that gay persons “are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuality is ‘likely . . . to reflect deep-seated prejudice rather than . . . rationality.’” 470 U.S. 1009, 1014 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)). On the next occasion, it recognized that “[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization.” Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, J., concurring).

Later, when the Court explicitly overruled Bowers in Lawrence v. Texas, Justice Kennedy stated “it must be acknowledged, of course that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.” 539 U.S. 558, 571 (2003). In his dissent, Justice Scalia, joined by Justice Clarence Thomas, similarly highlighted the unassailable conclusion that homosexuality was widely historically condemned, writing “[t]here are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state
In *Obergefell v. Hodges*, Justice Kennedy again took care to acknowledge historical discrimination against queer persons. He wrote, “until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity.”

Echoing the Supreme Court, countless lower courts have also acknowledged the history of state-sanctioned, and societal queerphobia.

Dissenting in *Pena-Rodriguez*, Justice Alito illustrated the constitutional dilemmas at play with an anecdote of two cellmates convicted for homicides. At one prisoner’s trial, during deliberations, a juror expresses bias against the defendant because of his race; at the other, a juror expresses animosity towards the defendant because the defendant was “wearing the jersey of a hated football team.” Alito ended the illustration by problematizing any distinction between the two hypothetical prisoners: if the Court has entitled the first prisoner to a no-impeachment rule exception, the other must receive one as well.

Justice Alito’s vignette fundamentally mischaracterizes the majority’s reasoning. Central to the majority’s focus is the danger of “systemic injury to the administration of justice.” This understanding is reflective of the historical and current extent of bias against specific communities in the United States. Presumably, even the most deep-seated of sport rivalries could not result in a community-wide loss of faith in the

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247. Id. at 2596.

248. See, e.g., *Watkins v. United States Army*, 875 F.2d 699, 724 (9th Cir. 1989) (“Discrimination against homosexuals has been pervasive in both the public and private sectors. Legislative bodies have excluded homosexuals from certain jobs and schools, and have prevented homosexuals marriage. In the private sphere, homosexuals continue to face discrimination in jobs, housing and churches.”) (citation omitted) (en banc) (Norris, J. concurring); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 427 (M.D. Pa. 2014) (“Within our lifetime, gay people have been the targets of pervasive police harassment, including raids on bars, clubs, and private home; portrayed by the press as perverts and child molesters; and victimized in horrific hate crimes.”); In re Marriage Cases, 183 P.3d 384, 442 (Cal. 2008) (“Outside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility . . . and such immediate and severe opprobrium as homosexuals.”) (citation omitted).


250. Id.

251. Id.

252. Id. at 868.
administration of justice, and in respect for the rule of law.253 To the contrary, queerphobic bias can.254

Collectively, queer individuals remain one of the most vulnerable minorities in this country. They are largely unprotected from the discriminatory whims of both private and governmental actors.255 Indeed, in United States society, anti-queer bias remains the “last socially acceptable prejudice.”256 Thus, allowing discrimination to enter the legal system gives queerphobic prejudices the added color of the law, amplifying the subjugation of queer individuals.257

253. Assuming, that the sports-team animus will not be detected by the Tanner procedural safeguards the reluctance related to reporting a fellow juror’s racial or queerphobic bias would likely not apply.

254. See Miller-El v. Dretke, 545 U.S. 231, 237 (2005) (“It is well known that prejudices often exist against particular classes in the community, which sway the judgement of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.”). To illustrate the full extent and significance of queerphobic bias, see Lee, supra note 84 at 539 (“Eighty-eight percent of Whites who have taken the IAT have manifested implicit bias in favor of Whites and against Blacks. Nearly 83% of heterosexuals have manifested implicit bias in favor of straight people over gays and lesbians.”). Compare Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, (Nat’l Bureau of Econ. Res., Working Paper No. 9873, 2003), http://www.nber.org/papers/w9873.pdf (finding resumes with White sounding names received 50 percent more callbacks than those with Black sounding ones), with András Tilesik, Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States, 117 Am. J. Soc. 586, 592 (2011), http://www-2.rotman.utoronto.ca/facbios/file/tileskikajs.pdf (finding that resumes without words signifying LGBT identity received 40 percent more callbacks than those that did), and Westgate et al., supra note 34 (documenting implicit bias against gays and lesbians.).


256. See Krystal E. Noga-Styron et al., The Last Acceptable Prejudice: An Overview of LGBT Social and Criminal Injustice Within the USA, 15 CONTEMP. CRIM. JUST. REV. 369 (2012).

257. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (“[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds.”).
When a court ignores blatant anti-queer bias “within jury deliberations, [it] is tantamount to state-sponsored” queerphobia.\footnote{Kevin Zhao, Note, The Choice Between Right and Easy: Pena-Rodriguez v. Colorado and the Necessity of a Racial Bias Exception to Rule 606(B), 12 DUKE J. CONST. L. & PUB. POL’Y 33, 42 (2016) (making the same argument in cases of racial bias).} Given the jury’s place as an “instrument of the court system,”\footnote{Id. (citing Sinclair v. United States, 279 U.S. 749, 765 (1929)).} allowing a conviction to stand despite its basis in anti-queer bias “undermines the jury’s ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression.”\footnote{Zhao, supra note 259, at 42 (citing 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6074, at 513 (2d ed. 2007)).} To echo the petitioner’s brief in \textit{Pena-Rodriguez}, “[t]his cannot be right.”\footnote{Brief for Petitioner at 46, Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) No. 15–606.}

Based on the results of studies examining implicit biases against queerfolk, it is clear that like the racial animus discussed in \textit{Pena-Rodriguez}, queerphobic biases are concealable and insidious, making the judicial safeguards discussed in \textit{Tanner} ineffective at detecting or rendering them innocuous at trial.\footnote{See supra Part.1(A).} As we have seen, \textit{voir dire} is overwhelmingly unsuccessful at removing queerphobic bias. This is because defense attorneys may be reluctant to raise the issue of sexual orientation, trial courts may, in their discretion, refuse to inquire about attitudes towards LGBTQ+ issues,\footnote{See supra notes 185–194 and accompanying text.} and where \textit{voir dire} is allowed to investigate queerphobia, few jurors will openly admit having such prejudices.\footnote{See supra notes 196–208 and accompanying text.} Moreover, venire members who actually admit to having prejudices against queer persons are routinely sent into jury duty after being “rehabilitated,” though the effectiveness of this process remains dubious.\footnote{See supra notes 209–216 and accompanying text.}

Free from the inherent pressure of the venire process and scrutiny from fellow venire members and the judge, during deliberations jurors feel less urgency to give socially desirable responses.\footnote{See Wolin, supra note 210, at 287–88.} It is then that jurors’ biases will be revealed.\footnote{Id. at 288.} However, fellow jurors are unlikely to immediately report queerphobic statements made during the course of deliberations, whether out of fear of confronting other jurors, because they are unaware they can make such reports, or for a separate reason.\footnote{“Unless instructed, jurors may not know that they have a duty—or even the ability—to report another juror’s bias or prejudice. Furthermore, even those who know that they have this ability may not know that it is no longer available once they render the verdict.”.}
Consequently, post-verdict evidence of bias may be the only means by which to prove juror misconduct.\footnote{269} To avoid manifest injustice against queer defendants, it is therefore necessary to allow an extension of the Pena-Rodriguez holding to blatant statements of queerphobic bias. Where judicial safeguards fail to prevent bias from entering deliberations, a defendant’s Sixth Amendment rights must supersede Rule 606(b).\footnote{270}

In addition, the Rule 606(b) exception must ultimately be expanded, not only to apply to defendants who are queer, but also to a wider array of cases than was present in Pena-Rodriguez. Jurors’ biases are not restricted to defendants.\footnote{271} Instead, as shown, juror’s biases disrupt justice in innumerable ways. In the case of queerphobic sentiment, these biases may infringe on a defendant’s right to a fair and impartial trial even where the defendant herself is not queer.\footnote{272} Limiting the exception to only statements made against queer defendants would be to willfully ignore the many ways that anti-queer bias threatens a defendant’s Sixth Amendment rights. Juror’s blatantly anti-queer statements are arguably no less detrimental when made against a queer victim, witness, or attorney, than when made against a defendant.

In his Pena-Rodriguez dissent, Justice Alito invoked the Court’s earlier concerns in Tanner and Wagner that such an exception would impair “full and frank discussion,”\footnote{273} promote an increase in juror harassment, and “undermine the finality of verdicts.”\footnote{274} Evidence from states that have implemented such exceptions renders these concerns moot.\footnote{275} Any further apprehensions related to a “barrage of post-verdict scrutiny”\footnote{276} are particularly inapplicable in expanding Pena-Rodriguez to post-trial evidence of queerphobic bias, given the small population of Americans who identify as queer.\footnote{277}

\footnotesize{269. Id. at 283.  
270. Tanner v. United States, 483 U.S. 107, 137 (1987) (“If [Rule 606(b)] policy considerations seriously threaten the constitutional right to trial by a fair and impartial jury, they must give way.”) (Marshall, J., dissenting).  
271. In fact, recall that in Pena-Rodriguez the juror expressed bias against both the defendant and the witness. Specifically, he discounted the witness an “illegal,” indicating that his biases affected not only his evaluation of the defendant but his overall interpretation of the evidence proffered at trial. See also PartI(B)(2)–(4).  
272. For example, if a juror makes a statement indicating that he has disregarded the testimony of one of the defendant’s witnesses because they are queer, the defendant’s right to an impartial jury has been infringed upon, despite the defendant herself not being queer. See supra PartI(B)(2)–(4).  
274. Id. at 885.  
275. Id. at 870.  
276. Tanner, 483 U.S. at 121.  
Admittedly, the Supreme Court’s history of confronting anti-queer discrimination in the justice system pales in comparison to its history of addressing racial animus. However, limiting *Pena-Rodríguez*’s Rule 606(b) exception to instances where the Court has historically made efforts to eliminate bias in the justice system is akin to asking the Court to stand still; the Court has not yet confronted queerphobic prejudice within the judicial system, so it must not do so now. To the contrary, as the Court noted in *Obergefell*, “new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”*278* The rampant queerphobia in the justice system is one such inequality.

The Court’s decision in *Pena-Rodriguez* symbolizes only a portion of a journey, a step toward the “promise for equal treatment under the law.”*279* In his dissent in *Tanner*, Justice Thurgood Marshall forecasted that if “policy considerations [underlying Rule 606(b)] seriously threaten the constitutional right to trial by a fair and impartial jury, they must give way.”*280* Thirty years later, in *Pena-Rodriguez*, the Court heeded Justice Marshall’s teaching. It is time the journey toward equal treatment under the law continues. Queerfolk deserve to share in the impartiality of the justice system and the equal administration of justice.

The majority in *Pena-Rodriguez* noted in closing, “it is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history.”*281* With respect to juror queerphobic bias, undeniably, the lessons learned from combating juror racial bias are relevant. *Pena-Rodríguez*’s progression to queerphobic bias would not be novel, and, considering the continued vulnerability of the queer community, a failure to do so would be both arbitrary and unjust.*282* When faced with the question of whether to extend *Pena-Rodriguez* to protect the Sixth Amendment rights of queerfolk,*283* Justice Marshall’s closing words in *Tanner* are apt: “If we deny them this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless.”*284*


282. *See* Jessica L. West, *supra* note 46, at 185 (remarking on the arbitrariness of limiting a post-verdict evidence exception to evidence of racial bias in a pre-*Pena-Rodríguez* argument for a Rule 606(b) exception).


CONCLUSION

In providing a detailed account of the ways juror queerphobia can manifest at trial, this Note has shown that jurors’ anti-queer biases infringe upon queerfolk’s Sixth Amendment rights and threaten the impartiality of the judicial system. Procedural safeguards such as *voir dire*, used to eliminate impartial jurors, have proven ineffective at detecting, removing, or rendering queerphobic biases innocuous.

In response, this Note examined one possible solution—expanding the *Pena-Rodriguez* exception. As this Note argues, in order to avoid a systemic injury and giving anti-queer prejudices the color of the law, the Court must confront juror biases when they are made apparent. Thus, the Supreme Court’s holding in *Pena-Rodriguez* must be extended to the context of blatant juror queerphobic bias.